

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	Case No. 97-1474
)	
Plaintiff,)	
)	
v.)	
)	
BOBBY T. SHEPPARD,)	
)	
Defendant.	)	<u>THIS IS A DEATH PENALTY CASE</u>

**Defendant Sheppard's Memorandum in Opposition to
the State's Motion to Set Execution Date**

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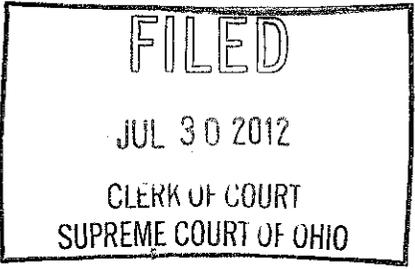
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I. Introduction

Defendant Bobby Sheppard hereby opposes the State's motion to set an execution date or, alternatively, requests that this Court hold the motion in abeyance. Sheppard's federal habeas proceedings are not concluded, contrary to the State's assertion. Instead, Sheppard has a motion pending before the federal district court to reopen his case following the Supreme Court of the United States' decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Sheppard's circumstances present the exact scenario the Supreme Court found troubling in *Martinez*; that, due to ineffective assistance of counsel, no court would ever address the merits of Sheppard's claim. Indeed, Sheppard's *Martinez* claim is strong, especially because the evidence in support of his underlying ineffective-assistance-of-trial-counsel claim that has already been developed is compelling. Moreover, Sheppard and the State (in the form of the Warden of Chillicothe Correctional Institution) are also litigating a second-in-time federal habeas petition or a Rule 60(b)(6) motion to reopen his initial petition to add claims related to Ohio's lethal injection execution method. In short, granting the State's motion would be premature and unnecessary.

II. Background: Because of trial counsel's failures, this Court never heard significant evidence that undermined the Court's conclusion that Sheppard could not demonstrate prejudice from egregious, undisputed juror misconduct.

A. State court proceedings

The heart of Sheppard's mitigation phase defense was his severe mental illness, namely that Sheppard suffers from paranoid schizophrenia. He presented expert witness testimony from Dr. Jeffrey Smalldon about the mental illness, including testimony that Sheppard suffers from the illness and an explanation of how the illness manifests. Then, during sentencing phase

deliberations, one of Sheppard’s jurors—Juror Fox—solicited extrinsic evidence about paranoid schizophrenia by asking a woman the juror believed to be a psychologist, Dr. Helen Jones, about the condition. When this misconduct came to light, Juror Fox and Dr. Jones told the trial court that Jones had provided Fox with a brief description and explanation of paranoid schizophrenia and told him that people with paranoid schizophrenia are “not really in touch with reality.” That Juror Fox’s actions constituted egregious misconduct is indisputable. Indeed, every court that has reviewed his case—including this Court—has agreed.

But the trial court found that there was no prejudice from the misconduct. The trial court relied primarily on statements from prosecutors and statements in a sworn affidavit procured from Dr. Jones by the prosecutors to deny Sheppard’s motion for a new trial after the juror misconduct was revealed.¹ According to an affidavit from Dr. Jones which the prosecutors filed

¹ Juror Fox also stated that he was not influenced by the extrinsic evidence when initially questioned by the trial court. The trial court, and subsequently this Court, also relied on those statements from Juror Fox describing the subjective effect of the extrinsic evidence to conclude that there was no prejudice. *See State v. Sheppard*, 84 Ohio St. 3d 230, 233 (1998). But those statements were impermissibly considered, because Ohio Rule of Evidence 606(B), like its Federal Rule counterpart, prohibits inquiry into the subjective effect of extrinsic influences on a jury’s verdict.

This Court cited *Smith v. Phillips*, 455 U.S. 209, 215 (1982), for the proposition that a “court may determine that a juror’s impartiality has remained unaffected based upon that juror’s testimony.” *State v. Sheppard*, 84 Ohio St. 3d 230, 233 (1998). But *Smith* established only that a juror’s testimony about the facts of what occurred may be used as evidence; *Smith* did not establish that a juror’s testimony about the subjective effects or impressions of extrinsic evidence may be considered. *See Rushen v. Spain*, 464 U.S. 114, 121 (1983) (distinguishing the type of juror testimony that is admissible under Fed. Rule 606(b) and *Smith*—*i.e.*, objective evidence about whether extraneous prejudicial information was brought to the juror’s attention, where, when, how, etc.—from the type of juror testimony that is still prohibited, namely any testimony about the subjective effect of the extraneous evidence); *see also Gall v. Parker*, 231 F.3d 265, 333 (6th Cir. 2000), overruled on other grounds in *Bowling v. Parker*, 344 F.3d 487, 501, n.3 (6th Cir. 2003) (“[W]hen a juror testifies as to external evidence, that testimony must be parsed

in opposition to Sheppard's motion for a new trial and motion for resentencing, Dr. Jones had "thoroughly reviewed" the entire transcript of Dr. Smalldon's testimony at the State's request, and Dr. Jones had determined that everything she told Fox had been "totally consistent" with, and did not "contradict[] anything" in Dr. Smalldon's testimony. (Jones Aff., Oct. 1, 1995 (attached here as Exhibit 1), App'x A-2.)

For their part, prosecutors repeated Dr. Jones's allegations in their memorandum in opposition to Sheppard's motion for resentencing. (State's Mem. in Opp. to Mot. to Resentence, Oct. 4, 1995 (attached here as Exhibit 2), App'x A-4-A-6.) Moreover, prosecutors made the same representations to the trial court on the record, telling the court that they had given Dr. Jones a transcript of Dr. Smalldon's trial testimony, and that Dr. Jones "totally reviewed the testimony of Doctor Smalldon. Nothing that she told the juror in this case was inconsistent with anything that Doctor Smalldon said. In fact, the little bit that she told Steven Fox was totally consistent with what the defendant's expert said." (Trial Tr. Oct. 6, 1995, 10 (attached here as

(continued...)

of all references regarding the effect of that information on the juror's mental processes or the jury's deliberations.") (citation and internal quotation marks omitted); *Sassounian v. Roe*, 230 F.3d 1097, 1109 (9th Cir. 2000) (explaining that a "long line of precedent distinguishes between juror testimony about the consideration of extrinsic evidence, which may be considered by a reviewing court, and juror testimony about the subjective effect of evidence on the particular juror, which may not. See, e.g., *Rodriguez [v. Marshall]*, 125 F.3d [739], 744 [(9th Cir. 1997)]; *Dickson v. Sullivan*, 849 F.2d 403, 406 (9th Cir. 1988) ('the question of prejudice is an objective, rather than a subjective, one'); *United States v. Bagnariol*, 665 F.2d 877, 884-85 (9th Cir. 1981) ('Jurors may testify regarding extraneous prejudicial information or improper outside influences. They may not be questioned about the deliberative process or subjective effects of extraneous information, nor can such information be considered by the trial or appellate courts.');

Rushen v. Spain, 464 U.S. 114, 121 n.5 [] (1983); *Mattox v. United States*, 146 U.S. 140, 149, [] (1892)"). But as these cases along with Federal Rule of Evidence 606(b) and Ohio Rule of Evidence 606(B) make clear, such subjective evidence is flatly prohibited.

Exhibit 3), App'x A-10.) The State continued: "In effect, Judge, this juror, if anything, was seeking for some type of confirmation of what this defense expert was saying was true. If anyone has been prejudiced by this misconduct, it was the State because we have this expert coming in here for the defense that apparently this juror, for some reason, wanted to verify what he was saying. He turned to someone he knew, trusted, this Helen Jones." (*Id.* at 10-11, App'x A-10.) The State concluded: "She basically told him the same thing this expert was saying. So, in effect, if anyone was prejudiced by this contact and by this misconduct, it was the State of Ohio." (*Id.* at 11, App'x A-10.)

Upon consideration of Dr. Jones's affidavit and the prosecutors' arguments, the trial court concluded there could not have been any prejudice to Sheppard, because Jones's evidence could have only bolstered Sheppard's defense. (*Id.* at 13-14, App'x A-11.) Accordingly, the trial court denied Sheppard's motions for a new trial and for resentencing. (Entry Overruling Motion for New Trial, Oct. 10, 1995 (attached here as Exhibit 4), App'x A-13; Entry Overruling Motion to Resentence Defendant to Life Imprisonment, Oct. 10, 1995 (attached here as Exhibit 5), App'x A-15.)

This Court subsequently relied on the same evidence to likewise conclude that Sheppard could not demonstrate prejudice from Fox's misconduct. *State v. Sheppard*, 84 Ohio St. 3d 230, 233 (1998). The Court found that "[i]n fact, the juror's brief conversation clearly did not prejudice appellant because the psychologist's comments reinforced expert defense testimony. Thus, if the juror was influenced at all, he could have been influenced only in appellant's favor Accordingly, appellant has not established that any prejudice resulted from this juror misconduct." *Id.*

B. Federal habeas proceedings

The federal habeas courts “[found] this issue troubling.” *See Sheppard v. Bagley*, No. 1:00-cv-493, Opinion and Order, Doc. No. 131, at 61 (S.D. Ohio Mar. 4, 2009). Indeed, the federal courts agreed with this Court and the trial court that juror misconduct had occurred. *See id.* at 62 (“Every court that has reviewed this issue has concluded that Mr. Fox committed misconduct. The only question that requires discussion is whether Mr. Fox’s misconduct sufficiently prejudiced Petitioner so as to warrant relief.”). But, the federal courts held, this Court’s rejection of Sheppard’s substantive juror misconduct claim did not warrant federal habeas relief under the rigid limitations on federal courts’ power to grant habeas relief prescribed in 28 U.S.C. § 2254(d) and (e). *Id.* at 62-63; *Sheppard v. Bagley*, 657 F.3d 338, 344 (6th Cir. 2011).

But that is not the end of the story, for it turns out that the evidence on which the trial court and this Court denied relief was false and critically incorrect. No state court had the opportunity to consider the proper, compelling evidence, however, because Sheppard’s counsel provided ineffective assistance.

1. *The evidence this Court never heard is disturbing, but stringent habeas rules barred the federal courts from considering it either.*

The federal district court granted Sheppard’s motion for discovery and an evidentiary hearing on his substantive juror misconduct claim. The evidence that was obtained in federal court establishes that Sheppard’s death sentence is unconstitutional.

a. *Dr. Jones’s deposition and hearing testimony directly contradicts the evidence on which this Court based its no-prejudice determination.*

Under oath during a deposition, Dr. Jones testified that she had never reviewed a transcript of a court proceeding in her life. *Sheppard v. Bagley*, No. 1:00-cv-493, Doc. No. 27,

Jones Dep. 61-63, Feb. 25, 2001 (attached here as Exhibit 6), App'x A-32. She also testified in her deposition that she did not recall ever "having been sent 100 pages of testimony" to review, and that she had no recollection of ever reviewing Dr. Smalldon's trial testimony transcript. *Id.* Significantly, Dr. Jones explicitly admitted in sworn testimony during the subsequent federal evidentiary hearing that she did not read or review the hundreds of pages of transcript that contained Dr. Smalldon's mitigation phase testimony, and thus she did not even know what Sheppard's expert had said about paranoid schizophrenia. *Sheppard v. Bagley*, No. 1:00-cv-493, Doc. No. 64, Evid. Hr'g Tr. at 194, 197-98, June 25, 2002 (attached here as Exhibit 7), App'x A-52-53. Dr. Jones also admitted in her deposition testimony that she had "no way of knowing whether, in fact, what [she] said was consistent or inconsistent with anything else . . . that [Fox] was told." Jones Dep., at 68-69, App'x A-33-34.

