CASE NO. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

In re CHARLES RUSSELL RHINES, *Petitioner*

Petition for a Writ of Habeas Corpus

APPENDIX

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Dated: November 1, 2019

APPENDIX CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2376

Charles Russell Rhines

Appellant

v.

Darin Young, Warden, South Dakota State Penitentiary

Appellee

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

ORDER

With the district court's final order denying Charles Russell Rhines's federal petition for a writ of habeas corpus pending on appeal, Rhines filed in the district court a Rule 15(a)(2) motion for leave to amend the petition and a Rule 60(b) motion for relief from judgment. The district court denied relief on the ground that Rhines was seeking second or successive habeas relief that had not been authorized by the court of appeals, see 28 U.S.C. § 2244(b)(3)(A), and denied a certificate of appealability. We deny Rhines's application for a certificate of appealability from that ruling. Judge Kelly would grant the certificate.

Rhines also filed a motion in the district court for an order requiring respondent to produce Rhines for evaluation by mental health experts retained by the defense to support a potential request for executive clemency, relief that the South Dakota state courts have denied. The district court denied relief on the merits and denied a certificate of appealability. We conclude that no certificate of appealability is required to appeal this issue. A separate order establishing a briefing schedule will be issued.

The motion for leave to file an amicus brief is hereby granted.

September 07, 2018

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

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2376

Charles Russell Rhines

Appellant

v.

Darin Young, Warden, South Dakota State Penitentiary

Appellee

American Civil Liberties Union, et al.

Amici on Behalf of Appellant(s)

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

ORDER

The petition for rehearing by the panel is denied.

September 18, 2018

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

/s/ Michael E. Gans

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

STATE OF SOUTH DAKOTA, **Plaintiff and Appellee,**	)	**ORDER**
	)	**#28444**
vs.	)	
CHARLES RUSSELL RHINES, **Defendant and Appellant.**	)	

Appellant having served and filed a motion for relief from the circuit court's judgment in the above-entitled matter, and appellee having served and filed a response thereto along with a motion to file exhibits under seal, and appellant having served and filed a reply thereto, and Lambda Legal Defense and Education Fund having served and filed a motion for leave to file a brief of amicus curiae, and the Court having considered said motions, responses, and replies, and being fully advised in the premises, now, therefore, it is

ORDERED that Appellee's motion to file exhibits under seal is granted;

ORDERED that Appellant's motion for relief from the circuit court's judgement is denied. Appellant cites *Pena-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017), arguing that the jury improperly considered his sexual orientation in the penalty phase of his trial. Assuming, but not deciding, that this appellate Court has original jurisdiction to grant relief from a circuit court's final judgment under SDCL 15-6-60(b)(6) based on an

alleged change in conditions, and assuming but not deciding that the constitutional rule articulated in *Pena-Rodriguez* is to be retroactively applied, this Court declines to apply *Pena-Rodriguez*. It is this Court's view that neither Appellant's legal theory (stereotypes or animus relating to sexual orientation) nor Appellant's threshold factual showing is sufficient to trigger the protections of *Pena-Rodriguez*; and it is

ORDERED that Lambda Legal Defense and Education Fund's motion for leave to file a brief of amicus curiae is denied as moot.

DATED at Pierre, South Dakota, this 2nd day of January, 2018.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

(Justice Janine M. Kern disqualified.)

PARTICIPATING: Chief Justice David Gilbertson, Justices Steven L. Zinter, Glen A. Severson and Steven R. Jensen.

STATE OF SOUTH DAKOTA
In the Supreme Court
I, Shirley A. Jameson-Fergel, Clerk of the Supreme Court of South Dakota, hereby certify that the within instrument is a true and correct copy of the original thereof as the same appears on record in my office. In witness whereof, I have hereunto set my hand and affixed the seal of said court at Pierre, S.D. this 2nd day of Jan, 20 18.
Clerk of Supreme Court
Deputy

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
JAN - 2 2018
Clerk

548 N.W.2d 415
Supreme Court of South Dakota.

STATE of South Dakota, Plaintiff and Appellee,
v.
Charles Russell **RHINES**, Defendant and Appellant.

No. 18268.
|
Argued Oct. 18, 1995.
|
Decided May 15, 1996.
|
Rehearing Denied June 28, 1996.

Defendant was convicted in the Seventh Judicial Circuit Court, Pennington County, John K. Konenkamp, J., of murder and sentenced to death, and he appealed. The Supreme Court, Miller, C.J., held that: (1) defendant had complete understanding of his right to stop questioning; (2) advisement reasonably conveyed the right to appointed counsel; (3) defendant was given adequate explanation of his option to waive *Miranda* rights; (4) there is no prohibition against state's use of peremptory challenges to exclude jurors who express doubts about death penalty; (5) there is no constitutional error in vesting sentencing decision solely in the jury rather than the trial court; (6) neither State nor Federal Constitution requires that aggravating circumstances be "sufficiently substantial"; (7) specific state statute authorizing admission of victim impact evidence is not required; (8) depravity of mind aggravating circumstance, as limited by trial court's instruction, did not adequately channel jury's discretion; (9) invalidity of depravity of mind circumstance did not mandate reversal of death sentence; (10) jury may properly consider and find two conceptually distinct aggravating circumstances; (11) findings of aggravating circumstances that murder involved torture and that defendant committed the murder to avoid being arrested were supported; (12) s imilar cases for purposes of proportionality review are those cases in which capital sentencing proceeding was actually conducted; (13) death sentence should not be invalidated simply because another jury determined that another defendant deserved mercy; and (14) sentence was not disproportionate.

Affirmed.

Sabers and Amundson, JJ.,, dissented and filed opinions.

West Headnotes (106)

[1] **Criminal Law**
Compelling Self-Incrimination

Fifth Amendment privilege against self-incrimination is implicated whenever an individual is subjected to a custodial interrogation by the police. U.S.C.A. Const.Amend. 5.

4 Cases that cite this headnote

[2] **Criminal Law**
Right to remain silent
Criminal Law
Right to counsel
Criminal Law
Use of statement

In the absence of other equivalent procedures, law enforcement must advise a suspect prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that, if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. U.S.C.A. Const.Amend. 5.

1 Cases that cite this headnote

[3] **Criminal Law**
Right to remain silent
Criminal Law
Counsel

If suspect indicates at any time before or during questioning that he wishes to remain silent or that he wants an attorney, interrogation must end. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[4] **Criminal Law**
Custodial interrogation in general

If law enforcement fails to follow *Miranda* or other equivalent procedures, prosecution may not use statements made during custodial interrogation as proof of guilt. U.S.C.A. Const.Amend. 5.

1 Cases that cite this headnote

[5] **Criminal Law**
Form and sufficiency

Miranda does not require that warnings be given in the exact form described in that decision. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[6] **Criminal Law**
Form and sufficiency

Detective's statement that defendant had a "continuing right to remain silent" adequately advised him of his option to terminate questioning at

any time. U.S.C.A. Const.Amend. 5.

1 Cases that cite this headnote

[7] **Criminal Law**
Particular cases

Defendant's complete understanding of his right to stop questioning at any time was demonstrated by fact that, before making any incriminating statements, defendant specifically told officers that he would only answer the questions he liked and that, when officers questioned him about a topic he did not wish to discuss, he would shut off the tape recorder or tell them to "be quiet."

Cases that cite this headnote

[8] **Criminal Law**
Form and sufficiency

Officer's advisement that defendant need not answer questions he did not like and that he "can always say stop" adequately warned defendant of his right to terminate questioning at any time. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[9] **Criminal Law**
Form and sufficiency

Miranda warning need not be elegantly phrased or mechanically recited.

Cases that cite this headnote

[10] **Criminal Law**
Purpose

Purpose of *Miranda* warning is to explain an aspect of constitutional law to a criminal suspect, so that he can make voluntary, knowing and intelligent decision whether to talk to the police. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[11] **Criminal Law**
Particular cases

Defendant's response to officer that he "can take the 5th Amendment" demonstrated that he amply understood his privilege against self-incrimination. U.S.C.A.

Const.Amend. 5.

Cases that cite this headnote

[12] **Criminal Law**
Form and sufficiency
Criminal Law
Right to counsel

Fact that defendant was told at the beginning of each interview that he had the right to the presence of an attorney plainly communicated the right to have an attorney present at that time.

Cases that cite this headnote

[13] **Criminal Law**
Right to counsel

At the heart of the *Miranda* opinion is the concern that the indigent accused in police custody be informed that he has just as much right to representation by an attorney as a person who can afford one.

Cases that cite this headnote

[14] **Criminal Law**
Form and sufficiency
Criminal Law
Right to counsel

Although warning need not contain the exact language used in the *Miranda* opinion, it must effectively communicate the right to appointed counsel if the accused cannot afford to hire a lawyer.

Cases that cite this headnote

[15] **Criminal Law**
Form and sufficiency
Criminal Law
Right to counsel

In determining whether particular warning adequately conveys the right to have counsel appointed if accused cannot afford one, reviewing court must look to the warnings as a whole rather than focusing on one sentence in isolation.

1 Cases that cite this headnote

[16] **Criminal Law**
Form and sufficiency
Criminal Law
Right to counsel

Advisement reasonably conveyed

the right to appointed counsel where officer expressly informed defendant of his right to remain silent, to consult with an attorney, and to have an attorney present, defendant was also told that an attorney "can" be appointed if he could not otherwise afford one, and there was no additional information to mislead him into believing that an attorney would not be appointed if he could not pay for one.

1 Cases that cite this headnote

[17] **Criminal Law**
Particular Cases

Asking defendant whether "Having these rights in mind, are you willing to answer questions?" was adequate explanation of his option to waive *Miranda* rights and did not prevent him from giving a valid waiver. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[18] **Criminal Law**
Form and sufficiency

Advisement of *Miranda* rights need not specifically refer to a "waiver" of rights in order to be valid.

Cases that cite this headnote

[19] **Criminal Law**
Voluntariness

When state offers incriminating statement allegedly made by the defendant, state has the burden of proving beyond a reasonable doubt that the statement was given knowingly, intelligently, and voluntarily.

Cases that cite this headnote

[20] **Criminal Law**
Form and sufficiency in general

In determining whether defendant has given valid waiver of his *Miranda* rights, Supreme Court looks to the totality of the circumstances, including background, experience, and conduct of accused.

Cases that cite this headnote

[21] **Criminal Law**
Admission, statements, and confessions

Trial court's finding that defendant's *Miranda* rights had been waived and that his statements were voluntary must be upheld unless it is clearly erroneous.

Cases that cite this headnote

[22] **Criminal Law**
Form and sufficiency in general
Criminal Law
Waiver of rights

Waiver of *Miranda* rights need not be express, but may be inferred from defendant's understanding of his rights coupled with course of conduct reflecting his desire to give up his right to remain silent and have the counsel of an attorney.

1 Cases that cite this headnote

[23] **Criminal Law**
Particular Cases

Defendant's conduct showed valid waiver of *Miranda* rights; when asked whether he understood his rights, he responded that he did, and he then answered affirmatively when asked if he was willing to answer questions, he was articulate and detailed in making his statements, there was no indication that he was under the influence of drugs or alcohol or that he was otherwise impaired in his functioning or that law enforcement officers unlawfully induced or coerced him to make a confession, and he referred to his reasons for confessing to the murder by remarking "This will come out in court again" and "If you guys bring some of this stuff into court, you're gonna look really foolish" and also boldly professed to have knowledge of the statutory and case law. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[24] **Jury**
Competence for Trial of Cause

Both the United States and South Dakota Constitutions guarantee trial by an impartial jury, and jury selection is an important means of ensuring that right. U.S.C.A. Const.Amend. 6; Const. Art. 6, § 7.

Cases that cite this headnote

[25] **Jury**
Examination of Juror

Voir dire process is designed to eliminate persons from the venire

who demonstrate that they cannot be fair to either side of the case. U.S.C.A. Const.Amend. 6; Const. Art. 6, § 7.

Cases that cite this headnote

[26] **Jury**
Personal opinions and conscientious scruples

Court did not abuse its discretion in allowing additional questioning of juror about death penalty after initially denying state's challenge for cause where, before court denied the challenge for cause, state expressly reserved opportunity to continue questioning, where juror stated in response to court's question as to whether she could "consider all the law and options that the law allows" that she could, but where her response to subsequent questions from the state demonstrated that she was confused by the court's questions and that additional clarification was necessary as to whether she could follow court's instructions as to the death penalty.

Cases that cite this headnote

[27] **Jury**
Personal opinions and conscientious scruples

In light of similar questioning by the state and the defense, defendant did not show that juror's responses with respect to death penalty questioning were the product of intimidation or confusion caused by manner of state's questioning.

Cases that cite this headnote

[28] **Jury**
Punishment prescribed for offense
Jury
Evidence

Exclusion of jurors because of views on death penalty is not limited to those who have unequivocally and without contradiction expressed complete inability to impose the death penalty, and juror's bias need not be proved with unmistakable clarity. U.S.C.A. Const.Amend. 6; Const. Art. 6, § 7.

Cases that cite this headnote

[29] **Criminal Law**
Selection and impaneling
Criminal Law
Jury selection
Jury
Discretion of court

Trial judge has broad discretion in determining juror qualifications, and ruling of court will not be disturbed, except in the absence of any evidence to support it; when evidence of each juror is contradictory in itself, and is subject to more than one construction, finding either way upon the challenge is conclusive on appeal.

1 Cases that cite this headnote

[30] **Jury**
Punishment prescribed for offense

Fact that prospective juror responded affirmatively when court asked if she could follow the law did not preclude court from excusing her for cause where she misunderstood court's query and did not realize that following the law included consideration of the death penalty.

1 Cases that cite this headnote

[31] **Jury**
Bias and Prejudice

Impartiality of a juror must be based upon the whole voir dire examination and single isolated responses are not determinative.

Cases that cite this headnote

[32] **Jury**
Punishment prescribed for offense

Although prospective juror said at various times during voir dire that she could consider a death sentence during penalty deliberations, court did not err in excusing her for cause where she also stated that she could not consider capital punishment under any circumstances, that she did not like the death penalty and "would rather not" sit on a jury in a capital case, and that she did not know if she could sleep at night if she voted to impose the death penalty and where, when asked by court if she would fairly consider both options, she stated, "No, I guess not." U.S.C.A. Const.Amend. 6; Const. Art. 6, § 7.

Cases that cite this headnote

[33] **Jury**
Peremptory Challenges

Peremptory challenge is an objection to a juror for which no reason need be given, and it can be exercised without inquiry and without being

subject to the court's control. SDCL 23A–20–19.

Cases that cite this headnote

[34] **Jury**
Peremptory challenges

Upon prima facie showing that prosecutor used peremptory challenges in racially or sexually discriminatory manner, prosecutor has the burden of establishing nondiscriminatory reasons for striking particular members of the venire. U.S.C.A. Const.Amend. 6; Const. Art. 6, § 7.

1 Cases that cite this headnote

[35] **Jury**
Peremptory challenges

Batson restriction on state's use of peremptory challenges is based on the principle that a person's race or gender is unrelated to his fitness as a juror.

Cases that cite this headnote

[36] **Jury**
Peremptory challenges

Discriminatory use of peremptories based on race or gender gives effect to invidious group stereotype and preempts individualized assessment of competency.

Cases that cite this headnote

[37] **Jury**
Challenges for Cause
Jury
Criminal prosecutions

Challenges for cause are unlimited, while peremptory challenges are restricted in number. SDCL 23A–20–20.

Cases that cite this headnote

[38] **Jury**
Peremptory Challenges
Jury
Criminal prosecutions

Because peremptory challenges are limited and both state and defendant receive the same number, prosecution and defense have equal opportunity to remove those members of the venire who, while able to follow the instructions of the

court, espouse extreme views of capital punishment. SDCL 23A–20–20.

Cases that cite this headnote

[39] **Jury**
Competence for Trial of Cause

Law does not demand a balanced sampling of opinions in the jury box. U.S.C.A. Const.Amend. 6; Const. Art. 6, § 7; SDCL 23A–20–20.

Cases that cite this headnote

[40] **Jury**
Peremptory challenges

There is no state or federal constitutional prohibition against state's use of peremptory challenges to exclude all prospective jurors who expressed reservations about the death penalty but were not excludable for cause on that basis. U.S.C.A. Const.Amend. 6; Const. Art. 6, § 7; SDCL 23A–20–20.

Cases that cite this headnote

[41] **Constitutional Law**
Presumptions and Construction as to Constitutionality

There is a strong presumption in favor of the constitutionality of a statute; presumption is rebutted only when it appears clearly, palpably, and plainly that the statute violates a constitutional provision.

Cases that cite this headnote

[42] **Sentencing and Punishment**
Validity of Statute or Regulatory Provision

To satisfy constitutional requirements, capital sentencing scheme must reasonably justify imposition of a more severe sentence on defendant compared to others found guilty of murder.

Cases that cite this headnote

[43] **Homicide**
Murder
Sentencing and Punishment
Murder
Sentencing and Punishment
Killing while committing other offense or in course of criminal conduct

Both felony murder and premeditated murder are punishable by death or by life imprisonment. SDCL 22–6–1, 22–16–4, 22–16–12.

Cases that cite this headnote

[44] **Sentencing and Punishment**
Aggravating circumstances in general

In order to impose death sentence on individual convicted of either felony murder or premeditated murder, jury must find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt. SDCL 23–27–5, 23A–27A–4, 23A–27A–5.

1 Cases that cite this headnote

[45] **Sentencing and Punishment**
Killing while committing other offense or in course of criminal conduct

Where defendant was convicted of premeditated murder, not felony murder, any constitutional inequities in punishment of felony murderers were inapplicable to his case.

Cases that cite this headnote

[46] **Sentencing and Punishment**
Killing while committing other offense or in course of criminal conduct

Individuals who commit murder while engaged in other serious crimes are not less deserving of the death penalty than those who commit premeditated murder. SDCL 22–16–4.

Cases that cite this headnote

[47] **Sentencing and Punishment**
Intent of offender
Sentencing and Punishment
Killing while committing other offense or in course of criminal conduct

Intent is relevant consideration in imposition of death penalty, but not only those who intend to kill should receive the ultimate punishment; malicious motives elemental to felony murder can also justify a sentence of death, and the law is free to equally condemn those who murder with the intent to kill and those who murder but do so with the intent to rape, steal, or burn. SDCL 22–16–4.

Cases that cite this headnote

[48] **Sentencing and Punishment**
Killing while committing other offense or in course of criminal conduct

Unless jury finds at least one statutory aggravating circumstances, indicating more extreme criminal culpability, individual guilty of felony murder cannot receive the death sentence, and capital sentencing scheme thus reasonably justifies imposition of a more severe sentence on certain defendants compared to others found guilty of murder. SDCL 22–16–4, 23A–27A–1.

2 Cases that cite this headnote

[49] **Sentencing and Punishment**
Provision authorizing death penalty

Defendant did not show that the pool of death eligible offenses is unconstitutionally broad.

Cases that cite this headnote

[50] **Sentencing and Punishment**
Provision authorizing death penalty
Sentencing and Punishment
Instructions

Existence of vague and overbroad definitions of capital crimes does not necessarily establish constitutional violation, as state courts may fashion limiting instructions.

Cases that cite this headnote

[51] **Sentencing and Punishment**
Degree of proof

Under capital sentencing statutes, jury must find the existence of an aggravating circumstance beyond a reasonable doubt before it may impose the death penalty, and law permits jury to consider any mitigating circumstances, but does not impose any standard of proof regarding mitigation. SDCL 23A–27A–1, 23A–27A–2, 23A–27A–4, 23A–27A–5.

2 Cases that cite this headnote

[52] **Sentencing and Punishment**
Individualized determination

In determining whether individual eligible for death penalty should in fact receive that sentence, law demands that jury make individualized determination on the basis of the character of the individual and the circumstances of the crime; requirement of individualized sentencing is satisfied by allowing jury to consider all relevant mitigating evidence. SDCL 23A–27A–1, 23A–27A–2.

1 Cases that cite this headnote

[53] **Sentencing and Punishment**
Individualized determination

Capital sentencing procedures that permit jury to exercise wide discretion in evaluating mitigating and aggravating facts are consistent with individualized sentencing determination. SDCL 23A–27A–1, 23A–27A–2.

1 Cases that cite this headnote

[54] **Sentencing and Punishment**
Evidence in mitigation in general

South Dakota's open-ended treatment of mitigating evidence coincides with the mandate of individualized sentencing and adequately directs the jury's evaluation of aggravating and mitigating evidence during the capital sentencing phase. SDCL 23A–27A–1, 23A–27A–2.

2 Cases that cite this headnote

[55] **Sentencing and Punishment**
Verdict or Recommendation of Jury

Neither State nor Federal Constitution requires trial court to review propriety of jury's sentencing decision in a capital case. SDCL 23A–27A–4.

Cases that cite this headnote

[56] **Sentencing and Punishment**
Procedure

In light of Supreme Court's sweeping, mandatory review of capital defendant's sentence, there is no constitutional error in vesting sentencing decision solely in the jury rather than the trial court. SDCL 23A–27A–4, 23A–27A–9, 23A–27A–12.

1 Cases that cite this headnote

knowingly given.

Cases that cite this headnote

[57] **Criminal Law**
Evidence calculated to create prejudice against or sympathy for accused
Criminal Law
Relevance

Delicate balancing process under which trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice is within the trial court's sound discretion and the court's ruling will not be disturbed absent abuse. SDCL 19–12–1 to 19–12–3.

3 Cases that cite this headnote

[58] **Criminal Law**
Particular cases

Defendant's statements in which he compared himself to other individuals who are guilty of murder, referred to "wanting to get off," and stated that he was as truthful as he could be with the officers were relevant to the determination of guilt, as they tended to show truthfulness of his confession and reinforce state's assertion that he killed victim and that his confession was freely and

[59] **Criminal Law**
Evidence calculated to create prejudice against or sympathy for accused

"Prejudice" which may warrant exclusion of relevant evidence refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means. SDCL 19–12–3.

1 Cases that cite this headnote

[60] **Criminal Law**
Acts, admissions, declarations, and confessions of accused

Even if statements in which defendant compared himself to other individuals who are guilty of murder, referred to "wanting to get off," and stated that he was as truthful as he could be with the officers were improperly admitted, it would constitute harmless error where evidence of his guilt was overwhelming.

Cases that cite this headnote

circumstances of the murder.

Cases that cite this headnote

[61] **Sentencing and Punishment**
Declarations and confessions

Where one aggravating factor alleged by the state at sentencing phase was that defendant committed the murder to avoid being arrested for burglary, statement in which defendant indicated that he wanted "to get off" and that only his lack of money prevented him from doing so related to his alleged motive for killing victim, and possibility that the jury might disapprove of defendant's cynical attitude was not enough to defeat the probative value of this evidence. SDCL 19–12–3, 23A–27A–1(9).

Cases that cite this headnote

[62] **Sentencing and Punishment**
Harmless and reversible error

Even if statements in which defendant compared himself to other individuals who are guilty of murder, referred to "wanting to get off," and stated that he was as truthful as he could be with the officers were irrelevant or unfairly prejudicial at sentencing phase, any error was harmless where there was ample evidence relating to the

[63] **Costs**
Expert witnesses or assistance in general

Appointment of expert is within the trial court's discretion, but courts should scrutinize defense request for expert to insure that indigent defendant may procure any reasonable defense, and, when in doubt, lean toward the appointment of such an expert.

1 Cases that cite this headnote

[64] **Costs**
Expert witnesses or assistance in general

Where indigent defendant requests appointment of expert at county expense, request must be in good faith, it must be reasonable in all respects, it must be timely and specifically set forth the necessity of the expert, and it must specify that defendant is financially unable to obtain the required service himself and that such services would otherwise be justifiably obtained

were defendant financially able.

1 Cases that cite this headnote

[65] **Costs**
Expert witnesses or assistance in general

There was no necessity for a public opinion survey and supplemental questionnaire to ascertain juror bias concerning homosexuality where impartial jury was impaneled, and where defense counsel questioned 11 of the 12 jurors regarding their feelings about homosexuality, ten of the jurors expressed neutral feelings about homosexuality, indicating it would have no impact on their decision making, and 11th juror stated that she regarded homosexuality as sinful but that defendant's sexual orientation would not affect how she decided the case.

Cases that cite this headnote

[66] **Costs**
Expert witnesses or assistance in general
Sentencing and Punishment
Matters Related to Jury

Jury's note to judge during penalty phase of capital case asking for clarification of sentence of life without parole and whether defendant would be allowed to marry or have conjugal visits did not show bias against his homosexuality or that he should have had expert appointed to help him develop jury questionnaire on the issue; jury's questions related to prison conditions rather than defendant's sexual orientation.

Cases that cite this headnote

[67] **Criminal Law**
Duty of judge in general
Criminal Law
Construction and Effect of Charge as a Whole

Trial court has broad discretion in instructing the jury, and instructions are adequate when, considered as a whole, they give the full and correct statement of the law applicable to the case.

4 Cases that cite this headnote

[68] **Criminal Law**
Instructions on Particular Points

To warrant reversal, refusal to give appropriate instruction must unfairly prejudice the defendant, and he must

show that jury might and probably would have returned a different verdict if the instruction had been given.

4 Cases that cite this headnote

[69] **Sentencing and Punishment**
Manner and effect of weighing or considering factors

Neither the State nor Federal Constitutions require that aggravating circumstances be "sufficiently substantial"; once sentencer finds the existence of a statutory aggravating circumstance, it has broad discretion to decide whether to impose sentence of death.

Cases that cite this headnote

[70] **Sentencing and Punishment**
Instructions

Instructions that jury could impose penalty of life imprisonment even if it found the existence of one or more statutory aggravating circumstances and that life sentence could be imposed for any or no reason were sufficient to guide jury's discretion.

Cases that cite this headnote

[71] **Criminal Law**
Punishment and powers of recommendation to mercy

Instructions that jury could impose life sentence regardless of whether they found any aggravating circumstances that might otherwise authorize imposition of death penalty, that they need not find existence of any mitigating facts or circumstances in order to fix penalty at life imprisonment, and that they could fix the penalty at life imprisonment for any reason or without any reason amply informed jury of their authority to set penalty at life imprisonment, and there was no abuse of discretion in refusing proposed instruction that law presumes that life without parole is appropriate sentence for murder in the first degree.

2 Cases that cite this headnote

[72] **Sentencing and Punishment**
Instructions

Court adequately advised jury regarding effect of either a life or death sentence by informing jury that decision it made will determine the sentence which will be imposed

by the court, that if jury decided on sentence of death, court would impose sentence of death, and that if jury decided on sentence of life imprisonment without parole, court would impose sentence of life imprisonment without parole.

2 Cases that cite this headnote

[73] **Constitutional Law**
Sentencing and Imprisonment
Sentencing and Punishment
Victim impact

Where decision allowing victim impact statements in capital cases was issued months before defendant's murder of victim, application of the decision did not implicate ex post facto analysis.

Cases that cite this headnote

[74] **Sentencing and Punishment**
Victim impact

Payne decision does not require specific state statute authorizing admission of victim impact evidence in capital case.

Cases that cite this headnote

[75] **Criminal Law**
Reception and Admissibility of Evidence

Trial court's ruling on admissibility of evidence is reviewed under abuse of discretion standard.

1 Cases that cite this headnote

[76] **Sentencing and Punishment**
Harm or injury attributable to offense

Victim impact statement read by murder victim's mother which related to her son's personal characteristics and the emotional impact of the crimes on the family was properly admitted.

1 Cases that cite this headnote

[77] **Sentencing and Punishment**
Harm or injury attributable to offense

Victim impact evidence may include testimony about victim's personal characteristics.

2 Cases that cite this headnote

[78] **Sentencing and Punishment**
Harm or injury attributable to offense

Information contained in victim impact statement concerning murder victim's plans for the future and how his family shared in those plans was relevant to jury's sentencing decision.

Cases that cite this headnote

[79] **Sentencing and Punishment**
Victim impact

Assessment of the harm caused by a criminal act is important factor in determining the appropriate punishment; state may legitimately conclude that evidence about victim and about the impact of the murder on the victim's family is relevant to jury's decision as to whether death penalty should be imposed.

1 Cases that cite this headnote

[80] **Sentencing and Punishment**
Harm or injury attributable to offense

Probative value of victim impact statement was not substantially outweighed by the danger of unfair prejudice where brief testimony by victim's mother came after defendant's sisters testified about his upbringing and good qualities, their love for him, and the negative effect his death would have on their family. SDCL 19–12–3.

3 Cases that cite this headnote

[81] **Constitutional Law**
Capital Punishment; Death Penalty
Sentencing and Punishment
Requirements for Imposition

Eighth and Fourteenth Amendments to the United States Constitution prohibit state sentencing systems that cause the death penalty to be wantonly and freakishly imposed. U.S.C.A. Const.Amends. 8, 14.

Cases that cite this headnote

[82] **Sentencing and Punishment**
Narrowing class of eligible offenders
Sentencing and Punishment

Aggravating circumstances in general

To satisfy constitutional mandates, aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty, must reasonably justify the imposition of a more severe sentence on defendant compared to others found guilty of murder, and may not be unconstitutionally vague. U.S.C.A. Const.Amends. 8, 14.

2 Cases that cite this headnote

[83] **Sentencing and Punishment**
Aggravating circumstances in general

Aggravating circumstance is impermissibly vague when it fails to adequately inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with open-ended discretion. U.S.C.A. Const.Amends. 8, 14.

Cases that cite this headnote

[84] **Sentencing and Punishment**
Other particular provisions

Depravity of mind language of death penalty statute, by itself, is vague and overbroad. U.S.C.A. Const.Amends. 8, 14; SDCL 23A–27A–1(6).

1 Cases that cite this headnote

[85] **Sentencing and Punishment**
Aggravating or mitigating circumstances
Sentencing and Punishment
Instructions

Depravity of mind aggravating circumstance, as limited by trial court's instruction which allowed jury to find depravity of mind based on the senselessness of the crime or the helplessness of the victim, did not adequately channel jury's discretion as required by the State and Federal Constitutions. U.S.C.A. Const.Amends. 8, 14; SDCL 23A–27A–1(6).

4 Cases that cite this headnote

[86] **Sentencing and Punishment**
Dual use of evidence or aggravating factor
Sentencing and Punishment
Motive

Jury may properly consider and find two conceptually distinct

aggravating circumstances, and is not restricted to finding only one motive for capital murder. SDCL 23A–27A–1.

Cases that cite this headnote

[87] **Sentencing and Punishment**
Personal or pecuniary gain
Sentencing and Punishment
Witnesses

Jury could find that defendant both killed victim to silence a witness and to receive money, which are two separate motives for murder which could exist independent of one another and which could each serve as aggravating factor. SDCL 23A–27A–1(3, 9).

1 Cases that cite this headnote

[88] **Sentencing and Punishment**
Sufficiency

Finding of aggravating circumstance that defendant killed victim for purpose of receiving money was supported by evidence that victim was regarded as a trusted employee, so that it was reasonable to infer that he would not have passively permitted defendant to take the money without attempting to contact the police or otherwise stop the theft, that defendant was beginning to take the money when he heard the door to the shop being opened, and that, after stabbing his victim, he continued his theft of the store. SDCL 23A–27A–1(9).

Cases that cite this headnote

[89] **Criminal Law**
Construction in favor of government, state, or prosecution
Criminal Law
Verdict supported by evidence
Criminal Law
Inferences or hypotheses from evidence

When reviewing the sufficiency of the evidence, Supreme Court must consider the evidence in the light most favorable to the verdict; verdict will not be set aside if the evidence and all favorable inferences that can be drawn from it support a rational theory of guilt.

Cases that cite this headnote

[90] **Sentencing and Punishment**
Vileness, heinousness, or atrocity

"Unnecessary pain," which will support finding of torture

aggravating circumstance, implies suffering in excess of what is required to accomplish the murder. SDCL 23A–27A–1(6).

2 Cases that cite this headnote

[91] **Sentencing and Punishment**
Vileness, heinousness, or atrocity

Defendant who intends to kill his victim instantly or painlessly does not satisfy requirement for finding of aggravating circumstance of torture, nor does the defendant who only intended to cause pain that is incident to death. SDCL 23A–27A–1(6).

2 Cases that cite this headnote

[92] **Sentencing and Punishment**
Vileness, heinousness, or atrocity

Finding of aggravating circumstance that murder involved torture was supported by evidence that, after defendant inflicted the second nonfatal stab wound, he did not swiftly proceed to end victim's life but, instead, brought victim to his feet and walked him to the store room, that victim begged for his life and asked for medical help, that defendant ignored his pleas and seated him on a pallet and arranged his body for what he referred to as the "coup de grace," and that during this time victim became passive and seemed to acknowledge his impending death. SDCL 23A–27A–1(6).

1 Cases that cite this headnote

[93] **Sentencing and Punishment**
Harmless and reversible error

Invalidity of "depravity of mind" circumstance did not so taint penalty proceedings as to mandate reversal of death sentence. SDCL 23A–27A–1(6).

Cases that cite this headnote

[94] **Sentencing and Punishment**
Manner and effect of weighing or considering factors

Once jury has found the existence of an aggravating circumstance beyond a reasonable doubt, capital sentencing scheme gives jurors broad discretion in deciding whether to impose life imprisonment or a death sentence.

1 Cases that cite this headnote

[95] **Sentencing and Punishment**
Deliberations

Jury's questions about work release and distraction from punishment did not show that they considered irrelevant or arbitrary factors in rendering a verdict; questions directly related to conditions of confinement under a sentence of life without parole, as prison life was appropriate topic for discussion when weighing alternatives of life imprisonment and the death penalty.

1 Cases that cite this headnote

[96] **Criminal Law**
Authority or discretion of court

Decision whether to provide further instruction to jury rests within the sound discretion of trial court.

Cases that cite this headnote

[97] **Criminal Law**
Requisites and sufficiency

Decision to respond to jury's questions concerning nature of prison life defendant would experience if he did not receive death penalty by telling jurors that all the information that the court could give was in the instructions was not an abuse of discretion, despite defendant's claim that court should have told jurors not to base decision on speculation or guesswork.

Cases that cite this headnote

[98] **Sentencing and Punishment**
Sufficiency

Finding that defendant committed the murder to avoid being arrested was supported by his statement to the police that he wanted to "leave no witnesses," that he had been "caught in the act," and that his decision to tie victim's hands was based on fact that he did not want him to be able to call police. SDCL 23A–27A–1(9).

Cases that cite this headnote

[99] **Sentencing and Punishment**
Determinations based on multiple factors
Sentencing and Punishment
Personal or pecuniary gain
Sentencing and Punishment

Killing while committing other offense or in course of criminal conduct
Sentencing and Punishment
Escape or other obstruction of justice
Sentencing and Punishment
Childhood or familial background

Although defendant presented mitigating evidence concerning his difficult youth and loving family, decision to impose death penalty in spite of this evidence was not arbitrary, where defendant brutally murdered victim so that he could steal less than $2,000 in cash and escape responsibility for his crime.

Cases that cite this headnote

[100] **Sentencing and Punishment**
Sympathy and mercy

With respect to death penalty, the law permits mercy, but does not require it.

Cases that cite this headnote

[101] **Sentencing and Punishment**
Proportionality

"Similar cases" for purposes of proportionality review are those cases in which capital sentencing proceeding was actually conducted, whether sentence imposed was life or death; because the aim of proportionality review is to ascertain what other capital sentencing authorities have done with similar capital murder offenses, the only cases that can be deemed similar are those in which imposition of the death penalty was properly before the sentencing authority for determination. SDCL 23A–27A–12(3).

10 Cases that cite this headnote

[102] **Sentencing and Punishment**
Requirements for Imposition

All defendants facing the death penalty are entitled to fairness and reasonable consistency in its imposition. SDCL 23A–27A–12(3).

Cases that cite this headnote

[103] **Sentencing and Punishment**
Proportionality in general

Fact that defendant is among the first to receive a death sentence in the state does not signify that his sentence is disproportionate.

23A–27A–12(3).

1 Cases that cite this headnote

[104] **Sentencing and Punishment**
Proportionality in general

Death sentence should not be invalidated simply because another jury determined that another defendant, who committed an analogous crime, deserved mercy. SDCL 23A–27A–12(3).

1 Cases that cite this headnote

[105] **Criminal Law**
Proportionality review

Proportionality review focuses not only on the crime, but also on the defendant. SDCL 23A–27A–12(3).

1 Cases that cite this headnote

[106] **Sentencing and Punishment**
Proportionality in general
Sentencing and Punishment
Killing while committing other offense or in course of criminal conduct

Death sentence imposed on defendant who stabbed victim in course of robbery was not excessive or disproportionate where offense involved existence of three separate aggravating circumstances, only one other case alleged the presence of three aggravating factors, and marked distinctions between defendant's case and the other justified juries' different verdicts. SDCL 23A–27A–12(3).

3 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

MILLER, Chief Justice.

[¶ 1] From the latter part of 1991 through February 1992, Charles Russell Rhines

worked at the Dig 'Em Donut Shop on West Main Street in Rapid City, South Dakota. In February 1992 Rhines was terminated from this job.

[¶ 2] On March 8, 1992, the body of Donnivan Schaeffer, an employee of Dig 'Em Donuts, was found in the storeroom of the donut shop on West Main Street. Schaeffer's hands were bound, and he had been repeatedly stabbed. Approximately $3,300 in cash, coins, and checks was missing from the store. Additional facts will be recited herein as they relate to specific issues.

[¶ 3] The State charged Rhines with third-degree burglary of the store and first-degree murder of Schaeffer. A jury convicted him of these crimes. The jury recommended a sentence of death for the first-degree murder conviction. The trial court entered a judgment and warrant of execution. Rhines appeals. We affirm.

ISSUE 1.

[¶ 4] **Did the trial court err by not suppressing incriminating statements made by Rhines to law enforcement officers on June 19 and 21, 1992?**

[¶ 5] At approximately 12:45 p.m. on June 19, 1992, Rhines was arrested in King County, Washington, for a burglary that occurred in that state. King County Police Officer Michael Caldwell read Rhines the following *Miranda* warning:

> You have the right to remain silent. Number 2, anything you say or sign can be used as evidence against you in a court of law. Number 3, you have the right at this time to an attorney of your own choosing, and to have him present before saying or signing anything. Number 4, if you cannot afford an attorney, you are entitled to have an attorney appointed for you without cost to you and to have him present before saying and signing anything. Number 5, you have the right to exercise any of the above rights at any time before saying or signing anything. Do you understand each of these rights that I have explained to you?

According to Officer Caldwell, Rhines responded by asking something to the effect, "Those two detectives from South Dakota are here, aren't they?" Caldwell made no reply. Caldwell did not attempt to question Rhines, and Rhines made no further statements to Caldwell. Rhines was placed in a holding cell at a King County police station.

[¶ 6] At 6:56 p.m. that same day, two South Dakota law enforcement officers, Detective Steve Allender of the Rapid City Police Department and Pennington County Deputy Sheriff Don Bahr, interrogated Rhines about

the burglary of Dig 'Em Donuts and the murder of Schaeffer. Detective Allender testified that he advised Rhines of his *Miranda* rights prior to questioning him. The exchange between himself and Rhines is as follows:

> Allender: You have the continuing right to remain silent. Do you understand that?
>
> Rhines: Yes.
>
> ***425** Allender: Anything you say can be used as evidence against you. Do you understand that?
>
> Rhines: Yes.
>
> Allender: You have the right to consult with and have the presence of an attorney, and if you cannot afford an attorney, an attorney can be appointed for you free of charge. Do you understand that?
>
> Rhines: Yes.
>
> Allender: Having those rights in mind, are you willing to answer questions?
>
> Rhines: Do I have a choice?

Allender testified he told Rhines he did have a choice and in fact Rhines did not have to talk with them at all. Allender then asked if Rhines wanted to talk with them and Rhines said, "I suppose so," and then said, "I'll answer any questions I like." Shortly thereafter, Rhines confessed to the burglary of Dig 'Em Donuts and to the killing of Schaeffer.

[¶ 7] Approximately two hours later, Rhines gave the officers permission to tape record his statements. The following exchange occurred:

> Allender: Ok. Um, do you remember me reading you your rights?
>
> Rhines: Yes.
>
> Allender: In the beginning? Did you understand those rights?
>
> Rhines: Yes.
>
> Allender: And uh, having those rights in mind you talked to us here?
>
> Rhines: Yes I have.

During the taped portion of the interview, Rhines again made incriminating statements about the burglary of Dig 'Em Donuts and the killing of Schaeffer.

[¶ 8] On June 21, 1992, Detective Allender and Deputy Sheriff Bahr posed additional questions to Rhines. This interview was tape recorded. Prior to questioning, Detective Allender had the following conversation with Rhines:

> Allender: You have the continuing right to remain silent, do you understand that?
>
> Rhines: Yes.
>
> Allender: Anything you say can be used as evidence against you. Do you understand that?
>
> Rhines: Yes.
>
> Allender: You have the right to consult with and have the presence of an attorney,

and if you cannot afford an attorney, an attorney can be appointed for you free of charge. Do you understand that?

Rhines: Yes.

Allender: K. Just like the other night, having these rights in mind, are you willing to answer questions?

Rhines: Yes.

Allender: Ok. And that, in this case, it goes, if you don't like the question, it doesn't mean that you're supposed to answer it. You can always say stop, ok?

Rhines: I can take the 5th Amendment.

Allender: Exactly.

Rhines proceeded to make incriminating statements about the burglary of Dig 'Em Donuts and the death of Schaeffer.

[¶ 9] Rhines filed a pretrial motion to suppress the incriminating statements made to the officers on June 19 and 21, 1992. After a hearing, the trial court denied this motion. At trial, Detective Allender testified regarding Rhines' statements during the untaped portion of the June 19, 1992, interview. Rhines entered a continuing objection to this testimony. Over Rhines' objection, the trial court also permitted the State to play the recordings of the interviews that took place on June 19 and 21, 1992. Rhines claims the trial court erred in admitting his statements.

[¶ 10] Rhines argues the trial court erred in failing to suppress the incriminating statements he made during the June 19 and 21 interviews. He claims that the *Miranda* warnings recited to him were deficient for several reasons. He also asserts that he never gave a valid waiver of his *Miranda* rights. We will consider each of his contentions in turn.

[1] [2] [3] [4] [¶ 11] Preliminarily, we reiterate that the Fifth Amendment to the United States Constitution provides in part:

> ***426** No person ... shall be compelled in any criminal case to be a witness against himself[.]

U.S. Const.Amend. V.[1] The Fifth Amendment privilege against self-incrimination is implicated whenever an individual is subjected to a custodial interrogation by the police. *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694, 726 (1966). To protect the privilege, law enforcement personnel must observe certain procedural safeguards. 384 U.S. at 478–79, 86 S.Ct. at 1630, 16 L.Ed.2d at 726. In the absence of other equivalent procedures, law enforcement must advise a suspect as follows:

1 Article VI, § 9, of the South Dakota Constitution states in relevant part: "No person shall be compelled in any criminal case to give evidence against himself[.]"

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney,

> and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.
> 384 U.S. at 479, 86 S.Ct. at 1630, 16 L.Ed.2d at 726. If the individual indicates at any time before or during questioning that he wishes to remain silent or that he wants an attorney, the interrogation must end. 384 U.S. at 473–74, 86 S.Ct. at 1627–28, 16 L.Ed.2d at 723. If law enforcement fails to follow these or other equivalent procedures, the prosecution may not use statements made during a custodial interrogation as proof of guilt. 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706.

[5] [¶ 12] Importantly, *Miranda* does not require that warnings be given in the exact form described in that decision. *Duckworth v. Eagan*, 492 U.S. 195, 202, 109 S.Ct. 2875, 2880, 106 L.Ed.2d 166, 176 (1989). "[T]he words of *Miranda* do not constitute a ritualistic formula which must be repeated without variation in order to be effective. Words which convey the substance of the warning along with the required information are sufficient." *Evans v. Swenson*, 455 F.2d 291, 295 (8th Cir.1972), *cert. denied*, 408 U.S. 929, 92 S.Ct. 2508, 33 L.Ed.2d 342 (1972) (citations omitted).

[¶ 13] 1. The right to terminate questioning.

[¶ 14] Rhines contends Detective Allender's warnings on June 19 and June 21, 1992, failed to advise him of his right to terminate questioning at any time. Rhines further argues that Officer Caldwell's earlier recitation, which includes such a warning, cannot be combined with Detective Allender's advisement to arrive at a sufficient warning. Rhines reasons that, since he never told Caldwell he understood the rights that Caldwell recited to him, the State failed to show that Rhines understood his right to terminate questioning.

[¶ 15] *Rhines points to State v. Brings Plenty*, 459 N.W.2d 390 (S.D.1990), as support for his claim that the "continuing right to remain silent" warning was insufficient. In *Brings Plenty*, the trial court ruled that statements by the defendant which were coerced and involuntary could be used to impeach the defendant, should he testify. *Id.* at 394. On appeal, we reversed and granted the defendant a new trial on the grounds that involuntary statements are inadmissible for any purpose. *Id.* at 397.

[¶ 16] In dicta, we criticized a warning that was essentially identical to the warning given to Rhines.[2] We reasoned the advisement was deficient under *Miranda*, because it failed to inform the defendant of his right to terminate questioning at any time. *Id.* at 395–96.

[2] According to the briefs in *Brings Plenty*, the officer advised defendant as follows:
> Ok, you have the continuing right to remain silent. Anything you say can be used as evidence against you. You have the right to consult with and the presence of an attorney. If you cannot afford an attorney, an attorney will be appointed to you. Do you understand these rights ... ?

[6] [¶ 17] Rhines' reliance on *Brings Plenty* is misplaced. First, the discussion of the warning in *Brings Plenty* is not binding precedent. Second, Detective Allender's

statement that Rhines had a "continuing right to remain silent" adequately advised ***427** him of his option to terminate questioning at any time. Additional warnings given to Rhines on June 19 and 21 reinforced this advisement. When Rhines was first arrested on June 19, 1992, Officer Caldwell told him, "You have the right to remain silent.... [Y]ou have the right to exercise any of the above rights at any time before saying or signing anything." There was no intervening interrogation of Rhines between his arrest and questioning by Allender and Bahr that might blunt the effect of this warning.

[7] [¶ 18] Rhines counters that his June 19 confession must be suppressed, because there was no showing that he understood the warnings given by Caldwell and Allender concerning the right to terminate questioning. We reject Rhines' assertion. There is ample evidence in the record indicating that Rhines had a complete understanding of his right to stop the questioning at any time. Before making any incriminating statements on June 19, Rhines specifically told Allender he would only answer the questions he liked. When the officers questioned him about a topic he did not wish to discuss, he would shut off the tape recorder or tell them to "be quiet." (For example, during the June 19, 1992 interview, Rhines turned off the recorder when the officers began to discuss whether he had been coerced into making a statement. He then explained his personal feelings toward a young man he knew and asked the officers not to dwell on the young man's involvement in the burglary of the donut shop. The officers agreed to that.)

[¶ 19] Excerpts from the taped interview of June 19, clearly show Rhines understood his right to terminate questioning as explained by Officer Caldwell. Law enforcement adequately advised Rhines of his *Miranda* rights prior to the interview on June 19. The trial court did not abuse its discretion in admitting the statements made by Rhines on that date.

[8] [9] [10] [11] [¶ 20] On June 21, 1992, the only advisement Rhines received was from Detective Allender. (*See* ¶ 8 supra). Allender's advisement at that time that Rhines need not answer questions he did not like and that he "can always say stop" adequately warned Rhines of his right to terminate questioning at any time. A *Miranda* warning need not be elegantly phrased or mechanically recited. *United States v. Noa*, 443 F.2d 144, 146 (9th Cir.1971) (citing *Camacho v. United States*, 407 F.2d 39, 42 n. 2 (9th Cir.1969)). The purpose of the *Miranda* warning is to explain an aspect of constitutional law to a criminal suspect, so that he can make a voluntary, knowing and intelligent decision whether to talk to the police. Allender's straightforward statements and conversational tone are an acceptable method of advising an individual of his constitutional right to be silent in the face of police interrogation. Furthermore, Rhines' response that he "can take the 5th Amendment" demonstrates that he amply understood his privilege against self-incrimination.

[¶ 21] **2. The right to an attorney during**

questioning.

[¶ 22] On June 19 and 21, 1992, Allender advised Rhines: "You have the right to consult with and have the presence of an attorney[.]" Rhines alleges this warning was deficient, because it did not explain the right to have an attorney present *during questioning* or the continuing right to request the presence of an attorney *at any point during questioning.* He contends his inculpatory statements to police should have been suppressed due to these deficiencies.

[¶ 23] This Court has held that the statement, "You have the right to consult with and the presence of an attorney," satisfied the requirement that the suspect be advised of the right to have an attorney present *prior* to any questioning. *Brings Plenty,* 459 N.W.2d at 395. *Accord State v. Croucher,* 326 N.W.2d 98, 98–99 (S.D.1982). We must now consider whether an essentially identical warning adequately communicates the right to have an attorney present *during* questioning.

[12] [¶ 24] Rhines was told at the beginning of each interview that he had the right to the presence of an attorney. Because this warning was delivered at the start of each questioning session, it plainly communicated the right to have an attorney present at that time. *Evans,* 455 F.2d at 295–96; *Sweeney v. United States,* 408 F.2d 121, 124 (9th Cir.1969); ***428** *People v. Johnson,* 90 Mich.App. 415, 282 N.W.2d 340, 342 (1979). We therefore find no *Miranda* violation.

[¶ 25] **3. The right to appointment of an attorney.**

[¶ 26] On June 19 and 21, 1992, Allender informed Rhines, "if you cannot afford an attorney an attorney can be appointed for you free of charge." According to Rhines, Detective Allender's statement that an attorney "can" be appointed is ambiguous and legally insufficient. He argues that *Miranda* requires he be advised an attorney *would* or *must* be appointed if he cannot afford to hire one.

[13] [¶ 27] At the heart of the *Miranda* opinion is the "concern that the indigent accused in police custody be informed that he has just as much right to representation by an attorney as a person who can afford one." *Mayfield v. State,* 293 Ark. 216, 736 S.W.2d 12, 14–15 (1987), *cert. denied,* 485 U.S. 905, 108 S.Ct. 1076, 99 L.Ed.2d 235 (1988). The *Miranda* Court wrote:

> In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the

> funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present.

384 U.S. at 473, 86 S.Ct. at 1627, 16 L.Ed.2d at 723. *Miranda* therefore mandated that a suspect be advised "if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." 384 U.S. at 479, 86 S.Ct. at 1630, 16 L.Ed.2d at 726.

[14] [15] [¶ 28] Although the warning need not contain the exact language used in the *Miranda* opinion, it must effectively communicate the right to appointed counsel if the accused cannot afford to hire a lawyer. *Mayfield*, 736 S.W.2d at 15. In determining whether a particular warning adequately conveys this right, a reviewing court must look to the warnings as a whole rather than focusing on one sentence in isolation. *United States v. Miguel*, 952 F.2d 285, 288 (9th Cir.1991) (citing *Duckworth*, 492 U.S. at 205, 109 S.Ct. at 2881, 106 L.Ed.2d at 178).

[¶ 29] In advancing his argument that Allender's warnings were deficient, *Rhines relies on United States v. Connell*, 869 F.2d 1349 (9th Cir.1989). In *Connell*, the Ninth Circuit Court of Appeals suppressed incriminating statements made by a defendant after he had been given a flawed advisement concerning the right to appointed counsel. *Id.* at 1353. We believe the facts in *Connell* to be clearly distinguishable.

[16] [¶ 30] In contrast to the defendant in *Connell*, Rhines was never told he would have to make his own arrangements for an attorney or that the government would not pay for his attorney. Nor was his right to appointed counsel contingent on a nebulous reference to the requirements of the law. Allender expressly informed Rhines of his right to remain silent, to consult with an attorney, and to have an attorney present. In this context, Rhines was also told that an attorney "can" be appointed if Rhines could not otherwise afford one. There was no additional information to mislead him into believing that an attorney would not be appointed if he could not pay for one.

[¶ 31] Based on the totality of the warning given to Rhines, we conclude the advisement reasonably conveyed the right to appointed counsel. *See also Duckworth*, 492 U.S. at 200–01, 109 S.Ct. at 2879, 106 L.Ed.2d at 175–76; *Miguel*, 952 F.2d at 287–88; *Tasby v. United States*, 451 F.2d 394, 398–99 (8th Cir.1971), *cert. denied*, 406 U.S. 922, 92 S.Ct. 1787, 32 L.Ed.2d 122 (1972); *State v. Blanford*, 306 N.W.2d 93, 95–96 (Iowa 1981); State v. Strain, 779 P.2d 221, 223–24 (Utah 1989).

***429** [¶ 32] **4. Waiver of Miranda rights.**

[17] [18] [¶ 33] Rhines contends he was never told that, by agreeing to answer questions,

he would be waiving the rights which had just been recited to him. Nor, he argues, was he specifically asked whether he was willing to waive these rights. He was simply asked, "Having these rights in mind, are you willing to answer questions?" Rhines contends this was an inadequate explanation of his option to waive *Miranda* rights and prevented him from giving a valid waiver. We disagree. An advisement need not specifically refer to a "waiver" of rights in order to be valid.

> " '*Miranda* is not a ritual of words to be recited by rote according to didactic niceties. What *Miranda* does require is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. We will not indulge semantical debates between counsel over the particular words used to inform an individual of his rights.' "

Blanford, 306 N.W.2d at 96 (quoting *Coyote v. United States,* 380 F.2d 305, 308 (10th Cir.1967), *cert. denied,* 389 U.S. 992, 88 S.Ct. 489, 19 L.Ed.2d 484 (1967)).

[19] [20] [21] [¶ 34] Having determined that the warning was adequate, we must now consider whether Rhines gave a valid waiver of his rights. When the State offers an incriminating statement allegedly made by the defendant, the State has the burden of proving beyond a reasonable doubt that the statement was given knowingly, intelligently, and voluntarily. *State v. Volk,* 331 N.W.2d 67, 70 (S.D.1983). In determining whether a defendant has given a valid waiver of his *Miranda* rights, we look to the totality of the circumstances, " 'including the background, experience, and conduct of the accused.' " *State v. Braddock,* 452 N.W.2d 785, 788 (S.D.1990) (quoting *State v. West,* 344 N.W.2d 502, 504 (S.D.1984)). The trial court's finding that the defendant's rights had been waived and his statements were voluntary must be upheld unless it is clearly erroneous. *Braddock,* 452 N.W.2d at 788 (citations omitted).

[22] [¶ 35] A waiver of *Miranda* rights need not be express, but "may be inferred from the defendant's understanding of his rights coupled with a course of conduct reflecting his desire to give up his right to remain silent and have the counsel of an attorney." *United States v. Betts,* 16 F.3d 748, 763 (7th Cir.1994) (citing *Fare v. Michael C.,* 442 U.S. 707, 724–25, 99 S.Ct. 2560, 2571–72, 61 L.Ed.2d 197, 212 (1979); *North Carolina v. Butler,* 441 U.S. 369, 373, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286 (1979)).

[23] [¶ 36] Rhines' conduct shows a valid waiver. When asked whether he understood his rights, Rhines responded that he did. He then answered affirmatively when asked if he was willing to answer questions. He was articulate and detailed in making his statements. There is no indication that Rhines was under the influence of drugs or alcohol or that he was otherwise impaired in his functioning. Nor is there any showing that law enforcement officers unlawfully induced or coerced Rhines to make a confession. Additionally, Rhines clearly

understood the consequences of relinquishing his rights, including the fact that his statements could be used against him in court. Referring to his reasons for confessing to the murder, Rhines remarked, "This will come out in court again." At another point in the questioning, Rhines told Allender and Bahr, "If you guys bring some of this stuff into court, you're gonna look really foolish[.]" When Allender reminded Rhines that "this isn't court," Rhines replied, "No. But it will be." Rhines also boldly professed to have knowledge of the statutory and case law.

[¶ 37] Rhines' gratuitous statements reflect an individual who is aware of the potentially grave legal consequences of his confession. The trial court was not clearly erroneous in concluding that Rhines made a knowing and voluntary decision to relinquish his *Miranda* rights.

ISSUE 2.

[¶ 38] **Did the trial court err in excusing a prospective juror for cause?**

[¶ 39] As part of the jury selection process, the defense and prosecution thoroughly questioned prospective jurors. When Diane ***430** Staeffler was called for questioning, defense counsel explained the two-step process for determining guilt and setting a sentence in a capital case. After extensive questioning by the defense, the State, and the trial court regarding whether Staeffler could consider imposing the death penalty on a defendant, the trial court denied the State's challenge for cause. The court then permitted the State to resume questioning Staeffler regarding capital punishment, followed by additional inquiries on the subject by the defense and the court. After this additional questioning, the court excused Staeffler from jury duty for cause.

[¶ 40] Rhines challenges the trial court's ruling on two grounds. First, Rhines contends it was error for the court to permit the State to continue questioning Staeffler about her feelings on the death penalty after the trial court had already allowed such questioning and had denied the State's challenge for cause. According to Rhines, State's ensuing questions were leading and argumentative and unfairly caused Staeffler to express an unwillingness to consider the death penalty. Second, Rhines contends the trial court's subsequent decision to excuse Staeffler for cause was a violation of the rule set forth in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). He argues that *Witherspoon* requires that the trial court discharge for cause only those who make it unmistakably clear they cannot and will not follow the court's instructions with respect to the death penalty. He claims the elimination of a qualified juror from the panel in violation of *Witherspoon*invalidates the death sentence imposed on him.

[24] [25] [¶ 41] Both the United States and South Dakota Constitutions guarantee trial by an impartial jury. *State v. Hansen*, 407 N.W.2d 217, 220 (S.D.1987) (citing U.S.Const.Amend. VI; S.D.Const. Art. VI, § 7; SDCL 23A–16–3); *Morgan v. Illinois*, 504 U.S. 719, 728, 112 S.Ct. 2222, 2229, 119 L.Ed.2d 492, 502 (1992) (holding the Sixth and Fourteenth Amendments to the

United States Constitution require "the impartiality of any jury that will undertake capital sentencing"). Jury selection is an important means of ensuring this right. The voir dire process is designed to eliminate persons from the venire who demonstrate they cannot be fair to either side of the case. *Morgan,* 504 U.S. at 734 n. 7, 112 S.Ct. at 2232 n. 7, 119 L.Ed.2d at 506 n. 7 (citing *Smith v. Balkcom,* 660 F.2d 573, 578 (5th Cir.1981), *modified,* 671 F.2d 858 (5th Cir.1982), *cert. denied,* 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982)).

[¶ 42] In *Witherspoon,* the Court held: "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522, 88 S.Ct. at 1777, 20 L.Ed.2d at 784–85. The Court reasoned that executing a death sentence returned by such a jury deprives the defendant of his life without due process of law and infringes his right to trial by an impartial jury under the Sixth and Fourteenth Amendments. 391 U.S. at 518, 88 S.Ct. at 1775, 20 L.Ed.2d at 783. The Court observed:

> [T]he decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death.

391 U.S. at 521–22 n. 20, 88 S.Ct. at 1776–77 n. 20, 20 L.Ed.2d at 784–85 n. 20.

[¶ 43] The Court suggested that the State could legitimately exclude "those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death." 391 U.S. at 520, 88 S.Ct. at 1776, 20 L.Ed.2d at 784. However, when the State swept from the jury those who simply expressed conscientious or religious scruples against capital punishment or who opposed it in principle, it crossed a constitutional line. 391 U.S. at 520–21, 88 S.Ct. at 1776, 20 L.Ed.2d at 784.

[¶ 44] The United States Supreme Court has since held that the improper exclusion of even one potential juror with general objections to capital punishment requires reversal of the death penalty. *Davis v. Georgia,* 429 U.S. 122, 123, 97 S.Ct. 399, 400, 50 L.Ed.2d 339, 341 (1976); *see also Gray v. Mississippi,* 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) (plurality opinion). In determining whether a prospective juror may be excluded for cause, the Court applies the following ***431** standard: Would the individual's views " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841, 851–52 (1985). With these principles in mind, we now consider Rhines' contentions.

[¶ 45] 1. Continued questioning of Staeffler.

[26] [¶ 46] Rhines contends the trial court improperly permitted the State to resume

questioning Staeffler after initially denying a challenge for cause. We disagree. The "latitude allowed to counsel in voir dire of prospective jurors rests largely in the trial court's discretion." *State v. Miller*, 429 N.W.2d 26, 38 (S.D.1988) (citing *State v. Muetze*, 368 N.W.2d 575, 584 (S.D.1985)). Before the court denied the challenge for cause, the State expressly reserved the opportunity to continue questioning Staeffler "depending on the Court's ruling." The court then proceeded to question Staeffler about her ability to decide the case. First, the court asked Staeffler if she could fulfill a juror's oath to be fair and impartial and to follow the law. Staeffler responded affirmatively. Second, the court asked if Staeffler could "consider all the law and options that the law allows." Staeffler agreed that she could. The court then denied the challenge. However, Staeffler's response to subsequent questions from the State demonstrates that she was confused by the court's questions and that additional clarification was necessary. Although Staeffler told the court she could follow its instructions, she immediately indicated to the State that she was not aware this would include consideration of the death penalty.

> State: Ma'am, the Judge just asked you whether you could consider all the options.
>
> Staeffler: Is that the death penalty?
>
> State: That includes the death penalty?
>
> Staeffler: Well—I don't know.

[¶ 47] The defense then interjected its objection to further questioning of Staeffler about capital punishment. However, it had just become apparent that Staeffler's promises to follow the law did not take into account her reservations about the death penalty. In response to subsequent questions by the State, Staeffler's misunderstanding of the court's questions became even more apparent:

> State: What I have been asking you about is whether or not you can fairly consider it as the Judge asked you in terms of having both options, including imposing death upon this man, Mr. Rhines, and what I need to clear up is, when you answered Judge Konenkamp, did you understand what he was asking you?
>
> Staeffler: Apparently not the first time about considering both options.

[¶ 48] Because Staeffler had not understood the court's questions, her ability to impartially follow the court's instructions was still undetermined. We cannot fault the court for allowing additional inquiries regarding her ability to serve. As the United States Supreme Court observed:

> Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. *Rosales–Lopez v. United States*, 451 U.S. 182, 188, 101 S.Ct. 1629, 1634, 68 L.Ed.2d 22 (1981) (White, J., plurality opinion). Hence, "[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of

fairness." *Aldridge v. United States*, 283 U.S. 308, 310, 51 S.Ct. 470, 471–72, 75 L.Ed. 1054 (1931).

Morgan, 504 U.S. at 729–30, 112 S.Ct. at 2230, 119 L.Ed.2d at 503. In light of her misunderstanding of the court's inquiries, we find no abuse of discretion in giving the State the opportunity to clarify Staeffler's answers.

[27] [¶ 49] Nor do we agree with Rhines' claim that the State's questions were misleading or argumentative. We can detect no material difference between the questioning by the State or by defense counsel. Both the State and the defense questioned Staeffler at length about her position on the death penalty. Both used leading questions during their examination. Indeed, Staeffler's uncertainty and vacillation necessitated lengthy, detailed inquiries and the use of leading questions. ***432** Her apparent contradictions concerning her ability to follow the court's instructions had to be explored by counsel for both sides. The defense even seemed to acknowledge the usefulness of leading questions in ascertaining Staeffler's views. At one point, defense counsel said to Staeffler, "I know I probably have been putting words in your mouth or trying to, but I don't intend to, but I'm trying to get at where you are really at on this death penalty." Later, defense counsel stated to Staeffler, "[The State's counsel is] trying to lead you down a road and I'm trying to lead you down a road, but here's what we need, we need jurors who come into this case and even though you have very strong reservations about the death penalty, we need jurors like you as well[.]" Staeffler's answers during *voir dire* appear to genuinely reflect her personal objections to capital punishment and her unwillingness to participate in the process of imposing a penalty of death. In light of similar questioning by the State and the defense, we cannot conclude that Staeffler's responses were the product of intimidation or confusion caused by the State.

[¶ 50] **2. Disqualification of Staeffler.**

[28] [¶ 51] Rhines claims the trial court improperly excused Staeffler for cause. Rhines asserts the trial court "can only exclude those who have *unequivocally* and *without contradiction* expressed a complete inability to impose the death penalty." (Emphasis in original.) The law does not demand such precision. In *Wainwright*, the Court held that a juror's bias need not be proved with "unmistakable clarity." The Court explained:

> [D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they

> will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.... [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Wainwright, 469 U.S. at 424–26, 105 S.Ct. at 852–53, 83 L.Ed.2d at 852–53.

[29] [¶ 52] In accordance with the Court's reasoning, our state law vests a trial judge with broad discretion in determining juror qualifications. *Hansen,* 407 N.W.2d at 220 (citing *State v. Flack,* 77 S.D. 176, 180, 89 N.W.2d 30, 32 (1958)). "The ruling of the trial court will not be disturbed, except in the absence of any evidence to support it[.]" *Flack,* 77 S.D. at 181, 89 N.W.2d at 32. "When the evidence of each juror is contradictory in itself, and is subject to more than one construction, a finding by the trial court either way upon the challenge is conclusive on appeal." *Id.* at 181, 89 N.W.2d at 32.

[30] [31] [32] [¶ 53] To support his claim of error, Rhines notes Staeffler responded affirmatively when the court asked if she could follow the law. However, as noted above, Staeffler misunderstood the court's query and did not realize that following the law included consideration of the death penalty. Furthermore, the impartiality of a juror "must be based upon the whole voir dire examination and single isolated responses are not determinative." *First Bank of South Dakota v. Voneye,* 425 N.W.2d 630, 633 (S.D.1988) (citing *Hansen,* 407 N.W.2d at 220; *Flack,* 77 S.D. at 181, 89 N.W.2d at 32). Although Staeffler said at various times during voir dire that she could consider a death sentence during penalty deliberations, she also stated that she could *not* consider capital punishment under any circumstances. She made still other statements indicating that, while she might be able to consider capital punishment, she could not be fair and impartial. Staeffler said she did not like the death penalty and "would rather not" sit on a jury in a capital case. She said she did not know if she could sleep at night if she voted to impose the death penalty. When asked if she could be part of a jury that sentenced a ***433** defendant to death, Staeffler said, "Probably not" and "I don't think I could really do it." Even when defense counsel described murders that Staeffler described as "just awful," she responded, "I still don't want to make the [death penalty] decision." Upon additional questioning by the State, Staeffler said she thought capital punishment was appropriate at times but noted she was not the one making the penalty decision. Although she said that imposition of the death penalty would depend on the circumstances, she also stated that she could not imagine any circumstances where she could impose a death sentence. If selected for jury duty, she stated she would be leaning toward imposing a life sentence as

opposed to the death penalty. When asked by the trial court if she would fairly consider both options, she stated, "No, I guess not." She later said, "I could consider [the death penalty], but I don't want to. I wouldn't want to make the decision for death." She then reiterated that she could not give fair consideration to both options of life imprisonment and the death penalty.

[¶ 54] Based on a complete review of Staeffler's testimony, we conclude that her views on the death penalty would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." *Wainwright*, 469 U.S. at 424, 105 S.Ct. at 852, 83 L.Ed.2d at 851–52. The trial court did not abuse its discretion in excusing her for cause.

ISSUE 3.

[¶ 55] **Did the State use peremptory challenges in violation of due process guarantees by excluding prospective jurors with reservations about the death penalty?**

[¶ 56] It is undisputed the State used peremptory challenges to eliminate prospective jurors who had some reservations about capital punishment. These individuals had indicated they could set aside their doubts and be fair and impartial and were therefore not excludable for cause under *Witherspoon* and its progeny. The State also waived its 19th and 20th peremptory challenges in an attempt to seat a jury before a prospective juror who had expressed equivocal sentiments about the death penalty could be called for individual questioning.

