UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CHARLES RUSSELL RHINES, Plaintiff, vs. DARIN YOUNG, Warden, South Dakota State Penitentiary; Defendant.	5:00-CV-05020-KES ORDER DENYING MOTION TO AMEND THE JUDGMENT AND DENYING MOTION TO STRIKE

Petitioner, Charles Rhines, moves the court to alter or amend its judgment. Respondent, Darin Young, resists the motion. Respondent also moves to strike certain exhibits from the record. Rhines resists the motion. For the following reasons, the court denies the motion to alter or amend the judgment and denies the motion to strike.

BACKGROUND

The procedural history of this case is set forth more fully in the court's February 16, 2016 order granting summary judgment in favor of respondent and denying Rhines's federal habeas petition. *See* Docket 305. The following facts are relevant to the pending motions:

Rhines is a capital inmate at the South Dakota State Penitentiary in Sioux Falls, South Dakota. He was convicted of premeditated first-degree murder for the death of Donnivan Schaeffer and of third-degree burglary of a Dig'Em Donuts Shop in Rapid City, South Dakota. A jury found that Rhines

should be subject to death by lethal injection, and a state circuit court judge imposed the sentence. On February 16, 2016, this court granted respondent's motion for summary judgment and denied Rhines's federal petition for habeas corpus. Docket 305. The court entered judgment in favor of respondent on the same day. Docket 306.

I. Rhines's Rule 59(e) Motion

LEGAL STANDARD

Federal Rule of Civil Procedure 59(e) was adopted to clarify a district court's power to correct its own mistakes within the time period immediately following entry of judgment. *Norman v. Ark. Dep't of Educ.*, 79 F.3d 748, 750 (8th Cir. 1996) (citing *White v. N.H. Dep't of Empl. Sec.*, 455 U.S. 445, 450 (1982)). "Rule 59(e) motions serve the limited function of correcting 'manifest errors of law or fact or to present newly discovered evidence.'" *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006). "Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment." *Id.* The habeas context is no exception to the prohibition on using a Rule 59(e) motion to raise new arguments that could have and should have been made before the court entered judgment. *Bannister v. Armontrout*, 4 F.3d 1434, 1440 (8th Cir. 1993). The Rule "is not intended to routinely give litigants a second bite at the apple, but to afford an opportunity for relief in extraordinary circumstances." *Dale & Selby Superette & Deli v. United States Dep't of Agric.*, 838 F. Supp. 1346, 1348 (D. Minn. 1993); *see also* 11 Charles Alan Wright &

Arthur R. Miller, *Federal Practice & Procedure, Federal Rules of Civil Procedure* § 2810.1 (3d ed.) ("However, reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly"). "A district court has broad discretion in determining whether to grant or deny a motion to alter or amend [a] judgment pursuant to Rule 59(e)[.]" *Metro. St. Louis*, 440 F.3d at 933.

DISCUSSION

A. Conflict of Interest

Rhines's conflict of interest argument is based on his interpretations of the Supreme Court's *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) opinion. On June 5, 2015, Rhines moved to hold his federal habeas proceeding in abeyance.[1] He argued that the stay was necessary so that he could investigate potential ineffective assistance of trial counsel claims premised on the *Martinez* decision. On August 5, 2015, the court concluded that *Martinez* did not apply to him and denied Rhines's motion for several reasons. Docket 272. As one reason for denying Rhines's motion, the court found that Rhines received independent counsel between his initial-review collateral proceeding and his federal habeas proceedings.[2] Thus, there was no conflict of interest that interfered with Rhines's federal habeas counsel.

---

[1] The court lifted the earlier stay on Rhines's federal habeas proceeding on February 4, 2014. Docket 224. Respondent's summary judgment motion became ripe for review on November 26, 2014.

[2] The court's August 5, 2015 order traces the lineage of attorneys who have represented Rhines throughout his state and federal proceedings. Docket 272 at 10-12. The court learned during oral argument on respondent's summary judgment motion that two other attorneys–Judith Roberts and Mark Marshall–also represented Rhines during his second state habeas proceeding.