Dr. Jones's testimony directly contradicts the contents of her sworn affidavit and the on-the-record representations the State provided to the trial court in the State's successful efforts to oppose Sheppard's motions for a new trial and a new sentencing based on juror misconduct.

Dr. Jones also admitted in her federal court testimony that her Ph.D. was in education, not in psychology, and that she worked as a consulting human resources psychologist for businesses and other organizations, not in a field that involved diagnosis or treatment of mental illness. Jones Dep., at 5-11, 15-18, App'x A-18-19, A-20-21; *see also* June 25, 2002 Evid. Hr'g Tr., at 164-65, App'x A-44. She testified that her professional work had focused on "developing people skills," and that her education and professional experience had never included the diagnosis or treatment of mental illness. *Id.* at 29-32, App'x A-24. Dr. Jones testified that she had no professional expertise in mental health disorders, she had never been a licensed

psychologist, did not work in clinical psychology, and that she is not qualified to give a definition of the symptomology of paranoid schizophrenia. June 25, 2002 Evid. Hr'g Tr., at 163-66, App'x A-44-45; Jones Dep., at 18-22, 38, 40, 58, App'x A-21-22, A-26, A-31. Dr. Jones even testified that she did not know the symptoms of paranoid schizophrenia. *Id.* at 175, 179, App'x A-47-48; Jones Dep., at 34-36, 47, App'x A-25, A-28. In addition, Dr. Jones testified that she had told Juror Fox that paranoid schizophrenia was a communication disorder and that those suffering from the illness experience difficulties in communication, and that they are out of "touch with reality." *Id.* at 170-71, App'x A-46; *see also* Jones Dep., at 45, 49, App'x A-28-299. Dr. Jones further admitted that the information she gave Fox was not based on the definition of "paranoid schizophrenia" as that disorder is explained in any clinically appropriate reference book such as the DSM-IV; instead, Dr. Jones looked up the definitions of "paranoia" and "schizophrenia" in Webster's dictionary, *id.* at 167-70, App'x A-45-46, Jones Dep., at 45-47, 49, App'x A-28-29, and gave Fox those two separate definitions. But the combined definitions of "paranoia" and "schizophrenia" do not equal the definition for "paranoid schizophrenia." Indeed, Dr. Jones admitted that the information she gave Fox "very well" could have been misleading. Jones Dep., at 51, 54-55, App'x A-29-30.

Thus, Dr. Jones gave Fox a critically incorrect definition and description of the symptoms one who suffers from paranoid schizophrenia would exhibit. Dr. Jones's description, when combined with the prosecutor's egregious comments about Sheppard's behavior during trial and

on the videotape recording of the crime, would have led one to believe that Sheppard did not suffer from paranoid schizophrenia.²

- b. *Dr. Smalldon's testimony and affidavit demonstrate why the evidence Dr. Jones gave to Fox was so prejudicial to Sheppard.*

Dr. Smalldon signed a sworn affidavit that was filed in federal court in support of Sheppard's motion for an evidentiary hearing. *Sheppard v. Bagley*, No. 1:00-cv-493, Doc. No. 30, Ex. 1, Smalldon Aff., June 15, 2000 (attached here as Exhibit 8), App'x A-56-58. Dr. Smalldon explained in his affidavit that Dr. Jones's information given to Fox "grossly distorts both the clinical picture of Paranoid Schizophrenia and what I had to say about the disorder during my testimony." *Id.*, at ¶ 6, 8, 11, App'x A-57-58. Dr. Smalldon explained why Dr. Jones's information was so misleading: "Telling juror Fox that someone with Paranoid Schizophrenia is 'not really in touch with reality' was erroneous and very misleading because it played into the popular stereotype — accepted as 'true' by many laypeople — that individuals diagnosed with schizophrenia act in a very disorganized and outwardly bizarre manner." *Id.* at ¶ 9, App'x A-57-58. Dr. Smalldon further explained why Dr. Jones's erroneous information was so prejudicial to Sheppard: "Since the Bobby Sheppard that this juror saw on the crime scene videotape was not in any obvious way 'out of touch with reality,' juror Fox could reasonably have inferred from his working definition of Paranoid Schizophrenia that the defendant was not really mentally ill." *Id.*

² It is undisputed today that Sheppard suffers from schizophrenia; he receives treatment for the disorder from the Ohio Department of Rehabilitation and Corrections, and has for years.

Dr. Smalldon also testified in the federal evidentiary hearing, explaining from the witness stand why the information Dr. Jones gave to Fox was so critically incorrect and harmful to Sheppard. Dr. Smalldon testified that Jones's description of paranoid schizophrenia as a communication disorder was incorrect, *Sheppard v. Bagley*, No. 1:00-cv-493, Doc. No. 84, Evid. Hr'g Tr. 20, June 5, 2003 (attached here as Exhibit 9), App'x A-64, and inconsistent with his testimony, and that using the phrase "out of touch with reality" to describe paranoid schizophrenia did not comport with the clinical reality, *id.* at 24-26, App'x A-65-66. He explained, "the very rigidly held false beliefs that are typically part of the inner life of someone with paranoid schizophrenia" "are not evident in relatively superficial interactions" and that, in his opinion, to say someone is "out of touch with reality" "implies a very different kind of" behavioral presentation "than what one typically sees with paranoid schizophrenia." *Id.* at 26, App'x A-66. He also stated that, in his professional opinion, Sheppard did not suffer from a communication disorder, *id.* at 38, App'x A-69, and testified that paranoid schizophrenics are often "unusually intelligent" and "very capable of engaging" in "planful sequential behavior," *id.* at 47, App'x A-71.

- c. *Juror Fox's testimony confirms that Dr. Jones gave him critically wrong information about paranoid schizophrenia, and, although inadmissible as to the subjective effect of the misconduct, contradicts his (inadmissible) statements to the trial court on which this Court found no prejudice.*

Juror Fox's testimony during the federal habeas proceedings also contradicted his state-court responses that he was not subjectively affected by Dr. Jones's (incorrect) information. He testified in the evidentiary hearing and at his deposition that he might not have voted for death if Jones had given him a definition that indicated Sheppard was paranoid schizophrenic. *Sheppard v. Bagley*, No. 1:00-cv-493, Doc. No. 63, Evid. Hr'g Tr. 135, June 24, 2002 (attached here as

Exhibit 10), App'x A-77; *id.*, Doc. No. 27, Fox. Dep., 36-37, Feb. 5, 2001 (attached here as Exhibit 11), App'x A-88-89, (“Q: If Dr. Jones had said something to you that would have led you to believe that in fact Bobby Sheppard was paranoid schizophrenic, do you agree with me you wouldn't have sentenced him to die? A: That's a possibility, yet.”) Directly contrary to the representations the prosecution made to the trial court, Dr. Jones's opinion allowed Fox to confirm that Sheppard did *not* suffer from paranoid schizophrenia, and this made it “easier” for him “to vote for death.” *Id.* at 137-38, App'x A-78; *see also* Fox Dep., at 15-19, 25-27, 29-32, App'x A-83-84, A-86-87 (admitting that “there may have been some small amount of doubt” about whether Sheppard suffered from paranoid schizophrenia “that I may have had at the time” of the call to Dr. Jones).

Fox also testified that Dr. Jones's information “influenced” his verdict, and that it “must have” “contributed to” his vote. *Id.*, at 137-38, App'x A-78; *see also* Fox Dep., at 33-35, App'x A-87-88 (admitting that Jones's information “was like the straw, I guess, you know, that maybe put me, you know, on the path to say I feel that, you know, what I'm about to do is right,” and that “it had some influence”); *id.* at 39, App'x A-89 (“It had to have some influence . . .”). Fox also admitted that “There may have been some doubt in mind” as to Dr. Smalldon's testimony about paranoid schizophrenia was. Fox Dep. at 35, App'x A-88. Fox's testimony also contradicted Dr. Jones's affidavit, as he admitted that the information Jones gave him “wasn't an explanation that [he was] given in trial.” *Id.*, at 14, App'x A-83. Fox also testified that Dr. Jones explained to him that someone with paranoid schizophrenia “doesn't have a grasp of reality,” *id.*, at 12-13, 41, App'x A-82-83, and that, to Fox, that meant someone who doesn't “understand what's going on around them, what they're doing,” *id.*, at 13-14, App'x A-83.

The prejudice to Sheppard from that definition of paranoid schizophrenia is glaring, especially when juxtaposed with the prosecution's ignorant and misleading characterizations of Sheppard as somehow faking his mental illness. Fox admitted as much, testifying that after his conversation with Dr. Jones, "I guess at that point I decided, you know, he did have a grasp on reality, you know, he did understand." Fox. Dep., at 41, App'x A-90.

Of course, Juror Fox's federal court testimony about the subjective effect of the extrinsic evidence should be inadmissible for the same reasons Fox's statements to the trial court are inadmissible, *see* note 1 above, above, and his subjective-effect testimony is thus irrelevant to determining whether Sheppard's verdict was prejudiced by the extrinsic evidence.

- d. *The Sixth Circuit held that the federal courts could not consider any of this evidence in reviewing Sheppard's substantive jury misconduct claim.*

Although this compelling and disturbing new evidence directly contradicted key aspects of the evidence supporting this Court's no-prejudice determination, the Sixth Circuit ultimately held that the federal courts were prohibited from considering any of this evidence in reviewing Sheppard's substantive jury misconduct claim, because Sheppard's counsel had not been diligent in developing and presenting it in state court. *Sheppard v. Bagley*, 657 F.3d 338, 343-44 (6th Cir. 2011) (citing § 2254(e)(2)).

2. *The federal courts did not consider the merits of Sheppard's ineffective-assistance-of-trial-counsel claim, finding it procedurally defaulted after Sheppard's initial-review collateral review counsel failed to present the IAC claim to the state courts.*

Significantly, although the federal courts adjudicated Sheppard's substantive juror misconduct claim, they never considered the merits of Sheppard's IAC claim related to counsel's failure to present the evidence of prejudice to the state courts. Instead, they found that claim

procedurally defaulted. *See Sheppard v. Bagley*, No. 1:00-cv-493, Report and Recommendation, Doc. No. 94, at 85, 89 (S.D. Ohio June 1, 2004); Opinion and Order, Doc. No. 131, at 67.

Sheppard raised a claim that his counsel provided ineffective assistance for failing to investigate and present evidence in support of his motions in his second petition for state post-conviction relief. But the state trial court refused to consider the merits of this claim because it was raised in a second post-conviction petition that did not meet the stringent statutory requirements for a successive petition, because it was untimely, and because ineffective assistance of post-conviction counsel was not a cognizable claim under Ohio law. The state appellate court affirmed that holding on appeal, *State v. Sheppard*, No. C-000665, 2001 WL 331936 at *2 (Ohio App. 1st Dist. April 6, 2001), and this Court declined review, *State v. Sheppard*, 92 Ohio St. 3d 1445 (2001).

Additionally, Sheppard was represented on direct appeal by the same counsel who litigated his motions for a new trial and resentencing in the trial court, and that counsel failed to allege his own ineffectiveness. *See Sheppard v. Bagley*, No. 1:00-cv-493, Pet. Sheppard's Mot. for Relief From Judgment Under Rule 60 to Allow Reconsideration of One Portion of Ground for Relief Nine in Light of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (the "*Martinez* motion"), Doc. No. 150, PageID 926 (attached here as Exhibit 12), App'x A-92-144; Pet. Sheppard's Mem. in Reply to the Warden's Mem. in Opp. to Sheppard's June 15, 2012 Mot. for Relief From Judgment (the "Reply memo"), Doc. No. 155, PageID 967-70 (attached here as Exhibit 13), App'x A-146-65. Sheppard's later-appointed counsel failed to raise in an application to reopen Sheppard's direct appeal the underlying IAC claim or a claim for ineffective-assistance-of-appellate-counsel for failing to raise the IAC claim. Consequently, to the extent that it could

have been, the underlying IAC claim was never presented to this Court in direct appeal proceedings or in an application to reopen direct appeal.