[¶ 57] Rhines contends the State's use of peremptory challenges violated his constitutional right to a trial by a fair and impartial jury. He argues the State should not be permitted to peremptorily challenge all jurors with mere qualms about the death penalty when it is prohibited from excluding the same individuals for cause. He reasons that a jury which, because of the State's selective use of peremptory challenges, does not have any members with reservations about capital punishment is no different than a jury from which members of that group have been excluded for cause. Rhines thus asserts his conviction and sentence must be reversed for a new trial by a jury that has not been culled of all who question the wisdom of the death penalty.

[33] [34] [35] [¶ 58] By statute, the prosecution and the defense are each given an equal number of peremptory challenges. SDCL 23A–20–20. A peremptory challenge "is an objection to a juror for which no reason need be given." SDCL 23A–20–19. It can be exercised " 'without inquiry and without being subject to the court's control.' " *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, ——, 114 S.Ct. 1419, 1431, 128 L.Ed.2d 89, 108 (1994) (O'Connor, J., concurring) (quoting *Swain v. Alabama*, 380 U.S. 202, 220, 85 S.Ct. 824, 836, 13 L.Ed.2d 759, 772 (1965)). An exception is upon a prima facie showing that the prosecutor used peremptory challenges in a racially or sexually discriminatory manner. *Batson v. Kentucky*, 476 U.S. 79, 96–7, 106 S.Ct. 1712, 1723, 90

L.Ed.2d 69, 87–88 (1986); *J.E.B.*, 511 U.S. at ——, 114 S.Ct. at 1429, 128 L.Ed.2d at 106–07. The prosecutor then has the burden of establishing nondiscriminatory reasons for striking particular members of the venire. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88; *J.E.B.*, 511 U.S. at ——, 114 S.Ct. at 1429, 128 L.Ed.2d at 106–07. This restriction on the State's use of peremptory challenges is based on the principle that a person's race or gender is unrelated to his fitness as a juror. *See Batson*, 476 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81; *J.E.B.*, 511 U.S. at ——, 114 S.Ct. at 1426–27, 128 L.Ed.2d at 102–04. However, "[t]here is no basis for declaring ***434** that a juror's attitudes towards the death penalty are similarly irrelevant to the outcome of a capital sentencing proceeding." *Brown v. North Carolina*, 479 U.S. 940, 941, 107 S.Ct. 423, 424, 93 L.Ed.2d 373, 374 (1986) (O'Connor, J., concurring). In fact, "a juror's views on capital punishment, unlike his or her race, are directly related to potential performance on a capital jury." *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518, 525 (1988), *vacated on other grounds*, 494 U.S. 1022, 110 S.Ct. 1464, 108 L.Ed.2d 602 (1990). Ignoring these attitudes would severely inhibit the State's prosecution of capital crimes and defense counsel's zealous representation of their clients.

> There can be no dispute that a prosecutor has the right, indeed the duty, to use all legal and ethical means to obtain a conviction, including the right to remove peremptorily jurors whom he believes may not be willing to impose lawful punishment. Of course, defense counsel has the same right and duty to remove jurors he believes may be prosecution oriented. This Court's precedents do not suggest that the *Witherspoon* line of cases restricts the traditional rights of prosecutors and defense counsel to exercise their peremptory challenges in this manner.

Gray, 481 U.S. at 671–72, 107 S.Ct. at 2058, 95 L.Ed.2d at 641–42 (Powell, J., concurring).

[36] [¶ 59] United States Supreme Court precedent teaches that " 'jury competence is an individual rather than a group or class matter.' " *J.E.B.*, 511 U.S. at ——, 114 S.Ct. at 1434, 128 L.Ed.2d at 112 (Kennedy, J., concurring) (quoting *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220, 66 S.Ct. 984, 985, 90 L.Ed. 1181, 1185 (1946)). The discriminatory use of peremptories based on race or gender gives effect to an invidious group stereotype and preempts an individualized assessment of competency. That is not the case where a juror is peremptorily challenged due to his or her own views of the death penalty. In that case, counsel has made a particularized and fact-based appraisal of the prospective juror's ability to judge fairly and impartially. Pernicious group biases have not been given effect in that circumstance.

[37] [¶ 60] Rhines also ignores an important distinction between peremptory challenges and challenges for cause. Challenges for cause are unlimited, while peremptory challenges are restricted in number. In *Witherspoon*, state law permitted the prosecution to excuse for cause all jurors who expressed *any* conscientious scruples against capital punishment. 391 U.S. at 514, 88 S.Ct. at 1772–73, 20 L.Ed.2d at 780. This broad-based rule of exclusion gave the State a decided advantage in jury selection, because it was automatically guaranteed a jury free of any reservations about the death penalty.

[38] [¶ 61] In contrast, peremptory challenges are limited and both the State and the defendant receive the same number. SDCL 23A–20–20. Consequently, the prosecution and the defense have an equal opportunity to remove those members of the venire who, while able to follow the instructions of the court, espouse extreme views of capital punishment. *See Brown*, 479 U.S. at 941, 107 S.Ct. at 424, 93 L.Ed.2d at 374 (O'Connor, J., concurring in denial of certiorari).

> "[W]e see no ... constitutional infirmity in permitting peremptory challenges by both sides on the basis of specific juror attitudes on the death penalty. While a statute requiring exclusion of all jurors with any feeling against the death penalty produces a jury biased in favor of death, we have no proof that a similar bias arises, on either guilt or penalty issues, when *both parties* are allowed to exercise their equal, limited numbers of peremptory challenges ... against jurors harboring specific attitudes they reasonably believe unfavorable."

People v. Gordon, 50 Cal.3d 1223, 270 Cal.Rptr. 451, 475, 792 P.2d 251, 275 (1990) (quoting *People v. Turner*, 37 Cal.3d 302, 208 Cal.Rptr. 196, 690 P.2d 669 (1984)) (emphasis in original), *cert. denied*, 499 U.S. 913, 111 S.Ct. 1123, 113 L.Ed.2d 231 (1991). *See also J.E.B.*, 511 U.S. at ——, 114 S.Ct. at 1431, 128 L.Ed.2d at 108 (O'Connor, J., concurring) ("Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminat[ing] extremes of partiality on both sides, thereby assuring the selection ***435** of a qualified and unbiased jury.") (quoting *Holland v. Illinois*, 493 U.S. 474, 484, 110 S.Ct. 803, 809, 107 L.Ed.2d 905 (1990)).

[39] [¶ 62] Importantly, Rhines does not identify any jurors who were biased in favor of the State or otherwise incapable of fairly weighing the facts and applying the law. He simply objects to the elimination of jurors who may have been less inclined to impose a death sentence. "[A]n impartial jury consists of nothing more than 'jurors who will conscientiously apply the law and find the facts.' " *Lockhart v. McCree*, 476 U.S. 162, 178, 106 S.Ct. 1758, 1767, 90 L.Ed.2d 137, 151 (1986) (quoting *Wainwright*, 469 U.S. at 423, 105 S.Ct. at 852, 83 L.Ed.2d at

841) (emphasis deleted). "[W]e do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor." *Wainwright*, 469 U.S. at 423, 105 S.Ct. at 852, 83 L.Ed.2d at 851. Furthermore, the law does not demand a balanced sampling of opinions in the jury box.

> [I]f it were true that the Constitution required a certain mix of individual viewpoints on the jury, then trial judges would be required to undertake the Sisyphean task of "balancing" juries, making sure that each contains the proper number of Democrats and Republicans, young persons and old persons, white-collar executives and blue-collar laborers, and so on.
>
> * * *
>
> ... [I]t is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints. Prospective jurors come from many different backgrounds, and have many different attitudes and predispositions. But the Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.
>
> *Lockhart*, 476 U.S. at 183–84, 106 S.Ct. at 1770, 90 L.Ed.2d at 154–55.

[40] [¶ 63] We therefore hold there is no state or federal constitutional prohi-bition against the State's use of peremptory challenges to exclude all prospective jurors who expressed reservations about the death penalty but were not excludable for cause on that basis.

ISSUE 4.

[¶ 64] **Do South Dakota's capital punishment statutes violate the state or federal constitution?**

[41] [¶ 65] Rhines contends that South Dakota's capital punishment statutes violate the state and federal constitutions on a number of grounds. In considering his claims, we reiterate that there is a strong presumption in favor of the constitutionality of a statute. *State v. Floody*, 481 N.W.2d 242, 255 (S.D.1992) (citing *Simpson v. Tobin*, 367 N.W.2d 757, 765 (S.D.1985)). This presumption is rebutted only when it appears clearly, palpably, and plainly that the statute violates a constitutional provision. *Id.*

[¶ 66] 1. Distinctions between felony murder and premeditated murder.

[42] [43] [¶ 67] To satisfy constitutional requirements, a capital sentencing scheme "must reasonably justify the imposition of a more severe sentence on the defendant

compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235, 249–50 (1983). Under South Dakota law, both felony murder and premeditated murder are punishable by death or by life imprisonment. SDCL 22–16–4; 22–16–12; 22–6–1.

[¶ 68] At the time of the killing of Schaeffer, South Dakota law defined felony murder as a homicide "committed by a person engaged in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, or unlawful throwing, placing or discharging of a destructive device or explosive." SDCL 22–16–4. Premeditated murder is defined as a homicide "perpetrated without authority of law and with a premeditated ***436** design to effect the death of the person killed or of any other human being." *Id.*

[44] [¶ 69] In order to impose a death sentence on an individual convicted of either felony murder or premeditated murder, the jury must find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt. SDCL 23A–27A–4, –5. At the time of Rhines' crime, SDCL 23A–27A–1 listed the following aggravating circumstances:

> (1) The offense was committed by a person with a prior record of conviction for a Class A or Class B felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions;
>
> (2) The defendant by his act knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
>
> (3) The defendant committed the offense for himself or another, for the purpose of receiving money or any other thing of monetary value;
>
> (4) The defendant committed the offense on a judicial officer, former judicial officer, prosecutor, or former prosecutor while such prosecutor, former prosecutor, judicial officer, or former judicial officer was engaged in the performance of his official duties or where a major part of the motivation for the offense came from the official actions of such judicial officer, former judicial officer, prosecutor, or former prosecutor;
>
> (5) The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person;
>
> (6) The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;
>
> (7) The offense was committed against a law enforcement officer, employee of a corrections institution, or fireman while engaged in the performance of his official duties;
>
> (8) The offense was committed by a person in, or who has escaped from, the lawful custody of a law enforcement officer or place of lawful confinement;

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

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

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[¶ 70] Rhines argues that individuals who commit felony murder are less culpable than those who are guilty of premeditated murder, presumably because they lack the specific intent to kill another human being. He claims the law therefore fails to distinguish between those individuals who deserve the death penalty and those who do not.

[45] [46] [47] [¶ 71] We reject Rhines' claim for three reasons. First, we note Rhines was convicted of premeditated murder, not felony murder. Therefore, any constitutional inequities in the punishment of felony murderers are inapplicable to his case. Second, we cannot agree that individuals who commit murder while engaged in other serious crimes are less deserving of the death penalty than those who commit premeditated murder. Rhines implies that only those who intend to kill should qualify for the death penalty. While we agree that intent is a relevant consideration, we do not agree that only those who intend to kill should receive the ultimate punishment. The malicious motives elemental to felony murder can also justify a sentence of death. The law is free to equally condemn those who murder with the intent to kill and those who also murder, but do so with the intent to rape, steal, or burn.

[48] [¶ 72] Third, in claiming that felony murder is less deserving of capital punishment, Rhines ignores the long list of statutory aggravating circumstances that further ***437** limit the imposition of the death sentence. Unless the jury finds at least one of these aggravating circumstances, indicating more extreme criminal culpability, an individual guilty of felony murder cannot receive the death sentence. We therefore conclude the State's capital sentencing scheme "reasonably justif[ies] the imposition of a more severe sentence on [certain] defendant[s] compared to others found guilty of murder." *Zant*, 462 U.S. at 877, 103 S.Ct. at 2742, 77 L.Ed.2d at 249–50. Rhines' constitutional challenge is rejected.

[¶ 73] **2. Defining and narrowing "death eligible" offenses.**

[¶ 74] Without identifying any other specific infirmities, Rhines separately alleges that the legislature's broad delineation of Class A felonies, combined with the statutory aggravating circumstances in SDCL 23A–27A–1, does not sufficiently narrow and define the pool of "death eligible" offenses. He further argues that the trial court may not cure these constitutional defects by fashioning jury instructions to define and limit capital crimes. He asserts that to do so would violate the separation of

powers between the legislative and judicial branches and represent an unconstitutional delegation of legislative authority.

[49] [¶ 75] Rhines makes the generalized complaint that the pool of death eligible offenses is too broad. He does not articulate any specific reasons why these classifications are inadequate. We note the United States Supreme Court has approved a state capital punishment scheme that is nearly identical to South Dakota's death penalty laws. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Rhines' general allegations defy more meaningful review and therefore fail.

[50] [¶ 76] As to Rhines' claim that state courts are prohibited from fashioning limiting instructions, we must disagree. The United States Supreme Court has held that the existence of vague and overbroad definitions of capital crimes does not necessarily establish a constitutional violation. *Walton v. Arizona*, 497 U.S. 639, 653–54, 110 S.Ct. 3047, 3057, 111 L.Ed.2d 511, 528–29 (1990). The Court expressly acknowledged that a state court may further define and limit otherwise vague and overbroad aggravating factors so as to provide guidance to the sentencer and satisfy constitutional requirements. 497 U.S. at 654, 110 S.Ct. at 3057, 111 L.Ed.2d at 529.

[¶ 77] **3. Guidance concerning mitigating evidence.**

[51] [¶ 78] When the jury returns a guilty verdict in a capital case, the trial court must conduct a presentence hearing before the jury. SDCL 23A–27A–2. At that time, the jury may hear additional evidence in mitigation and aggravation of punishment. *Id.* Under South Dakota's capital sentencing statutes, the jury must find the existence of an aggravating circumstance beyond a reasonable doubt before it may impose the death penalty. SDCL 23A–27A–4 and –5. The law permits the jury to consider any mitigating circumstances, but does not impose any standard of proof regarding mitigation. SDCL 23A–27A–1 and –2.

[¶ 79] Rhines asserts that death sentences will be arbitrarily imposed in violation of the state and federal constitutions, because the South Dakota capital sentencing statutes do not include a standard of proof for mitigating circumstances or otherwise explain how the jury should weigh evidence of mitigation.

[52] [53] [54] [¶ 80] In determining whether an individual eligible for the death penalty should in fact receive that sentence, the law demands that the jury make "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Tuilaepa v. California*, 512 U.S. 967, ——, 114 S.Ct. 2630, 2635, 129 L.Ed.2d 750, 760 (1994) (citations omitted) (emphasis in original). "The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Blystone v. Pennsylvania*, 494 U.S. 299, 307, 110 S.Ct. 1078, 1083, 108 L.Ed.2d 255, 264 (1990). Capital sentencing procedures that permit the jury to exercise wide discretion in evaluating mitigating and aggravating facts

are consistent with an individualized sentencing ***438** determination. *Tuilaepa*, 512 U.S. at ——, 114 S.Ct. at 2636, 129 L.Ed.2d at 761. South Dakota's open-ended treatment of mitigating evidence coincides with the mandate of individualized sentencing.

[¶ 81] Our state's capital sentencing scheme is modeled after Georgia's sentencing procedures. In *Gregg*, a plurality of the United States Supreme Court gave tacit approval to the Georgia scheme:

> While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence[.]

Gregg, 428 U.S. at 206–07, 96 S.Ct. at 2941, 49 L.Ed.2d at 893 (plurality opinion of Stewart, Powell, and Stevens, J.J.). *See also Zant*, 462 U.S. at 875, 103 S.Ct. at 2741–42, 77 L.Ed.2d at 248–49 (noting the *Gregg* Court approved Georgia's capital sentencing statute even though it did not enunciate specific standards to guide the jury's consideration of aggravating and mitigating circumstances).

[¶ 82] Similarly, the Court has opined: "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision.... '[D]iscretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed' is not impermissible in the capital sentencing process." *Tuilaepa*, 512 U.S. at ——, 114 S.Ct. at 2638–39, 129 L.Ed.2d at 764 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 315 n. 37, 107 S.Ct. 1756, 1779 n. 37, 95 L.Ed.2d 262, 293 n. 37 (1987)). The Court has stated its position in even more emphatic terms:

> We have rejected the notion that "a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." *Franklin v. Lynaugh*, 487 U.S. 164, 179, 108 S.Ct. 2320, 2330, 101 L.Ed.2d 155, 169 (1988). Equally settled is the corollary that the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer.

Harris v. Alabama, 513 U.S. 504, ——, 115 S.Ct. 1031, 1035, 130 L.Ed.2d 1004, 1014 (1995). Based on this authority, we conclude that South Dakota's statutes adequately direct the jury's evaluation of aggravating and mitigating evidence during the capital sentencing phase.

[¶ 83] **4. The jury as sentencer.**

[¶ 84] SDCL 23A–27A–4 states that upon receipt of a jury recommendation of death, the trial judge "*shall* sentence the defendant

to death." (Emphasis supplied.) Rhines contends this mandatory provision prevents the trial judge from ruling on the appropriateness of the jury's verdict, as he may in other cases, and therefore violates equal protection guarantees. He asserts the trial court cannot consider whether the sentence was imposed arbitrarily, whether the evidence supported the jury's finding of an aggravating circumstance, and whether the sentence was excessive or disproportionate to the penalty imposed in similar cases. He further argues the mandatory nature of the jury's verdict denies the capital defendant the opportunity to request a judgment of acquittal or file a motion for a new trial.

[55] [¶ 85] Neither the state nor federal constitution require the trial court to review the propriety of the jury's sentencing decision in a capital case. The United States Supreme Court has approved a capital sentencing scheme that permits the jury, rather than the trial court, to make the sentencing decision. *Gregg,* 428 U.S. at 206–07, 96 S.Ct. at 2940–41, 49 L.Ed.2d at 893 (plurality opinion of Stewart, Powell, and Stevens, J.J.); *Gregg,* 428 U.S. at 221–24, 96 S.Ct. at 2947–49, 49 L.Ed.2d at 901–04 (concurring opinion of White, Rehnquist, J.J., and Burger, C.J.). In approving this scheme, the Court did not mandate that the trial judge independently review the jury's sentencing decision. Additionally, in *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), the Court seemed to acknowledge the jury's legitimate role as sentencer in a capital case: "This Court's decisions indicate that the discretion of the sentencing authority, *whether judge or jury*, must be limited and reviewable." ***439** 468 U.S. at 462, 104 S.Ct. at 3163, 82 L.Ed.2d at 354 (emphasis added). The Court further wrote:

> We have no particular quarrel with the proposition that juries, perhaps, are more capable of making the life-or-death decision in a capital case than of choosing among the various sentencing options available in a noncapital case. Sentencing by the trial judge certainly is not required by *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). What we do not accept is that, *because juries may sentence,* they constitutionally must do so. (Emphasis supplied.)

468 U.S. at 463 n. 8, 104 S.Ct. at 3163–64 n. 8, 82 L.Ed.2d at 354 n. 8.

[¶ 86] In addition, unlike any other criminal defendants, individuals who are sentenced to death by a jury or a trial judge receive automatic appellate review of their sentence. SDCL 23A–27A–9 ("If the death penalty is imposed, and if the judgment becomes final in the trial court, the sentence *shall* be reviewed on the record by the South Dakota Supreme Court.") (Emphasis supplied.) In evaluating the sentence, this Court must determine:

> (1) Whether the sentence was imposed under the influence of passion,

prejudice, or any other arbitrary factor; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 23A–27A–1; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

SDCL 23A–27A–12.

[56] [¶ 87] In light of this Court's sweeping, mandatory review of a capital defendant's sentence, we find no constitutional error in vesting the sentencing decision solely in the jury rather than the trial court.

ISSUE 5.

[¶ 88] **Did the trial court abuse its discretion in admitting statements by Rhines concerning inequities in the justice system?**

[¶ 89] Over Rhines' objection, the trial court admitted the following portion of his June 19, 1992, taped confession for the jury's consideration during the guilt phase of the trial:

Allender: You don't really buy into our justice system do you? I mean you don't really believe in it?

Rhines: Justice?

Allender: Yeah.

Rhines: For who? If I had $100,000 for a fancy attorney I'd walk. Free, on an acquittal.

Bahr: Do you think that's right, that, that?

Rhines: Do you?

Bahr: No, not if you took a life.

Rhines: You know it's true.

Bahr: Do you ...

Rhines: If I had $100,000 to drop into the best attorney in the country or in the midwest region.

Bahr: But see anything's possible, Charles. But if somebody takes a life.

Rhines: I've seen guilty and then walk. Knowing they were guilty.

Bahr: Would you want to get off?

Rhines: Would you?

Bahr: I'm not in that predicament.

Rhines: Me neither.

Bahr: You've been completely honest with us, Charles?

Rhines: I'm not, I'm not in a predicament of wanting to get off and having the wherewithal to do so. I'm in the predicament of wanting to get off and not having the wherewithal to do so.

Bahr: Have you been truthful with us?

Rhines: As much as I can emotionally.

Bahr: These sequences as best your, that you can remember? I don't have anything further.

Allender: Either do I.

Rhines: Do you suppose uh try for a last Camel before the night?

Allender: Yeah.

Rhines: It's gonna be kind of rough (inaudible—talking over)

***440** Allender: Um, just a second. This will be the end of this tape is 2232.

[¶ 90] The trial court found the discussion gave insight into the nature of Rhines' statements to law enforcement officers, showed his state of mind at the time of his confession, and allowed the jury to weigh Rhines' attitude about his confession and his crime. The court further found the probative value of this evidence outweighed any prejudicial effect.

[¶ 91] During the penalty phase of the trial, the State asked the court to instruct the jury to reconsider the evidence previously entered during the guilt proceedings. This would necessarily include Rhines' statements regarding the justice system. The defense did not raise any objections and the jury was instructed to reconsider all evidence previously admitted during the guilt phase.[3]

[3] Under SDCL 23A–27A–12, this Court must determine "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor." Because of this independent basis for reviewing the proceedings in a capital sentencing hearing, we need not decide whether the failure to renew evidentiary objections during the penalty phase constitutes a waiver or triggers plain error analysis. *See State v. Sonnier*, 379 So.2d 1336, 1370 (La.1980).

[¶ 92] Rhines argues his statements concerning the justice system were not relevant to either the guilt or sentencing proceedings. He disputes the trial court's finding that his remarks were relevant to his state of mind or the reliability of his confession. He asserts the statements were inadmissible character evidence, that portrayed him as a bad person who distrusted and scorned the criminal justice system. Rhines acknowledges that the effect of these statements on the jury's guilty verdict "may well have been minor or slight." However, he asserts the admission of his statements unfairly prejudiced him during the sentencing phase of the trial and warrant reversal of the jury's death sentence.

[¶ 93] According to the State, Rhines' remarks reflect on the reliability and voluntariness of his statements, a relevant inquiry during the guilt phase of the trial. The State also asserts the sentencer must have a broad range of information so that it may appropriately determine the sentence, and evidence of Rhines' background and character, particularly his lack of remorse, was highly relevant to this determination. Even if the evidence was not admissible, the State argues any error was harmless.

[57] [¶ 94] "Evidence which is not relevant is not admissible." SDCL 19–12–2. " 'Relevant evidence' means evidence having any tendency to make the existence of any

fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." SDCL 19–12–1. However, the trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice [.]" SDCL 19–12–3. This delicate balancing process is within the trial court's sound discretion and the court's ruling will not be disturbed absent abuse. *State v. Cross,* 390 N.W.2d 564, 566 (S.D.1986); *State v. Thomas,* 381 N.W.2d 232, 235 (S.D.1986).

[¶ 95] **1. Admissibility at guilt phase.**

[58] [¶ 96] Contrary to Rhines' contention, the trial court properly determined his statements were relevant to the determination of guilt. The remarks in question tend to show the truthfulness of Rhines' confession. Rhines compared himself to other individuals who are guilty of murder. He referred to "wanting to get off." He also stated that he was as truthful as he could be with the officers. All of these statements reinforce State's assertion that Rhines killed Schaeffer and that his confession to the crime was freely and knowingly given.

[59] [¶ 97] Nor can we conclude that admission of the remarks unduly prejudiced Rhines during the guilt phase. Prejudice "refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *State v. Holland,* 346 N.W.2d 302, 309 (S.D.1984). The statements in question were brief and occurred at the end of Rhines' lengthy and detailed confession. In this context, the jury was more likely to rely on the statements for their legitimate purpose—as proof of the reliability ***441** of Rhines' confession, rather than as evidence of bad character.

[60] [¶ 98] Even if the statements were improperly admitted, it would constitute harmless error. Evidence of Rhines' guilt was overwhelming. Rhines confessed to the burglary and murder four times, once to a young woman and three times to law enforcement officers. The jury even listened to tape recordings of Rhines confessing to the burglary and the murder. His statements about the location of clothing and other items that he discarded after the crime were substantiated by witnesses who discovered the items. The defense did not refute any of the State's evidence, having rested immediately after the conclusion of the State's case. In light of the strong evidence of Rhines' guilt, it is unlikely the jury would unfairly rely on Rhines' disputed statements in rendering a guilty verdict.

[¶ 99] **2. Admissibility at penalty phase.**

[¶ 100] In all capital cases where the jury has rendered a guilty verdict, state law requires a hearing prior to sentencing. SDCL 23A–27A–2. "Such hearing shall be conducted to hear additional evidence in mitigation and aggravation of punishment." *Id.* In this case, the trial court granted a defense motion prohibiting the State from offering any evidence on non-statutory

aggravating factors. The State was therefore restricted to offering evidence that related to the aggravating circumstances set forth in SDCL 23A–27A–1.

[61] [62] [¶ 101] Rhines contends the disputed statements were irrelevant to any of the aggravating circumstances urged by the State. We disagree. One aggravating factor alleged by the State was that Rhines committed the murder to avoid being arrested for burglary. SDCL 23A–27A–1(9). In the disputed discussion, Rhines indicated he wanted "to get off" and that only his lack of money prevented him from doing so. His desire to avoid punishment in spite of his admitted wrongdoing directly relates to his alleged motive for killing Schaeffer—to avoid lawful arrest and confinement. The possibility that the jury might disapprove of Rhines' cynical attitude is not enough to defeat the probative value of this evidence. Furthermore, even if the evidence was irrelevant or unfairly prejudicial, any error was harmless. There was ample evidence relating to the circumstances of the murder. As noted above, Rhines confessed four times, once to a young woman and three times to law enforcement officers, and the jury listened to recordings of two of Rhines' confessions. Armed with Rhines' own account of his crime, it is unlikely the jury relied on the disputed remarks in ascertaining the circumstances of Schaeffer's death and rendering its sentence.

ISSUE 6.

[¶ 102] **Did the trial court abuse its discretion in refusing to appoint a forensic communication expert to assist Rhines in preparing his case?**

[¶ 103] Rhines submitted a pretrial motion for appointment of a forensic communication expert to conduct and analyze a community attitude study and design a supplemental juror questionnaire at the county's expense. Rhines was concerned that his homosexuality would unfairly influence the jury, and he anticipated using the community attitude survey and juror questionnaire to address this issue. The trial court denied Rhines' motion.

[¶ 104] Rhines claims the denial of the motion was an abuse of the trial court's discretion. He contends voir dire alone was an inadequate method for detecting and eliminating jurors with biases against homosexuality. To support his claim, he points to portions of a three-page note composed by the jury and delivered to the court during penalty deliberations. The note included the following questions:

> Will Mr. Rhines be allowed to mix with the general inmate population?
>
> Will Mr. Rhines be allowed to discuss, describe or brag about his crime to other inmates, especially new and or young men jailed for lesser crimes (Ex: drugs, DWI, assault, etc.)?
>
> Will Mr. Rhines be allowed to marry or have conjugal visits?
>
> Will Mr. Rhines be jailed alone or will he have a cell mate?

***442** The trial court responded to the jury's questions with the following written statement: "I acknowledge your note asking questions about life imprisonment. All the information I can give you is set forth in the jury instructions."

[¶ 105] Rhines contends the jury's note reflected homophobic sentiments that improperly affected jury deliberations. He asks this Court to reverse his conviction and sentence and order that he receive the requested expert assistance on retrial.

[63] [64] [¶ 106] The appointment of an expert is within the trial court's discretion. *State v. Stuck*, 434 N.W.2d 43, 50 (S.D.1988) (citing *State v. Archambeau*, 333 N.W.2d 807, 811 (S.D.1983)). "Trial courts should scrutinize a defense request for an expert to insure that an indigent defendant may procure any reasonable defense, and, when in doubt, lean toward the appointment of such an expert." *Id.* at 51 (citing *State v. Hallman*, 391 N.W.2d 191, 195 (S.D.1986)). Where an indigent defendant such as Rhines requests appointment of an expert at county expense, four requirements must be satisfied: (1) the request must be in good faith; (2) it must be reasonable in all respects; (3) it must be timely and specifically set forth the necessity of the expert; and (4) it must specify that the defendant is financially unable to obtain the required service himself and that such services would otherwise be justifiably obtained were defendant financially able. *Id.* (Citations omitted.)

[65] [¶ 107] In this case, there was no necessity for a public opinion survey and supplemental questionnaire to ascertain juror bias. "[V]oir dire examination is the better forum for ascertaining the existence of hostility towards the accused." *State v. Smith*, 477 N.W.2d 27, 33 (S.D.1991) (citing *State v. Reutter*, 374 N.W.2d 617, 629 (S.D.1985)). Our review of voir dire shows an impartial jury was impaneled. Defense counsel questioned eleven of the twelve jurors regarding their feelings about homosexuality. Ten of the jurors expressed neutral feelings about homosexuality, indicating it would have no impact on their decision making. The eleventh juror stated that she regards homosexuality as sinful. However, she also stated Rhines' sexual orientation would not affect how she decided the case. Rhines' counsel did not seek to remove this juror from the panel.

[66] [¶ 108] Although Rhines contends the jury's note to the judge shows a bias against homosexuality, we do not agree. The jury's questions during the penalty phase relate to prison conditions rather than Rhines' sexual orientation. The jurors began the note with the following statement:

> Judge Konnekamp [sic],
>
> In order to award the proper punishment we need a clear prospective [sic] of what "Life In Prison Without Parole" really means. We know what the Death Penalty Means, but we have no clue as to the reality of Life Without Parole.

Other questions posed by the jury involved whether Rhines would be given work release, placed in a minimum security prison, allowed to create a group of followers or admirers, permitted to attend college, or allowed to "have or attain any of the common joys of life (ex TV, Radio,

Music, Telephone or hobbies and other activities allowing him distraction from his punishment).” The jury also asked what the daily routine would be in prison. The jury closed with these remarks:

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

In this context, the jury’s questions about Rhines marrying, having a cell mate or conjugal visits, and having contact or discussions with other inmates do not reflect a bias against Rhines’ sexual preference. Instead, they reflect the jury’s legitimate efforts to weigh the appropriateness of life imprisonment versus the death penalty. We find no abuse of discretion by the trial court.

ISSUE 7.

[¶ 109] **Did the trial court abuse its discretion by refusing three of Rhines’ proposed jury instructions?**

[¶ 110] The trial court refused Rhines’ proposed jury instructions Nos. 8, 9 and 11. ***443** Rhines claims the trial court’s failure to give these instructions violated the due process and cruel punishment clauses of the United States and South Dakota Constitutions.

[67] [68] [¶ 111] The trial court has broad discretion in instructing the jury. *State v. Bartlett*, 411 N.W.2d 411, 415 (S.D.1987). “[J]ury instructions are adequate when, considered as a whole, they give the full and correct statement of the law applicable to the case.” *State v. Fast Horse*, 490 N.W.2d 496, 499 (S.D.1992) (citing *State v. Grey Owl*, 295 N.W.2d 748, 751 (S.D.1980)) (emphasis omitted). To warrant reversal, the trial court’s refusal to give an appropriate instruction must unfairly prejudice the defendant. The defendant must show that “ ‘the jury might and probably would have returned a different verdict if [the] instruction had been given.’ ” *Bartlett*, 411 N.W.2d at 415 (quoting *Grey Owl*, 295 N.W.2d at 751, *appeal after remand*, 316 N.W.2d 801 (S.D.1982)).

[¶ 112] We will consider each of Rhines’ proposed jury instructions separately.

[¶ 113] 1. Proposed jury instruction No. 8: sufficiently substantial aggravating circumstances.

[¶ 114] Rhines’ proposed jury instruction No. 8 stated in relevant part:

> South Dakota law allows the imposition of the death penalty only if the prosecution, in addition to proving that the defendant is guilty of murder in the first degree, also proves each of the following beyond a reasonable doubt:
>
> (1) That one or more of the alleged

aggravating circumstances exist; and

(2) That the aggravating circumstance or circumstances, considered in connection with any mitigating circumstances, are sufficiently substantial to require the death penalty in this case, and that death is the only appropriate punishment for the crime committed, and for the defendant.

[69] [70] [¶ 115] Rhines contends the proposed instruction was necessary to suitably limit and guide the jury's sentencing discretion. We disagree. Rhines' proposed instruction would require that aggravating circumstances be "sufficiently substantial." Neither the state nor federal constitutions impose this requirement. Once the sentencer finds the existence of a statutory aggravating circumstance, it has broad discretion to decide whether to impose the sentence of death. Further, the "sufficiently substantial" standard does little to aid the jury in its difficult sentencing decision. The trial court instructed the jury that the death penalty could not be imposed unless at least one aggravating circumstance was present beyond a reasonable doubt. The trial court further instructed that the jury could impose a penalty of life imprisonment even if it found the existence of one or more statutory aggravating circumstances, explaining that a life sentence could be imposed for any or no reason. These instructions were sufficient to guide the jury's discretion.

[¶ 116] **2. Rhines' proposed jury instruction No. 9: presumption of life imprisonment.**

[¶ 117] Rhines' proposed instruction No. 9 stated in pertinent part:

> The law also presumes that the appropriate sentence for murder in the first degree is life in prison without parole. This presumption is sufficient to justify your recommendation that the appropriate sentence in this case is life in prison without parole. Only if the jury is unanimously convinced beyond a reasonable doubt both that one or more aggravating circumstances exist, and that the death penalty is the only appropriate sentence in this case, may the jury return a verdict recommending a sentence of death.

[¶ 118] According to Rhines, his death sentence violates the due process and cruel punishment clauses of the state and federal constitutions, because the jury was not instructed regarding the presumption in favor of life imprisonment over the death penalty.

[71] [¶ 119] The trial court's instructions adequately advised the jury of the State's burden of proof and the presumption of innocence in favor of the defendant. The court instructed the jury:

> In this case the law raises

> no presumption against the Defendant, but every presumption of the law is in favor of his innocence ***444** as to the alleged aggravating circumstances. He is not required to prove himself innocent of the aggravating circumstances, or put in any evidence at all upon that subject. The fact that the Defendant has not testified in this case raises no presumption against him, and you must give no thought to the fact that the Defendant did not testify in his own behalf in this case in arriving at your sentencing decision.

Furthermore, the law gives the jury broad discretion to impose life imprisonment rather than a sentence of death, and the trial court properly instructed the jury in this regard. As noted above, the trial court informed the jury they could impose a life sentence regardless of whether they found any aggravating circumstances that might otherwise authorize the imposition of the death penalty. The trial court further advised the jury that they need not find the existence of any mitigating facts or circumstances in order to fix the penalty at life imprisonment. Finally, the court charged the jury that they may fix the penalty at life imprisonment for any reason or without any reason. These instructions, taken together, amply informed the jury of their authority to set the penalty at life imprisonment. There was no abuse of discretion in refusing Rhines' proposed instruction.

[¶ 120] 3. Rhines' proposed jury instruction No. 11: effect of life or death sentences.

[¶ 121] Rhines' proposed jury instruction No. 11 stated:

> The two specified sentences that you are to consider in this case are death, and life in prison without parole.
>
> In your deliberations, you are to presume that if you sentence Charles Russell Rhines to death, he will in fact be executed by lethal injection. You must not assume or speculate that the courts, or any other agency of government, will stop the defendant's execution from taking place.
>
> Similarly, you are to presume that if you sentence Charles Russell Rhines to life in prison without parole, he will in fact spend the rest of his natural life in prison. You must not assume or speculate that the courts, or any other agency of government, will release the defendant from prison at any time during his life.

[¶ 122] The note sent by the jury to the trial judge asked whether Rhines could ever be placed in a minimum security prison or given work release. According to Rhines, this demonstrates that the trial court's instructions were inadequate, and that the jury was unduly concerned that Rhines would be released if he received a life sentence. He claims he was unfairly

prejudiced by the trial court's refusal to read the instruction.

[72] [¶ 123] We believe the trial court's instruction adequately advised the jury regarding the effect of either a life or death sentence. The trial court informed the jury:

> The decision you make will determine the sentence which will be imposed by the court. If you decide on a sentence of death, the court will impose a sentence of death. If you decide on a sentence of life imprisonment without parole, the court will impose a sentence of life imprisonment without parole.

[¶ 124] The trial court's instruction gave a "full and correct statement of the law." There was no error in refusing Rhines' proposed instruction.

ISSUE 8.

[¶ 125] **Did the trial court err in allowing victim impact testimony during the penalty phase of the trial?**

[¶ 126] SDCL 23A–27A–1 sets forth the aggravating circumstances which may be considered by a judge or jury when determining whether to impose the sentence of death. Effective July 1, 1992, nearly four months after the murder of Donnivan Schaeffer, the legislature amended SDCL 23A–27A–1 to permit "testimony regarding the impact of the crime on the victim's family."[4] 1992 S.D.Sess.L. ch. 173, § 2.

4 This provision has since been deleted from SDCL 23A–27A–1 and inserted in SDCL 23A–27A–2.

***445** [¶ 127] During a pretrial motion hearing, the State gave oral notice of intent to offer victim impact testimony at the penalty phase of the proceedings. Rhines filed a motion to exclude any such testimony. Following a hearing, the trial court ruled that victim impact testimony would be allowed during the penalty proceedings based on the case of *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). The Court indicated that such evidence could be offered "in response to Defendant's mitigating evidence."

[¶ 128] Peggy Schaeffer, Donnivan Schaeffer's mother, read the following statement during State's rebuttal at the penalty hearing:

> Donnivan was our youngest son. He was a happy, considerate and helpful young man. His dreams were to finish school, live on his own, and get married. He attended Vo–Tech and had a job waiting for him when he graduated. His plan was to marry Sheila Pond in May, 1993. Our

> dreams were becoming his dreams and those dreams are never to be a reality. Not having Donnivan with us has left us with heartache and sadness that at times seem unbearable. Now, at the end of the hall in our home is a bedroom filled with memories and we can only dream of the future Donnivan may have had.

[¶ 129] Rhines contends the trial court committed reversible error by allowing the introduction of Peggy Schaeffer's victim impact testimony. He makes numerous arguments in support of his position. First, Rhines asserts the *Payne* decision simply authorizes states to pass laws that allow the sentencer to consider some types of victim impact evidence. He argues that at the time of Rhines' alleged offense, South Dakota statutes and case law did not authorize admission of victim impact testimony, so the evidence was inadmissible. Second, Rhines notes the South Dakota Legislature did amend SDCL 23A–27A–1 to explicitly allow victim impact testimony, but only did so after Schaeffer's murder and the Court's decision in *Payne*. Rhines contends the amendment is a substantive rather than a procedural law. Because this statutory provision was not in effect at the time of Rhines' alleged offense, he argues the admission of victim impact testimony violated the constitutional prohibition against *ex post facto* laws. *See* U.S.Const. Art. I, § 10; S.D.Const. Art. VI, § 12. Third, Rhines objects to the characterization of the victim impact statement as a rebuttal to evidence offered by Rhines during the penalty phase. During the sentencing proceedings, Rhines offered the testimony of his two sisters. He claims their testimony was limited to his upbringing and their relationship with him; they did not testify to Donnivan Schaeffer's character or the impact of his death on his family. Fourth, even if otherwise admissible, Rhines claims Peggy Schaeffer's testimony went beyond the bounds of victim impact testimony, because at least half of the statement described Schaeffer's personal characteristics rather than the impact of his death. Finally, Rhines asserts the improper admission of Peggy Schaeffer's testimony was not harmless error, because the jury likely would have imposed a less severe sentence without this evidence.

[¶ 130] We hold that the trial court did not abuse its discretion in admitting the victim impact testimony. In *Payne*, 501 U.S. at 817, 111 S.Ct. at 2604, 115 L.Ed.2d at 730, the Court reconsidered whether "the Eighth Amendment prohibits a capital sentencing jury from considering 'victim impact' evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family." The Court had previously held that such evidence was *per se* inadmissible in the penalty phase of a capital trial. *Payne*, 501 U.S. at 811, 111 S.Ct. at 2601, 115 L.Ed.2d at 726 (citing *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989); *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987)).

[¶ 131] The Court began by noting that the impact of a defendant's crime is a relevant

sentencing consideration:

> [T]he assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining ***446** the elements of the offense and in determining the appropriate punishment.

Payne, 501 U.S. at 819, 111 S.Ct. at 2605, 115 L.Ed.2d at 731. The Court further observed that "the sentencing authority has always been free to consider a wide range of relevant material." 501 U.S. at 820–21, 111 S.Ct. at 2606, 115 L.Ed.2d at 732. As to the propriety of admitting victim impact testimony in a capital sentencing proceeding, the Court reasoned:

> Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.... We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family. By turning the victim into a faceless stranger at the penalty phase of a capital trial, *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

501 U.S. at 825, 111 S.Ct. at 2608, 115 L.Ed.2d at 735 (citations and quotations omitted). The Court therefore concluded "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." 501 U.S. at 827, 111 S.Ct. at 2609, 115 L.Ed.2d at 736.

[73] [74] [¶ 132] *Payne* was decided in June, 1991, months before Rhines' murder of Schaeffer in March, 1992. Therefore, the rule in *Payne* does not implicate *ex post*

facto analysis. However, Rhines contends that *Payne* requires a specific state statute authorizing the admission of victim impact evidence. We can discern no such requirement in the Court's opinion. In fact, the Court seems to regard victim impact testimony as no different than other evidence for purposes of determining admissibility. The *Payne* Court wrote: "There is no reason to treat such evidence differently than other relevant evidence is treated." 501 U.S. at 827, 111 S.Ct. at 2609, 115 L.Ed.2d at 736.

[75] [¶ 133] Under South Dakota law, evidence is generally admissible so long as it is relevant and is not unfairly prejudicial. SDCL 19–12–2, –3. We review the trial court's ruling on the admissibility of evidence under the abuse of discretion standard. *Thomas*, 381 N.W.2d at 235.

[76] [77] [¶ 134] The victim impact statement read by Schaeffer's mother related to her son's personal characteristics and the emotional impact of the crimes on the family. This is precisely the type of evidence permitted by the Court's decision in *Payne*, 501 U.S. at 817, 111 S.Ct. at 2604, 115 L.Ed.2d at 730. Rhines is therefore incorrect when he asserts that victim impact evidence may not include testimony about the victim's personal characteristics.

[78] [79] [¶ 135] Additionally, the information contained in the statement was relevant to the jury's sentencing decision. As noted by the *Payne* court, assessment of the harm caused by a criminal act is an important factor in determining the appropriate punishment. 501 U.S. at 819, 111 S.Ct. at 2605, 115 L.Ed.2d at 731. "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." 501 U.S. at 827, 111 S.Ct. at 2609, 115 L.Ed.2d at 736.

[80] [¶ 136] Furthermore, the probative value of the victim impact statement was not substantially outweighed by the danger of unfair prejudice. *See* SDCL 19–12–3. The brief testimony by Schaeffer's mother came after Rhines' sisters testified about his upbringing and good qualities, their love for him, and the negative effect his death would ***447** have on their family. To paraphrase *Payne*, the victim impact statement "illustrated quite poignantly some of the harm that [Rhines'] killing had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant." 501 U.S. at 826, 111 S.Ct. at 2609, 115 L.Ed.2d at 736. We therefore hold that the trial court did not abuse its discretion in admitting the statement read by Schaeffer's mother.

ISSUE 9.

[¶ 137] **Did the trial court err in its instructions to the jury regarding the definition of "depravity of mind" for purposes of imposing the penalty of death?**

[81] [¶ 138] The Eighth and Fourteenth Amendments to the United States

Constitution prohibit state sentencing systems that cause the death penalty to be wantonly and freakishly imposed. *Lewis v. Jeffers*, 497 U.S. 764, 774, 110 S.Ct. 3092, 3099, 111 L.Ed.2d 606, 618 (1990).

> [I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates standardless sentencing discretion. It must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death.

Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764–65, 64 L.Ed.2d 398, 406 (1980) (Stewart, J., plurality opinion) (citations and quotations omitted).

[82] [83] [¶ 139] "A State's definitions of its aggravating circumstances—those circumstances that make a criminal defendant 'eligible' for the death penalty—therefore play a significant role in channeling the sentencer's discretion." *Lewis*, 497 U.S. at 774, 110 S.Ct. at 3099, 111 L.Ed.2d at 619. To satisfy constitutional mandates, an aggravating circumstance must meet two basic requirements. First, it "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant*, 462 U.S. at 877, 103 S.Ct. at 2742, 77 L.Ed.2d at 249–50. Second, "the aggravating circumstance may not be unconstitutionally vague." *Tuilaepa*, 512 U.S. at ——, 114 S.Ct. at 2635, 129 L.Ed.2d at 759. A challenged provision is impermissibly vague when it fails to adequately inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with open-ended discretion. *Maynard v. Cartwright*, 486 U.S. 356, 361–62, 108 S.Ct. 1853, 1858, 100 L.Ed.2d 372, 380 (1988).

[¶ 140] As noted above, under the South Dakota sentencing statutes, the jury may not recommend a sentence of death unless it finds at least one aggravating circumstance beyond a reasonable doubt. South Dakota includes the following aggravating circumstance in its statutory scheme:

> The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim[.]

SDCL 23A–27A–1(6).[5]

5 In 1995, the legislature added the following sentence to SDCL 23A–27A–1(6): "Any murder is wantonly vile, horrible, and inhuman if the victim is less than thirteen years of age." 1995 S.D.Sess.L. ch. 132.

[¶ 141] The State alleged "the offense was outrageously or wantonly vile, horrible or inhuman in that it involved ... depravity of mind." SDCL 23A–27A1(6). In its sentencing instructions to the jury, the trial court defined depravity of mind as follows:

> Depravity of mind is a reflection of an utterly corrupt, perverted, or immoral state of mind *at the time of the murder*. In determining whether the offense of First Degree Murder in this case involved depravity of mind on the part of the Defendant, you may consider the age and physical characteristics of the victim and you may consider the actions of the defendant prior to, *during* and after the commission ***448** of the murder. In order to find that the offense of First Degree Murder involved depravity of mind, you must find that the Defendant, as a result of utter corruption, perversion, or immorality, committed torture upon the living victim; or subjected the body of the deceased victim to mutilation or serious disfigurement; *or relished the murder; or inflicted gratuitous violence upon the victim; or the senselessness of the crime; or the helplessness of the victim. If acts occurring after the death of the victim are relied upon by the state to show depravity of mind of the Defendant, such acts must be shown to have occurred so close to the time of the victim's death, and must have been of such a nature, that the inference can be drawn beyond a reasonable doubt that the depraved state of mind of the murderer existed at the time the fatal blows were inflicted upon the victim.* (Emphasis added.)

[¶ 142] Rhines submitted an alternative definition of depravity of mind that did not include the italicized language. The trial court rejected this instruction. Rhines contends the trial court's lengthier definition of depravity of mind was so vague and overbroad as to violate the "cruel and unusual punishment" clause of the Eighth Amendment and the due process guarantees of the Fourteenth Amendment to the United States Constitution.

[¶ 143] Rhines correctly notes there are essentially six separate definitions of depravity of mind in the trial court's instructions. They are that: (1) the defendant committed torture upon the living victim; (2)

the defendant subjected the body of the deceased victim to mutilation or serious disfigurement; (3) the defendant relished the murder; (4) the defendant inflicted gratuitous violence upon the victim; (5) the senselessness of the crime; or (6) the helplessness of the victim. He specifically objects to the inclusion of the last two phrases, which ask the jury to consider the "senselessness of the crime" or the "helplessness of the victim" as distinct definitions of depravity of mind. Rhines argues virtually every murder satisfies these definitions. He reasons the jury's finding of depravity of mind was likely based on these vague and overbroad phrases, since the other factors listed in the instruction did not apply. Rhines urges reversal of the death sentence for this reason.

[84] [¶ 144] There is little doubt that the language of SDCL 23A–27A–1(6), by itself, is vague and overbroad. In *Godfrey*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398, the Court considered a provision identical to South Dakota's "outrageously or wantonly, vile, horrible or inhuman" circumstance. The trial court in *Godfrey* simply quoted the aggravating circumstance in its instructions to the jury and provided no additional definitions or explanations concerning this aggravating factor. 446 U.S. at 426, 100 S.Ct. at 1764, 64 L.Ed.2d at 405. The jury found beyond a reasonable doubt that the two murders committed by the defendant were "outrageously or wantonly vile, horrible and inhuman" and imposed the penalty of death. 446 U.S. at 426, 100 S.Ct. at 1764, 64 L.Ed.2d at 405. The Georgia Supreme Court affirmed the sentence, without applying any limiting construction to the aggravating circumstance. 446 U.S. at 432, 100 S.Ct. at 1767, 64 L.Ed.2d at 408–09. On appeal, the United States Supreme Court invalidated the death sentence. 446 U.S. at 433, 100 S.Ct. at 1767, 64 L.Ed.2d at 409. Justice Stewart, writing for the plurality, condemned the trial court's bare reiteration of the statutory aggravating circumstance in its charge to the jury. 446 U.S. at 428–29, 100 S.Ct. at 1765, 64 L.Ed.2d at 406–07. He reasoned that the statutory provision, by itself, failed to give the jury adequate guidance in imposing the death penalty and therefore created the likelihood of an arbitrary and capricious result. 446 U.S. at 428–29, 100 S.Ct. at 1765, 64 L.Ed.2d at 406–07; *see also Espinosa v. Florida*, 505 U.S. 1079, 1080–82, 112 S.Ct. 2926, 2927–28, 120 L.Ed.2d 854, 858–59 (1992) (stating simple charge to jury that murder was "especially wicked, evil, atrocious or cruel" did not satisfy constitutional requirements); *Maynard*, 486 U.S. at 363–64, 108 S.Ct. at 1859, 100 L.Ed.2d at 382 (invalidating "especially heinous, atrocious, or cruel" aggravating factor where no additional limiting instruction was given).

***449** [¶ 145] Finding the statutory language is vague and overbroad, as the *Godfrey* Court did, does not necessarily establish a constitutional violation. *Walton*, 497 U.S. at 653–54, 110 S.Ct. at 3057, 111 L.Ed.2d at 528. If a state court further defines and limits those otherwise vague and overbroad terms so as to provide adequate guidance to the sentencer, then constitutional requirements are satisfied. *Id.* In this case, we hold that the trial court's definition of depravity of mind does not meet these mandates.

[¶ 146] In *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706, 731–32 (1986), *cert. denied*, 484 U.S. 872, 108 S.Ct. 206, 98 L.Ed.2d 157 (1987), the Nebraska Supreme Court approved a definition for "exceptional depravity" that is nearly identical to the "depravity of mind" definition given in this case. The *Palmer* court devised the following limiting instruction:

> [I]n determining whether the death penalty may be imposed, we hold that "exceptional depravity" in a murder exists when it is shown, beyond a reasonable doubt, that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim.

Id.

[¶ 147] In a subsequent appeal challenging the validity of the "exceptional depravity" circumstance, the Eighth Circuit Court of Appeals rejected the Nebraska Supreme Court's limiting instruction. *Moore v. Clarke*, 904 F.2d 1226, 1232–33 (8th Cir.1990), *reh'g denied*, 951 F.2d 895 (8th Cir.1991), *cert. denied*, *Clarke v. Moore*, 504 U.S. 930, 112 S.Ct. 1995, 118 L.Ed.2d 591 (1992). The court reasoned that "senselessness of the crime" and "helplessness of the victim" were vague criteria that failed to adequately guide the sentencer's discretion. 904 F.2d at 1232. The court wrote:

> All murder victims could be characterized as "helpless" as evidenced by the fact that they were murdered....
> "[H]elplessness" is too broad to be useful. Furthermore, ... "senselessness of the crime" has no objective meaning. If senselessness of the crime were sufficient to permit a death penalty, virtually all murderers would be on death row.

Id. at 1231–32.

[85] [¶ 148] Arizona courts have similarly disapproved "senselessness of the crime" or "helplessness of the victim" as an independent measure of depraved conduct. *State v. Johnson*, 147 Ariz. 395, 710 P.2d 1050, 1056 (1985) (holding the senselessness of the killing in itself is not enough to satisfy the "especially heinous, or depraved" aggravating circumstance). *State v. Smith*, 146 Ariz. 491, 707 P.2d 289, 301 (1985) (ruling that absent additional aggravation, neither the senselessness of the crime nor the helplessness of the victim can alone make the offense especially heinous or depraved). *See also State v. White*, 395 A.2d 1082, 1090 (Del.1978) (holding the

defenselessness of the victim is an unconstitutionally vague aggravating circumstance). We therefore hold that the depravity of mind circumstance, as limited by the trial court's instruction, did not adequately channel the sentencer's discretion as required by the state and federal constitutions. The effect of our holding is considered later in this opinion.

ISSUE 10.

[¶ 149] **Did the trial court err in its instructions to the jury regarding SDCL 23A–27A–1(3), which permits the imposition of the death penalty if "the defendant committed the offense for himself or another, for the purpose of receiving money or any other thing of monetary value"?**

[¶ 150] The State alleged, as an aggravating circumstance, that Rhines committed the murder for himself for the purpose of receiving money. SDCL 23A–27A–1(3). The trial court instructed the jury in pertinent part:

> Before you may find that this aggravating circumstance exists in this case, you must find, beyond a reasonable doubt, that each of the following elements of this aggravating circumstance are proven by the evidence:
>
> ***450** 1. That the Defendant committed the murder for himself; and
>
> 2. That he committed the murder for the purpose of receiving money.

[¶ 151] Rhines had proposed a jury instruction which would have further defined the elements of this circumstance with the following language:

> It is not sufficient if you merely conclude that the murder was committed during the course of the commission of a burglary, or that the murder was committed only to enable the defendant to retain possession of money already obtained.

The trial court refused this proposed instruction.

[¶ 152] In addition to the pecuniary gain circumstance, the State also alleged that the offense "was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another." SDCL 23A–27A–1(9). Rhines does not dispute that he murdered Schaeffer to cover up Rhines' identity as the burglar and assailant so as to satisfy this aggravating circumstance. However, he contends the aggravating circumstance of "murder for the purpose of receiving money" should not apply, because (1) aggravating circumstances should not overlap so that the same facts can satisfy more than one circumstance; (2) the receipt of money was a result, rather than a cause, of Schaeffer's murder; (3) the murder was not part of a larger preexisting plan to obtain the money; and (4) Rhines had possession of the money before Schaeffer arrived, so the murder was not necessary to get the money.

[86] [87] [¶ 153] We reject Rhines' assertions of error. First, we do not agree that the sentencer is restricted to finding only one motive for capital murder. The jury may properly consider and find two conceptually distinct aggravating circumstances. Here, the State alleged that Rhines killed Schaeffer to silence a witness and to receive money—two separate motives for murder which could exist independent of one another.

[88] [¶ 154] Second, we do not agree that the facts fail to satisfy the pecuniary gain circumstance for any of the reasons listed by Rhines. Our review of the evidence demonstrates that Rhines did not have possession of all of the money when he killed Schaeffer and that obtaining this money was a motive for the murder. As an employee of Dig'Em Donuts, Schaeffer was responsible for collecting money from the West Main Street store and transporting it to the other Dig'Em Donut shops in the area. He was regarded as a trusted employee. It is reasonable to infer that Schaeffer would not have passively permitted Rhines to take the money without attempting to contact the police or otherwise stop the theft. By murdering Schaeffer, Rhines not only silenced a witness, he also facilitated receipt of the money. Additionally, although Rhines may not have intended to kill anyone when he entered the shop, the evidence suggests his intentions changed once he heard someone entering the store. Detective Allender testified that Rhines "was beginning to take the money" when he heard the door to the shop being opened. He retrieved his knife and waited behind the office door. Importantly, he did not wait until Schaeffer had seen or identified him. After explaining to the interrogating officers how he had stabbed and bound his victim, Rhines told them of his continued theft of the store:

> Rhines: I went back in the office and finished getting, finished getting what money I could find. About $1,700. Actually about um, about, oh probably 16, 15–1600 out of there. Change fund, basically.
>
> Allender: Yeah. And then
>
> Rhines: Cleaned out the change fund on the wall. Went over, used the phone....

Based on the evidence at trial, we cannot conclude that Rhines had possession of all of the stolen money prior to the killing or that the theft was simply a result rather than a cause of Schaeffer's death.

ISSUE 11.

[¶ 155] **Was the evidence insufficient to support the jury's finding that Rhines tortured Schaeffer?**

[¶ 156] The jury found that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved the torture of ***451** Schaeffer. Rhines disputes this finding, arguing the evidence presented at trial was insufficient to show beyond a reasonable doubt that he tortured his victim. He notes the fact Schaeffer suffered pain or anticipated the prospect of death is not sufficient, because torture requires the

intentional infliction of pain beyond that necessary to cause death. He claims the wounds inflicted on Schaeffer were designed to cause death, not unnecessary pain, and any suffering experienced by Schaeffer was incident to death.

[89] [¶ 157] When reviewing the sufficiency of the evidence, we must consider the evidence in the light most favorable to the verdict. *State v. Buller*, 484 N.W.2d 883, 889 (S.D.1992) (citing *State v. Ashker*, 412 N.W.2d 97, 105 (S.D.1987)), *cert. denied*, 506 U.S. 887, 113 S.Ct. 248, 121 L.Ed.2d 181 (1992). The jury's verdict will not be set aside if the evidence and all favorable inferences that can be drawn from it support a rational theory of guilt. *Id.* (citing *Ashker*, 412 N.W.2d at 105; *State v. Andrews*, 393 N.W.2d 76, 80 (S.D.1986)).

[¶ 158] According to Rhines' statements to police, he was burglarizing Dig'Em Donuts when Schaeffer unexpectedly entered the store. Schaeffer came into the office area of the store and Rhines stabbed him in the abdomen. Schaeffer fell down, thrashed about, and screamed Rhines' name. Rhines stabbed Schaeffer again in the back, piercing his left lung. Rhines then walked Schaeffer out of the office into the storeroom. Rhines could hear air whistling out of the wound in Schaeffer's back. As Rhines took Schaeffer to the storage area, Schaeffer said, "No, don't. I won't tell." Schaeffer also asked Rhines to call an ambulance for him. Rhines told Allender he thought, "Yeah, right, I am going to call you an ambulance, you bet." Rhines observed that Schaeffer became passive as though he realized he was going to die. Rhines seated Schaeffer on a pallet in the storeroom. He placed Schaeffer's head between his knees and thrust the knife into the base of his skull. Rhines claims Schaeffer continued to breathe and his arms were moving, so he tied Schaeffer's hands behind him. Rhines estimated that Schaeffer's breathing continued for approximately two minutes after inflicting the final knife wound.

[¶ 159] A forensic pathologist, Dr. Donald Habbe, testified at the trial. He opined that the first stab wound would not have been fatal to Schaeffer, but would have caused pain and difficulty breathing. Dr. Habbe stated the second stab wound punctured the left lung and would have the same painful effects, with increased difficulty breathing. He also testified that air could possibly whistle through the back of the wound. According to Dr. Habbe, the combination of the first and second stab probably would not have been fatal. The final stab wound cut into Schaeffer's brain stem. Dr. Habbe opined that death would be "near instantaneous." He opined that Schaeffer may have shown some short involuntary movements in his hands and arms after the infliction of the last wound. He stated that he could not determine whether or not Schaeffer's hands were tied before or after the final stab wound to Schaeffer's neck. He did note that the rope around Schaeffer's wrists was tied very tightly, and that there were abrasions along Schaeffer's left and right wrists.

[¶ 160] Under the South Dakota capital sentencing statutes, the jury may not recommend a sentence of death unless it finds at least one aggravating circumstance beyond a reasonable doubt. One aggravating circumstance alleged by the State was that

"the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture." SDCL 23A–27A–1(6). In its instructions to the jury, the trial court defined torture as follows:

> Torture occurs when a living person is subjected to the unnecessary and wanton infliction of severe physical or mental pain, agony, or anguish. Besides serious abuse, torture includes serious psychological abuse of a victim resulting in severe mental anguish to the victim in anticipation of serious physical harm. You would not be authorized to find that the offense of First Degree Murder involved torture simply because the victim suffered pain or briefly anticipated the prospect of death. Nor would acts committed upon the body of a deceased victim support a finding of torture. ***452** In order to find that the offense of First Degree Murder involved torture, you must find that the Defendant intentionally, unnecessarily, and wantonly inflicted severe physical or mental pain, agony or anguish upon a living victim.

[90] [91] [¶ 161] Rhines correctly observes that the trial court's instructions list two essential elements for a finding of torture: (1) the unnecessary and wanton infliction of severe pain, agony, or anguish; and (2) the intent to inflict such pain, agony or anguish. Our review of the evidence shows that both of these elements were satisfied. "Unnecessary pain" implies suffering in excess of what is required to accomplish the murder. *State v. Ramseur*, 106 N.J. 123, 524 A.2d 188, 229 (1987) (citing *State v. Sonnier*, 402 So.2d 650, 658–60 (La.1981), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983)). The defendant who intends to kill his victim instantly or painlessly does not satisfy this requirement, nor does the defendant who only intended to cause pain that is incident to death. *Ramseur*, 524 A.2d at 229–30.

[92] [¶ 162] After Rhines inflicted the second non-fatal stab wound, he did not swiftly proceed to end Schaeffer's life. Instead, he brought Schaeffer to his feet and walked him to the storeroom. During this time, Schaeffer begged for his life and asked for medical help. Rhines ignored his pleas. He seated him on a pallet and arranged his body for what Rhines referred to as the "*coup de grace.*" Rhines remarked that during this time Schaeffer became passive and seemed to acknowledge his impending death. We cannot agree that Schaeffer's mental and physical anguish during this time was simply pain incident to his death.

[¶ 163] Furthermore, one can reasonably infer from the evidence that Rhines bound Schaeffer's hands before he inflicted the third fatal stab wound. Rhines told

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

[¶ 164] The evidence also shows that Rhines possessed the necessary intent for a finding of torture. When Schaeffer pleaded with Rhines for his life, Rhines did not tell officers of his desire to quickly end his victim's life. Instead, Rhines described his own sarcastic and scornful attitude toward Schaeffer's suffering. Rhines also stated that when he believed Schaeffer had survived the third stab wound, he tied his victim's hands and left him to die. This evidence supports a finding that Rhines intended to cause unnecessary pain to his victim.

ISSUE 12.

[¶ 165] **Does the jury's consideration of an invalid aggravating circumstance require reversal of the death sentence?**

[¶ 166] In Rhines' case, the jury found four statutory aggravating circumstances. The jury determined: (1) the offense was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest under SDCL 23A–27A–1(9); (2) the offense was committed for the purpose of receiving money under SDCL 23A–27A–1(3); (3) the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture under SDCL 23A–27A–1(6); and (4) the offense was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind, also under SDCL 23A–27A–1(6). Rhines did not challenge the jury's finding that he committed the offense for the purpose of avoiding lawful arrest. Similarly, we have rejected Rhines' claims of error regarding the torture and pecuniary gain circumstances. However, we have concluded that the depravity of mind circumstance, as defined by the trial court, is constitutionally invalid.

[¶ 167] Rhines claims the invalidity of one of the aggravating circumstances found by ***453** the jury requires reversal of his death sentence. Alternatively, he argues the Court may uphold the death sentence only if the jury still would have imposed the death sentence without the invalid factors. He alleges the jury's decision to impose the death penalty was a result of the multiple number of aggravating circumstances that were found. Because the invalid aggravating circumstance cannot be excised from the jury's sentence of death, he claims the sentence must be reversed.

[¶ 168] In *Zant*, the Court considered whether a defendant's death sentence must be vacated when one of the three statutory

aggravating circumstances found by the jury was subsequently held to be invalid by the Georgia Supreme Court. 462 U.S. at 889, 103 S.Ct. at 2748, 77 L.Ed.2d at 257. The Court held that the invalidity of one aggravating circumstance did not require reversal of the death sentence. The Court stressed various factors that were important to its decision. First, the Court noted that the invalid aggravating circumstance did not implicate expressive activity that is protected by the First Amendment or include factors that are totally irrelevant to the sentencing process, such as the race, religion, or political affiliation of the defendant. 462 U.S. at 885, 103 S.Ct. at 2747, 77 L.Ed.2d at 255. Nor did the circumstance involve conduct that should militate in favor of a lesser penalty, such as the defendant's mental illness. 462 U.S. at 885, 103 S.Ct. at 2747, 77 L.Ed.2d at 255. Second, under Georgia law, aggravating circumstances simply identified those offenses that qualify as capital crimes, and the presence of only one circumstance was sufficient to permit consideration of the death penalty. 462 U.S. at 876–77, 103 S.Ct. at 2742, 77 L.Ed.2d at 249. Third, the same evidence relevant to the invalid circumstance was also admissible for purposes of ruling on the valid aggravating factors. 462 U.S. at 887–89, 103 S.Ct. at 2748–49, 77 L.Ed.2d at 256–57. Fourth, the Georgia death penalty statutes did not instruct the jury to weigh aggravating circumstances and mitigating circumstances against each other in deciding whether to impose a death sentence. 462 U.S. at 890, 103 S.Ct. at 2750, 77 L.Ed.2d at 258. Nor was the jury otherwise instructed to place any particular weight on the number of aggravating circumstances found. 462 U.S. at 891, 103 S.Ct. at 2750, 77 L.Ed.2d at 258. Finally, Georgia law mandated appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality. 462 U.S. at 890, 103 S.Ct. at 2749, 77 L.Ed.2d at 258.

[93] [¶ 169] Importantly, as noted earlier, South Dakota's capital sentencing scheme is modeled after Georgia's death penalty statutes. All of the procedural safeguards emphasized in *Zant* are also present in our capital punishment law. First, the depravity of mind circumstance did not encompass conduct that is constitutionally protected, personal characteristics of the defendant that are totally irrelevant to the sentencing process, or conditions that should favor a lesser penalty. Second, aggravating circumstances serve only to narrow the class of offenders eligible for the death penalty, and the existence of only one such circumstance is sufficient to warrant consideration of capital punishment. Third, all of the evidence relevant to the "depravity of mind" circumstance was also properly admitted for purposes of deciding the existence of other valid aggravating factors. Fourth, our statutes do not require the jury to weigh aggravating circumstances against mitigating factors, and the jury was not instructed to consider the specific number of aggravating factors in deciding whether to render a death sentence. Finally, SDCL 23A–27A–12 mandates this Court to consider whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. Therefore, in accordance with the Supreme Court's ruling in *Zant*, we hold the invalidity of the "depravity of mind" circumstance does not

so taint the penalty proceedings as to mandate reversal of Rhines' death sentence.

ISSUE 13.