Then on October 21, 2015, and two days prior to the oral argument hearing on respondent's summary judgment motion, Rhines moved for reconsideration of the court's order denying his request for a stay as well as for permission to amend his federal habeas petition.[3] According to Rhines, the court "fail[ed] to consider the unusual factual scenario that exists in Mr. Rhines' case. Mr. Rhines has not simultaneously had the benefit of effective, independent counsel for the entire time that his case has been pending in either state or federal court." Docket 279 at 1. Rhines argued that the court's interpretation of *Martinez* and its analysis concerning the independence of his counsel was wrong. The court concluded, among other things, however, that *Martinez* did not apply and that Rhines was not entitled to relief. Docket 304 at 19-20.

Here, and like Rhines's first motion for reconsideration, Rhines contends that "this Court has failed to recognize the impact of [*Martinez*] and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013)" because several attorneys from the Federal Public Defenders' Office (FPDO) represented Rhines during part of his second state habeas proceeding and in his federal habeas proceeding. Docket 323 at 2; Docket 340 at 1. Rhines contends that this partial overlap creates an impermissible conflict of interest.

The names of those attorneys did not appear on the federal docket.

[3] Rhines also moved for permission to file a supplemental summary judgment brief to include the arguments that Rhines sought to add to his federal habeas petition. The court denied the request.

Capital petitioners such as Rhines have a statutory right to counsel, and the court may upon motion appoint substitute counsel if the "interests of justice" so require. *Martel v. Clair*, 132 S. Ct. 1276, 1286-87 (2012). The FPDO was appointed as co-counsel for Rhines in 2009. Docket 184. Rhines never moved for the FPDO's substitution.[4] Thus, the issue of whether Rhines was entitled to substitute counsel was not raised before this court. While Rhines argued that the partial overlap between the attorneys who represented him during part of his second state habeas proceeding and the conclusion of his federal habeas proceeding created an impermissible conflict of interest, at no time did Rhines move for substitute federal habeas counsel, and the court does not believe an impermissible conflict of interest exists. Docket 272 at 12. The court is satisfied that it did not base its decision on a manifest error of law or fact. And the court has twice analyzed and rejected Rhines's contention that *Martinez* otherwise applies to him. Because Rule 59(e) is not intended to give litigants "a second bite at the apple," it, likewise, is not intended to give them a third. *See Dale & Selby Superette*, 838 F. Supp. at 1348. Thus, Rhines's conflict of interest argument fails.

B. Juror Bias and Impropriety

1. Actual and implied bias of jurors

Rhines contends that two jurors at his trial harbored anti-homosexual biases against him. He argues that those biases infected his sentencing process and caused the denial of his constitutional rights to an impartial jury, to due

[4] Rhines returned to state court for his second state habeas proceeding in 2005.

process, to be free from the arbitrary imposition of the death penalty, and to equal protection of the law.

Rhines did not raise previously his juror bias claim in any state or federal proceeding.[5] According to Rhines, the reason that this issue was not presented earlier is because none of Rhines's previous attorneys interviewed the jurors from his trial. Some of the former jurors were interviewed recently, and Rhines has secured their signed affidavits. Rhines argues that the affidavits are "newly discovered evidence" under Rule 59(e) and asserts that the court should amend its judgment accordingly in light of this new evidence.

Rhines's argument fails, however, for several reasons. First, a motion under Rule 59(e) cannot be used to "tender new legal theories, or raise arguments which should have been offered or raised prior to entry of judgment." *Metro. St. Louis*, 440 F.3d at 933; *see also Bannister*, 4 F.3d at 1440 ("Bannister first raised the claim in the district court in a Rule 59(e) motion. The district court correctly found that the presentation of the claim in a 59(e) motion was the functional equivalent of a second [habeas] petition, and as such was subject to dismissal as abusive"). Thus, Rhines's juror bias claim should have been raised at the outset of his habeas proceeding. *See* Docket 72 (directing Rhines "to include every known constitutional error or deprivation entitling [him] to relief"). Second, a principal purpose of Rule 59(e) is to afford courts the opportunity to correct their mistakes in the period immediately

---

[5] Rhines's federal habeas petition asserted that his right to an impartial jury was violated because certain jurors were excluded based on their views of the death penalty. *See* Docket 73.

following the entry of the judgment. *Norman*, 79 F.3d at 750. But Rhines does not explain how the court made a mistake regarding an issue that was never before the court. Third, because Rhines did not raise his juror bias claim during any of his state proceedings, this court cannot consider it. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) ("Before seeking a federal writ of habeas corpus, a state prisoner . . . must 'fairly present' his claim in each appropriate state court"); *Rucker v. Norris*, 563 F.3d 766, 769 (8th Cir. 2009) (agreeing with the district court that an "issue is procedurally barred because it was not 'fairly present[ed]' to the appropriate state court") (alteration in original). And while Rhines argues that each of his prior attorneys–including his initial-review collateral proceeding attorney–failed to develop his juror bias claim, Rhines cannot avail himself of the rule from *Martinez* because Rhines's defaulted claim is not a claim for ineffective assistance of trial counsel. *Martinez*, 132 S. Ct. at 1320.