Thus, this Court was never able to hear the evidence that disproves the factual findings upon which it denied relief on Sheppard's substantive juror misconduct claim in Sheppard's direct appeal. Nor was this Court ever presented with this evidence in the context of adjudicating Sheppard's IAC claim on the merits.

Because the state courts never considered the IAC claim and rejected it on a procedural bar, the federal district court found Sheppard's IAC claim procedurally defaulted in his habeas proceedings, without any excusing cause, and denied it accordingly. *See Sheppard v. Bagley*, No. 1:00-cv-493, R&R, Doc. No. 94, at 85, 89; Opinion and Order, Doc. No. 131, at 67.

3. *The previously well-settled law that precluded the district court from finding sufficient cause to excuse the default of Sheppard's IAC claim based on the ineffective assistance of initial-review collateral proceedings counsel has now changed following Martinez.*

Responsibility for the procedural default of Sheppard's IAC claim lies directly with his state post-conviction counsel and/or his *Murnahan* counsel. But at the time of the district court's procedural default ruling, the ineffective assistance of initial-review collateral proceedings counsel was of no effect for federal habeas proceedings, and therefore could not serve as sufficient cause to excuse procedural default. *See Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991); *Byrd v. Collins*, 209 F.3d 486, 516 (6th Cir. 2000) (explaining that ineffective assistance of post-conviction counsel is "clearly not a sufficient ground" for cause to excuse procedural default, because "the Supreme Court has held that ineffective assistance of post-conviction counsel cannot constitute 'cause'"); *Ritchie v. Eberhart*, 11 F.3d 587, 592 (6th Cir. 1993) (explaining what could constitute cause sufficient to excuse procedural default, and that *Coleman* "rejected, flat out, an argument that 'where there is no constitutional right to counsel . . . it is

enough that a petitioner demonstrate that his attorney's conduct would meet the *Strickland* standard, even though no independent Sixth Amendment claim is possible"); *Neal v. Bowlen*, No. 94-5765, 1995 U.S. App. LEXIS 4821, *7 (6th Cir. Mar. 9, 1995) (holding that a state prisoner "cannot establish cause based on alleged ineffective assistance of counsel received in state post-conviction proceedings as there is simply no constitutional right to counsel in such proceedings") (citation omitted); *Davie v. Mitchell*, 291 F. Supp.2d 573, 588 n.1 (N.D. Ohio 2003) ("Ineffective assistance of post-conviction counsel cannot be asserted as cause for a default attributable to such counsel) (citing *Coleman*, 501 U.S. at 755-57).

But that has changed. *Martinez* wrought a sea-change to that well-settled law by holding that the ineffective assistance of initial-review collateral proceedings counsel could serve to excuse procedural default when the petitioner raised claims of ineffective assistance of trial counsel. *Martinez*, 132 S. Ct. at 1315 (holding that "it is necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default" and that *Martinez* "qualifies *Coleman* by recognizing a narrow exception" to the rule). The fundamental concern animating the *Martinez* Court's holding is that "[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." *Id.* at 1316. Furthermore, "if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." *Id.*

- 4. *Martinez is directly applicable to Sheppard's IAC claim, and his Martinez claim is compelling.***

The facts of Sheppard's case present the exact concerns that animated the United States Supreme Court's holding in *Martinez*. Due to his initial-review collateral proceedings counsel's failures, the state courts never heard Sheppard's IAC claim related to Juror Fox's misconduct in seeking out and injecting prejudicial extrinsic evidence into the sentencing deliberations. Nor did any federal court consider the claim, because it was deemed procedurally defaulted, and ineffective assistance of initial-review collateral proceedings counsel did not, at that time, excuse procedural default. Thus, no court has ever considered the merits of Sheppard's claim that his trial counsel provided ineffective assistance by failing to develop and present evidence in support of his motions for a new trial and resentencing.

Moreover, the evidence that has already been developed—but deemed unable to be considered in the context of Sheppard's substantive juror misconduct claim by the Sixth Circuit—vividly demonstrates that Sheppard's IAC claim is compelling. *See Sheppard v. Bagley*, No. 1:00-cv-493, Pet. Sheppard's *Martinez* Mot., Doc. No. 150, at PageID 921-37, (Exhibit 12), App'x A-122-38. His counsel had an erroneous understanding of the law governing extrinsic evidence/juror misconduct claims. Counsel presented no evidence beyond evidence that established that the jury had been exposed to extrinsic evidence. Counsel believed that, having provided that evidence, a presumption of prejudice arose which the state bore the burden to disprove and which entitled Sheppard to relief without any further evidentiary showing by Sheppard. By failing to present any testimonial or affidavit evidence to demonstrate prejudice from the juror misconduct, however, counsel doomed Sheppard's motions to fail.

The evidence now demonstrates that the trial court's denial of Sheppard's juror misconduct claim, and this Court's eventual affirmance of that ruling, was predicated on

demonstrably incorrect factual findings and representations by the prosecutor and Dr. Jones. Had the trial court been aware of the evidence Sheppard's counsel failed to present, it is reasonably likely that the court would have found that Sheppard had demonstrated prejudice from the undisputed juror misconduct, thus undermining confidence in Sheppard's death sentence verdict.

III. This Court should deny the State's motion or hold it in abeyance.

Of course, Sheppard's IAC claim is not before this Court, so Sheppard provides this information only as background for the Court's consideration of the State's motion.³ Instead, the claim is part of Sheppard's habeas proceedings. The Supreme Court of the United States did not decide *Martinez* until after the Sixth Circuit had issued its opinion in Sheppard's habeas case. And, before the Sixth Circuit's mandate issued, Sheppard filed a motion under Federal Rule of Civil Procedure 60(b)(6) seeking to reopen his habeas case on the basis of a change in law following *Martinez*. See generally *Sheppard v. Bagley*, No. 1:00-cv-493, Pet. Sheppard's *Martinez* Mot., Doc. No. 150 (Exhibit 12), App'x A-92-144. That Rule 60(b) motion has been briefed and is now ripe for the district court's review. See *id.*, Warden's Mem. in Opp. to Sheppard's June 15, 2012 Mot. for Relief from Judgment, Doc. No. 151 (attached here as Exhibit

³ For this reason, Sheppard has selected some of the most pertinent materials from state and federal proceedings to include as exhibits to assist this Court in reviewing this background information. Should the Court request to review copies of any additional materials not already attached as exhibits to this memorandum, however, Sheppard will provide them.

14), App'x A-167-77; Pet. Sheppard's Reply Mem., Doc. No. 155 (Exhibit 13), App'x A-146-65.

If Sheppard prevails on his motion, litigation on the merits of his IAC claim will proceed accordingly. And, as briefly explained above and in Sheppard's *Martinez* motion and briefing, Sheppard will likely prevail in light of counsel's blatantly deficient performance and the compelling evidence never presented because of counsel's deficient performance that, at the very least, undermines confidence in Sheppard's death penalty verdict.

The State only obliquely references Sheppard's *Martinez* motion by asserting that "Sheppard will likely cite various motions filed by him to reopen his federal habeas corpus proceedings." (State's Mot. to Set Execution Date, at 5.) The "mere pendency" of Sheppard's *Martinez* motion, the State argues, "cannot overcome the State's compelling interests." (*Id.*) But the State's perfunctory reference to Sheppard's "various motions" understates the matter. It is more than the "mere pendency" of Sheppard's *Martinez* motion and his separate Rule 60(b)(6) motion that counsels in favor of denying or holding in abeyance the State's motion at this time; it is the distinct likelihood that Sheppard will prevail on his habeas claim or claims, thus obviating the need for this Court to set an execution date for Sheppard at all. The State's reference to Sheppard's "various motions" also fails to acknowledge that Sheppard has more than "motions" pending in the federal district court. Sheppard also has a second-in-time habeas petition pending. *Sheppard v. Robinson*, No. 1:12-cv-198, S.D. Ohio. The parties are actively litigating these issues at this time. *See id.*, Report and Recommendation on Remanded Issue, Doc. No. 19 (S.D. Ohio July 3, 2012); Warden's Objections, Doc. No. 21; Sheppard's Response, Doc. No. 26. Hence, setting an execution date for Sheppard would be premature.

Additionally, while the State's interest in finality may be compelling, the interests of fundamental fairness and justice at stake in Sheppard's case outweigh any interest in finality. *See Maples v. Thomas*, 132 S. Ct. 912, 927 (2012) (acknowledging the state's interests in finality and comity, but explaining that "fundamental fairness remains the central concern of the writ of habeas corpus") (internal brackets omitted) (quoting *Dretke v. Haley*, 541 U.S. 386, 393 (2004)). And any prejudice to the State resulting from denying the motion or holding it in abeyance is minimal at worst, in light of the myriad execution dates already scheduled through January 16, 2014.

IV. Conclusion

Because Sheppard's federal habeas proceedings are not completed, contrary to the State's assertions, and because a strong likelihood exists that Sheppard will prevail on his *Martinez* motion and his subsequent habeas litigation, obviating the need to set an execution date at all, this Court should deny the State's motion to set an execution date or, alternatively, hold the motion in abeyance.

Respectfully submitted,


/s/ Allen L. Bohnert

Allen L. Bohnert (0081544)

Assistant Federal Public Defender
Counsel of Record for Defendant Sheppard

/s/ Carol A. Wright

Carol A. Wright (0029782)

Assistant Federal Public Defender
CHU Supervising Attorney
Co-Counsel for Defendant Sheppard

/s/ Erin Gallagher Barnhart

Erin Gallagher Barnhart (0079681)

Assistant Federal Public Defender
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Erin_Barnhart@fd.org

Certificate of Service

I hereby certify that on July 30, 2012, a copy of the foregoing was sent via first class, United States mail, to each of: Joseph T. Deters and Ronald W. Springman, Jr. 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, Counsel for Plaintiff State of Ohio.

/s/ Allen L. Bohnert

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Counsel of Record for Defendant Sheppard

Exhibit 1

Exhibit 1

COURT OF COMMON PLEAS
CRIMINAL DIVISION
HAMILTON COUNTY, OHIO

STATE OF OHIO : CASE NO. B9405527
(Judge Crush)

vs. :

BOBBY TERRELL SHEPPHARD : AFFIDAVIT IN RESPONSE TO
MOTION FOR NEW TRIAL

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

HELEN JONES, being first duly cautioned and sworn, hereby state the following:

I have thoroughly reviewed the transcript of the testimony of Doctor Jeffrey Smalldon given at the trial of Bobby Terrell Shepphard, and attached as State's Exhibit 1.

The brief explanation I gave Mr. Fox of paranoid schizophrenia was totally consistent with the testimony of Dr. Smalldon.

Although I gave Mr. Fox very little information about paranoid schizophrenia, nothing I told him contradicted anything testified to by Dr. Jeffrey Smalldon.

Further affiant sayeth naught.

FILED
OCT 11 1995
CLERK
HAMILTON


Helen Jones

Sworn to and subscribed in my presence this 1 day of October, 1995.


