CASE NO. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES RUSSELL RHINES,
Petitioner,

v.

STATE OF SOUTH DAKOTA,
Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of the State of South Dakota

APPENDIX

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APPENDIX CONTENTS

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

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

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

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

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

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

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

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

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

(Justice Janine M. Kern disqualified.)

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

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

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

1996 SD 55

STATE of South Dakota, Plaintiff and Appellee,

v.

Charles Russell RHINES, Defendant and Appellant.

No. 18268.

Supreme Court of South Dakota.

Argued Oct. 18, 1995.

Decided May 15, 1996.

Rehearing Denied June 28, 1996.

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

Affirmed.

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

1. Criminal Law ⇐393(1)

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

2. Criminal Law ⇐412.2(3)

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

3. Criminal Law ⇐412.1(4), 412.2(4)

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

4. Criminal Law ⇐412.2(3)

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

5. Criminal Law ⇐412.2(3)

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

6. Criminal Law ⇐412.2(3)

Detective's statement that defendant had a "continuing right to remain silent" adequately advised him of his option to terminate questioning at any time. U.S.C.A. Const.Amend. 5.

7. Criminal Law ⇐412.1(4)

Defendant's complete understanding of his right to stop questioning at any time was

demonstrated by fact that, before making any incriminating statements, defendant specifically told officers that he would only answer the questions he liked and that, when officers questioned him about a topic he did not wish to discuss, he would shut off the tape recorder or tell them to "be quiet."

8. Criminal Law ⇐412.2(3)

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

9. Criminal Law ⇐412.2(3)

Miranda warning need not be elegantly phrased or mechanically recited.

10. Criminal Law ⇐412.2(3)

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

11. Criminal Law ⇐412.1(4)

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

12. Criminal Law ⇐412.2(3)

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

13. Criminal Law ⇐412.2(3)

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

14. Criminal Law ⇐412.2(3)

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

15. Criminal Law ⇐412.2(3)

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

16. Criminal Law ⇐412.2(3)

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

17. Criminal Law ⇐412.2(5)

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

18. Criminal Law ⇐412.2(3)

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

19. Criminal Law ⇐414

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

20. Criminal Law ⇐412.2(5)

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

21. Criminal Law ⇐1158(4)

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

22. Criminal Law ⇐412.2(5)

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

23. Criminal Law ⇐412.2(5)

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

24. Jury ⇐33(2.10)

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

25. Jury ⇐131(1)

Voir dire process is designed to eliminate persons from the venire who demonstrate that they cannot be fair to either side of the case. U.S.C.A. Const.Amend. 6; Const. Art. 6, § 7.

26. Jury ⇐131(8)

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

27. Jury ⇐131(17)

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

28. Jury ⇐108, 132

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

29. Criminal Law ⇐1152(2), 1158(3)
Jury ⇐85

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

30. Jury ⇐108

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

31. Jury ⇐97(1)

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

32. Jury ⇐108

Although prospective juror said at various times during voir dire that she could consider a death sentence during penalty deliberations, court did not err in excusing

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

33. Jury ⇐135

Peremptory challenge is an objection to a juror for which no reason need be given, and it can be exercised without inquiry and without being subject to the court's control. SDCL 23A–20–19.

34. Jury ⇐33(5.15)

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

35. Jury ⇐33(5.15)

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

36. Jury ⇐33(5.15)

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

37. Jury ⇐125, 136(4)

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

38. Jury ⇐135, 136(4)

Because peremptory challenges are limited and both state and defendant receive the same number, prosecution and defense have equal opportunity to remove those members of the venire who, while able to follow the instructions of the court, espouse extreme views of capital punishment. SDCL 23A–20–20.

39. Jury ⇐33(2.10)

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

40. Jury ⇐33(5.15)

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

41. Constitutional Law ⇐48(1)

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

42. Homicide ⇐356

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

43. Homicide ⇐354(2), 356

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

44. Homicide ⇐358(1)

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

45. Homicide ⇐357(3, 7)

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

46. Homicide ⇐357(7)

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

47. Homicide ⇐357(3, 7)

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

48. Homicide ⇐357(7)

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

49. Criminal Law ⇐1208.1(4.1)

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

50. Criminal Law ⇐1208.1(4.1, 6)

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

51. Criminal Law ⇐1208.1(5, 6)

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

52. Criminal Law ⇐1208.1(6)

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

53. Criminal Law ⇐1208.1(6)

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

54. Criminal Law ⇐1208.1(5)

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

55. Criminal Law ⇐1208.1(6)

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

56. Criminal Law ⇐1206.1(2)

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

57. Criminal Law ⇐338(7), 1153(1)

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

58. Criminal Law ⇐412(3)

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

59. Criminal Law ⇐338(7)

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

See publication Words and Phrases for other judicial constructions and definitions.

60. Criminal Law ⇐1169.12

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

61. Homicide ⇐358(1)

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

62. Homicide ⇐343

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

63. Costs ⇐302.2(2)

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

64. Costs ⇐302.2(2)

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

65. Costs ⇐302.2(2)

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

66. Costs ⇐302.2(2)
Criminal Law ⇐1208.1(6)

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

67. Criminal Law ⇐769, 822(1)

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

68. Criminal Law ⇐1173.2(1)

To warrant reversal, refusal to give appropriate instruction must unfairly prejudice the defendant, and he must show that jury might and probably would have returned a different verdict if the instruction had been given.

69. Criminal Law ⇐1208.1(5)

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

70. Criminal Law ⇐796

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

71. Criminal Law ⇐829(22)

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

72. Criminal Law ⇐796

Court adequately advised jury regarding effect of either a life or death sentence by informing jury that decision it made will determine the sentence which will be imposed by the court, that if jury decided on sentence of death, court would impose sentence of death, and that if jury decided on sentence of life imprisonment without parole, court would impose sentence of life imprisonment without parole.

73. Constitutional Law ⇐203
Homicide ⇐358(1)

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

74. Criminal Law ⇐1208.1(6)

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

75. Criminal Law ⇐1153(1)

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

76. Homicide ⇐358(1)

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

77. Criminal Law ⇐986.6(3)

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

78. Homicide ⇐358(1)

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

79. Homicide ⇐358(1)

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

80. Homicide ⇐358(1)

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

81. Constitutional Law ⇐270(1)
Criminal Law ⇐1213.8(8)

Eighth and Fourteenth Amendments to the United States Constitution prohibit state sentencing systems that cause the death pen-

alty to be wantonly and freakishly imposed. U.S.C.A. Const.Amends. 8, 14.

82. Homicide ⇐357(1, 4)

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

83. Criminal Law ⇐1208.1(5)

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

84. Homicide ⇐351

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

85. Homicide ⇐311, 351

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

86. Homicide ⇐357(4)

Jury may properly consider and find two conceptually distinct aggravating circumstances, and is not restricted to finding only one motive for capital murder. SDCL 23A–27A–1.

87. Homicide ⇐357(8, 9)

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

88. Homicide ⇐358(1)

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

89. Criminal Law ⇐1144.13(3), 1159.2(3, 8)

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

90. Homicide ⇐357(11)

"Unnecessary pain," which will support finding of torture aggravating circumstance, implies suffering in excess of what is required to accomplish the murder. SDCL 23A–27A–1(6).

See publication Words and Phrases for other judicial constructions and definitions.

91. Homicide ⇐357(11)

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

92. Homicide ⇐357(11)

Finding of aggravating circumstance that murder involved torture was supported by evidence that, after defendant inflicted the second nonfatal stab wound, he did not swiftly proceed to end victim's life but, instead, brought victim to his feet and walked him to the store room, that victim begged for his life and asked for medical help, that defendant ignored his pleas and seated him on a pallet and arranged his body for what he referred to as the "coup de grace," and

that during this time victim became passive and seemed to acknowledge his impending death. SDCL 23A–27A–1(6).

93. Homicide ⇐343

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

94. Criminal Law ⇐1208.1(6)

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

95. Criminal Law ⇐1208.1(6)

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

96. Criminal Law ⇐863(1)

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

97. Criminal Law ⇐863(2)

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

98. Homicide ⇐358(1)

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

99. Homicide ⇐357(4, 7, 8)

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

100. Criminal Law ⇐1208.1(4.1)

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

101. Criminal Law ⇐1134(2)

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

See publication Words and Phrases for other judicial constructions and definitions.

102. Criminal Law ⇐1208.1(4.1)

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

103. Criminal Law ⇐1208.1(4.1)

Fact that defendant is among the first to receive a death sentence in the state does not signify that his sentence is disproportionate. SDCL 23A–27A–12(3).

104. Criminal Law ⇐1208.1(4.1)

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

105. Criminal Law ⇐1134(1)

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

106. Homicide ⇐357(4, 7)

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

Mark Barnett, Attorney General, Grant Gormley, Craig M. Eichstadt, and Sherri Sundem Wald, and Gary Campbell, Assistant Attorneys. General, Pierre, for plaintiff and appellee.

Michael Stonefield, Pennington County Public Defender's Office, Joseph M. Butler of Bangs, McCullen, Butler, Foye & Simmons, and Wayne F. Gilbert of Johnson Huffman, Rapid City, for defendant and appellant.

MILLER, Chief Justice.

[¶ 1] From the latter part of 1991 through February 1992, Charles Russell Rhines worked at the Dig 'Em Donut Shop on West Main Street in Rapid City, South Dakota. In February 1992 Rhines was terminated from this job.

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

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

ISSUE 1.

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

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

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

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

[¶ 6] At 6:56 p.m. that same day, two South Dakota law enforcement officers, Detective Steve Allender of the Rapid City Police Department and Pennington County Deputy Sheriff Don Bahr, interrogated Rhines about the burglary of Dig 'Em Donuts and the murder of Schaeffer. Detective Allender testified that he advised Rhines of his *Miranda* rights prior to questioning him. The exchange between himself and Rhines is as follows:

> Allender: You have the continuing right to remain silent. Do you understand that?
>
> Rhines: Yes.

Allender: Anything you say can be used as evidence against you. Do you understand that?

Rhines: Yes.

Allender: You have the right to consult with and have the presence of an attorney, and if you cannot afford an attorney, an attorney can be appointed for you free of charge. Do you understand that?

Rhines: Yes.

Allender: Having those rights in mind, are you willing to answer questions?

Rhines: Do I have a choice?

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

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

Allender: Ok. Um, do you remember me reading you your rights?

Rhines: Yes.

Allender: In the beginning? Did you understand those rights?

Rhines: Yes.

Allender: And uh, having those rights in mind you talked to us here?

Rhines: Yes I have.

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

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

Allender: You have the continuing right to remain silent, do you understand that?

Rhines: Yes.

Allender: Anything you say can be used as evidence against you. Do you understand that?

Rhines: Yes.

Allender: You have the right to consult with and have the presence of an attorney, and if you cannot afford an attorney, an attorney can be appointed for you free of charge. Do you understand that?

Rhines: Yes.

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

Rhines: Yes.

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

Rhines: I can take the 5th Amendment.

Allender: Exactly.

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

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

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

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

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

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

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

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

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

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

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

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

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

[6] [¶ 17] Rhines' reliance on *Brings Plenty* is misplaced. First, the discussion of the warning in *Brings Plenty* is not binding precedent. Second, Detective Allender's statement that Rhines had a "continuing right to remain silent" adequately advised

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

2. According to the briefs in *Brings Plenty*, the officer advised defendant as follows:

> Ok, you have the continuing right to remain silent. Anything you say can be used as evidence against you. You have the right to consult with and the presence of an attorney. If you cannot afford an attorney, an attorney will be appointed to you. Do you understand these rights ... ?

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

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

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

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

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

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

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

[12] [¶ 24] Rhines was told at the beginning of each interview that he had the right to the presence of an attorney. Because this warning was delivered at the start of each questioning session, it plainly communicated the right to have an attorney present at that time. *Evans,* 455 F.2d at 295–96; *Sweeney*

v. United States, 408 F.2d 121, 124 (9th Cir.1969); *People v. Johnson*, 90 Mich.App. 415, 282 N.W.2d 340, 342 (1979). We therefore find no *Miranda* violation.

