

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

KEITH THARPE,

Petitioner,

vs.

WARDEN, Georgia Diagnostic and
Classification Prison,

Respondent.

CIVIL ACTION NO. 5:10-CV-433 (CAR)

ORDER

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

I. BACKGROUND AND PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. ANALYSIS

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

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

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

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

On March 6, 2017, the Supreme Court held:

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

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

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

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

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

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

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

Tharpe also argues that "numerous lower courts have already considered claims under *Pena-Rodriguez* in habeas proceedings." ECF No. 93 at 6. But, none of these courts found *Pena-Rodriguez* applicable; none addressed retroactivity; and in only one case⁴ did the respondent raise *Teague*. See *Berardi v. Paramo*, No. 15-55881, 2017 U.S. App. LEXIS 13638, at *2 (9th Cir. July 27, 2017) (no mention of retroactivity but

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Pretermitted *Teague*, Tharpe’s juror misconduct claim is procedurally barred.

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

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

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

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

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

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

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

ECF No. 14-3 at 7.

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

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

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

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

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

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

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

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

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

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

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

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

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

ECF No. 19-10 at 104.

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

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

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

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

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

137 S. Ct. at 869.

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

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

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

III. CONCLUSION

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

CERTIFICATE OF APPEALABILITY

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

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

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

Under this standard, the Court cannot find that "a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen judgment."

Id. The Court, therefore, declines to issue a COA.

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

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

Declaration of Frances Cersosimo

Pursuant to 28 U.S.C. § 1746

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

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

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

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

Frances Cersosimo

Frances Cersosimo

3-8-16

Date

Exhibit N

Frances Cerasimo

Jan. 7, 1993

My Journal on the murder trial of Donovan Schaffer. Charles Rhine is being charged w/ 1st degree murder.

On Dec. the 5th 1992 I received a jury summons for this case. I filled out the questionnaire and it was in the mail Dec. 7th. From that time on I have not thought of much else. My first reaction was that I could not be on the jury because it scared me. Since that time I have come to believe I could not only do a good job, realizing it would be emotionally hard on me, but that I wanted to do this.

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

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

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

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be asked to serve. I've thought about this a great deal & feel I can do this. Butler then asked about my children and what they do. I said Nancy is 23 and in her 4th year at Dakota as an assistant in the learning disability center. My 21 year old son is about to begin attending 70-tech and my 17 yr. old son attends Central. Butler then asked if I believed in the death penalty since the Jete was asking for the death penalty. I said yes I do. He said in every 1st degree murder case. I said no not always. He asked what a person would have to do to be given a death sentence in my view. I said well if it was pre meditated and the victim was killed in a painful violent way & the accused had no remorse. ~~Butler then asked if I could think~~

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

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

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

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

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I was asked to look at the names and tell him if I knew any of the people.

I said no not personally. Butler then said so you do recognize some of the names. I said a few I believe are names of law enforcement officers. He asked how I knew these names. I said

having lived here all my life I'd seen the names in the news eat. At the

end of questioning Mr. Butler said you seem like a nice caring woman &

this juror is accepted. Now it was

Mr. Goff's turn. He got out of his chair

& smiled at me and walked within a

few feet of me. He said I too have

read your statements in the questionnaire

& only recently was given the backside

where you wrote your situation with

Mr. Honenkamp^{prison} & your like & respect for

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

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

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One other thing Goff asked me was if I was on the jury and we gave the death sentence if people got upset with me and said things like how could you? Would you be able to handle that?

I said I don't see that as a problem, they have their opinion and I have mine.

are under oath + that you cannot discuss this case with anyone, read newspaper accounts of this case or TV news pertaining to this case. He said can you promise me this. I said yes I will do as you ask. He then said if for some reason you are unable to get in touch with you; if you don't hear from us by noon Tues. I was to call them.

After I left the court house I had mixed feelings. My heart finally started slowing down after 10 minutes or so. I have a strong feeling I will be chosen for the final 12 voting jurors. Four will be alternates who will hear all the evidence but will not vote unless one of the 12 cannot continue w/ the trial.

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

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

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Day! Jan. 15, 1993 The Trial

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

The judge gave us an example of what happened to one juror. She discussed the case w/ someone. During deliberations she brought up a

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point and the 11 other jurors did not know what she was talking about. He said we are only to consider evidence we hear in the court room and base our verdict on that information. Then the State Attorney, Dennis Stoff gave his opening statement. He basically told us step by step all he hoped evidence would show. As the judge said, this is like a roadmap of the case. He spoke for about 30 minutes. Of course everyone in the court room was constantly watching the jurors & I guess we were checking out the people. The victims family were mostly on the right side of the court room in the 1st row. His parents were next to the wall, the look on the

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Mother's face was pure grief. My heart went out to her, but she seemed immune to a lot of what was going on around her. I do understand some of her grief & I know this trial will be so very hard on her & also the father. Some time has passed but they now have to live this nightmare all over again.

We were given pencils & notepads to take notes if we wished. I liked the idea & I wrote down who testified & for how long, made notes of what they said and wrote each exhibit # and what it was. In the morning we heard testimony from 3 police officers who were 1st on the scene. We went to lunch at 11:40 till 1:00. During lunch some of us went to Hardier & got to know each other a little bit.