Notary Public



MARK E. PIEPMEIER, Attorney at Law
NOTARY PUBLIC - STATE OF OHIO
My Commission has no expiration date. Section 147.03 O.R.C.

(158)

Exhibit 2

Exhibit 2

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

STATE OF OHIO : NO. B9405527
Plaintiff : (Judge Crush)
vs. : MEMORANDUM IN OPPOSITION TO
MOTION TO RESENTENCE
BOBBY TERRELL SHEPPHARD : DEFENDANT TO LIFE
Defendant : IMPRISONMENT

Now comes the undersigned who moves the Court, on behalf of the State of Ohio, to overrule the motion to resentence the defendant to life imprisonment filed in the above captioned case.

The first part of the defendant's motion is basically a rehash of the already filed motion for new trial. As previously stated, to prevail at a motion for new trial, the defendant must show that the matters he raised in his motion for new trial "materially" affected his trial. "Materiality" means that, but for the error complained of, there is a reasonable likelihood that the outcome of the trial would have been different. *State v. Johnston*, 39 Ohio St. 3d 48 (1988). For example, if a defendant claims error in the denial of a continuance which he requested to seek new evidence, he must demonstrate what that evidence would be, and that with it the outcome of the trial would probably have been different.

The defendant argues that misconduct by juror Stephen Fox influenced his decision to impose the death penalty on defendant. The "evidence" presented by the defendant contradicts such a showing. Fox indicates he did not discuss what he had heard with any other jurors, that it did not influence his decision, and that he did not

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HAMILTON COUNTY
CLERK

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learn anything new. He also testified what he heard did not make him favor the prosecution, and that he would not have come to a different conclusion had he not talked to the outsider.

In response to the affidavit of Helen Jones filed by the defense, the State has also filed an affidavit wherein Ms. Jones indicates nothing she told Fox differed from what he heard in Court. Thus this prong of the defendant's attack in the new trial request, along with his motion to resentence, fails.

The second argument offered by the defense to resentence is an appellate issue alleging the Court improperly charged the jury and allowed them to consider two specifications that should have been merged. The defendant argues *State v. Cooley* (1989), 46 Ohio St. 3d 20, to support this proposition. The *Cooley* decision held the specifications in that case should have been merged as they were committed with the same animus. There has been no such finding here. In fact, defendant Sheppard by his own statement admitted after the robbery was complete, he decided to shoot his victim as he feared he might recognize him. Further, the *Cooley* court did not reverse for this decision by the trial court, finding such error not to be plain error.

The final prong of the defendant's argument finds defense counsel, in effect, overruling the recent decision by the Supreme Court of Ohio in *State v. Gumm* (1995), 73 Ohio St. 3d 413. The *Gumm* decision was a unanimous decision wherein the Supreme Court held proper the same conduct the defendant accuses this Court of in the instant case. For defense counsel to argue that the "Supreme Court's fatally fanciful decision ... is an ex post facto violation of the

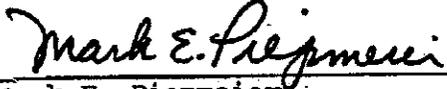
worst sort" is both troubling and misleading. Reading the defense memorandum would lead one to believe the Gumm decision supports his argument. Like it or not, defense counsel, prosecution and the Court are bound by the decisions of the Supreme Court. The decision in Gumm adds nothing to the defense argument.

WHEREFORE, Counsel for the State of Ohio respectfully requests a denial of the motion to resentence the defendant to life imprisonment filed herein.



M a r k E . P i e p m e i e r
Assistant Prosecuting Attorney

I hereby certify a copy of the foregoing memorandum was served upon Counsel for the Defendant by Ordinary Mail this 4 day of October, 1995.



Mark E. Piepmeier
Assistant Prosecuting Attorney
914 Main Street
Cincinnati, Ohio 45202
632-8534

Exhibit 3

Exhibit 3

RECEIVED

FILED

COURT OF COMMON PLEAS

COURT OF APPEALS

JUN 21 1996

JUN 21 1996

HAMILTON COUNTY, OHIO

BY THE COURT OF APPEALS

JAMES OSSELL
CLERK OF COURTS
HAMILTON COUNTY

STATE OF OHIO,

App. No. C-95-0402

PLAINTIFF,

C-95-0744

v.

Case No. B-94-5527

BOBBY TERRELL SHEPPARD,

DEFENDANT.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

ON BEHALF OF THE PROSECUTION:

MARK E. PIEPMEIER, ESQ.

ON BEHALF OF THE DEFENDANT:

H. FRED HOEFLER, ESQ.

BE IT REMEMBERED that upon the hearing of this cause on the dates hereinafter indicated, before the Honorable Thomas H. Crush, one of the said judges of the Hamilton County Common Pleas Court, the following proceedings were had.

case has been remanded here by the Court of Appeals, I wanted to raise two other points while this Court had jurisdiction to consider them, not only to preclude any allegation later on that it was waived by not raising it, but also to make the record on it so that the Court of Appeals can consider it all in one appeal.

The second prong being that the error was committed in not merging two of the specifications, and the third point being that the entire death penalty statute is now unconstitutional in light of the interpretation by the Supreme Court of State v. Gumm, which I don't care to argue unless you have a question. It's all set forth in the memorandum.

THE COURT: No.

MR. HOEFLER: You're not about to reverse the Supreme Court of Ohio.

THE COURT: I seldom do that. I did it once. I have never tried it again.

MR. HOEFLER: I would invite you to do it again. I don't expect it. Part of the problem I found that I have in raising the objection in that case is that now I'm bound to do it in every death penalty case until the issue is resolved.

PROCEEDINGS, October 6, 1995

THE COURT: State of Ohio versus Bobby Sheppard. This is a motion for what?

MR. HOEFLER: Judge, two motions, actually. I was appointed by Your Honor, Mr. Stidham also to represent the defendant in the appeal.

THE COURT: It's your motion. Use the podium.

MR. HOEFLER: Thank you.

THE COURT: You better move it over this way. Getting some weird static out of it. I believe that it is partly the location. Try that. Okay.

MR. HOEFLER: Thank you, Judge. Two motions before this Court. Mr. Ranz, who was Mr. Sheppard's trial counsel, filed a motion for new trial. then I filed a motion to re-sentence the defendant to life imprisonment.

Part of the reason for that is that under State v. Fenix, since what happened here that we claim to be error is in the penalty phase, under Fenix, there is no such thing as a new penalty trial, but that life in prison is the proper remedy as opposed to a new trial. So that is the reason for the second motion.

Also, that was necessitated and since the

I also orally move to strike from Juror Fox's testimony at the May 30th hearing which pre-dated the motion for a new trial, I believe that was in chambers, any and all questions and answers with respect to how his contact with Miss Jones affected the deliberations or the verdict of himself or any other --

THE COURT: You want to strike that?

MR. HOEFLER: Yes, Rule 606 B.

THE COURT: And you represent whom now?

MR. HOEFLER: Sheppard.

THE COURT: Well, Sheppard's attorney asked some of the questions.

MR. HOEFLER: Questions that I have a problem with were initially asked by the Court, and then his attorney followed up on this. This is not to say that I ask the entire matter be stricken, but how it affected the verdict in deliberation.

Reason is State v. Lane, which is a decision that I provided the Court from our Court of Appeals. Something similar happened in that case where the bailiff during deliberations injected himself improperly into the matter and the motion for a new trial was filed.

Defense counsel in the course of that sought

1 to inquire of the juror who had testified about
2 what the bailiff had actually done, as to how the
3 bailiff's actions and words and gestures
4 contributed to her verdict and the affect that it
5 had on the deliberation. Prosecutors objected.
6 Trial court sustained that saying that it was not
7 proper, relying upon 606 B that held the trial
8 court was correct. That's not proper evidence
9 here.

10 Conclusion of all this though is that under
11 State v. King, which has been cited, it is
12 presumptively prejudicial when juror misconduct of
13 this sort occurs and it is the burden of the State
14 or the prevailing party to show that it was not
15 prejudicial, yet we get into Lane which is a later
16 case, same Court saying that you can't go into how
17 it affected the jury deliberations or the verdict.

18 Now, that's seemingly ambiguous because how
19 else could the State hope to prove that there was
20 no prejudice and you have got the two opposite
21 cases.

22 Really, the bottom line is you go back to the
23 construction of the statute, Rule 606 B in
24 particular. And 2901.04 A provides that these
25 rules, statutes, et cetera, must be construed most

1 could have found it to exist, but that the
2 aggravating circumstances outweigh the mitigating
3 factors. The weight that's put on that fact by the
4 jurors could not help, by this juror, perhaps
5 others, could not help but be affected by the
6 impropriety that the juror committed.

7 The juror said that at page --

8 THE COURT: Do you want to -- are you going
9 to quote something that you want me to strike?

10 MR. ROEFLE: Well, this part --

11 THE COURT: That's all right. Appellate
12 courts do this.

13 MR. ROEFLE: Well, in a way, I might be a
14 little inconsistent here because Mr. Ranz asked "Can
15 you truthfully say that your conversation with her
16 or your need to call her did or did not enter into
17 your deliberation?" That part, as far as in the
18 deliberation, certainly should be stricken.

19 The juror said that "She didn't tell me
20 anything that I didn't know. I guess that it was
21 something like that I just needed to hear somebody
22 basically confirm what I thought already." So he
23 indicated that he needed this, needed this in order
24 to deliberate which this is not strikeable, and
25 then later, when he was asked whether he discussed

1 strictly against the State and favorably for the
2 accused. Using that rule of construction, I don't
3 think the State has any way out of the horns of
4 this dilemma.

5 If the error that is presumed, yet the State
6 is unable to rebut it, the only really practical
7 way that it can, because Evidence Rule 606 B will
8 not let them ask the juror how did this affect your
9 deliberations, pardon me, how did this affect your
10 verdict.

11 Another factor is that a penalty jury doesn't
12 only make findings of fact as to whether or not the
13 mitigating factors or any mitigating factor exists.
14 Once it decides that one exists, it must weigh the
15 mitigating factors against the aggravating
16 circumstances.

17 I don't know how in the world, when at least
18 the inquiry that was done here could accurately
19 explore the effect that this had on the weighing
20 process.

21 I know that in the sentencing opinion it was
22 concluded that the juror must have concluded that
23 the mitigating factor was not proof, but we
24 respectfully submit that the verdict doesn't
25 necessarily lead to that conclusion because they

1 the testimony with other jurors, really Mr. Ranz
2 used the word "testimony," but I believe that we
3 understood that he means what Doctor Jones told
4 him. He may have. He was vague on that.

5 So there is really no way at this point of
6 measuring the affect that it had anyway even if you
7 do not strike it, and the King case that we cite
8 also, that was cited originally, it is important in
9 that case that the conviction was upheld, but in
10 that case, the impropriety of the juror was caught
11 during deliberations. That was where the foreman
12 of the jury called Mr. Namanworth, asked him about
13 the difference between murder and manslaughter.
14 Once he found out over the weekend, the jury was
15 deliberating, he called the Court immediately and
16 the trial court had the opportunity to set
17 everything straight which was done.

18 In this case, however, the verdict had
19 already been returned by the time that this was
20 discovered. It was after the jury made the death
21 verdict, so to that extent, the affirmance in King
22 cannot be used to uphold the general denial of the
23 motions here.

24 I don't think that I have anything to add.
25 If I may have a moment, I would ask Mr. Ranz a

question.

THE COURT: Are they all your motions?

MR. RANZ: One is his, one is mine. Mr. Hoefle is going to argue both of them, Judge, for the sake of brevity.