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

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

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

> In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present.

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

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

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

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

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

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

[17, 18] [¶ 33] Rhines contends he was never told that, by agreeing to answer questions, he would be waiving the rights which had just been recited to him. Nor, he argues, was he specifically asked whether he was willing to waive these rights. He was simply asked, "Having these rights in mind, are you willing to answer questions?" Rhines contends this was an inadequate explanation of his option to waive *Miranda* rights and prevented him from giving a valid waiver. We disagree. An advisement need not specifically refer to a "waiver" of rights in order to be valid.

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

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

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

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

[23] [¶ 36] Rhines' conduct shows a valid waiver. When asked whether he understood his rights, Rhines responded that he did. He then answered affirmatively when asked if he was willing to answer questions. He was articulate and detailed in making his statements. There is no indication that Rhines was under the influence of drugs or alcohol or that he was otherwise impaired in his functioning. Nor is there any showing that law enforcement officers unlawfully induced or coerced Rhines to make a confession. Additionally, Rhines clearly understood the consequences of relinquishing his rights, including the fact that his statements could be used against him in court. Referring to his reasons for confessing to the murder, Rhines remarked, "This will come out in court again." At another point in the questioning, Rhines told Allender and Bahr, "If you guys bring some of this stuff into court, you're gonna look really foolish[.]" When Allender reminded Rhines that "this isn't court," Rhines replied, "No. But it will be." Rhines also boldly professed to have knowledge of the statutory and case law.

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

ISSUE 2.

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

[¶ 39] As part of the jury selection process, the defense and prosecution thoroughly questioned prospective jurors. When Diane

Staeffler was called for questioning, defense counsel explained the two-step process for determining guilt and setting a sentence in a capital case. After extensive questioning by the defense, the State, and the trial court regarding whether Staeffler could consider imposing the death penalty on a defendant, the trial court denied the State's challenge for cause. The court then permitted the State to resume questioning Staeffler regarding capital punishment, followed by additional inquiries on the subject by the defense and the court. After this additional questioning, the court excused Staeffler from jury duty for cause.

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

[24, 25] [¶ 41] Both the United States and South Dakota Constitutions guarantee trial by an impartial jury. *State v. Hansen*, 407 N.W.2d 217, 220 (S.D.1987) (citing U.S.Const. Amend. VI; S.D.Const. Art. VI, § 7; SDCL 23A–16–3); *Morgan v. Illinois*, 504 U.S. 719, 728, 112 S.Ct. 2222, 2229, 119 L.Ed.2d 492, 502 (1992) (holding the Sixth and Fourteenth Amendments to the United States Constitution require "the impartiality of any jury that will undertake capital sentencing"). Jury selection is an important means of ensuring this right. The voir dire process is designed to eliminate persons from the venire who demonstrate they cannot be fair to either side of the case. *Morgan*, 504 U.S. at 734 n. 7, 112 S.Ct. at 2232 n. 7, 119 L.Ed.2d at 506 n. 7 (citing *Smith v. Balkcom*, 660 F.2d 573, 578 (5th Cir.1981), *modified*, 671 F.2d 858 (5th Cir.1982), *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982)).

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

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

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

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

[¶ 44] The United States Supreme Court has since held that the improper exclusion of even one potential juror with general objections to capital punishment requires reversal of the death penalty. *Davis v. Georgia*, 429 U.S. 122, 123, 97 S.Ct. 399, 400, 50 L.Ed.2d 339, 341 (1976); *see also Gray v. Mississippi*, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) (plurality opinion). In determining whether a prospective juror may be excluded for cause, the Court applies the following

standard: Would the individual's views " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841, 851–52 (1985). With these principles in mind, we now consider Rhines' contentions.

[¶ 45] **1. Continued questioning of Staeffler.**

[26] [¶ 46] Rhines contends the trial court improperly permitted the State to resume questioning Staeffler after initially denying a challenge for cause. We disagree. The "latitude allowed to counsel in voir dire of prospective jurors rests largely in the trial court's discretion." *State v. Miller*, 429 N.W.2d 26, 38 (S.D.1988) (citing *State v. Muetze*, 368 N.W.2d 575, 584 (S.D.1985)). Before the court denied the challenge for cause, the State expressly reserved the opportunity to continue questioning Staeffler "depending on the Court's ruling." The court then proceeded to question Staeffler about her ability to decide the case. First, the court asked Staeffler if she could fulfill a juror's oath to be fair and impartial and to follow the law. Staeffler responded affirmatively. Second, the court asked if Staeffler could "consider all the law and options that the law allows." Staeffler agreed that she could. The court then denied the challenge. However, Staeffler's response to subsequent questions from the State demonstrates that she was confused by the court's questions and that additional clarification was necessary. Although Staeffler told the court she could follow its instructions, she immediately indicated to the State that she was not aware this would include consideration of the death penalty.

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

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

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

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

> Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. *Rosales–Lopez v. United States*, 451 U.S. 182, 188, 101 S.Ct. 1629, 1634, 68 L.Ed.2d 22 (1981) (White, J., plurality opinion). Hence, "[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness." *Aldridge v. United States*, 283 U.S. 308, 310, 51 S.Ct. 470, 471–72, 75 L.Ed. 1054 (1931).

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

[27] [¶ 49] Nor do we agree with Rhines' claim that the State's questions were misleading or argumentative. We can detect no material difference between the questioning by the State or by defense counsel. Both the State and the defense questioned Staeffler at length about her position on the death penalty. Both used leading questions during their examination. Indeed, Staeffler's uncertainty and vacillation necessitated lengthy, detailed inquiries and the use of leading questions.

Her apparent contradictions concerning her ability to follow the court's instructions had to be explored by counsel for both sides. The defense even seemed to acknowledge the usefulness of leading questions in ascertaining Staeffler's views. At one point, defense counsel said to Staeffler, "I know I probably have been putting words in your mouth or trying to, but I don't intend to, but I'm trying to get at where you are really at on this death penalty." Later, defense counsel stated to Staeffler, "[The State's counsel is] trying to lead you down a road and I'm trying to lead you down a road, but here's what we need, we need jurors who come into this case and even though you have very strong reservations about the death penalty, we need jurors like you as well[.]" Staeffler's answers during *voir dire* appear to genuinely reflect her personal objections to capital punishment and her unwillingness to participate in the process of imposing a penalty of death. In light of similar questioning by the State and the defense, we cannot conclude that Staeffler's responses were the product of intimidation or confusion caused by the State.

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

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

> [D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.... [T]his is why deference must be paid to the trial judge who sees and hears the juror.

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

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

[30–32] [¶ 53] To support his claim of error, Rhines notes Staeffler responded affirmatively when the court asked if she could follow the law. However, as noted above, Staeffler misunderstood the court's query and did not realize that following the law included consideration of the death penalty. Furthermore, the impartiality of a juror "must be based upon the whole voir dire examination and single isolated responses are not determinative." *First Bank of South Dakota v. Voneye*, 425 N.W.2d 630, 633 (S.D. 1988) (citing *Hansen*, 407 N.W.2d at 220; *Flack*, 77 S.D. at 181, 89 N.W.2d at 32). Although Staeffler said at various times during voir dire that she could consider a death sentence during penalty deliberations, she also stated that she could *not* consider capital punishment under any circumstances. She made still other statements indicating that, while she might be able to consider capital punishment, she could not be fair and impartial. Staeffler said she did not like the death penalty and "would rather not" sit on a jury in a capital case. She said she did not know if she could sleep at night if she voted to impose the death penalty. When asked if she could be part of a jury that sentenced a

defendant to death, Staeffler said, "Probably not" and "I don't think I could really do it." Even when defense counsel described murders that Staeffler described as "just awful," she responded, "I still don't want to make the [death penalty] decision." Upon additional questioning by the State, Staeffler said she thought capital punishment was appropriate at times but noted she was not the one making the penalty decision. Although she said that imposition of the death penalty would depend on the circumstances, she also stated that she could not imagine any circumstances where she could impose a death sentence. If selected for jury duty, she stated she would be leaning toward imposing a life sentence as opposed to the death penalty. When asked by the trial court if she would fairly consider both options, she stated, "No, I guess not." She later said, "I could consider [the death penalty], but I don't want to. I wouldn't want to make the decision for death." She then reiterated that she could not give fair consideration to both options of life imprisonment and the death penalty.

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

ISSUE 3.

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

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

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

[33–35] [¶ 58] By statute, the prosecution and the defense are each given an equal number of peremptory challenges. SDCL 23A–20–20. A peremptory challenge "is an objection to a juror for which no reason need be given." SDCL 23A–20–19. It can be exercised " 'without inquiry and without being subject to the court's control.' " *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, ——, 114 S.Ct. 1419, 1431, 128 L.Ed.2d 89, 108 (1994) (O'Connor, J., concurring) (quoting *Swain v. Alabama*, 380 U.S. 202, 220, 85 S.Ct. 824, 836, 13 L.Ed.2d 759, 772 (1965)). An exception is upon a prima facie showing that the prosecutor used peremptory challenges in a racially or sexually discriminatory manner. *Batson v. Kentucky*, 476 U.S. 79, 96–7, 106 S.Ct. 1712, 1723, 90 L.Ed.2d 69, 87–88 (1986); *J.E.B.*, 511 U.S. at ——, 114 S.Ct. at 1429, 128 L.Ed.2d at 106–07. The prosecutor then has the burden of establishing nondiscriminatory reasons for striking particular members of the venire. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88; *J.E.B.*, 511 U.S. at ——, 114 S.Ct. at 1429, 128 L.Ed.2d at 106–07. This restriction on the State's use of peremptory challenges is based on the principle that a person's race or gender is unrelated to his fitness as a juror. *See Batson*, 476 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81; *J.E.B.*, 511 U.S. at ——, 114 S.Ct. at 1426–27, 128 L.Ed.2d at 102–04. However, "[t]here is no basis for declaring

that a juror's attitudes towards the death penalty are similarly irrelevant to the outcome of a capital sentencing proceeding." *Brown v. North Carolina*, 479 U.S. 940, 941, 107 S.Ct. 423, 424, 93 L.Ed.2d 373, 374 (1986) (O'Connor, J., concurring). In fact, "a juror's views on capital punishment, unlike his or her race, are directly related to potential performance on a capital jury." *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518, 525 (1988), *vacated on other grounds*, 494 U.S. 1022, 110 S.Ct. 1464, 108 L.Ed.2d 602 (1990). Ignoring these attitudes would severely inhibit the State's prosecution of capital crimes and defense counsel's zealous representation of their clients.

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

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

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

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

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

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

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

of a qualified and unbiased jury.") (quoting *Holland v. Illinois*, 493 U.S. 474, 484, 110 S.Ct. 803, 809, 107 L.Ed.2d 905 (1990)).

[39] [¶ 62] Importantly, Rhines does not identify any jurors who were biased in favor of the State or otherwise incapable of fairly weighing the facts and applying the law. He simply objects to the elimination of jurors who may have been less inclined to impose a death sentence. "[A]n impartial jury consists of nothing more than 'jurors who will conscientiously apply the law and find the facts.'" *Lockhart v. McCree*, 476 U.S. 162, 178, 106 S.Ct. 1758, 1767, 90 L.Ed.2d 137, 151 (1986) (quoting *Wainwright*, 469 U.S. at 423, 105 S.Ct. at 852, 83 L.Ed.2d at 841) (emphasis deleted). "[W]e do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor." *Wainwright*, 469 U.S. at 423, 105 S.Ct. at 852, 83 L.Ed.2d at 851. Furthermore, the law does not demand a balanced sampling of opinions in the jury box.

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

Lockhart, 476 U.S. at 183–84, 106 S.Ct. at 1770, 90 L.Ed.2d at 154–55.

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

ISSUE 4.

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

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

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

[42, 43] [¶ 67] To satisfy constitutional requirements, a capital sentencing scheme "must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235, 249–50 (1983). Under South Dakota law, both felony murder and premeditated murder are punishable by death or by life imprisonment. SDCL 22–16–4; 22–16–12; 22–6–1.