We were all back by 1:00 but Counsel was with the judge going over some rules of law. The bailiff said this could happen alot during the trial. It was 1:15 when we went back in. The 1st witness was an employee who found Donovan Schaffer dead. He was so nervous I felt for him. He was calling the police when another employee Sam Harder arrived. He said to Sam don't go in the storage room so right away Sam went & looked. It was established that in the police photo the 2 vehicles parked there were his & Donovans. The next witness was a detective who said he spent about 13 hrs. taking photos & other evidence. When we went in after lunch & I saw the projector & big screen I knew we would be seeing areas of the business & the victim. As I

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expected the photos were graphic and of course in color. Of course the hardest pictures to view were of the victim. He had been left sitting on a pallet w/ his hands tied behind his back w/ rope that was from the shop. A tool box on the wall from the victim showed what could have been used to cut the rope and also showed more rope. The victims legs were crossed indian style & his body went forward and his head was on the floor in an enormous pool of blood. Because he was in this position we were not able to see his face. I think it helped me emotionally not to have seen his face, although in the last 3 days, several times I have seen the picture in my mind.

I was concerned how the family was handling all this so I looked over a few times. The parents had their heads down and didn't look. The rest of the family of course were wiping their eyes. The accused Mr. Rhines also did not look at the photos of the victim. He is sitting directly in front of me. I am in the front row in the middle. The last witness was a detective who had physical evidence which was passed around. They were tennis shoes of the 2 employees who found the victim. The other was a red cape found on the floor between the bathroom and the office. I was the 5th juror to look at the shoes, the 4 before me did not even look at

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the bottoms of the shoes to note the pattern. A lot of importance was placed on bloodied footprints left at the scene. Later if we need we can compare the prints w/ the shoes but I imagine experts at the FBI lab will have made their own conclusions.

It was now 2:30 and I was surprised the judge adjourned for the day. After just having seen profound pictures of the victim I guess it was a good place to stop. Since we aren't to discuss the case verbally, it would have been hard to have taken a break and not shown some emotion.

I went straight home and realized how tense I must have been as I had a terrible headache and was very tired from my lack of sleep. In

all honesty I feel I am handling this experience very well. I am even eager to get back in the court room and see what unfolds. I am trying to pay close attention and keep an open mind. I may not be doing the right thing but at this point I am trying to play devils advocate. I will do as the judge says and try not to make a decision until all the evidence has been given.

There are 8 men & 8 women on the jury. Like one man said, if the paper is right 1 man & 3 women will get the boot. Only 12 will vote & the journal had said 7 men & 5 women. I feel I will vote but I'll have to wait & see. I'm glad the 1st day is over & I think

The rest of the trial will be interesting. So far the jurors all seem very nice & I'm sure after this experience for many years to come we will remember each other.

Day 2 Jan. 19, 1993

A lot of ground was covered today. I think only a few more days and the jury can start deliberations. Around 17 people were questioned today. The morning started w/ a pathologist testifying about how the victim died. The first photo was upsetting. It was of the deceased victim waist up. Now I have seen his face. Although it was hard; from what some of the other jurors said, I was in a lot more control than they. Who knows with me the emotion could come out next month or tomorrow.

I don't think I will try and make notes as to the evidence given today, just say that it was a long day. I slept only 3 hrs last night. I just worry I guess that I'll over sleep or something. My back hurt, feet too hot ect. The only real damaging evidence came today by a 16 yr. old girl. In my court notes I wrote down much of what she said. I am anxious to hear what Sam Harder has to say. I'm trying to sort out the evidence & feel that I have. I have not made a decision yet as I still have my own questions about certain things. They may be answered in the next day or so. My butt was sure sore by 2:00 P.M.

I don't think the prosecution has much more to present. I would think Wed would wrap it up for them. The defense for R. King has been very quiet. I'm sure they have witnesses but if they don't, the jury could start deliberations by Friday. It was a long day even though we were released by 4.00 P.M. The jurors continue to get to know each other & are getting along pretty well. So far defense has very briefly cross examined maybe 4 people. I keep wondering what their game plan is. They reserved the right to an opening statement. I guess I'll know soon.

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Day 3, Jan. 20, 1993

Wow! What a day. I cannot seem to think of anything but the case. Today was climatic & anti-climatic. Dan Harder for whatever reason did not testify in this trial. I guess he wasn't really necessary to the case but I was very curious to see & hear him. As far as I'm concerned he was an accessory to burglary (^{before and} ~~after the fact~~) however, I feel since he was now married to Heather (7-92) he may have been ^{given} immunity from prosecution in exchange for his wife Heather's testimony. Her testimony ^{of 2 1/2 days} ~~today~~ was very damaging but the case was blown wide open today with a cassette tape we heard given to a detective and someone from the sheriff's office in Wash. last June