THE COURT: All right. Did you argue all motions? Just making sure for the record that was all of them.

MR. HOEFLE: Basically the motion to re-sentence. Motion for a new trial is based upon the same thing. Mr. Ranz wanted me to emphasize that when Juror Fox came in, the Court's request or order, and that it was I think prior to the filing even of the motion for a new trial, was it not? So that motion was not pending at the time.

Basic thrust of the motion for a new trial and the motion that I filed to re-sentence with respect to that issue is the same, basically that there was juror misconduct and that it is presumptively prejudicial error and that 606 B does not permit the prosecution in trying to rebut that presumption into how the juror actually felt about it, what affect that it had on him, what affect that it had on the deliberation of himself and other jurors, what affect that it had on the

was seeking for some type of confirmation of what this defense expert was saying was true. If anyone has been prejudiced by this misconduct, it was the State because we have this expert coming in here for the defense that apparently this juror, for some reason, wanted to verify what he was saying. He turned to someone he knew, trusted, this Helen Jones.

She basically told him the same thing this expert was saying. So, in effect, if anyone was prejudiced by this contact and by this misconduct, it was the State of Ohio.

I have seen no showing by the defense that they were the ones prejudiced by this conduct and, again, I believe that it is their burden to show that not only did this affect the outcome, it materially affected the outcome.

I don't see how you can call this person, this Juror Fox, ask him about this contact and not go the next step, did it affect you. He clearly states absolutely not, that it did nothing to change my opinion. So, in effect, I believe that there was not a showing for a need for a new trial. I ask that you overrule that motion.

As far as the motion to re-sentence, I

verdict. Thank you.

THE COURT: Mr. Prosecutor?

MR. PIEPMELER: Thank you, Your Honor. Your Honor, with regard to the motion for new trial, we will stand by what we said in our response which is it is up to the defense, their burden to show that this misconduct material affected the defendant's rights.

This week, Judge, I filed a response to the affidavit filed by the defense after we had raised the Aliunde rule, the defense filed an affidavit of the psychologist indicating that she, indeed, had contact with this juror, Steven Fox.

I have filed with the Court, and I would like to file today a transcript of the testimony of Doctor Smalldon which I gave to this psychologist, asked her to review it. In response to some questions, I have filed an affidavit wherein she states that she has totally reviewed the testimony of Doctor Smalldon. Nothing that she told the juror in this case was inconsistent with anything that Doctor Smalldon said. In fact, the little bit that she told Steven Fox was totally consistent with what the defendant's expert said.

In effect, Judge, this juror, if anything,

believe that the defense is basically asking this Court to now sit as a Court of Appeals and reverse itself because of an alleged faulty instruction that the Court gave to the jury for alleged improper sentencing that the Court did. I do not believe for one minute that the Court did anything improper in this case.

I do not believe that even if you felt that you did, and I don't think that you do, you would at this point reverse a decision that you made some months ago in this particular case.

I believe that the defense tried to misconstrue the Gumm decision. In that decision, which was unanimous, affirmed, the same position that the Court took in this particular case.

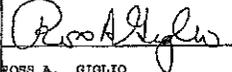
It is defense counsel, Mr. Hoefle, is trying to overrule the Supreme Court in this case and we would ask this Court not to go along with that.

THE COURT: All right. Go ahead.

MR. PIEPMELER: I referred in the affidavit that I filed to State's Number 1, I did give a complete copy of this transcript to Helen Jones, I would like to now file it with the Court of Appeals, this transcript.

THE COURT: All right. Okay.

1 MR. HOEFLE: We have no objection. We'll
 2 accept that representation of Mr. Piepmeier as to
 3 how he did this and that it was accurate.
 4 THE COURT: Okay. Now, just a short
 5 discussion. The Aliunde rule basically, I believe,
 6 that there has to be some outside evidence to
 7 impeach their verdict. Is that what it is,
 8 basically?
 9 MR. PIEPMEIER: Yes.
 10 THE COURT: Well, since we now have outside
 11 evidence to determine what the jury did, what was
 12 wrong, at least in retrospect now with the Court
 13 asking a juror the basis of the decision, you can't
 14 do that unless there is some outside evidence of
 15 the fact.
 16 Now here, the outside evidence came a little
 17 after the conversation, but nonetheless, it seems
 18 to me that you can't have it both ways, either side
 19 can't have it both ways. And if you don't allow
 20 the juror to testify, then the only evidence that
 21 you have regarding how it may have affected the
 22 jury is that testimony of this psychiatrist friend
 23 who said that she didn't tell him anything that he
 24 was not already told. That was stuff that was
 25 favorable to the defendant.

1 CERTIFICATE
 2 I, Ross A. Giglio, the undersigned, an
 3 official court reporter for the Court of Common Pleas,
 4 Hamilton County, Ohio, do hereby certify that at the time
 5 and place stated herein, I recorded in stenotype and
 6 thereafter transcribed into typewriting the within
 7 Transcript of Proceedings, and that the foregoing is a
 8 true, accurate and complete transcription of my said
 9 stenotype notes.
 10 IN WITNESS WHEREOF, I have hereunto set my
 11 hand at Cincinnati, Ohio this 22nd day of March, 1996.
 12 
 13
 14 ROSS A. GIGLIO
 15 OFFICIAL COURT REPORTER
 16 COURT OF COMMON PLEAS
 17 HAMILTON COUNTY, OHIO
 18
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1 If we say that the Aliunde rule doesn't apply
 2 because we have the evidence from the psychiatrist,
 3 we have both her statement which shows that there
 4 was no harm done by what she said. In fact, if
 5 anything, it was a little favorable to the
 6 defendant. Secondly, the juror's own statement, in
 7 addition of which the evidence in the case was
 8 absolutely overwhelming and the crime is absolutely
 9 horrendous. And I will overrule both motions.
 10 MR. PIEPMEIER: Thank you, Judge.
 11 THE COURT: Okay. Thank you.
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Exhibit 4

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

State of Ohio

CASE NO. B 9405527

Plaintiff(s)

Entry overruling
motion for new
trial

-v-

Bobby Terrell Sheppard



Defendant(s)

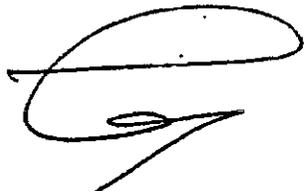
The Court, after having heard arguments of counsel and considered all filings herein, finds the motion for new trial not well taken, and overrules same. All to which defendant excepts.

*Robert J. Perry
Trial Atty. - 1st Dept.*

*Frank J. Kelly
Appellate
Counsel for Defendant*

*Charles A. ...
Trial Atty. for def.*

*Mark E. Pignone
Asst. Prof. Atty. 0006894*



Judge CRUSH

(161)

Exhibit 5

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

State of Ohio

CASE NO. B9405527

Plaintiff(s)

Entry overruling
motion to resentence
defendant to life
imprisonment

-v-

Bobby Terrell Sheppard



Defendant(s)

The Court, having considered all filings and arguments of counsel, finds the defendant's motion to resentence the defendant to life imprisonment not well taken, and hereby overrules same. All to which the defendant, through counsel, excepts.

Mark E. Fegmire
Asst. Proc. Atty. 0006894

Robert J. Perry
Trial Attorney

[Handwritten signature]

[Handwritten signature]
Attorney for Def.

[Handwritten signature]
Judge CRUSH

(162)

Exhibit 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BOBBY T. SHEPPARD,
Petitioner,
vs.
MARGARET BAGLEY, WARDEN,
Respondent.

CASE NO.
C-1-00-493

DEPOSITION OF: HELEN B. JONES, Ph.D.
TAKEN: By the Petitioner
Pursuant to Subpoena
DATE: February 25, 2001
TIME: Commencing at 9:31 a.m.
PLACE: Ace Reporting Services
Sixth Floor
216 East Ninth Street
Cincinnati, Ohio 45202
BEFORE: Linda S. Mullen, APR, RMR
Notary Public - State of Ohio

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I N D E X

HELEN B. JONES, Ph.D. PAGE
Cross-Examination by Mr. Moul 4
Cross-Examination by Mr. Wille 54

EXHIBITS	MARKED	REFERENCED
Sheppard Exhibit 1	17	17
Sheppard Exhibit 2	41	41
Sheppard Exhibit 3	57	57

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2

APPEARANCES:

On behalf of the petitioner:
Jane P. Perry, Esq.
of
Office of the Ohio Public Defender
11th Floor
8 East Long Street
Columbus, Ohio 43215

and
Geoffrey J. Moul, Esq.
of
Murray, Murphy, Moul & Basil LLP
Suite 400
326 South High Street
Columbus, Ohio 43215

On behalf of the respondent:
Charles L. Wille, Esq.
of
Office of the Attorney General
26th Floor
30 East Broad Street
Columbus, Ohio 43215

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DEPOSITION OF HELEN B. JONES, Ph.D.

4

1 HELEN B. JONES, Ph.D.
2 of lawful age, a witness herein, being first duly sworn as
3 hereinafter certified, was examined and deposed as follows:

4 CROSS-EXAMINATION

5 BY MR. MOUL:

6 Q. Dr. Jones, my name is Jeff Moul and I
7 represent Bobby Sheppard. We're here today to take your
8 deposition. Have you ever been deposed before?

9 A. No, I have not.

10 Q. Okay. Could you state your name for the
11 record, please?

12 A. Yeah, Helen B. Jones.

13 Q. Address?

14 A. 10421 Londonridge Court, Cincinnati, Ohio,
15 45242.

16 Q. Just so you understand here, we're just
17 basically going to have a conversation. I want to find out
18 some things about your background and --

19 A. Okay.

20 Q. -- and your conversations with Stephen Fox.
21 Just so you understand how this is going to work, I'll ask
22 you the question. And it may be at the end of my
23 questioning, Mr. Wille will ask you some questions as well.
24 We're going to need verbal responses.

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1 A. Now, what is Mr. Wille's role?
 2 Q. That sort of gets into the process here.
 3 You're not really -- you can ask us questions to the extent
 4 you don't understand my question, let me know.
 5 A. Okay.
 6 Q. But for the most part, we're going to be asking
 7 the questions here.
 8 A. Fine.
 9 Q. And if at any time you need to take a break,
 10 either because you're tired or because you need to use the
 11 restroom, or for whatever reason, please do so. I'll try to
 12 let you finish your answers, please let us try to finish our
 13 questions as well. I assume you're not under any medication
 14 today?
 15 A. No.
 16 Q. Any alcohol?
 17 A. No.
 18 Q. Okay. What is your educational background?
 19 A. I have a bachelor of science in education from
 20 Ohio State University, major in music, minor in mathematics;
 21 I have a master of education from Wittenberg University in
 22 Springfield, Ohio; and I have a Ph.D. from the Ohio State
 23 University, and my major areas were counseling, psychology
 24 and research.

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1 and Johnson seminars that they presented here in Cincinnati
 2 at one time, and just communication seminars that I thought
 3 might be helpful in my corporate work.
 4 Q. Any of that continuing education related to the
 5 field of clinical psychology?
 6 A. No, that was not my intent, to go into clinical
 7 work.
 8 Q. Any of the continuing education related to
 9 schizophrenia?
 10 A. No.
 11 Q. Any of the continuing education related to
 12 mental illness?
 13 A. Only insofar as it would relate to high school
 14 students, maybe anorexia and those types of things.
 15 Q. Okay.
 16 A. Or the sexuality dysfunctioning with Masters
 17 and Johnson.
 18 Q. What is Masters and Johnson?
 19 A. They are not as popular now obviously. One is
 20 now dead, but they were foremost, I guess, experts in -- in
 21 sexual dysfunction.
 22 Q. Maybe I'm showing my age --
 23 A. Yes, you are.
 24 Q. -- not knowing Masters and Johnson?