As to Rhines's newly discovered evidence argument, the court finds that Rule 59(e) is applicable in this context.[6] The Eighth Circuit applies the same standard for Rule 59(e) motions based on newly discovered evidence as it does

[6] In *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004) the Supreme Court held that a habeas petitioner must satisfy § 2254(e)(2) "when a prisoner seeks relief based on new evidence without an evidentiary hearing." But unlike this case, the *Holland* case involved an exhausted claim rather than a new claim. *Id.* at 650. Regardless, relief under § 2254(e)(2) also requires as a prerequisite that the new evidence "could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(ii); *Holland*, 542 U.S. at 653.

for Rule 60(b)(2) motions.[7] *Miller v. Baker Implement Co.*, 439 F.3d 407, 414 (8th Cir. 2006). "To prevail on this motion, [the movant is] required to show—among other things—that the evidence proffered with the motion was discovered after the court's order and that he exercised diligence to obtain the evidence before entry of the order." *Anderson v. United States*, 762 F.3d 787, 794 (8th Cir. 2014). The evidence must also be admissible. *Murdock v. United States*, 160 F.2d 358, 362 (8th Cir. 1947).

Here, and regardless of whether the juror affidavits are admissible, Rhines has had roughly twenty years to develop the evidence he now offers. In fact, Rhines faults each of his attorneys for not developing this evidence sooner. *See, e.g.*, Docket 323 at 2 ("Beginning with trial counsel, counsel at every stage of the prior proceedings have failed to interview the jurors"). But Rhines's allegations undermine the foundation of his motion. For Rhines to prevail, he must show that this evidence *could not have* been discovered earlier *despite* having exercised reasonable diligence to obtain it. Rhines, however, asserts that the evidence *should have* been discovered earlier *if* his attorneys were diligent. Rhines's contention is the inverse of what Rule 60(b)(2) is designed to address. He makes no showing that "he had been unable to uncover the newly discovered evidence prior to the court's summary judgment ruling." *Miller*, 439 F.3d at 414. Likewise, the decades-long period of delay

---

[7] Rule 60(b)(2) provides that litigants may seek relief from a final judgment or order based on "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2).

while the evidence was obtainable indicates a lack of diligence. *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (rejecting an argument to present new evidence because "[i]t is difficult to see, moreover, how respondent could claim due diligence given the 7-year delay"). "Because this evidence was available to [Rhines], it should have been presented prior to the entry of judgment." *Metro. St. Louis*, 440 F.3d at 935.

Finally, to the extent that Rhines's motion could be construed as a motion to present new evidence related to issue IX.D of his federal habeas petition,[8] the court's conclusion is the same. Issue IX.D was adjudicated on the merits in state court. Section 2254(d) and the rule in *Pinholster* limit this court's review of a claim that was adjudicated on the merits in state court to the record that was before the state court. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Rhines's juror affidavit evidence was not presented to or considered by the state court that adjudicated the claim. Rhines cannot use Rule 59(e) to circumvent § 2254(d) and *Pinholster*. *Pitchess v. Davis*, 421 U.S. 482, 489 (1975) (holding that the Federal Rules of Civil Procedure apply in § 2254 proceedings to the extent that they are not inconsistent with any statutory provisions). Consequently, this court cannot consider the evidence. Thus, Rhines's newly discovered evidence argument fails.

---

[8] Issue IX.D alleged that Rhines's trial attorneys were ineffective because they failed to exclude evidence of Rhines's homosexuality. *See* Docket 73.