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

tated design to effect the death of the person killed or of any other human being." *Id.*

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

(1) The offense was committed by a person with a prior record of conviction for a Class A or Class B felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions;

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

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

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

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

(6) The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(7) The offense was committed against a law enforcement officer, employee of a corrections institution, or fireman while engaged in the performance of his official duties;

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

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

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

1989 S.D. Sess.L. ch. 206.

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

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

[48] [¶ 72] Third, in claiming that felony murder is less deserving of capital punishment, Rhines ignores the long list of statutory aggravating circumstances that further

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[¶ 83] **4. The jury as sentencer.**

[¶ 84] SDCL 23A–27A–4 states that upon receipt of a jury recommendation of death, the trial judge "*shall* sentence the defendant to death." (Emphasis supplied.) Rhines contends this mandatory provision prevents the trial judge from ruling on the appropriateness of the jury's verdict, as he may in other cases, and therefore violates equal protection guarantees. He asserts the trial court cannot consider whether the sentence was imposed arbitrarily, whether the evidence supported the jury's finding of an aggravating circumstance, and whether the sentence was excessive or disproportionate to the penalty imposed in similar cases. He further argues the mandatory nature of the jury's verdict denies the capital defendant the opportunity to request a judgment of acquittal or file a motion for a new trial.

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

ble." 468 U.S. at 462, 104 S.Ct. at 3163, 82 L.Ed.2d at 354 (emphasis added). The Court further wrote:

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

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

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

(1) Whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

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

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

SDCL 23A–27A–12.

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

ISSUE 5.

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

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

> Allender: You don't really buy into our justice system do you? I mean you don't really believe in it?
>
> Rhines: Justice?
>
> Allender: Yeah.
>
> Rhines: For who? If I had $100,000 for a fancy attorney I'd walk. Free, on an acquittal.
>
> Bahr: Do you think that's right, that, that?
>
> Rhines: Do you?
>
> Bahr: No, not if you took a life.
>
> Rhines: You know it's true.
>
> Bahr: Do you . . .
>
> Rhines: If I had $100,000 to drop into the best attorney in the country or in the midwest region.
>
> Bahr: But see anything's possible, Charles. But if somebody takes a life.
>
> Rhines: I've seen guilty and then walk. Knowing they were guilty.
>
> Bahr: Would you want to get off?
>
> Rhines: Would you?
>
> Bahr: I'm not in that predicament.
>
> Rhines: Me neither.
>
> Bahr: You've been completely honest with us, Charles?
>
> Rhines: I'm not, I'm not in a predicament of wanting to get off and having the wherewithal to do so. I'm in the predicament of wanting to get off and not having the wherewithal to do so.
>
> Bahr: Have you been truthful with us?
>
> Rhines: As much as I can emotionally.
>
> Bahr: These sequences as best your, that you can remember? I don't have anything further.
>
> Allender: Either do I.
>
> Rhines: Do you suppose uh try for a last Camel before the night?
>
> Allender: Yeah.
>
> Rhines: It's gonna be kind of rough (inaudible—talking over)

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

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

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

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

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

[57] [¶ 94] "Evidence which is not relevant is not admissible." SDCL 19–12–2. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." SDCL 19–12–1. However, the trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" SDCL 19–12–3. This delicate balancing process is within the trial court's sound discretion and the court's ruling will not be disturbed absent abuse. *State v. Cross*, 390 N.W.2d 564, 566 (S.D.1986); *State v. Thomas*, 381 N.W.2d 232, 235 (S.D.1986).

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

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

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

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

of Rhines' confession, rather than as evidence of bad character.

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

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

[¶ 100] In all capital cases where the jury has rendered a guilty verdict, state law requires a hearing prior to sentencing. SDCL 23A–27A–2. "Such hearing shall be conducted to hear additional evidence in mitigation and aggravation of punishment." *Id.* In this case, the trial court granted a defense motion prohibiting the State from offering any evidence on non-statutory aggravating factors. The State was therefore restricted to offering evidence that related to the aggravating circumstances set forth in SDCL 23A–27A–1.

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

ISSUE 6.

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

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

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

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

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

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

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

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

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

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

Other questions posed by the jury involved whether Rhines would be given work release, placed in a minimum security prison, allowed to create a group of followers or admirers, permitted to attend college, or allowed to "have or attain any of the common joys of life (ex TV, Radio, Music, Telephone or hobbies and other activities allowing him distraction from his punishment)." The jury also asked what the daily routine would be in prison. The jury closed with these remarks:

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

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

ISSUE 7.

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

[¶ 110] The trial court refused Rhines' proposed jury instructions Nos. 8, 9 and 11.

Rhines claims the trial court's failure to give these instructions violated the due process and cruel punishment clauses of the United States and South Dakota Constitutions.

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

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

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

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

> South Dakota law allows the imposition of the death penalty only if the prosecution, in addition to proving that the defendant is guilty of murder in the first degree, also proves each of the following beyond a reasonable doubt:
>
> (1) That one or more of the alleged aggravating circumstances exist; and
>
> (2) That the aggravating circumstance or circumstances, considered in connection with any mitigating circumstances, are sufficiently substantial to require the death penalty in this case, and that death is the only appropriate punishment for the crime committed, and for the defendant.

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

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

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

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

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

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

> In this case the law raises no presumption against the Defendant, but every presumption of the law is in favor of his innocence

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

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

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

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

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

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

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

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

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

ISSUE 8.

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

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

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

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

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

> Donnivan was our youngest son. He was a happy, considerate and helpful young man. His dreams were to finish school, live on his own, and get married. He attended Vo–Tech and had a job waiting for him when he graduated. His plan was to marry Sheila Pond in May, 1993. Our dreams were becoming his dreams and those dreams are never to be a reality. Not having Donnivan with us has left us with heartache and sadness that at times seem unbearable. Now, at the end of the hall in our home is a bedroom filled with memories and we can only dream of the future Donnivan may have had.

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

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

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

> [T]he assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in deter-

mining the elements of the offense and in determining the appropriate punishment.

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

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

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

[73, 74] [¶ 132] *Payne* was decided in June, 1991, months before Rhines' murder of Schaeffer in March, 1992. Therefore, the rule in *Payne* does not implicate *ex post facto* analysis. However, Rhines contends that *Payne* requires a specific state statute authorizing the admission of victim impact evidence. We can discern no such requirement in the Court's opinion. In fact, the Court seems to regard victim impact testimony as no different than other evidence for purposes of determining admissibility. The *Payne* Court wrote: "There is no reason to treat such evidence differently than other relevant evidence is treated." 501 U.S. at 827, 111 S.Ct. at 2609, 115 L.Ed.2d at 736.

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

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

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

[80] [¶ 136] Furthermore, the probative value of the victim impact statement was not substantially outweighed by the danger of unfair prejudice. *See* SDCL 19–12–3. The brief testimony by Schaeffer's mother came after Rhines' sisters testified about his upbringing and good qualities, their love for him, and the negative effect his death would

have on their family. To paraphrase *Payne*, the victim impact statement "illustrated quite poignantly some of the harm that [Rhines'] killing had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant." 501 U.S. at 826, 111 S.Ct. at 2609, 115 L.Ed.2d at 736. We therefore hold that the trial court did not abuse its discretion in admitting the statement read by Schaeffer's mother.

ISSUE 9.

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

[81] [¶ 138] The Eighth and Fourteenth Amendments to the United States Constitution prohibit state sentencing systems that cause the death penalty to be wantonly and freakishly imposed. *Lewis v. Jeffers*, 497 U.S. 764, 774, 110 S.Ct. 3092, 3099, 111 L.Ed.2d 606, 618 (1990).

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

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

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

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

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

SDCL 23A–27A–1(6).[5]

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

> Depravity of mind is a reflection of an utterly corrupt, perverted, or immoral state of mind *at the time of the murder.* In determining whether the offense of First Degree Murder in this case involved depravity of mind on the part of the Defendant, you may consider the age and physical characteristics of the victim and you may consider the actions of the defendant prior to, *during* and after the commission

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

of the murder. In order to find that the offense of First Degree Murder involved depravity of mind, you must find that the Defendant, as a result of utter corruption, perversion, or immorality, committed torture upon the living victim; or subjected the body of the deceased victim to mutilation or serious disfigurement; *or relished the murder; or inflicted gratuitous violence upon the victim; or the senselessness of the crime; or the helplessness of the victim. If acts occurring after the death of the victim are relied upon by the state to show depravity of mind of the Defendant, such acts must be shown to have occurred so close to the time of the victim's death, and must have been of such a nature, that the inference can be drawn beyond a reasonable doubt that the depraved state of mind of the murderer existed at the time the fatal blows were inflicted upon the victim.* (Emphasis added.)

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

[¶ 143] Rhines correctly notes there are essentially six separate definitions of depravity of mind in the trial court's instructions. They are that: (1) the defendant committed torture upon the living victim; (2) the defendant subjected the body of the deceased victim to mutilation or serious disfigurement; (3) the defendant relished the murder; (4) the defendant inflicted gratuitous violence upon the victim; (5) the senselessness of the crime; or (6) the helplessness of the victim. He specifically objects to the inclusion of the last two phrases, which ask the jury to consider the "senselessness of the crime" or the "helplessness of the victim" as distinct definitions of depravity of mind. Rhines argues virtually every murder satisfies these definitions. He reasons the jury's finding of depravity of mind was likely based on these vague and overbroad phrases, since the other factors listed in the instruction did not apply. Rhines urges reversal of the death sentence for this reason.

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

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

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

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

Id.

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

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

Id. at 1231–32.

[85] [¶ 148] Arizona courts have similarly disapproved "senselessness of the crime" or "helplessness of the victim" as an independent measure of depraved conduct. *State v. Johnson*, 147 Ariz. 395, 710 P.2d 1050, 1056 (1985) (holding the senselessness of the killing in itself is not enough to satisfy the "especially heinous, or depraved" aggravating circumstance). *State v. Smith*, 146 Ariz. 491, 707 P.2d 289, 301 (1985) (ruling that absent additional aggravation, neither the senselessness of the crime nor the helplessness of the victim can alone make the offense especially heinous or depraved). *See also State v. White*, 395 A.2d 1082, 1090 (Del.1978) (holding the defenselessness of the victim is an unconstitutionally vague aggravating circumstance). We therefore hold that the depravity of mind circumstance, as limited by the trial court's instruction, did not adequately channel the sentencer's discretion as required by the state and federal constitutions. The effect of our holding is considered later in this opinion.

ISSUE 10.

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

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

> Before you may find that this aggravating circumstance exists in this case, you must find, beyond a reasonable doubt, that each of the following elements of this aggravating circumstance are proven by the evidence:

1. That the Defendant committed the murder for himself; and

2. That he committed the murder for the purpose of receiving money.

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

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

The trial court refused this proposed instruction.

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

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

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

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

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

ISSUE 11.

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

[¶ 156] The jury found that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved the torture of

Schaeffer. Rhines disputes this finding, arguing the evidence presented at trial was insufficient to show beyond a reasonable doubt that he tortured his victim. He notes the fact Schaeffer suffered pain or anticipated the prospect of death is not sufficient, because torture requires the intentional infliction of pain beyond that necessary to cause death. He claims the wounds inflicted on Schaeffer were designed to cause death, not unnecessary pain, and any suffering experienced by Schaeffer was incident to death.

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

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

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

[¶ 160] Under the South Dakota capital sentencing statutes, the jury may not recommend a sentence of death unless it finds at least one aggravating circumstance beyond a reasonable doubt. One aggravating circumstance alleged by the State was that "the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture." SDCL 23A–27A–1(6). In its instructions to the jury, the trial court defined torture as follows:

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

ture. In order to find that the offense of First Degree Murder involved torture, you must find that the Defendant intentionally, unnecessarily, and wantonly inflicted severe physical or mental pain, agony or anguish upon a living victim.

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

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

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

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

ISSUE 12.

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

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

[¶ 167] Rhines claims the invalidity of one of the aggravating circumstances found by

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

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

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

ISSUE 13.