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of Charles Rhines answers to questioning by these 2 men. He was definitely given his rights and Miranda warning. However, defense strongly made known on court record that the tape of his admission of all that pertained to the murder of Donovan S. on this tape be not admissible as evidence. This was argued in the judges chamber between counsel and Judge Korenkamp over ruled it and allowed the tape as evidence. If this case is taken to a higher court I feel this tape will be their grounds for dismissal or whatever they make be requesting. I was very moved at one point

during Rhine's admission tape
where from the time Donovan
first came in and severely startled
Rhine & when he first stabbed
him to his statement of what
Donovan said to him. I made
the mistake of looking at one
particular relative of Donovan,
(I think maybe an older sister)
she & I looked at each other
at the same time & the emotion
on my face & the tears that came
to my eyes I think caused her
to really cry at this point. This
may be hard for people to under-
stand but when I was in her
shoes 17 yrs. ago and watching
the jurors I too looked for some
signs w/ the jurors that showed

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one that; at least a little feeling
and compassion for my pain &
my families pain was within
them. Up to this time she & I
had alot of eye contact. She of
course grieving and angry and
looking at the jurors with a look
of some hostility like "we better
make the right decision". Whether
it was just me & my thinking I
don't know but I didn't see the
angry look directed at me any more.
As a juror I was trying very hard
to be completely open minded. Care-
fully listening to all evidence &
trying not to come to any con-
clusions of guilt or innocence. After
hearing R. himself describe where

and how the murder took place
in his own words on tape & remem-
bering the testimony which showed
the order of events as well; I had
no choice but to consciously
say to myself, there is no doubt
now that Rhines did without a
doubt murder Donovan Schaffer.
This is when I looked at Donovan
family w/ pain on my face. Until
that time I don't believe I showed
a lot of emotion. Later after the
tapes were played there was a few
more witnesses concerning the evidence
that was obtained as a result of
Rhines telling the police on tape
where to find them. I got the
feeling Rhines thought they had

already found them and maybe
he thought they were testing his
memory or something. The defense
cross examined the photographer &
evidence man (1 person) about how he
knew where to look. The officer
was trying not to say from
so & so as a result of the tape
telling the police where to look.
Defense is still making it known
for the record that this evidence
was only obtained from the tape
they feel should not be accepted
as evidence. Down the road it
will be interesting to see if in fact
a higher Court rules in favor or against
Judge Korenkamp's decision of using the
tape as evidence. I was surprised.

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when Mr. Guff announced that the state rests. The judge ordered a 10 min. recess. As we left the room I thought well now we will see what the defense will do.

When we returned to the courtroom I was stunned when the judge said the state rests & the defense rests. At this time I would like the jury to return at 9:00 A.M. on Friday. Tomorrow myself and the attorney will be involved in some legal matters.

When you come Fri you will hear closing arguments and begin deliberations. Please bring w/ you on Friday ~~and~~^a change of clothing, toilet articles ect. as you may

have to be sequestered Friday evening if deliberations aren't achieved by too late. So - - - now we wait till Fri. to find out which 12 deliberate & which 4 go home. I would be interested in that process but we'll see. In this trial I felt I had 2 hurdles to cross. I passed the 1st one now I have to see if I can get over the second one. At this time I am starting to get just a little queasy in the stomach about having to make the decision of life in prison or the death penalty. I honestly do not know at this time how I will vote on that

issue. I need to discuss my
thoughts & feeling w/ the other 11
people who have all heard what
I have. As far as all the
charges I don't even know as the
2 counts of murder will have specific
rules & actions based on the law that
applies to the type of murder charge.
I do know he is guilty of murder
but according to the law I don't
know to what degree. I'm leaning
towards life in prison. If I do
vote as a juror Fri or Sat. when
it's all said & done it will be
interesting to read this journal
and see if, what I thought I
would do in a given situation,
is what I actually do. See today

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Today is Fri. Boy was I
wrong! The woman I thought
was Donovan's mother was not.
His mother was the lady I
earlier referred as possibly his
sister.

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is Wed 1/24/93 Friday 1-22-93 is not
a reality for me yet & in all
honesty I do not know how the
deliberating & discussion process will
affect me.

For whatever reason - I guess
because I am a mother - I was
very aware of Mrs Schaffer on the 1st
day of the trial. She was not hard
to spot as she appeared to be the
most grieved looking person there.
During photos of her son taken at
the morgue, she put her head
down & did not look as did her
husband. It was a very painful
ordeal for her and she was not
there for the rest of this trial. I
don't know if she will be there Fri.

← left page

I kept thinking to myself if I could stand being there myself if it were my son who was murdered. The word nightmare does not seem adequate. On the other hand I looked to see if maybe Charles Rhein's mother was in the courtroom. I don't think so. That too would have been extremely difficult.

We were allowed to take notes during the trial. They definitely helped me to reinforce in my mind who the witnesses were & what was said. I hope we will be allowed to keep our notes. I will stop writing in this Journal now and will next write in it when my job as a juror is done.

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When the jury filed in this morning I noticed Charles Rhines was watching all the jurors come in & that he looked somewhat cheerful & he sort of smiled. I looked at him as I came in & he looked at me and it just seemed funny. It wasn't the 1st time he watched us come in but he usually had a sort of straight & unemotional look on his face. ←

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1st. Judge Koenigs read the charges & the law as defined by the law and explained the rules. We would not be allowed to leave.