2. Juror consideration of extrinsic evidence and *ex parte* contacts with the trial judge

Rhines argues that the jurors considered extrinsic evidence during the course of his trial. According to Rhines, the jurors at some point discussed a newspaper article that speculated about which of the jurors would serve as alternates. Rhines also argues that the jurors had improper *ex parte* contact with the trial judge when the judge allegedly told the jurors "that he would not refer to them by name and that the defense could ask them to affirm that the verdict as read was true." Docket 323 at 7. Rhines contends that these incidents violated his Sixth and Fourteenth Amendment rights.

This claim, like Rhines's juror bias claim, was not raised previously in any state or federal proceeding. For the reasons stated more fully in section I.B.1, *supra*, the court denies Rhines's motion to raise the claim for the first time now and denies Rhines's motion to present new evidence in support of the claim.

3. Whether one of the jurors did not live in Pennington County

Rhines's trial took place in Pennington County, South Dakota. Rhines argues that one of the jurors actually lived in Meade County, rather than Pennington County, and that the juror was thus ineligible to serve at Rhines's trial. Rhines argues that this error violated his Sixth and Fourteenth Amendment rights.

This claim, like Rhines's preceding arguments, was not raised previously in any state or federal proceeding. For the reasons stated more fully in section

I.B.1, *supra*, the court denies Rhines's motion to raise the claim for the first time now and denies Rhines's motion to present new evidence in support of the claim.

C. Ineffective Assistance of Trial Counsel Claims

Rhines moves for reconsideration of the court's adjudication of issues IX.A, IX.B, and IX.I of his federal habeas petition. Those three issues all concerned whether Rhines's trial counsel's investigation and presentation of mitigating evidence constituted ineffective assistance of counsel. Each claim was considered and rejected in state court. This court concluded that Rhines was not entitled to relief on any of his claims. *See* Docket 305 at 82-101.

1. Appropriate standard of review

Rhines challenges the legal standards used to adjudicate his ineffective assistance of trial counsel claims. Ineffective assistance claims are governed generally by *Strickland v. Washington*, 466 U.S. 668 (1984). The state court cited and analyzed the *Strickland* test. Docket 204-1 at 21 (explaining the so-called "deficient performance" and "prejudice" prongs). The court applied that test using the facts of the *Strickland* opinion and several other Supreme Court decisions involving attorneys' mitigation efforts for comparative purposes. *See id.* at 19 (citing *Burger v. Kemp*, 483 U.S. 776 (1987) and *Darden v. Wainwright*, 477 U.S. 168 (1986)). The state court determined that Rhines failed to show that his attorneys' performance was deficient and, therefore, it concluded that Rhines was not entitled to relief.

This court set out in its order granting summary judgment in favor of respondent the applicable standard of review in Rhines's case. *See* Docket 305 at 8-11. That standard is established by § 2254. The court cannot grant relief unless a state court's adjudication of a claim is "contrary to, or involved an unreasonable application of, clearly established Federal law" or unless the decision is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Also, "a determination of a factual issue made by a State court shall be presumed to be correct," and the habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). The Supreme Court has elaborated on the application of those provisions in numerous opinions, and this court's order set forth those principles. Docket 305 at 8-11.

The court also set forth the more specific standards that apply when a state court adjudicates an ineffective assistance claim. *Id.* at 82. The court held:

> In the context of § 2254, however, Rhines must overcome an additional hurdle. This court's task is to determine if the state court's decision involved an objectively unreasonable application of the *Strickland* standard. *See Knowles* [*v. Mirzayance*,] 556 U.S. [111,] 122 [(2009)]. Because the *Strickland* standard itself is deferential to counsel's performance, and because this court's review of the state court's decision under § 2254 is also deferential, the standard of review applied to Rhines's ineffective assistance claims is 'doubly deferential.' *Id.* at 123. Consequently, 'the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.' *Harrington v. Richter*, 562 U.S. 86, 105 (2011); *see also Pinholster*, 131 S. Ct. at 1403

> (noting the petitioner must demonstrate that the state court's determination regarding both prongs was unreasonable to be entitled to relief).

Id. This court concluded that the state court's resolution of Rhines's ineffective assistance claims was reasonable and that Rhines was not entitled to relief.

Here, Rhines argues that the state court's interpretation of the *Strickland* test was wrong. He argues that the state court's appraisal of the "deficient performance" prong was not exacting enough of counsel's performance. Rhines also argues that the state court's description of the "prejudice" prong was incomplete. And Rhines argues that this court's review of the state court's decision was based on an improper standard.