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

[¶ 171] Rhines contends the jury considered irrelevant or unfairly prejudicial matters when imposing the death penalty. He

claims the jury's note to the judge about life imprisonment demonstrates this bias. He specifically focuses on questions about whether prison conditions might allow "distraction from his punishment" and whether he might qualify for work release from prison.[6]

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

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

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

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

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

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

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

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

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

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

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

ISSUE 14.

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

[¶ 180] In every case where the death penalty is imposed, this Court is required to conduct an independent review of the sen-

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

tence. SDCL 23A–27A–12. We must determine:

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

SDCL 23A–27A–12.

[98] [¶ 181] We begin our review by determining whether the evidence supports any of the aggravating circumstances found by the jury. Rhines does not dispute that he committed the murder to avoid being arrested, thereby satisfying aggravating circumstance SDCL 23A–27A–1(9); there is substantial evidence in the record to support this finding. When describing the murder to Detective Allender and Deputy Sheriff Bahr, Rhines remarked, "leave no witnesses." He also referred to being "caught in the act." When discussing his decision to tie Schaeffer's hands, Rhines remarked, "I just don't want somebody to stand up in the middle of—or call anybody and go dial 911." Furthermore, we have previously concluded the offense was committed for the purpose of receiving money under SDCL 23A–27A–1(3) and the offense involved torture which was wantonly vile, horrible, or inhuman under SDCL 23A–27A–1(6). Clearly, Rhines was eligible for the death penalty.

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

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

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

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

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

[101] [¶ 185] We conclude that similar cases for purposes of SDCL 23A–27A–12(3) are those cases in which a capital sentencing proceeding was actually conducted, whether the sentence imposed was life or death. "[B]ecause the aim of proportionality review is to ascertain what other capital sentencing authorities have done with similar capital murder offenses, the only cases that could be deemed similar ... are those in which imposition of the death penalty was properly be-

fore the sentencing authority for determination." *Tichnell v. State*, 297 Md. 432, 468 A.2d 1, 15–16 (1983), *cert. denied*, 466 U.S. 993, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984). *Accord, Flamer v. State*, 490 A.2d 104, 139 (Del.1983), *cert. denied*, 474 U.S. 865, 106 S.Ct. 185, 88 L.Ed.2d 154 (1985).

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

[¶ 187] ***State v. Adams***

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

[¶ 189] ***State v. Bittner***

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

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

[¶ 192] ***State v. Helmer***

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

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

[¶ 195] ***State v. Moeller***

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

[¶ 197] ***State v. Smith***

[¶ 198] During the course of a bank robbery, James Elmer Smith shot a woman who failed to follow his order to lie down on the floor. The woman died within a few minutes of receiving the gunshot wound. The State sought the death penalty, alleging three ag-

gravating circumstances: (1) the defendant knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person; (2) the offense was committed for the purpose of receiving money or any other type of monetary value; and (3) the offense was committed by a person in, or who has escaped from, the lawful custody of a law enforcement officer or place of lawful confinement. The jury convicted Smith of first-degree murder and returned a verdict of life imprisonment.

[¶ 199] ***State v. Swallow***

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

[¶ 201] The State sought the death penalty against Swallow, alleging the murder of Wilson's daughter was committed by a person who had a substantial history of serious assaultive criminal convictions and was committed for the purpose of receiving money or any other thing of monetary value. Mitigating evidence showed Swallow was twenty-two years old, had a history of drug abuse, and that a co-perpetrator had received a sentence of sixty-five years. There was also testimony indicating Wilson initiated the shootout by firing at Swallow's companions.

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

[¶ 203] ***State v. Waff***

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

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

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

cert. denied, — U.S. —, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993).

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

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

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

[¶ 210] Affirmed.

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

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

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

SABERS, Justice (dissenting).

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

[¶ 215] For the reasons stated herein, the sentence of death is excessive and dispropor-

tionate to the penalty imposed in similar cases, considering both the crime and the defendant. SDCL 23A–27A–12(3).

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

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

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

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

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

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

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

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

methods should not be *automatically* omitted.[7] At any rate, to limit the pool of "similar cases" to the seven as the majority does is, in itself, arbitrary and unreasonable.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Several years ago, a young man brutally raped and murdered a nine-year-old Sioux Falls Argus Leader paper girl and received a life sentence.

Under the majority's view, these cases would *never* be considered in its pool of similar cases.

she and others smothered him with a pillow in Lemmon.

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

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

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

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

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

[¶ 226] Accordingly, it is pure fiction to say that Rhines' death sentence is neither excessive nor disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. Therefore, we have no choice but to reverse and remand because, in these circumstances, the law requires that "the court shall sentence such person to life imprisonment." SDCL 23A–27A–14.

AMUNDSON, Justice (dissenting).

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

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

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

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

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

> By "similar cases" is meant similar capital murders, not limited only to those where both death and life imprisonment were submitted to the jury and then affirmed on appeal, whichever way the case went on punishment. The evil deed is the

murder and what accompanied it and that, as well as the defendant, is what must be looked at in comparing what one defendant received in punishment under a capital murder charge with what another received. The fact that a capital murder defendant does not get the death penalty or gets a new trial or that the state waived the death penalty in his case or that his case is still pending before us does not mean that we can ignore his case in making our comparison. Once we accept the idea, as we must, that the death penalty cannot be inflicted at random, or arbitrarily or inconsistently, then necessarily we must take into consideration all capital murders we know about.

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

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

[¶ 231] SDCL 23A–27A–12(3) states that we are to consider both the crime and the defendant when conducting our comparative review, not just that a capital proceeding took place. In South Dakota, only two people since 1979 have been sentenced to death out of at least fifty-two eligible criminals. In conducting comparative proportionality review, if we required a case to be on all fours with the other cases in order for them to be similar, I submit that would be impossible. By using the pool already assembled by this court, it gives notice to the parties involved in the litigation as to what cases will be considered. Then, the litigants can make their argument on this issue based on that pool. Otherwise, a defendant does not find out what are similar cases until the decision is handed down. There is no statute in South Dakota that defines "similar case" nor does any statute provide us with a standard for performing the mandated review. On the other hand, all of the cases which I recommend be included in the pool have one similarity, namely, a wrongful taking of another person's life. By employing such a pool, this court would be proceeding with appropriate care and caution when making a decision involving life or death of a human being.

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

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

COURT'S EXHIBIT #5

about 10:45 A.M 1/26/93

Judge Konnekamp,

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

The questions We have are as follows:

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

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

⑤ Will Mr Rhines be allowed to Marry or have conjigal visits.

⑥ will he be allowed to attend college

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

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

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

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

Bobby Walton
Foreperson

Bear Brown
Matthew L. Anderson
Robert W Corrin - Harry Keeney
Mark Olsen
Fran Cersosimo
D gl Anderson
Burnett Black
Judy Shafer
Delight McGuff
Wilma Woodson

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

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

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

Harry Keeney

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

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

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

Frances Cersosimo 12-11-16

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

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

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

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

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

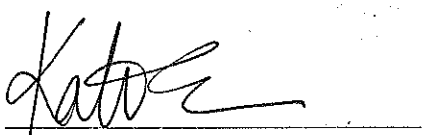
4. He stated that the jury had deliberated, and when asked to speak more about the deliberations, he immediately said, "There was lots of discussion of homosexuality. There was a lot of disgust. This is a farming community."

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

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

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

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



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

Date: December 12, 2016

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 18268

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STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CHARLES RUSSELL RHINES,

Defendant and Appellant.

MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO SDCL 15-6-60(b)

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ATTORNEYS FOR CHARLES RUSSELL RHINES

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MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO SDCL 15-6-60(b)

Charles Rhines is a death-sentenced prisoner whose direct appeal came before this Court in 1996. As part of his direct appeal, this Court conducted its initial mandatory review, pursuant to SDCL 23A-27A-12(1), and determined Mr. Rhines's sentence was not "imposed under the influence of passion, prejudice, or any other arbitrary factor." In reaching the decision, this Court reviewed the record and relied upon juror assertions of neutrality toward Mr. Rhines's homosexuality. Affidavits signed under the penalty of perjury by jurors in Rhines's case demonstrate the assertions relied upon by this Court were false. Until the United States Supreme Court's decision in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017), these statements would have been inadmissible due to South Dakota's "no impeachment" rule. SDCL 19-19-606. But *Pena-Rodriguez* establishes that the state law must yield to the demands of the Sixth and Fourteenth Amendments. These changed conditions make continued enforcement of South Dakota's no-impeachment rule inequitable. Accordingly, Rhines brings this Motion pursuant to SDCL 15-6-60(b)(6) for relief from a final judgment based on the changed conditions. *See* SDCL 15-24-1 (circuit court procedure applicable to Supreme Court unless otherwise provided); *see also* SDCL 23A-32-14 (provisions of civil appeals apply to criminal appeals unless otherwise provided).

Under these extraordinary circumstances, this Court should grant Mr. Rhines Rule 60(b) relief from his death sentence, remand to the Circuit Court for evidentiary development, and allow further briefing to determine whether the sentence was imposed under the influence of passion, prejudice, and arbitrary factors. The Court should not tolerate even a possibility of the intolerable: a death sentence imposed on Mr.

Rhines because he is a gay man. A brief in support of this Motion has been contemporaneously filed and is incorporated by reference.

NEIL FULTON, Federal Public Defender

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of November 2017, a true and correct copy of the foregoing Defendant's Motion for Relief from Judgment Pursuant to SDCL 15-6-60(b) in the above-entitled matter, was served via electronic mail, to the following named persons:

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/s/ Jason J. Tupman
Jason J. Tupman

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 18268

_____

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CHARLES RUSSELL RHINES,

Defendant and Appellant.

_____

BRIEF IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO SDCL 15-6-60(b)

_____

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

U.S. District Court Cases

South Dakota Codified Law

JURISDICTIONAL STATEMENT

Charles Rhines is a death-sentenced prisoner whose direct appeal came before this Court in 1996. As part of his direct appeal, this Court conducted its initial mandatory review, pursuant to SDCL 23A-27A-12(1), and determined Mr. Rhines's sentence was not "imposed under the influence of passion, prejudice, or any other arbitrary factor." In reaching the decision, this Court reviewed the record and relied upon juror assertions of neutrality toward Mr. Rhines's sexual orientation. Affidavits signed under the penalty of perjury by jurors in Rhines's case demonstrate the assertions relied upon by this Court were false. Until the United States Supreme Court's decision in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017), these statements would have been inadmissible due to South Dakota's "no impeachment" rule. SDCL 19-19-606. But *Pena-Rodriguez* establishes that the state law must yield to the demands of the Sixth and Fourteenth Amendments. These changed conditions make continued enforcement of South Dakota's no-impeachment rule inequitable. Accordingly, Rhines brings this Motion pursuant to SDCL 15-6-60(b)(6) for relief from a final judgment based on the changed conditions. *See* SDCL 15-24-1 (circuit court procedure applicable to Supreme Court unless otherwise provided); *see also* SDCL 23A-32-14 (provisions of civil appeals apply to criminal appeals unless otherwise provided).

STATEMENT OF THE ISSUE

WHETHER THE JURORS' ANTI-GAY BIAS DEPRIVED MR. RHINES OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO AN IMPARTIAL JURY AND HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS

Circuit Court Treatment of the Issue: Mr. Rhines challenges a decision made by this Court and this Court alone, therefore there is no decision by the Circuit Court on this issue.

***State v. Rhines*, 1996 SD 55, 548 N.W.2d 415**
***Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017)**
SDCL 15-6-60(b)
SDCL 23A-27A-12

SUMMARY OF THE ARGUMENT

South Dakota law imposes on this Court a unique duty, pursuant to SDCL 23A-27A-12(1) to review every death sentence for the influence of passion, prejudice, or any other arbitrary factor. Charles Rhines is a death-sentenced prisoner whose direct appeal came before this Court in 1996. In its mandatory "passion-prejudice" review of Mr. Rhines's sentence, the Court rejected his claim that a note from his deliberating penalty-phase jury demonstrated an anti-gay bias that had actuated their sentencing decision. *See* Appx. 1-3 (jury note). The Court relied on its own review of the *voir dire*, which showed:

> [A]n impartial jury was impaneled. Defense counsel questioned eleven of the twelve jurors regarding their feelings about homosexuality. Ten of the jurors expressed neutral feelings about homosexuality, indicating it would have no impact on their decision making. The eleventh juror stated that she regards homosexuality as sinful. However, she also stated Rhines' sexual orientation would not affect how she decided the case.