[¶ 170] **Was Rhines' death sentence imposed under the influence of passion, prejudice, or other arbitrary factors?**

[¶ 171] Rhines contends the jury considered irrelevant or unfairly prejudicial matters when imposing the death penalty. He ***454** claims the jury's note to the judge about life imprisonment demonstrates this bias. He specifically focuses on questions about whether prison conditions might allow "distraction from his punishment" and whether he might qualify for work release from prison.[6]

6 Rhines also reiterates his claim that some of the jury's questions demonstrate a bias against homosexuality. Having previously addressed this allegation, we need not revisit it here.

[¶ 172] Rhines also contends the trial court failed to adequately respond to the jury's improper concerns. As noted above, the trial court sent the following response to the jury:

> Dear Jurors: I acknowledge your note asking questions about life imprisonment. All the information I can give you is set forth in the jury instructions.

The trial court refused to give an additional instruction proposed by Rhines:

> You are further instructed, however, that you may not base your decision on speculation or guesswork.

Rhines contends that, by failing to give this instruction, the court improperly permitted the jury to speculate about the nature of life imprisonment.

[¶ 173] 1. Passion, prejudice or other arbitrary factors.

[94] [¶ 174] Once the jury has found the existence of an aggravating circumstance beyond a reasonable doubt, our capital sentencing scheme gives jurors broad discretion in deciding whether to impose life imprisonment or a death sentence. *See, e.g.*, *Tuilaepa*, 512 U.S. at ——, 114 S.Ct. at 2636, 129 L.Ed.2d at 761. Indeed, prior to sentencing deliberations, the jury was appropriately instructed: "You may fix the penalty at life imprisonment, if you see fit to do so, for any reason satisfactory to you, or without any reason."

[95] [¶ 175] In this context, the jury's questions about work release and "distraction from punishment" do not show that they considered irrelevant or arbitrary factors in rendering a verdict. Their questions directly relate to conditions of confinement under a sentence of life without parole. Prison life was an appropriate topic for discussion when weighing the alternatives of life imprisonment and the

death penalty.

[¶ 176] **2. Trial court's response.**

[96] [¶ 177] Rhines contends the trial court erred in failing to additionally advise the jury to avoid speculation and guesswork. We find no error. The decision whether to provide further instruction to the jury rests within the sound discretion of the trial court. *Floody*, 481 N.W.2d at 250 (citing *State v. Holtry*, 321 N.W.2d 530, 531 (S.D.1982)).

[97] [¶ 178] Although other courts have responded to similar inquiries by instructing jurors to refrain from speculation, *People v. Hovey*, 44 Cal.3d 543, 244 Cal.Rptr. 121, 145–46, 749 P.2d 776, 800 (1988), *cert. denied*, 488 U.S. 871, 109 S.Ct. 188, 102 L.Ed.2d 157 (1988); *People v. Stankewitz*, 51 Cal.3d 72, 270 Cal.Rptr. 817, 842–43, 793 P.2d 23, 48–49 (1990), *cert. denied*, 499 U.S. 954, 111 S.Ct. 1432, 113 L.Ed.2d 483 (1991), the trial court's decision to forego such an instruction was not an abuse of discretion. First, the proposed instruction to avoid speculation and guesswork could inadvertently chill the jury's broad discretion to fix the penalty at life imprisonment "for any reason ... or without any reason." Second, the instructions given by the trial court fully and accurately advised the jurors of the law governing the case. We can discern no error in simply referring the jurors to these instructions. " 'If the court in the exercise of sound discretion concludes that information or further instructions are not required, it may properly refuse such a request.' " *Holtry*, 321 N.W.2d at 531 (quoting *State v. Weinandt*, 84 S.D. 322, 327, 171 N.W.2d 73, 77 (1969)).

ISSUE 14.

[¶ 179] **Based on the appellate review mandated by SDCL 23A–27A–12, was Rhines' sentence of death lawfully imposed?**

[¶ 180] In every case where the death penalty is imposed, this Court is required to conduct an independent review of the sentence. ***455** SDCL 23A–27A–12. We must determine:

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

SDCL 23A–27A–12.

[98] [¶ 181] We begin our review by determining whether the evidence supports any of the aggravating circumstances found by the jury. Rhines does not dispute that he committed the murder to avoid being arrested, thereby satisfying aggravating

circumstance SDCL 23A–27A–1(9); there is substantial evidence in the record to support this finding. When describing the murder to Detective Allender and Deputy Sheriff Bahr, Rhines remarked, "leave no witnesses." He also referred to being "caught in the act." When discussing his decision to tie Schaeffer's hands, Rhines remarked, "I just don't want somebody to stand up in the middle of—or call anybody and go dial 911." Furthermore, we have previously concluded the offense was committed for the purpose of receiving money under SDCL 23A–27A–1(3) and the offense involved torture which was wantonly vile, horrible, or inhuman under SDCL 23A–27A–1(6). Clearly, Rhines was eligible for the death penalty.

[99] [100] [¶ 182] Nor can we conclude the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We have rejected Rhines' claims that inadmissible evidence was considered by the jury and that the jury permitted irrelevant facts to taint its verdict. We cannot discern any independent basis for invalidating the jury's sentence. Although Rhines presented mitigating evidence concerning his difficult youth and loving family, the decision to impose the death penalty in spite of this evidence was not arbitrary. Rhines brutally murdered Donnivan Schaeffer so he could steal less than $2,000 in cash and escape responsibility for his crime. The law permits mercy, but does not require it.

[¶ 183] Finally, we consider whether Rhines' death sentence is excessive or disproportionate to the penalty imposed in similar South Dakota cases. SDCL 23A–27A–12(3) is patterned after the proportionality review provisions in the Georgia capital punishment statutes. As the United States Supreme Court observed in *Gregg*, provision for proportionality review:

> substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

428 U.S. at 206, 96 S.Ct. at 2940, 49 L.Ed.2d at 893.

[¶ 184] As for the mechanics of proportionality review, Rhines argues the pool of similar cases for proportionality review should encompass all homicide cases that were prosecuted or could have been prosecuted under the State's current capital punishment scheme. He reasons that prosecutorial discretion is an important factor that this Court must consider when ruling on proportionality. The State argues the pool of similar cases should be limited to those South Dakota cases proceeding to the capital punishment phase, regardless of whether a death sentence was actually imposed. There are seven other South Dakota cases that have proceeded to death penalty deliberations.

[101] [¶ 185] We conclude that similar cases for purposes of SDCL 23A–27A–12(3) are those cases in which a capital sentencing proceeding was actually conducted, whether the sentence imposed was life or death. "[B]ecause the aim of proportionality review is to ascertain what other capital sentencing authorities have done with similar capital murder offenses, the only cases that could be deemed similar ... are those in which imposition of the death penalty was properly before ***456** the sentencing authority for determination." *Tichnell v. State*, 297 Md. 432, 468 A.2d 1, 15–16 (1983), *cert. denied*, 466 U.S. 993, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984). *Accord*, *Flamer v. State*, 490 A.2d 104, 139 (Del.1983), *cert. denied*, 474 U.S. 865, 106 S.Ct. 185, 88 L.Ed.2d 154 (1985).

[¶ 186] Since the enactment of South Dakota's current death penalty statute in 1979, eight capital sentencing proceedings have taken place. In six of those cases, the jury imposed life sentences. In Rhines' case and one other, the jury returned a verdict of death. We will briefly set forth the facts of each of these other cases so as to provide a foundation for our review.

[¶ 187] ***State v. Adams***

[¶ 188] Howard Adams and Jimmy Lee Boykin kidnapped, robbed and murdered DuWayne Jensen, a stranger who was delivering newspapers early in the morning on June 19, 1986. Jensen's jaw and windpipe had been fractured and both of his eyes were blackened. The cause of his death was multiple stab wounds. The State sought the death penalty, alleging the offense was committed for the purpose of receiving money or any other thing of monetary value and the offense was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim. The jury only found the aggravated battery circumstance and sentenced Adams to life imprisonment. Mitigating circumstances included Adams' deprived childhood, a history of alcohol abuse, and use of alcohol immediately prior to the crime.

[¶ 189] ***State v. Bittner***

[¶ 190] On March 20, 1982, two police officers responded to a complaint that Steven Bittner had physically abused his girl friend in the home the couple shared. As the officers proceeded to the upstairs portion of the house, Bittner bounded down the stairs and stabbed both officers. One of the officers died as a result of his injuries.

[¶ 191] The State sought the death penalty, alleging one aggravating circumstance—that the offense was committed against a law enforcement officer while in the performance of his duties. The jury sentenced Bittner to life imprisonment, without finding the existence of any statutory aggravating circumstances. Bittner established various mitigating circumstances, including abuse and neglect as a child, a history of alcohol or drug abuse, use of alcohol immediately prior to the crime, and a disavowal of any intent to deliberately kill the officer.

[¶ 192] ***State v. Helmer***

[¶ 193] The State alleged that William J. Helmer killed an acquaintance, Randy Dixon, by shooting Dixon in the head. The State also claimed that, after killing Dixon, Helmer cut off Dixon's head and hands with an axe. Helmer presented evidence that he had experienced mental problems for a number of years. Testimony indicated that Helmer suffered from post-traumatic stress disorder at the time of Dixon's murder. There was also evidence indicating Dixon had been abusive toward Helmer and may have stolen property from Helmer.

[¶ 194] The State sought the death penalty, asserting the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim and the offense was committed for the purpose of receiving money or anything of monetary value. The jury convicted Helmer of first-degree murder and sentenced Helmer to life imprisonment.

[¶ 195] ***State v. Moeller***

[¶ 196] The State alleged Moeller anally and vaginally raped a nine-year-old girl and stabbed her to death. The State sought the death penalty, claiming the offense was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim. The jury convicted Moeller of rape and first-degree murder. The jury also found the existence of the aggravated battery circumstance and imposed a sentence of death.

[¶ 197] ***State v. Smith***

[¶ 198] During the course of a bank robbery, James Elmer Smith shot a woman who failed to follow his order to lie down on the floor. The woman died within a few minutes of receiving the gunshot wound. The State sought the death penalty, alleging three aggravating ***457** circumstances: (1) the defendant knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person; (2) the offense was committed for the purpose of receiving money or any other type of monetary value; and (3) the offense was committed by a person in, or who has escaped from, the lawful custody of a law enforcement officer or place of lawful confinement. The jury convicted Smith of first-degree murder and returned a verdict of life imprisonment.

[¶ 199] ***State v. Swallow***

[¶ 200] Accompanied by two others, Edwin Swallow went to the home of Conrad Wilson, an illicit drug dealer. A shootout ensued. Wilson was found, barely alive, on the porch of the house. He eventually died of his injuries. Wilson's seventeen-year-old daughter, who was not involved in the drug trade, was found dead from a single shotgun blast.

[¶ 201] The State sought the death penalty against Swallow, alleging the murder of Wilson's daughter was committed by a person who had a substantial history of serious assaultive criminal convictions and was committed for the purpose of receiving money or any other thing of monetary value.

Mitigating evidence showed Swallow was twenty-two years old, had a history of drug abuse, and that a co-perpetrator had received a sentence of sixty-five years. There was also testimony indicating Wilson initiated the shootout by firing at Swallow's companions.

[¶ 202] The jury convicted Swallow of one count of first-degree manslaughter for the death of Wilson and one count of first-degree murder for the death of Wilson's daughter. The judge imposed a life sentence for the manslaughter conviction. The jury imposed a life sentence without possibility of parole for the first-degree murder conviction, without indicating whether the aggravating circumstances were satisfied.

[¶ 203] ***State v. Waff***

[¶ 204] David Waff killed Russell Keller in exchange for a payment of $1500 from Keller's business partner. Waff had shot Keller once in the head and stabbed him eight times. The State sought the death penalty, asserting the murder was committed for the purpose of receiving money or other things of monetary value and the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. The jury found Waff guilty of first-degree murder and sentenced him to life imprisonment.

[102] [¶ 205] The law demands individualized sentencing. *Tuilaepa*, 512 U.S. at ——, 114 S.Ct. at 2635, 129 L.Ed.2d at 760. The jury's verdict in any capital case is necessarily premised on the unique facts before it. Yet, all defendants facing the death penalty are entitled to fairness and reasonable consistency in its imposition. *State v. Bey*, 137 N.J. 334, 645 A.2d 685, 689 (1994), *cert. denied*, 513 U.S. 1164, 115 S.Ct. 1131, 130 L.Ed.2d 1093 (1995). " '[A] death sentence is comparatively excessive if other defendants with similar characteristics generally receive sentences other than death for committing factually similar offenses in the same jurisdiction.' " *Id.* (quoting *State v. Marshall*, 130 N.J. 109, 613 A.2d 1059, 1070 (1992)).

[103] [104] [105] [¶ 206] A dissenting opinion implies that Rhines' sentence is disproportionate because he is one of only two defendants to have received a verdict of death. We respectfully suggest this reasoning is flawed. First, the fact that Rhines is among the first to receive a death sentence does not signify that his sentence is disproportionate. Otherwise, the death penalty itself would be nullified. Second, a death sentence should not be invalidated simply because a jury determined that another defendant, who committed an analogous crime, deserved mercy. Proportionality review focuses not only on the crime, but also on the defendant. SDCL 23A–27A–12(3). *See State v. Benn*, 120 Wash.2d 631, 845 P.2d 289, 317 (1993) (quoting *State v. Lord*, 117 Wash.2d 829, 822 P.2d 177, 223 (1991)) ("Simply comparing numbers of victims or other aggravating factors may superficially make two cases appear similar, where in fact there are mitigating circumstances in one case to explain either a jury's verdict not to impose the death penalty or a prosecutor's decision not to seek it."), ***458** *cert. denied*, 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993).

[106] [¶ 207] We conclude the death sentence is not excessive or disproportionate in Rhines' case. First, we note Rhines' offense involved the existence of three separate aggravating circumstances. Only one other case, *State v. Smith,* 477 N.W.2d 27 (S.D.1991), alleged the presence of three aggravating factors. Marked distinctions between Rhines' case and *Smith* justify the juries' different verdicts. In *Smith,* the victim died quickly from a single gunshot delivered swiftly and unexpectedly by Smith. In contrast, Schaeffer did not die quickly from a single wound. Rhines first stabbed him in the stomach, which caused Schaeffer to collapse to the floor, screaming and writhing in pain. After Rhines pierced Schaeffer's lung with the second thrust of his knife, Schaeffer pleaded for his life. According to Rhines, when he assisted Schaeffer to the storeroom to deliver the "*coup de grace,*" Schaeffer seemed to anticipate his own death. The disparity in suffering endured by victims is an important and legitimate consideration when evaluating the proportionality of a death sentence.

[¶ 208] Additionally, the nature of the evidence in this case sets it apart from any other capital case in this state. In the seven other cases where the death penalty was considered, the prosecution's evidence was circumstantial or involved testimony by third-persons who observed the defendant's wrongdoing or who heard inculpatory statements by the defendant. In this case, the jury heard Rhines' own description of his crime. His arrogant and cold-blooded attitude toward his offense was made shockingly apparent in his own words and in his own voice. Rhines described the stabbing of Schaeffer in chilling, clinical detail. He told about Schaeffer "thrashing" and "screaming" after the first stab wound. He said air whistled out of the wound in Schaeffer's back, and called it a "sucking back wound." As to the final death blow, Rhines remarked: "Sat him down and put him basically, his head between his legs and applied the knife to the back of the neck where the skull joins the spinal column. Right in the joint at the spinal column. In kind of upward, up and in.... Attempted to reach the small brain ..." Then Rhines told the officers, "... he was still breathing, I didn't know what I had. I've never stabbed anybody to death. I've never stabbed anybody, period. You guys seen anybody get stabbed to death? Know what it takes? Quit fighting very quickly, but, you don't die very quickly." When the officers told Rhines that a pathologist had suggested Schaeffer might have been tied up before the last stab wound, Rhines stated, "Too bad he wasn't there. To watch." Then Rhines burst into laughter. In explaining Schaeffer's movements after the last wound, Rhines drew an analogy to butchered chickens. Rhines laughed intermittently throughout the first interview, usually in reference to witnesses the officers had not spoken to or items of evidence they had not found. At one point he remarked caustically, "I try not to condescend." During Rhines' lengthy taped confessions, he did not spontaneously express any feeling of remorse for Schaeffer's death. When finally asked, "Are you sorry Donnivan's dead now?" Rhines simply responded, "Yeah." He then proceeded to tell the officers that he wanted to "get off."

[¶ 209] Faced with such compelling evidence of the defendant's moral culpability and apparent lack of sincere remorse, we conclude the death sentence imposed on Rhines was neither excessive nor disproportionate to the penalty imposed in similar cases in South Dakota.

[¶ 210] Affirmed.

[¶ 211] GILBERTSON, J., and JOHNSON, Circuit Judge, concur.

[¶ 212] SABERS and AMUNDSON, JJ., dissent.

[¶ 213] JOHNSON, Circuit Judge, sitting for KONENKAMP, J., disqualified.

SABERS, Justice (dissenting).

[¶ 214] The issue is: Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

[¶ 215] For the reasons stated herein, the sentence of death is excessive and disproportionate ***459** to the penalty imposed in similar cases, considering both the crime and the defendant. SDCL 23A–27A–12(3).

[¶ 216] SDCL 23A–27A–12 provides the factors to be reviewed by the Supreme Court regarding a death sentence. For the purpose of this case, I will assume that this death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and that the evidence supports the jury's finding of a statutory aggravating circumstance as enumerated in SDCL 23A–27A–1.

[¶ 217] However, as indicated above, SDCL 23A–27A–12(3) mandates that the Supreme Court affirmatively determine that this death sentence is neither excessive nor disproportionate to the penalties imposed in similar cases, considering both the crime and the defendant. In fact, unless we affirmatively determine that the death sentence is neither excessive nor disproportionate to the penalties imposed in criminal cases, then, in that event, SDCL 23A–27A–14 requires that "the court shall sentence such person to life imprisonment." That is what must be done here.

[¶ 218] Before considering the penalties imposed in similar cases, it is very important to point out that in *Pulley v. Harris,* 465 U.S. 37, 50–51, 104 S.Ct. 871, 879, 79 L.Ed.2d 29, 40–41 (1984), the United States Supreme Court held that the Constitution of the United States does not require proportionality review. In other words, it was not necessary for the South Dakota Legislature to enact SDCL 23A–27A–12(3) requiring mandatory proportionality review by the South Dakota Supreme Court. I submit that it was a mistake for the South Dakota Legislature to require mandatory proportionality review when it was not required by the United States Constitution. This statement presumes, of course, that the death penalty was desired by the legislature in most murder cases.

[¶ 219] Most murders are, for the most part,

full of aggravating circumstances and at least for death penalty proponents, more than adequate for capital punishment. However, when our legislature has clearly said that those aggravating circumstances are *not enough*, and that, in addition, there must be mandatory proportionality review by the Supreme Court, it is clear that no death sentence shall be imposed unless we can affirmatively determine that the death sentence is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. In other words, even if we were to conclude that this defendant and this defendant's crime deserves death, we cannot impose it because it is excessive and disproportionate to the penalties imposed in similar cases. That is our task under SDCL 23A–27A–12(3). It did not have to be that way, but it is. The United States Constitution does not require it but the South Dakota Legislature does.

[¶ 220] Concerning the mechanics of proportionality review, the majority opinion states:

> Rhines argues the pool of similar cases for proportionality review should encompass all homicide cases that were prosecuted or could have been prosecuted under the State's current capital punishment scheme. He reasons that prosecutorial discretion is an important factor that this Court must consider when ruling on proportionality. The State argues the pool of similar cases should be limited to those South Dakota cases proceeding to the capital punishment phase, regardless of whether a death sentence was actually imposed. There are seven other South Dakota cases that have proceeded to death penalty deliberations.

The majority opinion promptly proceeds to adopt the State's argument without any consideration of other murder cases and without any reasoned analysis.

[¶ 221] It seems clear to me that if proportionality review is to be meaningful, as intended by our legislature, the pool of "similar cases" must include at a minimum *all* reported murder cases. This would present no great difficulty in South Dakota, where the crime of murder is still infrequent, if not uncommon. Generally, we have less than ten reported murder cases per year. Prosecutorial discretion and plea bargaining should be factors for consideration, even if not controlling, and the cases disposed of by those ***460** methods should not be *automatically* omitted.[7] At any rate, to limit the pool of "similar cases" to the seven as the majority does is, in itself, arbitrary and unreasonable.

[7] Consider for a moment the recent "murder for hire" case of Mary K. Ross in Sioux Falls. The man who hired the killing and the two killers received life sentences as a result of pleas despite the fact that she was stabbed numerous times over a substantial period of time. She lived long enough to call the 911 operator to report that she was being killed and that her baby was in the next bedroom.

> Several years ago, a young man brutally raped and murdered a nine-year-old Sioux Falls Argus Leader paper girl and received a life sentence.
> Under the majority's view, these cases would *never* be considered in its pool of similar cases.

[¶ 222] It takes no great memory to recall numerous "similar cases" where the facts and the aggravating circumstances were at least as hideous as in Rhines' case. In fact, the major distinguishing feature in all other cases is that the penalty was life in prison or less, and not death. Consider for a moment, the following cases:

1. *State v. Ashker*, 412 N.W.2d 97 (S.D.1987).

   Lewis Ashker and Curt Novaock were convicted of first-degree murder of the death of Jerry Plihal in Delmont. Plihal had struggled with his attackers and had been stabbed numerous times. Plihal's guns were missing, but not found by the authorities.

2. *Jenner v. Leapley*, 521 N.W.2d 422 (S.D.1994).

   In 1986, Jackie Sjong was found dead under a bridge near Spearfish, the victim of four bullets fired at close range, from two different weapons. Sjong was "picked up" by Michael Jenner in California and brought to Sturgis for execution because he had "ratted" on a fellow club member. Michael Jenner and Richard Elliott, members of an "outlaw" motorcycle club, were convicted of first-degree murder and each received a life sentence.

3. *State v. Braddock*, 452 N.W.2d 785 (S.D.1990).

   Edward Braddock was convicted of murder and sentenced to life imprisonment for killing Douglas Cramer by shooting him 8 times with an AK–47 assault rifle at the Edgemont city dump. He claimed Cramer owed him money.

4. *State v. Rough Surface*, 440 N.W.2d 746 (S.D.1989).

   Donald Rough Surface received life in prison for murder, rape, robbery and assault of his uncle. The victim's body was found naked, bloody, badly beaten, and burned in the crawl space beneath a grain elevator in Mobridge. The victim had also been raped and robbed.

5. *State v. Bradley*, 431 N.W.2d 317 (S.D.1988).

   Jamie Thunder Hawk's body was found in a roadside ditch near Baltic in 1986. Her head had been severed with a knife. There was testimony that she had been abused and tortured over a period of time by Bradley and that on the day of her death, she was kicked, raped and strangled to death. Bradley received life imprisonment.

6. *State v. Miller*, 429 N.W.2d 26 (S.D.1988).

   Todd Miller was convicted of murder, kidnapping, possession of ransom money and forgery for the death of his "friend" Michael Kinney near Aberdeen. He received life sentences.

7. *State v. Corder,* 460 N.W.2d 733 (S.D.1990).

Ronald Corder and Harvey Ernst each received a life sentence for the brutal beating of Clifford Hirocke near Vermillion.

8. *State v. Davi,* 504 N.W.2d 844 (S.D.1993).

Scott Davi received life in prison for convictions of murder and rape of his ex-wife, and burglary of her apartment in Sioux Falls. She had been brutally beaten, raped and strangled.

9. *State v. Phillips,* 489 N.W.2d 613 (S.D.1992).

Darlene Phillips received a life sentence in her conviction of conspiracy to commit murder. After several aborted attempts with poison and fire to kill her ex-husband for whom she was caring, ***461** she and others smothered him with a pillow in Lemmon.

10. *State v. Henjum,* 1996 SD 7, 542 N.W.2d 760 (S.D.1996).

Finally, as recently as February 27, 1994, in Mitchell, Lawrence Henjum, shot his friend and roommate, Mark Nelson, in the head with a rifle for no apparent reason. The murder charge was dropped to manslaughter, he pled guilty and received forty-five years.

[¶ 223] Minimal research discloses approximately 80 reported murder cases since 1978, many of which are as hideous as Rhines' case. *None* of them resulted in a death sentence. *None* of them are even considered in the majority opinion.

[¶ 224] Even if the pool of similar cases was limited to the seven cases used by the majority, the facts and aggravating circumstances of *Rhines* are more common than exceptional. Although the specific details vary, the brutality of each killing is similar. In fact, viewed objectively, all of them were hot or cold blooded murders or executions against defenseless victims. The only real distinguishing feature is that all of those murderers received life in prison. Therefore, Rhines' death sentence is disproportionate *and* excessive in comparison.

[¶ 225] As stated in the majority opinion: "[A] death sentence is comparatively excessive if other defendants with similar characteristics generally receive sentences other than death for committing factually similar offenses in the same jurisdiction." *State v. Marshall,* 130 N.J. 109, 613 A.2d 1059, 1070 (1992). To paraphrase, Rhines' death sentence is comparatively excessive *because all* other defendants with similar characteristics received sentences other than death for committing factually similar offenses in the same jurisdiction.

[¶ 226] Accordingly, it is pure fiction to say that Rhines' death sentence is neither excessive nor disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. Therefore, we have no choice but to reverse and remand because, in these circumstances, the law requires that "the court shall sentence such person to life imprisonment."

23A–27A–14.

AMUNDSON, Justice (dissenting).

[¶ 227] I respectfully dissent on Issue 14, for I believe the majority's comparative proportionality review universe or pool is too restrictive. When I embarked on this mandated review, I felt much like Benjamin N. Cardozo when he stated:

> I was much troubled in spirit in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile.... As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.

Benjamin N. Cardozo, *The Nature of the Judicial Process*, 166 (1921).

[¶ 228] One of the fundamentals of proportionality review is to avoid "death sentences imposed ... wantonly or freakishly." *Gregg v. Georgia*, 428 U.S. 153, 224, 96 S.Ct. 2909, 2948, 49 L.Ed.2d 859, 903 (1976) (White, J., concurring). In order to avoid such a result, a larger pool needs to be used for comparison to ensure we properly perform this ominous task. This maiden voyage provides an opportunity to establish a procedure for evaluating the appropriateness of a death sentence. A court should not lose sight of the fact that the purpose of this review is fairness notwithstanding the nature of the crime.

[¶ 229] In *State v. Mercer*, 618 S.W.2d 1, 21 (Mo.1981) (Seiler, J., dissenting) it was noted:

> By "similar cases" is meant similar capital murders, not limited only to those where both death and life imprisonment were submitted to the jury and then affirmed on appeal, whichever way the case went on punishment. The evil deed is the ***462** murder and what accompanied it and that, as well as the defendant, is what must be looked at in comparing what one defendant received in punishment under a capital murder charge with what another received. The fact

> that a capital murder defendant does not get the death penalty or gets a new trial or that the state waived the death penalty in his case or that his case is still pending before us does not mean that we can ignore his case in making our comparison. Once we accept the idea, as we must, that the death penalty cannot be inflicted at random, or arbitrarily or inconsistently, then necessarily we must take into consideration all capital murders we know about.

[¶ 230] Our state legislature mandates us to carry out proportionality review. SDCL 23A–27A–12. Since 1979, SDCL 23A–27A–8 has required this court to accumulate the records of all capital felony cases that we deem appropriate. The information available at this time tracks cases from 1981 until 1993. Our records contain forty-eight capital felony cases that we deemed appropriate to accumulate. Beyond the records assembled in Pierre at this time, there are at least four other cases that could be included in this accumulation.[8] What is the majority's rationale for culling this established pool to seven? Since the legislature has mandated this review, it must be meaningful or the result will be suspect. As Justice Utter stated in his dissent in *State v. Benn*, 120 Wash.2d 631, 845 P.2d 289, 326–27 (1993):

> Without such review, the death penalty, like lightning, will strike some, but not others, in a way that defies rational explanation. The severity of the death penalty, its irrevocability, and our statutory mandate, require us to assess carefully whether the death penalty has been imposed arbitrarily. We cannot, under the statute, simply defer to a jury's sentencing determination.

[¶ 231] SDCL 23A–27A–12(3) states that we are to consider both the crime and the defendant when conducting our comparative review, not just that a capital proceeding took place. In South Dakota, only two people since 1979 have been sentenced to death out of at least fifty-two eligible criminals. In conducting comparative proportionality review, if we required a case to be on all fours with the other cases in order for them to be similar, I submit that would be impossible. By using the pool already assembled by this court, it gives notice to the parties involved in the litigation as to what cases will be considered. Then, the litigants can make their argument on this issue based on that pool. Otherwise, a defendant does not find out what are similar cases until the decision is handed down. There is no statute in South Dakota that

8 *State v. Helmer*, 1996 SD 31, 545 N.W.2d 471 (Convicted July 8, 1994. Victim was shot and then decapitated and hands removed.); *State v. Henjum*, 1996 SD 7, 542 N.W.2d 760 (Pleaded guilty to manslaughter in the first degree sometime in 1994. Defendant shot victim with no provocation.); *State v. New*, 536 N.W.2d 714 (S.D.1995) (Convicted May 2, 1994, of second-degree murder. New stated he did not actually murder, just witnessed.); *State v. Larson*, 512 N.W.2d 732 (S.D.1994) (Convicted November 21, 1992, of second-degree murder. Victim shot while driving down Interstate.).

defines "similar case" nor does any statute provide us with a standard for performing the mandated review. On the other hand, all of the cases which I recommend be included in the pool have one similarity, namely, a wrongful taking of another person's life. By employing such a pool, this court would be proceeding with appropriate care and caution when making a decision involving life or death of a human being.

[¶ 232] In conclusion, I might personally feel Rhines has earned the sentence imposed by the jury, but that is not the issue. The issue is whether the death penalty is being imposed uniformly and not arbitrarily. This issue cannot be resolved by only considering cases where capital sentencing proceedings were actually conducted.

All Citations

548 N.W.2d 415, 1996 S.D. 55

STATE OF SOUTH DAKOTA,))SS. COUNTY OF PENNINGTON.)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, vs. CHARLES RUSSELL RHINES, DOB: 7/11/56 PCN #: 1674495 Defendant.	File No. 93-81 JUDGMENT

On the 29th day of January, 1993, at the hour of 9:00 o'clock a.m., the Defendant, CHARLES RUSSELL RHINES, being present personally and being represented by and through his attorneys, Joseph Butler, Wayne Gilbert, and Mike Stonefield, each of Rapid City; the State being represented by State's Attorney, Dennis A. Groff, and Deputy State's Attorney, Mark A. Vargo; the Defendant having previously been arraigned on an Indictment alleging the offense of COUNT I: FIRST DEGREE MURDER (FELONY), committed on or about March 8, 1992, in violation of SDCL 22-16-4; the Defendant having previously entered a plea of Not Guilty to COUNT I of the Indictment as charged; a jury trial having been held before this Court commencing the 4th day of January, 1993, with respect to said offense; the jury having returned its verdict of Guilty of the offense of COUNT I: FIRST DEGREE MURDER (FELONY) on January 22, 1993; a pre-sentence hearing having been held before the jury commencing on the 25th day of January, 1993; the jury having returned its unanimous verdict with a finding of three aggravating circumstances and a

recommendation that the the death sentence be imposed, and the Defendant having been fully advised of his rights, and the Court having affixed this day as the date for pronouncing sentence; the Defendant having been asked whether there was any legal cause to show why a judgment should not be pronounced against him in accordance with the law and no cause being shown; it is hereby

ORDERED AND ADJUDGED, and the judgment and sentence of this Court is that you, CHARLES RUSSELL RHINES, upon your conviction for the crime of FIRST DEGREE MURDER (FELONY), shall suffer the death penalty, said penalty to be inflicted within the walls of the South Dakota State Penitentiary in the manner prescribed by the statutes of the State of South Dakota, and it is further

ORDERED, that the week of August 22, 1993, be and the same is hereby appointed as the week within which this death sentence shall be executed, and it is further

ORDERED, that the Defendant, CHARLES RUSSELL RHINES, is hereby remanded to the custody and control of the Sheriff of Pennington County, South Dakota, to be by him delivered to the Warden of the South Dakota State Penitentiary at Sioux Falls, South Dakota, within ten (10) days from the date hereof for the execution of the sentence for the offense of MURDER IN THE FIRST DEGREE, to be held by him pending the final determination of the appeals in this matter, which are automatic, and said sentence to be executed upon final determination of said appeals.

Dated this 29th day of January, 1993.

BY THE COURT:

The Honorable John K. Konenkamp
Circuit Court Judge
Seventh Judicial Circuit

ATTEST:

/s/Bonnie Fitzgerald
Clerk of Courts

By _____
Deputy

(SEAL)

Pennington County, S.D.
FILED
IN THE CIRCUIT COURT

JAN 29 1993

Bonnie Fitzgerald, Clerk
By _____ Deputy

NOTICE OF RIGHT TO APPEAL

You, CHARLES RUSSELL RHINES, are hereby notified that pursuant to SDCL 23A-27A-9, that the Clerk of Courts of the Seventh Judicial Circuit, within ten (10) days after receiving the transcript of this trial, shall transmit the entire record and transcript of the Supreme Court together with a Notice prepared by the Clerk and a report prepared by the trial judge. The Notice shall set forth the title and docket number of this case, your name and the names and addresses of your attorneys, a narrative statement of the Judgment, the offense, and the punishment prescribed.

You are further notified that you have a right to appeal as provided for by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of the State of South Dakota and the State's Attorney of Pennington County and by filing a copy of the same, together with proof of such service with the Clerk of this Court within Thirty (30) days from the date that this Judgment is filed with said Clerk.

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

STATE OF SOUTH DAKOTA, Plaintiff and Appellee, vs. CHARLES RUSSELL RHINES, Defendant and Appellant.	)	WARRANT OF DEATH SENTENCE AND EXECUTION #18268

TO: The Warden of the South Dakota State Penitentiary, Sioux Falls, South Dakota:

BE IT KNOWN that Appellant Charles Russell Rhines, having been convicted of the crime of Murder in the First Degree, and the jury having imposed a sentence of death, and judgment having been duly entered, and a Warrant of Death Sentence and Execution having been delivered to you, the Warden of the State Penitentiary, appointing the week of August 22, 1993, as the week in which the infliction of the punishment of death was to be carried out; and

Appellant having appealed his conviction and sentence to this Court, and this Court having affirmed said conviction and sentence by opinion filed May 15, 1996, and denied rehearing by order filed June 28, 1996, and that said judgment affirming the conviction and sentence having become final on June 28, 1996; and

It appearing that during the pendency of such appeal appellant was not executed pursuant to said sentence and warrant, and has not been executed, and the sentence and judgment inflicting the death penalty stands in full force; and

#18268, State v. Rhines - Warrant of Death Sentence and Execution

The Court having received the application of the Attorney General for an order to issue a new warrant appointing the week in which the infliction of the punishment of death is to be carried out, and the Court having conducted a hearing pursuant to SDCL 23A-27A-31, and having found that there is no legal cause against the execution of the judgment of death, and having entered an order granting said motion for issuance of a death warrant, it is

ORDERED, that you, the Warden of the South Dakota State Penitentiary, are commanded to hold in your custody until the infliction of the punishment of death upon him, unless he is lawfully discharged from such imprisonment, Charles Russell Rhines, and you are commanded to carry out the sentence of death, during the week of January 19, 1997, at a time within such week to be selected by you at your discretion, in the manner and means prescribed by law and in accordance with SDCL Ch. 23A-27A.

In Witness Whereof, I, Robert A. Miller, Chief Justice of the Supreme Court of the State of South Dakota, hereby cause the seal of said court to be affixed hereto.

Dated at Sioux Falls, South Dakota, this 16th day of August, 1996.

BY THE COURT:

Robert A. Miller, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

Supreme Court
State of South Dakota
FILED

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CT EX #5

Judge Konnekamp,

In order to award the proper punishment we need a clear prospective of what "Life In Prison Without Parole" really means. We know what the Death Penality Means, but, we have no clue as to the reality of Life without parole.

The questions We have are as follows:

1. Will Mr Rhines <u>ever</u> be placed in a minimum security prison or be given work release.
2. Will Mr Rhines be allowed to mix with the general inmate population
3. allowed to create a group of followers or admirers.

④ will Mr Rhines be allowed to discuss, describe or brag about his crime to other inmates, especially new and or young men jailed for lessed crimes (ex: Drugs, DwI, assault etc)

⑤ will Mr Rhines be allowed to Marry or have congigal visits.

⑥ will he be allowed to attend college

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

(8) Will Mr Rhines be jailed alone or will he have a cellmate.

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

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

Bill Brown
Martha L. Anderson
Robert W Corrin - Harry Keeney
Mark Dean
Fran Cerasoni

Bobby Walton
Foreperson
Dot Ash
Barnett Blair
Judy Shafer
Delight McGriff
Wilma Woodson

DECLARATION OF Harry Keeney
PURSUANT TO 28 U.S.C. § 1746

I am positive Charles Rhines is guilty. We sentenced him to what he should get a long time ago. We deliberated and all thought he deserved death. I still think he does. We thought that the crime was intentional We also knew that he was a homosexual and thought that he shouldn't be able to spend his life with men in prison. I still believe he deserves the death penalty.

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Harry Keeney

DECLARATION OF Frances Cersosimo
PURSUANT TO 28 U.S.C. § 1746

I was a juror on Charles Rhines's case. I think we came to the right decision. I think his shot at redemption is waiving his appeals and being executed. We deliberated at both the guilt and penalty phases. We followed the judge's instructions. I remember we sent a note about life and death. We talked about that for a while. Our responsibility was profound and we took it seriously. One juror said it would be a deterrent to other criminals if Charles received a death sentence. After discussing this, we agreed the death penalty served no deterrent purpose. One juror made ~~an~~ a comment that if he's gay, we'd be sending him where he wants to go if we voted for LWOP. Rhine's confession jumped out, with his jarring laughter — a huge contrast to his otherwise soft voice. We had Donovan's picture in front of us - the one of his body as it was found. Rhines destroyed his freedom and that was a big thing. I think we made the right decision. Rhines had a fair trial, and deserves his sentence. I stand by my decision today. Rhines had a fair and compassionate jury - very fair. Nobody said he was evil. We judged his deeds, not his character. FC 12-11-16

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Frances Cersosimo 12-11-16

DECLARATION OF KATHERINE ENSLER
PURSUANT TO 28 U.S.C. § 1746 & 18 P.A. CONS. STAT. § 4904

I, Katherine Ensler, do hereby declare and verify as follows:

1. I spoke with Mr. Bennett Blake on December 10, 2010, over the phone with my colleague Alex Kursman.

2. Mr. Blake began the conversation stating that an investigator had called him recently, that his wife was a producer for KOTA, that he knows several defense attorneys, and that he has family in law enforcement.

3. Mr. Blake then stated that he had no remorse for the verdict or sentence.

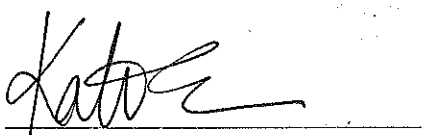
4. He stated that the jury had deliberated, and when asked to speak more about the deliberations, he immediately said, "There was lots of discussion of homosexuality. There was a lot of disgust. This is a farming community."

5. He stated that it was very clear that Mr. Rhines was a homosexual given the testimony at trial. He then said, "There were lots of folks who were like 'Ew, I can't believe that.'"

6. I let Mr. Blake know I was going to write down what he said to us about the case, which he said was fine.

7. Later the same day he sent my colleague a text message telling him he did not want to be contacted again.

8. I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information and belief, subject to 28 U.S.C. § 1746 and 18 Pa. Cons. Stat. § 4904.



Katherine Ensler, Esq.
Research and Writing Specialist
Federal Community Defender Office for the Eastern District of Pennsylvania

Date: December 12, 2016

*2000 S.D. 19, *; 2000 S.D. LEXIS 23, **

CHARLES RUSSELL RHINES, Petitioner and Appellant, v. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Appellee.

20816

SUPREME COURT OF SOUTH DAKOTA

2000 SD 19; 2000 S.D. LEXIS 23

September 16, 1999, Argued
February 9, 2000, Opinion Filed

PRIOR HISTORY: [**1] Hon. Merton B. Tice Jr., Judge. Appeal from the Seventh Judicial Circuit, Pennington County, SD.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner appealed the judgment of the Seventh Judicial Circuit, Pennington County, South Dakota, denying his application for a writ of habeas corpus. Petitioner had been sentenced to death by lethal injection for first-degree murder.

OVERVIEW: An employee, hands bound, was found in the back storeroom of a donut shop stabbed to death. Money was missing from the store. A jury convicted petitioner of first-degree murder and third-degree burglary and sentenced him to death by lethal injection, having found four aggravating circumstances in connection with the killing. On appeal, one of the aggravating circumstances was held invalid, but the conviction and sentence were affirmed. The court held that: (1) petitioner failed to prove that counsel did not pursue a sound trial strategy by not pursuing a coercion argument at a hearing to suppress his confession; (2) petitioner did not show that he was prejudiced by counsel's decision to attack the confession solely on Miranda grounds; (3) there was no support that the jury imposed a death sentence because of the sheer number of aggravating circumstances; and (4) no error in affirming sentence despite invalid aggravating circumstance.

OUTCOME: Judgment affirmed; petitioner failed to prove ineffective assistance of counsel due to strategy of attacking confession solely on Miranda grounds rather than coercion grounds; jury did not impose death sentence because of the sheer number of aggravating circumstances; and no error in affirming sentence despite invalid aggravating circumstance.

CORE TERMS: aggravating circumstances, aggravating circumstance, prosecutor, death sentence, death penalty, depravity, confession, ineffective assistance, ineffective assistance of counsel, invalid, sentencing, sentence, life imprisonment, parole, prong, harmless error analysis, future dangerousness, murder, prison, objective standard of reasonableness, habeas corpus, deliberations, detective, oral argument, prejudiced, invalidity, weighing, coercion, writ of habeas corpus, first-degree

CORE CONCEPTS - Hide Concepts

Criminal Law & Procedure : Habeas Corpus : Cognizable Issues
The remedy of a writ of habeas corpus is in the nature of a collateral attack on a final judgment, therefore, the scope of review is limited. Habeas corpus can be used only to review (1) whether the court had jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases, whether an incarcerated defendant has been deprived of basic constitutional rights. For purposes of habeas corpus, constitutional violations in a criminal case deprive the trial court of jurisdiction.

Criminal Law & Procedure : Habeas Corpus : Custody Requirement
Habeas corpus is available only where the defendant is imprisoned or restrained of his liberty.

Criminal Law & Procedure : Habeas Corpus : Habeas Corpus Procedure
Habeas corpus is not a substitute for direct review. The habeas petitioner has the initial burden to prove by a preponderance of the evidence that he is entitled to relief.

Criminal Law & Procedure : Habeas Corpus : Standards of Review
The habeas court's factual findings are given considerable deference and the appellate court will not reverse these findings unless they are clearly erroneous.

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : Effective Assistance
Whether a defendant has received ineffective assistance of counsel is essentially a mixed question of law and fact. In the absence of a clearly erroneous determination by the circuit court, the appellate court must defer to its findings on such primary facts regarding what defense counsel did or did not do in preparation for trial and in presentation of the defense at trial. The appellate court, however, may substitute its own judgment for that of the circuit court as to whether defense counsel's actions or inactions constituted ineffective assistance of counsel.

Constitutional Law : Criminal Process : Assistance of Counsel
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : Effective Assistance
The U.S. Const. amend. VI right to counsel is the right to the effective assistance of counsel. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : Effective Assistance
The Supreme Court of South Dakota applies a two-prong test to ineffective assistance of counsel claims. In order to meet the burden of proof for a claim of ineffective assistance of counsel, a defendant must prove (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that such deficiency prejudiced the defendant.

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : Effective Assistance
In regard to the first prong of the test for ineffective assistance of counsel, an objective standard of reasonableness, counsel's errors must be so serious that he or she was not functioning as the counsel guaranteed by U.S. Const. amend. VI. As a result judicial scrutiny of counsel's performance must be highly deferential. A defendant asking the court to invoke such scrutiny carries a heavy burden. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound

trial strategy. Moreover, every effort must be made to eliminate the distorting effects of hindsight. The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances.

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : Effective Assistance
In regard to the second prong of the test for ineffective assistance of counsel, prejudice to the defendant, the court must focus on whether the result of the proceeding was fundamentally unfair or unreliable, not merely on whether the outcome would have been different. The law does not entitle the defendant to have his conviction set aside solely because the outcome would have been different but for the counsel's error. Rather, counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Criminal Law & Procedure : Sentencing : Procedures
Where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible.

Criminal Law & Procedure : Sentencing : Sentencing Guidelines
S.D. Codified Laws § 23A-27A-1(6) provides an aggravating circumstance where the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of the mind, or an aggravated battery to the victim.

Criminal Law & Procedure : Sentencing : Capital Punishment : Aggravating Circumstances
In South Dakota, the jury must find one aggravating circumstance beyond a reasonable doubt to impose the death penalty, but they are always free to choose life imprisonment. S.D. Codified Laws §§ 23A-27A-4, -5.

Criminal Law & Procedure : Sentencing : Capital Punishment : Mitigating Circumstances
When considering capital punishment, South Dakota law permits the sentencer to consider all mitigating circumstances, but imposes no standard of proof on mitigation. S.D. Codified Laws §§ 23A-27A-1, -2.

Criminal Law & Procedure : Sentencing : Capital Punishment : Aggravating Circumstances
Criminal Law & Procedure : Sentencing : Capital Punishment : Mitigating Circumstances
South Dakota law does not require the weighing of aggravating circumstances against mitigating factors. Although the jury is free to consider all mitigating circumstances, they need only find one statutory aggravating factor beyond a reasonable doubt to impose the death penalty.

Criminal Law & Procedure : Habeas Corpus : Cognizable Issues
The settled law in South Dakota is that issues, which were raised in a direct appeal, are res judicata on a writ of habeas corpus.

COUNSEL: Michael W. Hanson, Sioux Falls, SD, Attorney for Petitioner and Appellant.

Mark Barnett, Attorney General, Craig M. Eichstadt, Deputy Attorney General, Grant Gormley, Gary Campbell, Sherri Sundem Wald, Assistant Attorneys General, Pierre, SD, Attorneys for Appellee.

JUDGES: ANDERSON, James W., Circuit Judge. MILLER, Chief Justice, and SABERS, AMUNDSON, and GILBERTSON, Justices, concur. ANDERSON, James W., Circuit Judge, for KONENKAMP, Justice, disqualified.

OPINIONBY: James W. Anderson

OPINION: ANDERSON, James W., Circuit Judge.

[*P1] Charles Russell Rhines (Rhines) appeals from a circuit court judgment denying his application for a writ of habeas corpus. We affirm.

FACTS AND PROCEDURE

[*P2] A full review of the facts can be found in this Court's previous opinion affirming Rhines' conviction and sentence. **State v. Rhines, 1996 SD 55, 548 N.W.2d 415, cert. denied**, Rhines v. South Dakota, 519 U.S. 1013, 117 S. Ct. 522, 136 L. Ed. 2d 410 (1996). Only those facts relevant to Rhines' present appeal of the denial of habeas corpus will be reiterated [**2] in this opinion.

[*P3] From late 1991 until he was terminated in February 1992, Rhines worked at the Dig 'Em Donut Shop on West Main Street in Rapid City, South Dakota. On March 8, 1992, the body of Donnivan Schaeffer, an employee of Dig 'Em Donuts, was found in the back storeroom of the donut shop. Schaeffer's hands had been bound, and he had been stabbed in the abdomen, upper back, and the back of the neck. Approximately $ 3,300 in cash, coins, and checks was missing from the store.

[*P4] On July 27, 1992, Rhines was indicted by a Pennington County grand jury in connection with the burglary at Dig Em' Donuts and the murder of Schaeffer. Trial commenced on January 4, 1993, with Rhines being represented by Wayne Gilbert, Joseph Butler, and Michael Stonefield. On January 22, 1993, the jury found Rhines guilty of premeditated first-degree murder and third-degree burglary.

[*P5] On January 26, 1993, the same jury sentenced Rhines to death by lethal injection for the first-degree murder conviction, having found four aggravating circumstances in connection with Schaeffer's death: (1) the offense was committed for the purpose of avoiding, interfering with, or preventing [**3] a lawful arrest under SDCL 23A-27A-1(9); (2) the offense was committed for the purpose of receiving money under SDCL 23A-27A-1 (3); (3) the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture under SDCL 23A-27A-1(6); and (4) the offense was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of the mind under SDCL 23A-27A-1(6).

[*P6] Thereafter, Rhines' trial counsel were appointed to represent him on appeal of his conviction and sentence to this Court. In that appeal, we ruled that the sentencing jury's discretion was not adequately channeled by the "depravity of the mind" aggravating circumstance, as limited by the trial court's instruction. **Rhines, 1996 SD 55, P148, 548 N.W.2d at 449.** However, we held that "the invalidity of the 'depravity of the mind' circumstance did not so taint the penalty proceedings as to mandate reversal of Rhines' death sentence." **Id.** at P169, 548 N.W.2d at 453. Accordingly, this Court affirmed Rhines' conviction and death sentence.

[*P7] Subsequently, Rhines filed an application for writ of habeas corpus. The Honorable Merton Tice Jr. denied the application [**4] and quashed the writ in a written opinion dated October 8, 1998. Additional facts will be recited herein as they relate to specific issues.

STANDARD OF REVIEW

[*P8] The remedy of a writ of habeas corpus "is in the nature of a collateral attack on a final judgment, therefore, our scope of review is limited." Black v. Class, 1997 SD 22, P4, 560 N.W.2d 544, 546.

> Habeas corpus can be used only to review (1) whether the court had jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases, whether an incarcerated defendant has been deprived of basic constitutional rights. For purposes of habeas corpus, constitutional violations in a criminal case deprive the trial court of jurisdiction.

Siers v. Class, 1998 SD 77, P9, 581 N.W.2d 491, 494 (quoting **Black**, 1997 SD 22, P4, 560 N.W.2d at 546). Moreover, "habeas corpus is available only where the defendant is imprisoned or restrained of his liberty." Loop v. Class, 1996 SD 107, P11, 554 N.W.2d 189, 191 (quoting Two Eagle v. Leapley, 522 N.W.2d 765, 768 (SD 1994)).

[*P9] We [**5] have also stated:

> Habeas corpus is not a substitute for direct review ... The habeas petitioner has the initial burden to prove by a preponderance of the evidence that he is entitled to relief. The habeas court's factual findings are given 'considerable deference' and we will not reverse these findings unless they are clearly erroneous.

Siers, 1998 SD 77, PP9-10, 581 N.W.2d at 494 (citations omitted).

[*P10] In regard to ineffective assistance of counsel claims, the following standard applies:

> Whether a defendant has received ineffective assistance of counsel is essentially a mixed question of law and fact. In the absence of a clearly erroneous determination by the circuit court, we must defer to its findings on such primary facts regarding what defense counsel did or did not do in preparation for trial and in ... presentation of the defense at trial. This court, however, may substitute its own judgment for that of the circuit court as to whether defense counsel's actions or inactions constituted ineffective assistance of counsel.

Loop, 1996 SD 107, P11, 554 N.W.2d at 191 (quoting Aliberti v. Solem, 428 N.W.2d 638, 640 (SD 1988)). [**6]

ANALYSIS AND DECISION

ISSUE ONE

[*P11] **Whether the circuit court erred in denying Rhines' application for writ of habeas corpus based on claims of ineffective assistance of counsel.**

[*P12] The Sixth Amendment "right to counsel is the right to the **effective** assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 692 (1984) (emphasis added). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." **Id.**, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93.

[*P13] This Court applies a two-prong test to ineffective assistance of counsel claims. In order to meet the burden of proof for a claim of ineffective assistance of counsel, a defendant must prove (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that such deficiency prejudiced the defendant. **Siers**, 1998 SD 77, P12, 581 N.W.2d at 495; Sprik v. Class, 1997 SD 134, P22, 572 N.W.2d 824, 829; [**7] **Strickland**, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

[*P14] In regard to the first prong of this test, an objective standard of reasonableness, counsel's errors must be "so serious that [he or she] was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." Garritsen v. Leapley, 541 N.W.2d 89, 93 (SD 1995) (quoting **Strickland**, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693)). As a result, "judicial scrutiny of counsel's performance must be highly deferential." **Strickland**, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. A defendant asking this Court to invoke such scrutiny carries a heavy burden:

> Because of the difficulties inherent in making the evaluation, a court must indulge a **strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance**; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered **sound trial strategy**.

Loop, 1996 SD 107, P14, 554 N.W.2d at 192 (emphasis added) (quoting **Strickland**, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95). [**8] Moreover, "every effort [must] be made to eliminate the distorting effects of hindsight." **Strickland**, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." Phyle v. Leapley, 491 N.W.2d 429, 433 (SD 1992) (quoting Kimmelman v. Morrison, 477 U.S. 365, 381, 106 S. Ct. 2574, 2586, 91 L. Ed. 2d 305, 323 (1986)), **overruled on other grounds by** Hopfinger v. Leapley, 511 N.W.2d 845, 847 (SD 1994).

[*P15] In regard to the second prong of the test, prejudice to the defendant, this Court must focus on whether the result of the proceeding was fundamentally unfair or unreliable, not merely on whether the outcome would have been different. **Siers**, 1998 SD 77, P12, 581 N.W.2d at 495; **Sprik**, 1997 SD 134, P22, 572 N.W.2d at 829; **Loop**, 1996 SD 107, P15, 554 N.W.2d at 192; **Hopfinger**, 511 N.W.2d at 847. The law does not entitle the defendant to have his conviction set aside "solely because the outcome would have been different [**9] but for the counsel's error." Lockhart v. Fretwell, 506 U.S. 364, 369-70, 113 S. Ct. 838, 842-

43, 122 L. Ed. 2d 180, 189 (1993). Rather, "counsel's errors [must be] so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." **Strickland**, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

[*P16] With these principles in mind, we now examine Rhines' claims of ineffective assistance of counsel during his trial and original appeal. n1

A. Whether counsel were ineffective because they did not attempt to suppress Rhines' confession on grounds that it was induced by a false promise and thereby coerced and involuntary.

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n1 We have previously recognized that the same ineffective assistance rules apply to both trial counsel and appellate counsel. Lykken v. Class, 1997 SD 29, P27, 561 N.W.2d 302, 309.

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[*P17] Rhines was arrested in King County, Washington, at approximately 12:45 p.m. on June 19, 1992, for a burglary that occurred [**10] in that state. After being read a **Miranda** warning, Rhines asked something to the effect of, "those two detectives from South Dakota are here, aren't they?" Rhines was asked no further questions by the King County authorities.

[*P18] Detective Steve Allender of the Rapid City Police Department and Pennington County Deputy Sheriff Don Bahr arrived at 6:56 p.m. the same day to interrogate Rhines about the burglary and murder at Dig 'Em Donuts. Detective Allender testified that he advised Rhines of his **Miranda** rights before questioning began. During this questioning, Rhines confessed to burglarizing Dig 'Em Donuts and murdering Schaeffer. At some point in the interrogation Rhines also stated, "I don't deserve anything but a kick in the teeth and the electric chair." In response, Detective Allender observed that South Dakota had not executed anyone in fifty years.

[*P19] In Rhines' trial and original appeal, his appointed counsel unsuccessfully argued for suppression of Rhines' confession based on an inadequate **Miranda** warning and insufficient waiver of **Miranda** rights. n2 At the habeas corpus hearing, Michael Stonefield, one of Rhines' appointed [**11] counsel, testified that Rhines' confession was very damaging in both the guilt and penalty phases of the trial, and the attorneys never discussed ways to suppress the confession beyond the **Miranda** challenge. Stonefield also testified that he now believes the confession could have been challenged on grounds that Detective Allender made some type of implied promise to Rhines that he would not get the death penalty. Additionally, Wayne Gilbert, another of Rhines' appointed counsel, testified that he had some concern about Detective Allender's statements in that they may have suggested to Rhines that the chance of the death penalty was remote. n3

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n2 **See Rhines, 1996 SD 55, PP5-37, 548 N.W.2d at 424-29.**

n3 Gilbert, unlike Stonefield, testified that trial counsel did talk about suppressing the confession on these grounds, but Gilbert did not know how fully the discussion was developed into a legal argument.

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[*P20] On this habeas appeal, Rhines argues that his statement could have [**12] been attacked as involuntary, having been coerced by a false promise by Allender that Rhines would not receive the death penalty. He claims that had counsel made this argument at the suppression hearing, his confession could have been thrown out. **See** State v. Smith, 1998 SD 6, P7, 573 N.W.2d 515, 517 (involuntary confessions inherently unreliable).

[*P21] However, in applying the two-prong analysis above, it becomes clear that counsels' failure to make this "coercion" argument was not ineffective assistance. First, there is no indication that counsel's representation fell below an objective standard of reasonableness as required by the first prong of the test. **Siers**, 1998 SD 77, P12, 581 N.W.2d at 495. The test for ineffective assistance is not whether counsel could dream up new trial strategies with the benefit of hindsight. It is whether counsel pursued a sound strategy at the time of the alleged error. **Sprik**, 1997 SD 134, P23, 572 N.W.2d at 829. At the time counsel were developing strategy for suppressing the statement, it was **entirely reasonable** for them not to pursue a coercion argument based on an alleged false [**13] promise by Allender.

[*P22] The reasons for this conclusion are threefold. One, Allender's comment that South Dakota had not executed anyone in fifty years was a true statement and could not be construed as a **false promise** that Rhines would not get the death penalty. Two, there is nothing in the record from Rhines himself indicating that Allender's statement alone induced him to confess. In fact, the only real evidence of this supposed coercion is counsels' supposition at the habeas hearing.

[*P23] Three, a number of factors indicate Rhines' confession was voluntary. Although Allender's statement might have induced Rhines to cooperate, "the question is not whether the ... statements were the cause of the confession but whether those statements were so manipulative or coercive that they deprived [the defendant] of his ability to make an unrestrained, autonomous decision to confess." **Smith**, 1998 SD 6, P8, 573 N.W.2d at 517. Rhines made incriminating statements prior to Allender ever mentioning South Dakota's recent history with the death penalty. n4 Additionally, in response to Allender's comment on the lack of recent executions, Rhines predicted, [**14] "There is a first time for everything." Moreover, as we recognized in Rhines' previous appeal, his statements throughout the interview reflected "an individual who [was] aware of the potentially grave legal consequences of his confession." **Rhines, 1996 SD 55, P37, 548 N.W.2d at 429.** Therefore, Rhines' contention that counsel should have pursued a coercion argument at the suppression hearing is not supported by the evidence, and he has failed to prove that counsel did not pursue a sound trial strategy under the first prong of the ineffective assistance test.

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n4 Rhines had indicated that he was standing in the donut shop with money in his hand when he heard the door to the shop open, and at that point had nowhere to run. He had also asked, "You can't plead guilty to first-degree murder, can you?" to which Allender had responded, "I don't know."

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[*P24] Second, in addition to not meeting the first prong of the ineffective assistance test discussed above, Rhines has not shown, under the [**15] second prong of the test, that he was prejudiced by the decision to attack the confession solely on **Miranda** grounds. **Siers**, 1998 SD 77, P12, 581 N.W.2d at 495. Rhines' brief and oral argument are replete with indications that his trial counsel would have pursued the coercion theory if they could do everything over again. What is utterly lacking, however, is any evidence that their decision to solely pursue a **Miranda** argument prejudiced Rhines, that is, deprived him a fair trial. n5 As a result, Rhines has failed to satisfy either prong of the test for ineffective assistance of counsel in regard to his confession, and hence, we affirm the circuit court's decision on this issue.

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n5 Indeed, Rhines' appellate counsel admitted in oral argument that no prejudice could be shown from trial counsels' decision to pursue only the **Miranda** argument.

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B. Whether counsel were ineffective because they did not appeal the trial court's refusal to answer the jury's questions on prison [**16] **life under Simmons v. South Carolina.**

[*P25] After finding Rhines guilty of first-degree murder, the jury had to choose between the death penalty and life imprisonment without parole. During deliberations, the jury sent the court a note with specific questions about life imprisonment without parole, including:

Will Mr. Rhines be allowed to mix with the general inmate population?

Will Mr. Rhines be allowed to discuss, describe or brag about his crime to other inmates, especially new and/or young men jailed for lesser crimes? (ex: drugs, DWI, assault, etc.)

Will Mr. Rhines be allowed to marry or have conjugal visits?

Will Mr. Rhines be allowed to have or attain any of the common joys of life (ex. TV, radio, music, telephone, or hobbies and other activities to distract him from his punishment)?

Will Mr. Rhines be jailed alone or will he have a cell mate?

What sort of free time will Mr. Rhines have (what would his daily routine be)?

[*P26] The court responded, "All the information I can give you is set forth in the jury

instructions." The court denied defense counsels' request that the court add, "You may not base your decision on speculation [**17] or guess work."

[*P27] After the jury returned a sentence of death for first-degree murder, Rhines' trial counsel filed an appeal with this Court. In that appeal, counsel did not raise the trial judge's refusal to answer the jury's specific questions about prison life. Additionally, at oral argument, counsel did not cite Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994). n6

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n6 Even though **Simmons** was not decided until after briefs were submitted in Rhines' original appeal, this Court's rules allow a party to present late authorities not available at the time of brief-writing, provided certain procedures are followed. SDCL 15-26A-73.

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[*P28] In **Simmons**, the sentencing jury was given a choice between imposing the death penalty or "life in prison," and the trial court refused to instruct the jury that "life in prison" did not include the possibility of parole. Additionally, the prosecution argued that the defendant's future dangerousness could be [**18] considered by the jury in fixing a suitable punishment and that a death sentence would "be an act of self-defense." 512 U.S. at 157, 114 S. Ct. at 2191, 129 L. Ed. 2d at 139. In addition, when the jury sent the court a note asking whether a life sentence carried a possibility of parole, the trial judge instructed them that they were not to consider parole eligibility and that life imprisonment was to be understood in its "plain and ordinary" meaning. 512 U.S. at 160, 114 S. Ct. at 2192, 129 L. Ed. 2d at 140.

[*P29] On appeal, the Supreme Court overturned the conviction on due process grounds. The Court held that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." 512 U.S. at 156, 114 S. Ct. at 2190, 129 L. Ed. 2d at 138.

[*P30] Having put in place this background of the **Simmons** case and the jury's questions regarding prison life at Rhines' sentencing, we now turn to Rhines' ineffective assistance of counsel claim. Rhines argues the trial court should have specifically answered the [**19] jury's questions about the "reality of life without parole," and that its refusal to do so was a violation of due process under **Simmons**. Accordingly, he asserts that counsels' failure to make this argument at oral argument on his original appeal was ineffective assistance.

[*P31] However, a closer analysis reveals that counsels' failure to cite **Simmons** at oral argument in the original appeal did not violate an objective standard of reasonableness or prejudice Rhines, as is required by the test for ineffective assistance. **Simmons** is clearly distinguishable from the case at hand.

[*P32] The Court in **Simmons** made it clear that its decision was based on (1) the state putting the defendant's future dangerousness at issue, and (2) the failure of the trial court to tell the jury that "life in prison" meant life without parole. 512 U.S. at 161-162, 114 S. Ct. at 2193, 129 L. Ed. 2d at 141. Neither of these factors were present at Rhines' sentencing.

[*P33] First, the State never told the jury that future dangerousness was a factor for them to consider in sentencing. Rhines indicates that the prosecutor made such argument indirectly. For [**20] example, the prosecutor told the jury to consider such things as "the death of an innocent witness," and "the greedy killing of ... [Schaeffer]" when evaluating aggravating circumstances. In addition, he suggested that Rhines knew how to kill with a knife, and that many people in the jury did not know how to kill with a knife. Finally, Rhines contends that the "depravity of the mind" circumstance itself n7 suggested that Rhines would be dangerous in the future.

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n7 This aggravating circumstance provides that "the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of the mind, or an aggravated battery to the victim." SDCL 23A-27A-1(6).

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[*P34] However, the prosecutor's comments in this case do not rise to the level of argument in **Simmons**, in which the prosecutor expressly told the jury that imposing the death penalty would "be an act of self-defense." **Id.** at 157, 114 S. Ct. at 2191, 129 L. Ed. 2d at 139. In addition, the facts of [**21] **Simmons** do not support the idea that the "depravity of the mind" circumstance, in and of itself, translates into a statement that Rhines' future dangerousness makes him deserving of the death penalty.

[*P35] Second, even if future dangerousness was somehow made an issue, the jury in Rhines' case was repeatedly told that life imprisonment meant life without parole, which is exactly what is required by **Simmons**. That case did not require the trial court to speculate as to every possible situation which Rhines could encounter while spending the rest of his life in jail. n8 Not only would this require a grotesque extension of **Simmons**, it would force a trial judge to speculate on day-to-day correctional decisions which are entirely within the discretion of the Department of Corrections. Indeed, had the trial judge attempted to answer the jury's questions in this case, he could have said little more than, "It depends," which would have generated even more unanswerable questions from the jury. It is impossible to believe that such a situation was envisioned by the Supreme Court in **Simmons**.

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n8 Rhines relies heavily on isolated language from Justice Souter's concurrence in **Simmons** for the proposition that the trial court should have answered specific questions on prison life: "Whenever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning, and a death sentence following refusal of such a request should be vacated." 512 U.S. at 172-173, 114 S. Ct. at 2198, 129 L. Ed. 2d at 148 (Souter J, concurring). However, an entire reading of the concurrence indicates that Justice Souter is addressing the sentencing term "life imprisonment," not suggesting that a trial court must specifically define "life without parole."

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[*P36] Because the State did not put future dangerousness at issue at Rhines' sentencing, and even if it did, the jury was clearly told that life imprisonment did not include a possibility of parole, **Simmons** is clearly distinguishable. As a result, Rhines cannot prove that his counsel violated an objective standard of reasonableness by failing to cite **Simmons** in his original appeal or that this tactical decision prejudiced Rhines with a fundamentally unfair

result in that appeal. The circuit court was correct in rejecting this issue.

C. Whether counsel were ineffective because they failed to ask for specific instructions that aggravating circumstances must be considered individually.

[*P37] During the sentencing phase of the trial, the prosecutor began his argument by asking the jury to go to the death penalty verdict form when they began deliberations and to determine whether or not one of the aggravating circumstances had been proven to exist beyond a reasonable doubt. He then proceeded to discuss individual aggravating circumstances. In part of this discussion, he stated:

> Consider this aggravating circumstance, the death of an innocent [**23] witness. And when you consider that circumstance, and you consider it just in and of itself; because only one must be proven, based on that circumstance and that circumstance alone, I ask you to return a verdict imposing the sentence of death ... But there is more ... **there is not just one aggravating circumstance in this case, not just one upon which the law justifies the death sentence.** (emphasis added).

[*P38] He later pointed out:

> And on that circumstance alone, that greedy killing of this young man, I would ask you to impose the death penalty ... without even considering his relationship to the first one. But literally what I have talked to you about right now is why, why was Donnivan Schaeffer killed and sometimes in our daily lives we talk about the how and why, and I am going into the how now. **For there is another aggravating circumstance for you to consider, and that's the first one on the sheet.** (emphasis added).

[*P39] Rhines claims that the prosecutor's argument violated South Dakota's capital sentencing scheme. [n9] In this state, the jury must find one aggravating circumstance beyond a reasonable doubt to impose the death penalty, [**24] but they are always free to choose life imprisonment. SDCL 23A-27A-4 and 23A-27A-5. Because of the prosecutor's statements, argues Rhines, the jury chose death solely because of the sheer number of aggravating circumstances. He attaches special importance to this argument because the jury was not instructed on how to decide between life imprisonment and death once they found one aggravating circumstance existed beyond a reasonable doubt. n9 Rhines argues that counsel should have objected to the prosecutor's argument and proposed instructions that the number of aggravating circumstances had no impact on what sentence the jury should impose.