Rhines, however, already received an opportunity to challenge–and he did challenge–the state court's analysis. *See* Docket 232 at 80-96 (Rhines's summary judgment brief). Rule 59 is not a vehicle for re-litigating old matters or advancing arguments that should have been made before. *Metro. St. Louis*, 440 F.3d at 933. Rhines cites in support of his "deficient performance" argument the Supreme Court's decisions in *Strickland*, *Wiggins v. Smith*, 539 U.S. 510 (2003), *Williams v. Taylor*, 529 U.S. 362 (2000), and *Rompilla v. Beard*, 545 U.S. 374 (2005). This court previously considered and rejected the same argument Rhines raises now. The court stated:

> While Rhines argues that *Williams* and *Wiggens* were controlling and dispositive, the Supreme Court has explained that *Strickland* is the appropriate standard that courts should apply to resolve ineffective assistance claims. *Pinholster*, 131 S. Ct. at 1406-07 (rejecting argument that *Williams*, *Wiggins*, and *Rompilla v. Beard*, 545 U.S. 374 (2005) impose a duty to investigate in every case). Likewise, the Court cautioned against 'attributing strict rules to

this Court's recent case law.' *Id.* at 1408.

Docket 305 at 97. The court is satisfied that it did not make a manifest error concerning this issue.

As to Rhines's prejudice argument, the state court described the prejudice prong as requiring a showing of "actual prejudice." Docket 204-1 at 21. Rhines argues that the state court should have included the Supreme Court's further explanation that prejudice requires "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694. A defendant must satisfy both *Strickland* prongs, however, and a court can adjudicate them in either order if the defendant fails to establish one. *Id.* at 697. The state court never reached the prejudice inquiry because it concluded that Rhines's attorneys rendered reasonably competent assistance. This court agreed with the state court. Thus, even assuming the state court's description of the prejudice prong was objectively unreasonable–which it was not–the error would not affect the outcome of Rhines's case. The court is satisfied that it did not make a manifest error concerning this issue.

Regarding Rhines's argument that this court applied the incorrect standard of review to the state court's decision, Rhines does not identify the standard the court should have applied. Rhines cites primarily to various cases involving the review of ineffective assistance claims in the first instance. The Supreme Court has explained, however, that the "doubly deferential" standard

under § 2254(d) applies when a federal court reviews a state court's adjudication of an ineffective assistance claim on the merits. The court finds no manifest error with its decision. Thus, Rhines is not entitled to relief.

2. Mitigation investigation

The bulk of Rhines's motion contends that his trial attorneys failed to properly investigate and present mitigating evidence. His arguments can be grouped broadly into five areas where, according to Rhines, his attorneys should have investigated further: (1) Rhines's family; (2) Rhines's military history; (3) Rhines's jail and criminal records; (4) Rhines's mental health; and (5) Rhines's family history of exposure to neurotoxins.

Each area highlighted by Rhines, with the exception of the neurotoxins issue, was investigated by his trial attorneys. *See* Docket 204-1 at 16-19 (noting "Rhines'[s] counsel did investigate possible mitigation evidence. They investigated by talking to Rhines, his family and friends, reviewing his military service records, his schooling, employment history, [and] psychiatric and psychological examinations and found that there was very little mitigating evidence to be found or presented."). Like Rhines's standard of review argument, Rhines had the opportunity to contest–and did contest–the state court's determinations concerning his attorneys' efforts and their strategy. Docket 232 at 80-93. This court rejected those arguments and concluded that Rhines was not entitled to habeas relief. Here, Rhines devotes many pages of his reconsideration brief to re-litigating his mitigation claims. But Rhines cannot use Rule 59(e) to re-litigate old matters or advance new arguments that

should have been made before. *Metro. St. Louis*, 440 F.3d at 933. And bookending those arguments with conclusory language that this court's decision was unreasonable is an insufficient basis to justify relief. The court finds no manifest error with its decision. Thus, Rhines's claims will not be revisited.

The court will, however, address several specific issues raised in Rhines's motion. For example, Rhines cites a number of affidavits signed by individuals who, like the jurors, were also recently interviewed. *See, e.g.*, Docket 323-8 (signed March 15, 2016); Docket 323-9 (signed March 11, 2016); Docket 323-10 (signed March 15, 2016). Rhines references these affidavits in support of his arguments that the court's decision was erroneous. Rhines's ineffective assistance of counsel claims were each adjudicated on the merits in state court. Rhines has not shown that these contemporary affidavits, or similar evidence containing the same substance, were ever presented to or considered by the state court. Thus, this court cannot consider the affidavits. *Pinholster*, 563 U.S. at 181.