State v. Rhines, 1996 SD 55, ¶ 104, 548 N.W.2d 415, 441; *see id.* at ¶ 171 n.6 (relying on this discussion in rejecting passion-prejudice claim pursuant to SDCL 23A-27A-12(1)).

These assurances of neutrality, on which this Court relied, were false. Two jurors have now stated under penalty of perjury that they were *not* neutral, and that a desire to prevent Mr. Rhines from serving a life sentence "around other men" or enjoying "conjugal visits" played a strong role in their decision. A third has recalled discussions among all the jurors reflecting their repugnance and reluctance to impose a life sentence because Mr. Rhines is a gay man. *See* Appx. 4 (Declaration of Frances Cersosimo); Appx. 5 (Declaration of Harry Keeney); Appx. 6 (Declaration of Katherine Ensler).

Until earlier this year, the statements of Mr. Rhines's jurors would have been inadmissible to attack their verdict under South Dakota's "no impeachment" rule. *See* SDCL 19-19-606. The United States Supreme Court, however, held in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017), that the Sixth Amendment requires the states to receive evidence showing that jurors acted with racial animus, even in the face of identical state rules of evidence. Because there is no principled distinction between the racial bias displayed in *Pena-Rodriguez* and the anti-gay bias that motivated Mr. Rhines's sentencing jury, the jurors' statements would now be admissible to establish that they sentenced him to death under the influence of "passion, prejudice, or any other arbitrary factor." SCDL 23A-27A-12(1).

The Legislature imposed on this Court the obligation to protect defendants facing the ultimate punishment from the influence of "passion, prejudice, or any other arbitrary factor." SDCL 23A-27A-12(1). The jurors' declarations undermine the basis for this Court's decision pursuant to that mandate, and *Pena-Rodriguez* establishes that the state law making them inadmissible must yield to the demands of the Sixth and Fourteenth Amendments. These changed conditions "makes continued enforcement [of South

Dakota's no-impeachment rule] inequitable.'" *Rabo Agrifinance, Inc. v. Rock Creek Farms*, 2013 SD 64, ¶ 14, 836 N.W.2d 631, 637 (S.D. 2013). For the reasons below, the Court must grant Rule 60(b) relief from the judgment affirming Mr. Rhines's sentence, and order evidentiary development and briefing of his passion-prejudice claim in the Circuit Court.

STATEMENT OF THE CASE AND FACTS

In January 1993, Mr. Rhines stood trial in the Circuit Court of Pennington County, Seventh Judicial Circuit Court for the 1992 murder of Donnivan Schaeffer. The Honorable John K. Konenkamp presided over the trial. Mr. Rhines was convicted and sentenced to death.

From before the beginning of the trial, prospective jurors were informed that he was gay. Mr. Rhines's own lawyers asked venirepersons if they harbored anti-gay bias. *See, e.g.*, Trial Tr. at 99 (1/5/1993) ("You are going to hear evidence that Mr. Rhines is gay, he's a homosexual, and you are going to hear that at least a couple of the people testifying in this case also are gay. Does that change your feelings about this case or sitting on this case in any way?").

During the trial, the jury also heard evidence regarding Mr. Rhines's homosexuality. For example, witness Heather Harter testified that she walked in on Mr. Rhines "cuddling" with her husband, Sam Harter, when she and Mr. Harter visited Mr. Rhines in Seattle. Trial Tr. at 2362 (1/19/1993); Appx. 105 (Testimony of Heather Harter). Ms. Harter further testified that Mr. Rhines told her that he hated her because Mr. Harter loved her instead of him. Trial Tr. at 2364 (1/19/1993); Appx. 107 (Testimony of Heather Harter). Mr. Rhines's ex-boyfriend Arnold Hernandez also

testified that he had a "sexual" relationship with Mr. Rhines before Mr. Rhines lived with Mr. Harter. Trial Tr. at 2292 (1/19/1993); Appx. 129 (Testimony of Arnold Hernandez).

Some of the jurors appeared to be incapable of separating out their knowledge of Mr. Rhines's sexual orientation from their duty to serve impartially. During penalty-phase deliberations, the jury debated the merits of a death sentence versus a sentence of life without parole ("LWOP"). On the second day of penalty deliberations, the jurors sent the trial judge a note that read as follows:

> Judge Kon[en]kamp,
>
> In order to award the proper punishment we need a clear p[er]spective on what "Life In Prison Without Parole" really means. We know what the Death Penalty means, but we have no clue as to the reality of Life Without Parole.
>
> The questions we have are as follows:
>
> 1. Will Mr. Rhines <u>ever</u> be placed in a minimum security prison or be given work release.
> 2. Will Mr. Rhines be allowed to mix with the general inmate population.
> 3. [A]llowed to create a group of followers or admirers.
> 4. Will Mr. Rhines be allowed to discuss, describe or brag about his crime to other inmates, especially new and/or young men jailed for lesser crimes (ex: Drugs, DWI, assault, etc.)
> 5. Will Mr. Rhines be allowed to marry or have conjugal visits.
> 6. Will he be allowed to attend college.
> 7. Will Mr. Rhines be allowed to have or attain any of the common joys of life (ex[:] TV, Radio, Music, Telephone or hobbies and other activities allowing him distraction from his punishment).
> 8. Will Mr. Rhines be jailed alone or will he have a cellmate.
> 9. What sort of free time will Mr. Rhines have (what would his daily routine be).
>
> We are sorry, Your Honor, if any of these questions are inappropriate but there seems to be a huge gulf between our two alternatives. On one hand there is Death, and on the other hand what is life in prison w/out parole.

Appx. 1-3 (Jury Note).

The jury note suggested that anti-gay bias played a role in the jury's decision-making process. The jurors' concerns mirrored themes elicited in the testimony of Heather Harter and Arnold Hernandez and reflected commonly held stereotypes of gay men: the jurors were worried that he might taint other inmates by "mingling" with general population, that he might develop "followers" or "admirers," and that he might "brag" to young inmates or have "conjugal visits."

The jury returned a death sentence on January 26, 1993. This Court affirmed the conviction and sentence on May 15, 1996. State and federal habeas relief were also denied, following litigation that included review by the United States Supreme Court. *Rhines v. Weber*, 544 U.S. 269 (2005); *Rhines v. Weber*, 2000 SD 19, 608 N.W.2d 303; *see Rhines v. Young*, No. 5:00-CV-05020-KES, 2016 WL 615421 (D.S.D. Feb. 16, 2016). In 2016, Mr. Rhines appealed the denial of his petition for a writ of habeas corpus by the United States District Court. The appeal is pending in the Court of Appeals for the Eighth Circuit. *See Rhines v. Young*, Case No. 16-3360 (8th Cir.).

Mr. Rhines brings this motion because of newly discovered information that Mr. Rhines's homosexuality was definitely a focal point of the deliberations.

Juror Frances Cersosimo recalled hearing an unidentified juror comment of Mr. Rhines "that if he's gay we'd be sending him where he wants to go if we voted for LWOP." Ex. B, Decl. of Frances Cersosimo. Juror Harry Keeney stated that the jury "knew that [Mr. Rhines] was a homosexual and thought he shouldn't be able to spend his life with men in prison." Appx. 5 (Decl. of Harry Keeney). Juror Bennett Blake confirmed that "[t]here was lots of discussion of homosexuality. There was a lot of

disgust. This is a farming community. . . . There were lots of folks who were like, 'Ew, I can't believe that.'" Appx. 6 (Decl. of Katherine Ensler).

All of the jurors who were asked,[1] including Mr. Keeney and Mr. Blake, had told the Court in *voir dire* that they did not harbor anti-gay bias that would affect their verdict. *See, e.g.*, Trial Tr. at 327-28 (1/5/1993) (Keeney), Appx. 67-68; 932 (1/8/1993) (Blake), Appx. 144. The newly discovered information establishes that these assertions were false.

Because the new information destroys the foundation of this Court's earlier ruling that passion and prejudice played no role in the jurors' decision to sentence Mr. Rhines to death – its assumption that their voir dire assurances were true – the Court should grant him relief from judgment.

ARGUMENT

I. MR. RHINES IS ENTITLED TO RELIEF FROM JUDGMENT PURSUANT TO SDCL 15-6-60(B).

SDCL 15-6-60(b) provides that a court "may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . (6) Any other reason justifying relief from the operation of the judgment." *See* SDCL 15-24-1 (circuit court procedure applicable to Supreme Court unless otherwise provided); *see also* SDCL 23A-32-14 (provisions for civil appeals apply to criminal appeals unless otherwise provided). The statute requires the litigant to make the motion within a "reasonable time." *Id.*; *see Anderson v. Somers*, 455 N.W.2d 219, 221 (S.D. 1990)(citing *Rogers v. Rogers*, 351 N.W.2d 129 (S.D. 1984)).

[1] The one exception was juror Daryl Anderson, who was never asked how he felt about Mr. Rhines's sexual orientation. *See* Trial Tr. at 1326-50 (1/11/1993), Appx. 157-180.

A court's decision to grant or deny Rule 60(b) relief is governed by equitable principles, and requires a reviewing court to "maintain the difficult balance between finality and justice." *In re Ibanez*, 2013 SD 45, ¶ 20, 834 N.W.2d 306, 311-12. A litigant may obtain relief by showing "'some change in conditions that makes continued enforcement inequitable.'" *Rabo Agrifinance, Inc. v. Rock Creek Farms*, 2013 SD 64, ¶ 14, 836 N.W.2d 631, 637-39 (quoting *Lowe v. Schwartz*, 2006 S.D. 48, ¶ 10, 716 N.W.2d 777, 779). For example, this Court concluded in *Corcoran v. McCarthy*, 2010 SD 7, ¶¶ 13-33, 778 N.W.2d 141, 147-53, that a litigant's failure to produce records that would have been "probative on the issue of damages" required relief from judgment. *See also Miller v. Weber*, 1996 SD 47, ¶¶ 9-14, 546 N.W.2d 865, 868-69 (granting relief from default judgments entered without personal jurisdiction).

In Mr. Rhines's case, the Supreme Court's decision in *Pena-Rodriguez* dramatically altered the relevant circumstances. Before that decision, information "intrinsic" to the deliberations, including the "feelings and bias that every juror carries into the jury room" would have been inadmissible in a South Dakota court. *See Russo v. Takata Corp.*, 2009 SD 83, ¶ 29, 774 N.W.2d 441, 448-49; *see also* SDCL 19-19-606(b)(1) (during inquiry into validity of verdict, jurors may not testify about "any juror's mental processes concerning the verdict or indictment"). Indeed, in *State v. Motzko*, 2006 SD 13, ¶¶ 12-20, 710 N.W.2d 433, 439-40, this Court, citing Rule 606(b), rejected a new trial motion based on juror affidavits recounting jurors' "mistaken beliefs," although it recognized that a verdict may be set aside in "extreme cases where it is the result of passion or prejudice."

This is an extreme case in which a change in the law altered the premises of this Court's original decision that passion or prejudice played no role in the death verdict. As discussed in the claim for relief below, *Pena-Rodriguez* requires states to admit juror declarations recounting instances of racial bias that would otherwise constitute inadmissible descriptions of jurors' mental processes. There is no principled distinction between the racial bias manifested in that case and the anti-gay bias on display in this case. In combination with the jurors' note during deliberations, the newly admissible declarations establish that the jurors sentenced Mr. Rhines to death under the influence of passion and prejudice. For the reasons explained in the claim for relief below, equity requires this Court to relieve him from its direct appeal judgment and allow evidentiary development and briefing of his claim that his sentence was imposed under the influence of "passion, prejudice, or any other arbitrary factor." SDCL 23A-27A-12(1).