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n9 [n9] South Dakota law permits the sentencer to consider all mitigating circumstances, but

imposes no standard of proof on mitigation. SDCL 23A-27A-1 and 23A-27A-2.

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[*P40] Once again, these arguments fail to meet the test for ineffective assistance of counsel. First, if indeed the jury was given no guidance on how to make a decision between life imprisonment and death [**25] after they found at least one aggravating circumstance, n10 this is clearly permissible under the precedents of this Court and the United States Supreme Court. **Rhines, 1996 SD 55, PP79-82, 548 N.W.2d at 437-38;** Tuilaepa v. California, 512 U.S. 967, 978-79, 114 S. Ct. 2630, 2638-39, 129 L. Ed. 2d 750, 764 (1994); Zant v. Stephens, 462 U.S. 862, 875, 103 S. Ct. 2733, 2741-42, 77 L. Ed. 2d 235, 248-49 (1983). Therefore, this supposed lack of guidance lends no support to Rhines' ineffective assistance argument.

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n10 The jury was told that they could consider all mitigating factors and impose a life sentence even without a reason, which implies that they were given some guidance. However, because the law is clear on this point, we need not dwell on this issue.

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[*P41] Second, the prosecutor did not encourage the jury to give the number of aggravating circumstances special weight in arriving at a death sentence. The prosecutor began his argument by telling the jury that each individual [**26] aggravating circumstance was "so serious and so offensive by just one of those, the law tells you, you are justified in imposing the death penalty, just one." Moreover, it is clear that he argued each aggravating factor separately. The portions of his argument which mention more than one aggravating circumstance are clearly just matters of transition between the different aggravating circumstances. Indeed, the jury would have had difficulty following the argument if he had not used such segues.

[*P42] Third, even if one could interpret the prosecutor's argument as inviting the jury to stack aggravating circumstances, the trial court's instructions adequately guided their deliberations. For example, the jury was instructed that they were not required to impose a death sentence, and they could impose a life sentence for any reason satisfactory to them, or for no reason. In addition, they were informed that "**each alleged aggravating circumstance**, and the evidence applicable thereto, should be considered separately ... **the existence of any one aggravating circumstance should not control or influence your decision with respect to another alleged aggravating circumstance** [**27] ." (emphasis added). Finally, they were told, "If you find **one or more** aggravating circumstances to exist, then you may return one of two verdicts as to the penalty in this case," and they were given a choice between life imprisonment without parole or a death sentence. (emphasis added).

[*P43] Therefore, even if the prosecutor's argument could be interpreted as encouraging the jury to give special weight to the sheer number of aggravating factors, the court's instructions adequately guided their deliberations. The fact that the jury found more than one aggravating circumstance did not undermine their verdict.

[*P44] Thus, there is no support for Rhines' argument that the jury imposed a death sentence because of the sheer number of aggravating circumstances. Likewise, he has failed to prove that counsels' failure to object to the prosecutor's argument during sentencing or

propose specific instructions either violated an objective standard of reasonableness or prejudiced him with a trial that was fundamentally unfair. The circuit court was correct in denying his ineffective assistance claim on this issue.

Remaining Ineffective Assistance Claims

[*P45] [**28] Rhines raises several other issues relating to ineffective assistance of counsel in his brief. However, these remaining instances are either conclusions, which are wholly unsupported by the record, or sound trial strategy when judged by the circumstances facing trial counsel at the time of their decisions. **Strickland**, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95. Therefore, this Court will address the remaining ineffective assistance claims no further than to point out that Rhines has not proven either prong of the ineffective assistance test in regard to these claims. The circuit court's denial of these ineffective assistance issues is affirmed.

ISSUES TWO AND THREE

[*P46] **Whether this Court was required to conduct detailed harmless error analysis under the Eighth Amendment to the United States Constitution regarding the trial court's instructional error defining depravity of the mind, and whether this error was not harmless if the jury found Rhines more worthy of the death penalty because of the number of aggravating circumstances based on the State's argument at the penalty phase.**

[*P47] In support of its death penalty verdict, [**29] the jury cited four separate aggravating circumstances in connection with Schaeffer's death. **Rhines, 1996 SD 55, P166, 548 N.W.2d at 452.** One of these four circumstances was that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of the mind. **Id.**

[*P48] In Rhines' original appeal of his conviction and sentence, this Court ruled that the jury's discretion was not adequately channeled by the depravity of the mind aggravating circumstance, as limited by the trial court's instruction. **Rhines, 1996 SD 55 at PP137-148, 548 N.W.2d at 447-49.** As a result, we held that the depravity of the mind circumstance, as defined by the trial court, was overbroad and vague and hence constitutionally invalid under the **Eighth and Fourteenth Amendments. 1996 SD 55 at P166, 548 N.W.2d at 452.**

[*P49] However, because the jury found four aggravating circumstances, only one of which was invalid, we analyzed what effect, if any, the invalid "depravity of the mind" circumstance had on Rhines' death sentence. Most of this analysis involved a thorough examination of **Zant**, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235. [**30] In that case, the Supreme Court held that the invalidity of one aggravating circumstance did not require reversal of a death sentence if certain procedural safeguards were present in a state's capital punishment law. We determined that South Dakota's capital sentencing scheme, which is modeled after the Georgia death penalty statutes at issue in **Zant**, included all the procedural safeguards emphasized in that case. **Rhines, 1996 SD 55, P169, 548 N.W.2d at 453.** As a result, we ultimately ruled that "the invalidity of the 'depravity of the mind' circumstance did not so taint the penalty proceedings as to mandate reversal of Rhines' death sentence." **Id.**

[*P50] With that background in mind, we turn to two interrelated issues raised by Rhines. First, he claims that this Court erred in not conducting a detailed harmless error analysis in his original appeal after we determined that the "depravity of the mind" circumstance, as limited by the trial court's instruction, was unconstitutional. n11 Second, he claims that the instructional error was not harmless because after the prosecutor's argument in the penalty phase of the trial, the jury imposed the death [**31] penalty based on the sheer number of aggravating circumstances. To state this argument another way, Rhines claims that if the jury imposed the death sentence solely because there were four aggravating circumstances, and one of the four aggravating circumstances was unconstitutional, then his sentence must be reversed.

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n11 This harmless error issue was seemingly raised in Rhines' original appeal. **Rhines, 1996 SD 55, P167, 548 N.W.2d at 453.** However, this Court did not directly address the issue in its previous opinion, so we will dispose of the issue here. **Id.** at PP168-169, 548 N.W.2d at 453.

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[*P51] We first address Rhines' argument that this Court was required to, and did not, undertake a specific harmless error analysis in his original appeal. He contends that this Court was required to give a detailed explanation of what the sentencing jury would have done absent the invalid "depravity of the mind" circumstance.

[*P52] Rhines proceeds down two different avenues to arrive [**32] at this contention. First, he argues that South Dakota should be considered one of the "weighing" jurisdictions whose capital sentencing schemes require the sentencer to weigh aggravating and mitigating circumstances before arriving at a death sentence. In those weighing capital punishment jurisdictions, before it can uphold a death sentence imposed by a sentencer who considered an invalid aggravating circumstance, the appellate court must undertake either a re-weighing of aggravation and mitigation evidence, or a detailed explanation, based on the record, of why the invalid circumstance did not contribute to the sentence obtained. Sochor v. Florida, 504 U.S. 527, 532, 112 S. Ct. 2114, 2118, 119 L. Ed. 2d 326, 336-37 (1992); Clemons v. Mississippi, 494 U.S. 738, 741, 110 S. Ct. 1441, 1444, 108 L. Ed. 2d 725, 733 (1990).

[*P53] However, this argument is without merit. This Court has clearly held that South Dakota law does not require the weighing of aggravating circumstances against mitigating factors. Although the jury is free to consider all mitigating circumstances, they need only find one statutory aggravating factor beyond a reasonable doubt to impose the death [**33] penalty. **Rhines, 1996 SD 55, PP78-82, 169, 548 N.W.2d at 437-38, 453.** As pointed out above, our analysis in Rhines' original appeal satisfied the requirements of **Zant**, which is all that is required in a non-weighing capital punishment state such as **South Dakota. 1996 SD 55, PP168-69, 548 N.W.2d at 453.**

[*P54] Second, Rhines opines that a detailed harmless error analysis is required even if South Dakota is a non-weighing state. In support of this proposition, he cites Stringer v. Black, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992). In that opinion the Supreme Court stated:

> With respect to the function of a state reviewing court in determining whether the

> sentence can be upheld despite the use of an improper aggravating factor, the difference between a weighing State and a nonweighing State is not one of 'semantics,' ... but of critical importance. **In a nonweighing State**, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty. Assuming a determination by the state [**34] appellate court that the invalid factor would not have made a difference to the jury's determination, there is no constitutional violation resulting from the introduction of the invalid factor in an earlier stage of the proceedings. **But when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence**.

503 U.S. at 231-232, 112 S. Ct. at 1137, 117 L. Ed. 2d at 379 (emphasis added) (citation omitted).

[*P55] Contrary to Rhines' interpretation, a review of the above-quoted language reveals that a detailed harmless error analysis is not required in a non-weighing state such as South Dakota. After a thorough analysis of South Dakota's capital sentencing scheme according to the factors in **Zant**, we concluded that the "invalidity of the 'depravity of the mind' circumstance did not so taint the penalty proceedings [**35] as to mandate reversal of Rhines' death sentence." **Rhines, 1996 SD 55, P169, 548 N.W.2d at 453.** After the detailed analysis of **Zant**, it was inherent in our conclusion that the "invalid factor would not have made a difference to the jury's determination." **Stringer**, 503 U.S. at 232, 112 S. Ct. at 1137, 117 L. Ed. 2d at 379. Therefore, this Court committed no error in its analysis of the effect of the jury's consideration of the invalid "depravity of the mind" aggravating circumstance in Rhines' original appeal.

[*P56] As for his next issue, Rhines argues that his conviction cannot survive harmless error analysis because the prosecutor at his trial suggested that the number of aggravating circumstance carried special weight in the jury's sentencing deliberations. As a result, Rhines contends, the invalidity of one of these aggravating circumstances requires reversal of Rhines' sentence.

[*P57] Rhines' argument here has the same basis as his ineffective assistance of counsel claim discussed above under Issue 1(C). He claims that the prosecutor's argument to the jury in the sentencing phase of his trial urged them to stack aggravating circumstances [**36] to arrive at a death sentence. Essentially, Rhines contends that the prosecutor turned his jury into a "weighing" jury.

[*P58] This Court has already rejected the merits of this argument under Issue 1(C). We find that the prosecutor's mention of multiple aggravating factors was merely a matter of transition in his argument, and even if this were not the case, the court's instructions sufficiently guided the jury's sentencing deliberations. As a result, even if this Court were required to undertake a harmless error analysis as urged by Rhines, his argument on this issue would have no bearing on the Court's decision.

ISSUES FOUR THROUGH SIXTEEN

[*P59] All remaining issues in Rhines' brief (Issues 4-16) were fully and fairly considered by this Court in his direct appeal. **Rhines, 1996 SD 55, 548 N.W.2d 415.** Therefore, we are bound by the "settled law in South Dakota that issues, which were raised in a direct appeal, are res judicata on a writ of habeas corpus." **Sprik**, 1997 SD 134, P20, 572 N.W.2d at 828. **See also Loop**, 1996 SD 107, P24, 554 N.W.2d at 193; Lodermeier v. Class, 1996 SD 134, P24, 555 N.W.2d 618, 626; [**37] Scott v. Class, 532 N.W.2d 399, 402 (SD 1995); St. Cloud v. Leapley, 521 N.W.2d 118, 129 (SD 1994). Consequently, these issues are barred by the doctrine of res judicata and will not be considered by this Court in this habeas review.

CONCLUSION

[*P60] Rhines has failed to meet his burden of proof under our two-prong test for ineffective assistance of counsel. Additionally, this Court did not err by not undertaking a reweighing of aggravating and mitigating factors or a detailed harmless error analysis in Rhines' original appeal because such analysis is not required in a nonweighing jurisdiction such as South Dakota. We also reject Rhines' contention that under such analysis, his conviction must be reversed because the prosecutor's argument at the sentencing phase of his trial encouraged the jury to stack aggravating circumstances.

[*P61] Affirmed.

[*P62] MILLER, Chief Justice, and SABERS, AMUNDSON, and GILBERTSON, Justices, concur.

[*P63] ANDERSON, James W., Circuit Judge, for KONENKAMP, Justice, disqualified.

Service: **LEXSEE®**
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Date/Time: Wednesday, May 3, 2000 - 4:51 PM EDT

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
) SS		
COUNTY OF PENNINGTON)		SEVENTH JUDICIAL CIRCUIT
		File No. Civ. 02-924
CHARLES RUSSELL RHINES)		
)		
Petitioner,)		MEMORANDUM DECISION ON MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND ORDER
)		
)		
DOUGLAS WEBER, Warden, South)		
Dakota State Penitentiary,)		
)		
Respondent.)		

I. PROCEDURAL AND FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

Ground One:

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

Ground Two:

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

Ground Three:

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

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

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

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

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

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

Ground Four:

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

Ground Five:

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

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

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

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

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

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

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

Ground Six:

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

Ground Seven:

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

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

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

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

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

Ground Eight:

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

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

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

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

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

Ground Nine:

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

Ground Ten:

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

Ground Eleven:

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

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

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

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

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

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

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

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

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

Ground Twelve:

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

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

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

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

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

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

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

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

Ground Thirteen:

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

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

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

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

The Petitioner's claims will be addressed separately below.

II. ANALYSIS

1. Burden of Proof, Summary Judgment and Review Standards

A. Burden of Proof

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

B. Summary Judgment

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

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

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

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

C. Successive Habeas Petitions and Res Judicata

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

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

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

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

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

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

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

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

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

Ground One
Juror Jack Meyer

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

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

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

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

A: I guess you could say that.

Mr. Groff: Challenge for cause, you Honor.

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

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

Mr. Gilbert: Okay, nothing further.

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

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

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

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

Ground Two
SDCL 23A-27A-1 Unconstitutional

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

SDCL 23A-27A-1 provides:

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

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

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

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

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

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

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

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

Ground Three
Ineffective Assistance of Trial Counsel

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

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

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

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

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

a. Tepid Presentation of Evidence during Penalty Phase

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

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

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

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

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

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

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

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

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

Q: [By Michael Hanson] What did you or your team do with regard to putting together something to perhaps combat the victim impact statement or soften its blow?

A: [By Wayne Gilbert] You mean factually?

Q: Yes.

A. Well, um, ultimately we called Charlie's two sisters as witnesses. Um, we spoke to Charlie himself to try to see if there were others we could call, high school teachers, friends, people like that; really didn't come up with much. We talked about calling Charlie's mother but were told that her state of health was such that it would be disastrous for her.

Q: Who told you that?

A: Charlie's sisters.

Q: Did you ever personally speak with his mother?

A: I did not, no.

HCT at p. 126.

. . . .

Q: Did you ever consider the possibility of moving the Court to allow Charles Rhines to make an unsworn allocution to the jury before they decided on the penalty?

A: Yes.

Q: What developed as a result of those thoughts? Well, did you bring such a motion or request?

A: No.

Q: Why didn't you?

A: To the best of my recollection, ah, Charlie decided that he did not want to do that.

. . . .

Q: Did—we discussed this a little bit earlier before I got—realized my notes got a little mixed up here, Mr. Gilbert, but if you'll bear with me. Did your team ever discuss what type of mitigation defense should be put on in the event this case went to the penalty phase?

A: Yes.

Q: What did your group discuss or think of?

A: Well, we discussed Charlie himself testifying or making some sort of allocution statement, his family, members of his immediate family; and as I said earlier, if we could come up with someone from Charlie's past such as teachers or friends, something along that line, talking to them.

A: Did you ever consider putting in Charles' army records?

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

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

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

HCT at p. 131.

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

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

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

Q: Will you share for us what was discussed?

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

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

HCT at p. 41-42.

. . . .

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

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

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

A: No, I didn't.

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

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

HCT at p. 43-44.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A: Sure.

HCT at p. 84.

Attorney Joe Butler gave similar testimony:

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

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

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

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

HCT 173-174.

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

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

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

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

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

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

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

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

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

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

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

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

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

Ground Four
Prosecutorial Misconduct

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

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

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

A. Hands Tied Before Fatal Wound

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

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

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

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

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

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

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

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

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

B. Improper Argument that Victim was "gutted"

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

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

Q: [By Groff]: What did you observe about that particular wound?

A: [By Dr. Habbe]: This wound measured, width-wise, from a point down here to a point up here measured a little under one and a half inches. The interior part of the wound here has a blunt margin to it and the superior part of the wound has a sharp, pointed appearance to it. Coming from the tip of this wound is a superficial, and I think you can see part of it right here, what would be called an incised wound coming extending all the way up to right here. From here to here this wound is very superficial and barely breaks through the skin.

Q: With respect to that would you said the blunt portion was on the bottom?

A: Right there.

Q: And the sharp portion was on the top?

A: Right. And that's —to get that what you do is you reapproximate the wound and you can see the blunt margin right here and if you put this back together this margin up at the top I pointed.

Q: And then the area above that wound, the lighter area is that consistent with being caused by the sharp portion of that instrument?

A: Yes.

Q: Tell the jury what you found in the internal examination, please.

A: This wound, the margin of your ribs run along in here, so this wound goes in between two ribs. Can I refer to this report?

Q: Yes.

A: This wound goes in between two ribs on the right side of the chest. It goes into the plural space, which is the space where the right lung would be. The right lung is not involved by the stab wound. The wound then hits the diaphragm which bulges up in here and goes in to the abdominal cavity right where the liver would be. The liver is also not involved.

State's Exhibit 3 at 2218-2220.

. . . .

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

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

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

A: It's less.

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

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

State's Exhibit 3 at p.2223.

. . . .

Q: Approximately how far did those wounds go?

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

State's Exhibit 3 at p. 2226.

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

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

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

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

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

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

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

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

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

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

c. Wishard Testimony

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

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

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

d. Jury Selection

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

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

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

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

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

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

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

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

a. Death Penalty in Prosecutor's Sole Discretion

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

SDCL 23A-27A-2 provides:

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

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

As stated in *Moeller III*:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. Constitutional Right to Plead Guilty

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

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

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

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

HCT 169-170.

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

d. Death Qualified Jury

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

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

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

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

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

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

(emphasis added.)

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

e. Proper Pool for Proportionality Review

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

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

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

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

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

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

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

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

(emphasis added.)

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

Ground Six:
Proportionality Review

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

Ground Seven:
Aggravating Factors must be alleged in Indictment

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

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

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

Ground Eight:

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

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

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

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies

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

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

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

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

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

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

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

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

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

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

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

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

Ground Nine:
Ineffective assistance of appellate counsel

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

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

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

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

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

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

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

Ground Ten:
Ineffectiveness of Habeas Counsel

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

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

Ground Eleven:

Lethal injection execution protocol violates Eighth Amendment

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

Ground Twelve:

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

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

Ground Thirteen:

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

A. *Ex Post Facto* Law

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

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

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

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

B. Bill of Attainder

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

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

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

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

(emphasis added.)

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

III. CONCLUSION

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

ORDER

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

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

BY THE COURT

Honorable Thomas L. Trimble
Circuit Judge, Seventh Judicial Circuit

ATTEST:
Ranae Truman, Clerk of Courts

By: _____
Deputy Clerk

(SEAL)

State of South Dakota } Seventh Judicial
County of Pennington } Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this

SEP 17 2012

RANAE L. TRUMAN
Clerk of Courts, Pennington County
By _____ Deputy

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

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

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

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

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

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

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

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

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

WESTLAW

2016 WL 615421
Only the Westlaw citation is currently available.
United States District Court,
D. South Dakota, Western Division.

Rhines v. Young
United States District Court, D. South Dakota, Western Division. | February 16, 2016 | Slip Copy | 2016 WL 615421 *(Approx. 55 pages)*

Charles Russell Rhines, Petitioner,

v.

Darin Young, Warden, South Dakota State Penitentiary; Respondent.

5:00-CV-05020-KES
Signed 02/16/2016

Attorneys and Law Firms

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Craig M. Eichstadt, Sherri Sundem Wald, Paul S. Swedlund, Attorney General of South Dakota, Pierre, SD, for Respondent.

ORDER GRANTING SUMMARY JUDGMENT AND DENYING PETITION FOR HABEAS CORPUS

KAREN E. SCHREIER, UNITED STATES DISTRICT JUDGE

*1 Respondent, Darin Young, moves the court for summary judgment to deny petitioner, Charles Russell Rhines's, petition for habeas corpus. Rhines resists the motion. On October 23, 2015, the court heard oral argument on the motion. For the following reasons, the court grants the respondent's motion for summary judgment and denies Rhines's petition for habeas relief.

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PROCEDURAL HISTORY

Rhines was convicted of premeditated first-degree murder for the death of Donnivan Schaeffer and of third-degree burglary of a Dig'Em Donuts Shop in Rapid City, South Dakota. On January 26, 1993, a jury found Rhines should be subject to death by lethal injection. A state circuit judge imposed this sentence. Rhines appealed his conviction and sentence to the South Dakota Supreme Court. Fourteen issues were raised on direct appeal, including the excusal of prospective juror Diane Staeffler, the state's use of its peremptory challenges, the use of victim impact testimony, and the proportionality review. The South Dakota Supreme Court affirmed Rhines's conviction and sentence, and the United States Supreme Court denied further review on December 2, 1996.

Rhines then applied for a writ of habeas corpus in state court on December 5, 1996. In his state habeas, Rhines raised numerous issues, including ineffective assistance of counsel, the excusal for cause of prospective juror Diane Staeffler, and the constitutionality of the South Dakota capital punishment statutes. The trial court denied Rhines's state habeas on October 8, 1998. The South Dakota Supreme Court affirmed the denial on February 9, 2000.

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

On direct appeal, the Eighth Circuit Court of Appeals vacated the stay and remanded the case so this court could determine whether Rhines could proceed by dismissing the unexhausted claims from his petition. *Rhines v. Weber*, 346 F.3d 799 (8th Cir. 2003). Rhines filed a petition for a writ of certiorari with the United States Supreme Court. The United States Supreme Court granted certiorari to determine whether a district court may issue an order of stay and abeyance in a case involving a mixed petition for habeas corpus, that is, a petition containing exhausted and unexhausted claims. *Rhines v. Weber*, 544 U.S. 269 (2005). The Supreme Court held that stay and abeyance is permissible under some circumstances. *Id.* at 277. The Court remanded the case to the Eighth Circuit Court of Appeals so it could determine whether this court abused its discretion in granting the stay. *Id.* at 279. The Court specifically stated that "once the petitioner exhausts his state remedies, the district court will lift the stay and allow the petitioner to proceed in federal court." *Id.* at 275-76.

***4** Because this court did not have the benefit of the controlling Supreme Court authority when it issued the order of stay and abeyance in 2002, the Eighth Circuit Court of Appeals remanded the case to this court to analyze the petition for writ of habeas corpus under the new test enunciated by the Supreme Court. *Rhines v. Weber*, 409 F.3d 982, 983 (8th Cir. 2005). This court was directed to analyze each unexhausted claim to: (1) determine whether Rhines had good cause for his failure to exhaust the claims in state court, (2) determine whether the claims were plainly meritless, and (3) consider whether Rhines had engaged in abusive litigation tactics or intentional delay. *Id.* (citing *Rhines*, 544 U.S. at 277-28). On December 19, 2009, this court found that Rhines had good cause for failing to exhaust the claims, the claims were not plainly meritless, and Rhines had not engaged in abusive litigation tactics. Docket 150. The court ordered that Rhines's petition for habeas corpus was stayed pending exhaustion in state court. *Id.*

Rhines returned to state court to exhaust his claims. On February 27, 2013, the Circuit Court for the Seventh Judicial Circuit of South Dakota entered judgment in favor of respondent on all of Rhines's claims. Rhines timely requested a Certificate of Appealability from both the Circuit Court and the Supreme Court of South Dakota. His request was denied on July 17, 2013. In early October of 2013, Rhines filed a petition for certiorari with the United States Supreme Court. The Court denied the petition on January 21, 2014. Docket 223. On February 4, 2014, this court lifted the stay on Rhines's federal habeas corpus proceeding. Docket 224. That same day, respondent filed the present motion for summary judgment. Docket 225. On October 22, 2015, the court heard oral argument on the motion and granted the parties an opportunity to submit further briefing on two issues: (1) on the interplay between the standards of review applicable to Rule 56 of the Federal Rules of Civil Procedure and § 2254(d); and (2) on the relationship between *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Cullen v. Pinholster*, 563 U.S. 170 (2011). The parties have completed the round of supplemental briefing.

LEGAL STANDARD

Section 2254 of Title 28, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), governs a district court's authority to grant a writ of habeas corpus to state prisoners. Here, respondent has moved for summary judgment. Generally, when a party moves for summary judgment, Rule 56 of the Federal Rules of Civil Procedure applies, and the court views the facts in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). The Federal Rules of Civil Procedure apply to § 2254 proceedings "to the extent that they are not inconsistent with any statutory provisions[.]" Rules Governing Section 2254 Cases in the United States District Court; *Pitchess v. Davis*, 421 U.S. 482, 489 (1975). The statutory provisions of AEDPA provide the standard of review applicable to § 2254 proceedings, and AEDPA overrides the ordinary rules applicable to motions for summary judgment. *See, e.g.*, *Cummings v. Polk*, 475 F.3d 230, 237 (4th Cir. 2007) (noting on summary judgment that "AEDPA's deferential standard of review [applies] to the state court's adjudication of a petitioner's claims on their

merits."); *Ogan v. Cockrell*, 297 F.3d 349, 356 (5th Cir. 2002) (same); *Workman v. Bell*, 178 F.3d 759, 765 (6th Cir. 1998) (same); *Sanchez v. Shillinger*, 1995 WL 87117 at * 2 (10th Cir. 1995) (unpublished opinion) (same). Thus, although presented as a motion for summary judgment, the court's standard of review is governed by AEDPA.

Where a petitioner's claim has been adjudicated on the merits in a state court proceeding, the district court cannot grant relief unless the state court's adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> ***5** (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2); *see also Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). The standard is "difficult to meet," and "[t]he petitioner carries the burden of proof." *Pinholster*, 131. S. Ct. at 1398. These limitations were designed "to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). A federal court applies a deferential standard of review when assessing a state court's disposition of a habeas petition. *See Barnett v. Roper*, 541 F.3d 804, 814 (8th Cir. 2008).

Under § 2254(d)(1), whether federal law is said to be "clearly established" is determined by "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *see also Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) (explaining "clearly established federal law" refers to "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision."). The statute's "contrary to" and "unreasonable application of" clauses have independent meanings. *See Williams*, 529 U.S. at 405; *Bell*, 535 U.S. at 694. First, "[t]he word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.' " *Williams*, 529 U.S. at 405 (quoting *Webster's Third New International Dictionary* 495 (1976)). Thus, a state court's decision is said to be "contrary to" clearly established federal law "if the state court applies a rule different from the governing law set forth in [the Supreme Court's] cases, or if it decides a case differently than [the Court has] done on a set of materially indistinguishable facts." *Bell*, 535 at 694. Second, as to the "unreasonable application of" clause, a federal court may grant relief if "the state court correctly identifies the governing legal principle from [the Supreme Court's] decisions but unreasonably applies it to the facts of the particular case." *Id.* Under this inquiry, the focus is "whether the state court's application of clearly established federal law is objectively unreasonable." *Id.* Thus, a federal habeas court may not grant relief "simply because that court concludes in its independent judgment that the relevant state-court decisions applied clearly established federal law erroneously or incorrectly." *Williams*, 529 U.S. at 411.

Under § 2254(d)(2), the state court's factual determinations will be upheld unless they are objectively unreasonable. *Barnett*, 541 F.3d at 811. Thus, those determinations are "not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 300 (2010). And § 2254(e)(1) provides that "a determination of a factual issue made by a State court shall be presumed to be correct" and the habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *See Barnett*, 541 F.3d at 811 ("We presume that the state court's findings of fact are correct, and the prisoner has 'the burden of rebutting the presumption of correctness by clear and convincing evidence.' ") (quoting 28 U.S.C. § 2254(e)(1)); *see also Smulls v. Roper*, 535 F.3d 853, 858 (8th Cir. 2008) (same). A state court's adjudication of mixed questions of law and fact is reviewed under § 2254(d)(1). *Garcia v. Bertsch*, 470 F.3d 748, 754 (8th Cir. 2006); *Evans v. Rogerson*, 223 F.3d 869, 872 (8th Cir. 2000).

DISCUSSION

I. Were Rhines's Constitutional Rights Violated by the Admission of His June 19 and 21, 1992 Confessions?

***6** Rhines was arrested in Seattle, Washington, on June 19, 1992, following an investigation of a burglary in that state. At approximately 12:45 p.m., King County Police Officer Michael Caldwell read Rhines the following warning:

> You have the right to remain silent. Number 2, anything you say or sign can be used as evidence against you in a court of law. Number 3, you have the right at this time to an attorney of your own choosing, and to have him present before saying or signing anything. Number 4, if you cannot afford an attorney, you are entitled to have an attorney appointed for you without cost to you and to have him present before saying and signing anything. Number 5, you have the right to exercise any of the above rights at any time before saying or signing anything. Do you understand each of these rights that I have explained to you?

State v. Rhines, 548 N.W.2d 415, 424 (S.D. 1996) (hereinafter *Rhines I*); *see also* Docket 215-70 at 14-15 (Suppression Transcript). Caldwell testified that Rhines did not respond to his inquiry, but instead asked about the presence of two detectives from South Dakota. Caldwell did not respond or attempt to question Rhines. Rather, Rhines was brought to a holding cell at the King County police station.

Approximately six hours later, two Rapid City, South Dakota law enforcement officers, Detective Steve Allender and Pennington County Deputy Sheriff Don Bahr, interviewed Rhines at the King County police station. Rhines initially did not want to have his conversation recorded. Allender testified at Rhines's suppression hearing that he read Rhines his *Miranda* rights prior to questioning. Specifically, Rhines was asked:

> You have a continuing right to remain silent. Do you understand that? Anything you say can be used as evidence against you. Do you understand that? You have the right to consult with and have the presence of an attorney, and if you cannot afford an attorney, an attorney can be appointed for you free of charge. Do you understand that? Having these rights in mind, are you willing to answer questions?

Rhines I, 548 N.W.2d at 424-25 (altered for formatting); Docket 215-70 at 42-43. Allender testified that Rhines responded affirmatively to each of his questions, although Rhines asked if he had a choice regarding the final inquiry. Allender assured Rhines that he did in fact have a choice and did not have to speak with the officers at all. Following that exchange, Rhines agreed to be interviewed with the caveat that he would answer only the questions he wanted. During the course of the interview, Rhines confessed to murdering Schaeffer and to burglarizing the Dig'Em Donuts Shop.

Approximately two hours into the interview, Rhines allowed Allender to switch on the tape recorder. The conversation between Allender and Rhines included the following exchange:

Q: Ok. Um, do you remember me reading you your rights?

A: Yes.

Q: In the beginning? Did you understand all those rights?

A: Yes.

Q: And, uh, having those rights in mind you talked to us here?

A: Yes I have.

Rhines I, 548 N.W.2d at 425; Docket 215-1 at 1-2 (June 19, 1992 audio transcript). Rhines made additional incriminating statements during the taped portion of the interview.

Two days later, on June 21, 1992, Allender and Bahr interviewed Rhines again. This interview was also tape recorded. At the beginning of the interview the following exchange between Allender and Rhines occurred:

*7 Q: ... Ok, Charles, let me ah, advise of your rights again, ok. Could you answer as far as you understand 'em or not. Ok. You have the continuing right to remain silent, do you understand that?

A: Yes.

Q: Anything you say can be used as evidence against you. Do you understand that?

A: Yes.

Q: You have the right to consult with and have the presence of an attorney, and if you cannot afford an attorney, an attorney can be appointed for you free of charge. Do you understand that?

A: Yes.

Q: K. Just like the other night, having these rights in mind, are you willing to answer questions?

A: Yes.

Q: Okay. And that, in this case, it goes, if you don't like the question, it doesn't mean that [you're] supposed to answer it.

A: I can take the 5th Amendment.

Q: Exactly.

Rhines I, 548 N.W.2d at 425; Docket 215-2 at 1 (June 21, 1992 audio transcript). Rhines then made further incriminating statements regarding the Schaeffer murder and the Dig'Em Donuts Shop burglary.

Rhines filed a pretrial motion to exclude his incriminating statements. The trial court denied the motion. Allender was allowed to testify regarding statements Rhines made during the untaped portions of their conversations. Additionally, the state played the recordings of Rhines's June 19 and 21 interviews. Rhines challenged the trial court's admission of his statements on direct appeal. *Rhines I*, 548 N.W.2d at 424-29. Rhines argued that he did not receive adequate *Miranda* warnings prior to the interviews and that he did not give a valid waiver of his *Miranda* rights. The South Dakota Supreme Court disagreed.

A. Was Rhines adequately advised of his *Miranda* rights?

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. In *Miranda v. Arizona*, 384 U.S. 436, 478 (1966), the Supreme Court held that the privilege against self-incrimination enunciated by the Fifth Amendment is implicated whenever law enforcement subjects an individual to custodial interrogation. In that situation, the Court instructed that certain "[p]rocedural safeguards must be employed to protect the privilege[.]" *Id.* at 478-79. Thus, in the absence of other equally effective procedures, officers must apprise a suspect prior to any questioning that:

> he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479. Those rights, as well as the opportunity to exercise them, must be afforded to an individual throughout the interrogation. *Id.* An individual may nonetheless knowingly and voluntarily waive those rights and agree to answer questions or make a statement. *Id.* But if those rights are not conveyed or honored, or if the individual does not knowingly and voluntarily waive them, no evidence obtained as a result of the interrogation may be used against the individual. *Id.*

The Supreme Court has explained, however, that "these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). "Reviewing courts therefore need not examine *Miranda* warnings as if construing a will or defining the terms of an easement." *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989). Rather, "the inquiry is simply whether the warnings reasonably 'conve [y] to [a suspect] his rights as required by *Miranda*.' " *Id.* (quoting *California v. Prysock*, 453 U.S. 355, 361 (1981) (alterations in original)).

***8** The South Dakota Supreme Court observed similar dictates from contemporary United States Supreme Court cases before reaching the merits of Rhines's arguments. *Rhines I*, 548 N.W.2d at 425-26 (citations omitted). First, the Court rejected Rhines's contention that he had not been advised of his right to terminate the officers' questioning at any time. Specifically, the Court noted that Allender's warning on June 19 informed Rhines of his "continuing right to remain silent." *Id.* at 426-27. Earlier that day, Caldwell also told Rhines that he had the right to remain silent and to exercise any of his rights at any time. *Id.* at 427. The Court found that this earlier warning, and the lack of intervening interrogation, served to

reinforce the fact that Rhines was appraised of his continuing right to remain silent. *Id.* Further, the Court found that Rhines's caveat and practice of only answering the questions he wished demonstrated that he understood his right to terminate the questioning at any time. *Id.* (noting that Rhines switched off the tape recorder on occasion to answer certain questions). And on June 21, Allender again informed Rhines of his continuing right to remain silent and that he did not have to answer any questions if he so chose. *Id.*

Second, the South Dakota Supreme Court rejected Rhines's argument that he had not been informed of his right to have an attorney present during questioning. To the contrary, the Court noted that at the outset of the June 19 and 21 interviews, Allender told Rhines that he could consult with and have an attorney present. *Id.* Third, the Court rejected Rhines's assertion that he was not informed that an attorney would be appointed for him if he could not afford one. The Court observed that Allender told Rhines that if he could not afford an attorney, an attorney "can" be appointed for him. While Allender's use of the word "can" may not have been as definitive as stating an attorney "would" or "must" be appointed, the Court concluded that Allender's warning nonetheless reasonably complied with the substance of *Miranda*. *Id.* at 428 (citing *Miranda*, 384 U.S. at 473). Consequently, the Court concluded that Rhines received adequate *Miranda* warnings.

Here, Rhines argues the South Dakota Supreme Court's conclusion was an objectively unreasonable application of clearly established federal law. Specifically, Rhines argues that neither Caldwell's warning nor the two warnings issued by Allender satisfy *Miranda*.

1. Caldwell's warning

Rhines does not attack the substance of Caldwell's warning, but argues that because it was issued roughly six hours prior to his interrogation, it was too remote in time to be effective. Rhines relies on a quotation from the *Miranda* decision that "a warning *at the time of the interrogation* is indispensable ... to insure that the individual knows he is free to exercise the privilege at that point in time." *Miranda*, 384 U.S. at 468 (emphasis added).

Rhines's argument has three problems. The first is that the quoted language from the Court's decision is, in context, a reiteration of the general requirement that the warning must be given prior to any questioning in order to be effective, rather than ascribing a specific temporal limitation on the warning itself. *See id.* at 467-68 ("if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent."). Second, even if the language could be read to support the reading Rhines gives it, Rhines has cited no clearly established federal law from the Supreme Court holding that a six hour delay between a valid warning and a subsequent interrogation prefaced by another warning is impermissible. *See* Docket 232 at 10 (citing *State v. Roberts*, 513 N.E.2d 720 (Ohio 1987)). And finally, the South Dakota Supreme Court did not simply rely on Caldwell's warning. Rather, the Court explained that his warning "reinforced" the fact that Rhines was aware of his *Miranda* rights at the outset of the interview. *Rhines I*, 548 N.W.2d at 427. [1]

2. Allender's warnings

***9** As to the warnings given by Allender, Rhines raises the same three arguments that were made on direct appeal. Namely, that he was not apprised of his right to terminate the questioning if he desired, that he was not told of his right to have counsel present, and that he was not advised that an attorney would be appointed for him if he could not afford one. Rhines does not explain how the South Dakota Supreme Court unreasonably applied clearly established federal law when it rejected these very arguments. Rather, Rhines attempts to relitigate whether, as a matter of substance, the warnings issued by Allender were legally sufficient. That, however, is in contravention of this court's role in federal habeas. *See Bell*, 535 U.S. at 693.

Rhines was told at the beginning of each interview that he had the continuing right to remain silent. He was told that anything he said could be used as evidence against him. He was told that he had the right to consult with or have an attorney present. And he was told that if he could not afford an attorney, an attorney could be appointed for him. Rhines was then asked if he understood those rights, to which Rhines responded affirmatively. Additionally, Rhines was told that he did not have to answer any questions he did not want to answer. Rhines responded that he would answer only the questions he wanted and that he could invoke the Fifth Amendment. Rhines's statements illustrate that he knew he could stop answering questions if he desired. While Allender may not have recited the language of *Miranda* verbatim, "the initial warnings given to [Rhines] touched all the bases required by *Miranda*." *Duckworth*, 492 U.S. at 203. Thus, the court concludes that the South Dakota Supreme

Court did not unreasonably apply clearly established federal law when it determined that Rhines received effective *Miranda* warnings prior to his June 19 and 21, 1992 interviews.

B. Did Rhines validly waive his *Miranda* rights?

As discussed in issue I.A, *supra*, the Supreme Court observed that after a *Miranda* warning is given, an "individual may knowingly and intelligently waive [his *Miranda*] rights and agree to answer questions or make a statement." *Miranda*, 384 U.S. at 479. The question of whether an individual has waived his *Miranda* rights "is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). The court must inquire "into the totality of the circumstances surrounding the interrogation" to make that determination. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

The South Dakota Supreme Court noted that after finding a valid *Miranda* warning, its next task was to determine if Rhines waived his rights. *Rhines I*, 548 N.W.2d at 429. The Court then made its inquiry based upon the totality of the circumstances. *Id.* Finding a valid waiver, the Court explained:

> When asked whether he understood his rights, Rhines responded that he did. He then answered affirmatively when asked if he was willing to answer questions. He was articulate and detailed in making his statements. There is no indication that Rhines was under the influence of drugs or alcohol or that he was otherwise impaired in his functioning. Nor is there any showing that law enforcement officers unlawfully induced or coerced Rhines to make a confession. Additionally, Rhines clearly understood the consequences of relinquishing his rights, including the fact that his statements could be used against him in court. Referring to his reasons for confessing to the murder, Rhines remarked, 'This will come out in court again.' At another point in the questioning, Rhines told Allender and Bahr, 'If you guys bring some of this stuff into court, you're gonna look really foolish[.]' When Allender reminded Rhines that 'this isn't court,' Rhines replied, 'No. But it will be.' Rhines also boldly professed to have knowledge of the statutory and case law. ... [Rhines's] gratuitous statements reflect an individual who is aware of the potentially grave legal consequences of his confession.

***10** *Id.*

Rhines does not take issue with any of the court's findings, but rather contends that his understanding of his rights is irrelevant. Rhines supports this argument with a quotation from *Miranda*:

> [W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, *whatever the background of the person interrogated*, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

Docket 232 at 15 (quoting *Miranda*, 384 U.S. at 469) (alteration and emphasis in original).

First, the Court's subsequent holdings in *Butler* and *Fare* make clear that a defendant's background and understanding are relevant to whether, under the totality of the circumstances, the defendant has effectively waived his or her rights. Second, Rhines's quoted language from *Miranda* stands for the proposition that the warning must be given even if the defendant may already know the rights he or she possesses. *See* *Miranda*, 384 U.S. at 469 (noting the court will not attempt to ascertain "whether the defendant was aware of his rights without a warning being given."). The South Dakota Supreme Court applied the appropriate analysis as dictated by clearly established federal law to determine whether Rhines waived his *Miranda* rights. Thus, the South Dakota Supreme Court's determination that Rhines did in fact waive his *Miranda* rights is not an objectively unreasonable application of the law. Consequently, Rhines is not entitled to relief on this claim.[2]

II. Were Rhines's Sixth and Fourteenth Amendment Rights to an Impartial Jury Violated by the Exclusion for Cause of Prospective Jurors Diane Staeffler and Jack Meyer?

A. Diane Staeffler

*11 During the jury selection process, the defense and state attorneys, and the trial court, each questioned potential juror Diane Staeffler about her views on the death penalty and her ability to follow the court's instructions. *See* *Rhines I*, 548 N.W.2d at 429-30; Docket 215-3 at 12-36. At times, Staeffler responded to questions by the defense by indicating her willingness and ability to serve impartially. For example:

> Q: Okay. Now, I am going to ask you the general question of what your views on the death penalty are.
>
> A: I guess there have been times when I thought that it was something that should maybe happen, but I don't like it, but there have been some things that have happened that I have read about that I felt like maybe that probably would be the best thing, depending on the circumstances.
>
> ...
>
> Q: Now, your feeling concerning the death penalty would not prevent you from following the Court's instructions and considering it; whether you decide to apply it or not is up to you, but you would consider it, would you not?
>
> A: Yeah.

Docket 215-3 at 17-18.

At other times, Staeffler responded to the state's questions by indicating she could not be impartial. For example:

> Q: I'm interested in one of the comments you made ... when you said you'd rather not be on, what were you telling us?
>
> A: I just really don't know, to make a difficult decision for the death penalty, if it came to that and live with it later. I don't know how I could handle something like that and maybe it was the right decision, but I don't know if I could sleep at night knowing that I had done that.
>
> ...
>
> Q: You don't think you could sit in judgment of someone else and follow the instructions and consider and give the death penalty consideration, is that right?
>
> A: No, I couldn't.
>
> Q: Is there anything you think I could say to you that I could change your mind about that?
>
> A: I just don't think I could do it.
>
> Q: Under any circumstances?
>
> A: Well, no.

Docket 215-3 at 19; 22-23. The trial court initially denied the state's request to excuse Staeffler for cause, but allowed the state to conduct further questioning on the subject of capital punishment:

> Q: ... Do you think you'd be leaning in one direction even if you found him guilty and in that second stage do you think you'd be leaning towards one of those verdicts?
>
> A: Yes.
>
> Q: Which one would you be leaning toward?
>
> A: The life sentence.
>
> ...
>
> Q: ... but by your verdict you can't imagine yourself putting, ever putting anyone to death, is that right?
>
> A: No.

Docket 215-3 at 32-33.

The trial court then asked Staeffler a few questions, including whether she could fairly consider both the death penalty and life imprisonment. Staeffler responded, "No, I guess not." *Id.* at 33. Both sides were then given an additional opportunity to question Staeffler. Finally, the trial court asked Staeffler if she wanted a few minutes to think over her responses. After Staeffler declined, the trial court granted the state's motion to excuse her for cause.

The Sixth Amendment guarantees in relevant part that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]" U.S. Const. amend. VI. "[T]he quest [for an impartial jury] is for jurors who will conscientiously apply the law and find the facts." *Wainwright v. Witt*, 469 U.S. 412, 423 (1985); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.") The process of *voir dire* affords both the defense and the state an opportunity to winnow out those prospective jurors who would not perform their duties impartially. *Morgan v. Illinois*, 504 U.S. 719, 733-34 (1992).

***12** In *Witherspoon v. Illinois*, 391 U.S. 510, 521-22 (1968), the Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." A jury so chosen would not be the impartial one demanded by the constitution, but rather "a jury uncommonly willing to condemn a man to die." *Id.* at 521. But states retain a "legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial." *Lockhart v. McCree*, 476 U.S. 162, 175-76 (1986). Thus, in *Wainwright*, the Court articulated a standard by which potential jurors *could* be excused for cause based upon their views on capital punishment. "That standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright*, 469 U.S. at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). Moreover,

> [T]his standard ... does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. ... [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Id. at 424-25.

Rhines challenged the trial court's ruling to exclude Staeffler for cause on direct appeal. *Rhines I*, 548 N.W.2d at 429-433. Rhines argued that the trial court erred by allowing the continued questioning of Staeffler and asserted that the court's decision to excuse her for cause was impermissible. The South Dakota Supreme Court disagreed.

The South Dakota Supreme Court cited relevant United States Supreme Court decisions, such as *Wainwright*, *Witherspoon*, and similar others, and its own state court decisions applying like rules. It rejected Rhines's argument that the trial court abused its discretion by allowing Schaeffer to be re-questioned, noting the oscillations in the answers she gave to whether or not she could impose the death penalty and the reservations she harbored following the court's instructions. *Rhines I*, 548 N.W.2d at 431. The Court similarly rejected Rhines's argument that Schaeffer had been impermissibly excused for cause. The Court summarized a number of Staeffler's statements and, "[b]ased on a complete review of [her] testimony," concluded her views on the death penalty would prevent or substantially impair her ability to serve as a juror. *Id.* at 433.

Here, Rhines challenges the Court's rejection of his claim that Staeffler had been impermissibly excused for cause. Rhines notes that Staeffler affirmed many times that she could serve impartially and would be capable of following the trial court's instructions. Rhines further argues that Staeffler simply expressed her conscientious or religious scruples toward the death penalty, rather than indicating her views would substantially impair her ability to serve as a juror. Thus, according to Rhines, the South Dakota Supreme Court's decision was objectively unreasonable.

This court disagrees. While Staeffler expressed her opinion that she could consider the imposition of the death sentence and would follow the court's orders, she also stated that she did not want to have to make the death penalty determination, that she would lean toward imposing a life sentence over death, and that she would not be able to give fair consideration to both options. The trial court noted that "[t]his juror has given a number of different answers" and "[h]er final word on this was that she would not be able to fairly consider both possibilities[.]" Docket 215-3 at 37. As the Court explained in *Wainwright*, a trial court performs an inherently imprecise science when it is asked to determine whether a juror can or cannot be impartial in a given case. That is why the juror need not make her bias "unmistakably clear" before she may be excluded for cause, and why deference is owed to the trial judge who is able to see and hear the juror. *Wainwright*, 469 U.S. at 425-26. It was only after lengthy questioning by each side, and from the court itself, that the trial court determined Staeffler could not be impartial. Based on Staeffler's varying responses, her statement that she could not give each option fair consideration, and the deference due to the trial court, this court concludes that the South Dakota Supreme Court's determination that Staeffler had properly been excused was not objectively unreasonable.

B. Jack Meyer

***13** Like Diane Staeffler, Jack Meyer was questioned during the jury selection process about his views on capital punishment. Docket 215-3 at 2-10. Also like Staeffler, Meyer first responded to defense counsel's questions indicating an ability to consider the death penalty and follow the court's instructions:

> Q: If you were to be instructed that [a sentence of death] is a penalty to be considered in this case and that you as a juror should understand certain circumstances if there is satisfactory proof of certain circumstances that you should consider imposing the death penalty, you'd be able to follow that instruction?
>
> A: Yes.

Docket 215-3 at 2. But when questioned by the state, Meyer expressed uncertainty about his own impartiality:

> Q: As you sit here today, do you have the ability to envision yourself being a part of that jury that would be seated over there, coming back with a verdict that would put this Defendant to death? Can you envision yourself doing that?
>
> A: Not actually, no.
>
> ...
>
> Q: Let me make it real. Would it be fair to say as [you] look at me right now and as we talk about this, under no circumstances could you ever envision yourself being part of a jury that would impose the death penalty on this Defendant?
>
> A: I guess not.

Docket 215-3 at 6-7. After the state moved to strike Meyer for cause, defense counsel was allowed to ask more questions. This time, however, Meyer gave defense counsel a similar response to the one he provided the state:

> Q: So, in other words, if the Court's instructions lead you to that conclusion that you should consider the penalty of death and actually consider imposing it and being a member of the jury that comes in and says, yes, we think the penalty of death ought to be imposed here, you would be able to follow those instructions?
>
> A: I'm not sure. ... I don't think I could be a part of that jury, I really don't.
>
> Q: Regardless of the Court's instructions, in other words, if the court instructed you to consider it?
>
> A: Yes.
>
> Q: Okay. Nothing further.

Docket 215-3 at 10. Following this last exchange, the trial court granted the state's motion to excuse Meyer for cause.

Rhines did not challenge Meyer's exclusion on direct appeal. Rather, this claim was unexhausted at the time this court entered its order staying the proceedings in 2005.

Thereafter, Rhines returned to state habeas court to pursue his unexhausted claim. The Circuit Court for the Seventh Judicial Circuit of South Dakota rejected Rhines's argument that Meyer had been impermissibly stricken for cause. *See* Docket 204-1 at 10-13. Because the South Dakota Supreme Court denied Rhines's motion for a certificate of probable cause without addressing any of his arguments, the state circuit court is the "last reasoned decision" and therefore the relevant state court adjudication for purposes of this court's review. *Mark v. Ault*, 498 F.3d 775, 783 (8th Cir. 2007) ("Because the Iowa Supreme Court denied Mark review, we apply the AEDPA standard to the decision of the Iowa Court of Appeals because it is the 'last reasoned decision' of the state courts.").

The state circuit court noted that its task was to analyze whether Meyer's views would prevent or substantially impair his ability to serve as a juror. Docket 204-1 at 10. It followed the framework laid out by the South Dakota Supreme Court in *Rhines I* and reviewed Meyer's *voir dire* transcript. *Id.* at 11-12. Based upon its review, the court concluded that Meyer "was unable to perform his duties as a juror in accordance with the Court's instructions and his oath." *Id.* at 12.

***14** Here, Rhines argues that the court's determination was objectively unreasonable. As with Staeffler, Rhines contends that Meyer testified he could follow the court's instructions. Rhines also argues that while Meyer expressed reluctance about imposing the death penalty, Meyer did not indicate that he could never vote in favor of the death penalty or that he would not consider it.

Although Meyer's *voir dire* differs from Staeffler's in that the trial court did not make its own inquiries of him, Meyer's responses nonetheless demonstrate the same inability to serve as an impartial juror as Staeffler's. While Meyer initially stated he could follow the court's instructions and give fair consideration to the imposition of the death penalty, Meyer retreated from that position and testified that he could not envision himself on a jury that would return a verdict of death. Additionally, Meyer held his ground when defense counsel sought to question him further and reiterated that he did not believe he could follow the court's instructions. The state circuit court's conclusion that Meyer's views would prevent or substantially impair his ability to serve as an impartial juror was therefore not objectively unreasonable. Consequently, Rhines is not entitled to relief based on the exclusion of these two potential jurors.

III. Were Rhines's Sixth and Fourteenth Amendment Rights Violated by the State's Use of Peremptory Challenges?

Rhines's third claim is similar to his second, in that it relates to the state's removal of prospective jurors who harbored reservations about imposing the death penalty. These jurors, however, were not excused for cause but were removed by the state's use of its peremptory challenges. Rhines raised this issue on direct appeal, and the South Dakota Supreme Court observed that "[i]t is undisputed the State used peremptory challenges to eliminate prospective jurors who had some reservations about capital punishment." *Rhines I*, 548 N.W.2d at 433. The Court also noted that those jurors "had indicated they could set aside their doubts and be fair and impartial and were therefore not excludable for cause under *Witherspoon* and its progeny." *Id.* The Court ultimately concluded that the use of peremptory challenges in this manner did not offend the state or federal constitution.

The Supreme Court has addressed the use of peremptory challenges by the state. In *Swain v. Alabama*, 380 U.S. 202 (1965), an African-American defendant sought to challenge the state's use of peremptory challenges in his case as violative of the Equal Protection Clause of the Fourteenth Amendment. The Court refused to examine the state's justification for using its peremptory challenges, instead relying on a presumption that the state had properly exercised them. *Id.* at 223. But the Court held that a defendant could make out a prima facie case of discrimination if he or she could demonstrate a widespread or systematic exclusion of potential jurors on the basis of their race in other cases. *Id.* at 223-24. Although much of the *Swain* decision was significantly retooled by *Batson v. Kentucky*, 476 U.S. 79, 91-92 (1986), the *Swain* holding nonetheless provided a detailed discourse about the history and role of the peremptory challenge in American jurisprudence that remains relevant today. The Court observed that "[t]he persistence of peremptories and their extensive use demonstrate the long and widely held belief that [the] peremptory challenge is a necessary part of trial by jury." *Swain*, 380 U.S. at 219. Moreover,

> ***15** The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. ... Although historically the incidence of the prosecutor's challenge has differed from that of the accused, the view

> in this country has been that the system should guarantee "not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held."

Id. at 219-20 (internal citations omitted). And elaborating upon the fundamental difference between the peremptory challenge and challenging a juror for cause, the Court explained:

> While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. ... It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.

Id. at 220-21.

While the permissible scope of using peremptory challenges is broad, the Court in *Batson* held that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Batson*, 476 U.S. at 96. To do so, the defendant was required to show "that he is a member of a cognizable *racial* group" and "that the prosecutor has exercised peremptory challenges to remove from the venire members *of the defendant's race*." *Id.* (emphasis added). Later, the requirement that the defendant first be a member of the excluded racial group was removed by *Powers v. Ohio*, 499 U.S. 400, 416 (1991) ("We conclude that a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race."). Additionally, the Court has expanded the reach of *Batson* to those cases where prospective jurors were peremptorily excluded on the basis of gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994). The Court held "that gender, like race, is an unconstitutional proxy for juror competence and impartiality." *Id.* at 129.

On direct appeal, Rhines argued that it was impermissible for the state to use peremptory challenges to strike members of the jury that expressed reservations about imposing the death penalty but were not otherwise excludable for cause. The South Dakota Supreme Court rejected this argument, noting that, under South Dakota law, the state and defense were given an equal but limited number of peremptory challenges to use as they saw fit. *Rhines I*, 548 N.W.2d at 433. Additionally, it held that *Batson* and its progeny only encompassed those situations where prospective jurors were peremptorily struck on the basis of race or gender. *Id.* The Court concluded that there was no similar rule that would prevent the state from using its peremptory challenges to strike otherwise qualified jurors because they may be less inclined to impose the death penalty. *Id.* at 435.

Here, Rhines argues that under *Witherspoon*, a prosecutor cannot exclude prospective jurors *for cause* simply because they express qualms or religious scruples with imposing the death penalty. Rhines folds that prohibition into the holding from *Batson* to conclude that a state is likewise forbidden from using its *peremptory challenges* to do what it could not do under *Witherspoon*, namely, to exclude jurors who merely harbor reservations about capital punishment.

***16** While *Witherspoon* and the *Batson* line of cases were clearly established at the time of the South Dakota State Supreme Court's decision, Rhines's claim fails because there is no clearly established federal law extending the reach of these separate doctrines into the realm of the other. The two decisions address two distinct aspects of the jury selection process—exclusion of a juror for cause and exclusion of a juror by peremptory challenge. Challenges for cause are unlimited in number but are circumscribed to permit the exclusion of those jurors who demonstrate an inability to serve fairly and impartially. *Swain*, 380 U.S. at 220; *Witherspoon*, 391 U.S. at 519. Peremptory challenges, by contrast, are limited in number but may be used by either side to strike a potential juror for almost any reason except race, gender, or ethnic background. *Batson*, 476 U.S. at 96; *J.E.B.*, 511 U.S. at 146.

An individual's attitude toward the death penalty that the individual may be able to set aside is wholly unlike an immutable characteristic such as the individual's race or gender. *Lockhart*, 476 U.S. at 175-76. ("Furthermore, unlike blacks, women, and Mexican-Americans," potential jurors opposed to the death penalty "are singled out for exclusion in

capital cases on the basis of an attribute that is within the individual's control."); *see also* *Brown v. North Carolina*, 107 S. Ct. 423, 424 (1986) (denial of certiorari) (O'Conner, J., concurring) ("Permitting prosecutors to take into account the concerns expressed about capital punishment by prospective jurors, or any other factor, in exercising peremptory challenges simply does not implicate the concerns expressed in *Witherspoon*."). Moreover, those who oppose the death penalty do not comprise the same type of protected class as those groups that were historically excluded from jury service on account of their race or gender. *Cf.* *J.E.B.*, 511 U.S. at 143 ("Parties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review."). And the Court has rejected the notion that "simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor." *Wainwright*, 469 U.S. at 423. Rather, both the state and the defense are permitted to use their peremptory challenges "to attempt to produce a jury favorable to the challenger." *Lockhart*, 476 U.S. at 178-79; *Holland v. Illinois*, 493 U.S. 474, 484 (1990). Based on the clearly established federal law at the time, this court concludes that the South Dakota Supreme Court did not apply the clearly established federal law in an objectively unreasonable manner. Rhines is not entitled to relief on this claim.

IV. Did Admission of Victim Impact Evidence During the Penalty Phase Violate the *Ex Post Facto* Clause of the Constitution? [3]

South Dakota Codified Law 23A-27A-1 sets forth the aggravating circumstances that make a defendant eligible for the death penalty. Donnivan Schaeffer was murdered on March 8, 1992. The South Dakota legislature amended SDCL 23A-27A-1 to permit "testimony regarding the impact of the crime on the victim's family." [4] The law became effective on July 1, 1992.

***17** Rhines challenged the admission of victim impact evidence by written motion and during trial. The trial court denied Rhines's motion. The trial court found the victim impact testimony was admissible as a response to Rhines's mitigation evidence. Docket 215-71. Moreover, the trial court ordered that the jury would only be allowed "to consider the effect of the victim's loss to his family" and required the state to submit its proposed victim impact evidence in writing to the court for review prior to its admission. *Id.* Following Rhines's mitigation evidence, Peggy Schaeffer, Donnivan Schaeffer's mother, read the paragraph-length statement that had been screened by the trial court. *Rhines I*, 548 N.W.2d at 445. Rhines raised numerous challenges to the admission of this evidence on direct appeal, including whether its admission violated the *Ex Post Facto* clause. *Id.*

Article I, section 10 of the Constitution provides that "[n]o state shall ... pass any ... ex post facto Law[.]" "Although the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,' it has long been recognized by [the Supreme] Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them." *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (citations omitted). The prohibition on *ex post facto* laws "assure[s] that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28 (1981). In a case decided early in this nation's history, Justice Chase observed four categories of laws that fell within this prohibition:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
>
> 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed.
>
> 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.
>
> 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder v. Bull, 3 U.S. 386, 390 (1798) (Chase, J., seriatim) (altered for formatting).

To determine if a law violates the *Ex Post Facto* clause, the Court has adopted the following two-part test: First, "it must be retrospective, that is, it must apply to events occurring before its enactment," and second, "it must disadvantage the offender affected by it." *Id.* at 29. Retrospective laws which are merely procedural, however, do not violate the prohibition on *ex post facto* laws even though they may disadvantage the accused. *Collins*, 497 U.S. at 45;

Dobbert v. Florida, 432 U.S. 282, 293 (1977). These procedural laws are "changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." *Collins*, 497 U.S. at 45. But "by simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause." *Id.* at 46.

The South Dakota Supreme Court concluded that the legislative change that permitted the admission of victim impact evidence during the penalty phase of Rhines's trial was not an *ex post facto* law. *Rhines I*, 548 N.W.2d at 446. The Court did not specifically cite or reference any United States Supreme Court authority concerning the *Ex Post Facto* Clause. For purposes of federal habeas review under § 2254(d)(1), however, this court's inquiry is whether the state court's decision was "contrary to" or involved an "unreasonable application of" clearly established federal law, even if the state court did not cite or rely on that law. *Cf. Early v. Packer*, 537 U.S. 3, 8 (2002) ("Avoiding these pitfalls does not require citation of our cases-indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.") (emphasis in original).

***18** While the South Dakota Supreme Court did not specifically address the *ex post facto* issue, its decision referenced *Payne v. Tennessee*, 501 U.S. 808 (1991), a case where the Supreme Court concluded that victim impact evidence may be admissible during sentencing. *See Payne*, 501 U.S. at 827. The *Payne* decision was handed down almost a year prior to Schaeffer's murder, and the South Dakota Supreme Court concluded that *Payne*'s holding did not implicate the prohibition on *ex post facto* laws. Nonetheless, Rhines argued that the *Payne* opinion required states to pass specific statutes authorizing the admission of victim impact evidence before the evidence was admissible and, because South Dakota's law was not effective until after Schaeffer's murder, that change in the law amounted to an *ex post facto* violation. *Rhines I*, 548 N.W.2d at 446. The South Dakota Supreme Court rejected that argument, noting "no such requirement in the [Supreme] Court's opinion." *Id.*

Here, Rhines argues that because the provision that permits the admission of victim impact evidence was placed in SDCL 23A-27A-1, which is the list of statutory aggravating circumstances, victim impact evidence is an aggravating circumstance. Further, Rhines argues that had the statute not been enacted, victim impact evidence would not have been admissible. Rhines concludes that the 1992 amended version of SDCL 23A-27A-1 ran afoul of several of the categories of *ex post facto* laws identified by Justice Chase in the *Calder* opinion.

First, while SDCL 23A-27A-1 contains a list of the potential aggravating circumstances that may render a defendant eligible for the death penalty, including the provision permitting the admission of victim impact testimony, no plausible reading of the statute supports a conclusion that victim impact evidence was itself a statutory aggravating circumstance. Moreover, the jury was instructed that only four aggravating factors were to be considered; "victim impact testimony" was not one of them. Docket 241-1 at 4.[5] Furthermore, the jury was specifically instructed that they "may not consider this victim impact evidence as an aggravating circumstance." *Id.* at 15. Consequently, adding a provision for victim impact evidence onto SDCL 23A-27A-1 after Schaeffer's murder did not offend the prohibition of *ex post facto* laws.

Second, Rhines provides no authority for his argument that the victim impact evidence was admissible only by virtue of the July 1, 1992 amendment to SDCL 23A-27A-1. As the South Dakota Supreme Court observed, the *Payne* decision was handed down almost a year prior to Schaeffer's murder. *Rhines I*, 548 N.W.2d at 466. And Rhines points to nothing that would refute the court's reading of *Payne* to impose no such requirement.[6]

Finally, even if the amendment of the statute was a pre-requisite for the evidence's admissibility, the statute would amount to a procedural change and would therefore not violate the prohibition on *ex post facto* laws. Although not explicitly stated as such, the South Dakota Supreme Court observed: "In fact, the Court seems to regard victim impact testimony as no different than other evidence for purposes of determining admissibility." *Id.* The *Payne* Court likewise decreed:

> ***19** The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.

Payne, 501 U.S. at 824-25. And "[t]here is no reason to treat such evidence differently than other relevant evidence is treated." *Id.* at 827. Likewise, the Supreme Court long ago acknowledged:

> Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.

Hopt v. People, 110 U.S. 574, 589 (1884). Thus, even if the amended statute applied retroactively to Rhines's case, its procedural nature would not implicate the prohibition on *ex post facto* laws. Therefore, the South Dakota Supreme Court's decision was neither contrary to nor did it involve an unreasonable application of clearly established federal law. Rhines is not entitled to relief on this claim.

V. Was Rhines's Death Sentence Invalidated by the Jury's Finding of an Aggravating Circumstance Later Determined to be Unconstitutionally Vague?

During the penalty phase of Rhines's trial, the jury found four statutory aggravating circumstances had been proved beyond a reasonable doubt: (1) the offense committed was outrageously or wantonly vile, horrible or inhuman in that it involved torture; (2) the offense committed was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of the mind; (3) the offense was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest; and (4) the offense was committed for the purpose of receiving money. *Rhines I*, 548 N.W.2d at 452; SDCL 23A-27A-1(3), (6), & (9); *see also* Docket 215-10 (verdict form). On direct appeal, the South Dakota Supreme Court determined the "depravity of mind" aggravating circumstance, as limited by the trial court's instructions to the jury, was unconstitutionally vague. *Rhines I*, 548 N.W.2d at 449. The Court, nonetheless, determined the invalidity of that factor did not mandate reversal of Rhines's death sentence. *Id.* at 453.

The Supreme Court has formulated different rules that apply to "weighing" and "non-weighing" states in the event that a statutory aggravating factor is determined to be invalid. *See, e.g.*, *Zant v. Stephens*, 462 U.S. 862 (1983); *Stringer v. Black*, 503 U.S. 222 (1992). The Court in *Stringer* described a weighing state as one where "after a jury has found a defendant guilty of capital murder and found the existence of at least one statutory aggravating factor, it must weigh the aggravating factor or factors against the mitigating evidence." *Id.* For the jury to impose the death sentence, "it must determine that the aggravating factor or factors are not outweighed by the mitigating circumstances, if any." *Id.* at 225. The Court described a non-weighing state as one where the jury,

> ***20** must find the existence of one aggravating factor before imposing the death penalty, but aggravating factors as such have no specific function in the jury's decision whether a defendant who has been found to be eligible for the death penalty should receive it under all the circumstances of the case. Instead, under [such a] scheme, " '[i]n making the decision as to the penalty, the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial. These circumstances relate both to the offense and the defendant.' "

Id. at 229-30 (quoting *Zant*, 462 U.S. at 872).

When a statutory aggravating factor is subsequently determined to be invalid, "the difference between a weighing State and a non[-]weighing State is ... of critical importance." *Id.* at 231. In a weighing state,

> when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Id. at 232. By contrast, in a non-weighing state,

> so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty. Assuming a determination by the state appellate court that the invalid factor would not have made a difference to the jury's determination, there is no constitutional violation resulting from the introduction of the invalid factor in an earlier stage of the proceedings.

Id.

With this background in mind, the South Dakota Supreme Court concluded that South Dakota is, like Georgia in *Zant*, a non-weighing state. *Rhines I*, 548 N.W.2d at 453. According to the Court, this is because South Dakota's "statutes do not require the jury to weigh aggravating circumstances against mitigating factors, and the jury was not instructed to consider the specific number of aggravating factors in deciding whether to render a death sentence." *Id.* While the jury is allowed "wide discretion in evaluating mitigating and aggravating facts," the jury is not told to weigh any of the aggravating circumstances it has found against the mitigating factors, if any. *Id.* at 437-38.