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1 Q. When did you get your B.S. from OSU?
 2 A. B.S., '56. Master of education was probably
 3 about '76.
 4 Q. Uh-huh.
 5 A. No, I'm sorry, it was before that. It was like
 6 '61, and my Ph.D. in 1974.
 7 Q. Your Ph.D. is in what?
 8 A. It's a Ph.D. actually from the college of arts
 9 and sciences, and I had a concentration in counseling
 10 psychology and research.
 11 Q. Is it a Ph.D. in psychology?
 12 A. No, it's not, it's from the department of
 13 psychology. It's from the arts and science department of
 14 education with a concentration in psychology.
 15 Q. Okay. So it's a Ph.D. in education?
 16 A. Right.
 17 Q. In addition to your B.S. from OSU, master's of
 18 education from Wittenberg --
 19 A. Wittenberg University.
 20 Q. -- Ph.D. from OSU, any other education?
 21 A. Just seminars attended.
 22 Q. And those would be weekly, daily? Are we --
 23 A. Annually. Possibly if a seminar would come
 24 through that I thought would be helpful. I attended Masters

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1 MS. PERRY: I'm sorry to say I know exactly who
 2 you're talking about.
 3 Q. With respect to your higher education, your
 4 formal education at OSU, did you take any courses related to
 5 clinical psychology while at OSU when working on your B.S.?
 6 A. Well, yes -- well, not bachelor of science, no,
 7 no.
 8 Q. Okay. And when working on your master's of
 9 education, did you take any courses that focused on clinical
 10 psychology at Springfield?
 11 A. Well, it would be in areas like the exceptional
 12 child. "exceptional" meaning anything that's deviant.
 13 Q. Could you read that back for me?
 14 (The record was read.)
 15 Q. Okay. You're going to have to give me some
 16 more understanding about what those mean.
 17 A. Okay.
 18 Q. What -- while at Wittenberg --
 19 A. Uh-huh.
 20 Q. -- what courses related to clinical work did
 21 you take that related to the needs of exceptional children?
 22 A. Oh, boy. I guess the word "clinical" kind of
 23 throws me off, because in my high school counseling I did,
 24 it would be counseling, but I wouldn't call it clinical,

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1 because that wasn't my primary role.

2 Q. Okay. Answer this for me. What is clinical
3 psychology?

4 A. Well, to me that would be involved in the
5 diagnosis and treatment of mental illnesses in a clinical
6 setting, not necessarily limited to that, because I did do
7 practicums and, in dealing with a dysfunctional family,
8 drug-related problems. Those would also be considered
9 clinical. But when I use clinical, I mean in terms of
10 diagnosis and treatment of mental illnesses.

11 Q. And what other fields of psychology are there
12 besides clinical psychology?

13 A. There's consulting psychology, social
14 psychology, organizational psychology. I'm trying to
15 think. Well, you can get into music therapy, you can get
16 into art therapy. There's a lot of branches off of
17 counseling psych.

18 Q. Okay. What is consulting psychology?

19 A. That would be working with organizations.

20 Q. What kind of organizations?

21 A. Oh, my. I would say basically business
22 organizations, public organizations, community
23 organizations. I don't know.

24 Q. Is that what you do now?

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1 A. I would say not, no.

2 Q. I'm sorry. Social psychology is?

3 A. Well, this would be just studying trends, group
4 behaviors, mass behaviors, those kinds of things.

5 Q. Okay.

6 A. My background, that's very limited. I just did
7 not find that helpful to what I wanted to do.

8 Q. In organizational psychology, could you tell me
9 a little bit more about that?

10 A. Well, probably it would be a better background
11 in how organizations develop. And I really don't have a
12 strong background in that, although that's not a lot of the
13 things I do now.

14 Q. But again, it doesn't involve the diagnosis and
15 the treatment of mental illness?

16 A. No. If I would suspect that, I would make a
17 referral, which I have done on occasion.

18 Q. Okay. Getting back to your work on your
19 master's at Wittenberg.

20 A. Okay.

21 Q. Did you take any courses relating to the
22 diagnosis or treatment of mental illness?

23 A. No, not as part of the master's.

24 Q. Okay. As part of your Ph.D. studies in

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1 A. Yes. Yes, it is.

2 Q. For whom do you work now?

3 A. I work for myself.

4 Q. Okay. I certainly want to get into that. I
5 guess just to sort of drop back though, it would help me if
6 I understood the language you are using when you talk about
7 consulting psychology, working with organizations and
8 businesses. What kind of substantive information are you
9 providing to the organizations that you're consulting with?

10 A. Probably analysis of their -- well, of their
11 corporation in terms of their culture. And this would
12 include psychological testing, personality testing, seminars
13 that I design specifically for the companies. It might be
14 wherever I would anticipate their needs being or it's
15 obvious where their needs are.

16 Q. Is this more personality testing work?

17 A. I would say it includes that, but it's not my
18 basic function. My basic function is to help them resolve
19 any conflicts they may have in terms of interpersonal kinds
20 of things, human relations issues they're dealing with. And
21 I do use personality testing just to help me diagnose
22 where I think their problems are.

23 Q. Okay. Consulting psychology, though, doesn't
24 involve the diagnosis or treatment of mental illness?

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1 education at Ohio State, did you have the opportunity to
2 take any courses in which you studied the diagnosis or
3 treatment of mental illness?

4 A. Well, yes, yes.

5 Q. Could you tell me what those courses were?

6 A. Well, it would be -- well, I can't think of
7 specific names of the courses, but we did obviously have to
8 have a working knowledge of the different types of problems
9 that we might run into in our work, to be able to at least
10 recognize, make referrals on.

11 I guess abnormal behavior psych or abnormal
12 psych would be as close as I could think of in terms of
13 course title.

14 Q. Is it safe to say that course on abnormal
15 behavior was the only course that you took at OSU that
16 related to the diagnosis of mental illness?

17 A. Well, it wasn't just one three-hour course. It
18 would be several courses in that sequence.

19 Q. By the way, how long was the Ph.D. program?
20 How long did it take you?

21 A. Well, I was working full time, it took me five
22 years.

23 Q. What is the typical?

24 A. Oh, I would say four to five years, unless the

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1 person can really concentrate totally on that, which very
2 few people have that luxury.

3 Q. I know you talked about the series of courses
4 that you took on abnormal behavior. Try to quantify that
5 for me. What are we talking about?

6 A. Well, probably 15 quarter hours at Ohio State.
7 That would be maybe, you know, three five-hour courses and
8 just going through deviant behaviors.

9 Q. Those are -- okay. So essentially, basically,
10 you studied it for a year it sounds like?

11 A. Yes, yes. Enough to be able to recognize in
12 your working with people if -- you know, if you recognize
13 the symptoms and make a referral on to a psychotherapist, or
14 somebody you feel more qualified to handle it. That was not
15 my intent. I didn't really concentrate a lot in that, I was
16 a lot more interested in counseling psych.

17 Q. Other than the one year of course study at OSU
18 for, quote, unquote, abnormal behavior, any other courses
19 during the Ph.D. program on diagnosing mental illness?

20 A. Well, that's basically what psychology is, a
21 studying of human behavior. I mean -- I can't, it's been 25
22 years, I can't tell you exactly what the courses, were but
23 obviously it's studying human behavior.

24 Q. Any clinical -- was any clinical work required

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1 drug addicted people coming in.

2 Q. Is it correct that none of these practicums
3 focused on mental illness, you were developing interpersonal
4 skills?

5 A. Not mental illness, per se. There was some
6 mental illness prevalent in some cases in which I would
7 write that in my report and make a referral on.

8 Q. But the work more focused on sort of
9 counseling, social work type area, is that right?

10 A. Well, I hesitate to use social work because I
11 don't see myself as a social worker. Well, I think in
12 counseling you're constantly going through a diagnosis.
13 There is that procedure, even when I'm doing psychological
14 testing today, I'm always alert for signs of problems. And
15 to say it's without diagnosis would be wrong, because I
16 think it's part of my responsibility to be able to recognize
17 anything that I consider that might be deviant or might be
18 needing additional work.

19 Q. You say you have your own counseling company
20 now -- or excuse me, consulting company?

21 A. Right.

22 Q. H.B. Jones & Associates?

23 A. Yes. I spent the first 26 years in the
24 education field.

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1 as part of the master's program?

2 A. My -- well, not the master's, my Ph.D.

3 Q. Excuse me, Ph.D.

4 A. Yeah, I did practicums, yes. I worked in a
5 mental health center in Springfield, Ohio and I worked in a
6 mental health center in Columbus and I worked for the
7 Association for the Blind, just in terms of testing and
8 diagnosing some problems there, and I worked in a drug
9 addiction center.

10 Q. What did your training -- I mean, I'm getting
11 the impression that it wasn't your objective to seek out and
12 obtain sort of training on diagnosing mental illness, it's
13 more of communications?

14 A. My area, I felt would be stronger in a
15 communications field.

16 Q. And so what mental health center did you work
17 at as part of the practicum?

18 A. I honestly can't recall the names. There was
19 one in Columbus that I did some family counseling and one in
20 Springfield was also family oriented. The Center for the
21 Blind is right -- was on North High Street in Columbus,
22 maybe it still is. The drug addiction center was also there
23 on North High Street. This was the time when methadone was
24 given, and so I was involved in the intake interviews with

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1 Q. Oh-huh.

2 A. So when my daughter got out of college, I
3 decided that I really enjoyed being independent and doing
4 the consulting work and being an entrepreneur.

5 Q. Let's work backwards.

6 A. All right.

7 Q. I'm not good with numbers. So H.B. Jones &
8 Associates, how long have you been out on your own?

9 A. At least 15 years.

10 Q. So that takes us back to 1985 about?

11 A. Yeah.

12 Q. I'm trying to back it up before then.

13 A. Yeah, maybe a little before then, 16, 17 by
14 now.

15 Q. Can you tell me what kind of work you perform
16 as --

17 A. Gosh.

18 Q. I assume you're the principal. It looks like
19 you're the director?

20 A. It's a one person operation, unless I have a
21 very big project, and then I have other people in similar
22 fields to assist me. But basically I work on my own. And
23 my job is to -- I work by referral only, I've never done any
24 advertising. I started out -- my first big projects were

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1 then existing Super X drug stores, and my goal with them was
2 to take women who were basically employees and at the
3 beginning of women's movements, trying to give these people
4 some additional communication skills, demeanor skills, any
5 type of skills that would be beneficial to them that they
6 could be elevated into management positions.

7 Q. Let me ask you this. Are you the only employee
8 of H.B. Jones & Associates?

9 A. Yes.

10 Q. It says you're the director?

11 A. Well, I don't know what else to call it.

12 Owner, sole proprietor didn't sound too good on a business
13 card.

14 Q. And you characterize your consulting work as --
15 or yourself as a human resource consultant?

16 A. Correct.

17 Q. Is that right?

18 A. Correct.

19 Q. That's more, again, corporate counseling?

20 A. Yes.

21 Q. Can I have that marked as Exhibit 1, please?

22 (Sheppard Exhibit 1 was marked for
23 identification.)

24 Q. I'm handing you what's been marked --

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1 counseling for Wright Management. They're a national
2 company that do outplacement work, and part of their work is
3 helping out displaced -- outplaced people determine their
4 talents and abilities and future goals.