II. THE JURORS' ANTI-GAY BIAS DEPRIVED MR. RHINES OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO AN IMPARTIAL JURY AND HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

A. Mr. Rhines's Right to an Impartial Jury Was Violated.

The Sixth Amendment guarantees a defendant that each juror will be "indifferent as he stands unsworne." *Irvin v. Dowd,* 366 U.S. 717, 722 (1961) (citation omitted). When a juror gives material false information during *voir dire* regarding possible bias, the nondisclosure may deny the defendant his right to an impartial jury. *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 549 (1984). Under the *McDonough Power* standard, a defendant must be granted a new trial if (1) a juror provides false information during *voir dire* and (2) the truth, if known, would have provided the defense the basis for a successful cause challenge to that juror. *Id.* at 556.

Here, both Juror Keeney and Juror Blake satisfy the *McDonough Power* standard. First, they both provided false information during *voir dire*. Each testified that Mr. Rhines's sexual orientation would not affect his decision. *See* Trial Tr. at 328 (1/5/1993), Appx. 68 (Keeney) ("I guess a man or lady has to live their own lives the way they see fit. . . . I don't see where that would have any variance on this case as far as I'm concerned."); 932 (1/8/1993), Appx. 144 (Blake) ("Q: [T]here will be some evidence here that will show that Mr. Rhines is a homosexual, he's gay and one or two of the witnesses who might be called in this case are also gay and have had relationship[s] with Mr. Rhines. Knowing that, does that cause you to view Mr. Rhines differently at all? A: Not at all."). Based on their later statements regarding Mr. Rhines's homosexuality, each testified falsely.

Second, had each of the jurors answered the *voir dire* questions truthfully, Mr. Rhines and his attorneys would have known that each harbored anti-gay animus that he would not be able to put aside in judging Mr. Rhines's case. Thus, each could have been challenged for cause.

Separate from the *McDonough Power* standard, a defendant can show a violation of his Sixth Amendment rights where he can demonstrate actual bias on the part of a juror. *See Smith v. Phillips*, 455 U.S. 209, 215-16 (1982).

Here, Mr. Rhines can demonstrate actual bias against him on the part of Mr. Keeney, Mr. Blake, and the jury as a whole. The jurors not only discussed Mr. Rhines's homosexuality during deliberations, they held it against him. Eager to prevent him from receiving what they saw as the benefit of access to other men in prison, the jurors voted to impose a death sentence instead of life without parole.

Under *Smith*, the jurors who based their decision on anti-gay animus were biased against Mr. Rhines and thus deprived him of his right to fair trial under the Sixth and Fourteenth Amendments.

B. The "No-Impeachment Rule" Does Not Apply.

Like most jurisdictions, South Dakota employs a version of the "no-impeachment" rule. The rule, codified in South Dakota at SDCL 19-19-606, provides that a juror may not testify or offer an affidavit "about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment." The rule has several exceptions that are not relevant to this case.

However, under the Supreme Court's recent decision in *Pena-Rodriguez*, there are circumstances where the no-impeachment rule must give way to allow a court to consider evidence that purposeful discrimination has infected the deliberation process.

In *Pena-Rodriguez*, the defendant was charged with sexual assault. According to two jurors, a fellow juror commented during deliberations that he believed the defendant to be guilty of the sexual assault because "Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." 137 S. Ct. at 862. The Colorado courts ruled that they could not consider the evidence of racial bias because the no-impeachment rule barred the jurors from providing evidence regarding the internal process of deliberations. *Id.* at 862-63.

The Supreme Court reversed, holding that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order

to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." 137 S. Ct. at 869.

The Court acknowledged other instances in which it had declined to find exceptions to the no-impeachment rule, including cases where jurors harbored generalized bias in favor of one side or abused drugs and alcohol. *Id.* at 868. The Court stressed that the no-impeachment rule remained generally applicable to help the jury system avoid "unrelenting scrutiny." *Id.*

But the Court concluded that racial bias was different because "if left unaddressed, [it] would risk systemic injury to the administration of justice." *Id.* The Court's earlier decisions "demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns" and added: "An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy." *Id.*

The logic of *Pena-Rodriguez* applies in this case. Like racial discrimination, discrimination on the basis of sexual orientation risks systemic, rather than case-specific, injury to the administration of justice. Like racial discrimination, discrimination on the basis of sexual orientation implicates unique historical, constitutional, and institutional concerns that the Supreme Court has recognized in a series of cases, implicating the access of gay persons to a variety of fundamental rights and to the protection of the law itself.

In *Romer v. Evans*, 517 U.S. 620, 620 (1996), the Court considered an amendment to the Colorado Constitution that precluded all government action designed

to protect gay, lesbian, and bisexual persons from discrimination. Justice Kennedy, writing for the majority, found that the amendment violated equal protection because it imposed a "broad and undifferentiated disability on a single named group" and was so broad that it seemed "inexplicable by anything but animus toward the class it affects." It thus lacked a rational relationship to legitimate state interests. *Id*. at 632. He concluded:

> We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.

Id. at 635. A few years later, the Court struck down a law criminalizing sexual conduct between persons of the same sex in *Lawrence v. Texas*, 539 U.S. 558 (2003). The majority observed that the liberty protected by the Due Process clause guaranteed homosexual persons "respect for their private lives . . . 'there is a realm of personal liberty which the government may not enter.'"

More recently, the Court addressed the federal Defense of Marriage Act, which defined a marriage for federal purposes as excluding same-sex spouses who had been lawfully married in the states where they lived. *See United States v. Windsor*, 133 S.Ct. 2675 (2013). The Court held that the statute violated "basic due process and equal protection principles applicable to the federal government." *Id*. at 2693. As Justice Kennedy explained for the majority:

> By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition.

Id. at 2694.

Finally, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Court invalidated state statutes that defined marriage as a union between a man and a woman. Relying in part on *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down a prohibition on interracial marriage on both equal protection and due process grounds, Justice Kennedy wrote that the two protections are complementary. *Id.* at 2603. He recognized that historical practices are not dispositive.

> If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. *See Loving*, 388 U.S. at 12, 87 S.Ct. at 1817; *Lawrence*, 539 U.S. at 566-67, 123 S.Ct. at 2472.

Obergefell, 135 S. Ct. at 2602. The Court held that the right to marry is a "fundamental right" that may not be denied to same-sex couples. *Id*. at 2604-05.

Each of these cases recognizes the equal right of all citizens to the protection of the laws and participation in society's institutions, regardless of sexual orientation. Anti-gay bias in jury deliberations, just like racial bias, thus "implicates unique historical, constitutional, and institutional concerns" because it undermines gay persons' right to participate in a fundamental institution of our society: a trial by an impartial jury. *Pena-Rodriguez*, 137 S.Ct. at 868. An effort to rid the justice system of discrimination on the basis of sexual orientation is not an exercise in "perfecting the jury but rather an attempt to ensure that the legal system provides equal treatment under law." *Id.*

Furthermore, as with attitudes about race, opinions about sexual orientation are not necessarily easy to unmask. *See Pena-Rodriguez*, 137 S. Ct. at 869. That was the case here, where the jurors explicitly deliberated regarding Mr. Rhines's sexual

orientation despite having pledged during *voir dire* that it would have no impact on their decision.

There is no principled reason to relax the no-impeachment rule to root out racial discrimination but enforce it where sexual-orientation-based animus is alleged. The jurors have made "clear statement[s] that indicate[] [they] relied on [anti-gay] stereotypes or animus" to sentence Mr. Rhines to death. *Pena-Rodriguez*, 137 S. Ct. at 869. Therefore, the no-impeachment rule should not apply here.

C. The Court Should Order Evidentiary Development and Briefing of Mr. Rhines's "Passion-Prejudice" Claim.

The Legislature imposed on this Court the obligation to protect defendants facing the ultimate punishment from the influence of "passion, prejudice, or any other arbitrary factor." SDCL 23A-27A-12(1). It has exercised its independent judgment in fulfilling this obligation. For example, in *State v. Robert*, 2012 SD 60, ¶¶ 14-29, 820 N.W.2d 136, 142-45, the Court reviewed the death sentence of a defendant who had fought vigorously for his own execution. It found that

> Robert's persistent efforts to hasten his own death necessitate intense scrutiny to guarantee his desire to die was not a consideration in the sentencing determination.

Id. at ¶ 19. After carefully reviewing the circuit court's ruling, it concluded that the sentence was not the product of such an arbitrary factor. *Id*. at ¶ 21.

The Court has also taken steps to develop the record in aid of its passion-prejudice review and its related statutory obligation to determine if the death sentence was "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." SDCL 23A-27A-12(3). For example, in *State v. Page*, 2006 SD 2, 709 N.W.2d 739, the Court remanded the case to the Circuit Court for

proportionality review in light of the lower court's imposition of life without parole on a co-defendant. The Circuit Court made findings of fact and conclusions of law. *Id*. at ¶ 11. This Court then reviewed the amplified record on appeal and upheld the sentence against arguments that the sentence was both disproportionate and imposed under the influence of passion or prejudice. *Id*. at ¶ 18, ¶¶ 60-65.

In Mr. Rhines's case, this Court did not realize in 1996 that it could not rely on the voir dire assurances of jurors who denied any prejudice against Mr. Rhines because of his sexual orientation. As a result of the Supreme Court's decision in *Pena-Rodriguez*, however, evidence from the jurors, attesting that they voted for death because "we'd be sending him where he wants to go if we voted for LWOP," and because "he shouldn't be able to spend his life with men in prison," is now admissible.

Under these extraordinary circumstances, this Court should grant Mr. Rhines SDCL 15-6-60(b) relief from his death sentence, remand to the Circuit Court for evidentiary development, and allow further briefing to determine whether the sentence was imposed under the influence of passion, prejudice, and arbitrary factors. The Court should not tolerate even a possibility of the intolerable: a death sentence imposed on Mr. Rhines because he is a gay man.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Rhines Rule 60(b) relief from its 1996 judgment affirming his death sentence, remand to the Circuit Court for evidentiary development, and allow further briefing pursuant to SDCL 23A-27A-12(1) on the question whether the sentence was imposed under the influence of "passion, prejudice, or any other arbitrary factor."

Dated this 13th day of November 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of November 2017, a true and correct copy of the foregoing Defendant's Brief in support of Motion for Relief from Judgment Pursuant to SDCL 15-6-60(b) in the above-entitled matter, was served via electronic mail, to the following named persons:

Paul S. Swedlund
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/s/ Jason J. Tupman
Jason J. Tupman

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CHARLES RUSSELL RHINES,	*	
Petitioner,	*	
v.	*	CIV 00-5020-KES
DARIN YOUNG, Warden, South Dakota State Penitentiary,	*	
Respondent.	*	

AFFIDAVIT OF BRETT GARLAND

Affiant, after first being sworn upon his oath, states as follows:

1. Affiant is a Special Agent for the South Dakota Department of Criminal Investigation. At the direction of the Office of the Attorney General, affiant attempted to contact all jurors in the matter of ***State v. Rhines,* CR 93-81 (Cir.Ct.S.D.7th),** in order to determine if the sentence of death was imposed due to homophobic bias. Affiant learned that one juror, **Martha Anderson,** is deceased.

2. The jurors were uniformly annoyed or uncomfortable about being contacted to discuss their deliberations and verdict, whether by affiant or Rhines' defense team. Some were willing to discuss the experience with affiant, others were not.

3. The jurors uniformly described the deliberations as serious and professional. The jurors were complimentary of their fellow jurors' conscientiousness, and of the foreman's professionalism in particular. The jurors uniformly reported that Rhines' sexual orientation had no influence on their decision to impose a death sentence. Rather, the jurors reported that it was the brutality of the killing and Rhines' remorseless confession that caused them to believe a death sentence was warranted.

4. On May 2, 2017, affiant contacted **Bobby Charles Walton** by telephone. Juror Walton served as **foreman** of the jury.