The jury in Rhines's case was instructed that it should consider "any and all mitigating circumstances," but it was not told to weigh mitigating evidence against aggravating factors to determine what sentence to impose. *See* Docket 214-1 at 18 (Instruction 16). Rather, the jury was instructed to consider "all of the facts and circumstances of the case, including mitigating and aggravating circumstances which you find to exist[.]" *Id.* at 21 (Instruction 19). And the jury was told that it could impose a life sentence, even if it found the presence of one or more aggravating factors, "for any reason satisfactory to you, or without any reason." *Id.* at 20 (Instruction 18).

Relying on the *Zant* decision,[7] the South Dakota Supreme Court concluded the invalidity of the "depravity of mind" circumstance did not warrant setting aside Rhines's sentence. *Rhines I*, 548 N.W.2d at 453. The Court's determination was briefly revisited during Rhines's first habeas appeal when he argued that the Court was required to perform the constitutional harmless-error analysis described in the *Stringer* opinion. *See Rhines II*, 608 N.W.2d at 314. Rejecting this argument,[8] the Court reiterated its holding from *Rhines I*, explaining that "[t]his Court has clearly held that South Dakota law does not require the weighing of aggravating circumstances against mitigating factors." *Id.*

***21** Here, Rhines does not dispute the South Dakota Supreme Court's observation that its state's laws do not require the jury to mentally weigh aggravating circumstances against mitigating factors in reaching its decision. According to Rhines, however, that is not what differentiates a weighing state from a non-weighing state. Rather, Rhines argues that the test is whether the only aggravating factors a jury may consider are those specified by statute. If so, the state is a weighing state. But if the jury is allowed to consider aggravating factors different from or in addition to those spelled out by statute, then it is a non-weighing state. Rhines draws support for this conclusion from *Brown v. Sanders*, 546 U.S. 212 (2006). There, the Court observed that a weighing state is one in "which the only aggravating factors permitted to be considered by the sentencer were the specified eligibility factors." *Sanders*, 546 U.S. at 217. And a non-weighing state is one where the jury is permitted "to consider aggravating factors different from, or in addition to, the [statutory] eligibility factors[.]" *Id.*

The *Sanders* opinion, however, was decided several years after Rhines's direct appeal and first habeas appeal and therefore is incapable of serving as "clearly established federal law" for purposes of this court's review of either decision. *Cf. Williams*, 529 U.S. at 412 (explaining AEDPA's "clearly established" language refers to "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions *as of the time of the relevant state-court decision*.") (emphasis added). But in formulating its description of weighing and non-weighing states, the *Sanders* opinion relied on two cases that were decided prior to Rhines's direct appeal and first habeas appeal. *See Sanders*, 546 U.S. at 217 (citing *Parker v. Dugger*, 498 U.S. 308 (1991) and *Richmond v. Lewis*, 506 U.S. 40 (1992)). The *Parker* opinion described Florida as a weighing state because "the death penalty may be imposed only where specified aggravating circumstances outweigh all mitigating circumstances." *Parker*, 498 U.S. at 318. The *Richmond* decision involved the statutory scheme of Arizona which, the Court observed, "requires the sentencer to weigh aggravating and mitigating circumstances-to determine the relative 'substan[ce]' of the two kinds of factors." *Richmond*, 506 U.S. at 47 (alteration in original).

While the *Parker* decision observed that Florida's laws define which specific aggravating factors the jury can consider, *Parker*, 498 U.S. at 313, the *Stringer* decision explained that the distinction that makes a state a weighing state is whether the jury "must weigh the aggravating factor or factors against the mitigating evidence." *Stringer*, 503 U.S. at 229. And while *Richmond* was decided after *Stringer*, *Richmond* recited a similar general balancing standard. *See Richmond*, 506 U.S. at 46 ("Second, in a 'weighing' State ... the aggravating and mitigating factors are balanced against each other[.]"). Additionally, neither *Parker* nor *Richmond* invalidated *Zant*, which the *Stringer* court cited approvingly. Thus, *Parker* and *Richmond* are not inconsistent with the framework utilized by the South Dakota Supreme Court. *See also Clemons v. Mississippi*, 494 U.S. 738, 745 (1990) (holding Mississippi is a weighing state because "the jury is required to weigh any mitigating factors against the aggravating circumstances"); *Tuggle v. Netherland*, 516 U.S. 10, 11 (1995) (explaining that *Zant*'s treatment of non-weighing states "did not apply in States in which the jury is instructed to weigh aggravating circumstances against mitigating circumstances in determining whether to impose the death penalty."). As a consequence, the South Dakota Supreme Court's determination that it was a non-weighing state because its state's laws did not require the jury to weigh aggravating and mitigating factors against each other was not an unreasonable application of the clearly established federal law at that time.

Furthermore, to the extent that *Parker* and *Richmond* could be read to be in tension with *Stringer*, that does not benefit Rhines. If the Supreme Court has not "clearly established" an issue of federal law, the state court's interpretation of that unsettled issue will not entitle a habeas petitioner to relief. *See, e.g.*, *Carey v. Musladin*, 549 U.S. 70, 76 (2006) ("Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.' ") (quoting *Carey*, 549 U.S. at 77) (alteration in original); *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented ... 'it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law.' ") (alterations in original); *Knowles v. Mirzayance*, 556 U.S. 111, 121 (2009) ("But this Court has held on numerous occasions that it is not 'an unreasonable application of clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court."). Thus, to the extent *Parker* and *Richmond* created some ambiguity about what classifies a state as a weighing state, the South Dakota Supreme Court's determination that South Dakota was a non-weighing state could not be said to be an unreasonable application of clearly established federal law. Consequently, Rhines is not entitled to relief on this claim.

VI. Are South Dakota's Capital Punishment Statutes Unconstitutional?

***22** In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court declared in a single-paragraph per curiam opinion that the methods of imposing the death penalty in Georgia and Texas violated the constitutional prohibition on cruel and unusual punishment. Nine separate concurring and dissenting opinions followed. Thereafter, the Court clarified that a capital sentencing scheme must not be "arbitrary and capricious," *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (Stewart, J., concurring), nor leave the sentencer with "standardless and unchanneled" discretion. *Godfrey v. Georgia*, 446 U.S. 420, 429 (1980) (Stewart, J., plurality); *see also Zant*, 462 U.S. at 874 ("A fair statement of the consensus expressed by the Court in *Furman* is 'that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' ") (quoting *Gregg*, 428 U.S. at 189).

A. Does the listing of aggravating circumstances under SDCL 23A-27A-1 adequately limit "death eligible" defendants or offenders?

B. Do South Dakota's capital sentencing statutes contain insufficient standards to guide the sentencing body's discretion to determine whether a particular defendant will or will not receive the death penalty?

Rhines combines his argument on issue VI.A with issue VI.B. *See* Docket 232 at 46. Therefore, the court will address them together.

The jury found that four statutory aggravating factors had been proved beyond a reasonable doubt: depravity of mind, torture of the victim, committing the crime to avoid arrest, and committing the crime for pecuniary gain. On direct appeal, the South Dakota Supreme Court determined that the "depravity of mind" aggravating factor was unconstitutionally vague. *See Rhines I*, 548 N.W.2d at 452.

With regard to Rhines's complaints about the other aggravating circumstances, the South Dakota Supreme Court stated:

> Rhines makes the generalized complaint that the pool of death eligible offenses is too broad. *He does not articulate any specific reasons why these classifications are inadequate*. We note the United States Supreme Court has approved a state capital punishment scheme that is nearly identical to South Dakota's death penalty laws. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Rhines' general allegations defy more meaningful review and therefore fail.

Rhines I, 548 N.W.2d at 437 (emphasis added). Rhines also argued in state court that South Dakota's statutes do not adequately guide the jury's determination of how to treat aggravating and mitigating evidence. On direct appeal, the South Dakota Supreme Court rejected this argument, finding that the constitution did not require juries to be instructed to weigh the aggravating and mitigating factors against each other. *Rhines I*, 548 N.W.2d at 438.

Here, in issues VI.A and VI.B, Rhines does not address whether the South Dakota Supreme Court's rejection of his arguments was improper. Rather, while Rhines titles his assertions before this court the same as the exhausted arguments he made before the South Dakota Supreme Court, in substance he is raising new vagueness arguments. And while Rhines attacked the "depravity of mind" portion of the state statute for vagueness on direct appeal, he did not argue that the "torture" portion of the statute was vague.[9] It is well-established that a federal habeas court cannot adjudicate a claim for relief under § 2254 that was not first fairly presented to the state court for resolution. *See, e.g.*, *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); 28 U.S.C. § 2254(b)(1). Nonetheless, because the "depravity of mind" and "torture" circumstances are included in the same statutory subsection, and because Rhines did specifically challenge the "depravity of mind" portion of it for vagueness, this court will assume Rhines fairly presented that issue to the South Dakota Supreme Court.

***23** Additionally, Rhines did not challenge the "avoiding arrest" factor. In fact, the South Dakota Supreme Court observed:

> In addition to the pecuniary gain circumstance, the State also alleged that the offense "was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another." SDCL 23A–27A–1(9). *Rhines does not dispute that he murdered Schaeffer to cover up Rhines' identity as the burglar and assailant so as to satisfy this aggravating circumstance*.

Rhines I, 548 N.W.2d at 450 (emphasis added). Likewise, in another portion of the Court's opinion, it noted that "[i]n Rhines' case, the jury found four statutory aggravating circumstances. ... Rhines did not challenge the jury's finding that he committed the offense for the purpose of avoiding lawful arrest." *Id.* at 452. And when the Court undertook its mandatory appellate review, it found that "Rhines does not dispute that he committed the murder to avoid being arrested, thereby satisfying aggravating circumstance SDCL 23A–27A–1(9); there is substantial evidence in the record to support this finding." *Id.* at 455. Thus, Rhines failed to present this issue in his state court proceedings prior to raising it here. Consequently, the claim fails. *Cf. Baldwin*, 541 U.S. at 29.

1. The "torture" aggravating factor

South Dakota law identifies as an aggravating factor: "The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." SDCL 23A-27A-1(6). In *Gregg*, 428 U.S. at 201, the Court expressed skepticism concerning similar language in a Georgia statute, noting "[i]t is, of course, arguable that any murder involves depravity of mind or an aggravated battery." Even so, however, the Court explained that "this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." *Id.*

In *Tuilaepa v. California*, 512 U.S. 967 (1994), the Supreme Court described the role that aggravating circumstances play in capital sentencing and the degree to which those circumstances must be defined. The Court explained that to be eligible for the death penalty, a defendant must be convicted of a capital crime and the trier must find that at least one aggravating circumstance has been proved. *Id.* at 971-72. As for the aggravating circumstances themselves, they must meet two requirements: "First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of

defendants convicted of murder," and "[s]econd, the aggravating circumstance may not be unconstitutionally vague." *Id.* at 972 (citations omitted).

Because the eligibility decision "fits the crime within a defined classification," the aggravating factors "almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to 'make rationally reviewable the process for imposing the death penalty.' " *Id.* at 973 (quoting *Arave v. Creech*, 507 U.S. 463, 471 (1993)). Thus, to guard against arbitrary and capricious decision making, aggravating factors cannot be " 'too vague.' " *Id.* (quoting *Walton v. Arizona*, 497 U.S. 639, 654 (1990)). An aggravating factor is said to be "too vague" when it "fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman*[.]" *Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988). But the Court explained that its "vagueness review is quite deferential" because the degree of defining aggravating factors " 'is not susceptible of mathematical precision[.]' " *Tuilaepa*, 512 U.S. at 973 (quoting *Walton*, 497 U.S. at 655)). As a basic principle, "a factor is not unconstitutional if it has some 'common-sense core of meaning ... that criminal juries should be capable of understanding.' " *Id.* (quoting *Jurek v. Texas*, 428 U.S. 262, 279 (1976) (White, J., concurring in the judgment)).

***24** The South Dakota Supreme Court noted these guidelines when it analyzed whether the "depravity of mind" factor was unconstitutionally vague. *Rhines I*, 548 N.W.2d at 447. While the South Dakota Supreme Court made no formal findings on whether the "torture" circumstance is vague, it made the following observation when it addressed Rhines's ancillary claim of whether the evidence was sufficient to support the jury's determination that the "torture" factor had been proved beyond a reasonable doubt: [10]

> In its instructions to the jury, the trial court defined torture as follows:
>
> Torture occurs when a living person is subjected to the unnecessary and wanton infliction of severe physical or mental pain, agony, or anguish. Besides serious abuse, torture includes serious psychological abuse of a victim resulting in severe mental anguish to the victim in anticipation of serious physical harm. You would not be authorized to find that the offense of First Degree Murder involved torture simply because the victim suffered pain or briefly anticipated the prospect of death. Nor would acts committed upon the body of a deceased victim support a finding of torture. In order to find that the offense of First Degree Murder involved torture, you must find that the Defendant intentionally, unnecessarily, and wantonly inflicted severe physical or mental pain, agony or anguish upon a living victim.
>
> Rhines correctly observes that the trial court's instructions list two essential elements for a finding of torture: (1) the unnecessary and wanton infliction of severe pain, agony, or anguish; and (2) the intent to inflict such pain, agony or anguish.

Rhines I, 548 N.W.2d at 451-52.

First, this is not a case where the trial court simply repeated the bare statutory language to the jury as part of its instructions without further elaboration. *See Godfrey*, 446 U.S. at 426. Rather, it provided detailed standards and guidelines to channel the jury's decision making. Second, the trial court's explanatory instruction is similar to instructions the Supreme Court has previously upheld against vagueness challenges. *See, e.g.*, *Walton*, 497 U.S. at 654 (noting the instruction asked whether "the perpetrator inflicts mental anguish or physical abuse before the victim's death" and "that mental anguish includes a victim's uncertainty as to his ultimate fate."); *Proffitt v. Florida*, 428 U.S. 242, 255-58 (1976) (plurality opinion) (observing the instruction asked whether the offense involved "the conscienceless or pitiless crime which is unnecessarily tortuous to the victim."). Thus, the South Dakota Supreme Court's determination that the aggravating factor of torture was defined and the jury's decision making was properly guided did not involve an unreasonable application of clearly established federal law.

C. Does South Dakota unconstitutionally mandate the imposition of a death sentence upon a jury's recommendation and foreclose the discretion of the trial judge?

South Dakota Codified Law 23A-27A-4 provides that if a jury determines at least one aggravating circumstance has been proved and recommends a sentence of death, then "the court shall sentence the defendant to death." On direct appeal, Rhines argued that this provision is unconstitutional because it prevents the trial judge from reviewing the appropriateness of the jury's capital sentencing decision. *Rhines I*, 548 N.W.2d at 438.

Additionally, Rhines argued that it denied capital defendants the ability to challenge the sufficiency of the jury's findings. *Id.*

***25** The South Dakota Supreme Court rejected these arguments. First, it found no state or federal constitutional requirement that the trial court review the propriety of the jury's sentencing determination in a capital case. *Id.* Second, the Court explained that capital defendants, unlike non-capital defendants, are afforded an automatic appellate review of their sentence. *Id.* at 439. In accordance with South Dakota law, the South Dakota Supreme Court reviews whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; whether the evidence supported the trier's finding of an aggravating factor; and whether the defendant's sentence was disproportionate from the penalties imposed in similar cases. *Id.* (quoting SDCL 23A-27A-12). Thus, the Court found no constitutional infirmity.

Here, Rhines maintains that the capital sentencing structure is unconstitutional because the trial court is bound to accept the jury's recommendation and because Rhines was not afforded the opportunity to challenge the sufficiency of the sentencing body's findings. The court will address these claims separately.

1. The jury as the sentencer

In *Gregg*, the Supreme Court described the capital sentencing structure of Georgia. Among other provisions, the Court noted that during the penalty phase of the trial, "the jury, or the trial judge in cases tried without a jury, must find beyond a reasonable doubt one of the 10 aggravating circumstances specified in the statute." *Gregg*, 428 U.S. at 164-65. A sentence of death could not be imposed unless the "the jury (or judge) finds one of the statutory aggravating circumstances then elects to impose that sentence." *Id.* at 165-66. And the Court observed that "[i]n jury cases, the trial judge is bound by the jury's r[ec]ommended sentence." *Id.* Thus, South Dakota Supreme Court's determination that the Constitution does not require the trial court to review the propriety of the jury's sentencing decision did not involve an unreasonable application of clearly established federal law.

2. Opportunity to contest the sentencing jury's findings

The Supreme Court in *Gregg* also made the following observation about Georgia's capital sentencing procedures:

> As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine ... whether the evidence supports the jury's finding of a statutory aggravating circumstance[.]

Gregg, 428 U.S. at 197; *see also Zant*, 462 U.S. at 876 (noting the mandatory review proceeding was one of two principal features the Court endorsed to help "adequately protect [ ] against the wanton and freakish imposition of the death penalty."). South Dakota Codified Law 23A-27A-9 affords capital defendants an automatic and mandatory review before the South Dakota Supreme Court, and SDCL 23A-27A-12 requires, *inter alia*, that the court review whether the evidence supports the judge or jury's finding of an aggravating circumstance.

Rhines argues South Dakota's statutory scheme is constitutionally deficient to the extent that it does not afford him the opportunity to contest the sufficiency of the penalty phase evidence at the trial court level. He relies on *Jackson v. Virginia*, 443 U.S. 307 (1979), where the Supreme Court examined the role of federal courts when a habeas petitioner challenges the sufficiency of the evidence underlying his or her state conviction. The Court in *Jackson* also recognized that due process affords every individual the constitutional right not to be convicted of a crime "except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt." *Id.* at 313-14. The Court did not, however, hold that every capital defendant must be afforded the opportunity to challenge the sufficiency of the penalty phase evidence against him at the trial court level.

***26** Rhines ignores that he was afforded the opportunity to contest the sentencing jury's findings by virtue of South Dakota's automatic and mandatory appeal mechanism. Even if a defendant fails to make a sufficiency challenge, the South Dakota Supreme Court will automatically review whether the evidence supports the jury's findings on an aggravating circumstance. The Supreme Court in *Jackson* approved of the very structural mechanism South Dakota employs. Rhines points to nothing in *Jackson* or any other case that requires

more. Consequently, the South Dakota Supreme Court's decision did not involve an unreasonable application of clearly established federal law.

D. Do South Dakota's statutes require proportionality review without providing adequate guidance or a means of collecting information on death penalty cases?
Returning to *Gregg*, the Supreme Court observed that another salient feature of Georgia's capital sentencing scheme was that the state supreme court would conduct a proportionality analysis as part of its mandatory appeal process. *Gregg*, 428 U.S. at 198. The Court explained that the state supreme court "compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." *Id.*

South Dakota Codified Law 23A-27A-8 directs the South Dakota Supreme Court to "accumulate the records of all capital felony cases that the court deems appropriate." When the Court conducts its mandatory review, it considers whether the capital sentence being reviewed is disproportionate to the penalty imposed in "similar cases." SDCL 23A-27A-12(3). On direct appeal, the Court concluded that those "similar cases" were "those cases in which a capital sentencing proceeding was actually conducted, whether the sentence imposed was life or death." *Rhines I*, 548 N.W.2d at 455. The Court explained its rationale: "[b]ecause the aim of proportionality review is to ascertain what other capital sentencing authorities have done with similar capital murder offenses, the only cases that could be deemed similar ... are those in which imposition of the death penalty was properly before the sentencing authority for determination." *Id.* at 455-56 (quotation omitted).

In Rhines's second habeas proceeding, he argued that the proportionality pool should have included all first-degree homicide cases regardless of whether the sentencing phase was reached. The Circuit Court for the Seventh Judicial Circuit of South Dakota rejected Rhines's argument, finding no constitutional infirmity with the state's "similar cases" definition. Docket 204-1 at 38. Because the South Dakota Supreme Court denied Rhines's motion for a certificate of probable cause without addressing any of his arguments, the state circuit court is the last reasoned decision and therefore the relevant state court adjudication for purposes of this court's review.

Here, Rhines reiterates his argument that the South Dakota Supreme Court's definition of "similar cases" is too narrowly defined because it does not include all first-degree homicide cases. He relies on the Supreme Court's approval of the proportionality review procedure in *Gregg*. But while the Court in *Gregg* approved of the general methodology employed by Georgia, it did not command every state to define its proportionality pool in the manner Georgia had done. *Gregg*, 428 U.S. at 195 ("We do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis."). An argument similar to Rhines's was made by the petitioners in *Gregg* and *Proffitt*, and the Court rejected those arguments in footnotes. *Id.* at 204 n.56 (rejecting argument that the proportionality pool was too narrow because "cases involving homicides where a capital conviction is not obtained are not included in the group of cases which the Supreme Court of Georgia uses for comparative purposes"); *see also Proffitt*, 428 U.S. at 259 n.16 (rejecting the argument "that since the Florida Court does not review sentences of life imprisonment imposed in capital cases or sentences imposed in cases where a capital crime was charged but where the jury convicted of a lesser offense" that the state court's proportionality pool was inadequate). Moreover, subsequent to *Gregg*, the Supreme Court held that the constitution does not require that a proportionality review be conducted at all. *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984). What is required in states that employ capital punishment is that the sentencer's discretion be adequately channeled to avoid the arbitrary and capricious imposition of the death penalty that the Court denounced in *Furman*. *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987). While the proportionality review procedure approved of in *Gregg* is an "additional safeguard against arbitrary or capricious sentencing," the Court "did not declare that comparative review was so critical that without it the Georgia statute would not have passed constitutional muster." *Pulley*, 465 U.S. at 45.

***27** Although South Dakota elected to include such an additional safeguard, Rhines has no constitutional basis to contend that the state's chosen definition of "similar cases" must include consideration of all first-degree homicide cases. *Id.* at 875 ("A federal court may not issue the writ on the basis of a perceived error of state law."); *see also Walton v. Arizona*, 497 U.S. 636, 656 (1990), *overruled in part on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002), (rejecting a challenge to the state's proportionality review and concluding that

once the state has undertaken its review in good faith, that "[t]he Constitution does not require us to look behind that conclusion."). While this court disagrees with the parameters the South Dakota Supreme Court has chosen to conduct its proportionality analysis, that is not a sufficient basis for granting Rhines's request for relief because the state circuit court's rejection of Rhines's argument was not contrary to or an objectively unreasonable application of clearly established federal law.

E. Do South Dakota's statutes unconstitutionally mandate consideration of the death penalty for Class A felonies?

South Dakota Codified Law 23A-27A-4 provides that a defendant must be convicted of a Class A felony before the death penalty can be considered. The state does not classify all homicides as Class A felonies; rather, premeditated murder is designated as a Class A felony. SDCL 22-16-4; SDCL 22-16-12. In such cases, "the judge shall consider, or shall include in instructions to the jury for it to consider, any mitigating circumstances" and any of the ten statutory aggravating circumstances "which may be supported by the evidence." SDCL 23A-27A-1. The death penalty may not be imposed unless the sentencing body finds at least one statutory aggravating factor beyond a reasonable doubt. SDCL 23A-27A-4. Even if the sentencing body finds that one or more statutory aggravating factors have been proved, it retains the discretion to recommend a life sentence rather than the death penalty. *Id.* If the death penalty is imposed, an automatic appeal process to the South Dakota Supreme Court is triggered. *See* SDCL 23A-27A-9.

Rhines contends that the so-called mandatory consideration provision of SDCL 23A-27A-1 is unconstitutional because it does not sufficiently narrow the class of persons eligible to receive the death penalty. Rhines relies on *Godfrey*, where the Court noted that states must tailor their capital punishment statutes to avoid their application to "every murder." *Godfrey*, 446 U.S. at 428-29. This was an unexhausted claim when this court stayed the proceedings in 2005. Upon Rhines's return to state court, he presented this claim to the Circuit Court for the Seventh Judicial Circuit of South Dakota. That court rejected Rhines's argument, concluding that the state's statutory scheme as a whole was not unconstitutional. Docket 204-1 at 13-15. Because the South Dakota Supreme Court denied Rhines's motion for a certificate of probable cause without addressing any of his arguments, the state circuit court is the last reasoned decision for purposes of this court's review.

Unlike the situation described in *Godfrey*, South Dakota's capital punishment statutes do not make every perpetrator of a homicide eligible for the death penalty. Rather, a defendant must be convicted of a Class A felony, such as premeditated murder, before consideration of the death penalty can begin. Further, a Class A felony conviction does not make an individual eligible to receive the death penalty unless at least one aggravating circumstance is proven beyond a reasonable doubt, and even then the sentencing body is not required to impose the death penalty. And if the death penalty is imposed, it is subject to automatic review by the South Dakota Supreme Court. Thus, before an individual can receive the death penalty, he must pass through several narrowing mechanisms that separate " 'the few cases in which [the death penalty] is imposed from the many cases in which it is not.' " *Gregg*, 428 U.S. at 198 (quoting *Furman*, 408 U.S. at 313) (White, J., concurring); *see also Zant*, 462 U.S. at 870-73 (analogizing the narrowing procedure in Georgia to the shape of a pyramid). Rhines has not presented any clearly established federal law that would prohibit the procedure provided by SDCL 23A-27A-1 in light of the state's statutory structure as a whole. Consequently, the circuit court's decision was not contrary to or an unreasonable application of clearly established federal law.

VII. Were Rhines's Constitutional Rights Violated by Improper Jury Instructions During the Penalty Phase?

A. The "depravity of mind" instruction

***28** Rhines argues that the "depravity of mind" jury instruction given by the trial court, and later determined to be unconstitutionally vague by the South Dakota Supreme Court, rendered his death sentence unconstitutional. Rhines's argument on this point is co-extensive with his argument in issue V, *supra*. For the reasons set forth in issue V, *supra*, the court concludes that the presence of this instruction did not render Rhines's death sentence unconstitutional.

B. The "pecuniary gain" instruction

As an aggravating factor, the state alleged that Rhines murdered Schaeffer for himself and for the purpose of receiving money. *Rhines I*, 548 N.W.2d at 449; *see* SDCL 23A-27A-1(3). The trial court instructed the jury:

> Before you may find that this aggravating circumstance exists in this case, you must find, beyond a reasonable doubt, that each of the following elements of this aggravating circumstance are proven by the evidence:
>
> 1. That the Defendant committed the murder for himself; and
>
> 2. That he committed the murder for the purpose of receiving money.

Id. at 449-50; *see also* Docket 241-1 at 11 (Instruction No. 9). On direct appeal, Rhines argued that the aggravating circumstance did not apply to him for several reasons, namely because: "(1) aggravating circumstances should not overlap so that the same facts can satisfy more than one circumstance; (2) the receipt of money was a result, rather than a cause, of Schaeffer's murder; (3) the murder was not part of a larger preexisting plan to obtain the money; and (4) Rhines had possession of the money before Schaeffer arrived, so the murder was not necessary to get the money." *Rhines I*, 548 N.W.2d at 450. The South Dakota Supreme Court disagreed with each of these contentions. *Id.*

Here, without specifying which of his arguments the South Dakota Supreme Court wrongly rejected, Rhines argues generally that the trial court's jury instruction violated his due process rights. Rhines notes that due process requires the prosecution to prove every element of an offense beyond a reasonable doubt. *See Jackson*, 443 U.S. at 316. And Rhines relies on *Sandstrom v. Montana*, 442 U.S. 510, 520-21 (1979) for the proposition that jury instructions cannot have the effect of relieving the state of its burden of proof. Beyond those general observations, Rhines does not explain how the instruction violated due process principles.

The language used in the jury instruction largely tracked the language provided in the statute. *See* SDCL 23A-27A-1(3) ("The defendant committed the offense for the benefit of the defendant or another, for the purpose of receiving money or any other thing of monetary value[.]"). The instruction stated two elements. Rhines has not shown that the jury was required to find anything beyond or different from the elements as phrased in the instruction. And the instruction properly noted that the jurors had to find each of the elements beyond a reasonable doubt for the factor to apply.

Nonetheless, Rhines argues that the South Dakota Supreme Court should have asked "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991).[11] Such an inquiry would have been proper if the jury instruction was ambiguous. *See id.* ("[I]n reviewing an ambiguous instruction such as the one here ..."). But Rhines does not explain how the instruction could be construed as ambiguous. By its own terms, the instruction asked the jury whether Rhines committed the murder for himself and for the purpose of receiving money. In general, "[t]he burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). There is no ambiguity with what the jury was asked to decide, and the instruction comported with what was required to be shown by statute. Thus, Rhines's burden is "especially heavy because no erroneous instruction was given." *Id.* at 155. Rhines's unsubstantiated allegation that an otherwise properly phrased instruction nonetheless offended his rights to due process is insufficient. Consequently, the South Dakota Supreme Court's conclusion that the trial court did not err by giving its pecuniary gain instruction is not contrary to or an unreasonable application of clearly established federal law.

C. Did the trial court err in its refusal to give Rhines's proposed jury instruction number 8?

***29** On direct appeal, Rhines argued the trial court erred by not giving his proposed instruction number 8, which would have asked the jury to determine whether the aggravating circumstances against him were "sufficiently substantial" to warrant the death penalty. *Rhines I*, 548 N.W.2d at 442-43. The South Dakota Supreme Court rejected Rhines's argument. *Id.* at 443. The failure to give a requested jury instruction may provide a basis for habeas relief only when it can be said that the failure amounted to denial of due process. *See Cupp v. Naughten*, 414 U.S. 141, 147 (1973). While Rhines's federal habeas petition listed this perceived error as one of his claims for relief, Docket 73 at 10, Rhines provides no argument on the matter here. Consequently, the court concludes Rhines has not met his burden to justify relief on this claim.

D. Did the trial court err in its refusal to give Rhines's proposed instruction number 9?

On direct appeal, Rhines argued that the trial court erred when it refused to give his proposed instruction number 9, which would have told the jury that the law presumes an appropriate punishment for first degree murder is life imprisonment without parole. *Rhines I*, 548 N.W.2d at 443. The South Dakota Supreme Court rejected Rhines's argument. While Rhines's habeas petition listed this perceived error as one of his claims for relief, Docket 73 at 10, Rhines has provided no argument on the matter here. Consequently, the court concludes Rhines has not met his burden to justify relief on this claim.

E. Did the trial court err in its refusal to give Rhines's proposed instruction number 11?

On direct appeal, Rhines argued that the trial court erred when it refused to give his proposed jury instruction number 11. That instruction stated:

> The two specified sentences that you are to consider in this case are death, and life in prison without parole.
>
> In your deliberations, you are to presume that if you sentence Charles Russell Rhines to death, he will in fact be executed by lethal injection. You must not assume or speculate that the courts, or any other agency of government, will stop the defendant's execution from taking place.
>
> Similarly, you are to presume that if you sentence Charles Russell Rhines to life in prison without parole, he will in fact spend the rest of his natural life in prison. You must not assume or speculate that the courts, or any other agency of government, will release the defendant from prison at any time during his life.

Rhines I, 548 N.W.2d at 444. The trial court refused this instruction, and instead instructed the jury as follows:

> The decision you make will determine the sentence which will be imposed by the court. If you decide on a sentence of death, the court will impose a sentence of death. If you decide on a sentence of life imprisonment without parole, the court will impose a sentence of life imprisonment without parole.

Id.; *see also* Docket 241-1 at 21 (Instruction No. 19). The South Dakota Supreme Court found that the trial court's instruction was a full and correct statement of the law, and the trial court did not err in its refusal of Rhines's proposed instruction. *Rhines I*, 548 N.W.2d at 444.

The portion of Rhines's proposed instruction that was not included in the court's jury instruction would have told the jury not to speculate on the possibility that Rhines's death sentence would be commuted or on the possibility that he may later be released if he were sentenced to life imprisonment without parole. Rhines argues this language was necessary for several interrelated reasons. First, he notes that a defendant's future dangerousness is not listed as an aggravating factor under SDCL 23A-27A-1. Second, Rhines argues that his future dangerousness was nonetheless presented to and considered by the sentencing jury as an aggravating factor. Finally, consideration of Rhines's future dangerousness caused the sentencing jury to become more inclined to sentence him to death in order to prevent him from ever being released back into the community. Therefore, his proposed instruction was necessary to cure this inequity, and the rejection of his proposed instruction was a denial of due process.

***30** Although Rhines argued on direct appeal that the trial court's instruction was inadequate, he did not argue that its inadequacy was because his future dangerousness had been put in issue. This issue was raised, however, as one of Rhines's ineffective assistance of counsel claims litigated in his first habeas appeal. *See Rhines II*, 608 N.W.2d at 309-311. The South Dakota Supreme Court rejected this claim and stated:

> First, the State never told the jury that future dangerousness was a factor for them to consider in sentencing. Rhines indicates that the prosecutor made such argument indirectly. For example, the prosecutor told the jury to consider such things as "the death of an innocent witness," and "the greedy killing of ... [Schaeffer]" when evaluating aggravating circumstances. In addition, he suggested that Rhines knew how to kill with a knife, and that many people in the jury did not know how to kill with a knife. Finally, Rhines contends that the "depravity of the mind" circumstance itself suggested that Rhines would be dangerous in the future.
>
> However, the prosecutor's comments in this case do not rise to the level of argument in [*Simmons v. South Carolina*, 512 U.S. 154 (1994)], in which the prosecutor expressly told

> the jury that imposing the death penalty would "be an act of self-defense." *Id.* at 157, 114 S.Ct. at 2191, 129 L.Ed.2d at 139. In addition, the facts of *Simmons* do not support the idea that the "depravity of the mind" circumstance, in and of itself, translates into a statement that Rhines' future dangerousness makes him deserving of the death penalty.

Id. at 311.

To the extent that Rhines now argues that his future dangerousness in fact was put before the jury because of the allegedly suggestive comments by the prosecutor and the "depravity of mind" instruction, after a review of the record, this court concludes that the South Dakota Supreme Court's determination that future dangerousness was not put at issue and was not a factor for the jury's consideration was not an objectively unreasonable one. And to the extent Rhines disagrees with the Court's finding in *Rhines I* that the trial court's instruction was proper, this court concludes that that decision was not contrary to nor an unreasonable application of clearly established federal law.

F. Did the trial court improperly respond to a jury note concerning the meaning of life without parole?

During the sentencing phase, the jurors sent the trial judge a note containing several questions. The note began:

> Judge Konnekamp [sic],
>
> In order to award the proper punishment we need a clear prospective [sic] of what "Life In Prison Without Parole" really means. We know what the Death Penalty Means, but we have no clue as to the reality of Life Without Parole.

Rhines I, 548 N.W.2d at 442. The note contained a number of questions related to prison life. The trial court responded to the note with the following written statement: "I acknowledge your note asking questions about life imprisonment. All the information I can give you is set forth in the jury instructions." *Id.*

Rhines's claim here is a combination of arguments he made in separate proceedings. On direct appeal, Rhines argued that the jury note showed that the trial court's instruction regarding the meaning of a life imprisonment or death sentence was insufficient and that his proposed instruction number 11 should have been given. *Rhines I*, 548 N.W.2d at 444. The Court rejected Rhines's argument. *Id.* Then in Rhines's first habeas appeal, he argued that his counsel was ineffective because they did not appeal the trial court's refusal to answer the jury note in accordance with *Simmons v. South Carolina*, 512 U.S. 154 (1994). *Rhines II*, 608 N.W.2d at 309-11. The Court rejected the ineffective assistance argument and explained that *Simmons* was distinguishable. *Id.* at 311.

***31** In *Simmons*, the defendant was legally ineligible for parole under South Carolina law due to his criminal history. *Simmons*, 512 U.S. 156. The Supreme Court found that the prosecution had put the defendant's future dangerousness into issue during closing argument by telling the jury that its task was to decide "what to do with [the defendant] now that he is in our midst" and that a death sentence "will be an act of self-defense." *Id.* at 157. Concerned that the jury might believe that the defendant would be eligible for parole even though he was not, defense counsel asked the court to clarify the meaning of "life imprisonment" for the jury and to tell them that the defendant was not eligible for parole. *Id.* at 158. The trial court refused. After 90 minutes of deliberation, the jurors sent the judge a note asking: "Does the imposition of a life sentence carry with it the possibility of parole?" *Id.* at 160. The trial court responded by instructing the jurors not to consider parole, but did not tell them that the defendant was parole ineligible. *Id.* (noting the court only told the jurors that "[t]he terms life imprisonment and death sentence are to be understood in their [plain] meaning."). Twenty-five minutes later, the jury returned a verdict of death. *Id.*

The Supreme Court concluded that the defendant's due process rights had been violated by the trial court's refusal to clarify that a life sentence would not include the possibility of parole in his case. *Id.* at 161. More specifically, the Court noted that the prosecution had put the defendant's future dangerousness into issue, and that the jury may have been concerned that the only way to ensure the defendant would not be released back into the community was to issue a death sentence. *Id.* By prohibiting the defendant from rebutting this suggestion with factually accurate information concerning his parole ineligibility, the trial court denied the defendant due process. *Id.* at 165.

In rejecting Rhines's ineffective assistance claim, the South Dakota Supreme Court held that *Simmons* was distinguishable for several reasons. First, unlike in *Simmons*, the prosecution

did not put Rhines's future dangerousness into issue. *Rhines II*, 608 N.W.2d at 311. Second, even if Rhines's future dangerousness was in issue, the jury in Rhines's case was instructed that life imprisonment meant life without parole, which the trial court in *Simmons* failed to do. *Id.*

Here, Rhines contends that pursuant to *Simmons*, an obligation was imposed on the trial court by virtue of the jury note to further clarify its instruction on the meaning of life imprisonment without parole. This court disagrees, however, because the instruction given told the jury that a sentence of life imprisonment was without parole. No further clarification was needed. Thus, the South Dakota Supreme Court's decision that *Simmons* did not apply was not contrary to or an unreasonable application of clearly established federal law.

VIII. Did Sufficient Evidence Support the Jury's Finding of Two Statutory Aggravating Circumstances?

On direct appeal, and in addition to the "depravity of mind" factor, Rhines argued that two statutory aggravating factors did not apply to him, namely: (1) that Rhines killed Schaeffer for pecuniary gain; and (2) that Rhines tortured Schaeffer. *Rhines I*, 548 N.W.2d at 449-52. Rhines did not dispute that he murdered Schaeffer to avoid arrest in satisfaction of a third aggravating factor. [12]

Here, Rhines contends that the evidence was insufficient to support the jury's findings regarding the pecuniary gain and torture factors. The court's inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original). Rhines's burden is a high one because it "is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos v. Smith*, 132 S. Ct. 2, 3 (2011) (per curiam). And "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.' " *Id.* (quoting *Renico v. Lett*, 559 U.S. 766, 773 (2010)).

A. Sufficiency of the evidence supporting the pecuniary gain factor

***32** On direct appeal, Rhines did not specifically contest the sufficiency of the evidence to satisfy the pecuniary gain factor. Rather, he argued the trial court erred in its instructions to the jury and asserted that the factor "should not apply" to him because: "(1) aggravating circumstances should not overlap so that the same facts can satisfy more than one circumstance; (2) the receipt of money was a result, rather than a cause, of Schaeffer's murder; (3) the murder was not part of a larger preexisting plan to obtain the money; and (4) Rhines had possession of the money before Schaeffer arrived, so the murder was not necessary to get the money." *Rhines I*, 548 N.W.2d at 450. The South Dakota Supreme Court stated that "we do not agree that the facts fail to satisfy the pecuniary gain circumstance for any of the reasons listed by Rhines," and it recited a number of facts in support of that conclusion. *Id.*

When Schaeffer arrived at the Dig'Em Donuts Shop, Rhines was already inside the store. As a former employee, Rhines knew where the money in the store was kept and believed the store would be vacant. When Rhines spoke to Allender and Bahr, he explained that he was surprised by Schaeffer's arrival. Schaeffer was a trusted employee of the Dig'Em Donuts stores, and it was his responsibility to transport money from the West Main Street store location to the other stores in the area. From this, the South Dakota Supreme Court observed that it would be reasonable to infer that Schaeffer would not have allowed Rhines to continue his theft of the store unopposed. And although Rhines may not have intended to kill Schaeffer when Rhines first entered the store, the evidence suggested that Rhines's motives changed when he heard Schaeffer enter. Specifically, Rhines thought about the situation for a moment, went to retrieve his knife, and hid behind an office door. Rhines then attacked and killed Schaeffer. Rhines's statements to Allender indicated that he killed Schaeffer before he retrieved around $1,600 from the store:

> Rhines: I went back in the office and finished getting, finished getting what money I could find. About $1,700. Actually about um, about, oh probably 16, 15-1600 out of there. Change fund, basically.
>
> Allender: Yeah. And then[?]

> Rhines: Cleaned out the change fund on the wall.

Id. at 450. On those facts, viewed in the light most favorable to the prosecution, a rational factfinder could conclude that Rhines killed Schaeffer for himself and for the purpose of obtaining money.

Rhines does not refute any of the Court's observations. Instead, he denies an argument that is raised in respondent's brief, namely that Rhines murdered Schaeffer so that he could buy himself a plate of French fries at Perkins. Docket 232 at 74. Rhines then faults the South Dakota Supreme Court for pointing to only "scant additional evidence to support sufficiency of the pecuniary gain aggravator." Docket 232 at 75. But Rhines never asked the South Dakota Supreme Court to make that determination regarding this factor, only the torture factor. *Contra* *Rhines I*, 548 N.W.2d at 450-51 ("Rhines disputes [the jury's finding of torture], arguing the evidence presented was insufficient to show beyond a reasonable doubt that he tortured his victim."). But to the extent the South Dakota Supreme Court determined that the evidence was sufficient to support the jury's finding regarding the pecuniary gain factor, this court concludes that that determination was not objectively unreasonable.

B. Sufficiency of the evidence supporting the torture factor

Unlike the pecuniary gain factor, Rhines specifically contested whether the evidence was sufficient to satisfy the jury's determination that he tortured Schaeffer. *Id.* at 450-52. On direct appeal, the South Dakota Supreme Court noted the instruction and its requisite elements as dictated by the trial court:

> Torture occurs when a living person is subjected to the unnecessary and wanton infliction of severe physical or mental pain, agony, or anguish. Besides serious abuse, torture includes serious psychological abuse of a victim resulting in severe mental anguish to the victim in anticipation of serious physical harm. You would not be authorized to find that the offense of First Degree Murder involved torture simply because the victim suffered pain or briefly anticipated the prospect of death. Nor would acts committed upon the body of a deceased victim support a finding of torture. In order to find that the offense of First Degree Murder involved torture, you must find that the Defendant intentionally, unnecessarily, and wantonly inflicted severe physical or mental pain, agony or anguish upon a living victim.

***33** *Rhines I*, 548 N.W.2d at 451-52. The Court agreed that there were two essential elements that must be proved: "(1) the unnecessary and wanton infliction of severe pain, agony, or anguish; and (2) the intent to inflict such pain, agony or anguish." *Id.* at 452. The Court concluded that both of these elements were satisfied.

The evidence introduced at trial included Rhines's own words as he told Officers Allender and Bahr what occurred at the Dig'Em Donuts Shop. Rhines acknowledged that he was burglarizing the store when Schaeffer unexpectedly arrived. When Schaeffer entered the office area, Rhines admitted that he stabbed him in the abdomen with a hunting knife. According to Rhines, Schaeffer fell down and was "thrashing around and screaming." Docket 215-1 at 4. Schaeffer recognized his assailant and screamed Rhines's name. Rhines stabbed Schaeffer again, this time in the upper left portion of his back. Schaeffer told Rhines that he would not tell anyone what had happened and asked Rhines to call an ambulance. Rhines refused. Rhines helped Schaeffer up, walked him into the back storeroom, and sat him down on a pallet. Rhines said that Schaeffer went "rather willingly like he's decided it's time to go." *Id.* Rhines placed Shaeffer's head between his knees and drove the hunting knife into the base of Schaeffer's skull. Although Schaeffer slumped forward, Rhines claimed that he could still hear Schaeffer breathing and that Schaeffer's arms were moving. Rhines tied Schaeffer's hands behind him because Rhines did not want him to "stand up" or "call anybody and go dial 911." Docket 215-2 at 7. According to Rhines, Schaeffer continued breathing for several minutes after the third stab wound.

Dr. Donald Habbe, a forensic pathologist, testified at trial. Dr. Habbe explained that the first stab wound would not have been fatal, although it would have caused pain and difficulty breathing. He opined that the second stab wound would have pierced Schaeffer's left lung, which again would not have been fatal but would have caused additional pain and difficulty breathing. Dr. Habbe did not believe the two stab wounds would have been fatal in combination. He opined, however, that the third stab wound cut into Schaeffer's brain stem and should have resulted in a "near instantaneous" death. Dr. Habbe testified that he could not determine if Schaeffer's hands were bound prior to the third stab wound, but noted that the ligature was tied tightly and that there were abrasions along both of Schaeffer's wrists.

Regarding the torturous act element, the South Dakota Supreme Court found that Rhines did not act swiftly to end Schaeffer's life after the first or second non-fatal stab wounds. *See Rhines I*, 548 N.W.2d at 452. Rather, Rhines walked Schaeffer to the back storeroom and ignored Schaeffer's pleas for help. Rhines himself observed that Schaeffer became passive, seeming to acknowledge his impending death. Rhines then arranged Schaeffer on a pallet in order to administer what Rhines described as the "*coup de grace*." Additionally, the Court explained that when Rhines was questioned about the possibility that he bound Schaeffer's hands before the third stab wound, Rhines's responses were evasive and nonsensical. The Court opined that a juror could have inferred from the evidence that Rhines bound Schaeffer's hands prior to his death. As Dr. Habbe testified, there were abrasions on Schaeffer's wrists that suggested that Schaeffer continued to struggle against his restraints before his death. Thus, the Court concluded the evidence was sufficient to demonstrate that Schaeffer experienced unnecessary mental and physical anguish rather than pain that was simply incidental to his death.

***34** As to the intent element, the Court observed that Rhines did not express any desire to end Schaeffer's life quickly. Rather, as he spoke with Allender and Bahr, Rhines expressed sarcasm and scorn towards Schaeffer's suffering. Rhines also told the officers that his reason for binding Schaeffer's hands was to prevent him from leaving or calling 911, and the evidence suggested that Rhines also intended to leave Schaeffer in the storeroom to die. Therefore, the Court concluded the evidence was sufficient to demonstrate that Rhines intended to torture Schaeffer.

Here, Rhines confronts the intent element first by arguing that the series of events that lead to Schaeffer's death took place over a span of only a few minutes. Rhines observes that the office and the storeroom were nearby, and he relies on Dr. Habbe's opinion that the third stab wound should have resulted in a near instantaneous death. Rhines argues that if Schaeffer was already deceased, then Rhines could not have committed an act of torture by binding Schaeffer's hands. And while Rhines stabbed Schaeffer three times, Rhines argues that that could suggest he was simply startled or an inexperienced killer. Rhines also takes issue with the South Dakota Supreme Court's classification of his attitude toward Schaeffer's suffering as "scornful," arguing that his lack of remorse could be relevant to the depravity of mind factor but not the torture factor.

Next, Rhines argues that the torturous act element could not be satisfied. He observes that the jury instruction told the jurors that they could not find that the torture factor was fulfilled if the victim only briefly anticipated the prospect of death. According to Rhines, the evidence demonstrated a brief period of time between his initial assault upon Schaeffer and Schaeffer's demise.

Viewing the evidence in the light most favorable to the prosecution, however, a rational factfinder could conclude that Rhines tortured Schaeffer. Regarding the act element, Rhines stabbed Schaeffer twice, no doubt inflicting a great deal of pain, before walking Schaeffer to the back room of the store. The jury could infer that Schaeffer experienced severe mental anguish as he recognized the face of his attacker and begged for his life, only to have his pleas ignored as he was taken into the storeroom. Once there, the jury could also infer that Schaeffer believed he could do no more than abandon hope of survival. As Rhines observed, externally Schaeffer appeared docile. And if the jury believed that Rhines bound Schaeffer's hands before his death, the jury could also have determined that Schaeffer struggled before he died thereby causing the abrasions on his wrists. Although Rhines now relies on Dr. Habbe's opinion that Schaeffer should have died nearly instantaneously, Rhines himself disputed that same opinion, telling Allender that "[Habbe] doesn't know everything in the world." Docket 215-2 at 8.

As to the intent element, the jury could have inferred that Rhines stabbed Schaeffer twice in order to disable him. Once Schaeffer was mostly incapacitated, Rhines proceeded methodically, arranging Schaeffer on a pallet before lining up the third stab into the back of Schaeffer's neck. As Rhines stated, he believed Schaeffer was breathing and that he lived for another couple of minutes following the third stab wound. The jury could have further inferred that by binding Schaeffer's hands, Rhines intended to prevent Schaeffer from leaving so that Schaeffer would be left to die in the storeroom alone. And while the trial court's instruction told the jury that it could not conclude that Rhines tortured Schaeffer if Schaeffer only briefly anticipated the prospect of death, it did not preclude the jury from finding that the factor was satisfied if the series of events unfolded in a matter of minutes. Therefore, the court concludes that the South Dakota Supreme Court's determination that the evidence was sufficient to support the torture factor was not objectively unreasonable.

IX. Did Rhines's Trial Counsel Render Ineffective Assistance?

*35 Rhines alleges that he received ineffective assistance of counsel at trial. Generally, in order to establish ineffective assistance of counsel, Rhines must satisfy the two-pronged standard articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "First, the defendant must show that counsel's performance was deficient." *Id.* This "performance prong" requires a petitioner to "show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. This "prejudice prong" requires the petitioner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Rhines has the burden of satisfying both *Strickland* prongs. *Id.* at 687. A court is free to evaluate the two prongs in either order. *Id.* at 697.

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

A. Was trial counsel ineffective by failing to adequately perform a mitigation investigation on behalf of Rhines?

The parties combine issues IX.A, IX.B, and IX.I, together as each claim involves the performance of Rhines's trial counsel investigating and presenting mitigation evidence. The court will likewise address these issues together.

For issue IX.A, Rhines's first habeas appeal included the claim that his "counsel failed to investigate his background for mitigation evidence." Brief for Appellant at 34, *Rhines II*, 608 N.W.2d 303 (2000), 1999 WL 34818796. The South Dakota Supreme Court summarily rejected that argument (and several other ineffective assistance claims together), stating:

> Rhines raises several other issues relating to ineffective assistance of counsel in his brief. However, these remaining instances are either conclusions, which are wholly unsupported by the record, or sound trial strategy when judged by the circumstances facing trial counsel at the time of their decisions. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-95. Therefore, this Court will address the remaining ineffective assistance claims no further than to point out that Rhines has not proven either prong of the ineffective assistance test in regard to these claims. The circuit court's denial of these ineffective assistance issues is affirmed.

Rhines II, 608 N.W.2d at 313. Issue IX.B (that counsel's presentation of mitigation evidence was "tepid") and issue IX.I (that counsel failed to hire a mitigation expert) were unexhausted when Rhines filed his federal habeas petition. On remand, Rhines brought those two issues before the Seventh Judicial Circuit of South Dakota, and that court rejected Rhines's arguments. *See* Docket 204-1 at 15-22, 24-25. The circuit court also considered and rejected Rhines's argument that his trial counsel failed to properly perform a mitigation investigation. *See id.* at 15 ("Rhines contends that his trial counsel failed to properly investigate possible mitigation evidence."). Because the circuit court is the last court to address each of these three claims, it is the last reasoned decision concerning issues IX.A, IX.B, and IX.I.

1. Issues IX.A and IX.B: investigation and presentation of mitigation evidence

a. Mitigation Investigation

*36 Rhines was represented at trial by attorneys Michael Stonefield, Wayne Gilbert, and Joseph Butler. They provided testimony during Rhines's first state habeas proceeding. Stonefield explained that Rhines's taped confessions were "very damning" and "the strongest thing we had going against us" going into the penalty phase of Rhines's trial. Docket 215-11 at 9. While Stonefield agreed that the confessions were the most damaging piece of evidence, he acknowledged "the overwhelming amount of evidence that we had

against us" posed a serious obstacle to Rhines's case. HCT at 7.[13] On its review of the record, the circuit court found that trial counsel investigated numerous potential sources for mitigating evidence: "They investigated by talking to Rhines, his family and friends, reviewing his military services records, his schooling, employment history, psychiatric and psychological examinations and found that there was very little mitigating evidence to be found or presented." Docket 204-1 at 6 (citing Docket 215-23 at 6 (affidavit of Wayne Gilbert)).[14] For example, Rhines was asked to complete an autobiography that the circuit court observed to be "at best disturbing." *Id.* (citing Docket 215-12 (Rhines's autobiography)).

Regarding Rhines's military career, he joined the military when he was seventeen after dropping out of high school. Rhines's military records indicated that he was jailed, disciplined, and received several Article 15 reprimands "for insubordination, drug use, theft of plastic explosives, and assault with a deadly weapon on a fellow service member." Docket 2014-1 at 16 (citing Docket 215-12; Docket 215-18 at 9-13, 25, 28 (Rhines's Military Records)). Rhines was discharged in 1976 "on less than honorable conditions 4 months before the completion of his enlistment." Docket 204-1 (citing Docket 215-12 at 17, 24). Gilbert testified that he felt "the army records as a whole would not be helpful" to their mitigation case. Docket 215-11 at 17.

After being discharged, Rhines briefly attended college. After burglarizing a dorm room, however, Rhines spent seven months in the state penitentiary. Docket 204-1 at 16 (citing Docket 215-12 at 2). After his release from prison, Rhines began working for an excavation company and was taught how to use dynamite. One day he attempted to explode a grain elevator using dynamite, but one of Rhines's supervisors managed to prevent the explosion from occurring.

In 1979, Rhines was convicted of armed robbery and of being a felon in possession of a firearm after robbing a liquor store while armed with a sawed-off shotgun. Docket 215-12 at 2-3. He served an eighty-seven month sentence, partially in South Dakota and partially in a Washington state prison. *Id.* at 3, 41-42. In Rhines's autobiography, he noted that it could be "detrimental if the prosecution obtains [his] central file" from the Washington prison. *Id.* at 37. Rhines's file notes a number of disciplinary infractions, including several instances where Rhines was in possession of a weapon. Docket 215-37 at 2-3. Among other events, the file includes a report that Rhines was placed in protective custody after accumulating a drug debt to a prison group known as the "Skins." *Id.* at 13.

After Rhines was released from prison, he reported working numerous odd jobs. Docket 215-12 at 3. He began working for Winchell's Donut House in February of 1987 where he was eventually promoted to a management position. After "discovering payroll checks could be easily altered to any amount," Rhines stole approximately $40,000 from the company. *Id.* at 11. In 1990, Rhines skipped town. In 1991, he began working for Dig'Em Donuts in Rapid City. *Id.* He was fired, however, after a payroll dispute with the owner. Following Schaeffer's murder and the robbery of Dig'Em Donuts in 1992, Rhines moved back to Seattle until he was apprehended.

***37** Rhines was ordered to undergo a psychiatric examination prior to trial. Docket 215-24 at 2 (order for psychiatric examination). Stonefield wrote to Dr. Daniel Kennelly, the examining physician, and asked Dr. Kennelly to "do whatever testing or evaluations you feel are appropriate for your determinations in the areas of competency for trial, mental illness and sanity." *Id.* at 1. Dr. Kennelly interviewed Rhines and submitted a report. Docket 215-35. The report briefly discussed Rhines's homosexuality. Rhines reported that he was suffering from an identity problem stemming from his sexuality while growing up that persisted until he received counseling in 1978. *Id.* at 1. Rhines denied promiscuity but stated that he was sexually assertive and at times sadistic, although only with consenting partners. *Id.* at 2. Dr. Kennelly opined, however, that Rhines's sexuality was not related to the slaying of Schaeffer. *Id.* Additionally, Dr. Kennelly found no "history of any symptoms that lead to a psychotic diagnosis," "no evidence that [Rhines] has experienced any major mental disorders," and concluded "that no major mental illness can be diagnosed." *Id.* at 3-5. Dr. Kennelly wanted to review a report from Dr. Arbes, however, and his own information again. *Id.* at 5.

Dr. Arbes is a psychologist who also examined Rhines. Dr. Arbes had Rhines complete several tests, such as the Minnesota Multiphasic Personality Inventory (MMPI) exam, the Million Clinical Multiaxial Inventory (MCMI), the House, Tree, Person test, the Rorschach Personality Diagnosis Method, and the Thematic Apperception Test (TAT). Docket 215-27 at 1. Dr. Arbes suspected Rhines attempted to cast himself in a more negative light during the

MMPI and MCMI exams, which called the accuracy of those test results into question. *Id*. at 1-2. Dr. Arbes, nonetheless, noted "some signs of cognitive disturbance" and that Rhines tended to be "depressed and morose." *Id.* at 2-3. Dr. Arbes suggested diagnoses of generalized anxiety disorder and a "[s]chizotypal [p]ersonality with prominent schizoid or avoidant traits." *Id.* at 5. After reviewing Dr. Kennelly's and Dr. Arbes's findings, Gilbert and Stonefield did not believe they had discovered any evidence that would serve as useful mitigation evidence. Docket 215-23 at 2; Docket 215-24 at 4.

Rhines's attorneys also reached out to his family and friends. Two of Rhines's sisters agreed to testify on his behalf during the penalty phase of the trial. They told Gilbert, however, that their elderly mother would be unable to take the witness stand or assist in his defense. Docket 215-23 at 2. Gilbert also unsuccessfully tried to persuade Rhines's brother Karl to testify. *Id.* Stonefield attempted to find people living in Rhines's hometown to act as mitigation witnesses as well, but he was unable to find any. *Id.* at 1. Gilbert reviewed discovery from the prosecution and interviewed several of Rhines's acquaintances: Sam Harter, Heather Shepard, and Arnold Hernandez. *Id.* at 2. The defense team did not believe those sources contained any usable mitigation evidence. During Rhines's first state habeas proceedings, Gilbert recalled that they discussed the possibility of Rhines providing an unsworn allocution statement, but Rhines decided against it. Docket 215-11 at 14. Gilbert acknowledged his own belief that Rhines was incapable of showing any remorse. *Id.* at 16.

b. Presentation

Stonefield testified at the first state habeas proceeding that one of their primary concerns in mitigation was opening the door to Rhines's criminal past and the fact that Rhines had spent much of his adult life in prison. Docket 215-11 at 6. In order to avoid allowing that evidence in, the defense team decided to have Rhines's sisters testify about growing up with Rhines and their family lives, while avoiding any specifics about past misconduct on Rhines's part. *Id.*

Elizabeth, one of Rhines's older sisters, testified during the penalty phase of Rhines's trial. She was an elementary teacher. Docket 215-3 at 166. She testified that their mother was living with her and that their father had passed away roughly five years earlier. Elizabeth recalled how she and their mother went through some old, personal items and came across Rhines's report cards from elementary school. *Id.* at 168. She explained that his grades were somewhat low and that they contained notes indicating problems with Rhines's attitude and ability to stay on tasks. Elizabeth testified how those kinds of behaviors today would signal that it is time to look at getting a child help, although those were not things that people knew about thirty years ago. *Id.* Elizabeth explained that she and another of Rhines's sisters performed very well in school and that Rhines would have been aware of his relative shortcomings growing up. *Id.* at 171. After Rhines dropped out of high school, he moved in with Elizabeth and her husband. They discussed the possibility of Rhines re-enrolling, but Elizabeth testified that "[w]hen you get through grade school with D's and F's you don't have the skills you need to go into high school." *Id.* at 172.

***38** When Rhines decided to go into the military, Elizabeth recalled asking their father not to let Rhines go because she felt that Rhines had problems and needed psychological help. Their parents, however, thought Rhines may grow out of whatever problems he had, and his father signed the permission papers to allow Rhines to enlist at age 17. Elizabeth believed that Rhines's time in the military caused him to come home with more problems than he had when he left. *Id.* at 173. She recalled some of the more pleasant memories she had with Rhines and ended her testimony with a plea for the jury to spare Rhines's life.

Jennifer, another older sister, also testified during the penalty phase of Rhines's trial. She identified Rhines as her "baby brother," explained that she was the closest sibling to Rhines in terms of age, and stated that they were very close growing up. *Id.* at 179-80. Jennifer echoed Elizabeth's observations that Rhines struggled in school and that it would not be easy for him to follow in the footsteps of his older sisters who received straight A's. She noted Rhines "had problems paying attention and punctuality and getting work done," and that "he got labeled as the strange one, the loner" in town. *Id.* at 182. Jennifer shared Elizabeth's hope that Rhines would re-enroll in high school after he dropped out and expressed hesitation about Rhines entering the military. She, like Elizabeth, had concerns that Rhines was not prepared for military life and asked their father not to let Rhines enlist. Jennifer felt Rhines had emotional troubles and what she described as "a pain that nobody could touch." *Id.* at 185. Jennifer detected negative changes in Rhines after he enlisted in the military. For example, she observed that he became more withdrawn and less able to communicate with others.

Rhines eventually moved in with Jennifer in Rapid City while he looked for work. In 1978, Rhines shared with Jennifer for the first time that he was a homosexual. Rhines told his parents, too, who "were very understanding for Midwestern, conservative people and [Jennifer] though they did pretty darn well." *Id.* at 188. Over the years that followed, Jennifer stayed in touch with Rhines. She recalled a time in 1984 when she attempted to convince Rhines to come to Denver, Colorado, a place with "a positive gay community" and a place where Jennifer had a job lined up for Rhines, but he never made the move. *Id.* at 190-91. Like Elizabeth, Jennifer ended her testimony with a plea for Rhines's life.

c. Circuit court decision

The circuit court relied on three Supreme Court cases to address Rhines's claims: *Strickland*; *Burger v. Kemp*, 483 U.S. 776 (1987); and *Darden v. Wainwright*, 477 U.S. 168 (1986). Docket 204-1 at 19. As the court observed, not only did these cases deal with ineffective assistance claims, but they were all death penalty cases concerning an attorney's performance during the mitigation portion of sentencing.

In *Strickland*, the Court concluded counsel was not ineffective for failing to investigate and present additional mitigation evidence. *Strickland*, 466 U.S. at 699. Notably, the defendant had provided damaging confessions to the police. *Id.* at 672. The Court explained that counsel had successfully kept out the defendant's criminal history. Additionally, counsel had learned from his conversations with the defendant that additional character and psychiatric evidence would provide little benefit. The attorney, therefore, decided to limit the testimony that would come in during the mitigation phase to the testimony the defendant previously gave at his change of plea hearing. That testimony conveyed that the defendant had financial and emotional troubles. By limiting the evidence in that manner, counsel was able to ensure that contrary character evidence would not come in. Thus, the Court concluded, "[T]here can be little doubt ... that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment." *Id.* Moreover, even if the Court assumed counsel had acted in a professionally unreasonable manner, it concluded the defendant could not establish prejudice. This was so because the evidence that the defendant claimed should have been presented was either cumulative of evidence already introduced or would have opened the door to unfavorable character evidence. *Id.* at 700.

***39** In *Darden*, counsel was likewise not ineffective for failing to present mitigation evidence arising from the defendant's background. *Darden*, 477 U.S. at 184. The Court observed that attempting to paint the defendant as a non-violent man would have opened the door to evidence of his criminal background. That evidence had not previously been admitted, however, and counsel could reasonably have believed that the evidence would have been damaging. For example, the jury could have learned that the defendant "had been in and out of jails and prisons for most of his adult life." *Id.* at 186 (citation omitted). Similarly, presenting psychiatric evidence would have invited the state to respond with its own psychiatric evidence that showed the defendant had a damaging "sociopathic type personality." *Id.* And if counsel attempted to portray the defendant as a family man, it would have opened the door to evidence that the defendant spent a weekend with a girlfriend despite the fact that he was married. Thus, the Court concluded that the defendant had not overcome the presumption that counsel's choices were sound trial strategy. *Id.* at 186-87.

In *Burger*, counsel interviewed several potential witnesses but presented no mitigation evidence. *Burger*, 483 U.S. at 788. The defendant claimed that counsel should have called the defendant's mother and a psychologist to testify on his behalf, as well as several other witnesses. The Court concluded counsel acted reasonably, however, noting that the defendant's criminal history presented at the time of the penalty phase was clean. His mother's testimony may have resulted in the introduction of evidence of the defendant's troubled upbringing and of his prior run-ins with police. While those instances may not have been overly damaging, the Court felt it was not unreasonable for counsel to conclude that it would be best to keep that harmful information out. Moreover, the attorney's decision not to have the defendant testify was reasonable because counsel did not feel that the defendant was able to express any remorse. That decision was buttressed by the psychologist who was not called to testify, because the psychologist noted that the defendant may have even bragged about his crimes. *Id.* at 791. Although the defendant provided affidavits of several other parties who could have testified about his troubled upbringing, the Court was not convinced that their testimony would have been uniformly helpful. Some, for example, attested that the defendant had violent tendencies and that the affiants were aware of the defendant's prior run-ins with the police. The Court observed that counsel "could well have made a more thorough investigation than he did," but ultimately found "a reasonable basis

for his strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty." *Id.* at 794.

In this case, after its review of the facts and these cases, the circuit court concluded Rhines's trial counsel acted pursuant to a reasonable trial strategy. Not only did counsel conduct a thorough investigation into Rhines's background, but trial counsel's mitigation strategy was predicated on two pretrial victories: (1) an order *in limine* excluding Rhines's two prior felony convictions for armed robbery; and (2) an order *in limine* preventing the state from introducing evidence related to non-statutory aggravating factors. Docket 204-1 at 16. As counsel acknowledged during the first habeas proceeding, they were concerned about opening the door to Rhines's criminal history and the fact that he had spent the majority of his adult life in prison. The task before them was a difficult one considering the majority of the evidence they uncovered from Rhines's past contained potentially damaging information. By focusing their mitigation case on the testimony of Rhines's sisters, however, they were able to portray a sympathetic and largely unchallenged picture of Rhines's unaddressed academic, sexual, and emotional childhood difficulties while keeping his violent and often criminal past away from the jury's consideration. *Id.* at 19.

***40** The court also addressed Rhines's argument that his attorneys overlooked critical mitigation evidence. Rhines identified several childhood friends and teachers who he believed could have provided helpful testimony on his behalf.[15] Docket 215-32. Those individuals submitted affidavits,[16] but the circuit court did not find their proffered statements helpful to Rhines. *See* Docket 215-14 (affidavit of Kerry Larson); Docket 214-15 (affidavit of Roy Jundt); Docket 215-16 (affidavit of Jerry Brooks); Docket 214-17 (affidavit of Gus Miller). For example, Larson noted that Rhines "was viewed as an intimidating and scary person" in their hometown, and that many people knew that Rhines had tried to blow up the grain elevator. Docket 215-14 at 2. Additionally, Rhines had a reputation around town for being a firestarter and abusive to small animals. *Id.* Jundt was a teacher who had Rhines in two classes while Rhines was in seventh grade. Docket 215-15 at 1. Jundt recalled that Rhines "was defiant to authority and rebellious," and that Rhines did not apply himself to school work. *Id.* Jundt also recalled Rhines's reputation for starting fires and for breaking into businesses around town. *Id.* Brooks was another former teacher. Docket 215-16 at 1. Brooks did not recall any instances where Rhines displayed signs of ADHD or behavioral problems in class, but noted that Rhines had a bad reputation in the community. *Id.* Miller was a co-owner of the excavation company where Rhines was hired and where Rhines learned to use dynamite. Docket 215-17 at 1. In fact, it was Miller's brother who, to prevent an explosion, removed the blasting caps from the dynamite that Rhines had attached to the grain elevator. Docket 215-17 at 1. And like others, Miller recalled Rhines's reputation for being a firestarter in the community. *Id.* at 2.