5 It involves some testing. It involves a lot of
6 what I will call hand holding and encouragement, almost of a
7 helping these people develop a positive approach to what's
8 happening. And that's where I apply my communication skills
9 and influences.

10 I did -- I've done a lot of that on and off
11 over the years for Wright Association. I also did a
12 two-year program with Procter & Gamble where I handled their
13 education program. They offered a training program for the
14 people that they outplaced, and I worked with these people,
15 counseled with them in terms of what interests they might
16 have and help them -- because of my education background of
17 26 years, would help them identify what further education
18 they might need, then pursue the places where they might get
19 that education, and got approval for their funds and that.

20 Q. So I'm getting the impression you try to help
21 people identify what potential jobs fit their personality?

22 A. With that field, yeah. That's just depending,
23 a part of what I do. I've done corporate culture
24 identification, trying to help organizations determine, you

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1 MR. MOUL: Do you have a copy, by the way?

2 MR. WILLE: Yes, I do.

3 Q. -- what's been marked Sheppard Exhibit 1?

4 A. Yes, that's my business card.

5 Q. Okay. So I understand, you've been a human
6 resource consultant for 15 years?

7 A. Yes.

8 Q. Are you a licensed psychologist?

9 A. No, I did not pursue licensure.

10 Q. I think when we talked before, I got an answer
11 to this question, are you a licensed social worker?

12 A. No, I didn't pursue that area at all.

13 Q. Do social workers have to be licensed in the
14 State of Ohio?

15 A. They can be. I'm working with an organization
16 that has some MSWs, which is master of social work, and I
17 assume they're licensed. And now I think you can get some
18 kind of counseling licensure within the State of Ohio.

19 Q. I certainly don't want you to disclose any real
20 confidences here. But -- and in all honor, can you tell me
21 who some of your clients are now, and just sort of generally
22 the type of work that you're doing so I can get a flavor?

23 A. Okay. Well, let me go back to the last couple
24 of years. I do a lot of outplaced -- outplacement

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1 know, what kind of culture do they have, what's going to
2 help them perpetuate that culture. That means testing of
3 the executive teams, what -- how do they function and what
4 are some of the -- who are some of the people within their
5 organization they may want to consider promoting into higher
6 level positions. And I do that with a lot of testing and
7 just talking with the people involved.

8 I also do employee opinion surveys, help
9 analyze employees' opinions in terms of helping
10 organizations determine -- determining their goals, you
11 know, what direction they may want to go to in the future.
12 So it's a very comprehensive type of thing that I do.

13 Q. But these -- Wright Management, for example,
14 doesn't bring you in to test for mental illness for their
15 employees?

16 A. Not at all, no. If I would -- if I would
17 perceive that, somebody coming in, I would immediately make
18 a referral and have that person tested elsewhere.

19 Q. Right. But that's not the kind of information
20 that the employers are eliciting from you, they're not
21 bringing you in to find out who are employees with mental
22 illness, correct?

23 A. No, not at all. That's never been the focus of
24 my human resources consulting.

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1 Q. Other than the outplacement evaluation and
2 training services that you provide, can you describe what
3 other human resource consulting work you do?

4 A. Well, a lot of team building with that. Again,
5 I look at personality types, and I use the California
6 Psychological Inventory, the Myers-Briggs Type Indicator,
7 Supers Work Values Inventory. I try to determine what are
8 the strengths of the group, what might their weaknesses be,
9 whether it's their organizational skills or whether it's
10 their communications skills, and then work with a group in
11 trying to build a stronger team based on their strengths and
12 weaknesses. That's probably been the focal point the last
13 few years with that type of work.

14 I usually start with a top executive team and
15 help them understand what I'm doing, and then it's with
16 their cooperation and enthusiasm that I usually go to the
17 next level of management.

18 Q. So if I heard you correctly, it sounds like
19 you essentially work on people's organizational skills,
20 correct?

21 A. Yes.

22 Q. And their team building skills?

23 A. Right, and communication skills. I would call
24 on an individual's goals in terms what they may need to

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1 they needed was more maybe the psychological approach in how
2 you deal with non-traditional students returning to school,
3 in terms of just helping them determine career directions,
4 helping them with the psychological aspect, being older
5 returning to school.

6 Q. I certainly want to walk through what your
7 responsibilities were at each of these positions, but if you
8 could sort of help me and provide a road map. It sounds
9 like from 1980 to '85 you worked as the director of
10 counseling at what college?

11 A. Raymond Walters. It's a branch of the
12 University of Cincinnati.

13 Q. And prior -- what was the job immediately
14 preceding that job?

15 A. I was in student services at Indian Hill High
16 School in Cincinnati, was there three years.

17 Q. So it sound like from about 1977 to 1980?

18 A. Yeah. I may be off a year or two on that.

19 Q. What was the job you held immediately preceding
20 your position at Indian Hill? -

21 A. Well, before that -- I didn't think about these
22 dates. I got my Ph.D. in '74, and I took a job with the
23 state department of education, division of guidance and
24 testing. And that basically was to get me away from high

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1 fulfill what their obligations are to that organization.

2 Q. Other than working on individual organizational
3 skills, team building skills and communication skills, is
4 there any other service that you're providing to the
5 organization?

6 A. That pretty much covers a lot of ground,
7 actually. I may do in-depth communication skills in terms
8 of decision-making, conflict resolution. Yeah, those -- I
9 would just branch out from there if I saw need for that, I
10 might design other seminars for them.

11 Q. Have you ever in the last 15 years been
12 retained to perform clinical psychology?

13 A. No, that's not been -- not been what I do. And
14 I don't know how you would do that in an organizational
15 setting anyway, it would be inappropriate.

16 Q. Prior to 1985, you worked for whom? Just walk
17 me back.

18 A. Okay. From -- I was the director of the
19 counseling center at Raymond Walters College. That was for
20 five years, I can't give you the exact date. My job there
21 was to design the programs that are needed for --
22 particularly at that time, there were a lot of older women
23 returning to college. And the programming they had, had
24 been -- pretty much had been a clinical approach, and what

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1 schooling, give me an exposure throughout the state, which
2 it did.

3 And with that, I visited schools and evaluated
4 their student services. And I just did that for one year.
5 And it was through that position that I designed a new
6 program for Indian Hill High School, and they were looking
7 for somebody as director of the high school program. And I
8 interviewed and got that job, so --

9 Q. Okay.

10 A. -- it was kind of a doorway into something
11 where I was happier with what I was doing.

12 Q. So you graduated in 1974?

13 A. With my Ph.D., correct.

14 Q. You went to work for the State of Ohio?

15 A. Right, for one year.

16 Q. Okay. I'm sorry, your position was?

17 A. Consultant for division of guidance and
18 testing.

19 Q. Who were you consulting, the state?

20 A. Public schools.

21 Q. Board of education?

22 A. My job was to go into the public schools and
23 analyze their student services, to determine if it was
24 meeting the needs of the students in that population.

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1 Q. Okay. One of your job responsibilities as the
2 consultant for -- I'm sorry, what --
3 A. Division of guidance and testing. It was Ohio
4 Department of Education.
5 Q. While with the Ohio Department of Education,
6 one of your job responsibilities was not to diagnose mental
7 illness?
8 A. Not at all.
9 Q. Just so I can get that out, clearly, as part of
10 your job responsibilities for the Ohio Department of
11 Education, one of your job responsibilities was not to
12 diagnose mental illness?
13 A. No.
14 Q. What were your job responsibilities at Indian
15 Hill High School?
16 A. Implementing a new program in terms of student
17 services. This would be family counseling, counseling with
18 students in terms of their skills and what area they might
19 want to go into post high school. If the student was having
20 problems with grades, counseling with them in terms of
21 motivational problems.
22 Q. Did you actually do counseling or were you just
23 the head administrator?
24 A. No, I did counseling.

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1 illness?
2 A. This was high school, this was just grades 10
3 through 12.
4 Q. For example, you wouldn't give mental illness
5 testing?
6 A. No, I did not, not as a high school guidance
7 counselor.
8 Q. And you wouldn't diagnose any specific mental
9 illness, you would recognize --
10 A. Referral.
11 Q. Identify people who you suspected may have a
12 mental problem?
13 A. Yes.
14 Q. So the record's clear, it's going -- what we're
15 going to have is a transcript, and it's going to be hard to
16 read if we're communicating and I don't let you finish with
17 your answers and if my questions get broken up. I know
18 you're anticipating my questions. It will be cleaner and a
19 lot quicker if you could wait until I finish my question.
20 A. I'm sorry. I didn't realize.
21 Q. Don't apologize. Again, what was your title
22 at Indian Hill High School?
23 A. Let me see. Director of student services in
24 high school or department head, I forgot exactly how they

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1 Q. And was part of your job responsibility to
2 diagnose mental illness?
3 A. Part of it was to be able to recognize it,
4 which I did, and did refer several students on. I saw
5 suicidal tendencies in a couple students and other abnormal
6 behaviors, which I made a reference to the school
7 psychologist who took it from there.
8 Q. Okay. That was sort of -- not necessarily one
9 of your defined job responsibilities, it sounds like more in
10 the course of providing counseling?
11 A. Yes.
12 Q. You would recognize?
13 A. Right. But I felt responsible for anything
14 that I should be able to recognize.
15 Q. The school actually had a psychologist?
16 A. Oh, yeah, every school district does, yes.
17 They're basically -- I'm sorry, they're basically
18 educational psychologists, in terms of testing children,
19 placement of kids in the right grade level and these kinds
20 of things. Yeah, my good friend was the school psychologist
21 there.
22 Q. So again, in Indian Hill, your responsibilities
23 were more focused on working with children on their
24 interpersonal skills rather than diagnosing any mental

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1 typified my role. I was in charge of the other counselors,
2 but I also did counseling myself, I had a case load.
3 Q. As director of student services, you weren't
4 responsible for implementing a -- any test to diagnose
5 mental illness, correct?
6 A. Not at all.
7 Q. And as director of student services at Indian
8 Hill High School, you never actually diagnosed any specific
9 mental illness?
10 A. I did not, I recognized symptoms and passed
11 them on.
12 Q. And that, again, wasn't one of your job
13 responsibilities, to identify and diagnose mental illness,
14 correct?
15 A. Well, I could split that apart and say maybe I
16 felt responsible for helping to identify, but I did not feel
17 responsible for the diagnosis and treatment.
18 Q. Okay. Director of counseling center at Raymond
19 Walters College. You were there for approximately five
20 years?
21 A. Yes.
22 Q. And can you describe for me your job
23 responsibilities at Raymond Walters?
24 A. Again, it was implementing new programming

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1 based on the student population at that time. We were
2 getting more and more non-traditional students in, older
3 women particularly coming back to school. The programs
4 previously had been designed in a very clinical approach for
5 the traditional college student, so there were no support
6 systems to help returning women.

7 Q. Oh-huh.

8 A. And my job was to basically support women
9 coming back to school, helping them determine what courses
10 they should take, how to handle the psychological problems
11 of being back in a non-traditional setting for them, also
12 relationships with other students, how to relate with other
13 students. I did seminars, workshops, I worked with teachers
14 helping them understand.

15 Q. Correct me if I'm wrong, but it sounds like in
16 all of your positions over the last 25 years, your work has
17 focused on developing people's organizational skills, team
18 building skills and communication skills, is that --

19 A. Just developing people skills, really.

20 Q. But at no time during the last 25 years has
21 your job responsibilities included the diagnosis of mental
22 illness?