5. When contacted by affiant, Juror Walton stated that "four or five people" from the Rhines defense team had "come last year knocking on [his] door or calling" him. Juror Walton stated that "these people" were asking if he had "changed" his mind about the case. Juror Walton was audibly frustrated with people "trying to get [jurors] involved again" and was

EXHIBIT
tabbies
2

"tired of being harassed." Juror Walton told Rhines' defense team that he had "nothing else to say or do in that matter."

6. Juror Walton also refused to meet with affiant or any representative from the South Dakota Office of the Attorney General.

7. Juror Walton did inform affiant over the phone that he did not "recall anybody saying anything like [SOB queer] when we were in the deliberation phase." Juror Walton said the allegation that a juror had said "SOB queer" during deliberations was "news to me." When asked if anyone was influenced to hand down the death sentence based on Rhines' homosexuality, Juror Walton responded "No. No."

8. Juror Walton recalled being asked during *voir dire* about whether he had any "qualms" with "people being . . . gay." Juror Walton remembers telling them that he could not "care less about who is gay or who is whatever." Juror Walton's attitude toward a person's sexual orientation was "To each his own."

9. When asked if he felt that anyone tried to influence his decision at all based on sexual orientation or religion, Juror Walton said "No. No. None of that was brought up." When asked if he remembered any conflict at all with any specific individual or individuals in that jury room as it related to religion, sexual orientation or anything like that, Juror Walton said "No. No."

10. Juror Walton stated that his decision was based on the evidence, Rhines' taped confession, and "what [Rhines] did to that young boy. He could have spared that boy's life." Juror Walton stated that the jury arrived at its verdict "as a group."

11. On April 28, 2017, affiant interviewed **Mark Thomas Dean.**

12. Juror Dean was advised that affiant was investigating an allegation of a homophobic statement made during the jury deliberations. Before the interview, Juror Dean was not told the reason affiant wanted to talk to him or made aware of the "SOB queer" statement attributed to him in the affidavit of "Juror B" on file in this case. DOCKET 323, Exhibit B. Juror Dean was directed to Paragraph 7 of Juror B's affidavit to read the allegation for himself so that affiant could witness his reaction.

13. After reading Paragraph 7 of Juror B's affidavit, Juror Dean stated that he had no recollection of any such statement and could not imagine that he would have made any such statement. Juror Dean said "I would never say something like that in a situation like that." Juror Dean knew that Rhines' homosexuality had no bearing on any decision he had to make.

14. Juror Dean stated that he is not homophobic. He stated that he believed people have the right to live in the way they want. Juror Dean said "I honest to God can say I don't remember saying anything like that in that

room, or wherever." Juror Dean said a person's sexual orientation is not something he would judge them by. Juror Dean said a person's sexual orientation was none of his business.

15. Juror Dean said he voted for the death penalty based on the guidelines of the law provided by the judge, the type of crime and the way it was committed, and the brutality of the crime.

16. Juror Dean stated that the jury followed guidelines of what the law required them to do. Juror Dean described the jury foreman, Bobby Walton, as a "ramrod" strict military man who conducted the deliberations in a non-nonsense manner. According to Juror Dean, the jury found that the crime was premeditated and that Rhines deserved the maximum sentence. Juror Dean stated that nobody on the jury wanted to have someone's life in their hands and that the jury struggled with the decision.

17. When asked if he felt anyone on the jury was influenced to return a death sentence because of Rhines' homosexuality, Juror Dean said "Honestly, no." Juror Dean said Rhines' homosexuality did not matter to him and had nothing to do with the crime.

18. Juror Dean said it was disturbing to read Paragraph 7 of Juror B's affidavit. Juror Dean said that the jurors all got along with each other. He stated that each juror was allowed to think on their own. Juror Dean said neither he nor anyone else tried to sway a juror to vote for a death sentence against their moral or religious beliefs. Juror Dean said that the mood in the room was that nobody was wanting to "lay anything on one person's shoulder" that they would later regret. Juror Dean said that the goal of the deliberations was to let everyone make their own decision so when they walked out of the jury room they could live with themselves.

19. Juror Dean's wife, Patricia, sat at the table during the interview. She mentioned that she met Juror Dean shortly after the trial. She said the only thing that Juror Dean had ever said to her about the case was that it was a very brutal murder. Patricia said the topic of Rhines' homosexuality had never come up in the entire time she has known Juror Dean. Patricia said that she did not even know that Rhines was homosexual before the interview with affiant. Patricia said it was not like her husband to throw around careless words like those alleged.

20. Juror Dean stated that persons from Rhines' defense team had come to his door and had called him. He told them that the trial was done and that he had done what he thought was right, and that he did not want to talk about it. Juror Dean stated he did not want to have to come to court to testify about the case.

21. Contrary to Juror B's characterization of Juror Dean as "a masculine, self-assured guy who . . . saw things in a very black and white way,"

affiant found him to be a soft-spoken and thoughtful individual who described performing his duties as a juror in a conscientious manner and who was sensitive to the opinions and feelings of his fellow jurors and the magnitude of the decision he and his fellow jurors were tasked with.

22. Affiant spoke with **Frances Cersosimo** on May 4, 2017.

23. Like other jurors, Cersosimo was aware that Rhines is a homosexual. She stated this fact was "abstract from the reality of what we were even basing anything on."

24. According to Cersosimo, one juror made a joke that Rhines might enjoy a life in prison where he would be among so many men. This "stab at humor" "did not go over well" and everyone agreed that Rhines' sexual orientation "was not even a consideration" and had nothing to do with their verdict. The juror who made the joke said that what he had said was stupid or dumb or something to that effect and "that was the end of it." According to Cersosimo, there were no other comments like that and Rhines' sexual orientation was not discussed again.

25. Cersosimo kept a journal of her jury service. DOCKET 340, Exhibit N. After each day of proceedings or deliberations in the case, Cersosimo recorded her thoughts and impressions in her journal. Cersosimo stated that if she had felt that Rhines' homosexuality influenced the sentencing determination in any way, she would have recorded it in her journal. The court can review DOCKET 340, Exhibit N, to see if her journal contains any mention of Rhines' homosexuality influencing the deliberations.

26. Cersosimo stated that the jury was instructed against basing its sentencing determination on bias or prejudice and that the jury followed that instruction by giving Rhines' sexual orientation no weight in consideration of a death sentence. When asked what bearing Cersosimo believed Rhines' sexual orientation had on the verdict she said "Not one iota. Not one iota."

27. Cersosimo said she did not observe any juror being pressured in any way for any reason by any other juror to return a death sentence. Cersosimo said her own sentencing determination was based on the relevant evidence and the nature of the crime itself, not Rhines' sexual orientation.

28. When asked her thoughts on the allegation that the jury sentenced Rhines to death because he is gay, Cersosimo said it "ludicrous."

29. Affiant spoke with **Robert Corrin** on June 6, 2017.

30. When asked if he felt that he or any of the jurors reached their decision to impose the death penalty based on any prejudices in regard to Rhines' sexual orientation, Corrin stated that "No. None of that went on."

31. Corrin said that the jury foreman did a very good job. There was no friction between the jurors on any matters.

32. In regard to a person's sexual orientation, Corrin stated that it did not matter to him who a person is. He said that every person has the same rights as everyone else and he went into the trial with an open mind and the thought that Rhines was innocent. The jury's verdict, he said, was based on the evidence presented. Corrin believed that a death sentence was the only option that seemed fair and right and that Rhines' actions warranted the penalty.

33. Corrin was approached by members of Rhines' defense team. He was uncomfortable talking to them and felt that they were "grasping at straws." He was concerned that his statements to them would be "taken the wrong way."

34. Affiant spoke with **Bennett Blake** at his home on June 6, 2017.

35. Blake stated that people from Rhines' defense team, one an attorney who identified himself as an "Assistant Federal Defender" from Philadelphia, came to his home in October of 2016. They were "rude as hell." He did not invite them into his house.

36. They wanted to know if he now thought that life in prison would be acceptable. Blake stated that he told them it would as long as Rhines never got out. Blake stated that he felt Rhines had committed a "horrible crime" for just "chump change."

37. Blake stated that Rhines' defense team kept badgering him about homosexuality. Like Cersosimo, Blake recalled a comment to the effect that Rhines might like life in the penitentiary among other men. Blake felt the comment was made as "somewhat of a tension release." Blake said that the foreman and everyone else on the jury agreed that Rhines was not on trial for being homosexual. The comment was just "a one moment thing" which "was never referred to again."

38. Blake said that, though he believed that some religious jurors disapproved of homosexuality, no juror attempted to influence his decision to vote for the death penalty based on any prejudices. Blake said "everything was done very professionally."

39. Blake had no recollection of anyone referring to Rhines as an "SOB queer." Blake said there was no friction between the jurors. He said everyone was uncomfortable with making a life and death decision. When asked if he believed the decision to impose a death sentence was reached based on Rhines' race, ethnicity or sexual orientation, Blake said that it was not. Blake said he had a difficult time distinguishing what was said during the guilt phase deliberations from what was said in the penalty phase deliberations.

40. When asked if he felt he was influenced to impose a death sentence based on Rhines' homosexuality, Blake answered "No sir." Blake stated that Rhines' crime of "splitting a kid's head open with a hunting knife" for "$200-$300 in change" was "deplorable" to him. He thought the death penalty was appropriate based on the evidence presented.

41. Affiant spoke with **Judy Shafer/Rohde** on June 6, 2017.

42. Like other jurors, Rohde was contacted by Rhines' defense team who said they were trying to find something that would get Rhines out of the death penalty. They asked if anyone on the jury had referred to Rhines in pejorative terms such as "faggot" and, if so, if that made her feel differently about the outcome. Rohde stated that nothing like that happened. Rohde stated that everything about the deliberations was "all good and clean." She said everyone did the job they were supposed to in a very professional manner.

43. Rohde remembers some religious jurors having difficulty with imposing a death sentence. She remembers one such juror waivering on the decision until she looked at the pictures from the trial and other evidence, at which time she stated "Yes, he deserves to die."

44. Rohde stated that no juror tried to influence her or anyone else to reach any decision based on race, ethnicity, sexual orientation or religion. She said everyone was taking the job very seriously and that all the jurors were "real professional."

45. Rohde stated that nothing like "SOB queer" was ever said during deliberations. When asked if any statements regarding Rhines' sexual orientation were made during deliberations she said that "Nothing. Absolutely nothing." Rohde said she would have been offended if she had heard someone talk like that in that situation.

46. Rohde said the deliberations were "extremely professional." She said she was impressed with all the extra care and thought people put into it. Rohde said the process was very serious. The jury foreman did a good job and kept everyone on task. Rohde said that neither she nor anyone else was influenced to hand down a death sentence based on Rhines' homosexuality.

47. Rohde said that when Rhines' defense team talked to her about the deliberations, they were more "vocal" than affiant and "used a lot of bad language." Rohde said she did not typically talk that way, but Rhines' defense team asked her if anyone referred to Rhines as a "fucking queer" and things like that. Rohde said there was no talk like that among the jurors. Rhines' defense team tried to get her to tell them that some aspersion about homosexuality may have been made that would have influenced somebody or the outcome of the deliberations. Rohde said that she did not think that the jury ever discussed Rhines' sexual orientation whatsoever. She had no memory of any "flippant comments"

being made about homosexuality during the deliberations. Rohde said Rhines' sexual orientation did not matter, that it had no bearing on what happened.

48. Rohde said that she has no personal feelings one way or the other about homosexuality. Rohde said the jury based its decision in the fact that Rhines had "brutally killed that kid, and intended to." She mentioned that Rhines had even commented on how he could shove a knife through a person's head to a certain point to kill them because he was military trained. Rohde remembered that, at one point, Rhines laughed because it did not kill the victim right away like Rhines thought it would. She said it was an awful thing to think about someone doing.

49. On June 6, 2017, affiant made contact with **Harry Keeney.** Affiant identified himself. When asked if he had served on the Rhines jury, Keeney stated he had but that it was a long time ago. Keeney then said goodbye, and hung up.

50. On October 27, 2017, affiant contacted **Delight McGriff.** McGriff stated that she is not personally comfortable with the death penalty but she voted in favor of it because Rhines showed no remorse for the murder whatsoever in his confession and kind of bragged about it on the tapes.