The circuit court was also unpersuaded by an affidavit signed by Dr. Dewey Ertz. *See* Docket 215-28. Dr. Ertz is a psychologist who reviewed materials from Rhines's trial, including the reports from Dr. Kennelly and Dr. Arbes. Dr. Ertz also met with Rhines on May 26, 2012, and administered the Wechsler Adult Intelligence Scale-Fourth Edition. *Id.* at 2. Dr. Ertz opined that Rhines showed symptoms of attention-deficit/hyperactivity-disorder (ADHD) and that Rhines had difficulty processing information. The circuit court found that Dr. Ertz's findings would have added little to the defense team's mitigation strategy. Docket 204-1 at 17. Thus, because Rhines could not meet the deficient performance or prejudice prong of *Strickland*, the circuit court concluded that Rhines's ineffective assistance claims failed.

d. Federal habeas

Here, Rhines primarily takes issue with the circuit court's determination that his trial counsel proceeded according to sound trial strategy. He points to *Williams v. Taylor*, 529 U.S. 362 (2000) and *Wiggins v. Smith*, 539 U.S. 510 (2003) to support his contention that his attorneys rendered ineffective assistance. These cases, like *Strickland*, *Darden*, and *Burger*, also involved allegations that trial counsel was ineffective during the mitigation phase of a capital trial. They, however, are distinguishable for several reasons.

First, a major reason the district court granted the petitioner's claim for relief in *Williams* was the fact that the Virginia Supreme Court misapplied federal law. The Virginia Supreme Court found that the United States Supreme Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), modified the prejudice test set forth in *Strickland*, when it did not. *Williams*, 529 U.S. at 393 ("Nonetheless, the Virginia Supreme Court read our decision in *Lockhart* to require a separate inquiry into fundamental fairness ... the trial judge analyzed the ineffective-assistance claim under the correct standard; the Virginia Supreme Court did not."). Here, the circuit court did not misconstrue federal law. It correctly observed the general standard for

analyzing ineffective assistance claims under *Strickland* and then relied on *Strickland*, *Darden*, and *Burger* for comparative purposes. While Rhines argues that *Williams* and *Wiggens* were controlling and dispositive, the Supreme Court has explained that *Strickland* is the appropriate standard that courts should apply to resolve ineffective assistance claims. *Pinholster*, 131 S. Ct. at 1406-07 (rejecting argument that *Williams*, *Wiggins*, and *Rompilla v. Beard*, 545 U.S. 374 (2005) impose a duty to investigate in every case). Likewise, the Court cautioned against "attributing strict rules to this Court's recent case law." *Id.* at 1408.

***41** Second, the petitioners in *Williams* and *Wiggins* not only alleged that trial counsel failed to conduct a meaningful mitigation investigation, but they pointed out specific, detailed, and often highly prejudicial information that counsel overlooked. In *Williams*, although counsel presented some mitigation evidence, counsel did not present "documents prepared in connection with Williams' commitment when he was 11 years old that dramatically described mistreatment, abuse, and neglect during his early childhood, as well as testimony that he was 'borderline mentally retarded,' had suffered repeated head injuries, and might have mental impairments organic in origin." *Williams*, 529 U.S. at 370. The district court rejected the argument that counsel's mitigation decision was sound trial strategy, observing that:

> counsel did not fail to seek Williams' juvenile and social services records because he thought they would be counterproductive, but because counsel erroneously believed that " 'state law didn't permit it.' " Counsel also acknowledged in the course of the hearings that information about Williams' childhood would have been important in mitigation. And counsel's failure to contact a potentially persuasive character witness was likewise not a conscious strategic choice, but simply a failure to return that witness' phone call offering his service.

Id. at 373 (internal citations omitted). And in *Wiggins*, trial counsel failed to present any evidence on the petitioner's background in mitigation despite his "bleak life history." *Wiggins*, 539 U.S. at 516. That history included:

> petitioner's mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner-an incident that led to petitioner's hospitalization. At the age of six, the State placed Wiggins in foster care. Petitioner's first and second foster mothers abused him physically, and, as petitioner explained to Selvog, the father in his second foster home repeatedly molested and raped him. At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion. After leaving the foster care system, Wiggins entered a Job Corps program and was allegedly sexually abused by his supervisor.

Id. at 516-17. Although counsel did perform some investigation, counsel abandoned it after looking at only minimal information such as a pre-sentence report containing a one-page account of Wiggins' childhood and a handful of records from the Maryland Department of Social Services. *Id.* at 523-24.

While Rhines devotes many pages of his brief to criticizing the methodology his trial counsel employed, he only identifies one piece of potentially helpful information they allegedly overlooked: Dr. Ertz's opinion. That opinion was formed approximately twenty years after Rhines's trial, and it suggested that Rhines showed symptoms of ADHD and a mental processing disorder. But in addition to combing through Rhines's background and family history, Rhines's counsel did have him examined for psychiatric and psychological disturbances, and Stonefield's letter to Dr. Kennelly asked him to search broadly for mental problems. That those examinations did not reveal the same opinion that Dr. Ertz only recently reached does not mean that trial counsel acted unreasonably. [17]

***42** Finally, in *Wiggins*, the Court made the following observation:

> Indeed, counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless; this case is therefore

> distinguishable from our precedents in which we have found limited investigations into mitigating evidence to be reasonable.

Wiggins, 539 U.S. at 524. The Court then cited *Strickland*, *Darden*, and *Berger*, as cases where counsel learned, through their investigation, that an additional investigation would be fruitless or that presenting certain evidence that was discovered would be harmful. And that is precisely what Rhines's counsel faced: when delving into his military history, school history, employment history, or social history, they continued to find damaging information about Rhines's criminal past. Like in *Darden*, counsel did not want the jury to know Rhines had been in and out of jails all his adult life. *Darden*, 477 U.S. at 186.

Rhines's counsel conducted a thorough and painstaking investigation into his background. Based on what they uncovered, they determined the best way to proceed in order to keep potentially damaging information from the jury was to present a sympathetic picture of Rhines's life through the eyes of his sisters. The state court applied *Strickland* and concluded Rhines's counsel acted pursuant to a reasonable trial strategy. "The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington*, 562 U.S. at 105. Based on this court's review of the record, it answers that question affirmatively. Consequently, Rhines is not entitled to relief on claims IX.A or IX.B.

2. Issue IX.I: failure to hire a mitigation expert

Rhines did not exhaust this claim before filing his federal habeas petition. In Rhines's second state habeas proceeding, the issue was not briefed separately before the circuit court. Nonetheless, the circuit court addressed the claim. Docket 204-1 at 24. The court observed that the function of a mitigation expert is to gather a thorough and comprehensive picture of a defendant's background and records. It concluded that that task had been performed by Rhines's trial counsel, noting the mitigation expert "would have interviewed the same friends, family, teachers, employers and reviewed the same records including the autobiography of Rhines, as his attorneys did." *Id.* at 25.

Strickland acknowledged that an investigation itself is not necessary in every case. *Strickland*, 466 U.S. at 691. What is required is that counsel's actions be reasonable. The circuit court concluded Rhines's counsel did not act unreasonably, given the extensive investigation that had already taken place. At the very least, a reasonable argument supports the notion that Rhines's counsel satisfied the *Strickland* standard. Therefore, Rhines is not entitled to relief on this claim.

B. Was trial counsel ineffective by presenting a "tepid" mitigation case?

The court has included its analysis and resolution of this issue in its discussion of issue IX.A, *supra*. For the reasons stated therein, Rhines is not entitled to relief on this claim.

C. Was trial counsel ineffective for failing to inform the jury of Rhines's willingness to plead guilty or not giving Rhines an opportunity to allocute?

***43** Related to Rhines's mitigation arguments is the argument that his attorneys should have informed the jury that Rhines offered to plead guilty in exchange for a life sentence and should have allowed him to offer an allocution statement. These claims were raised in Rhines's first habeas appeal. *See* Brief for Appellant at 30-33, *Rhines II*, 608 N.W.2d 303 (2000), 1999 WL 34818796. And like his mitigation arguments, these arguments were summarily rejected by the South Dakota Supreme Court as sound trial strategy. *Rhines II*, 608 N.W.2d at 313. The circuit court mentioned counsel's reasons for not presenting an allocution statement, Docket 204-1 at 17, 19, but did not specifically address the ineffectiveness issue. Rather, the court ultimately concluded, as the South Dakota Supreme Court did in *Rhines II*, that the attorneys acted pursuant to sound trial strategy. While Rhines himself does not specify which decision he is challenging, this court will assume the circuit court's decision was the last reasoned decision on the matter.

There is no constitutional right to allocution. *Hill v. United States*, 368 U.S. 424, 428 (1962) ("The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus."). An attorney's decision to present an allocution statement or otherwise inform the jury of a defendant's willingness to accept his or her responsibility may be an element of trial strategy. *See Burger*, 483 U.S. at 791 (noting the attorney thought "it would be unwise to put petitioner himself on the witness stand" because the "petitioner never expressed any remorse."); *see also Williams*, 529 U.S. at 369 (observing "counsel repeatedly emphasized the fact that Williams had initiated the contact with the police[.]").

In Rhines's first state habeas proceeding, Stonefield noted that the defense team pursued a possible plea agreement where Rhines would plead guilty in exchange for a life sentence. Docket 215-11 at 5. The response they received, however, was that "it wasn't going to happen." *Id.* Stonefield recalled that the attorneys discussed having Rhines provide an allocution statement, but he was concerned about opening Rhines up to cross-examination. HTC at 39. Gilbert testified that the trial team discussed the possibility of Rhines making an unsworn allocution statement, but "[Rhines] decided that he did not want to do that." Docket 215-11 at 14. Gilbert also noted a concern about putting Rhines on the stand and subjecting him to cross-examination. *Id.* at 16. Gilbert further believed that Rhines was incapable of showing remorse. *Id.* During Rhines's second state habeas proceeding, Gilbert submitted an affidavit that confirmed his earlier testimony:

> I discussed with Charles the possibility of him giving his own allocution at sentencing. As we talked, I felt that Charles' allocution would not be convincing, and advised Charles of my opinion. It is my recollection that the defense team discussed an unsworn allocution, and that Charles agreed that having him allocate was not going to work.

Docket 215-23 at 2.

Neither state court decision expounds on the trial team's decision not to present evidence of Rhines's willingness to accept responsibility for his crimes. Both courts concluded by summary adjudication that Rhines's allegations did not establish a violation of *Strickland*. Rhines's counsel was aware of, and did in fact consider putting on, evidence that Rhines was willing to accept responsibility for his crimes. And they concluded that the evidence should not be presented because it would not be credible or helpful. Gilbert himself believed that Rhines was incapable of showing remorse in the event an allocution statement would be presented. Likewise, informing the jury that Rhines was willing to take a plea agreement would have invited a response from opposing counsel that Rhines was willing to do so only if ensured that his life would be spared. Thus, the court finds that a reasonable argument supports the conclusion that the trial team's decision to refrain from presenting this evidence met the *Strickland* standard. Consequently, Rhines is not entitled to relief on this claim.

D. Was trial counsel ineffective for failing to exclude evidence of Rhines's homosexuality?

***44** Rhines raised this issue in his first habeas appeal. Brief for Appellant at 29-30, *Rhines II*, 608 N.W.2d 303 (2000), 1999 WL 34818796. The South Dakota Supreme Court summarily rejected the argument. *Rhines II*, 608 N.W.2d at 313. Thus, the South Dakota Supreme Court's conclusion in *Rhines II* is the last reasoned decision on the matter. That the court's opinion is a summary dismissal does not change the fact that it is a decision on the merits of Rhines's claim. *Harrington*, 562 U.S. at 98 (noting the habeas petitioner must still show there is "no reasonable basis for the state court to deny relief.").

Each of Rhines's attorneys brought up the subject of his homosexuality during *voir dire*. *See* Docket 215-11 at 3. When asked why during Rhines's first habeas proceeding, Stonefield explained:

> Because as I see it, it was something that—it was an issue that was going to come out during the course of the trial. I don't think there was any question that, if not explicitly, there was at least going to be an implication or an inference that Charles is a homosexual. And I didn't think that I —and I don't think any of the others thought either that it was something we needed to hide. I think if we had not raised it as an issue, the potential consequences—well, potentially you run the risk of getting someone on your jury who hasn't discussed this issue and who, when they find out about it, becomes hostile to you. That's why it came up. I mean, that's why we felt it was necessary to bring up.

Id. at 3-4. For example, Stonefield noted that Rhines was in a romantic relationship with his roommate, Sam Harter, who was also a potential witness. *Id.* at 13. Although Harter ultimately was not called as a witness, Stonefield explained that he "certainly expected" that Harter was going to testify. HTC at 16; *see also id.* at 106 (noting that relationship was "part of the reason why we brought up the issue" of Rhines's sexuality). When asked whether the attorneys talked to Rhines about bringing up the issue of his sexuality, Stonefield replied, "I don't recall Charles having any great objection to this topic being brought up." Docket 215-11 at 12. Gilbert acknowledged he believed that potential witnesses aside from Harter would make reference to Rhines's sexuality. HTC at 115. Gilbert also viewed the *voir dire*

questioning as a way to weed out potential jurors who might be hostile to Rhines because of his sexuality. *Id.* In retrospect, Gilbert harbored suspicion that some of the jurors may not have honestly answered questions about Rhines's sexuality, although he explained "[t]here's always that question in a criminal case." *Id.* at 157. Butler similarly noted that Rhines agreed with the decision to bring up his sexuality. Docket 215-11 at 20. When asked why the attorneys thought the issue should be brought up in *voir dire*, he explained that "it would tend to possibly explain that he was a little bit different than some of the other people. That might tend to have a mitigating [effect]." *Id.* Rhines points to the incongruity between Stonefield and Gilbert's rationale and Butler's rationale for bringing up his sexuality. He also argues that there could be no sound trial strategy because the attorneys' responses indicate that they did not agree on the strategy.

While no explicit analysis from the South Dakota Supreme Court is available, this court concludes that the South Dakota Supreme Court did not unreasonably apply *Strickland*. First, the rationales provided by each of Rhines's attorneys are not mutually incompatible with each other. For example, both Stonefield and Gilbert believed that Rhines's sexuality would ultimately come in through witnesses at trial. Thus, bringing up Rhines's sexuality during *voir dire* would be a way to identify potential jurors who might react with hostility to such knowledge. And both Stonefield and Butler recalled that Rhines agreed to bring up the issue. Second, even if the variances in the attorneys' rationales were enough to overcome the first *Strickland* prong,[18] Rhines has not made any showing of prejudice. Although Gilbert believed that some of the jurors may not have answered their questions honestly, Rhines offers no evidence that that in fact happened here. Thus, Rhines is not entitled to relief on this claim.

E. Was trial counsel ineffective for improperly handling a jury note regarding the conditions of life imprisonment?

***45** As discussed in conjunction with issue VII.E, *supra*, the South Dakota Supreme Court found that Rhines's future dangerousness was not put into issue. *Rhines II*, 608 N.W.2d at 311. This court concluded that that determination was not objectively unreasonable. In conjunction with issue VII.E, Rhines also alleged his attorneys rendered ineffective assistance of counsel responding to a jury note that asked about life imprisonment without parole. More specifically, Rhines argued that his counsel should have appealed the trial court's refusal to answer the jury's questions under *Simmons v. South Carolina*, 512 U.S. 154 (1994). The South Dakota Supreme Court rejected that argument. *Rhines II*, 608 N.W.2d at 311. This court found no error with the instruction as given by the trial court, but reserved addressing the South Dakota Supreme Court's rejection of Rhines's ineffective assistance of counsel claim for here.

Rhines does not contend that the South Dakota Supreme Court's denial of his ineffective assistance claim as presented was contrary to or an unreasonable application of clearly established federal law. Rather, Rhines converts the ineffective assistance claim he did assert in state court into an issue that was not asserted. Rhines's new issue is that his attorneys were ineffective because they opened the door to the state's future dangerousness argument, and they failed to properly cure their error when given the chance. The Supreme Court has long recognized, however, that a petitioner cannot "rais[e] one claim in the state courts and another in the federal courts." *Picard v. Connor*, 404 U.S. 270, 276 (1971).

To the extent that this ineffective assistance argument was presented and resolved against Rhines, this court concludes such a resolution is not an unreasonable application of the *Strickland* standard. First, because Rhines's future dangerousness was not presented to the jury, Rhines cannot demonstrate prejudice. Even if Rhines's attorneys improperly invited the state to put his future dangerousness into issue, the state's refusal to take the bait could not have prejudiced Rhines. Second, Rhines acknowledges that his attorneys submitted a more detailed jury instruction regarding life imprisonment than the one given by the trial court. The substance of that proposed instruction was to instruct the jury not to speculate on the possibility that his death sentence would be commuted or on the possibility that he may later be released even if he were sentenced to life imprisonment without parole. The court refused this language. Rhines does not explain what more his counsel should have done. Moreover, this court has concluded that the instruction as given by the trial court was proper. Therefore, Rhines again has demonstrated prejudice. Consequently, Rhines is not entitled to relief on this issue.

F. Was trial counsel ineffective by disproportionately delegating defense work to third-chair counsel?

Rhines combines his arguments on issues IX.F and IX.G together. The court will do the same, and these issues are discussed in issue IX.G, *infra*.

G. Was trial counsel ineffective due to mental and moral shortcomings and expressing a favorable view of the death penalty?

In his first habeas appeal, Rhines argued that Gilbert was suffering from depression and that Gilbert had misappropriated an unspecified sum of money while he represented Rhines. Brief for Appellant at 27-28, *Rhines II*, 608 N.W.2d 303 (2000), 1999 WL 34818796. He asserted that Gilbert's personal problems caused a lot of work to be shifted to Stonefield. *Id.* at 27. Rhines also argued that Butler improperly told the jury during closing arguments that the death penalty was an appropriate punishment in certain cases. *Id.* at 26-27. Rhines's claims were summarily rejected by the South Dakota Supreme Court. *Rhines II*, 608 N.W.2d at 313.

***46** Here, Rhines acknowledges these claims would not constitute ineffective assistance of counsel. Rather, he asserts that they should be considered in combination with his other ineffective assistance claims. For the reasons stated both *supra* and *infra*, this court rejects each of Rhines's other ineffective assistance claims. As a corollary, this court concludes Rhines is not entitled to relief on this claim as well.

H. Was trial counsel ineffective for failing to exclude or challenge testimony from Glen Wishard?

This claim was not exhausted when Rhines filed his federal habeas petition. It was addressed for the first time by the circuit court in Rhines's second habeas proceeding. Docket 204-1 at 22-24. Because the South Dakota Supreme Court denied Rhines's motion for a certificate of probable cause without addressing any of his arguments, the state circuit court is the last reasoned decision addressing this claim.

Wishard was a baker and an employee of Dig'Em Donuts. He was called to testify during the state's case-in-chief. *See* Docket 215-3 at 131-138. Wishard explained that he went into work at the Dig'Em Donuts store located in Box Elder on March 8, 1992. Schaeffer was murdered that night at the West Main Street location in Rapid City. According to Wishard, he began his shift at 10:00 that evening and worked overnight. Around 2:00 a.m., Wishard learned from Dennis Digges, a co-owner of Dig'Em Donuts, that Schaeffer had been killed.

Rhines arrived at the Box Elder store with Sam Harter, his roommate, sometime after Dennis Digges spoke with Wishard. Wishard was asked if he could recall Rhines's appearance at this time. He testified that Rhines appeared to be "cheerful." *Id.* at 137. Wishard recounted how Rhines told him that he had just been questioned by the police because Rhines was a former Dig'Em Donuts employee. When asked if Rhines appeared to be concerned about being questioned, Wishard responded, "No, he was very cheerful." *Id.* On cross-examination, Stonefield asked Wishard when he first told the police about the events that formed the substance of his testimony. Wishard stated that he first spoke to the police in September. Stonefiled reiterated: "So the incidents that you testified about occurred in March and you contacted [the police] about in September?" *Id.* at 138. Wishard responded, "That's right." *Id.* Stonefield stated that he had no further questions.

Rhines argued that his trial counsel were ineffective because they did not object to or rebut Wishard's testimony about Rhines's appearance. Rhines claimed that he told his attorneys that Wishard's testimony was false and that Wishard had his dates mixed up.

During Rhines's first state habeas proceeding, Stonefield was asked about Wishard's testimony. He was asked if Rhines told him that Wishard was lying. Stonefield responded, "If I remember right, I think Charles said something about disputing what—about what that man was saying, yeah, that sounds—that sounds familiar." HTC at 53. Stonefield added that "if I remember right, what the dispute was about was—was demeanor, was how Charles was acting or how Sam was acting, that kind of thing." *Id.* at 54. Stonefield was asked if Rhines told him that Wishard had his nights mixed up, and Stonefield responded, "He may very well have said that. That sounds familiar." *Id.*

The circuit court reviewed Stonefield's and Butler's responses to questions about cross-examining a number of state witnesses, including Wishard. They both expressed agreement with the sentiment that cross-examination should be pursued if the examiner has a point to make. Docket 204-1 at 23. The court determined that Stonefield's cross-examination was part of the defense team's trial strategy. It also concluded that, given the overwhelming body of evidence against Rhines, he could not demonstrate prejudice.

*47 Although not elaborated upon by the circuit court, its finding regarding trial strategy appears to be that by highlighting the several months that lapsed between Wishard's observations and the time he spoke to police, Stonefield was underscoring the point that Wishard's memory was not trustworthy. Moreover, in contrast to Rhines's suggestion that Wishard had his dates mixed up, Wishard testified that he spoke with Dennis Digges on March 9 about Schaeffer's murder shortly before Rhines arrived. Wishard also testified how Rhines told him that he had just been questioned by the police about the murder. The fact that Wishard learned of Schaeffer's murder on the same day that Rhines told Wishard he had just been questioned by the police about the murder shows that Wishard was not, as Rhines suggests, thinking of an earlier meeting. Although Rhines suggests that Wishard's report of his demeanor must have been from a different time, Rhines asserts that position only by speculation. And to some degree, Rhines's counsel did draw the jury's attention to the possible inaccuracy of Wishard's memory through cross-examination. Finally, Rhines's refutation of the court's prejudice determination consists only of conclusory language. Thus, the court finds that at least a reasonable argument supports the conclusion that Stonefield's cross-examination of Wishard complied with the *Strickland* standard. Consequently, Rhines is not entitled to relief on this claim.

I. Was trial counsel ineffective for failing to hire a mitigation expert?

The court has included its analysis and resolution of this issue in its discussion of issue IX.A, *supra*. For the reasons stated therein, Rhines is not entitled to relief on this claim.

J. Was trial counsel ineffective for failing to exclude testimony concerning Rhines's possession of a gun and his conduct at victim's funeral?

This claim was not exhausted when Rhines filed his federal habeas petition. Rhines raised the issue in his second state habeas proceeding, but he did not brief or present any argument in support of it. Docket 204-1 at 15. Consequently, the circuit court summarily rejected the claim. *Id.*

As a threshold matter, Rhines's failure to support this argument at all in state court suggests this claim was not "fairly presented" to the court for resolution. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). Giving Rhines the benefit of the doubt, this court will assume the state court's summary disposition of Rhines's argument is a determination on the merits that Rhines did not satisfy the *Strickland* test for ineffective assistance of counsel. *See Harrington*, 562 U.S. at 98 (noting the habeas petitioner must still show there is "no reasonable basis for the state court to deny relief.").

1. Rhonda Graff

Rhonda Graff was called as a witness during the state's case-in-chief. Docket 215-3 at 79-85. She was a resident in the same apartment complex where Rhines and Harter lived. Aside from the occasional greeting in passing, Graff did not have much contact with Rhines prior to March 9, 1992—the day after Schaeffer's murder. Graff testified that she and her father were speaking to Rhines that morning. They asked Rhines about the incident at Dig'Em Donuts. Rhines told Graff that he had known Schaeffer and that Harter was the one that found his body. Rhines then drew a map of the store in the snow and indicated where Schaeffer had been found.

Graff asked if the police knew who committed the murder. Rhines said that they did not. Rhines knew, however, "exactly how many times [Schaeffer] had been stabbed ... he knew the exact number and where." *Id.* at 82. Specifically, Rhines said Schaeffer had been stabbed "twice in the front and once in the back with his hands tied behind his back." *Id.* Graff found this striking because the news reports did not state how many times Schaeffer had been stabbed, but Rhines did. Graff also recalled that Rhines made a reference to Schaeffer having vacation plans, and that "if he would have stayed away like he said, on his vacation ... and not come back early and went to work, he would have still been alive." *Id.* at 84. Graff noted that Rhines would periodically attempt to change the subject during their conversation.

Graff recalled seeing Rhines on March 10, the following day. She testified that she saw Rhines and Harter on the front porch of their apartment "handling firearms of some caliber." *Id.* at 83. She recalled that they went inside, however, and Graff did not elaborate on what she observed. Graff testified that she saw Rhines leave home in a suit on March 11, presumably to attend Schaeffer's funeral. After Rhines came home, Graff saw him get into his car and leave. She testified that was the last time she saw Rhines.

*48 Here, Rhines argues that Graff's reference to the fact that she observed him handling a firearm was irrelevant and highly prejudicial. He argues it was irrelevant because whether he

handled a firearm was of no consequence to his guilt nor any statutory aggravating factor. He also asserts her testimony was prejudicial because it suggested he was prone to violence. Thus, his attorneys' failure to object could not constitute sound trial strategy. The court concludes, however, that Rhines has failed to show the absence of a reasonable basis for the state court to deny him relief.

First, whether Rhines possessed the handgun is arguably relevant to the issue of guilt and Rhines's own knowledge of his guilt. By the time Graff observed Rhines in possession of a firearm, Rhines had already provided her with specific details of Schaeffer's murder that were not publically known. The jury could infer that Rhines was arming himself to prepare to avoid arrest. This is bolstered by the fact that Rhines fled the following day. Second, even if the statement was irrelevant and should have been objected to, Rhines has not demonstrated prejudice by its admission sufficient to undermine the confidence in the outcome of his trial. Graff merely mentioned the fact that Rhines owned a gun without further elaboration. She recounted how she observed Rhines with Harter the day after she first spoke with Rhines, and she was able to provide specific details about Rhines's conduct that supported the veracity of her recollection. Moreover, had his attorneys objected to her statement about the firearm, such an objection could have drawn even more attention to the fact that Rhines possessed a gun. At a minimum, the court finds that at least a reasonable argument supports the conclusion that the trial team's decision to refrain from objecting to this evidence complied with the *Strickland* standard.

2. Connie Royer

Royer was called as a witness immediately after Graff. Docket 215-3 at 85-93. Royer was a co-owner of Dig'Em Donuts along with Dennis and Donna Digges. She was very close to Schaeffer and knew him before the donut shop opened. Royer recalled the last conversation she had with Schaeffer and that Schaeffer said he would be going out of town. Royer testified that she received word of the murder around 10:30 p.m., and that she came straight to the donut shop. Royer also testified that she knew Rhines as a former employee but that he had been fired. She explained that she went to Schaeffer's funeral on March 11, and that she saw Rhines there. Royer recalled that she was crying and that Rhines came up and put his arm around her. Rhines told her, “Connie, it will be all right. This is where he should be. He's in God's hands now.” *Id.* at 215-3.

Like Rhines's objection to Graff's testimony, Rhines asserts that Royer's testimony about his behavior at the funeral was irrelevant. Likewise, he contends that his counsel should have objected to it and that their failure to do so was in violation of the *Strickland* standard of effective representation. Again, however, the court finds there is a reasonable basis to support the rejection of Rhines's ineffective assistance claim.

First, Rhines's statement to Royer at the funeral could suggest a lack of remorse or an inability to accept responsibility for his actions. Second, to the extent Royer's testimony was irrelevant, Rhines cannot demonstrate prejudice by its admission. The attitude Rhines displayed toward Schaeffer's death during the funeral was consistent with the attitude he demonstrated in his interview with Allendar and Bahr. *Rhines I*, 548 N.W.2d at 452 (observing “Rhines described his own sarcastic and scornful attitude toward Shaeffer's suffering”); Docket 215-2 at 6 (laughing and explaining “Too bad [the pathologist] wasn't there” to watch Schaeffer's final moments). This taped interview was played for the jury. Thus, like with Graff's testimony, at least a reasonable argument supports the conclusion that trial team's decision to refrain from objecting to this evidence complied with the *Strickland* standard. Consequently, Rhines is not entitled to relief on this claim.

X. Did the South Dakota Supreme Court Fail to Perform its Proportionality Review?

***49** As discussed in issue VI.D, *supra*, the Supreme Court in *Gregg* expressed a favorable view of the mandatory appeal mechanism enacted in Georgia. That procedure required the state supreme court “to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.” *Gregg*, 428 U.S. at 198. South Dakota enacted a similar requirement. SDCL 23A-27A-12. The South Dakota Supreme Court followed that procedure in Rhines's direct appeal. *Rhines I*, 548 N.W.2d 453-58. It concluded: (1) that Rhines's death sentence was not imposed under the influence of passion, prejudice, or another arbitrary factor, *id.* at 455; (2) that the evidence supported the jury's finding of at least one statutory aggravating factor, *id.*; and (3) after comparing seven cases where the jury reached the penalty phase of a capital trial, that Rhines's sentence was not disproportionate. *Id.* at 456-58. Also discussed in issue VI.D, *supra*, was Rhines's

challenge to the South Dakota Supreme Court's determination of the pool of similar cases it used to compare to Rhines's case for proportionality purposes. For the reasons previously stated in issue VI.D, *supra*, Rhines's challenge here to the South Dakota Supreme Court's proportionality review fails.

Rhines also argues that the South Dakota Supreme Court ignored information suggesting his death sentence was imposed based on passion, prejudice, or some other arbitrary factor. Rhines does not identify what evidence the Court ignored. On direct appeal, the South Dakota Supreme Court rejected Rhines's argument that the jurors' bias against him was made manifest by the jury note asking about life in prison. *Rhines I*, 548 N.W.2d at 453-54. The Court rejected that argument, noting "[p]rison life was an appropriate topic for discussion when weighing the alternatives of life imprisonment and the death penalty." *Id.* at 454. And the Court also observed:

> Nor can we conclude the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We have rejected Rhines' claims that inadmissible evidence was considered by the jury and that the jury permitted irrelevant facts to taint its verdict. We cannot discern any independent basis for invalidating the jury's sentence. Although Rhines presented mitigating evidence concerning his difficult youth and loving family, the decision to impose the death penalty in spite of this evidence was not arbitrary. Rhines brutally murdered Donnivan Schaeffer so he could steal less than $2,000 in cash and escape responsibility for his crime. The law permits mercy, but does not require it.

Id. at 455.

The burden is on Rhines to demonstrate why he is entitled to habeas relief. But Rhines has not elucidated what additional information the South Dakota Supreme Court allegedly ignored. He has neither explained how the South Dakota Supreme Court's decision was contrary to or involved an unreasonable application of clearly established federal law, nor has he explained why the Court's adjudication of this issue was based on an objectively unreasonable determination of the facts. Consequently, Rhines is not entitled to relief on this claim.

XI. Did the Trial Court Improperly Deny Rhines's Motion to Appoint a Forensic Communications Expert?

On direct appeal, Rhines argued that the trial court abused its discretion when it denied his motion to appoint a forensic communication expert. *Rhines I*, 548 N.W.2d at 441; *see* SDCL 19-19-706(a) (providing authority for a trial court to appoint experts when "the court deems expert evidence is desirable"). [19] According to Rhines, such an expert should have been appointed "to conduct and analyze a community attitude study and design a supplemental juror questionnaire[.]" *Rhines I*, 548 N.W.2d at 441. Rhines was concerned that the jurors could be unfairly influenced by his homosexuality, and explained the expert's study and juror questionnaire were necessary to properly address the issue.

To support his argument on direct appeal, Rhines pointed to the juror note inquiring about prison life. Among the questions presented, the jurors asked:

> ***50** Will Mr. Rhines be allowed to mix with the general inmate population?
>
> Will Mr. Rhines be allowed to discuss, describe or brag about his crime to other inmates, especially new and or young men jailed for lesser crimes (Ex: drugs, DWI, assault, etc.)?
>
> Will Mr. Rhines be allowed to marry or have conjugal visits?
>
> Will Mr. Rhines be jailed alone or will he have a cell mate?

Id. Rhines argued that these questions demonstrated homophobic concerns that prejudiced the jury's deliberations.

The South Dakota Supreme Court disagreed for several reasons. First, it found that there was no necessity for the type of expert services Rhines requested. Rather, the Court concluded that *voir dire* was an appropriate vehicle for determining juror hostility, and the court found that an impartial jury had been impaneled. *Id.* at 442. It noted that counsel questioned eleven of the twelve jurors about Rhines's sexuality, and observed that ten responded it would have no impact on their decision making. The eleventh thought homosexuality was sinful, but nonetheless stated that Rhines's sexuality would not affect how she decided the case. Second, the Court disagreed that the juror note revealed any

homophobic bias on the part of the jurors. Rather, the Court found that the jurors' questions related to prison life and prison conditions rather than Rhines's sexual orientation. *Id.* For example, other questions the jurors posed were focused on whether Rhines would be eligible for work release, whether he could attend college, whether he would be able to watch TV or listen to the radio, and what his daily routine would be like. The Court determined that, in context, this series of questions reflected "the jury's legitimate efforts to weigh the appropriateness of life imprisonment versus the death penalty." *Id.* Thus, the South Dakota Supreme Court found no error in the trial court's refusal to appoint an expert.

Here, Rhines's claim for relief derives from *Ake v. Oklahoma*, 470 U.S. 68 (1985). In *Ake*, the defendant exhibited signs of a mental illness "so bizarre that the trial judge, *sua sponte*, ordered him to be examined by a psychiatrist" to determine if he could stand trial. *Id.* at 70. The defendant was committed to a state hospital, and it was determined that he was not competent to stand trial. Six weeks later, the court was informed by the chief forensic psychologist that Ake would be competent to stand trial if he continued to receive daily doses of an anti-psychotic drug.

At a pretrial proceeding, Ake's attorney gave notice that he would raise an insanity defense. *Id.* at 72. The attorney asked the court to appoint a psychiatrist to examine Ake and to determine if he was incompetent *at the time of the offense*, because none of the psychiatrists who had examined Ake had explored that issue. He also noted that Ake was indigent and asked for the funds to hire an expert if the court would not appoint one. The trial court refused, finding no constitutional requirement to fulfill the attorney's request. Ake was subsequently tried for and convicted of murder, and sentenced to death. The state appellate court upheld the sentence.

***51** The United States Supreme Court reversed. It held "that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." *Id.* at 74.

Rhines reads *Ake* as a broad requirement that the government must provide an indigent defendant with expert assistance whenever that expertise would be relevant to any so-called "substantial factor" of the indigent's defense. Rhines reiterates his concern that the jury might have been hostile toward him based upon his homosexuality and that the forensic communications expert could have helped prepare trial counsel for addressing the issue. He contends that the jury questions demonstrated that his sexuality was a "substantial factor" in his case and that the expert was a necessity. Rhines concludes that the South Dakota Supreme Court's decision, therefore, was contrary to or involved an unreasonable application of *Ake*.

This court disagrees. First, the defense at issue in *Ake* was insanity. Unlike Rhines's sexuality, a defendant's sanity implicates his or her capacity to comply with the law. If the defendant is insane at the time an offense is committed, his or her lack of sanity at that time is a defense to otherwise criminal conduct. *Cf. United States v. Voice*, 627 F.2d 138, 146 (8th Cir. 1980). As the Court in *Ake* observed, the defendant had placed his sanity in issue; thus his argument was that he could not be held criminally responsible for the conduct with which he was charged. And despite having the burden of proving that he was insane, he had no means to marshal such evidence in the absence of a court appointed expert. *Ake*, 470 U.S. at 72. By contrast, Rhines's sexuality is not a defense to Schaeffer's murder or the burglary of the donut shop. The Court's holding in *Ake* is congruent with its recognition of the uniquely "elusive and often deceptive" symptoms of mental illness that only an expert can help define, and the unfairness that inures "when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer" without affording him any means to mount a meaningful defense on that issue. *Id.* at 80 (internal quotation omitted). The Court observed that "[a] defendant's mental condition is not necessarily at issue in every criminal proceeding, however, and it is unlikely that psychiatric assistance of the kind we have described would be of probable value in cases where it is not." *Id.* at 82. Thus, the Court's holding was limited to the issue of appointing a psychiatrist in those cases where the defendant's mental capacity was put in issue. That the Court's holding in *Ake* was limited in such a manner is stated expressly by the Court when it reiterated that

> when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an

> appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 83.

Moreover, Rhines has not identified any clearly established federal law expanding the express holding of *Ake* to encompass the appointment of experts in other cases generally nor, more specifically, in those cases where a defendant's sexuality is, in Rhines's view, a "significant factor" to his general defense strategy. Thus, the South Dakota Supreme Court's decision was not contrary to clearly established federal law, nor was it an unreasonable application of that law.

***52** Finally, Rhines disagrees with the South Dakota Supreme Court's determinations that the expert he desired would not be necessary to his case, that *voir dire* was effective in impaneling an impartial jury, and that the jury questions focused on prison conditions and not Rhines's sexuality. Reviewing the court's resolution of those factual issues, this court finds that the South Dakota Supreme Court's determinations were not objectively unreasonable. Consequently, Rhines is not entitled to relief on this issue.

XII. Did the Prosecutor Engage in Misconduct?

Rhines alleges four grounds of prosecutorial misconduct. These arguments were not exhausted when Rhines filed his federal habeas petition. They were addressed for the first time by the state circuit court in Rhines's second habeas proceeding. Docket 204-1 at 25-30. Because the South Dakota Supreme Court denied Rhines's motion for a certificate of probable cause without addressing any of his arguments, the state circuit court is the last reasoned decision addressing these issues.

In *Darden*, 477 U.S. at 181, the United States Supreme Court addressed the standard applicable to habeas claims of prosecutorial misconduct. To be entitled to relief, Rhines must not only demonstrate that the prosecutor's comments were improper but also that those comments " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). The Court has explained that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). This test, however, "is a very general one, leaving courts 'more leeway ... in reaching outcomes in case-by-case determinations[.]' " *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

A. Did the prosecutor improperly argue that Schaeffer's hands were tied prior to his death?

Rhines asserts that the prosecuting attorney misstated the evidence during closing arguments and improperly told the jury that Schaeffer's hands were tied prior to his death. The prosecutor did not mention the issue until the penalty phase of Rhines's trial. Describing the effect of the third stab wound, the prosecutor stated: "He goes limp. It's over and whether or not he tied him up before or after is for your determination." TT 2662.[20] And in rebuttal, when the prosecutor was addressing defense counsel's argument about the deterrent effect of the death penalty, he stated:

> But wouldn't you like to think for just a moment that the next time a convenience store or donut shop has this sort of thing happen, that the person who does it realizes that no matter whether you stab him once or twice or you bind him and you stab him in the head or you mutilate him, that at some point in time you just don't get by with just a life sentence? Might there not be some deterrence here?

Id. at 2693.

The circuit court observed that Dr. Habbe—the state's pathologist—was unsure whether the ligature was tied before or after Schaeffer's death. It also observed that the prosecuting attorney explained that whether or not Schaeffer's hands were bound prior to his death was for the jury to determine. And it referenced the South Dakota Supreme Court's conclusion in *Rhines I* that the jury could reasonably infer from the evidence presented at trial that Schaeffer's hands were bound prior to his death. For those reasons, the circuit court found no prosecutorial misconduct occurred. *See* Docket 204-1 at 27.

***53** As explained in issue VIII.B, *supra*, this court concluded that the South Dakota Supreme Court's determination regarding the evidence presented at trial was not objectively

unreasonable. A juror could have inferred from the evidence that Schaeffer's hands were tied before his death. Additionally, in the prosecutor's first reference to the binding, he explicitly told the jury that whether Schaeffer's hands were bound prior to his death was for them to determine. In the second reference, he spoke of the binding in hypothetical terms. Contrary to Rhines's assertion, the prosecutor did not misstate the evidence presented at trial nor did he tell the jury that Schaeffer's hands were bound prior to his death. The circuit court's findings were not objectively unreasonable, and its conclusion that no prosecutorial misconduct occurred was not contrary to nor did it involve an unreasonable application of clearly established federal law. Thus, Rhines is not entitled to relief on this claim.

B. Did the prosecutor improperly argue that Schaeffer was "gutted?"
Rhines asserts that the prosecutor improperly told the jury that Rhines "gutted" Schaeffer when the prosecutor described the manner in which Schaeffer was killed. The prosecutor's statement is based on the testimony of Dr. Habbe.

Dr. Habbe performed an autopsy of Schaeffer. Certain photographs taken during the autopsy were introduced into evidence. Regarding the first stab wound, Dr. Habbe testified:

> This wound measured, width-wise, from a point down here to a point up here measured a little under one and a half inches. The interior part of the wound here has a blunt margin to it and the superior part of the wound has a sharp, pointed appearance to it. Coming from the tip of this wound is a superficial, and I think you can see part of it right here, what would be called an incised wound coming extending all the way up to right here. From here to here this wound is very superficial and barely breaks through the skin.

TT at 2218-19. The prosecutor continued to question Dr. Habbe as follows:

Q: With respect to that wound you said the blunt portion was on the bottom?

A: Right there.

Q: And the sharp portion was on the top?

A: Right. And that's—to get that what you do is you reapproximate the wound and you can see the blunt margin right here and if you put this back together this margin up at the top is pointed.

Q: And then the area above that wound, the lighter area is consistent with being caused by the sharp portion of that instrument?

A: Yes.

Id.

Dr. Habbe testified that the wound would be consistent with a knife wound and that such a wound would be consistent with the knife that the prosecution introduced into evidence. *Id.* at 2223. This series of questions between the prosecutor and Dr. Habbe followed:

Q: What did you notice about that wound in terms of the regularity of the wound?

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

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

A: It's less.

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

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

Id. at 2223-24.

The prosecutor asked how deep the stab wounds went. Dr. Habbe responded, "[t]he first one was probably not as deep as the second one. This one goes somewhere in the neighborhood of four to six inches, and understand that's a guess, basically." *Id.* at 2226.

During closing arguments of the guilt phase of Rhines's trial, the prosecutor argued that the jury should find Rhines guilty of premeditated murder. In doing so, he described the manner in which Schaeffer was killed in order to show that Rhines acted with the intent necessary to support that crime. *See* TT at 2510. For example, he noted that Rhines decided to lie in wait behind a desk when he heard someone enter the store room. *Id.* at 2511. The prosecutor then explained that Rhines knew how to use a knife, and he described the manner in which Rhines held the knife. *Id.* at 2511-12. The prosecutor opined that most people would hold a knife with the blade facing down to avoid possibly cutting themselves, but according to Dr. Habbe's testimony, Schaeffer's wounds indicated that the blade was facing upward when the first stab wound occurred. *Id.* at 2512. The prosecutor then argued: "That knife was held with that blade up for this ripping kind of motion to gut that person[.]" *Id.* at 2512.

***54** The circuit court found that there was evidence to support the prosecutor's argument that the blade was facing upward and that the wound was created by upward movement. It also noted that the prosecutor only used the word "gut" once. The circuit court determined that the prosecutor's use of the word was not so prejudicial that it would undermine the fairness of Rhines's trial. Thus, it rejected Rhines's claim. *See* Docket 204-1 at 29.

Here, Rhines primarily disputes whether there was any evidentiary support for the prosecutor's argument. He notes that Dr. Habbe was uncertain whether the irregularities of the first stab wound came from the movement of the knife or from the movement of the victim. He also argues that Dr. Habbe did not know whether the knife the state introduced into evidence was even the right knife. For that proposition, he notes that Gilbert asked Dr. Habbe whether the wounds "point[ed] unequivocally to one knife or the other," to which Dr. Habbe responded, "No, that's right." TT 2235.

But the point is not, as Rhines suggests, whether the prosecutor's argument rests on an unassailable foundation. Although Dr. Habbe was not present when the murder occurred and therefore could not be completely sure what instrument was used to create Schaeffer's wounds, he testified that the wounds were consistent with the knife introduced into evidence by the state. He also testified that the irregularities with the first stab wound suggested that it may have been caused by an upward motion. There is, therefore, evidentiary support for the state's argument that Rhines held the knife with the blade facing upward and that he stabbed Schaeffer with an upward motion.

All that remains is whether the prosecutor's use of the word "gut" was so improper that it would undermine the fairness of Rhines's trial. In *Darden*, for comparative purposes, the prosecutor argued that "the only way [he] can be sure" that the defendant would not get out of prison was the imposition of a death sentence. *Darden*, 477 U.S. at 180 n.10. He categorized the defendant as an "animal" and argued that "he shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of the leash." *Id.* nn. 11, 12. The prosecutor also explained how he "wish[ed] someone had walked in the back door and blown [the defendant's] head off[.]" *Id.* at n.12. The Court opined that the prosecutor's "argument deserves the condemnation it has received from every court to review it, although no court has held that the argument rendered the trial unfair." *Id.* at 179. The Court observed that the argument was inflammatory, but it did not misstate the evidence or impugn a constitutional right such as the defendant's right to remain silent. *Id.* at 181-82. Much of the argument, too, was invited by comments made by the defense attorney. *Id.* at 182. Ultimately, the Court agreed that the argument was not so improper to undermine the fairness of the defendant's trial.

Like in *Darden*, the prosecutor in Rhines's case did not misstate the evidence nor did he negatively implicate any of Rhines's constitutional rights. While the use of the word "gut" may not have been invited by defense counsel, the prosecutor used the word only once, and it is far less inflammatory than the comments made by the prosecutor in *Darden*. Thus, this court concludes that the circuit court's determination that the prosecutor's argument did not undermine the fairness of Rhines's trial is not contrary to or an unreasonable application of clearly established federal law. Consequently, Rhines is not entitled to relief on this claim.

C. Did the prosecutor act improperly by introducing and using the testimony of Glen Wishard?

***55** In his federal habeas petition, Rhines asserted that the prosecutor acted improperly by introducing and using the testimony of Glen Wishard. Docket 73 at 14. The circuit court

rejected Rhines's argument. Docket 204-1 at 30. Rhines advances no argument here for why the court's decision was erroneous. This court, therefore, concludes that Rhines has not met his burden to justify relief on this claim.

D. Did the prosecutor act improperly by eliminating all jurors who had misgivings about imposing the death penalty?

Rhines asserts, in conjunction with issues II and III, *supra*, that the prosecutor acted improperly by deliberately excluding jurors that expressed misgivings about the death penalty. In issues II and III, *supra*, this court concluded that Rhines was not entitled to relief. Because those jurors were not improperly excluded, it follows that the prosecutor did not commit misconduct by excluding them. Thus, Rhines is not entitled to relief on this claim.

CONCLUSION

The court concludes that Rhines is not entitled to habeas corpus relief on any of the grounds he has asserted. Accordingly, it is

ORDERED that respondent's motion for summary judgment (Docket 225) is granted.

IT IS FURTHER ORDERED that Rhines's amended habeas petition (Docket 73) is denied.

All Citations

Slip Copy, 2016 WL 615421

Footnotes

1 Rhines also makes the unsupported argument that a *Miranda* warning itself is only effective as it relates to the specific crime or crimes for which an individual is arrested. Rhines's argument is contradicted by *Colorado v. Spring*, 479 U.S. 564, 576 (1987) (concluding *Miranda* does not require an individual to be apprised of every offense for which he may be interrogated).

2 Rhines's federal habeas petition includes an argument that his confessions were involuntary because they were procured by a statement from Allender to the effect that South Dakota had not executed an inmate in fifty years. Rhines did not brief this issue, and the South Dakota Supreme Court did not address it as part of Rhines's direct appeal. Rhines's first habeas appeal before the South Dakota Supreme Court addresses this allegation in conjunction with an ineffective assistance of trial counsel claim. *See Rhines v. Weber*, 608 N.W.2d 303, 309 (S.D. 2000). The court noted that (1) Allender's observation was factually accurate; (2) no facts suggested the statement induced Rhines to confess; (3) Rhines in fact made incriminating statements before Allender made his remark; and (4) Rhines himself responded "There is a first time for everything," indicating his awareness of the consequences of his confession. *Id.* Rhines has not shown that the court's findings were incorrect or that his confession was involuntarily given because of Allender's comment.

3 Rhines's federal habeas petition also challenged the admission of this evidence on Eighth Amendment grounds. Docket 73 at 6. Rhines has subsequently clarified, however, that he "does not argue that the admission of victim impact testimony during the penalty phase violated his rights under the Eighth Amendment." Docket 232 at 30. Rather, his argument is limited to whether the admission of the testimony violated the *Ex Post Facto* clause. *Id.*

4 This provision is now located at SDCL 23A-27A-2(2).

5 The court's instruction provided that only three, rather than four, aggravating circumstances were to be considered because the so-called "torture" and "depravity of mind" factors were paired together by statute.

6 Notably, the *Payne* decision held: "Congress and most of the States have, in recent years, enacted ... legislation to enable the sentencing authority to consider information about the harm caused by the crime committed by the defendant. *The evidence involved in the present case was not admitted pursuant to any such enactment*[.]" *Payne*, 501 U.S. at 821 (emphasis added).

7 The South Dakota Supreme Court specifically addressed the various procedural safeguards in the Georgia capital sentencing regime that were analyzed and approved of in *Zant*. The Court noted that South Dakota's death

penalty scheme is modeled on Georgia's and that each of those safeguards were present in South Dakota's statutory framework. *Rhines I*, 548 N.W.2d at 453. The only finding that Rhines challenges here is the Court's determination that South Dakota is a non-weighing state.

8 The South Dakota Supreme Court found that, per *Stringer*, harmless-error analysis is only applicable in weighing states. *Rhines II*, 608 N.W.2d at 315 (quoting *Stringer*, 503 U.S. at 231-32).

9 Rhines contends that the South Dakota Supreme Court acknowledged that an aggravating circumstance that mentions "torture" is, without further explanation, unconstitutionally vague. Docket 232 at 46. Although the South Dakota Supreme Court made a general citation to SDCL 23A-27A-1(6), its analysis was explicitly focused on whether the "depravity of mind" factor, as instructed by the trial court, was unconstitutionally vague. *Rhines I*, 548 N.W.2d at 448. It did not, as Rhines suggests, address a vagueness argument related to the torture portion of the statute.

10 Rhines challenges this portion of the South Dakota Supreme Court's decision in issue VIII.

11 Rhines relies on *Waddington v. Sarausad*, 555 U.S. 179 (2009) for his argument. While the *Waddington* case itself was decided after Rhines's appeal, the principle it stands for, recited in *Estelle*, was not novel at the time. *Waddington* likewise noted the defendant must show that the instruction was ambiguous. *Id.* at 190-91.

12 The Court assessed this factor as part of its mandatory review and found "substantial evidence in the record to support this finding." *Rhines I*, 548 N.W.2d at 455.

13 "HTC" refers to Rhines's first state habeas corpus transcript. Because there is no correlating docket entry containing the entire transcript, the court will cite to the excerpts that have been docketed when possible.

14 For simplicity, this court will cite to the locations of the exhibits as they appear in this court's docket.

15 Rhines's petition asserted that his attorneys could have received helpful testimony from John Fouske, James Mighell, and Connie Royer. Docket 73 at 12. Rhines later acknowledged, however, that he had not identified any testimony from those individuals that he would rely upon. Docket 215-32 at 5.

16 One of the identified parties, Joyce Bossert, wrote a letter indicating she did not trust her memory enough to sign an affidavit. Docket 215-13 at 1.

17 It is not clear from Dr. Ertz's affidavit that he, in fact, formally diagnosed Rhines with ADHD or any other learning disorder. Rather, Dr. Ertz opined that Rhines showed symptoms of ADHD and at times behaved in a manner consistent with individuals who have ADHD.

18 Rhines has offered no clearly established federal law establishing such a rule.

19 This provision has been recently relocated from SDCL 19-15-9.

20 "TT" refers to Rhines's trial transcript. Like Rhines's habeas transcript, there is no docket entry containing the entirety of this transcript.

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES, Petitioner, v. DARIN YOUNG, Warden, South Dakota State Penitentiary, Respondent.	))))))))))))	CIV. 00-5020-KES PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT

Petitioner Charles Russell Rhines, by and through undersigned counsel, timely moves this Court, pursuant to Federal Rules of Civil Procedure 59(e), to alter or amend its judgment (Dkt. 306) granting the State's Motion for Summary Judgment. In support, Mr. Rhines states as follows:

I. Introduction

This section proceeds in two parts. First, it explains that newly discovered evidence provides new grounds for relief and that current counsel suffer from a disabling conflict of interest, impairing their ability to litigate those claims. Second, the section explains the factual and legal errors underlying the Court's order.

Undersigned counsel for Mr. Rhines has undertaken basic investigation that had, until very recently, been left undone. The jurors who imposed a death sentence had not been interviewed. As discussed below and as demonstrated in the appendix, that investigation uncovered evidence, *inter alia*, that at least one juror harbored serious anti-gay bias and that homophobic stereotypes served as a basis for imposing a death sentence. This critical, fundamental area of investigation had been undertaken by neither his trial counsel nor any of his counsel in state post-conviction proceedings,

including current counsel in the office of the Federal Public Defender's Office of the District of South Dakota and North Dakota.

The latter were responsible for litigation in both state post-conviction proceedings and for representing Mr. Rhines in this Court. Counsel for Mr. Rhines, therefore, have a "'disabling conflict of interest'" preventing them from presenting critical vehicles for addressing these recently discovered claims for relief. *See Martel v. Clair*, 132 S. Ct. 1276, 1284 (2012); (2015). "Counsel cannot reasonably be expected to [argue their own ineffectiveness], an argument, which threatens their professional reputations and livelihood." *Christeson v. Roper*, 135 S. Ct. 891, 894 (2015). That is, counsel cannot be expected to argue their own ineffectiveness in litigating Mr. Rhines's state post-conviction proceedings, the stage wherein trial counsel's ineffectiveness must be raised. *See Martinez v. Ryan*, 132 S. Ct. 1309, 1313 (2012) (ineffective state post-conviction counsel may serve as basis for excusing procedural default of ineffective assistance of counsel claims).

Beginning with trial counsel, counsel at every stage of the prior proceedings have failed to interview the jurors. Conducting this basic step of the investigation would have resulted in setting aside Mr. Rhines's death sentence. In South Dakota state trial courts, a motion for a new trial is the proper avenue for raising claims related to juror misconduct or bias. *See* SDCL §15-6-59(a)(2) (jury misconduct is proper basis for raising motion for a new trial); SDCL §15-6-59(b) (providing timeline for filing motion for a new trial). South Dakota courts regularly review juror claims in such a motion, and this proceeding provides a critical basis for ensuring the reliability of the trial court proceedings. *See, e.g.*, *State v. Dillon*, 788 N.W.2d 360, 372 (S.D. 2010) (considering claim of juror misconduct raised in motion for a new trial); *Uhlir v. Webb*, 541 N.W.2d 738, 740 (S.D. 1996) (same); *State v. Wilkins*, 536 N.W.2d 97, 99 (S.D. 1995) (same).

In such proceedings, the court may consider "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. SDCL §19-14-7. Extraneous information includes "media publicity, conversations between jurors and non-jurors and evidence not admitted by the court." *Wilkins*, 536 N.W.2d at 99.

Despite the unique source of information that jurors provide into potential problems with the trial process, until recently no counsel for Mr. Rhines had ensured that the jurors were interviewed. This failure to even investigate, by both trial counsel and state habeas counsel, falls below the standard of competency at the time of Mr. Rhines's trial and post-conviction proceedings. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984) (standard for trial counsel deficient performance); *Martinez*, 132 S. Ct. at 1318. Mr. Rhines was prejudiced by this failure. Jury investigation would have uncovered substantial claims of jury misconduct, entitling him to relief. *Martinez*, 132 S. Ct. at 1318 (providing for excusal of procedural default where the "underlying ineffective-assistance-of-counsel claim is a substantial one."). Had trial counsel or post-conviction counsel undertaken this investigation, there is a reasonable probability that his sentence of death would have been set aside. *See Strickland*, 466 U.S. at 694.

Here, Mr. Rhines's grounds for relief stemming from the juror investigation provide substantial bases for relief. "The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law." *United States v. Wood*, 299 U.S. 123, 133 (1936). Anti-gay bias affected the jury's decision to sentence Mr. Rhines to death, violating his constitutional guarantees to an impartial jury, due process of law, the right to be free from arbitrary imposition of the death penalty, and equal protection of the law. U.S. Const. amends. V, VI, VIII, XIV.

A. Anti-gay bias precipitated jury's decision to sentence Mr. Rhines to death.

1. Actual and implied bias of jurors violated Mr. Rhines's right to an impartial jury.

Two jurors harbored anti-gay bias against Mr. Rhines and allowed their own biases to infect the sentencing process. The jurors also considered extrajudicial, extrinsic evidence in the course of the trial and had an ex parte discussion with the judge about the sentencing procedure. Each of these issues are addressed in turn.

At several points throughout the trial, Mr. Rhines's sexual orientation, including by his counsel during voir dire, was made apparent to the jurors. *See, e.g.*, Tr. 1477. His same-sex relationship with Sam Harter was an important part of the case because of his confession to Harter's girlfriend (and later wife), Heather Shepard.

During penalty phase deliberations, one of the jurors made his anti-gay bias known, referring to Mr. Rhines as "[t]hat SOB queer." Sealed Ex. A, ¶7. The statement was heard by the other jurors, and it made them "fairly uncomfortable." *Id.* The juror's description of Mr. Rhines as an "SOB" and as a "queer" make it unmistakable that the juror harbored anti-gay bias against Mr. Rhines. The use of such a slur, and directing it at Mr. Rhines specifically, makes it unmistakable that this juror was biased in a way that is fundamentally at odds with a fair trial. *Cf. State v. Hunter*, 463 S.E.2d 314, 361 (S.C. 1995) (use of the n-word during deliberations was "highly improper," but not fundamental error because it was not in reference to the defendant). "If a defendant proves that jurors were actually biased, the conviction must be set aside." *Johnson v. Armontrout*, 961 F.2d 748, 754 (8th Cir. 1992). Derogatorily referring to Mr. Rhines as "[t]hat SOB queer" demonstrates actual bias requiring that the death sentence be set aside. This juror's decision to impose death based on Mr. Rhines's homosexuality is further evidence of actual bias because it conflicts with the voir dire testimony, *McDonough*, 464 U.S. at 556, but also is evidence of the

prejudice that Mr. Rhines suffered as a result of the anti-gay bias on the jury: he was sentenced to death for being gay.

In addition to actual bias, the law recognizes "implied bias" or "presumed bias." Thus, where "the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances," bias is presumed. *Sanders v. Norris*, 529 F.3d 787, 792 (8th Cir. 2008). The juror's remarks more than merely imply his bias against a defendant depicted in the way Mr. Rhines was portrayed during the trial proceedings.

2. Untruthful *voir dire* responses obscured grounds that would have precluded biased jurors from sitting in judgment of Mr. Rhines

The juror's bias is all the more troubling in light of his sworn testimony avowing his lack of anti-gay animus during jury voir dire. He was asked whether Mr. Rhines's sexual orientation would affect how he viewed Mr. Rhines.

Q. And the evidence is going to show that Mr. Rhines is a homosexual. Does that . . . affect how you look at Mr. Rhines?

A. I guess not.

Q. You said you guess not?

A. Well, no.

Q. Have you ever known any homosexuals?

A. Yeah.

Q. Were they friends?

A. Yeah.

Q. And even though they have a different lifestyle than yourself, you still regard them as your friends?

A. Yeah.

Tr. 1477.

In light of the juror's foregoing testimony that Rhines's sexual orientation would *not* affect how he viewed the capital defendant, his use of the anti-gay slur is all the more troubling. Because

the juror "failed to answer honestly a material question on voir dire" and because a "correct response would have provided a valid basis for a challenge for cause," The juror's presence on the jury requires reversal without a specified showing of prejudice. *See McDonough Power Equipment Co. v. Greenwood*, 464 U.S. 548, 556 (1984). Under *McDonough*, a venire member's failure to provide a truthful answer would warrant relief where "an honest answer from this juror would have provided a basis to challenge her for cause." *Jackson v. State of Alabama State Tenure Com'n*, 405 F.3d 1276, 1288 (11th Cir. 2005). Honesty from the juror clearly would have supplied grounds to strike him from the jury.

Similarly, honesty from another juror would also have precluded him from service on the jury. Upon recent investigation, this juror has explained that anti-gay stereotypes informed his decision to impose a death sentence: "One of the witnesses talked about how they walked in on Rhines in Washington fondling a man in a motel room bed. I got the sense it was a sexual assault situation and not a relationship between the two men." Sealed Ex. B ¶11. To the contrary, there was no evidence at trial that the interrupted encounter was anything other than consensual.

Regardless, the juror decided to impose the death penalty to prevent Mr. Rhines from being a "sexual threat to other inmates and take advantage of other young men in or outside of prison." Sealed Ex. B, ¶11. These hateful stereotypes, that homosexual men are sexual predators, led at least one juror to impose a death sentence.

In contrast to these actual views, the juror testified during *voir dire* that he did not possess such bias:

> Q. There is going to be some evidence in this case that Mr. Rhines is a homosexual and one or two of the witnesses that may be called are also homosexuals. Do you have any opinions about homosexuals as to whether that's sinful or a wrong lifestyle or course of conduct?
>
> A. I guess a man or lady has to live their own lives the way they see fit and the way they are directed and the way they live it is entirely up to them and so, you know, I

don't see where that would have any variance on this case as far as I'm concerned. Tr. 327-28.

B. Jurors considered extrinsic evidence and held unrecorded, *ex parte* discussion with the trial court.

The jurors also considered extrinsic evidence during the course of the trial. During the guilt phase, the jurors had not yet been informed of which jurors would deliberate and vote. At the close of the guilt phase, the court informed the jurors who would deliberate. Nonetheless, the jurors discussed the speculation published in the newspaper about who would serve, "Like one man said, if the paper is right, 1 man & 3 women will [serve as alternates]." This evidence was not admitted at trial and should not have been considered by the jurors. Their having done so violated Mr. Rhines's constitutional rights. U.S. Const. amends. VI, XIV.

The jurors also had an ex parte, unrecorded discussion with the trial judge during their deliberations. The judge, outside the courtroom, explained to the jurors that he would not refer to them by name and that the defense could ask them to affirm that the verdict as read was true. That this conversation took place outside the presence of Mr. Rhines, violated his right to be present at his capital trial. *See* U.S. Const. amends. VI, XIV.

None of this evidence had been uncovered until undersigned's recent preparation for an evidentiary hearing. Had the court provided one, Mr. Rhines would have been able to present this information in support of a claim entitling him to relief. This Court should allow Mr. Rhines to amend his petition in light of this newly discovered evidence.

C. One of the jurors did not live in the county of conviction and was therefore unqualified to sit on Mr. Rhines's jury.

The same juror investigation also uncovered that one of the jurors on Mr. Rhines's jury was not qualified to serve because he did not live in the county in which Mr. Rhines was tried. The alleged offense and trial took place in Pennington County, South Dakota. The jury was,

according to South Dakota law, supposed to be drawn from residents of that county. SDCL §16-13-10 (West 1992) (referencing "residents of the county where the jury is selected" as potentially eligible jurors); *see also Nebraska Electrical Generation and Transmission Co-op., Inc. v. Markus*, 241 N.W.2d 142, 146 n.2 (1976) (noting impropriety of residents of once county sitting on a jury in another county). The Sixth and Fourteenth Amendments to the U.S. Constitution likewise require that a jury be drawn from a fair cross-section of the community in which the offense occurred. *See Taylor v. Louisiana*, 419 U.S. 522, 526-31, 538 (1966); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

One of the jurors sitting on Mr. Rhines's jury was a resident of Meade County at the time of his jury service. At the time of Mr. Rhines's trial, the juror was going through a divorce and lived in Meade County while his divorce proceedings were pending. Sealed Exs. C; D. Investigation has revealed that the juror lived in Meade County during his jury service. Sealed Ex. E.

Having an unqualified person on Mr. Rhines's jury violated his constitutional rights. U.S. Const. amend. VI, XIV. This Court should allow Mr. Rhines to amend his petition to raise this claim.

II. This Court's ruling that Mr. Rhines's trial counsel provided constitutionally effective assistance of counsel by failing to conduct a thorough mitigation investigation, to retain a trained mitigation investigator or a similarly qualified individual who could investigate Mr. Rhines' life history and their failure to present the results of a constitutionally effective mitigation investigation to Mr. Rhines' jury is contrary to, or an unreasonable application of clearly established federal law pursuant to 28 U.S.C. §2254(d)(1), as set forth in *Strickland v. Washington, Wiggins v. Smith, Williams v. Taylor, Rompilla v. Beard, Sears v. Upton* and *Porter v. McCollum*, as well as an unreasonable determination of the facts in light of the state court record pursuant to 28 U.S.C. §2254(d)(2).

A. Introduction

In its February 16, 2016 Memorandum Opinion and Order (Dkt. 305), this Court determined that the Seventh Circuit Judicial Court "concluded that Rhines' ineffective assistance claims failed…because Rhines could not meet the deficient performance or prejudice prong of *Strickland.*" Dkt. 305 at 96. As will be discussed *infra*, this Court's decision with respect to Claims IXA, IXB and IXI of Mr. Rhines' First Amended Petition for Writ of Habeas Corpus and Statement of Exhaustion (Dkt. 73) is both contrary to and an unreasonable application of clearly established federal law as well as an unreasonable determination of the facts in light of the state court record. 28 U.S.C. §2254(d)(1), (d)(2). Due to the manifest errors of law and fact contained in this Court's Memorandum Order and Opinion (Dkt. 304, 305), Mr. Rhines is entitled to relief pursuant to Fed. R. Civ. P. 59(e).

B. Both the circuit court's decision (Dkt. 204-1) and this Court's Memorandum Opinion and Order (Dkt. 305) are contrary to, and an unreasonable application of, clearly established federal law, as promulgated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), *Wiggins v. Smith*, and *Williams v. Taylor.*

A federal habeas petitioner may obtain relief pursuant to 28 U.S.C. §2254(d)(1) if he can prove that an adverse state court ruling is either "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." When "a state court applies a rule that contradicts the governing law set forth in [Supreme Court of the United States] cases", it is contrary to clearly established federal law. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). An unreasonable application of clearly established federal law occurs when a "state court identifies the correct governing legal principle but unreasonably applies it to the particular facts of the particular state prisoner's case." *Id.* at 413.

The circuit court's decision (Dkt. 204-1, at 21) does not set forth the correct standard for assessing Mr. Rhines's ineffective assistance of trial counsel claims. According to the circuit

court, the standard for determining the first prong of the *Strickland* analysis—deficient performance—is "reasonably competent assistance." *Id. Strickland*, however, does not stop there; "[t]he proper measure of attorney performance remains simply reasonableness ***under prevailing professional norms.***" *Strickland v. Washington*, 466 U.S. 668, 688 (1984)(emphasis added). Nowhere in either the circuit court's decision nor in this Court's Memorandum Opinion and Order (Dkt. 305) is trial counsels' performance assessed in terms of whether it was "reasonable[ ] under prevailing professional norms." *Id.*

Moreover, both the circuit court's decision (Dkt. 204-1) and this Court's Memorandum Opinion and Order (Dkt. 305) *presume* that trial counsel's purported "strategy" was reasonable, rather than analyzing the reasonableness of the mitigation investigation that trial counsel actually did to determine whether that was indeed the case. *Strickland* mandates that "…strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. In *Wiggins v. Smith*, the Court further explored the requirement that reviewing courts scrutinize trial counsel's asserted "strategies." *Wiggins v. Smith*, 539 U.S. 510, 523-27 (2003). Counsel is ineffective if a decision is made *not* to investigate or interview a witness unless they have investigated enough to know what additional investigation may or may not reveal. *Id.* at 527. In *Wiggins*, the Supreme Court specifically held that investigation into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Id.* at 524-25, citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989). *Cf. id.*, 11.8.6, p.

133 ("among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences"). Where facts known to counsel suggest particular investigation would be fruitful, the failure to investigate results from "inattention, not reasoned strategic judgment." *Id.* at 526.