Fri 1-22-93 Day 4

9:00 A.M. Court started w/ the State giving its closing argument. Mr. Groff reviewed the evidence & reviewed the way the killing of Donovan started & how the final stab in the neck was meant to finish the victim off. He wanted the jury to return a verdict of murder in the 1st. degree and guilty of 1st degree burglary.

The defense described how Rhines was petrified w/ Donovan surprised him while he was robbing Dig 'Em'. Out of fear he stabbed & killed Donovan. They contend that it was not premeditated murder. From the onset they said they wanted to speak to us jurors w/ candor. They said we all

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know that Charles Rhine killed Donover Schaffer but that Rhine only meant to rob Big 'Em' not kill any one.

Then the judge said at this time he would read the names of the four alternate jurors. He thanked them and said after their name was read they should go ahead & leave.

The remaining 12 were ~~then~~ sent to deliberate. The smokers wanted 1 good cigarette before starting. The group was all somewhat shocked but we soon accepted the responsibility. While we were trying to decide how to pick a foreman [redacted] said we maybe should ask who wants the job. One man said he had alot of time in a courtroom & [redacted] said well --- [redacted] said how about we

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put our names in a hat and whoever gets
picked does it. I said I don't want the
job and someone else said they didn't
either. So we said whoever wants to
put your name in. One woman & 3 or 4 men
put their names in. [REDACTED] [REDACTED]
[REDACTED] was chosen. He did a wonderful
job. The bailiff then brought in all the
evidence in for us to have. [REDACTED] said
are we all agreed that Rhine killed
Donovan Scheffer and we all said yes.
Then he said ok then let's read
again the definition for 1st degree
murder & 2nd degree murder. I said
before we get down to brass tacks
couldn't we just vent some feelings &
discuss some of the things we heard &
maybe get some questions answered. They
all agreed it was a good idea since we
had all been silent & we needed to

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talk about this trial. Well it got pretty wild. There was 4 or 5 conversations going on all at once. I said we have plenty of time so let's take turns speaking because w/ all these conversations going on I couldn't catch what all was being said. Eventually we got back to discussing whether we thought Rhine should be charged w/ 1st or 2nd degree murder. It seemed everyone was in agreement that it was murder 1 but me. I said my feeling had always been that premeditated murder was the planning ahead of time of how you were going to kill someone & then doing it. Everyone said yes & then we did to put the law reads that in a burglary if the perpetrator makes a conscious decision to end a life it is 1st degree. 2nd degree would be if the perpetrator is

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fear struck someone like over the head
to keep them from seeing them &
left them & as a result that person
died, it is 2nd degree as they didn't
intend that the person should die.

We decided to have lunch & then
vote. Lunch was over so we got back to
our decision. [REDACTED] asked me if I was
OK to vote & I said yes, I had wanted
some time for our decision to sink in
as we all were so terribly aware of how
serious the charge was. Our decision
was going to mean that Charles Rhine
was never going to ever be a free man.
Donovan Schaffer will never be a free
man either. We can only hope & pray
that he is a free (& happy) spirit. OK!

Now we were ready to vote. We decided
we would vote w/ a show of hands. 1st degree
Burglary. All 12 hands up. Murder in

the 1st degree. All hands go up. Then
[redacted] filled out the form to check in
the appropriate charges. After he
did this & signed his name, passed
the form & all of the jurors checked
it to see it was as agreed. I have
to say this is a special group of people.
Many said they wanted everyone's name so
we could keep in touch w/ each other. Many
felt it could get emotionally hard at times in the future.

When we went into the court room it
was more packed than ever. It seemed
like there was a lot of tension there.
Prior to coming in Judge Korenkamp
came to the deliberation room and
told us that he would not use our
names at roll call but assigned us each
a number. He also said that the defense

could ask for each juror to say
yes or no to the murder indictment.

[REDACTED] gave the bailiff the
form that said what our decision was.

He gave it to the judge who gave
it (after looking at it himself of course) to
the woman who swore the witnesses
in. When she read the verdict

I was surprised Rhine was not
asked to stand up. The family
at first stiffened & clutched at each
other & there was a large sigh
from most of Donovan's family. Mrs.
Schaffer was fighting tears & at this
point so was I. The defense requested,
as the judge told us he might, that
each juror say yes in response to
agreement of the verdict. Again it was
juror #1's turn. I noticed some of the

jurors voices were just a little shaky.
The judge then told us that he was
going to release us for the day and we
were to come back on Monday at 9:00 at
which time both counsel would have
statements and the judge would give
us more rules of law or something. I am
not sure just what to expect. This
procedure is what they call phase II.
The judge said after this the jury
would then deliberate as to Rhine
punishment, Life in Prison (in S.D. this
mean life until a natural death, no
pard.) or a death sentence. Had we
found Rhine guilty of murder in the
second degree the judge would have
passed sentence. The judge asked the
jury not to think & come to a decision
over the weekend to wait until we
have heard what is to be said on Mon. 1/25/93