As for Rhines's neurotoxins argument, it is a theory that Rhines advanced in his October 21, 2015 motion to amend his federal habeas petition. *See* Docket 281 at 3-5. Rhines asserted that his trial attorneys as part of their mitigation efforts should have investigated whether Rhines was exposed to pesticides and other toxins while he was growing up in McLaughlin, South Dakota. Rhines argued that that exposure could have caused him to develop various neurological disorders. He claimed that the failure of his trial attorneys

to pursue this area of inquiry suggested that their mitigation efforts were deficient. And Rhines moved to buttress his argument with affidavits from three experts who reviewed Rhines's case file and records. *See* Docket 281-1, -2, and -3. Those experts made their own findings and conclusions concerning Rhines, his background, his mental health, and the effectiveness of Rhines's trial counsel's mitigation efforts.

This court denied Rhines's motion to amend his federal habeas petition to include his new theory and evidence. Rhines's ineffective assistance claims were each adjudicated on the merits in state court. This court held that the rule in *Pinholster* prevented Rhines from "bolster[ing] his exhausted ineffective assistance claims with new evidence that was not presented to or considered by the state court." Docket 304 at 18. The court, for similar reasons, denies Rhines's motion to present these arguments and this evidence as part of his reconsideration motion.

In sum, Rhines has not identified any manifest error with the court's judgment concerning his ineffective assistance claims. Thus, Rhines is not entitled to relief.

D. Jury Note and Juror Confusion

Rhines moves for reconsideration of the court's adjudication of Issue IX.E of his federal habeas petition. Issue IX.E alleged that Rhines's trial attorneys were ineffective due to the way they handled a note from the jurors. The state court denied Rhines's claim, and this court concluded that Rhines was not entitled to relief. Docket 305 at 106-08.

Here, Rhines attempts to re-litigate Issue IX.E. He invokes arguments that either were made or should have been made before and also cites evidence that was not presented to the state court that adjudicated his claim. Rhines's argument suffers the same infirmities as those discussed in sections I.A-C, *supra*. The court is satisfied that its decision did not involve any manifest error. Thus, Rhines's ineffective assistance claim will not be revisited.

Rhines has failed to justify altering or amending the court's judgment. Thus, Rhines's Rule 59(e) motion is denied.

II. Respondent's Motion to Strike

Respondent moves the court to strike various exhibits from the court's docket. These exhibits consist of affidavits and other documents that the court determined that it cannot consider because, for example, Rhines did not present the evidence to any state court for consideration. *Cf. Pinholster*, 563 U.S. at 181. Rhines, nonetheless, cited to some of those same exhibits in his Rule 59(e) motion, and respondent asserts that Rhines may continue to do so on appeal. Thus, respondent asks the court to excise the exhibits from the docket.

The court will not strike the exhibits. Respondent has not shown that he will be prejudiced by the continued presence of the exhibits on the court's docket. Thus, the motion is denied.

CONCLUSION

Rhines has not shown any manifest error with the court's decision. Thus, he is not entitled to relief. Respondent has not shown that the various exhibits

should be struck from the court's docket. Therefore, the exhibits will remain. Thus, it is

ORDERED that Rhines's motion to alter or amend the judgment (Docket 323) is denied.

IT IS FURTHER ORDERED that respondent's motion to strike (Docket 324) is denied.

Dated July 5, 2016.

BY THE COURT:

/s/Karen E. Schreier

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

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

KEITH THARPE, Petitioner, vs. WARDEN, Georgia Diagnostic and Classification Prison, Respondent.	CIVIL ACTION NO. 5:10-CV-433 (CAR)

ORDER

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

I. BACKGROUND AND PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. ANALYSIS

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

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

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

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

On March 6, 2017, the Supreme Court held:

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

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

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

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

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

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

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

Tharpe also argues that "numerous lower courts have already considered claims under *Pena-Rodriguez* in habeas proceedings." ECF No. 93 at 6. But, none of these courts found *Pena-Rodriguez* applicable; none addressed retroactivity; and in only one case[4] did the respondent raise *Teague*. *See Berardi v. Paramo*, No. 15-55881, 2017 U.S. App. LEXIS 13638, at *2 (9th Cir. July 27, 2017) (no mention of retroactivity but

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Pretermitting *Teague*, Tharpe's juror misconduct claim is procedurally barred.