Similarly, in *Rompilla v. Beard*, the Court found trial counsel ineffective for failing to follow up on "red flags" in school, medical and prison records that pointed to the need for further mental health testing. *Rompilla v. Beard*, 545 U.S. 374, 391 (2005). The Court further found that counsel had a duty in turn to follow up on the findings in those records and obtain additional records including Rompilla's juvenile records. It was also unreasonable for the trial attorneys to limit their investigation to interviewing Rompilla's parents and two of his five siblings. As a result of this narrow, incomplete investigation, the three mental health experts retained by trial counsel concluded, erroneously, that Mr. Rompilla was anti-social and did not suffer from any mental disease. A thorough investigation produced evidence establishing that Rompilla suffers from Fetal Alcohol Syndrome, borderline mental retardation, and possibly schizophrenia and posttraumatic stress disorder. *Id.* at 390-93 *See also Porter v. McCollum*, 130 S. Ct. 447 (2009), and *Sears v. Upton*, 130 S. Ct. 3259 (2010), in which the Court found that state court decisions denying ineffective assistance of counsel claims were objectively unreasonable where trial counsel abandoned without investigating potentially fruitful avenues of mitigating evidence.

Both the circuit court and this Courts' rulings presume that trial counsel's decision not to conduct a mitigation investigation was reasonable because trial counsel obtained court orders preventing the State from introducing evidence of Mr. Rhines's two prior felony convictions for third-degree burglary and armed robbery with a sawed-off shotgun and from presenting non-

statutory aggravating circumstances for the jury to consider. Dkt. 204-1, at 19; Dkt. 305 at 94. Both opinions, however, are based on erroneous interpretations of *Strickland, Burger v. Kemp,* and *Darden v. Wainwright.* Dkt. 204-1, at 19-20; Dkt. 305 at 91-94.

Strickland involved a far more egregious crime (triple homicide) and a client who consistently refused to take trial counsels' advice by confessing to all three murders and insisting upon entering a guilty plea without an offer to remove the death penalty as a sentencing option. *Strickland,* 466 U.S. at 672. In his plea colloquy, the defendant told the court that he did not have a significant prior criminal history, that he was under an extreme emotional disturbance at the time of the offense due to financial pressures he was facing, and appeared to be remorseful and accepted responsibilities for his role in the murders. *Id.* The trial judge had a reputation for appreciating defendants who were willing to accept responsibility and trial counsel believed that the judge would be receptive to the defendant's statements, in light of the fact that the defendant had waived a sentencing jury. *Id.* at 699-700. The other mitigation evidence that trial counsel uncovered would have negated the defendant's previous assertions that he was under extreme emotional disturbance at the time of the offense and that he lacked a significant prior criminal history. *Id.* at 673.

In *Burger v. Kemp*, 483 U.S.776, 794-95 (1987), the Supreme Court observed that "[t]he record at the habeas corpus hearing does suggest that [trial counsel] could well have made a more thorough investigation than he did"; however, the Court upheld defense counsel's decision not to present a mitigation case as a matter of reasonable professional judgment because it was made after counsel "interview[ed] *all potential witnesses* who had been called to his attention and that there was a reasonable basis for his strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty." *Id.* at 794 (emphasis added).

And, in *Darden v. Wainwright*, 477 U.S. 168 (1986), the Court ruled that trial counsel was not ineffective for relying on a simple plea of mercy from the defendant himself because counsel had conducted extensive pretrial investigation.. *Id.* at 186. The *Darden* Court expressly noted that "[t]he record clearly indicates that a great deal of time and effort went into the defense of this case; a significant portion of that time was devoted to preparation for sentencing." *Id.* at 185.

The circuit court's opinion also incorrectly stated the test for determining the second *Strickland* prong—whether trial counsels' deficient performance prejudiced Mr. Rhines. Dkt. 204-1, at 21. The circuit court held that "[t]he second prong of the *Strickland* test requires a defendant to show that counsel's deficient performance caused actual prejudice to the defendant." *Id.* (citations omitted). *Strickland,* however, held that, in order to prove that his trial counsel's deficient performance prejudiced him, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Again, neither the circuit court's decision (Dkt. 204-1), nor this Court's Memorandum Opinion and Order (Dkt. 305), applied this standard in determining whether trial counsel's deficient performance prejudiced Mr. Rhines.

This Court concluded that the circuit court "correctly observed the general standard for analyzing ineffective assistance claims under *Strickland* and then relied on *Strickland, Darden,* and *Burger* for comparison purposes. While Rhines argues that *Williams* and *Wiggins* were controlling and dispositive, the Supreme Court has explained that *Strickland* is the appropriate standard that courts should apply to resolve ineffective assistance claims." Dkt. 305, at 97. Although this Court is correct that the governing standard for determining whether trial counsel's deficient performance prejudiced Mr. Rhines is the one set forth in *Strickland,* the Court's

statement suggesting that *Williams* and *Wiggins* were somehow not dispositive is a manifest error of law. *Id*. Both *Williams* and *Wiggins* applied the *Strickland* standard to determine that trial counsel for Williams and Wiggins performed deficiently by failing to investigate and present readily available mitigation evidence. *See Williams*, 529 U.S. at 390; *Wiggins*, 539 U.S. at 521.

C. Trial counsel's mitigation investigation did not comply with prevailing professional norms.

1. Trial counsel neither consulted with or hired a mitigation investigator or a similarly qualified individual to interview and obtain life history records from Mr. Rhines and his family members, and to identify and interview friends, teachers, coaches, classmates, coworkers, and others who knew Mr. Rhines, nor did they perform these tasks themselves.

Mr. Rhines was tried in January 1993. At that time, the prevailing professional norms for capital lawyers were defined by the American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Capital Cases.* In *Strickland*, the Supreme Court has found that the ABA standards "are guides to determining what is reasonable" in determining whether trial counsel's performance was deficient. *Strickland*, 466 U.S. at 688; *see also* Deposition of Michael Butler, at 12-14.

In January 1993, at the time of Petitioner's trial, the ABA Guidelines mandated that investigations by defense counsel into mitigating evidence "`should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor'", and "`among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior juvenile and adult correctional experience, and religious and cultural influences'". *Wiggins*, 539 U.S. at 525 (quoting *ABA Guidelines for the Appointment and*

Performance of Counsel in Death Penalty Cases, 11.4.1(C), p. 93; 11.8.6, p. 133 (1989)(emphasis added).

Trial counsel's billing records reveal that they did not begin interviewing any penalty phase witnesses until a month before Petitioner's trial began.[1] On December 28, 1992 attorney Mike Stonefield travelled to Nebraska to interview Mr. Rhines' sisters. Stonefield timesheets, Ex. F, at 3. After that date, and after the commencement of the trial, Wayne Gilbert communicated by phone with Mr. Rhines' sisters, Elizabeth Young and Jennifer Abney, on January 16, 17 and 18, 1993. Gilbert timesheets, Ex. G, at 12-13. The records further reflect that counsel spoke with Mr. Rhines' sisters on the days immediately leading up to their testimony. *Id.* The other potential penalty phase with whom counsel spoke was Karl Rhines, who declined to testify. *Id.*at 9; Dkt.215-40. Further, their discussions with the sisters were so late in the day that trial counsel were not able to follow up on any of the mitigating themes or witnesses that the sisters revealed. Counsel's belated, hasty, and minimal investigation was the product of "inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S.at 526.

Mr. Rhines's sister, Jennifer Abney, confirmed that trial counsel did not contact her about her availability to testify for Mr. Rhines as a character witness until his trial was already underway. According to Jennifer,

> To the best of my recollection I was called by the defense team in January 1993. I was living in Australia and they asked me to fly to South Dakota and testify. Since I could not afford the plane ticket on my own, they paid for it.
>
> My flight was 30 hours from Australia. I was only able to take small naps off and on throughout the flight. It was very stressful knowing I was coming back to the United States to try to save my brother.
>
> I arrived approximately 2 days before I had to testify. I remember meeting a lawyer for a very brief time. I was not impressed by the brief time they spent with me because I

[1] Attorney Joseph Butler does not appear to have had any involvement in the mitigation investigation. Joseph Butler timesheets, Ex.G, at 17-19.

> really did not know what to expect. They wanted me to come to testify making me feel my testimony would be crucial and then I spent very little time speaking to the jury about my brother.
>
> I was flown in while the trial was already in progress. My role was to testify that my brother's life mattered. After I testified, I remained in the court room for the rest of the day. I left before it was over and did not learn that Charles had been sentenced to death until I was on my way back to Australia. The young lawyer called me and informed me about the death verdict. I never heard from the trial lawyers again.
>
> After the trial I was not contacted by anyone until 2011, when an investigator called me on the phone to talk about Charles. Although he mentioned coming out to California to meet with me in person, I never heard from him again...
>
> [Charles' trial lawyers] made me feel that because Charles confessed, they could not do anything for him. They did not ask for our family's help soon enough. I barely spoke with them before I testified. I was nervous and emotional because I had never testified in a case before. I was sleep deprived and very overwhelmed. If I had been prepped longer, been more informed about what they needed, not asked to hide parts of his life and prepared for my testimony I would have been willing to testify about any of the matters contained in my declaration if they had asked me…

Declaration of Jennifer Abney, Ex. H, ¶¶2-6; 28.

Counsel asked Rhines to write his "autobiography" (Dkt. 215-12). In his autobiography, Mr. Rhines wrote about a number of compelling mitigating themes, including a lifetime of feeling unwanted and unloved by his parents from a very early age; the lack of parental attention and affection he received; the isolation he experienced growing up in the family home once his siblings had moved out of the house; his the sexual molestation of by a neighbor boy beginning when he was just five years old; the fact that Mr. Rhines wet the bed until he was ten or eleven years old; his academic struggles, which included being socially promoted between the third through sixth grades, failing seventh grade and dropping out of high school during his sophomore year; his struggle with his sexual identity and how to live life as a gay man in a less than tolerant environment; the bullying and ridicule he endured for being different; and the trauma he experienced as a twenty year-old solider serving in Korea along the DMZ during the

Bonifas incident. Shockingly, trial counsel failed entirely to contact any of the individuals discussed in the autobiography, to collect any of the life history records of Mr. Rhines, his siblings, parents and extended family members, or to conduct investigation into any of the issues about which Mr. Rhines wrote. This Court highlighted the circuit court's observation of the journal as "at best disturbing." Dkt. 305 at 85. The content provided "red flags" that counsel ignored and their failure in that regard constituted deficient performance. *See Rompilla*, 545 U.S. at 392.

The autobiography did not and could not obviate counsel's duty to investigate, especially when its content provided significant areas to pursue in developing mitigation evidence. (Compounding this omission, Mr. Rhines was not counseled that the journal would be submitted to the state court, effectively rendering his diary as public testimony.) To the extent that counsel blames their failure to investigate on their client's journal, such a claim is neither reasonably competent nor constitutes a reasonable strategy decision. *See Rompilla*, 545 U.S. at 391 (counsel's reliance solely on interviews with their client and his family members was unreasonable.) Rather, counsel should have used the content of the journal to assist in channeling its investigative efforts.

Mr. Gilbert admits that the defense simply dropped the ball with regards to the mitigation investigation:

> Although Judge Konenkamp appointed Mike Stonefield as an investigative attorney, Mr. Stonefield eventually ended up doing legal work in the case rather than mitigation investigation.
>
> The defense team never discussed hiring a mitigation investigator or another similarly qualified person who could do mitigation investigation. Without a mitigation investigator to guide us, we thought the best we could do was to get family members to testify.

> I do not recall being [*sic*] whether I was aware of the 1989 American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Capital Cases,* and therefore I do not recall whether I read them or not prior to Mr. Rhines' trial. None of us did any training or received any education about how we should go about investigating and presenting mitigation evidence in the penalty phase of a capital trial.

Affidavit of Wayne Gilbert, Ex. I, ¶¶2-4.

Mike Stonefield echoed these sentiments during his state habeas testimony. Mr. Stonefield admitted that "this was a learning experience for everybody, certainly for me what a mitigation case even involves, what you're hoping to present if you have to come to it… who we ended up presenting as mitigation witnesses were his two sisters who were both adults, and they talked about him, what they remembered from his childhood and the contacts they have or they had with him more recently." HCT 41-42.

In contrast, both the circuit court and this Court found that trial counsel had conducted "a thorough investigation into Rhines's background", and that counsels' decision not to present additional "evidence at the penalty phase was due to strategic planning and an effort to minimize the potential "bad" evidence that the State could have introduced to rebut Rhines' efforts to put in mitigating evidence." Dkt. 204-1, at 21; Dkt. 305 at 94. This rationale represents an unreasonable determination of the facts and is predicated upon an unreasonable application of both *Strickland* and *Wiggins, supra*, which hold that strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691; *Wiggins,* 539 U.S. at 521.

2. Mr. Rhines was prejudiced.

Trial counsel not only failed to interview a single penalty phase witness until a week before trial, in contravention of well-defined norms at the time, they failed to appreciate those norms and displayed a fundamental misunderstanding of what constitutes mitigating evidence and how it can be used to humanize a capital client. As the circuit court's opinion noted, under South Dakota law, "the jury is free to consider all mitigating circumstances…" Dkt. 204-1, at 20 (citations omitted).

"[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment…requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The sentencer in a capital case must "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio,* 438 U.S. 586, 604 (1978)(plurality opinion of Burger, C.J.)(emphasis in original); *see also Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). The jury may not refuse to consider or be precluded from considering "any relevant mitigating evidence." *Eddings*, *supra*, 455 U.S. at 114; *see also Penry v. Johnson*, 532 U.S. 782, 797 (2001).

Trial counsels' constitutionally deficient mitigation investigation prevented Mr. Rhines' jurors from considering and giving effect to the kinds of mitigation evidence that would have enabled them to make an individualized sentencing determination.

According to one of Mr. Rhines's jurors,

> I found out after trial that Rhines had been to prison before, but I could pretty much guess that, based on the evidence we heard in the penalty phase. When his sister was presenting his life history, she tried to explain that he was a good kid growing up, but I remember wondering why there was a 10-12 year gap in his life

> that she didn't talk about. I assumed it meant he'd been locked up before, and that they couldn't talk about what he was doing during that time because he was in prison.

Sealed Ex. B, ¶10.

Another juror noted that,

> I remember Mr. Rhines' family offering testimony asking for leniency, but his attorneys didn't seem to have any sort of plan to present a case for leniency. It seems like they glossed over the details of his life, had nothing to say that would encourage mercy, and had pretty much nothing to give us, compared with the mountains of evidence that the prosecution had.

Sealed Ex. A, ¶ 9.

Trial counsel's decision to forego any meaningful investigation until the week before trial began, deprived the jury of compelling mitigation evidence that would have helped explain his behavior and offer support for an argument of leniency. As both jurors have averred, the jury had no idea who Mr. Rhines really was or why they should spare his life. This dearth of mitigation evidence was especially prejudicial in Mr. Rhines's case because there were possibly as many as three holdout jurors and it took more than twenty-four hours for the jury to return a death verdict. Sealed Ex. J, ¶5. Had trial counsel engaged in a constitutionally requisite mitigation investigation, there is more than a reasonable probability that Mr. Rhines would not have been sentenced to death. As discussed below, counsel's stunted and cursory investigation failed to uncover several areas of compelling mitigation. There exists a reasonable probability that, had the jury heard this evidence, they would have sentenced Mr. Rhines to life instead of death.

2. Mr. Rhines was prejudiced by his counsel's failure to discover and present evidence of his military, medical and mental health history especially evidence of his military service in Korea.

Mr. Rhines's parents signed him up for a three-year enlistment in the Army when was just seventeen years old. Dkt. 215-3, at 173, 185. Although both of his older sisters, Elizabeth

Young and Jennifer Abney tried to convince their father that it was not a good idea because of Mr. Rhines's psychological problems, their father thought the army might force his son to grow up. *Id.*

After enlisting in March 1974, Mr. Rhines attended basic training. In December 1975, having just turned 19 years old, Mr. Rhines was shipped to Korea to serve along a sensitive and newly Demilitarized Zone (DMZ). As a Private 2 and a Gunner 60, Mr. Rhines was ground artillery, responsible for patrolling the militarized zone on foot with a rifle. He remained in Korea for almost a year, until he was discharged from the military in October 1976. Dkt. 215-18, at 16. Rhines entered Korea at a critical time. A Normandy poplar tree partly obstructed the view of the "Bridge of No Return." As a last task to complete before his change of command, Captain Arthur Bonifas wanted to get this tree pruned. A previous pruning attempt on August 6, 1976 had been aborted after KPA (Korean People's Army) threats. The North Koreans demanded the tree pruning stop. When Captain Bonifas ignored the threats, he and 1st Lt. Mark Barrett were beaten and killed.

As retaliation, the U.S. Army chose to cut it all the way down as a show of force. Waves of helicopters carrying 140 troops began setting down in a field near the poplar, protected by seven Cobra gunships, three B-52's, and a huge force assembled just outside the DMZ. The tree was cut down while a hundred KPA soldiers stood watching from across the Bridge of No Return. Around the world, the tree became a symbol of communist brutality and a challenge to national honor.

Mr. Rhines described DMZ duty, of his battalion going on alert. They were issued live ammo and sat waiting for the go signal for three days. It was resolved the morning of the fourth day. Marines infiltrated the area under full camouflage. "It was a tense time for me. I was

carrying an M16/M203 grenade launcher and had 30 rounds of high explosive ammo strung across me in bandoliers … thinking 'all it takes is one round, and BOOM, I'm gone – not to mention that sympathetic detonation would set off the other 29 rounds – taking out the whole squad. That is when reality hits you right between the eyes—it stops being a game and becomes very serious." Dkt. 215-12, at 28-29.

Less than two months later, Mr. Rhines was discharged and returned to the United States. He reports he was "never so happy as when we landed back in the USA. I got off the plane and kissed the ground." *Id.* at 29.

Lt. Col. Jonathan Potter described the significance of the threat that Mr. Rhines faced during the Bonifas Incident as follows:

> Major Arthur Bonifas was an Army officer slain by North Korean soldiers in August 1976 while he was attempting to remove a tree from an area adjacent to the demilitarized Zone (DMZ) separating North and South Korea. While I did not personally take part in the aftermath of the "Bonifas Incident," it had significant effect on operations in Korea and serious repercussions for the military in general. The Bonifas Incident was discussed and included as part of hypothetical military exercises throughout my Army training, during Warfighter exercises, and at CGSC and Combined Arms Staff and Service School (CAS3). That it was a time of high stress and increased operational tempo is well known in the military. I understand Charles Russell Rhines served in Korea at that time. He and every other Soldier in Korea was under an enormous amount of pressure due to the Bonifas incident, as well as threat of imminent combat and the extraordinary stresses such a threat creates. I understand that in Mr. Rhines' case, the government has downplayed the threat Rhines would have faced because he was part of a substantial United States military presence and that presence was supported by Republic of Korea (ROK) Marines. While both those facts are true, the government substantially misunderstands the North Korean threat at that time. Facing our military was the threat was of over one million North Korean troops, highly trained and motivated, surging across the DMZ, overwhelming the force they faced. The American troops and ROK Marines would serve as a trip wire. Any notion that our military would not be under extreme duress is. It would have been incessant no-holds-barred combat, with the high number of casualties and extreme violence and chaos. Rhines would have been justified in feeling his life was in jeopardy under those circumstances and experiencing the stress of such day to day terror.

Declaration of Lt. Col. Jonathan Potter, Ex. K, at 1.

During Mr. Rhines's state habeas hearing, Mr. Stonefield testified that Mr. Rhines "may have talked about" being in Korea along the DMZ shortly after the North Koreans had killed two American officers, although it "[didn't] ring a bell." HCT 44. Mr. Gilbert provided an affidavit to the State during the remanded state habeas corpus proceedings in July 2012 stating trial counsel "reviewed Charles' military service records…[but] I did not recognize factors that would be helpful in mitigation other than to show the jury that Charles had family members who loved him." Dkt. 215-23, ¶6. .

Mr. Gilbert recently provided an affidavit in which he acknowledged that trial counsel obtained Mr. Rhines' military records through pretrial discovery provided to the defense team by the State. Gilbert affidavit, Ex. I, ¶5. He acknowledged that trial counsel never obtained Mr. Rhines' medical and mental health records from the military (which are kept separately from the records that the State provided to trial counsel) and that the trial team never discussed the possibility of consulting with a person who was familiar with military records to help explain the records to them. *Id.* Additionally, defense counsel never interviewed any of the individuals whose names are mentioned in the records or obtained information about the awards that Mr. Rhines received during his service, which included the National Defense Service Medal and Marksman Rifle. *Id;* Dkt. 215-18, at 16.

Mr. Rhines's military medical and mental health records, which were recently obtained by federal habeas counsel, reveal that in September 1976, as he was about to be discharged from the Army, he was suffering from several trauma-related symptoms, including "frequent or severe headaches, pain or pressure in chest, frequent indigestion, frequent trouble sleeping, depression or excessive worry, and loss of memory or amnesia." The box next to "[n]ervous trouble of any

sort" is marked with a question mark. Excerpts from Rhines's military medical records, Ex. L, at 1. Neither trial nor state habeas counsel obtained these records or conducted any investigation pertaining to Mr. Rhines's military service.

Both the State and this Court have erroneously asserted that Mr. Rhines was "jailed" and that he received less than an honorable discharge from the Army. These statements are unreasonable determinations of fact in light of the state court record. As Lt. Col. Jonathan Potter explains in his declaration:

> I have also reviewed a document from Mr. Rhines's military records. That document, a Report of Separation From Active Duty (DD 214) indicates Mr. Rhines was discharged from Active Duty with a General Discharge Under Honorable Conditions. His paperwork does not indicate he was being "chaptered" for criminal conduct, but for "apathy," a description given to a Soldier that is not thriving in military life. This is an important distinction. Such a discharge indicates Mr. Rhines may have had some bumps in his military career, but does not indicate serious misconduct. A General Discharge Under Honorable Conditions is generally not given for serious misconduct. Significantly, it cannot be given as a result of a court-martial. The only two discharges that result from a court-martial are a bad-conduct discharge and a dishonorable discharge. That is not what happened to Mr. Rhines. Also, nothing in those records indicate Mr. Rhines was confined, and confinement is usually only appropriate for courts-martial.

Declaration of Lt. Col. Jonathan Potter, Ex. K, at 2.

The fact that Mr. Rhines had disciplinary infractions during his military service should not have caused trial counsel to shy away from further investigating his military service and how it affected him. As the U.S. Supreme Court's decision in *Porter v. McCollum,* 130 S.Ct. 447, 450 (2009), makes clear, a prisoner's past military service is compelling mitigation evidence, even if the prisoner has a less than stellar military disciplinary record. Porter himself was AWOL twice in Korea and was sentenced to six months' imprisonment for going AWOL again upon his return to the United States. The Court determined that trial counsel's failure to investigate Porter's military service, his struggles to regain normality after the Korean War, his history of childhood

physical abuse, and his brain abnormality, limited education and difficulty reading and writing, deprived Porter's jury of hearing evidence that "would humanize Porter or allow them to accurately gauge his moral culpability", thus rendering their performance constitutionally deficient and prejudicial. *Id.* at 454.

During Mr. Rhines's state habeas corpus hearing, Mike Stonefield testified that defense counsel did not consider putting on testimony concerning Mr. Rhines enlisting in the army when he was just seventeen years old because "we were concerned with the fact that we might be opening up a door to information that we didn't want to come in." HCT 43-44. Mr. Stonefield further testified that Mr. Rhines "may have talked about" being in Korea along the DMZ shortly after the North Koreans had killed two American officers, although it "[didn't] ring a bell." *Id.* at 44. Mr. Rhines' service records were provided to trial counsel by the State during discovery. *Id*; Dkt. 215-18, at 1; Gilbert affidavit, Ex. I, ¶5. Trial counsel made no independent request for Mr. Rhines' military records, nor did they obtain his military medical and mental health records, or consider consulting with someone who was familiar with military records and who could have assisted them in understanding what the records meant. *Id.*

Mr. Rhines's military records demonstrate that he was put into harm's way in the service of his country and indicate that there were periods of time during which he showed improvement and that he had the potential to become a good solider. In November 1975, Platoon Sergeant Henry J. Kowalik wrote, "In the past few months PV2 Rhines has demonstrated himself as a self-improved solider in many ways. His best attribute is he [*sic*] excellent proficiency with the M60 machine gun. He has taken the initiative to accomplish things without constant supervising or guidance. PV2 Rhines now possesses the capabilities to become a good solider." Dkt. 215-18, at 7. Platoon Leader 2nd Lt. Thomas J. Cashman Jr. commented "PV2 Rhines' performance has

improved dramatically in the past few months. He probably knows more about an M60 machine gun than anyone else in my platoon. PV2 Rhines has room for improvement, but he has shown me lately that he has the capability to be a fine solider." *Id.* Trial counsel should have investigated and presented this mitigating evidence on behalf of Mr. Rhines. This Court unreasonably characterized trial counsel as "delving into his military history", Dkt. 305 at 100, when in reality counsel did nothing resembling the appropriate inquiry in that area. In the light of the foregoing explanation of Mr. Rhines's military history by a qualified authority with the benefit of records that trial counsel never obtained and even those that the State had produced in pre-trial discovery, this deficient trial counsel performance caused considerable prejudice. This Court's opinion warrants alteration to reflect this ineffectiveness of trial counsel.

3. Trial counsel rendered ineffective assistance of counsel by failing to obtain and review Mr. Rhines's jail and prison records and to investigate and present evidence that Mr. Rhines was capable of successfully adjusting to incarceration.

Another area of mitigation that trial counsel should have investigated was Mr. Rhines's incarceration history. Both the State and this Court erroneously state that Mr. Rhines advised trial counsel that if the State obtained his central file from the Washington State reformatory, it would be "detrimental"; however, this statement has been taken out of context. The actual statement that Mr. Rhines wrote in his autobiography was "How much have I left out of this bio? Most of what I went through at WSR. (WA St. Reformatory). It could be important for my defense but also detrimental if the prosecution obtains my central file from WSR." Dkt. 215-12, at 37.

Wayne Gilbert acknowledged that

> I do not remember discussing whether we should try to obtain additional records documenting Charles' life history, such as his prison records, psychological evaluations, counseling records from the Washington State Department of

> Corrections or his jail records from Pennington County. If I had it to do over again, I would have gotten those records and shown them to someone who could guide us on how to use them effectively.

Affidavit of Wayne Gilbert, Ex. I, ¶6.

Although Mr. Rhines's Washington state incarceration records contain evidence of disciplinary infractions, it is important to keep in mind that he was a gay man trying to survive in a violent, hostile environment. His Washington state incarceration records chiefly demonstrate that he was capable of excelling as an employee, assuming a leadership role within the prison by reviving the Sexual Minority Prisoners Caucus, and eventually transferring to the Honors Farm. A July 9, 1986 "Classification Action Record" noted that "he became primarily involved in the radio and TV repair shop and the electronics program. He is also a movie projectionist, worked in the band room as a music technician, and was involved in a sexual minority prisoners caucus. A good portion of his evaluations were superior." Dkt. 215-39, at 8.

Mr. Rhines's supervisor in the band room, Bob Cunningham, wrote several positive reviews about his skill level and work ethic. For example, on April 5, 1985, Mr. Cunningham wrote "Chuck has continued to be an outstanding worker. He is very reliable and can be depended upon. His knowledge in electronics and electricity is a great help to the program. He motivates himself and wants to learn. He is well accepted by all recreation staff." Dkt. 215-39, at 16. Similarly, on May 24, 1984, Mr. Cunningham observed that "Chuck has an experienced background in electronics and audio/visual equipment which is a great help for the program. He can depended upon repairing equipment and he is easy to work with." *Id.* at 19. Mr. Cunningham again gave Mr. Rhines all "superior" ratings on October 16, 1984 and commented, "Chuck is a very good electrician and in the field of electronics. He is the most important person of both crews because of his knowledge in electricity and the ability to repair equipment. He is very

reliable and easy to work with." *Id.* at 18. On January 24, 1985, Mr. Cunningham reported that "Chuck is very liable [*sic*] and prompt for work. He is very knowledgeable in the field of electronics. He has good communication with the recreation department and takes responsibility. He is a major factor in the music department in his ability to repair and keep equipment workable." *Id*. at 17. And, a "Classification Referral/Progress Report" dated April 16, 1984 noted that "Resident Rhines' electronics instructor reports that he is an excellent student in that program. Rhines is also receiving top-notch reports as a Projectionist, with his supervisor noting, "Charles has become skilled as a projectionist and is now learning Advanced Maintenance of the equipment." The supervisor states that Charles is very reliable and dependable, eager, and punctual. Rhines has received several reports from his job as a Music Technician, with the supervisor additionally noting a good attitude, good work habits, and good utilization of time. Charles has shown himself to be a good equipment repairman in both positions." *Id.* at 20. On November 12, 1985, Mr. Rhines was hired as a "Tool Crib Clerk I—Electronics" at the Edmonds Community College—WSR for instructor Patrick Forbes. His January 23, 1983 performance evaluation indicated that he was superior in competence and knowledge, above average in accomplishment of requirements, reliability, communication skills and overall performance.

Mr. Rhines's jurors never heard any of this evidence that he was able to adjust successfully to incarceration and to lead a productive life. As Mr. Rhines's sister, Jennifer Abney, stated, she was not allowed to testify about Mr. Rhines' good behavior while incarcerated. Mr. Rhines's jurors never heard Jennifer had "learned from the guards [in Washington State] that [Charles] was a good inmate." Declaration of Jennifer Abney, Ex. H, ¶10.

Nor did they learn that during his incarceration in Washington State, Jennifer "visited him often, took all his calls and wrote him letters. I wanted to help my brother." *Id.*

Evidence of Mr. Rhines's good behavior in prison was "relevant evidence in mitigation of punishment" and admissible under the Eighth Amendment. *Skipper,* 476 U.S. at 4, citing *Lockett,* 438 U.S. at 604 (plurality opinion). Had trial counsel obtained Mr. Rhines's prison records and consulted with an institutional adjustment expert to help explain them and put them into context for the jury, and to educate the jury on the harshness of a life without parole sentence, there is a reasonable probability that the outcome of Mr. Rhines's penalty trial would have been different.

4. Trial counsel rendered ineffective assistance of counsel by failing to provide their experts with information concerning Mr. Rhines's background and family history necessary to performing reliable mental health evaluations.

Mr. Rhines's trial counsel had no real understanding of how to work with mental health experts or what kinds of mental health evidence would be compelling mitigation evidence in a capital case. Mike Stonefield asked psychiatrist Dr. Daniel Kennelly to "do whatever testing or evaluations you feel are appropriate for your determinations in the areas of competency for trial, mental illness and sanity." Dkt. 215-24(emphasis in original).

Dr. Kennelly's report deemed Mr. Rhines competent to stand trial and did not diagnose Mr. Rhines with any major mental illness, but noted that "[t]here are a number of social interactions which could point to mixed personality traits." Dkt. 215-25, at 5. Without any empirical evidence to support his premise, Dr. Kennelly found that "[s]creening for neurological evaluation is negative." *Id.* at 1.

Bill Arbes, Ph.D, did not conduct any neuropsychological testing of Mr. Rhines. Dkt. 215-27, at 1. Although he administered a few personality tests, including the MMPI, Dr. Arbes

commented that Mr. Rhines displayed "[a] marked deficit in social interests", "frequent eccentricities" and "occasional magical thinking". He also determined that "[t]his 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." *Id.*

Neither Mr. Rhines's trial nor his state habeas counsel presented any mental health experts or mental health evidence at Mr. Rhines' trial or state habeas hearing. In May 2012, educational psychologist Dewey J. Ertz, Ph.D, conducted a psychological evaluation of Mr. Rhines. Dkt. 215-28, ¶7. Dr. Ertz administered a WAIS-IV and determined that although Mr. Rhines' verbal scores were in the 98th percentile, his perceptual reasoning and working memory scores were in the 50th percentile, and his processing speed was in the 8th percentile. *Id.* Dr. Ertz's affidavit emphasized that Mr. Rhines' test results were consistent with Attention-Deficit/Hyperactivity Disorder, learning impairments, social interaction impairments, and possible neurobehavioral problems. *Id.* at ¶¶7, 8.

Dr. Kennelly, Dr. Arbes and Dr. Ertz did not have the benefit of a comprehensive social history of Mr. Rhines and his family members when they evaluated Mr. Rhines and prepared their reports. Jennifer Abney's declaration reveals significant family history information, including her and Mr. Rhines's childhood blood poisoning episodes, a childhood seizure and high fever that Mr. Rhines had, his history of drug abuse and alcoholism, Jennifer's own struggle with alcoholism, their older brother Karl's birth defect, their paternal aunt's bipolar disorder and confinement in a state mental hospital, their father's exposure to mercury and pesticides that occurred as a result of his employment as the manager of the local grain co-op, and the family's

exposure to contaminated well water. Declaration of Jennifer Abney, Ex. H, ¶¶11, 12, 14, 20, 21, 24, 25, 27.

Both the circuit court and this Court determined that Dr. Ertz's affidavit "would have added little to the defense's mitigation strategy." Dkt. 204-1, at 17; Dkt. 305 at 96. However, this was the only reference that the circuit court's decision made concerning the failure of Mr. Rhines' trial counsel to investigate and present mitigating mental health evidence. Additionally, trial counsel's failure to do so was inconsistent with their stated objective of trying to convince the jury that Mr. Schaeffer's murder was not premeditated. HCT 139.

Trial counsel's complete failure to provide their mental health experts with a comprehensive social history of Mr. Rhines and his family fell far below prevailing professional norms. The resulting prejudice to Mr. Rhines is as severe or worse than in *Rompilla v. Beard*, where trial counsel "did not go to any other historical source that might have cast light on Rompilla's mental condition," and consequently defense mental health experts turned up "nothing useful" to the defense. 545 U.S. at 381. "[C]ourts have 'long recognized a particularly critical interrelation between expert psychiatric assistance and minimally effective assistance of counsel." *Blake v. Kemp,* 758 F.2d 523 (11th Cir. 1985), quoting *United States v. Edwards,* 488 F.2d 1154, 1163 (5th Cir.1974). It is for this very reason that "counsel has an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health." *Caro v. Woodford*, 280 F.3d 1247, 1254 -1255 (9th Cir. 2002), citing *Wallace v. Stewart*, 184 F.3d 1112, 1116 (9th Cir.1999), cert. denied, 528 U.S. 1105 (2000). *See Wilson v. Sirmon,* 536 F.3rd 1064, 1085 (2008)(Counsel did not arm their expert with "the collateral evidence that might provide insight into [the defendant's] psychology." Such

information "would have changed the substance and tone of the sentencing hearing"). Mr. Rhines is entitled to relief pursuant to Rule 59(e).

5. Trial counsel rendered ineffective assistance of counsel by failing to investigate and present mitigating evidence concerning Mr. Rhines's individual and family history of exposure to neurotoxins.

Mr. Rhines grew up in McLaughlin, South Dakota, a small town of approximately 800 people located within the Standing Rock Reservation. The town's economy depended on cattle ranching and farming. Mr. Rhines' father managed the local grain co-op, where Mr. Rhines, his brother Karl and his paternal grandfather all worked. Mr. Rhines' sister, Jennifer, recalled her father coming "home every day with pinked-stained arms from being in direct contact with mercury." Declaration of Jennifer Abney, Ex. H, ¶23. Jennifer believes that her father died from years of exposure to mercury that caused him to suffer from symptoms similar to those of Parkinson's disease. *Id.* Karl was born with a flat nose that had a hole in it and a growth on his forehead that has required several surgeries to correct. *Id.*, ¶24. Jennifer wonders whether mercury exposure also caused Karl's birth defect. *Id.*

Both Mr. Rhines and Jennifer suffered from childhood episodes of blood poisoning. Declaration of Jennifer Rhines Abney, Ex. H, ¶27. The family's water was supplied by a well of untreated water. *Id.* Jennifer recalled cutting her pinky finger when she was six years old and ending up in the hospital. *Id.* Mr. Rhines suffered at least three bouts of blood poisoning, including one that occurred in 1968 that was documented in his military medical records. Ex. L. at 2. Neither trial nor state habeas counsel, however, gathered Mr. Rhines' medical records or those of his family members to document this significant mitigation evidence.

The water contamination Jennifer refers to is well researched and well documented. Approximately 100 miles to the west of the Standing Rock Indian Reservation are 89 abandoned

uranium mines, as well as a number of undocumented mines on private land. The runoff from these mines, which includes uranium tails, eventually reaches the Grand and Morreau Rivers which flow through the Standing Rock Reservation. Over the past decades, researchers have tested the water on the creeks and rivers used by the people living on the Standing Rock Reservation. Most shockingly, these tests found grossly exaggerated levels of Gross Gamma Radiation, Alpha Radiation, and Beta Radiation as well as grossly increased levels of Potassium 40.

While most Americans are exposed to low levels of radiation throughout their lives, ingestion of high levels of radiation is extremely dangerous. By ingesting the radiation, the skin cannot act as a filter, thus, it the radiation is immediately and easily absorbed into the blood stream. Once in the blood stream, the damage is accelerated because the radiation continues to decay internally. This internal ionization of the radiation results in increased cell damage. Uranium also has a long half-life, meaning that the damage can continue to grow inside the body. Over time, ingested radiation can cause mutations and malformations within DNA and can cause neurological damage, behavioral abnormalities, damage to the central nervous system, and psychiatric disorders.

Karl's growth malfunction, as well as the multiple childhood blood poisonings, which Jennifer reports, are the types of symptoms resulting from by long-term exposure to radiation by ingestion. Reasonably competent counsel would have researched the radiation exposure as well as the contamination and potential neurological damage. It is reasonably likely that a jury, when faced with this kind of evidence, would have sentenced Mr. Rhines to life.

In *Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 2002), the Ninth Circuit Court of Appeals affirmed the district court's finding that Caro's trial counsel was ineffective because of his failure to investigate and present mitigating evidence of the brain damage Caro suffered as a

result of childhood abuse and neurotoxin exposure. *Id.* at 1258. Relying on *Williams*, the Court emphasized that "the evidence that was omitted is compelling" because Caro's jury did not hear that his behavior was physically compelled rather than premeditated, thus reducing his moral culpability. *Id.*

Trial counsels' failure to investigate and present this compelling mitigation evidence that could have helped them accomplish their goal of negating the element of premeditation fell below a standard of objective reasonableness and prejudiced Mr. Rhines. HCT 139. As one juror explained, there were two and possibly three holdouts, including herself, on Mr. Rhines's sentencing jury. Sealed Ex. J, ¶5. There is more than a reasonable probability that this mitigating evidence would have made a difference to at least one juror. *Wiggins*, 510 U.S. at 537. This Court, therefore, must grant Mr. Rhines relief pursuant to Rule 59 (e).

D. Trial counsels' constitutionally deficient and prejudicial mitigation investigation requires this Court to reopen its judgment granting the State's summary judgment motion with respect to Claims IXA, IXB and IXI of Petitioner's First Amended Petition for Writ of Habeas Corpus and Statement of Exhaustion.

In its February 16, 2016 Memorandum Opinion and Order (Dkt. 304), this Court denied Mr. Rhines's motion to reconsider (Dkt. 272), as well as his motions for leave to file a supplemental response to the State's summary judgment motion (Dkt. 281) and for leave to file a second amended habeas petition (Dkt. 282) with respect to Claims IXA, IXB and IXI. Basing its ruling on *Cullen v. Pinholster*, 563 U.S. 170 (2011), this Court concluded that Mr. Rhines's new mitigation evidence did not fundamentally alter Claims IXA, IXB and IXI, that these claims were adjudicated on the merits in state court, and therefore *Pinholster* bars this Court from considering the new evidence. Dkt. 304, at 18-22.

This Court's findings are manifest errors of law and this Court must grant Mr. Rhines relief pursuant to Rule 59 (e). First, Mr. Rhines did not receive full and fair process in the South

Dakota circuit court because his state habeas counsel were ineffective. None of Mr. Rhines' state habeas attorneys ever conducted a constitutionally effective mitigation investigation, nor did they present the compelling mitigation evidence that Mr. Rhines has recently developed. Moreover, the new evidence that Mr. Rhines has developed fundamentally alters Claims IXA, IXB and IXI, thus renders them unexhausted and not subject to *Pinholster's* restrictions. *See Wessinger v.Cain*, 2015 WL 4527245 *10-11 fn. 3 (M.D. La. 2015)(holding that *Martinez v. Ryan.* 132 S.Ct. 1309 (2012), allowed the district court to excuse the procedural default of Wessinger's ineffective assistance of counsel claim because newly presented evidence made the claim significantly different and stronger, thus rendering it unexhausted; distinguishing *Escamilla v. Stephens*, 749 F.3d 380, 394-95 (5th Cir. 2014), because Escamilla's initial review counsel had retained a mitigation investigator who conducted an investigation into his records and social history, whereas Wessinger's counsel had not; conducting *de novo* review of Wessinger's ineffective assistance of counsel claim, and granting habeas relief).

III. This Court's ruling that Mr. Rhines's trial counsel were not constitutionally ineffective for improperly handling the jurors' note concerning the meaning of life without parole (Claim IX E), are contrary to or an unreasonable application of *Simmons v. South Carolina* and *Strickland v. Washington*, as well as an unreasonable determination of the facts presented in the state court proceeding.

A. Introduction

This Court held that Mr. Rhines's trial counsel were not ineffective for the way in which they handled the jurors' note concerning the meaning of life imprisonment without parole. Dkt. 305, at 106-107. Both this Court and the state courts' findings on this issue are contrary to or an unreasonable application the clearly established federal law set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) and *Simmons v. South Carolina*, 512 U.S. 154 (1994), as well as an unreasonable determination of the facts in light of the evidence presented in the state court

proceedings. 28 U.S.C. §2254(e). This Court must correct these manifest errors of law and fact and grant Mr. Rhines relief pursuant to Fed. R. Civ. P. 59(e).

B. Trial counsel failed to realize that the jury instructions used the terms life sentence, life without parole and life imprisonment without parole interchangeably, creating confusion among the jurors about the meaning of a life sentence.

Mr. Rhines's trial counsel initially sought an instruction the made it clear that if the jurors "sentence Charles Russell Rhines to life in prison without parole, he will in fact spend the rest of his life in prison. Counsel's proposed instruction would have barred the jurors from "assum[ing] or speculat[ing] that the court, or any other agency of government, will release the defendant from prison at any time during his life." *Rhines v. Weber*, 548 N.W.2d 415, 444 (1996). The trial court rejected trial counsels' proposed jury instruction, instead instructing the jury that if they "decide on a sentence of life without parole, the court will impose" that sentence and that "if the jury cannot agree on the death penalty," the jury should "use the life sentence verdict form." Jury Instruction 19. The instruction immediately preceding this selection instruction informed the jury that the choice was "life imprisonment." Jury Instruction 18.

The jurors retired to begin their deliberations at 4:10 p.m. on January 25, 1993. Tr. 2697. On the morning of January 26, 1993, Judge Konenkamp advised trial counsel and the prosecutors that he had received a phone call from the bailiff at 10:45 a.m. advising him that the bailiff had received a three-page note from the jurors inquiring about the meaning of life imprisonment. Tr. 2697-98. The jurors were confused about "what 'Life In Prison Without Parole' really means." They explained that they knew "what the Death Penalty Means, but [had] no clue as to the reality of Life Without Parole." *Rhines I*, 548 N.W.2d at 444.

The jurors' note asked several questions about the conditions of Mr. Rhines' confinement should he be sentenced to life without parole, including whether he would ever be eligible for

minimum security or work release. *Id.* Although trial counsel asked the court to instruct the jurors that "you may not base your decision on speculation or guesswork", Tr. 2699, the trial court denied this request. Tr. 2700. Trial counsel did not renew their request for the court to give Mr. Rhines's proposed jury instruction clarifying that a life without parole sentence would mean that Mr. Rhines would die in prison.

Instead of answering the jurors' question, the trial court responded, "All the information I can give you is set forth in the jury instructions." Tr. 2698. The jurors returned a death sentence at approximately 6:40 p.m. on the evening of January 26, 1993. Tr. 2701. During Mr. Rhines's state habeas proceedings, the South Dakota Supreme Court rejected Mr. Rhines' claim that appellate counsel was ineffective for not raising the issue of the trial court's refusal to answer the jury note about prison life in their brief on direct appeal. *See Rhines v. Weber* (*Rhines II*), 608 N.W.2d 303, 311 (2000). The Court distinguished *Simmons*, *supra*, by asserting that the State had not put Mr. Rhines' future dangerousness in issue, either directly or indirectly, that *Simmons* did not hold that the State's decision to assert the depravity of mind aggravating circumstance meant that the State had put future dangerousness at issue, and that the *Simmons* jurors, unlike those in Mr. Rhines' case, had not been instructed that "life in prison" meant life without parole. *Id.* at 310-11. The Court concluded that Mr. Rhines's appellate counsel did not violate "an objective standard of reasonableness by failing to cite *Simmons* in his original appeal or that this tactical decision prejudiced Rhines with a fundamentally unfair result in his appeal. *Id.* at 311.

This Court determined that "the South Dakota Supreme Court's decision that *Simmons* did not apply was not contrary to or an unreasonable application of clearly established federal law" (Dkt. 305 at 73), because the trial court, unlike the trial court in *Simmons*, instructed Mr. Rhines' jurors "that a sentence of life imprisonment was without parole. No further clarification

was needed." The jurors' confusion on this point, as demonstrated by their question and in subsequent interviews, belies this determination. The juror question indicated that the jurors specifically asked for further clarification. Subsequent interviews of the jurors demonstrate that they had concerns about the meaning of life without parole. According to one of Mr. Rhines's jurors,

> We tried to ask the judge questions about whether or not Mr. Rhines might ever get out on parole, and how much he was going to be around other inmates in the prison. But the judge's answers didn't clear up any of the questions some of us had about those issues. If I had had reassurances that he wouldn't be released on parole or housed with a general minimum-security prison population, I definitely think that would have changed my vote for life instead of death.

Sealed Ex. J, ¶7.

Moreover, the instructions given created further confusion by using the terms "life without parole," "life imprisonment without parole," and "life sentence" without being clear that each of those terms referred to a sentence to life without parole. For these reasons, this Court's ruling was an unreasonable determination of the facts in light of the state court record. *See* 18 U.S.C. §2254(e). The jurors were confused about the meaning of life without parole.

C. Mr. Rhines's trial counsel were prejudicially ineffective for failing to renew their request for the trial court to give the jurors Mr. Rhines' proposed jury instruction 11 when they became aware of the jurors' confusion over the meaning of life imprisonment without parole.

Mr. Rhines's trial counsel should have objected to the trial court's refusal to answer the jurors' questions about what would happen if they could not reach a unanimous sentencing verdict. When "a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946); *see also Price v. Glosson Motor Lines, Inc.*, 509 F.2d 1033, 1037 (4th Cir. 1975) ("When a jury makes a specific difficulty known…[a]nd when the difficulty involved is an issue…central to the case…helpful

response is mandatory."). This is true even where the jury is initially given proper instructions. *See, e.g., People v. Morris*, 401 N.E.2d 284, 291 (Ill. App. Ct. 1980) (holding although initial accountability instruction was proper, "once the jury had exhibited confusion concerning the applicability of accountability to this instruction, it was reversible error for the trial court to provide a proper answer to the jury's query.").

Once the jurors specifically requested information concerning the meaning of life without parole and indicated that it was a point of confusion central to their sentencing deliberations, the situation became akin to *Simmons v. South Carolina*, 512 U.S. 154 (1994). There, the United States Supreme Court held that due process requires a capital sentencing jury to be informed of the defendant's parole ineligibility when future dangerousness is at issue. As the *Simmons* Court explained, "[t]he Due Process Clause does not allow the execution of a person `on the basis of information which he had no opportunity to deny or explain.'" *Id*. at 161 (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1977)). The high Court held that due required the trial court to provide the jury with "a straight answer" in light of their inquiries. *Id.* at 165-66. Here, as in *Simmons*, the jurors were deprived of a concrete, accurate response to their critical question.[2]

This Court's restrictive holding, limiting the application of *Simmons* to a rebuttal of future dangerousness arguments, is an unreasonable application of that case. *Simmons* held that due process demands accurate answers to important questions raised by the evidence or juror

[2] Whether the prosecution presented evidence of future danger is beside the point. The jury was confused on a critical point and made it known to the court and the parties. At that point, trial counsel had an obligation to ensure that the jury had their question answered accurately and, according to *Simmons*, due process required an answer. Even if this Court only requires accurate information about life about parole when the state has presented evidence of future danger, Mr. Rhines has made that showing. The state suggested he would be a future danger based on his statement to Detective Allender that "too bad it wasn't Dennis Digges" and that he threatened Heather Harter. Tr. 2692. Thus, the determination that the State did not put Mr. Rhines' future dangerousness in issue is an unreasonable determination of the facts.

questions. Trial counsel's failure to either renew their request for a jury instruction or for an accurate answer to the jurors' question prevented the jury from learning this critical information.

That failure was not the product of trial strategy. According to Wayne Gilbert, trial counsel had "no specific strategic reason as to why we did not renew our request for Judge Konenkamp to instruct the jurors that life without parole meant that Mr. Rhines would never be released from prison when they wrote the note asking questions about the meaning of life imprisonment." Declaration of Wayne Gilbert, Ex. I, ¶7.

Had the jurors received an accurate and complete response to their question, they would not have sentenced Mr. Rhines to death. According to one of the jurors, "[T]he judge's answers didn't clear up any of the questions" they had. Sealed Ex. J, ¶7. Instead, the jurors were told to return to the same instructions that produced the confusion in the first place. Trial counsel's failure to demand an accurate answer was prejudicially ineffective.

Both the South Dakota Supreme Court and this Court unreasonably applied *Simmons* and *Strickland* when they determined that trial counsel performed competently. Additionally, these conclusions are unreasonable determinations of the facts in the state court record. The trial court's instructions to the jury were inconsistent and confusing, producing a critical question that demanded an accurate and complete answer. This Court, therefore, should grant Mr. Rhines relief pursuant to Fed. R. Civ. P. 59 (e), order an evidentiary hearing, and conduct a *de novo* review of Mr. Rhines's claim.

Dated this 15th day of March, 2016.

Respectfully submitted,
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UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

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

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

BACKGROUND

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

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

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

I. Rhines's Rule 59(e) Motion

LEGAL STANDARD

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

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

DISCUSSION

A. Conflict of Interest

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

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

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

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

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

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

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

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

B. Juror Bias and Impropriety

1. Actual and implied bias of jurors

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Ineffective Assistance of Trial Counsel Claims

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

1. Appropriate standard of review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Mitigation investigation

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

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

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

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

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

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

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

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

D. Jury Note and Juror Confusion

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

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

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

II. Respondent's Motion to Strike

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

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

CONCLUSION

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

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

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

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

Dated July 5, 2016.

BY THE COURT:

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES,	)	
	)	**CIV. 5:00-5020-KES**
Petitioner,	)	
	)	
v.	)	**CAPITAL CASE**
	)	
DARIN YOUNG, Warden,	)	
South Dakota State Penitentiary,	)	
	)	
Respondent.	)	

MOTION FOR LEAVE TO AMEND PETITION FOR HABEAS CORPUS AND CONSOLIDATED BRIEF IN SUPPORT OF MOTION

Petitioner, Charles Rhines, by and through undersigned counsel, hereby seeks leave of this Court to amend his Petition for Habeas Corpus pursuant to Fed. R. Civ. P. 15(a)(2). In the alternative, Mr. Rhines requests that this Court construe this Motion as a Motion for Relief from Judgment Pursuant to Rule 60(b)(6). His proposed amendment is submitted as Exhibit 1 to this pleading.

Jurors from Mr. Rhines's trial have recently come forward to explain that a bias against Mr. Rhines because of his homosexual identity played a significant role in the decision to sentence him to death. Jurors rejected a sentence of life imprisonment because of an explicitly voiced concern that such a sentence would

effectively reward him with the opportunity to mingle with, and have sexual relations with, young male inmates.

Until recently, juror statements about their internal discussions and decision processes were always inadmissible and could never give rise to claims of juror misconduct. In *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017), however, the United States Supreme Court recently changed course, holding that such evidence is admissible when offered to prove a claim of juror bias. As described below, the new juror statements, combined with the change of law in *Pena-Rodriguez*, should provide Mr. Rhines the opportunity to show that there was juror bias that was not revealed in *voir dire*, and that he was sentenced to death, in part, because he is a homosexual.

BRIEF IN SUPPORT OF MOTION

I. THIS COURT HAS THE AUTHORITY TO GRANT LEAVE TO AMEND, AND AN AMENDMENT WOULD BE PROPER.

This Court has the authority to grant this motion to amend although the case is pending on appeal – both because it retains jurisdiction to amend until the conviction is final and because it may in any case grant relief pursuant to Rule 60(b) of the Rules of Civil Procedure. The circumstances support allowing the amendment.

A. New Evidence of Juror Bias

Newly discovered information has disclosed that Mr. Rhines's homosexuality was definitely a focal point of the deliberations.

Juror Frances Cersosimo recalled hearing an unidentified juror comment of Mr. Rhines "that if he's gay we'd be sending him where he wants to go if we voted for LWOP." Ex. B, Decl. of Frances Cersosimo.

Juror Harry Keeney stated that the jury "knew that [Mr. Rhines] was a homosexual and thought he shouldn't be able to spend his life with men in prison." Ex. C, Decl. of Harry Keeney.

Juror Bennett Blake confirmed that "[t]here was lots of discussion of homosexuality. There was a lot of disgust. This is a farming community. . . . There were lots of folks who were like, 'Ew, I can't believe that.'" " Ex. D, Decl. of Katherine Ensler.

All of the jurors who were asked, including Mr. Keeney and Mr. Blake, had told the Court in *voir dire* that they did not harbor anti-gay bias. *See, e.g.*, Trial Tr. at 327-28 (1/5/1993) (Keeney); 932 (1/8/1993) (Blake). The newly discovered information establishes that these assertions were false.

B. The Court Has Jurisdiction Because The Judgment Is Not Yet Final.

Because the judgment is not yet final, this motion does not qualify as a successive petition. 28 U.S.C. § 2244(b)(3)(A) requires that an applicant obtain

authorization from the Court of Appeals before filing a second or successive petition in the district court. An amendment filed in the district court during the pendency of an appeal of the habeas petition, however, is not considered a second or successive petition. *See Nims v. Ault*, 251 F.3d 698, 703 (8th Cir. 2001) (suggesting that the addition of a juror misconduct claim after a district court's denial of a habeas petition, but before that petition is resolved on appeal, was not successive, by considering that claim on its merits notwithstanding the jurisdictional prerequisites for filing second or successive petitions); *id.* at 705 (Bye, J., dissenting) ("The majority permits a prisoner to file a petition in district court, receive a complete adjudication on the merits, appeal, dismiss the appeal to add a new claim, and start all over *without penalty*.") (emphasis in original); *see also Whab v. United States*, 408 F.3d 116, 118-19 (2d Cir. 2005) (explaining that when a habeas petitioner raises a new claim, it is not successive so long as the habeas petition remains on appeal, and that the court should consider whether to permit the amendment under the flexible standards of Fed. R. Civ. P. 15(a), rather than the AEDPA standards governing second or successive petitions).

Later authority from this Circuit erroneously relied on the wrong panel opinion as precedent. In *Williams v. Norris*, 461 F.3d 999 (8th Cir. 2006), the panel held that an amendment to a habeas petition is a successive habeas petition if it occurs after the petition is denied by the district court but before the denial is affirmed on appeal. *Id.*

at 1004. The *Williams* Court declined to rely on *Nims*, and instead relied on *Davis v. Norris*, 423 F.3d 868 (8th Cir. 2005), a later panel opinion which conflicted with *Nims*. *Williams*, 461 F.3d at 1004. The Eighth Circuit has since ruled that "when faced with conflicting opinions, the earliest opinion must be followed as it should have controlled the subsequent panels that created the conflict." *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc). Here, the earliest opinion is *Nims*. Thus, the instant motion should be governed by *Nims* rather than *Williams*.

Because *Nims* stands for the proposition that a new claim cannot be deemed successive until the denial of the underlying petition has been affirmed on appeal, a district court retains discretion to permit an amendment under Fed. R. Civ. P. 15(a) while that petition is pending on appeal.

C. The Court Has Jurisdiction Under Rule 60(b) To Consider Whether An Obstacle To Merits Review Has Been Removed.

If this Court finds that it does not have jurisdiction to entertain this motion under the authority of *Nims* – although it should – it should nevertheless entertain this motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure. Rule 60(b)(6) provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). The statute requires the litigant to file a motion under Rule 60(b) within a "reasonable time[.]" Fed. R. Civ. P. 60(c).

"[A] Rule 60(b)(6) motion in a § 2254 case is not to be treated as a successive habeas petition if it does not assert, or reassert, claims of error in the movant's state conviction." *Gonzalez v. Crosby*, 545 U.S. 524, 538 (2005). Rather, upon a showing of extraordinary circumstances, Rule 60(b) is the proper vehicle where the "motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Id.* at 532, 535.

> If neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction, allowing the motion to proceed as denominated creates no inconsistency with the habeas statute or rules. Petitioner's motion in the present case, which alleges that the federal courts misapplied the federal statute of limitations set out in § 2244(d), fits this description.

Gonzalez , 545 U.S. at 533.

This Court has recognized that a change in the law that had previously prevented a litigant from even bringing a claim can, in some circumstances, warrant a grant of Rule 60(b) relief. *See Cornell v. Nix*, 119 F.3d 1329, 1332-33 (8th Cir. 1997) (analyzing whether newly decided *Schlup v. Delo*, 513 U.S. 298 (1995), which recognized innocence exception to procedural rule that would otherwise bar review of Cornell's claim, was "extraordinary circumstance" entitling him to 60(b) relief); *Cox v. Wyrick*, 873 F.2d 200, 201-02 (8th Cir. 1989) ("A change in the law having retroactive application may, in appropriate circumstances, provide the basis for granting relief under Rule 60(b)[,]" but in this case new law "inapposite.").

In a case similar to this one, *Cox v. Horn*, 757 F.3d 113, 120-26 (3d Cir. 2014), the petitioner sought to raise an otherwise defaulted trial ineffective assistance claim, arguing that the Supreme Court's then-recent decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), now provided a means to establish cause and prejudice to overcome the default and allow habeas review of the merits. The Court of Appeals rejected an argument that a new decision, categorically, could never be sufficient to support a Rule 60(b) motion. It held that a district court has discretion to consider the change in the law, along with other factors, in making the equitable determination whether to grant relief. *Id.* at 124; *accord Ramirez v. United States*, 799 F.3d 845, 850-6 (7th Cir. 2015) (district court abused discretion in ruling petitioner categorically ineligible for 60(b) relief in light of *Martinez*, and in failing to consider multiple factors before making equitable decision).

Here, Mr. Rhines attacks a defect in the integrity of the federal habeas proceeding. Just as the statute of limitations in *Gonzalez* precluded the habeas court from reviewing any of the claims in the habeas petition, in this case a rule of evidence, now declared unconstitutional, precluded review of this claim.[1] Indeed, it was not even raised in Mr. Rhines's habeas petition. Mr. Rhines could not introduce

[1] Mr. Rhines attempted to raise a similar claim in his motion for relief from judgment pursuant to Rule 59 of the Rules of Criminal Procedure. Although this Court rejected the claim because it was inappropriate matter for a Rule 59 motion, it also suggested that juror affidavits were not even admissible. Order, July 5, 2016, Doc. 348, at 8.

the evidence he now proffers in either state or federal court to establish that he was prejudiced, because federal law and South Dakota law forbade jurors from offering testimony or affidavits concerning what occurred during the jurors' deliberations. *See* Fed. R. Evid. 606(b)(1); SDCL § 19-19-606. Additionally, *Tanner v. United States*, 483 U.S. 107 (1987), barred Mr. Rhines from introducing the evidence he now proffers as support for a claim that jurors were untruthful during *voir dire*, and as a result his right to an impartial jury was violated.[2]

The Supreme Court has now set aside these obstacles to merits review on constitutional grounds. In *Pena-Rodriguez*, 137 S. Ct. at 860, the Court held that due process requires the states to allow petitioners in certain circumstances to offer jurors' affidavits to obtain relief from judgment. As explained below, this case presents one of those circumstances. Therefore, as in *Gonzalez*, Mr. Rhines seeks a ruling that would remove an obstacle to merits review. The motion therefore does not constitute a second or successive petition.

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[2] Mr. Rhines's stand-alone claim that his right to an impartial jury was violated is unexhausted in state court but not necessarily defaulted. In *Hughbanks v. Dooley*, 887 N.W.2d 319, 326 (S.D. 2016), the South Dakota Supreme Court construed the two-year statute of limitations provision in S.D.C.L. § 21-27-3.3 to allow an additional two-year period beginning on the statute's effective date July 1, 2012 for petitioners whose time to file had already lapsed. It did not determine whether the statute made any exception for capital cases, was subject to equitable tolling, or attempt to reconcile its well-settled case law. Thus, it remains unclear whether exhaustion of the new claims in state court would be futile.

The motion otherwise satisfies the criteria for Rule 60(b)(6) relief. Rule 60(b)(6) "confers broad discretion on the trial court to grant relief when appropriate to accomplish justice; it constitutes a grand reservoir of equitable power to do justice in a particular case and should be liberally construed when substantial justice will thus be served." *MIF Realty v. Rochester Assocs.*, 92 F.3d 752, 755 (8th Cir. 1996) ("Rule 60(b) is to be given a liberal construction so as to do substantial justice and to prevent the judgment from becoming a vehicle of injustice." (citations and quotation marks omitted)); *see also City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147, 1154 (8th Cir. 2013) (Rule 60(b)(6) "broadly permits relief" for any reason justifying it); *Thompson*, 580 F.3d at 444 (citations omitted) (granting Rule 60(b)(6) motion in capital habeas case); *Lasky v. Cont'l Prods. Corp.*, 804 F.2d 250, 256 (3d Cir. 1986) ("the Rule should be liberally construed for the purpose of doing substantial justice").

In *Buck v. Davis*, 137 S. Ct. 759 (2017), the Supreme Court reaffirmed a court's broad discretion to entertain Rule 60(b) motions and emphasized the range of factors that may properly be considered:

> In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863–864, 108 S. Ct. 2194, 100 L.Ed.2d 855 (1988).

137 S. Ct. at 777-78.

In *Buck*, the Court found extraordinary circumstances present because the petitioner had been sentenced to death in part because of his race. *Id.* at 778. "Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle." *Id.* The *Buck* Court further noted that, as to the second factor, "[r]elying on race to impose a criminal sanction 'poisons public confidence' in the judicial process." *Id.* (citation and quotations omitted). "It thus injures not just the defendant, but 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the process of our courts.'" *Id.*

Mr. Rhines's case presents an extraordinary circumstance – he was sentenced to death, in part, due to his homosexuality, an immutable characteristic congruent to the one condemned in *Buck*. Furthermore, just as relying on race in capital sentencing undermines public confidence in the judicial process, so too does relying on a defendant's sexuality in deciding whether he lives or dies.

State and federal evidentiary rules barred Mr. Rhines from presenting evidence to support his claim that he was sentenced to death based on his sexuality. These barriers have now been removed. Rule 60(b) relief from the judgment should accordingly be granted.

D. The Criteria for Amendment Are Satisfied.

Rule 15(a)(2) provides that a district court "should freely give leave [to amend] when justice so requires." "Under the liberal amendment policy of Federal Rule of Civil Procedure 15(a), a district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving partly, futility of the amendment, or unfair prejudice to the non-moving party can be demonstrated." *Roberson v. Hayti Police Department*, 241 F.3d 992, 995-96 (8th Cir. 2001) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962); *cf. Griffin v. Delo*, 961 F.2d 793, 793–94 (8th Cir. 1992) ("In light of the death sentence under which appellant labors and our granting of permission for his second attorney to withdraw, we believe that a remand with directions to allow the petitioner to raise additional issues for consideration by the district court is the most prudent course.").

Justice requires this Court to grant Petitioner leave to file an amendment to his petition. The proposed claim was never presented or ruled upon during Mr. Rhines's state or federal habeas corpus proceedings because evidentiary rules made it unavailable to Mr. Rhines. If this Court denies Mr. Rhines's motion for leave to amend his petition, these meritorious claims of constitutional magnitude may never be heard in any courtroom, state or federal, and no court will be able to correct this substantial injustice. Leave to amend should accordingly be granted.

CONCLUSION

For these reasons, the Court should grant Mr. Rhines leave to file the proposed amendment to his petition for a writ of habeas corpus, and all other appropriate relief.

Respectfully submitted,

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Counsel for Petitioner, Charles Russell Rhines

Dated: September 28, 2017

CERTIFICATE OF SERVICE

This will certify that, on September 28, 2017, a true and correct copy of the foregoing has been electronically filed with the Clerk of the Court via CM/ECF to be served on the following persons authorized to be noticed:

Paul S. Swedlund
Assistant Attorney General
State of South Dakota
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Pierre, SD 57501

/s/ Jason J. Tupman
Jason J. Tupman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES,	)	
	)	**CIV. 5:00-5020-KES**
Petitioner,	)	
	)	
v.	)	**CAPITAL CASE**
	)	
DARIN YOUNG, Warden,	)	
South Dakota State Penitentiary,	)	
	)	
Respondent.	)	

PROPOSED AMENDMENT TO PETITION FOR HABEAS CORPUS

VII. MR. RHINES'S RIGHT TO AN IMPARTIAL JURY WAS VIOLATED BY THE ANTI-GAY BIAS OF MULTIPLE JURORS, WHICH THEY FAILED TO DISCLOSE DURING *VOIR DIRE*.

1. "The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on government power." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017).

2. But in some instances, a jury's "imperfections" strike at the heart of the justice system. In these cases—where a jury acts on the basis of discrimination rather than the evidence before it—the jury's behavior "is especially pernicious." *Id.* at 868 (citation omitted).

3. The jury at Mr. Rhines's trial knew he was gay. Almost all of the jurors were offered an opportunity to acknowledge their anti-gay biases during *voir dire*. They denied bias.[1]

4. But for at least some jurors, Mr. Rhines's sexual orientation made it impossible for them to provide him with the unbiased deliberations guaranteed by the Sixth and Fourteenth Amendments.

5. Instead, the decision between life and death became, at least in part, a referendum on whether a gay man should be afforded the purported benefit of living around other men in prison.

6. The jury's anti-gay bias and untruthful *voir dire* responses deprived Mr. Rhines of his right to a fair trial by an impartial jury. Relief is warranted.

A. The Jury's Knowledge of Mr. Rhines's Homosexuality

7. From before the beginning of Mr. Rhines's January 1993 trial, prospective jurors were informed that he was gay.

8. Mr. Rhines's own lawyers asked venirepersons if they harbored anti-gay bias. *See, e.g.*, Trial Tr. at 99 (1/5/1993) ("You are going to hear evidence that Mr. Rhines is gay, he's a homosexual, and you are going to hear that at least a couple of the people testifying in this case also are gay. Does that change your feelings about this case or sitting on this case in any way?").

[1] The one exception was juror Daryl Anderson, who was never asked how he felt about Mr. Rhines's sexual orientation. *See* Trial Tr. at 1326-50 (1/11/1993).

9. During the trial, the jury also heard evidence regarding Mr. Rhines's homosexuality.

10. For example, witness Heather Harter testified that she walked in on Mr. Rhines "cuddling" with her husband, Sam Harter, when she and Mr. Harter visited Mr. Rhines in Seattle. Trial Tr. at 2362 (1/19/1993).