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We still were told not to discuss,
read newspapers or listen to news
concerning this case. We then left
the courtroom. [REDACTED] immediately
grabbed her coat and I saw she
was shaking. I put my hand on
her shoulder and said [REDACTED] take
a minute, there's no rush you don't need
to be driving now. My heart started
pounding as we left the courtroom &
now I too was shaking & wanted to cry
but tried to hold back. [REDACTED] asked
if I was OK. I said I will be it was
just so emotional. She also had tears
in her eyes. By now all the jurors
were huddled together & we were all
trying to support one another. My
feelings were so confused at this time

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and I remember thinking what is wrong w/ me. My legs started shaking and I had to sit down. Some of the jurors started asking if there was a side door we could go out as they were concerned about maybe some peoples reaction or the news media. ^{the judge} He told us of a side door we could go out but as far as news media they shouldn't bother us. We decided to walk out as a group & exit the doors from the old section of the courthouse as alot of us were parked out front. We should have waited a little longer because my legs started shaking again as we started down the 3 flights of stairs. We got to the parking lot & went our own ways. I got in my car & by the time I got to the parking lot ~~exit~~ I began to sob & tears were falling.

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I am still asking myself why I am feeling all this emotion. By the time I got to Omaha st. the sobbing stopped and I just felt drained. I got home to an empty house & was disappointed there was no one there to give me a hug.

It was almost 2:45. I waited until 2:47 only to find out Joe was not there at school.

I knew he had meetings outside the school today so I wasn't surprised.

Soon after my friend [REDACTED] called.

It was good to have someone to talk to. Then it was 3:30 & still

no [REDACTED] so I called [REDACTED] & asked

for [REDACTED] or [REDACTED]. [REDACTED] came to the phone & said he & Joe would be home

soon. I said no they could stay just tell

[REDACTED] I'm home & go back on Monday. He said

OK I'll tell him but they still would be home soon.

I then passed for a while & then felt I needed to hear a familiar voice so I called [redacted] at work. I'm glad I did because I had been on her mind and she felt better talking to me. I don't even remember what I said to her but then felt better. By now I figured [redacted] would be home so I quickly gave her a call to let her know what was happening. Now [redacted] was home and I got the hug I needed. It is so nice to have such a loving husband. I see the destruction the Schaffer family has suffered and I remember how at one time my family too suffered tragedy and I guess although I feel for the Schaffers I am so thankful we aren't in that kind of situation now. My past

experience cause me to be so very
thankful for all I have now. As I
am writing in this journal it is Fri.
Jan. 22, 1993 11:00 P.M. and earlier
this evening it came to me what all
this emotion I was feeling was all
about. Since the trial started on Jan.
15th I have gone into the courtroom
with a determination to as a citizen
do the best job I could in a court
process I believe is the best system in
the world. More & everyone's rights are
protected by this judicial process. I
felt it was a honor to serve but the
gravity of this case was at times over-
whelming. Through it all I was de-
termined to be a fair and impartial
juror. The trial itself was only 3 days
and never past 4:00 but it seemed like

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three weeks. We had to absorb so much information & to make matters worse we were not allowed to talk about anything we heard in the courtroom. Not a day in Court went by that some emotional & disturbing thing did not happen. All this time we jurors fought back our emotions & tears. Twice I did tear up but quickly got control. So - today seeing Donovan Schaffers family let out their emotional sigh of relief I held off until out of the courtroom and then my emotions - held back so long finally came out like a sigh of relief only I guess a little stronger. I think the impact of this major responsibility the major decision finally hit home & reality set in. It was very heavy & unsettling. I am OK now. Monday will be here

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soon and we'll see what happens. I
won't even venture now to say how I
think I'll vote. I guess alot may
depend on what we are told and what
rules & guidelines we are to go by. I am
disappointed we can't keep our notes
we make during the trial and I
intend to write in my own words & memories
what happened that sad night of March 8, 1992.
No one should did the way Donna did!

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Monday - Jan 25, 1993

Today in ~~Susan~~ ^{1/31/93} 2:30 P.M. I finally have some time to finish this Journal.

I was not looking forward to going to court Monday. When I got there we didn't wait long before we were called into the court room. A lot of people were there. The day started with Judge Koenkamp reading off numbers for jury roll call. He then read to the jurors several pages of instruction which defined terms and explained all we were to deliberate on. The State was asking us to decide on 3 aggravating circumstances. If we found the defendant guilty of just 1 of the three circumstances we could decide on the death penalty. In order to impose the death penalty all 12

jurors had to be in agreement. In case of a hung jury, life in prison would be given. The judge asked that we still not try and decide which penalty to give untill we listened to all that would be said in the courtroom during what was being called Phasent of the trial and also he asked that during deliberations we keep an open mind to what each other had to say. Mr. Loeff started with his closing argument. Again I felt that he had alot of eye contact w/me. Once in awhile it bothered me but I think I probably wasn't able to keep alot of expression out of my face & maybe he thought I was giving away my thoughts by my facial expression. I guess I'll never know why. He went through the 3 aggravated circumstances with us.