51. When asked if she recalled Rhines' sexual orientation being brought up during the deliberations, McGriff said "No." McGriff said that Rhines' sexual orientation made no difference as far as she was concerned. When asked if she felt pressured to hand down a death sentence based on Rhines' homosexuality, McGriff said "Oh, absolutely not. No."

52. McGriff said the deliberations were about the murder itself and that her decision was based on the facts of the case and the confession tapes.

53. On November 1, 2017, affiant contacted **William Brown.** Brown said that Rhines' sexual orientation had no bearing on his decision to vote in favor of a death sentence.

54. Affiant made several calls in an effort to contact jurors **Wilma Woodson** and **Daryl Anderson** but was unable to contact either.

Dated this 22nd day of November 2017.

Brett Garland, Special Agent
South Dakota Division of Criminal Investigation

Subscribed to and sworn before me this 22 day of November 2017.

Notary Public
My Commission Expires: 6/1/22

SEAL

LORI ANTONSEN NOTARY SEAL PUBLIC STATE OF SOUTH DAKOTA

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CHARLES RUSSELL RHINES,	*	
Petitioner,	*	
v.	*	CIV 00-5020-KES
DARIN YOUNG, Warden, South Dakota State Penitentiary,	*	
Respondent.	*	

SUPPLEMENTAL AFFIDAVIT OF BRETT GARLAND

Affiant, after first being sworn upon his oath, states as follows:

1. Affiant is a Special Agent for the South Dakota Department of Criminal Investigation. At the direction of the Office of the Attorney General, affiant attempted to contact all jurors in the matter of ***State v. Rhines,* CR 93-81 (Cir.Ct.S.D.7th),** in order to determine if the sentence of death was imposed due to homophobic bias. The results of affiant's investigation are reported in his initial affidavit.

2. Affiant was further tasked to attempt to re-interview Jurors Blake and Keeney in regard to specific allegations in Rhines' motion that these jurors had lied during *voir dire* in response to questions about whether either harbored homosexual bias which affected their deliberations as jurors.

3. On December 7, 2017, affiant and Assistant Attorney General Paul S. Swedlund made contact with **Bennett Blake** at his home. Rather than characterize the allegations made against Blake, AAG Swedlund provided Blake a copy of Rhines' motion for Blake to read for himself. Blake read out loud an excerpt from the top of Page 3 of the brief (copy attached) alleging that "two jurors have now stated under penalty of perjury that they were not neutral, and that a desire to prevent Mr. Rhines from serving a life sentence 'around other men' or enjoying 'conjugal visits' played a strong role in their decision." While reading this, Blake stated "Oh really?" After he finished reading the allegation, Blake said "I know I wasn't one of them."

4. Blake then read out loud a passage on Page 7 singling him out as someone who had allegedly falsely "told the court in *voir dire* that they did not harbor anti-gay bias that would affect their verdict." Blake

EXHIBIT
tabbies
3

responded that he did not care if anyone was gay. Blake said that "[Rhines'] lifestyle was his lifestyle."

5. Blake momentarily became offended. He somewhat angrily asked affiant "So you say I'm anti-gay now, is that what you're saying?" Blake was informed that these were allegations being made in Rhines' brief and was directed to Page 10 of the brief to read further.

6. Reading the allegations on Page 10 of the brief, Blake exclaimed "I did not provide false information." Blake said that the allegations in the brief were "Not true. I don't have anti-gay sentiments or anything like that." To the contrary, Blake said that his deceased brother was gay and that he had no adversity to his brother's lifestyle.

7. Blake next reviewed the document entitled "Declaration of Katherine Ensler" which purports to describe homophobic statements made by Blake or other jurors. After reading Ensler's "declaration," Blake stated "I don't care if he's homosexual or not." Blake said that he was not influenced in his vote for the death penalty by Rhines' homosexuality. Blake said "I don't even see how the sexual orientation of the man came to play in this case."

8. Blake stated that Rhines "killed a guy with a pocket knife for 50 bucks in quarters or something like that." Blake said "I don't care if he's queer or not, it didn't matter, the crime was committed as far as I'm concerned."

9. On December 7, 2017, affiant made contact with **Harry Keeney** and his wife Janet at their home. AAG Swedlund stated that they needed to ask some questions about the Rhines case. Janet said that her husband has problems with dementia and that she did not believe that her husband could remember much. Keeney seemed confused through parts of the conversation.

10. AAG Swedlund provided Janet with the same excerpts from Rhines' brief that had previously been provided to Blake. Janet said the allegations in the brief were a "bunch of nonsense."

11. Janet gave the excerpts to her husband to read. Keeney stated that he served on the Rhines jury. Janet reminded Keeney that everyone present knew that already. After reading the excerpts, AAG Swedlund asked Keeney if he had been honest when he was asked questions in *voir dire* and Keeney stated "You bet I was." Keeney stated that he believed his vote was true.

12. Janet stated that she did not find out that Rhines was gay until Rhines' attorneys showed up at their house asking questions about it. Janet said she then asked Keeney if homosexuality was ever brought up and he said "Not during the trial. That was not an issue." Janet said that groups of people came to their house and did not really say who they were representing or the purpose for meeting with them. "They were kind of sneaky in their regards, I guess." Nobody from the state had

previously visited the Keeney home so Janet could only have been referring to members of Rhines' defense team.

13. AAG Swedlund asked Keeney to examine the document titled "Declaration of Harry Keeney," copy attached hereto. Janet said Keeney did not write the document, that it had already been prepared when "they" came back.

14. Keeney said that from what he could remember of Rhines' trial, the jury was "very fair." That nobody hesitated, they discussed the case, and everybody agreed 100%. Keeney said that "Nobody said 'Well, I don't know . . . '"

15. When asked if he voted for the death penalty because Rhines was homosexual, Keeney answered that he had voted for the death penalty. When Janet explained to Keeney that the question asked whether he voted for the death penalty because Rhines is homosexual, Keeney stated "No, no, no. No, I didn't do that."

Dated this 15th day of December 2017.

Brett Garland, Special Agent
South Dakota Division of Criminal Investigation

Subscribed to and sworn before me this 15th day of December 2017.

Notary Public
My Commission Expires: 6-1-22

SEAL

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 18268

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

CHARLES RUSSELL RHINES,

Defendant and Appellant.

BRIEF IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO SDCL 15-6-60(b)

Neil Fulton, Federal Public Defender
Jason J. Tupman, Assistant Federal Public Defender
200 W. 10th Street, Suite 200
Sioux Falls SD 57104
Phone: (605)330-4489
Fax: (605)330-4499

ATTORNEYS FOR CHARLES RUSSELL RHINES

These assurances of neutrality, on which this Court relied, were false. Two jurors have now stated under penalty of perjury that they were *not* neutral, and that a desire to prevent Mr. Rhines from serving a life sentence "around other men" or enjoying "conjugal visits" played a strong role in their decision. A third has recalled discussions among all the jurors reflecting their repugnance and reluctance to impose a life sentence because Mr. Rhines is a gay man. *See* Appx. 4 (Declaration of Frances Cersosimo); Appx. 5 (Declaration of Harry Keeney); Appx. 6 (Declaration of Katherine Ensler).

Until earlier this year, the statements of Mr. Rhines's jurors would have been inadmissible to attack their verdict under South Dakota's "no impeachment" rule. *See* SDCL 19-19-606. The United States Supreme Court, however, held in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017), that the Sixth Amendment requires the states to receive evidence showing that jurors acted with racial animus, even in the face of identical state rules of evidence. Because there is no principled distinction between the racial bias displayed in *Pena-Rodriguez* and the anti-gay bias that motivated Mr. Rhines's sentencing jury, the jurors' statements would now be admissible to establish that they sentenced him to death under the influence of "passion, prejudice, or any other arbitrary factor." SCDL 23A-27A-12(1).

The Legislature imposed on this Court the obligation to protect defendants facing the ultimate punishment from the influence of "passion, prejudice, or any other arbitrary factor." SDCL 23A-27A-12(1). The jurors' declarations undermine the basis for this Court's decision pursuant to that mandate, and *Pena-Rodriguez* establishes that the state law making them inadmissible must yield to the demands of the Sixth and Fourteenth Amendments. These changed conditions "makes continued enforcement [of South

disgust. This is a farming community. . . . There were lots of folks who were like, 'Ew, I can't believe that.'" Appx. 6 (Decl. of Katherine Ensler).

All of the jurors who were asked,[1] including Mr. Keeney and Mr. Blake, had told the Court in *voir dire* that they did not harbor anti-gay bias that would affect their verdict. *See, e.g.*, Trial Tr. at 327-28 (1/5/1993) (Keeney), Appx. 67-68; 932 (1/8/1993) (Blake), Appx. 144. The newly discovered information establishes that these assertions were false.

Because the new information destroys the foundation of this Court's earlier ruling that passion and prejudice played no role in the jurors' decision to sentence Mr. Rhines to death – its assumption that their voir dire assurances were true – the Court should grant him relief from judgment.

ARGUMENT

I. MR. RHINES IS ENTITLED TO RELIEF FROM JUDGMENT PURSUANT TO SDCL 15-6-60(B).

SDCL 15-6-60(b) provides that a court "may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . (6) Any other reason justifying relief from the operation of the judgment." *See* SDCL 15-24-1 (circuit court procedure applicable to Supreme Court unless otherwise provided); *see also* SDCL 23A-32-14 (provisions for civil appeals apply to criminal appeals unless otherwise provided). The statute requires the litigant to make the motion within a "reasonable time." *Id.*; *see Anderson v. Somers*, 455 N.W.2d 219, 221 (S.D. 1990)(citing *Rogers v. Rogers*, 351 N.W.2d 129 (S.D. 1984)).

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[1] The one exception was juror Daryl Anderson, who was never asked how he felt about Mr. Rhines's sexual orientation. *See* Trial Tr. at 1326-50 (1/11/1993), Appx. 157-180.

Here, both Juror Keeney and Juror Blake satisfy the *McDonough Power* standard. First, they both provided false information during *voir dire*. Each testified that Mr. Rhines's sexual orientation would not affect his decision. *See* Trial Tr. at 328 (1/5/1993), Appx. 68 (Keeney) ("I guess a man or lady has to live their own lives the way they see fit. . . . I don't see where that would have any variance on this case as far as I'm concerned."); 932 (1/8/1993), Appx. 144 (Blake) ("Q: [T]here will be some evidence here that will show that Mr. Rhines is a homosexual, he's gay and one or two of the witnesses who might be called in this case are also gay and have had relationship[s] with Mr. Rhines. Knowing that, does that cause you to view Mr. Rhines differently at all? A: Not at all."). Based on their later statements regarding Mr. Rhines's homosexuality, each testified falsely.

Second, had each of the jurors answered the *voir dire* questions truthfully, Mr. Rhines and his attorneys would have known that each harbored anti-gay animus that he would not be able to put aside in judging Mr. Rhines's case. Thus, each could have been challenged for cause.

Separate from the *McDonough Power* standard, a defendant can show a violation of his Sixth Amendment rights where he can demonstrate actual bias on the part of a juror. *See Smith v. Phillips*, 455 U.S. 209, 215-16 (1982).

Here, Mr. Rhines can demonstrate actual bias against him on the part of Mr. Keeney, Mr. Blake, and the jury as a whole. The jurors not only discussed Mr. Rhines's homosexuality during deliberations, they held it against him. Eager to prevent him from receiving what they saw as the benefit of access to other men in prison, the jurors voted to impose a death sentence instead of life without parole.

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

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

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

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

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

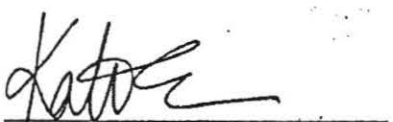
4. He stated that the jury had deliberated, and when asked to speak more about the deliberations, he immediately said, "There was lots of discussion of homosexuality. There was a lot of disgust. This is a farming community."

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

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

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

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



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

Date: December 12, 2016

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

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

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

Harry Keeney