11. Ms. Harter further testified that Mr. Rhines told her that he hated her because Mr. Harter loved her instead of him. Trial Tr. at 2364 (1/19/1993).

12. Mr. Rhines's ex-boyfriend Arnold Hernandez also testified that he had a "sexual" relationship with Mr. Rhines before Mr. Rhines lived with Mr. Harter. Trial Tr. at 2292 (1/19/1993).

B. "We'd Be Sending Him Where He Wants to Go."

13. Some of the jurors proved incapable of separating out their knowledge of Mr. Rhines's sexual orientation from their duty to serve impartially.

14. During penalty-phase deliberations, the jury debated the merits of a death sentence versus a sentence of life without parole ("LWOP").

15. On the second day of penalty deliberations, the jurors sent the trial judge a note that read as follows:

> Judge Kon[en]kamp,
>
> In order to award the proper punishment we need a clear p[er]spective on what "Life In Prison Without Parole" really means. We know what the Death Penalty means, but we have no clue as to the reality of Life Without Parole.

> The questions we have are as follows:
>
> 1. Will Mr. Rhines ever be placed in a minimum security prison or be given work release.
> 2. Will Mr. Rhines be allowed to mix with the general inmate population.
> 3. [A]llowed to create a group of followers or admirers.
> 4. Will Mr. Rhines be allowed to discuss, describe or brag about his crime to other inmates, especially new and/or young men jailed for lesser crimes (ex: Drugs, DWI, assault, etc.)
> 5. Will Mr. Rhines be allowed to marry or have conjugal visits.
> 6. Will he be allowed to attend college.
> 7. Will Mr. Rhines be allowed to have or attain any of the common joys of life (ex[:] TV, Radio, Music, Telephone or hobbies and other activities allowing him distraction from his punishment).
> 8. Will Mr. Rhines be jailed alone or will he have a cellmate.
> 9. What sort of free time will Mr. Rhines have (what would his daily routine be).
>
> We are sorry, Your Honor, if any of these questions are inappropriate but there seems to be a huge gulf between our two alternatives. On one hand there is Death, and on the other hand what is life in prison w/out parole.

Ex. A, Jury Note.

16. The jury note suggested that anti-gay bias played a role in the jury's decision-making process. The jurors' concerns mirrored themes elicited in the testimony of Heather Harter and Arnold Hernandez and reflected commonly held stereotypes of gay men: they were worried that he might taint other inmates by "mingling" with general population, that he might develop "followers" or

"admirers," and that he might "brag" to young inmates or have "conjugal visits" or marry.

17. As newly discovered information has disclosed, Mr. Rhines's homosexuality was definitely a focal point of the deliberations.

18. Juror Frances Cersosimo recalled hearing an unidentified juror comment of Mr. Rhines "that if he's gay we'd be sending him where he wants to go if we voted for LWOP." Ex. B, Decl. of Frances Cersosimo.

19. Juror Harry Keeney stated that the jury "knew that [Mr. Rhines] was a homosexual and thought he shouldn't be able to spend his life with men in prison." Ex. C, Decl. of Harry Keeney.

20. Juror Bennett Blake confirmed that "[t]here was lots of discussion of homosexuality. There was a lot of disgust. This is a farming community. . . . There were lots of folks who were like, 'Ew, I can't believe that.'" Ex. D, Decl. of Katherine Ensler.

21. All of the jurors, including Mr. Keeney and Mr. Blake, told the court that they did not harbor anti-gay bias. *See, e.g.*, Trial Tr. at 327-28 (1/5/1993) (Keeney); 932 (1/8/1993) (Blake). The newly discovered information establishes that these assertions were false.

C. Mr. Rhines's Right to an Impartial Jury Was Violated.

22. The Sixth Amendment guarantees a defendant that each juror will be "indifferent as he stands unsworne." *Irvin v. Dowd,* 366 U.S. 717, 722 (1961) (citation omitted).

23. When a juror gives material false information during *voir dire* regarding possible bias, a defendant must be granted a new trial if the nondisclosure denies the defendant his right to an impartial jury. *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 549 (1984).

24. Under the *McDonough Power* standard, a defendant must be granted a new trial where (1) a juror provides false information during *voir dire* and (2) the truth, if known, would have provided the defense the basis for a successful cause challenge to that juror. *Id.* at 556.

25. Here, both Juror Keeney and Juror Blake satisfy the *McDonough Power* standard. First, they both provided false information during *voir dire*. Each testified that Mr. Rhines's sexual orientation would not affect his decision. *See* Trial Tr. at 328 (1/5/1993) ("I guess a man or lady has to live their own lives the way they see fit. . . . I don't see where that would have any variance on this case as far as I'm concerned."); 932 (1/8/1993) ("Q: [T]here will be some evidence here that will show that Mr. Rhines is a homosexual, he's gay and one or two of the witnesses who might be called in this case are also gay and have had relationship[s]

with Mr. Rhines. Knowing that, does that cause you to view Mr. Rhines differently at all? A: Not at all."). Based on their later statements regarding Mr. Rhines's homosexuality, each testified falsely.

26. Second, had each of the jurors answered the *voir dire* questions truthfully, Mr. Rhines and his attorneys would have known that each harbored anti-gay animus that he would not be able to put aside in judging Mr. Rhines's case. Thus, each could have been challenged for cause.

27. Separate from the *McDonough Power* standard, a defendant can show a violation of his Sixth Amendment rights where he can demonstrate actual bias on the part of a juror. *See Smith v. Phillips*, 455 U.S. 209, 215-16 (1982).

28. Here, Mr. Rhines can demonstrate actual bias against him on the part of Mr. Keeney, Mr. Blake, and the jury as a whole.

29. The jurors not only discussed Mr. Rhines's homosexuality during deliberations, they held it against him.

30. Eager to prevent him from receiving what they saw as the benefit of access to other men in prison, the jurors voted to impose a death sentence instead of LWOP.

31. Under *Smith*, the jurors who based their decision on anti-gay animus were biased against Mr. Rhines and thus deprived him of his right to fair trial under the Sixth and Fourteenth Amendments.

D. The "No-Impeachment Rule" Does Not Apply.

32. Like most jurisdictions, South Dakota employs a version of the "no-impeachment" rule. The rule, codified in South Dakota at SDCL § 19-19-606, provides that a juror may not testify or offer an affidavit "about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment." The rule has several exceptions that are not relevant to this case.

33. However, under the Supreme Court's recent decision in *Pena-Rodriguez*, there are circumstances where the no-impeachment rule must give way to allow a court to consider evidence that purposeful discrimination has infected the deliberation process.

34. In *Pena-Rodriguez*, the defendant was charged with sexual assault. According to two jurors, a fellow juror commented during deliberations that he believed the defendant to be guilty of the sexual assault because "Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." 137 S. Ct. at 862. The Colorado courts ruled that they could not consider the evidence of racial bias because the no-impeachment rule barred the jurors from providing evidence regarding the internal process of deliberations. *Id.* at 862-63.

35. The Supreme Court reversed, holding that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." 137 S. Ct. at 869.

36. The Court acknowledged other instances in which it had declined to find exceptions to the no-impeachment rule, including cases where jurors harbored generalized bias in favor of one side or abused drugs and alcohol. *Id.* at 868. The Court stressed that the no-impeachment rule remained generally applicable to help the jury system avoid "unrelenting scrutiny." *Id.*

37. But the Court concluded that racial bias was different because "if left unaddressed, [it] would risk systemic injury to the administration of justice." *Id.* The Court noted that its decisions "demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns" and added: "An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy." *Id.*

38. The logic of *Pena-Rodriguez* applies in this case. Like racial discrimination, discrimination on the basis of sexual orientation risks systemic, rather than case-specific, injury to the administration of justice.

39. Like racial discrimination, discrimination on the basis of sexual orientation implicates unique historical, constitutional and institutional concerns. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (recognizing right to same-sex marriage); *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (striking down as unconstitutional provision in Defense of Marriage Act that defined marriage as between man and woman); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding unconstitutional law criminalizing private homosexual sexual conduct); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (declaring unconstitutional state constitutional amendment that banned laws which themselves banned discrimination against gays and lesbians).

40. And, like the effort to eradicate racial discrimination, an effort to rid the justice system of discrimination on the basis of sexual orientation is not an exercise in perfecting the jury but rather an attempt to ensure that the legal system provides equal treatment under law.

41. Finally, as with attitudes about race, opinions about sexual orientation are not necessarily easy to unmask. *See Pena-Rodriguez*, 137 S. Ct. at 869. That was the case here, where the jurors deliberated regarding Mr. Rhines's sexual

orientation despite having pledged during *voir dire* that it would have no impact on their decision.

42. There is no principled reason to relax the no-impeachment rule to root out racial discrimination but enforce it where sexual-orientation-based animus is alleged. The no-impeachment rule should not apply here.

E. This Claim Is Timely.

43. Federal law provides that a claim is timely if it is filed within one year of the "date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Diligent counsel would not have questioned the jurors on their deliberations because at the time of state post-conviction and federal habeas corpus proceedings, no statements made during a jury's deliberations were admissible. *See Pena-Rodriguez*, *supra*.

44. The factual predicates for the claims were developed during conversations between counsel for Mr. Rhines and jurors on December 10 and 11, 2016. *See* Exs. B-D. This petition is being filed within one year of the date of those conversations; the claim is therefore timely.

F. Conclusion

45. Mr. Rhines was "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Parker v. Gladden*, 385 U.S. 363, 366 (1966).

46. The involvement of biased jurors in the deliberation and decision of Mr. Rhines's case violated his right to a fair trial by an impartial jury. Mr. Rhines respectfully requests that this Court grant the writ, conditioned on a new trial of Mr. Rhines's guilt or innocence and/or penalty.

CONCLUSION

For these reasons, the Court should grant Mr. Rhines's petition for a writ of habeas corpus and all other appropriate relief.

Respectfully submitted,

NEIL FULTON, Federal Public Defender

By: /s/ Jason J. Tupman

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Claudia_Vanwyk@fd.org

Counsel for Petitioner, Charles Russell Rhines

Dated: September 28, 2017

CERTIFICATE OF SERVICE

This will certify that, on September 28, 2017, a true and correct copy of the foregoing has been electronically filed with the Clerk of the Court via CM/ECF to be served on the following persons authorized to be noticed:

Paul S. Swedlund
Assistant Attorney General
State of South Dakota
1302 East Highway 14, Suite 1
Pierre, SD 57501

/s/ Jason J. Tupman
Jason J. Tupman

Exhibit A

COURT'S EXHIBIT #5

about 10:45 A.M 1/26/93

Judge Konnekamp,

In order to award the proper punishment we need a clear prospective of what "Life In Prison Without Parole" really means. We know what the Death Penality Means, but, We have no clue as to the reality of Life Without Parole.

The questions We have are as follows:

1. will Mr Rhines ever be placed in a minimum security prison or be given work release.
2. will Mr Rhines be allowed to mix with the general inmate population.
3. allowed to create a group of followers or admirers.

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

⑤ Will Mr Rhines be allowed to Marry or have conjigal visits.

⑥ will he be allowed to attend college

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

(8) Will Mr Rhines be jailed alone or will he have a cellmate.

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

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

Bobby Walton
Foreperson

Matthew L. Anderson

Robert W Corrin - Harry Keeney

Mark [illegible]

Fran Cersosimo

Judy Shafer

Delight McGuff

Wilma Woodson

Exhibit B

DECLARATION OF Frances Cersosimo
PURSUANT TO 28 U.S.C. § 1746

I was a juror on Charles Rhines's case. I think we came to the right decision. I think his shot at redemption is waiving his appeals and being executed. We deliberated at both the guilt and penalty phases. We followed the judge's instructions. I remember we sent a note about life and death. We talked about that for a while. Our responsibility was profound and we took it seriously. One juror said it would be a deterrent to other criminals if Charles received a death sentence. After discussing this, we agreed the death penalty served no deterrent purpose. One juror made ~~an~~ a comment that if he's gay, we'd be sending him where he wants to go if we voted for LWOP. Rhine's confession jumped out, with his jarring laughter — a huge contrast to his otherwise soft voice. We had Donovan's picture in front of us - the one of his body as it was found. Rhines destroyed his freedom and that was a big thing. I think we made the right decision. Rhines had a fair trial, and deserves his sentence. I stand by my decision today. Rhines had a fair and compassionate jury - very fair. Nobody said he was evil. We judged his deeds, not his character. FC 12-11-16

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Frances Cersosimo 12-11-16

Exhibit C

DECLARATION OF Harry Keeney
PURSUANT TO 28 U.S.C. § 1746

I am postive Charles Rhines is guilty. We sentenced him to what he should get a long time ago. We deliberated and all thought he deserved death. I still think he does. we thought that the crime was intentional We also knew that he was a homosexual and thought that he shouldn't be able to spend his life with men in prison. I still believe he deserves the death penalty.

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Harry Keeney

Exhibit D

DECLARATION OF KATHERINE ENSLER
PURSUANT TO 28 U.S.C. § 1746 & 18 P.A. CONS. STAT. § 4904

I, Katherine Ensler, do hereby declare and verify as follows:

1. I spoke with Mr. Bennett Blake on December 10, 2010, over the phone with my colleague Alex Kursman.

2. Mr. Blake began the conversation stating that an investigator had called him recently, that his wife was a producer for KOTA, that he knows several defense attorneys, and that he has family in law enforcement.

3. Mr. Blake then stated that he had no remorse for the verdict or sentence.

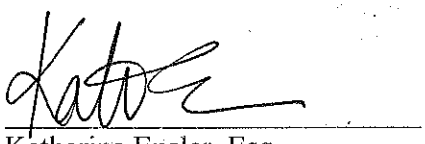
4. He stated that the jury had deliberated, and when asked to speak more about the deliberations, he immediately said, "There was lots of discussion of homosexuality. There was a lot of disgust. This is a farming community."

5. He stated that it was very clear that Mr. Rhines was a homosexual given the testimony at trial. He then said, "There were lots of folks who were like 'Ew, I can't believe that.'"

6. I let Mr. Blake know I was going to write down what he said to us about the case, which he said was fine.

7. Later the same day he sent my colleague a text message telling him he did not want to be contacted again.

8. I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information and belief, subject to 28 U.S.C. § 1746 and 18 Pa. Cons. Stat. § 4904.



Katherine Ensler, Esq.
Research and Writing Specialist
Federal Community Defender Office for the Eastern District of Pennsylvania

Date: December 12, 2016

FEDERAL COMMUNITY DEFENDER OFFICE
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Capital Habeas Unit

FEDERAL COURT DIVISION - DEFENDER ASSOCIATION OF PHILADELPHIA

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December 13, 2017

BY ECF and Regular Mail

Michael E. Gans
Clerk of Court
United States Court of Appeals
For the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street, Room 24.329
St. Louis, MO 63102

Re: *Charles Russell Rhines v. Darin Young*, No. 16-3360

Dear Mr. Gans:

In order to inform this Court of other pending litigation arising from Mr. Rhines's conviction and death sentence, I am writing to give notice of the following related litigation:

1. Mr. Rhines has moved in the district court for permission to amend the habeas petition to include the statements of jurors – newly admissible under *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) – that reflect anti-gay bias displayed during penalty phase deliberations. Alternatively, he has moved for relief from judgment pursuant to F.R. Civ. P.

60(b). *Rhines v. Young*, Civ. No. 5:00-5020-KES, Doc. Nos. 383, 389, 391. The motion is awaiting the district court's decision.

2. Mr. Rhines has moved for relief from judgment, on the basis of the same juror statements showing anti-gay bias, in the South Dakota Supreme Court. The State's response to the motion is due on December 18. A motion by Lambda Legal Defense Fund for permission to file a brief as *amicus curiae* is awaiting decision. *State v. Charles Russell Rhines*, Motion for Relief from Judgment Pursuant to SDCL 15-6-60(b), No. 28444 (S.D. S. Ct.).

3. Mr. Rhines has also appealed to the South Dakota Supreme Court an order of the Seventh Judicial Circuit Court that denied his application for authorization for his mental health experts to enter the prison to evaluate him. The State has moved to dismiss the appeal, Mr. Rhines has responded, and the State's motion is awaiting the State's reply (if any) and the Supreme Court's decision. *State v. Charles Russell Rhines*, Motion to Dismiss Appeal, No. 28460 (S.D. S. Ct.).

Respectfully submitted,

/s/ Claudia Van Wyk

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Attorneys for Petitioner Charles Russell Rhines

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CHARLES RUSSELL RHINES,	*	
Petitioner,	*	
v.	*	CIV 00-5020-KES
DARIN YOUNG, Warden, South Dakota State Penitentiary,	*	
Respondent.	*	

AFFIDAVIT OF BRETT GARLAND

Affiant, after first being sworn upon his oath, states as follows:

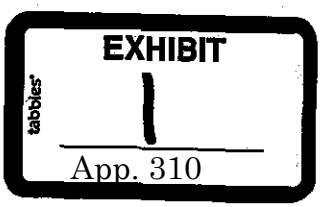
1. Affiant is a Special Agent for the South Dakota Department of Criminal Investigation. At the direction of the Office of the Attorney General, affiant attempted to contact all jurors in the matter of ***State v. Rhines,* CR 93-81 (Cir.Ct.S.D.7th),** in order to determine if the sentence of death was imposed due to homophobic bias. Affiant learned that one juror, **Martha Anderson,** is deceased.

2. The jurors were uniformly annoyed or uncomfortable about being contacted to discuss their deliberations and verdict, whether by affiant or Rhines' defense team. Some were willing to discuss the experience with affiant, others were not.

3. The jurors uniformly described the deliberations as serious and professional. The jurors were complimentary of their fellow jurors' conscientiousness, and of the foreman's professionalism in particular. The jurors uniformly reported that Rhines' sexual orientation had no influence on their decision to impose a death sentence. Rather, the jurors reported that it was the brutality of the killing and Rhines' remorseless confession that caused them to believe a death sentence was warranted.

4. On May 2, 2017, affiant contacted **Bobby Charles Walton** by telephone. Juror Walton served as **foreman** of the jury.

5. When contacted by affiant, Juror Walton stated that "four or five people" from the Rhines defense team had "come last year knocking on [his] door or calling" him. Juror Walton stated that "these people" were asking if he had "changed" his mind about the case. Juror Walton was audibly frustrated with people "trying to get [jurors] involved again" and was



"tired of being harassed." Juror Walton told Rhines' defense team that he had "nothing else to say or do in that matter."

6. Juror Walton also refused to meet with affiant or any representative from the South Dakota Office of the Attorney General.

7. Juror Walton did inform affiant over the phone that he did not "recall anybody saying anything like [SOB queer] when we were in the deliberation phase." Juror Walton said the allegation that a juror had said "SOB queer" during deliberations was "news to me." When asked if anyone was influenced to hand down the death sentence based on Rhines' homosexuality, Juror Walton responded "No. No."

8. Juror Walton recalled being asked during *voir dire* about whether he had any "qualms" with "people being . . . gay." Juror Walton remembers telling them that he could not "care less about who is gay or who is whatever." Juror Walton's attitude toward a person's sexual orientation was "To each his own."

9. When asked if he felt that anyone tried to influence his decision at all based on sexual orientation or religion, Juror Walton said "No. No. None of that was brought up." When asked if he remembered any conflict at all with any specific individual or individuals in that jury room as it related to religion, sexual orientation or anything like that, Juror Walton said "No. No."

10. Juror Walton stated that his decision was based on the evidence, Rhines' taped confession, and "what [Rhines] did to that young boy. He could have spared that boy's life." Juror Walton stated that the jury arrived at its verdict "as a group."

11. On April 28, 2017, affiant interviewed **Mark Thomas Dean.**

12. Juror Dean was advised that affiant was investigating an allegation of a homophobic statement made during the jury deliberations. Before the interview, Juror Dean was not told the reason affiant wanted to talk to him or made aware of the "SOB queer" statement attributed to him in the affidavit of "Juror B" on file in this case. DOCKET 323, Exhibit B. Juror Dean was directed to Paragraph 7 of Juror B's affidavit to read the allegation for himself so that affiant could witness his reaction.

13. After reading Paragraph 7 of Juror B's affidavit, Juror Dean stated that he had no recollection of any such statement and could not imagine that he would have made any such statement. Juror Dean said "I would never say something like that in a situation like that." Juror Dean knew that Rhines' homosexuality had no bearing on any decision he had to make.

14. Juror Dean stated that he is not homophobic. He stated that he believed people have the right to live in the way they want. Juror Dean said "I honest to God can say I don't remember saying anything like that in that

room, or wherever." Juror Dean said a person's sexual orientation is not something he would judge them by. Juror Dean said a person's sexual orientation was none of his business.

15. Juror Dean said he voted for the death penalty based on the guidelines of the law provided by the judge, the type of crime and the way it was committed, and the brutality of the crime.

16. Juror Dean stated that the jury followed guidelines of what the law required them to do. Juror Dean described the jury foreman, Bobby Walton, as a "ramrod" strict military man who conducted the deliberations in a non-nonsense manner. According to Juror Dean, the jury found that the crime was premeditated and that Rhines deserved the maximum sentence. Juror Dean stated that nobody on the jury wanted to have someone's life in their hands and that the jury struggled with the decision.

17. When asked if he felt anyone on the jury was influenced to return a death sentence because of Rhines' homosexuality, Juror Dean said "Honestly, no." Juror Dean said Rhines' homosexuality did not matter to him and had nothing to do with the crime.

18. Juror Dean said it was disturbing to read Paragraph 7 of Juror B's affidavit. Juror Dean said that the jurors all got along with each other. He stated that each juror was allowed to think on their own. Juror Dean said neither he nor anyone else tried to sway a juror to vote for a death sentence against their moral or religious beliefs. Juror Dean said that the mood in the room was that nobody was wanting to "lay anything on one person's shoulder" that they would later regret. Juror Dean said that the goal of the deliberations was to let everyone make their own decision so when they walked out of the jury room they could live with themselves.

19. Juror Dean's wife, Patricia, sat at the table during the interview. She mentioned that she met Juror Dean shortly after the trial. She said the only thing that Juror Dean had ever said to her about the case was that it was a very brutal murder. Patricia said the topic of Rhines' homosexuality had never come up in the entire time she has known Juror Dean. Patricia said that she did not even know that Rhines was homosexual before the interview with affiant. Patricia said it was not like her husband to throw around careless words like those alleged.

20. Juror Dean stated that persons from Rhines' defense team had come to his door and had called him. He told them that the trial was done and that he had done what he thought was right, and that he did not want to talk about it. Juror Dean stated he did not want to have to come to court to testify about the case.

21. Contrary to Juror B's characterization of Juror Dean as "a masculine, self-assured guy who . . . saw things in a very black and white way,"

affiant found him to be a soft-spoken and thoughtful individual who described performing his duties as a juror in a conscientious manner and who was sensitive to the opinions and feelings of his fellow jurors and the magnitude of the decision he and his fellow jurors were tasked with.

22. Affiant spoke with **Frances Cersosimo** on May 4, 2017.

23. Like other jurors, Cersosimo was aware that Rhines is a homosexual. She stated this fact was "abstract from the reality of what we were even basing anything on."

24. According to Cersosimo, one juror made a joke that Rhines might enjoy a life in prison where he would be among so many men. This "stab at humor" "did not go over well" and everyone agreed that Rhines' sexual orientation "was not even a consideration" and had nothing to do with their verdict. The juror who made the joke said that what he had said was stupid or dumb or something to that effect and "that was the end of it." According to Cersosimo, there were no other comments like that and Rhines' sexual orientation was not discussed again.

25. Cersosimo kept a journal of her jury service. DOCKET 340, Exhibit N. After each day of proceedings or deliberations in the case, Cersosimo recorded her thoughts and impressions in her journal. Cersosimo stated that if she had felt that Rhines' homosexuality influenced the sentencing determination in any way, she would have recorded it in her journal. The court can review DOCKET 340, Exhibit N, to see if her journal contains any mention of Rhines' homosexuality influencing the deliberations.

26. Cersosimo stated that the jury was instructed against basing its sentencing determination on bias or prejudice and that the jury followed that instruction by giving Rhines' sexual orientation no weight in consideration of a death sentence. When asked what bearing Cersosimo believed Rhines' sexual orientation had on the verdict she said "Not one iota. Not one iota."

27. Cersosimo said she did not observe any juror being pressured in any way for any reason by any other juror to return a death sentence. Cersosimo said her own sentencing determination was based on the relevant evidence and the nature of the crime itself, not Rhines' sexual orientation.

28. When asked her thoughts on the allegation that the jury sentenced Rhines to death because he is gay, Cersosimo said it "ludicrous."

29. Affiant spoke with **Robert Corrin** on June 6, 2017.

30. When asked if he felt that he or any of the jurors reached their decision to impose the death penalty based on any prejudices in regard to Rhines' sexual orientation, Corrin stated that "No. None of that went on."

31. Corrin said that the jury foreman did a very good job. There was no friction between the jurors on any matters.

32. In regard to a person's sexual orientation, Corrin stated that it did not matter to him who a person is. He said that every person has the same rights as everyone else and he went into the trial with an open mind and the thought that Rhines was innocent. The jury's verdict, he said, was based on the evidence presented. Corrin believed that a death sentence was the only option that seemed fair and right and that Rhines' actions warranted the penalty.

33. Corrin was approached by members of Rhines' defense team. He was uncomfortable talking to them and felt that they were "grasping at straws." He was concerned that his statements to them would be "taken the wrong way."

34. Affiant spoke with **Bennett Blake** at his home on June 6, 2017.

35. Blake stated that people from Rhines' defense team, one an attorney who identified himself as an "Assistant Federal Defender" from Philadelphia, came to his home in October of 2016. They were "rude as hell." He did not invite them into his house.

36. They wanted to know if he now thought that life in prison would be acceptable. Blake stated that he told them it would as long as Rhines never got out. Blake stated that he felt Rhines had committed a "horrible crime" for just "chump change."

37. Blake stated that Rhines' defense team kept badgering him about homosexuality. Like Cersosimo, Blake recalled a comment to the effect that Rhines might like life in the penitentiary among other men. Blake felt the comment was made as "somewhat of a tension release." Blake said that the foreman and everyone else on the jury agreed that Rhines was not on trial for being homosexual. The comment was just "a one moment thing" which "was never referred to again."

38. Blake said that, though he believed that some religious jurors disapproved of homosexuality, no juror attempted to influence his decision to vote for the death penalty based on any prejudices. Blake said "everything was done very professionally."

39. Blake had no recollection of anyone referring to Rhines as an "SOB queer." Blake said there was no friction between the jurors. He said everyone was uncomfortable with making a life and death decision. When asked if he believed the decision to impose a death sentence was reached based on Rhines' race, ethnicity or sexual orientation, Blake said that it was not. Blake said he had a difficult time distinguishing what was said during the guilt phase deliberations from what was said in the penalty phase deliberations.

40. When asked if he felt he was influenced to impose a death sentence based on Rhines' homosexuality, Blake answered "No sir." Blake stated that Rhines' crime of "splitting a kid's head open with a hunting knife" for "$200-$300 in change" was "deplorable" to him. He thought the death penalty was appropriate based on the evidence presented.

41. Affiant spoke with **Judy Shafer/Rohde** on June 6, 2017.

42. Like other jurors, Rohde was contacted by Rhines' defense team who said they were trying to find something that would get Rhines out of the death penalty. They asked if anyone on the jury had referred to Rhines in pejorative terms such as "faggot" and, if so, if that made her feel differently about the outcome. Rohde stated that nothing like that happened. Rohde stated that everything about the deliberations was "all good and clean." She said everyone did the job they were supposed to in a very professional manner.

43. Rohde remembers some religious jurors having difficulty with imposing a death sentence. She remembers one such juror waivering on the decision until she looked at the pictures from the trial and other evidence, at which time she stated "Yes, he deserves to die."

44. Rohde stated that no juror tried to influence her or anyone else to reach any decision based on race, ethnicity, sexual orientation or religion. She said everyone was taking the job very seriously and that all the jurors were "real professional."

45. Rohde stated that nothing like "SOB queer" was ever said during deliberations. When asked if any statements regarding Rhines' sexual orientation were made during deliberations she said that "Nothing. Absolutely nothing." Rohde said she would have been offended if she had heard someone talk like that in that situation.

46. Rohde said the deliberations were "extremely professional." She said she was impressed with all the extra care and thought people put into it. Rohde said the process was very serious. The jury foreman did a good job and kept everyone on task. Rohde said that neither she nor anyone else was influenced to hand down a death sentence based on Rhines' homosexuality.

47. Rohde said that when Rhines' defense team talked to her about the deliberations, they were more "vocal" than affiant and "used a lot of bad language." Rohde said she did not typically talk that way, but Rhines' defense team asked her if anyone referred to Rhines as a "fucking queer" and things like that. Rohde said there was no talk like that among the jurors. Rhines' defense team tried to get her to tell them that some aspersion about homosexuality may have been made that would have influenced somebody or the outcome of the deliberations. Rohde said that she did not think that the jury ever discussed Rhines' sexual orientation whatsoever. She had no memory of any "flippant comments"

being made about homosexuality during the deliberations. Rohde said Rhines' sexual orientation did not matter, that it had no bearing on what happened.

48. Rohde said that she has no personal feelings one way or the other about homosexuality. Rohde said the jury based its decision in the fact that Rhines had "brutally killed that kid, and intended to." She mentioned that Rhines had even commented on how he could shove a knife through a person's head to a certain point to kill them because he was military trained. Rohde remembered that, at one point, Rhines laughed because it did not kill the victim right away like Rhines thought it would. She said it was an awful thing to think about someone doing.

49. On June 6, 2017, affiant made contact with **Harry Keeney.** Affiant identified himself. When asked if he had served on the Rhines jury, Keeney stated he had but that it was a long time ago. Keeney then said goodbye, and hung up.

50. On October 27, 2017, affiant contacted **Delight McGriff.** McGriff stated that she is not personally comfortable with the death penalty but she voted in favor of it because Rhines showed no remorse for the murder whatsoever in his confession and kind of bragged about it on the tapes.

51. When asked if she recalled Rhines' sexual orientation being brought up during the deliberations, McGriff said "No." McGriff said that Rhines' sexual orientation made no difference as far as she was concerned. When asked if she felt pressured to hand down a death sentence based on Rhines' homosexuality, McGriff said "Oh, absolutely not. No."

52. McGriff said the deliberations were about the murder itself and that her decision was based on the facts of the case and the confession tapes.

53. On November 1, 2017, affiant contacted **William Brown.** Brown said that Rhines' sexual orientation had no bearing on his decision to vote in favor of a death sentence.

54. Affiant made several calls in an effort to contact jurors **Wilma Woodson** and **Daryl Anderson** but was unable to contact either.

Dated this 22nd day of November 2017.

Brett Garland, Special Agent
South Dakota Division of Criminal Investigation

Subscribed to and sworn before me this 22 day of November 2017.

Notary Public
My Commission Expires: 6/1/22

SEAL

LORI ANTONSEN NOTARY SEAL PUBLIC STATE OF SOUTH DAKOTA

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CHARLES RUSSELL RHINES,	*	
Petitioner,	*	
v.	*	CIV 00-5020-KES
DARIN YOUNG, Warden, South Dakota State Penitentiary,	*	
Respondent.	*	

SUPPLEMENTAL AFFIDAVIT OF BRETT GARLAND

Affiant, after first being sworn upon his oath, states as follows:

1. Affiant is a Special Agent for the South Dakota Department of Criminal Investigation. At the direction of the Office of the Attorney General, affiant attempted to contact all jurors in the matter of ***State v. Rhines*, CR 93-81 (Cir.Ct.S.D.7th)**, in order to determine if the sentence of death was imposed due to homophobic bias. The results of affiant's investigation are reported in his initial affidavit.

2. Affiant was further tasked to attempt to re-interview Jurors Blake and Keeney in regard to specific allegations in Rhines' motion that these jurors had lied during *voir dire* in response to questions about whether either harbored homosexual bias which affected their deliberations as jurors.

3. On December 7, 2017, affiant and Assistant Attorney General Paul S. Swedlund made contact with **Bennett Blake** at his home. Rather than characterize the allegations made against Blake, AAG Swedlund provided Blake a copy of Rhines' motion for Blake to read for himself. Blake read out loud an excerpt from the top of Page 3 of the brief (copy attached) alleging that "two jurors have now stated under penalty of perjury that they were not neutral, and that a desire to prevent Mr. Rhines from serving a life sentence 'around other men' or enjoying 'conjugal visits' played a strong role in their decision." While reading this, Blake stated "Oh really?" After he finished reading the allegation, Blake said "I know I wasn't one of them."

4. Blake then read out loud a passage on Page 7 singling him out as someone who had allegedly falsely "told the court in *voir dire* that they did not harbor anti-gay bias that would affect their verdict." Blake

EXHIBIT 2 tabbies

responded that he did not care if anyone was gay. Blake said that "[Rhines'] lifestyle was his lifestyle."

5. Blake momentarily became offended. He somewhat angrily asked affiant "So you say I'm anti-gay now, is that what you're saying?" Blake was informed that these were allegations being made in Rhines' brief and was directed to Page 10 of the brief to read further.

6. Reading the allegations on Page 10 of the brief, Blake exclaimed "I did not provide false information." Blake said that the allegations in the brief were "Not true. I don't have anti-gay sentiments or anything like that." To the contrary, Blake said that his deceased brother was gay and that he had no adversity to his brother's lifestyle.

7. Blake next reviewed the document entitled "Declaration of Katherine Ensler" which purports to describe homophobic statements made by Blake or other jurors. After reading Ensler's "declaration," Blake stated "I don't care if he's homosexual or not." Blake said that he was not influenced in his vote for the death penalty by Rhines' homosexuality. Blake said "I don't even see how the sexual orientation of the man came to play in this case."

8. Blake stated that Rhines "killed a guy with a pocket knife for 50 bucks in quarters or something like that." Blake said "I don't care if he's queer or not, it didn't matter, the crime was committed as far as I'm concerned."

9. On December 7, 2017, affiant made contact with **Harry Keeney** and his wife Janet at their home. AAG Swedlund stated that they needed to ask some questions about the Rhines case. Janet said that her husband has problems with dementia and that she did not believe that her husband could remember much. Keeney seemed confused through parts of the conversation.

10. AAG Swedlund provided Janet with the same excerpts from Rhines' brief that had previously been provided to Blake. Janet said the allegations in the brief were a "bunch of nonsense."

11. Janet gave the excerpts to her husband to read. Keeney stated that he served on the Rhines jury. Janet reminded Keeney that everyone present knew that already. After reading the excerpts, AAG Swedlund asked Keeney if he had been honest when he was asked questions in *voir dire* and Keeney stated "You bet I was." Keeney stated that he believed his vote was true.

12. Janet stated that she did not find out that Rhines was gay until Rhines' attorneys showed up at their house asking questions about it. Janet said she then asked Keeney if homosexuality was ever brought up and he said "Not during the trial. That was not an issue." Janet said that groups of people came to their house and did not really say who they were representing or the purpose for meeting with them. "They were kind of sneaky in their regards, I guess." Nobody from the state had

previously visited the Keeney home so Janet could only have been referring to members of Rhines' defense team.

13. AAG Swedlund asked Keeney to examine the document titled "Declaration of Harry Keeney," copy attached hereto. Janet said Keeney did not write the document, that it had already been prepared when "they" came back.

14. Keeney said that from what he could remember of Rhines' trial, the jury was "very fair." That nobody hesitated, they discussed the case, and everybody agreed 100%. Keeney said that "Nobody said 'Well, I don't know . . .'"

15. When asked if he voted for the death penalty because Rhines was homosexual, Keeney answered that he had voted for the death penalty. When Janet explained to Keeney that the question asked whether he voted for the death penalty because Rhines is homosexual, Keeney stated "No, no, no. No, I didn't do that."

Dated this 15th day of December 2017.

Brett Garland, Special Agent
South Dakota Division of Criminal Investigation

Subscribed to and sworn before me this 15th day of December 2017.

Notary Public
My Commission Expires: 6-1-22

SEAL

LORI ANTONSEN NOTARY SEAL PUBLIC STATE OF SOUTH DAKOTA

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CHARLES RUSSELL RHINES, Petitioner, vs. DARIN YOUNG, WARDEN, SOUTH DAKOTA STATE PENITENTIARY; Respondent.	5:00-CV-05020-KES ORDER DENYING MOTION FOR LEAVE TO AMEND, DENYING MOTION FOR RELIEF FROM JUDGMENT, AND DENYING MOTION FOR EXPERT ACCESS

Petitioner, Charles Russell Rhines, moves the court for leave to amend his petition for habeas corpus under Fed. R. Civ. P. 15(a)(2), or in the alternative, moves the court for relief from judgment under Fed. R. Civ. P. 60(b)(6). Docket 383. Respondent, Darin Young, resists the motion on both grounds. Docket 389. In addition, Rhines moves the court for an order requiring Young to produce Rhines for two mental health expert evaluations in support of a potential clemency application to the South Dakota Governor. Docket 394. Respondent also opposes Rhines's motion for expert access. Docket 396.[1] For the following reasons, the court denies Rhines's motion to

[1] Contained in respondent's briefs in opposition to Rhines's motions are numerous ethical allegations against the Pennsylvania Federal Community Defender's Office. Such claims have no relevance to Rhines's case, the law pertinent to Rhines's motions, or the particular attorneys appointed to represent Rhines. Rhines's motions appear to the court to be no more than zealous representation of Rhines, which is what this court expects from court appointed counsel. Respondent's ethical allegations are stricken as scandalous.

amend under Rule 15(a)(2), denies Rhines's motion for relief from judgment under Rule 60(b)(6), and denies Rhines's motion for expert access.

BACKGROUND

The factual and procedural history of this case is more fully set forth in the court's February 16, 2016 order granting summary judgment in favor of respondent. *See* Docket 305. The court will briefly summarize the procedural history and then address any facts that are relevant to Rhines's pending motions throughout the analysis.

Rhines is an inmate at the South Dakota State Penitentiary in Sioux Falls, South Dakota. He was convicted of premeditated first-degree murder and third-degree burglary of a Dig'Em Donuts Shop in Rapid City, South Dakota. On January 26, 1993, a jury found that the death penalty should be imposed, and the trial judge sentenced Rhines to death by lethal injection. The South Dakota Supreme Court affirmed Rhines's conviction and sentence on direct appeal, and the United States Supreme Court denied further review in 1996. Rhines applied for a writ of habeas corpus in state court, raising numerous issues, which was denied in 1998 and affirmed by the South Dakota Supreme Court in 2000.

Rhines then filed a federal petition for a writ of habeas corpus in 2000. This court found several of Rhines's claims were unexhausted and granted a stay pending exhaustion in state court. Following respondent's appeal, the Eighth Circuit vacated the stay and remanded the case. Rhines filed a petition for a writ of certiorari in the United States Supreme Court, which granted

certiorari. After finding that a stay and abeyance is permissible under some circumstances, the Supreme Court remanded the case for further analysis not relevant to the pending motions. Ultimately, Rhines's petition in this court was stayed until he exhausted his state court claims. When this court lifted the stay, respondent moved for summary judgment. On February 16, 2016, this court granted respondent's motion for summary judgment, denied Rhines's amended habeas petition, and ruled on numerous other motions not relevant to the current motions. *See* Dockets 304, 305, 306. The court then denied Rhines's motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). Docket 348. On August 3, 2016, Rhines appealed this court's rulings to the Eighth Circuit Court of Appeals. Docket 357. Rhines has filed the two current motions during the pendency of his appeal.

DISCUSSION

I. Rhines's Motion for Leave to Amend Petition under Fed. R. Civ. P. 15(a)(2)

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), a petitioner must file his or her application for a writ of habeas corpus within one year of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

Because habeas proceedings are civil in nature, the Federal Rules of Civil Procedure apply. *See* 28 U.S.C. § 2242 ("[An application for a writ of habeas corpus] may be amended or supplemented as provided in the rules of procedure applicable to civil actions."). Federal Rule of Civil Procedure 15(a)(2) allows a party to amend its pleading with the opposing party's consent or the court's leave "when justice so requires." But a petitioner's amendment must meet the relation back requirements set forth in Federal Rule of Civil Procedure 15, which provides:

> (1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date of the original pleading when:
> (A) the law that provides the applicable statute of limitations allows relation back;
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading . . . .

Fed. R. Civ. P. 15(c); *see also McKay v. Purkett*, 255 F.3d 660, 660-61 (8th Cir. 2001) (applying Rule 15(c) to a petitioner's § 2254 amended petition and affirming the district court's dismissal of the amended claims because they did not relate back to petitioner's original claims). Thus, in the habeas context, any amendment to a timely filed habeas petition must be filed within AEDPA's one-year limitations period or the amendment must assert a claim that arose out of the conduct, transaction, or occurrence set out in the original petition.

The Supreme Court has addressed what the phrase "conduct, transaction, or occurrence" means under Fed. R. Civ. P. 15(c)(2) in the habeas framework. In *Mayle*, the Ninth Circuit, in agreement with the Seventh Circuit, had interpreted "conduct, transaction, or occurrence" to allow relation back to an original habeas petition when the petitioner's new claim stemmed from the petitioner's trial, conviction, or sentence. *Mayle v. Felix*, 545 U.S. 644, 656 (2005). The Supreme Court rejected that definition because it was too broad. *Id.* at 656-58. "An amended habeas petition, we hold, does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Id.* at 650.

The substance of Rhines's new claim is that some jurors from his trial have recently expressed the notion that a homosexual bias against Rhines "played a significant role in the decision to sentence him to death." Docket 383 at 1. And Rhines argues such juror bias is now admissible under the United States Supreme Court's recent decision in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). *Id.*

Because Rhines has appealed this court's denial of his habeas petition to the Eighth Circuit and that appeal is still pending, this court must first determine if it has jurisdiction over Rhines's current motion. Rhines maintains that this court still has jurisdiction to allow his amendment because "the judgment is not yet final." *Id.* at 3. Other than his reliance on *Nims v. Ault*, 251 F.3d 698 (8th Cir. 2001) and resistance to *Williams v. Norris*, 461 F.3d 999 (8th

Cir. 2006), which will be addressed below, *see infra* Section II.B., Rhines has not cited any Eighth Circuit precedent to establish that a judgment is not considered "final" until it is affirmed on appeal. In response, respondent contends that this court's judgment is final so the Eighth Circuit has exclusive jurisdiction over Rhines's case. Docket 389 at 7-9.

A. Judgment is Final

In general, a district court decision is final if "there is some clear and unequivocal manifestation by the trial court of its belief that the decision made, so far as [the court] is concerned, is the end of the case." *Waterson v. Hall*, 515 F.3d 852, 855 (8th Cir. 2008) (internal quotations omitted) (alteration in original). "A final decision is ordinarily one which disposes of all the rights of all the parties to an action." *Patterson v. City of Omaha*, 779 F.3d 795, 800 (8th Cir. 2015) (quotation omitted).

Here, judgment is final. In addition to the order granting respondent's motion for summary judgment and denying Rhines's petition for habeas corpus (Docket 305), this court entered a judgment denying Rhines's petition for habeas corpus relief on February 16, 2016. Docket 306. Entering a judgment clearly demonstrated the court's belief that Rhines's case was over. Rhines moved the court to alter or amend its judgment under Fed. R. Civ. P. 59(e) (Docket 323), which this court denied. Docket 348. Rhines then appealed several of this court's rulings, including this court's order granting summary judgment in favor of respondent (Docket 305) and judgment (Docket 306). Docket 357. *See Patterson*, 779 F.3d at 800 (noting that the Eighth Circuit's

jurisdiction is "limited to appeals taken from final decisions of the district courts."). If the Eighth Circuit affirms this court's order and judgment, nothing further will remain to be done. Thus, this court's judgment, which disposed of all claims in Rhines's petition for habeas corpus relief, was final.

B. Because this Court's Judgment was Final, Rhines's Motion to Amend is a Successive Petition.

AEDPA established a strict procedure that prisoners in custody under a state court judgment must follow in order to file a second or successive habeas corpus application challenging that custody. Under 28 U.S.C. § 2244(b)(2), a claim presented in a successive habeas petition under section 2254 that was not presented in the prior petition shall be dismissed unless:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

Before a district court can consider a successive petition, the petitioner "shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." *Id.* § 2244(b)(3)(A). There is no indication that Rhines has moved the Eighth Circuit Court of Appeals for an

order authorizing this court to consider Rhines's new claim of juror bias based on his homosexuality.[2]

Rhines argues that "[a]n amendment filed in the district court during the pendency of an appeal of the habeas petition, however, is not considered a second or successive petition." Docket 383 at 4. He relies on *Nims v. Ault*, 251 F.3d 698 (8th Cir. 2001) to support his position, arguing that *Nims* suggests "the addition of a juror misconduct claim after a district court's denial of a habeas petition, but before that petition is resolved on appeal, was not successive" because the *Nims* court considered the claim on its merits. *Id.*

Nims was convicted of kidnapping and sexually abusing an eight year old girl, which was affirmed by the Iowa Supreme Court on direct appeal. *Nims*, 251 F.3d at 700. After his post-conviction application for relief was denied,

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[2] On January 11, 2017, Rhines filed a protective petition for writ of habeas corpus while his application for authorization to file a successive petition was pending in the Eighth Circuit. Docket 377. The new claim raised in Docket 377, Rhines argues, is based on a new rule of constitutional law made retroactive to cases on collateral review that was announced in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Rhines contends that *Hurst* stands for the rule that a statute must require a jury to make death penalty findings beyond a reasonable doubt in order to comply with the Sixth Amendment, and South Dakota's death penalty statute violates this rule. Docket 377 at 4-6. The Eighth Circuit consolidated Rhines's petition for permission to file a successive habeas petition (*Rhines v. Young*, No. 17-1060 (8th Cir. application docketed Jan. 10, 2017)), with Rhines's appeal of this court's orders (*Rhines v. Young*, No. 16-3360 (8th Cir. appeal docketed Aug. 15, 2016)). *See* No. 17-1060; 16-3360, CLERK ORDER, docketed Feb. 16, 2017. "[T]he panel to which the consolidated cases are submitted for disposition on the merits shall determine whether to grant or deny the petition at the time it considers the appeal from the district court's order denying habeas relief in No. 16-3360." *Id.* This application for authorization, however, does not request authorization to file a successive petition on Rhines's new claim of sexual orientation bias by his state court jury.

Nims filed a federal habeas corpus petition, which was initially denied by the district court. *Id.* While that denial was on appeal to the Eighth Circuit, Nims requested the Eighth Circuit to remand the case to the district court so Nims could file an amended petition raising a newly-discovered claim of juror misconduct. *Id.* The Eighth Circuit dismissed the appeal without prejudice and remanded the case to the district court. *Id.*

The district court then dismissed Nims's amended petition without prejudice in order for Nims to fully exhaust his state remedies. *Id.* Following an unsuccessful attempt in front of the Iowa post-conviction court, Nims again filed a habeas petition in federal court, which was denied by the district court because the newly-discovered claim of juror misconduct was procedurally defaulted. *Id.* at 701. The district court issued a certificate of appealability, and the Eighth Circuit opinion, that Rhines currently relies on, followed.

After discussing Nims's failure to show cause for and prejudice from the default, the Eighth Circuit ultimately concluded that the district court did not err in finding that Nims's new claims were procedurally defaulted. *Id.* at 703. But because the Eighth Circuit considered Nims's new juror misconduct claim on its merits rather than on jurisdictional grounds for successive petitions, Rhines argues that *Nims* stands for the proposition that an amendment filed in the district court while an appeal is pending is not a successive petition. *See id.* at 703-06 (Bye, J., dissenting) (stating that Nims's petition should be considered successive and noting that "[t]he majority permits a prisoner to file a petition in district court, receive a complete adjudication on the merits,

appeal, dismiss the appeal to add a new claim, and start all over *without penalty*.") (emphasis in original). As an initial matter, the court does not read *Nims* to stand for the far-reaching proposition that Rhines suggests.

In *Williams v. Norris*, 461 F.3d 999 (8th Cir. 2006), on the other hand, the Eighth Circuit affirmed the district court's denial of a motion for relief from judgment after finding that it was a successive petition. The federal district court denied Williams's original petition for a writ of habeas corpus. *Id.* at 1000. Williams then filed a motion to alter or amend the judgment, or alternatively, for relief from judgment, but the district court denied Williams's motion as successive. *Id.* Then a renewed motion for relief from judgment was filed on Williams's behalf, raising a new claim based on a recent United States Supreme Court ruling. The district court determined it was also a successive habeas petition and denied the motion. *Id.* at 1000-01.

On appeal, the Eighth Circuit reviewed whether Williams's motion for relief from judgment constituted a successive habeas petition de novo. *Id.* at 1001. The first argument raised by Williams, and noted as the "strongest argument" by the Eighth Circuit, "revolve[d] around the fact that the district court did not file a separate judgment, as required by Rule 58, when denying Williams's initial petition." *Id.*[3] Williams thus argued that the denial of his

[3] As discussed above, *see supra* Section II.A., this court filed a judgment as a separate document in Rhines's case (Docket 306), suggesting Rhines's argument here is weaker than the argument raised by Williams. *See Williams*, 461 F.3d at 1001 (noting the district court's inadvertent failure to file a judgment as a separate document was Williams's "strongest argument").

petition was not a final judgment so his Rule 59(e) motions to alter or amend the judgment and his Rule 60(b) motions for relief from judgment "should have been treated as motions to amend the initial habeas petition under Rule 15." *Id.* Despite the clerical error, the Eighth Circuit found that the district court properly dismissed Williams's Rule 59(e) and Rule 60(b) motions as successive petitions because it was clear that the district court intended its order to dispose of Williams's petition on the merits. *Id.* at 1002. The court cited to and discussed *Bonin v. Calderon*, 59 F.3d 815 (9th Cir. 1995), where the Ninth Circuit refused to construe the petitioner's motion to amend a habeas petition, after the district court had denied the petition, as a Rule 15 motion merely because the district court had failed to file a separate judgment. Agreeing with this analysis, the Eighth Circuit in *Williams* refused to accept Williams's argument that his motion should be construed as a Rule 15 motion just because a final judgment was inadvertently not filed.

Williams also argued that his motions were not successive because the denial of his original petition was not yet affirmed on appeal. *Williams*, 461 F.3d at 1003. Relying on *Davis v. Norris*, 423 F.3d 868 (8th Cir. 2005), the Eighth Circuit disagreed with Williams. *Id.*

Rhines argues that *Williams* erroneously relied on *Davis*, a 2005 decision, rather than the 2001 *Nims* decision, because Eighth Circuit precedent directs a court to follow the earliest opinion when there is a conflict between panel opinions. Docket 383 at 4-5 (quoting *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc)). Notably missing from Rhines's argument,

however, is the Eighth Circuit's discussion of the potential conflict between *Nims* and *Davis* in *Williams*. The *Williams* court found *Nims* and *Davis* reconcilable because the *Nims* court remanded the petition to the district court in 1992, pre-AEDPA and with the expectation that "petitioner [would] be able to later raise both his original and amended claims on appeal[,]" whereas *Davis* was different "in that the petitioner's request for a remand occurred after the passage of AEDPA." *Williams*, 461 F.3d at 1004. The *Williams* court's discussion of the distinctions between *Nims* and *Davis* leads this court to conclude that there are not two conflicting panel decisions that are implicated here. So Rhines's argument that *Nims*, the earlier decision, is controlling, rather than *Williams* and its reliance on *Davis*, is misplaced. Because Rhines's petition was filed post-AEDPA, *Williams*'s reliance on *Davis*, and the subsequent decision to "reject Williams's claim that an amendment to a petition is not a successive habeas if it occurs after the petition is denied, but before the denial is affirmed on appeal," controls. *Id.* at 1004.

The other issue with Rhines's argument is that *Nims* is distinguishable from this case. In *Nims*, the Eighth Circuit panel remanded the petition to the district court before Nims's petition was heard on appeal because Nims requested a remand. *Nims*, 251 F.3d at 700. And Nims requested the remand pre-AEDPA, but his subsequent appeal was heard and adjudicated by the Eighth Circuit post-AEDPA. Rhines's petition, on the other hand, was adjudicated by this court post-AEDPA, appealed to the Eighth Circuit post-AEDPA, and there is no indication that Rhines has asked the Eighth Circuit to

remand his petition to this court in order to amend the petition with his new claim of juror bias. So even if *Nims* did stand "for the proposition that a new claim cannot be deemed successive until the denial of the underlying petition has been affirmed on appeal" just because the *Nims* panel adjudicated Nims's claim on the merits, as Rhines argues (Docket 383 at 5), *Nims* is factually distinct from Rhines's motion. Thus, *Nims* does not support Rhines's position, and, based on *Williams*, the court rejects Rhines's argument that an amendment filed in the district court while the appeal of his habeas petition is pending is not a successive petition.

The court concludes that because it entered a final judgment in Rhines's case and the appeal of that final judgment is still pending, it does not retain jurisdiction to allow Rhines to amend his habeas petition to add a new claim under Fed. R. Civ. P. 15(a). Rather, based on Eighth Circuit case law, Rhines's motion to amend (Docket 383) is a successive petition. And because Rhines has not received authorization from the Eighth Circuit to file a successive petition, this court cannot adjudicate the merits of his motion under Rule 15.

II. Rhines's Rule 60(b) Motion

A. Jurisdiction

Rhines argues that if the court finds it does not have jurisdiction to grant his motion under Rule 15(a)(2), it should alternatively review the motion under Rule 60(b)(6). Docket 383 at 5. Federal Rule of Civil Procedure 60(b) allows a court to relieve a party from a final judgment, order, or proceeding for various reasons, such as mistake, newly discovered evidence, or fraud, among others.

Rule 60 includes a catchall provision, which allows the court to relieve a party for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). In order for a court to grant a 60(b)(6) motion, the movant must show "extraordinary circumstances" to justify relief, and "[s]uch circumstances will rarely occur in the habeas context." *Buck v. Davis*, 137 S. Ct. 759, 772 (2017) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)). "A district court has discretion under Rule 60(b) to grant postjudgment leave to file an amended complaint if the motion is 'made within a reasonable time,' and the moving party shows 'exceptional circumstances' warranting 'extraordinary relief.' " *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737, 743 (8th Cir. 2014) (quoting Fed. R. Civ. P. 60(c)(1); *United States v. Young*, 806 F.2d 805, 806 (8th Cir. 1986)).

What constitutes a reasonable time depends on the facts of the particular case. *Watkins v. Lundell*, 169 F.3d 540, 544 (8th Cir. 1999). *See Moses v. Joyner*, 815 F.3d 163, 166-67 (4th Cir. 2016) (concluding that the district court did not abuse its discretion in ruling that a habeas petitioner's Rule 60(b)(6) motion for relief from judgment, based on a change in habeas procedural law 15 months after the Supreme Court's decision, was untimely under Rule 60(c)). While leave to amend under Rule 15(a) should be "freely given," post-judgment leave to amend under Rule 60(b) is subject to stricter standards. *See Gonzalez*, 545 U.S. at 535 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 873 (1988) (Rehnquist, C.J., dissenting)) (noting a " 'very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved' ").

The Federal Rules of Civil Procedure also provide that if a court lacks authority to grant a motion for relief from judgment because an appeal is pending, "the court may: defer considering the motion; deny the motion; or state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed. R. Civ. P. 62.1(a). Thus, although an appeal is pending, this court may rule on Rhines's Rule 60(b) motion consistent with Rule 62.1(a).

B. Second or Successive Petition

The Supreme Court has acknowledged that Rule 60(b) motions in the habeas context, while playing "an unquestionably valid role," must not conflict with AEDPA's standards. *Gonzalez*, 545 U.S. at 533. "Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction-even claims couched in the language of a true Rule 60(b) motion-circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Id.* at 531 (citing 28 U.S.C. § 2244(b)(2)).

> A Rule 60(b) motion is a second or successive habeas corpus application if it contains a claim. For the purpose of determining whether the motion is a habeas corpus application, claim is defined as an 'asserted federal basis for relief from a state court's judgment of conviction' or as an attack on the 'federal court's previous resolution of the claim on the merits.' *Gonzalez*, 545 U.S. at 530, 532. 'On the merits' refers 'to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d).' *Id.* at 532 n.4. When a Rule 60(b) motion presents a claim, it must be treated as a second or successive habeas petition under AEDPA.

> No claim is presented if the motion attacks 'some defect in the integrity of the federal habeas proceedings.' *Id.* at 532. Likewise, a motion does not attack a federal court's determination on the merits if it 'merely asserts that a previous ruling which precluded a merits determination was in error-for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.' *Id.* at n.4.

Ward v. Norris, 577 F.3d 925, 933 (8th Cir. 2009). In *Gonzalez*, the Rule 60(b) motion, which sought to challenge a statute of limitations ruling that had prevented review of the petitioner's initial habeas petition, did not require authorization from the court of appeals. *Gonzalez*, 545 U.S. at 533, 538.

Here, Rhines argues his Rule 60(b)(6) motion is not a claim, and thus not a successive petition, because he attacks a defect in the integrity of the federal habeas proceeding. Docket 383 at 7. Specifically, he argues, "a rule of evidence, now declared unconstitutional [by *Pena-Rodriguez*], precluded review" of his claim of juror bias based on Rhines's homosexuality, and thus, the Supreme Court has removed an obstacle to a merits review of his claim. *Id.*

After considering Rhines's Rule 60(b)(6) motion, the court concludes Rhines's is attempting to present a new claim, which means his motion is a successive petition. Rhines is attempting to assert a claim of sexual orientation bias by the jury based on the Supreme Court's decision in *Pena-Rodriguez*. In other words, Rhines is attempting to use a Supreme Court case, and extend the holding of that case to the facts of his case, as a basis for relief from his death penalty sentence in state court. Thus, Rhines's new claim meets the very definition of "claim" that was established in *Gonzalez*: "an asserted federal basis for relief from a state court's judgment of conviction[.]" *Gonzalez*, 545

U.S. at 530; *see also id.* at 538 ("We hold that a Rule 60(b)(6) motion in a § 2254 case is not to be treated as a successive habeas petition if it does not assert, or reassert, claims of error in the movant's state conviction."). Rhines is doing exactly that—asserting a claim of error in his state conviction. Because Rhines's Rule 60(b)(6) motion is a successive petition and he did not seek or obtain the Eighth Circuit's authorization to file it, this court does not have jurisdiction to consider it on the merits. *See Burton v. Stewart*, 549 U.S. 147, 152 (2007) (concluding that because petitioner filed a successive petition without appellate authorization, "the [d]istrict [c]ourt never had jurisdiction to consider it in the first place.").

III. Rhines's Motion for Expert Access

Rhines also moves the court for an order requiring respondent to produce Rhines for expert evaluations by Richard Dudley, Jr., M.D., a forensic psychiatrist, and Dan Martell, Ph.D., a neuropsychologist. Docket 394. He plans to use the advice of Dr. Dudley and Dr. Martell for a possible clemency application, should one become necessary. *Id.* The Department of Corrections, acting under SDCL § 23A-27A-31.1, will not allow the two experts to access Rhines in prison without a court order. *Id.*

Rhines previously moved this court for a different doctor's expert access as part of his habeas proceeding. Docket 313. The court denied Rhines's motion because Rhines is in a state penitentiary, not a federal penitentiary, and SDCL § 23A-27A-31.1 authorizes a state trial court—here, the Circuit Court for the Seventh Judicial Circuit of South Dakota—to order the

Department of Corrections staff to allow other persons not specified in the statute access to capital inmates. Docket 334 at 6. Based on the principles of comity and federalism, the court concluded SDCL § 23A-27A-31.1 did not authorize the court to grant Rhines's request. *Id.* at 7.

Rhines contends that he has now addressed the federalism concerns because he has sought relief in the South Dakota courts, which have denied his motion for expert access. Docket 394 at 4; *see also* Docket 394-1 (Circuit Court for the Seventh Judicial Circuit of South Dakota denial of Rhines's motion, dated Oct. 24, 2017); Docket 394-2 (South Dakota Supreme Court order dismissing Rhines's appeal, dated Jan. 2, 2018). As a legal basis for his motion, Rhines argues that this court's appointment of counsel under 28 U.S.C. § 3599 extends representation to clemency proceedings, which may also include expert services in support of such clemency proceedings. Docket 394 at 6. Rhines also argues he has a due process right to these expert services for his possible clemency request. *Id.* at 12.

A. Authorization for Representation under 18 U.S.C. § 3599

On Rhines's first argument, 28 U.S.C. § 3599 provides in relevant part:

> (a)(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).
>
> . . . .
>
> (e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so

> appointed shall represent the defendant throughout every subsequent stage of . . . all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

18 U.S.C. § 3599.

The Supreme Court has interpreted the phrase, "shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant" found in 18 U.S.C. § 3599. *Harbison v. Bell*, 556 U.S. 180, 185 (2009). The Court concluded that the plain language of the statute provides that federally appointed counsel's authorized representation for a habeas petitioner includes state clemency proceedings that are available to state petitioners. *Id.* at 185-86. In rejecting the government's argument that § 3599(e) refers only to federal clemency, the Court reasoned:

> To the contrary, the reference to "proceedings for executive or *other* clemency, § 3599(e) (emphasis added), reveals that Congress intended to include state clemency proceedings within the statute's reach. Federal clemency is exclusively executive: Only the President has the power to grant clemency for offenses under federal law. U.S. Const., Art. II, § 2, cl. 1. By contrast, the States administer clemency in a variety of ways. . . . Congress' reference to "other clemency" thus does not refer to federal clemency but instead encompasses the various forms of state clemency.

Id. at 186-87 (internal citations omitted).

The Supreme Court's holding in *Harbison* does not mandate federally funded counsel for a capital habeas petitioner to represent the petitioner in his state clemency proceedings, it merely authorizes such representation. *See*

Harbison, 556 U.S. at 194 ("We further hold that § 3599 authorizes federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation."). And authorizing a federally appointed and funded counsel's representation under § 3599 does not give this court the authority to supervise or control a state's clemency process. Thus, 18 U.S.C. § 3599's authorization for representation alone does not require this court to order respondent to produce Rhines for an evaluation by the two mental health experts in support of a clemency request.

B. Due Process Right to Expert Services for Clemency

Rhines states that he has never received neuropsychological testing to determine if he suffers from any brain disease or injury, and he has never been evaluated by a psychiatrist who engaged in an independent background investigation. Docket 394 at 13. Thus, he argues, it is his due process right to be evaluated by Dr. Dudley and Dr. Martell in support of his "potential clemency application." *Id.* at 2, 12.

The Supreme Court has recognized that "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Harbison*, 556 U.S. at 192 (quoting *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993)). And as the Eighth Circuit has explained, "clemency is extended mainly as a matter of grace, and the power to grant it is vested in the executive prerogative, [so] it is a rare case that presents a successful due process challenge to clemency procedures themselves." *Noel v. Norris*, 336 F.3d 648, 649 (8th Cir. 2003) (per

curiam). But in *Ohio Adult Parole Authority v. Woodard*, a divided Supreme Court acknowledged that "some *minimal* procedural safeguards apply to clemency proceedings." 523 U.S. 272, 289 (1998) (O'Connor, J., concurring) (plurality opinion) (emphasis in original).

Rhines has not presented the court with a case holding that a capital habeas petitioner has a due process right to expert evaluations in support of a potential clemency application. In *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), which Rhines relies on, the Supreme Court held that a capital defendant has a due process right to access a competent psychiatrist when the "defendant demonstrates . . . his sanity at the time of the offense is to be a significant factor at trial" so the psychiatrist can help the defendant prepare his defense. Rhines, on the other hand, is potentially seeking clemency relief. He is not preparing for trial, and his motion for expert access does not raise the issue of insanity at the time of the offense.

The other cases Rhines cites, and the cases this court has reviewed, all discuss the "minimal" due process rights afforded to petitioners in the act of applying for clemency to the respective executive branch—not the preparation leading to a possible application. *See Lee v. Hutchinson*, 854 F.3d 978, 981-82 (8th Cir. 2017) (per curiam) (denying capital inmates' motion to stay executions because the Arkansas Parole Board's clemency process, "despite the procedural shortcomings," afforded the inmates the "minimal due process guaranteed by the Fourteenth Amendment."); *Winfield v. Steele*, 755 F.3d 629, 631 (8th Cir. 2014) (per curiam) (concluding that inmate failed to demonstrate "a significant

possibility of success on his claim that the Missouri clemency process violated his rights under the Due Process Clause" when he claimed correctional employees threatened and pressured someone to not make statements in support of the inmate's clemency application); *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (holding that a city attorney's interference, in the form of witness tampering, with the petitioner's efforts to present evidence to the Missouri Governor in his clemency application was "fundamentally unfair" and required a stay of execution). *But see Winfield*, 755 F.3d at 631-32 (Gruender, J., concurring) (maintaining that *Young* "lacks support in relevant Supreme Court authority" and is an "outlier" compared to narrower approaches adopted by other circuits). *See also Turner v. Epps*, 460 F. App'x 322, 330-31 (5th Cir. 2012) (concluding that capital prisoner's motion for expert access to assist in "laying a foundation for a request for clemency" did not violate his due process right).

In fact, the Eighth Circuit has rejected a due process argument for alleged interference with the ability to prepare for a clemency application. In *Noel v. Norris*, 336 F.3d 648, 649 (8th Cir. 2003) (per curiam), a capital prisoner in Arkansas claimed the State of Arkansas violated his due process right by interfering "with his ability to prepare and present his case for executive clemency." The Eighth Circuit noted that "if the state actively interferes with a prisoner's access to the very system that it has itself established for considering clemency petitions, due process is violated." *Id.* One argument Noel presented was that the state did not allow him to undergo a

particular brain-scan procedure to prove his brain damage should be considered in his clemency application. *Id.* But the Eighth Circuit rejected this argument, stating "we cannot say . . . that the state prohibited Mr. Noel from using the procedure that it had established." *Id.*

Rhines presents a similar claim to *Noel* in that he wants to undergo medical evaluations in order to prepare and present a clemency application. But the prisoner in *Noel* had already applied for, and been denied, clemency. Rhines, on the other hand, has construed his motion for expert access in his habeas case as a due process requirement for his "potential" clemency application. Unlike the cases discussed above where due process may be implicated by clemency procedures, Rhines has not initiated his clemency application. And he has not provided evidence that South Dakota has "arbitrarily denied [him] access to its clemency process." *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring) (plurality opinion). No Eighth Circuit case, South Dakota statute, or state or federal constitutional provision creates a due process right to accumulate all information that may lead to a clemency application, or to present a certain type of information in a clemency application. *See Turner*, 460 F. App'x at 331 (noting the lack of "a due process right to a more effective or compelling clemency application."). Because Rhines has not established a due process right to an expert evaluation in preparation for a possible clemency application, his request for this court to order respondent to produce Rhines for evaluations by Dr. Dudley and Dr. Martell is denied.

CONCLUSION

Rhines has appealed this court's final judgment to the Eighth Circuit, and that appeal is still pending. Thus, Rhines's Rule 15(a)(2) motion to amend is a successive petition, and Rhines has not received authorization to submit the successive petition to the district court. If construed to be a Rule 60(b)(6) motion, Rhine's motion is also a successive petition. But again, because he has not received authorization from the Eighth Circuit to file a successive petition raising the new claim of juror bias based on his homosexuality, this court does not have jurisdiction to rule on the merits of his motion. Finally, Rhines has failed to show he has a due process right under the Constitution to an expert evaluation in order to prepare for a potential clemency application to the South Dakota Governor. Thus, it is

ORDERED that Rhines's motion to amend, or in the alternative, motion for relief from judgment (Docket 383) is denied.

IT IS FURTHER ORDERED that Rhines's motion for expert access (Docket 394) is denied.

DATED this 25th day of May, 2018.

BY THE COURT:

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