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He basically talks about the senselessness of Donovan's death and how he died because he was a witness to the burglary. He finally said he hoped that our decision would be a death sentence. Then the defense called Rhine's oldest sister to the witness stand. She told of her brother's low marks at school and said he had some problems w/ relationships. She said her mother was in poor health after a breakdown 5 yrs ago after her husband's death, followed by a heart attack + later a stroke. She said growing up her family had a normal life but that Charles had problems. There were 4 children 2 boys + 2 girls. All but Charles had college degrees. He went into the military after dropping out of high school at the age of 17. His father

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Thought the military might help. He
got a GED in the military. She said
over the years Charles had problems but
never even thought he would end up
on trial for murder. The next witness
was Charles other sister who flew from
Australia to see him and testify. She
was closest in age to Charles. She
basically said they were fairly close. She
was the family member he confided in
about being homosexual. The last time
she saw Charles was in 1990 when she
had a disagreement w/ him. She was
asked if she loved her brother and she
said yes. He's my baby brother & all though
we had our misunderstandings she loved
him & always would. At this time Rhine
wiped his eyes. I wondered if he thought
she no longer loved him & was maybe

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des not want to hearing her verbally
that she loved him. She said if he
got life in prison she could still write
him & visit him whenever possible. Then
Mrs. Peggy Schaffer, Donovan's mother, took
the stand. Through tears & a choked
voice she read a statement about her
son & how kind & good he was. About
his fiancée Sheila Pora and their
dreams of marriage this Maq. She said
her dream & his were gone now & their
lives shattered. I was on an emotional
roller coaster. At some point I remember
feeling like I just wanted to really have
a crying session. I don't remember who
was talking but I lost it for awhile.
I wiped my eyes & tried very hard to
get my composure. I read a few days

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later in the newspaper of the various
people in tears that morning and
the article mentioned a juror cried.

I haven't talked to the other jurors
to ask if anyone else cried but I know
I did. Then the defense attorneys all
had a statement. They pleaded for
mercy & agreed that the killing
of Donovan was horrible but that was
the removing Rhine from humanity
be the only way justice could be
served. The last of the 3 Mr. Butler
talked. During his closing argument
he told us a little about himself
& that last summer when Judge
Korenkamp asked him to represent
Rhine & that the state was asking
for the death penalty, he said he was

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concerned because even though he was
a lawyer for many years he did not have
a lot of experience with a murder charge.
He had on large pieces of card board
a scripture from Exodus quoting the verse
about an eye for an eye etc. He called it
Mosaic law I believe. The next cardboard had
a scripture from the new Testament concerning
turning the other cheek. I don't remember
what the 3rd scripture was but he somehow
tried to tie in Jesus Christ in that he
was tried & given a death sentence. The
4th cardboard was a quote from Abraham
Lincoln concerning a soldier who killed
a soldier & who they were going to punish
w/ death. Lincoln's quote was against death
as a punishment. During his statement
like Goff he seemed to go in on me
with eye contact. I think he thought

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maybe I was being receptive to his remarks. In all honesty he did get to me somewhat. I remember thinking well maybe I will go for life in prison. When I thought that, I felt somewhat relieved. Mr. Groff said Lincoln also said: what I don't remember. He also said he could not believe Jesus Christ & Rhine were compared. He was appalled & said I won't even go into it further. At this time Rhine's 2 sisters were in the courtroom. Groff reminded us of Donovan's brutal death & as he described the events & stabbing that took place March 8th I watched Rhine's 2 sisters. The older one was clearly upset & would at times bang her head. The younger sister was at times putting her hands over her face & it was

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very hard on them hearing in detail
how their brother took a life. He again
asked for the death penalty. The judge
then said we were to deliberate our verdict.
Earlier that day we were told we would
be taken by Van to Howard Johnsons.
We had all been given a room key.
When we got to Ho Jo's we were all so
exhausted. It was late in the afternoon.
We decided to have dinner & then we
went to our conference room where all
the evidence & tapes & instructions from
the judge. We went over each of the
3 aggravated circumstances. We all
agreed on them. Before we quit for the
night we discussed many things. We
seemed to all wonder what life in
prison would be like. None of us

were for sure but we thought Rhine
would be able to have many privileges
like TV, Radio, reading material, access
to a gym for sports & weight lifting,
would be able to socialize w/ the prison
population etc. Someone even thought
that lifers were not required to work
as they were not being rehabilitated.
We talked about all the violence in
our country & that maybe it was time
for us to say enough of people
getting away with 1st. degree murder.
We were so tired & we decided to
get a good nights sleep & start the
next day getting up at 8:00. It was
11:30 then. I wanted to be alone. & so
I went to my room. I took a nice
bath & tried to sort out in my mind.

how I felt. By 12:00 I was ready to give my mind a break. I took my aspirin P.M. & got in bed to read. After reading the same sentences over & over as I couldn't seem to concentrate I told myself to let the trial go & finally I was able to read & able to get to sleep. It was 1:00 A.M. Then when I shut off my light. When I woke it was 7:00 & I decided to get up. I went to get coffee around 8:00. A few jurors were already up & ready for breakfast. I found out some were either up very late thinking or up early thinking. We were back deliberating by 10:00. One of the jurors had written a letter to the judge stating that we knew what a death sentence was but we didn't know what life in prison was. We asked about what I wrote earlier about what