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

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

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

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

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

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

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

ECF No. 14-3 at 7.

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

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

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

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

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

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

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

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

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

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

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

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

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

ECF No. 19-10 at 104.

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

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

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

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

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

137 S. Ct. at 869.

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

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

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

III. CONCLUSION

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

CERTIFICATE OF APPEALABILITY

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

---

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

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

Under this standard, the Court cannot find that "a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen judgment." *Id.* The Court, therefore, declines to issue a COA.

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

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

Declaration of Frances Cersosimo

Pursuant to 28 U.S.C. § 1746

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

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

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

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

Frances Cersosimo — 3-8-16

Frances Cersosimo — Date

Exhibit N

Frances Cerasaino Jan. 7, 1993

My Journal on the murder trial of Donovan Schaffer. Charles R. Sine is being charged w/ 1st degree murder. On Dec. the 5th 1992 I received a jury summons for this case. I filled out the questionaire and it was in the mail Dec. 7th. From that time on I have not thought of much else. My first reaction was that I could not be on the jury because it scared me. Since that time I have come to believe I could not only do a good job, realizing it would be emotionally hard on me, but that I wanted to do this.

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

000001

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

000002

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

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

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

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

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

000007

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

I was asked to look at the names and tell him if I knew any of the people. I said no not personally. Butler then said so you do recognize some of the names. I said a few I believe are names of law enforcement officers. He asked how I knew these names. I said having lived here all my life I'd seen the names in the news ect. At the end of questioning Mr. Butler said you seem like a nice caring woman & this juror is accepted. Now it was Mr. Groff's turn. He got out of his chair & smiled at me and walked within a few feet of me. He said I too have read your statements in the questionaire & only recently was given the backside where you wrote your situation with Mr. Konenkamp in 1996 & your like & respect for

000009

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

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

One other thing Groff asked me was if I was on the jury and we gave the death sentence if people got upset with me and said things like how could you? Would you be able to handle that? I said I don't see that as a problem, they have their opinion and I have mine.

000052

are under oath + that you cannot discuss this case with anyone, read newspaper accounts of this case or TV news pertaining to this case. He said can you promise me this. I said yes I will do as you ask. He then said if for some reason ~~you~~ we are unable to get in touch with you; if you don't hear from us by noon Tues. I was to call them. After I left the court house I had mixed feelings. My heart finally started slowing down after 10 minutes or so. I have a strong feeling I will be chosen for the final 12 voting jurors. Four will be alternates who will hear all the evidence but will not vote unless one of the 12 cannot continue w/ the trial.

←

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

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

Day 1 Jan. 15, 1993 The Trial

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

000006

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

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

We were given pencils & notepads to take notes if we wished. I liked the idea & I wrote down who testified & for how long, made notes of what they said and wrote each exhibit # and what it was. In the morning we heard testimony from 3 police officers who were 1st on the scene. We went to lunch at 11:40 till 1:10. During lunch some of us went to Hardees & got to know each other a little bit.

000098

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

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

000080

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

the bottoms of the shoes to note the patter. Alot of importance was placed on bloodied footprints left at the scene. Later if we need we can compare the prints w/ the shoes but I imagine experts at the FBI lab will have made their own conclusions. It was now 2:30 and I was surprised the judge adjourned for the day. After just having seen profound pictures of the victims I guess it was a good place to stop. Since we aren't to discuss the case verbally, it would have been hard to have taken a break and not shown some emotion. I went straight home and realized how tense I must have been as I had a terrible headache and was very tired from my lack of sleep. In

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

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

000083

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

Day 2 Jan. 19, 1993

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

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

I don't think the prosecution has much more to present. I would think Wed would wrap it up for them. The defense for Rhines has been very quiet. I'm sure they have witnesses but if they don't, the jury could start deliberations by Friday. It was a long day even though we were released by 4:00 P.M. The jurors continue to get to know each other & are getting along pretty well. So far defense has very briefly cross examined maybe 4 people. I keep wondering what their game plan is. They reserved the right to an opening statement. I guess I'll know soon.