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privilege Rhine would have. We all agreed it was a good question + all 12 jurors signed it. We asked the bailiff to ask the judge. Over the phone the judge told the bailiff it was too long + that he would send a runner for it and that all the lawyers would see our request. This was at 11:00. We had our answer at noon. The judge said all we could have was our instructions + the evidence to base our decision on. From then we had to share our thought on the death penalty versus life in prison. I guess it was the night before we took a vote to see where we stood. It was agreed the voting wouldn't count. It was 8 for death + 4 for life. We decided to listen to Rhine taped confession again. We stopped the tape at various times + discussed things. The whole

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time we were in deliberations was very painful. The enormity of our decision weighed very heavily on us. We did feel that life in prison was what we all had talked about + with all those privileges it didn't seem like justice for Donovan. We left the picture of Donovan out + none of us could shake the feeling that Donovan needed for us to remember all the rights + dreams he had that Rhine so selfishly took from him. We all agreed that if it were us in that picture we would want justice. We all agreed too that what Donovan's family wanted or what Rhine's family wanted was irrelevant + that justice for Donovan was where it was at. We decided to take another vote. When [REDACTED] was reading each vote aloud +

another juror was marking by the
time 10 deaths were read my heart
was pounding. at 12 we were all
stunned & looking at one another. Judy
on my right said I need a hug.
It was very emotional. She wiped her
eyes & said I feel such a relief like
a big weight has been lifted. We all
agreed. One juror said if I ever feel
bad about our decision I hope I can
come look at these pictures of Donovan.
We were all at peace in our hearts
but we talked about what was to
come in the court room. We decided
on a date to all get together again
and we talked about how hard it was
after the 1st degree murder charge was read
We talked about going into the courtroom

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strong & leaving strong. We agreed after leaving the courtroom we could cry or whatever but not until then. We also felt we would be pulled & readied ourselves for that. We also agreed that none of us would give statements to the press as a few words could not begin to describe the magnitude of our experience & also that it was a personal thing between us. We decided to eat before we told the bailiff. We missed lunch & it was now 3:30.

After we ate it was 4:45. We did not want to be in the courtroom before the 5:30 news as we didn't want anyone to think we hurried to make the news.

I told the others that during dinner I thought about a song we could keep in our heads to help us get through

The Courtroom. It was "waited we stand
divided we fall" ext. One of the guys said he
was thinking of the same song. We filled out
the forms + we all checked it over then let
the bailiff know. We packed + went to the
court house. The bailiff said the press was
everywhere so we were taken under the court
house where police cars are kept. Lots of Sheriff's
Dept. people were there. We were taken to a new
room + soon the judge came in + talked to us about
the press + our rights to speak or not to speak to them
but if we did to respect the other jurors + speak
for ourselves. He said deputies would be escorting us
to our cars. I was the only one without a car + the judge
said for me to call [redacted] there as we would be going in soon.
I did call for but it was still 30 min. before we got in.
Talk about nervous. The smokers were all chain
smoking. A few of the jurors during deliberations took up
smoking again. The pressure of this trial was so great.
Finally it was time to go in. We were in a white new
courtroom + it was so small for spectators. I saw Donnell
family + fiancé but I didn't see Rhina sisters.

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Rhonia was holding his hands prayer like. He was very nervous. The decision was given to the judge & he softly said the jury has imposed death. Donovan's mother smiled as did Sheila Pons & I guess most of the Schaffer family. Rhonia put his head on his hands on the table. The judge asked the defense if he wanted the jury polled & as we expected he did. We all sounded fine. My heart was still pounding & the whole court scene seemed unreal. Mr. Huff then dropped charges. I found out from a juror the day that it was for a habitual offender. We left the courtroom and we were checking each other out to see if we were OK. We didn't have much time as the judge told us we would be released & the courtroom held for 5 or 10 minutes so we could leave. I was so numb now & an officer said he was ready to take me down to [redacted]. We went downstairs & he didn't have a key. We went back upstairs & then down another way & the bailiff said we better hurry so we didn't run into the defendant. That's all I would have needed. When I got in the car & we got out of the parking lot [redacted] asked me what the verdict

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was. I told him death. I was so numb.
Joe asked if I wanted to go have a drink
somewhere. I quietly said no I don't want
to see anyone I knew. Not much was said
going home. At home I asked [redacted] to call
[redacted] + family + tell them I was home + OK
but I just couldn't talk to anyone. I was
just in a fog + like I said numb. I explained
to [redacted] about not wanting to talk to the press.
The newspaper was out + Joe started reading
to me parts about Rhine's previous prison
sentences + I finally let some emotion out
+ put my arms around him + cried a little
+ said boy we did do the right thing. We
knew nothing about his past. I took a bath
and felt somewhat alone. The feeling of
being outside of normal life was with me for a
few days. Each day I have felt more normal.
I feel in my heart + mind that justice
was served. I now am writing in this
journal.

This is my story of what happened concerning the murder of Donovan Schaffer and the trial of Charles Rhine. Three weeks prior to March 8, 1992, Rhine was fired from Dig "E." Donoughs. A 16 yr. old boy, Sam Harder, was also employed there and continued to be after Rhine was fired. Sam Harder & Charles Rhine were room mates in a 4 plex apartment. Rhine is a homosexual. One of his previous room-mates & lovers did testify at the trial. His testimony is not relevant. What I am going to write about is mainly what happened not the details of clues of evidence and the witnesses who helped put the pieces of evidence together. It was all leading to Rhine as Donovan's murderer. Going

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back to Sam. Rhinis had a certain influence over Harder. Rhinis is 36 yr. old. I don't believe the sexual relationship they had was a two sided love story. Rhinis loved or loved Sam Harder while I think Sam was partly involved w/ Rhinis as a bisexual man and I feel he was pressured by Rhinis as well. Sam is now married to a woman named Heather.

Rhinis at some time prior to being fired, was given a key by his employee Digo to give to Sam who was a baker who worked the 10:00 PM to 6:00 A.M. shift.

Rhinis had a key made for himself.

The night before the robbery a police officer was at Dig 'Em' at 3:00 A.M. to do paper work. Sam was in back baking & Charles waited on the officer & told the officer not to tell Digo he

was there since he had been fired
and wasn't suppose to be there. Charles
said he was just helping. Also. The
officer noted that Rhine was wearing
a buck knife in a leather sheath on
his hip. Rhine made a statement
in Seattle Wash. to a P.C. Detective
& a Deputy from the Sheriff's office around 6-11-92
It was taped recorded with Rhine's
permission. Date, time and place were
given on the tape names of officers and
most importantly Rhine was told of
his rights was given the Miranda rights.
he clearly answered yes he understands etc.
In Rhine's own words this is his story.
A day or two prior to March 8, 1992
a plan was thought up to burglarize
Dig 'Em' on a Sunday evening. The place
should have been empty from 7:00 to 10:00 P.M.

On Sundays the office door would be locked and behind that door on the floor or on a desk would be the money bags from Fri, Sat + Sun. ready to go to the bank Mon. morning. A slot fairly high on the door was the opening where the money was thrown through. When the time came on Sunday 3-8-92 Sam Hardin drove Charles to Dig 'Em' knowing he was to rob the place. Charles was dropped off a couple of blocks away. Sam went home to wait for Charles to call him when he was done. Charles had a gym type bag with him & inside the bag was a small torch to use on the safe in the office if he couldn't get in the safe. He did not have to use the torch. He had on

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leather gloves. He used his key to get in. ^{the thing he did was put on some plastic gloves he used when baking.} The last thing he did was unplug an overhead light which stayed on 24 hrs. With that light on 24 hrs. a day you could see inside from the door all the way back to the office. After unplugging the overhead the business was totally dark. Charles used a small flashlight to see with. He used his knife & jimmied the office door. While in the office he heard the bolt on the door click. He froze and was scared. He held his knife to his side blade up. Donovan walked back and stopped right outside the office where the control box for the lights were. He turned the lights on and saw Charles. He said what are you doing here. Charles then stabbed him in the right abdomen. Donovan tried to stop



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the knife of his hand & his throat had a large V cut on it. Donovan immediately went down screaming. Charlie, Charlie he was screaming. Charles then stabbed him in the left side of his back punching Donovans lung. Now the screaming stopped. Charles said he then helped Donovan up and helped him to the storage room located up by the door some 50 feet away. He said Donovan seemed resigned at this time like he knew his time to die had come. Inside the ~~the~~ storage room Charles sat Donovan down with his legs crossed indian style on the edge of a wooden crate a few inches off the floor. There was a tool box close by next to the wall and a supply

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of rope ^{part} the rope there was used
to tie Donovan's hands behind his back.
Then rapier left furrows + rope burns
on his wrist which meant Donovan tried
to get them off. Donovan asked Charles
to help him; to call an ambulance.

Charles said he thought, go right! I'm
going to call you an ambulance! Donovan
told Charles if he let him go he
promised he wouldn't tell anyone.

Charles said leave no witnesses. He
pushed Donovan's head down and
shoved the knife in at the base
of the skull above the 1st vertebrae
wanting to hit the medulla area of
the brain which would stop all
body functions. When the cops asked
him what he thought ~~that~~ ^{he} said

"It was the 'coup de grace'." I still shudder when I think of this phrase for it means "the final thrust or the final blow. This last act is what got Charles R. Lewis Murder in the 1st. degree. The 1st + maybe 2nd. stab wound could have fallen under 2nd. degree murder charge where in the act of a robbery you panick + strike out at someone so you can get away. They as a result die but you didn't intend to kill them. When Charles took the time to move Donovan out of a lighted area + did the final stab in the neck + brain he had designed in his mind to do this knowing full well this last stab would result in death. He

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premeditated the final blow. The
"coup de grâce". Charles then after
what he says was a little while
before Donovan died proceeded to
get all the money he came for. He
called Sam to come get him. Sam
came + they went back to the apart-
ment + counted the money (around \$1700 cash).
Rhines said this \$1700 cost Donovan his
life. Sam was very upset but Rhines
told him what's done is done. He
said too bad it wasn't Regi.