23 A. Correct, not at all.

24 Q. At no time over the course of the last 25 years

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1 dealing with drug addicted personalities. But the thrust
2 was not to go in and do a diagnosis. My job was to go in
3 and do counseling.

4 Q. Okay. So the thrust of none of the practicums
5 that you were involved with -- the diagnosis of mental
6 illness has never been the thrust of any position you've
7 ever held?

8 A. Right, right.

9 Q. And that includes any position that you ever
10 held in any practicums, correct?

11 A. Correct.

12 Q. That includes any position, any internship you
13 ever held, correct?

14 A. Right.

15 Q. No position you've ever held has ever focused
16 on the treatment of mental illness, is that correct?

17 A. That is correct.

18 Q. And no internship that you ever held focused on
19 the treatment of mental illness, correct?

20 A. Correct.

21 Q. And no practicums that you ever participated in
22 focused on the treatment of mental illness, correct?

23 A. Only in terms of dysfunctional family. I guess
24 I would need to know exactly what you mean by "mental

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1 has your job responsibilities included the treatment of
2 mental illness?

3 A. Not at all.

4 Q. Do you need to take a break?

5 A. No.

6 Q. Did you look at anything in preparation for
7 today's deposition?

8 A. I just went back over what you had mailed me.
9 That's it.

10 Q. Those --

11 A. I didn't think it was necessary, frankly.

12 Q. I'm just --

13 A. No, I didn't.

14 Q. -- just gathering information. When you refer
15 to what was sent to you, are you talking about the two
16 affidavits?

17 A. Oh-huh, exactly.

18 Q. When did you enroll in the Ph.D. program in
19 education at Ohio State?

20 A. It took me five years, it must have been 1969.

21 Q. Did any of your practicums require you to
22 diagnose mental illness?

23 A. Well, I think as part of the work I certainly
24 had to recognize that, in terms of dealing with families or

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1 illness."

2 Q. How do you define mental illness?

3 A. Well, I would define mental illness if the
4 family had problems in their dysfunctional areas or had
5 dysfunctional areas due to one person's mental illness. But
6 I feel that what you're saying is mental illness would be
7 somebody that could be hospitalized, or their behavior is so
8 abnormal that they're not functioning well in society, and
9 I've never dealt with anybody that was unable to function in
10 society.

11 Q. Well, what do you mean by -- how do you define
12 treatment?

13 A. Well, I would say two or three trips to a
14 psychotherapist a week, or hospitalized for that condition.
15 I certainly never was involved in anything like that.

16 Q. So it sounds like it is safe to say that no
17 practicums you've ever been involved with focused on the
18 treatment of mental illness, correct?

19 A. Correct.

20 Q. What is forensic psychology?

21 A. Well, that would be basically being called upon
22 to go into court, make a diagnosis and give your
23 professional opinion about a client.

24 Q. Have you ever practiced any forensic

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1 psychology?

2 A. No, I have not, no.

3 Q. What is the MMPI?

4 A. Minnesota Multi-Phasic Personality Inventory.

5 Q. Have you ever employed the MMPI?

6 A. No, I would not want to use that one.

7 Q. Have you ever used the MMPI?

8 A. No.

9 Q. What is the DSM?

10 A. This is the bible for clinicians, I guess, in
11 terms of helping put a number to a diagnosis. And I know
12 insurance companies require a DSM identification number. I
13 do own a DSM, but I have not used it in my -- in any of my
14 jobs.

15 Q. When you say "put a number," what does that
16 mean?

17 A. Well, just like when you go to a physician, in
18 order for them to get through the insurance they'll diagnose
19 your ailment and put a number to it, 119.4 or whatever. And
20 it's the same thing with mental illnesses. This book helps
21 you identify through very lengthy descriptions how you would
22 identify a person's problem, and then that would go -- that
23 would be their DSM number as your diagnosis.

24 Q. Okay. But correct me if I'm wrong, the DSM

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1 and that their process -- thought processing is not
2 consistent. Probably delusional. I was trying to think of
3 the types of things I had read quite some time ago. There
4 may be delusional characteristics.

5 Q. What are the subtypes of schizophrenia, do you
6 know?

7 A. I don't know subtypes of schizophrenia, no.

8 Q. So, for example, you don't know the difference
9 between or you can't describe for me the different symptoms
10 in residual schizophrenia as compared to undifferentiated
11 schizophrenia?

12 A. I cannot.

13 Q. You can't tell me the difference between
14 paranoid schizophrenia and residual schizophrenia?

15 A. Right.

16 Q. You can't tell me the difference between
17 disorganized schizophrenia and paranoid schizophrenia?

18 A. Correct.

19 Q. And you don't know the difference between
20 paranoid schizophrenia and catatonic schizophrenia?

21 A. I know what catatonic would mean, but I
22 wouldn't offer a description as you are looking at the
23 DSM-IV.

24 Q. So the answer is you --

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1 itself is a diagnostic tool for mental illness, correct?

2 A. It's -- it's more like a dictionary for mental
3 illness.

4 Q. Basically it's a checklist. It says if you
5 suffer bipolar disorder, you will manifest --

6 A. Yeah.

7 Q. -- these behavioral characteristics, correct?

8 A. Right, right.

9 Q. Have you ever been called upon to use the DSM
10 at any time since you graduated from OSU?

11 A. Not since I graduated, no.

12 Q. So since 1974 you haven't?

13 A. No, no.

14 Q. Are you familiar with the DSM diagnostic
15 criteria for schizophrenia?

16 A. I've read it, but I cannot tell you exactly
17 what it says at this point.

18 Q. When you say you can't tell me exactly what it
19 says, can you describe for me generally what the symptoms
20 are for schizophrenia?

21 A. Well, based on what I can recall, it would be
22 -- I know we talked in class about it being a communication
23 problem, where a person is unable to relate with another
24 person because of their not having a total grasp on reality.

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1 A. Not specifically. I'm sorry, not specifically.

2 Q. You started to talk about what you thought were
3 some of the symptoms of sort of the family of schizophrenia
4 without talking about that -- any specific symptom related
5 to any subareas of schizophrenia. Can you tell me again
6 what your recollection is of the symptoms of sort of the
7 family of schizophrenia?

8 A. Well, I can recall what we discussed in the
9 classroom, and that it is -- it was typified as basically a
10 communications disorder because of the person's inability to
11 relate comfortably and communicate appropriately. It might
12 be caused by delusions, it might be caused by lack of brain
13 functioning. I honestly don't know. But I do recall their
14 talking about it, it would manifest itself in communication
15 problems.

16 Q. Okay. So when you referred to referrals that
17 you had made to school psychologists and other intermittent
18 times in the last 25 years, when you've identified what you
19 believe were people with mental illness and referred them to
20 particular specialists in clinical psychology, at no point
21 in that time have you ever been able to identify any
22 particular mental illness that someone has suffered from,
23 correct?

24 A. I wouldn't attempt to identify specific

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1 illness, no.

2 Q. So it's more generally you think -- you'll run
3 into a situation where you believe someone may be suffering
4 from some unidentified type of mental illness, and in those
5 situations you'll refer someone to someone who practices
6 clinical psychology?

7 A. Yeah, without giving any diagnosis or my
8 feeling about it, I didn't feel qualified to do that.

9 Q. Okay. What is the difference between -- what
10 other psychotic disorders are there besides schizophrenia?

11 A. Well, you mentioned catatonia and you mentioned
12 paranoia, those are probably the main ones, manic
13 depression, bipolar. You mentioned those.

14 Q. In your mind, paranoia is something different
15 than schizophrenia?

16 A. Well, we studied it as something different, but
17 I realize there is a paranoid schizophrenia with feelings of
18 persecution, feelings of distrust of other people, hearing
19 voices. Again, you know, it's a loss of reality.

20 Q. What are typical dissociative disorders?

21 A. Well, I think that's what we've been talking
22 about. I honestly don't know for sure. If you mean
23 dissociative in terms of thought processing, you know, I
24 honestly don't know for sure I understand the question.

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1 A. No, I wouldn't attempt to do that.

2 Q. And can you give me the -- can you give me the
3 symptoms of any somatoform disorder?

4 A. No, I cannot.

5 Q. Can you give me the symptoms of factitious
6 disorders?

7 A. No, I cannot.

8 Q. Can you give me the symptoms of dissociative
9 disorders?

10 A. No.

11 Q. Can you describe all the symptoms of anxiety
12 disorders?

13 A. Not all the symptoms.

14 Q. Okay. Can you provide me a clinical definition
15 of the symptoms of anxiety disorders?

16 A. Well, just based on personal knowledge, it
17 would be feelings of suffocation, feelings that you don't
18 want to be around people, they make you anxious. I guess
19 it's a feeling of losing control. You can't breathe. Just
20 very uncomfortable feelings. I do have a friend who's been
21 diagnosed with that.

22 Q. Very uncomfortable feelings, that's it in a
23 nutshell?

24 A. He's not able to function in a job setting.

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1 Q. Why don't we take a quick break?

2 (A recess was taken from 10:26 to 10:34.)

3 Q. Who is Stephen Fox?

4 A. He was a former tenant of mine and eventually
5 bought the home that he was renting.

6 Q. When was he a tenant of yours, do you remember?

7 A. Probably about 1988, '89, '90, around in
8 there. I remarried in 1990, and at that time moved out of
9 my residence, so it must have been a couple years preceding.

10 And then he and his wife asked to buy the
11 house. That was probably '90, '91, I'm not exactly sure,
12 but they had rented a while from me.

13 Q. Getting back to the earlier sort of line of
14 questions, you will agree that you're not qualified to
15 diagnose any mental illness, is that correct?

16 A. I've never been asked to do that, and no, I'm
17 not qualified.

18 Q. And you're not qualified to and can't describe
19 the symptoms for any mental illness?

20 A. I hesitate to say I can't. I can give a very
21 brief view -- overview, but I certainly cannot diagnose it
22 as the DSM will prefer.

23 Q. Okay. Can you give me the diagnosis for
24 cocaine induced anxiety disorder?

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1 Q. You will agree that you're not qualified to
2 give a professional opinion on the definition of an anxiety
3 disorder?

4 A. No.

5 Q. And you're not qualified to give a professional
6 opinion on mood disorders?

7 A. No, I've never been asked do that.

8 Q. Not only have you never been asked, you're not
9 qualified?

10 A. Correct.

11 Q. You're not qualified to give a professional
12 opinion on schizophrenia and other psychotic disorders,
13 correct?

14 A. Right.

15 Q. I know you talked -- you said before that your
16 understanding is that schizophrenia is essentially a
17 communication disorder, correct?

18 A. Well, it was typified as that, yes.

19 Q. Can you tell me what the difference between
20 schizophrenia is and any subtype of schizophrenia? When I
21 use the word "schizophrenia," I'm referring to it
22 generally. Can you tell me what the difference is between
23 schizophrenia and any of the following communication
24 disorders, expressive language disorder?

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1 A. I've never diagnosed expressive language.
 2 Q. Do you know any of the symptoms of expressive
 3 language disorder?
 4 A. No, I do not.
 5 Q. And do you know any of the symptoms of mixed
 6 receptive language disorder?
 7 A. No.
 8 Q. Do you know any of the symptoms of phonological
 9 disorder?
 10 A. No.
 11 Q. Do you know any of the -- can you tell me the
 12 difference between any of the symptoms of mixed receptive
 13 expressive disorder and the communication -- as you put it,
 14 the communication disorders --
 15 A. No.
 16 Q. -- of schizophrenia?
 17 A. No.
 18 MR. MOUL: Can we go off the record?
 19 (Off-the-record.)
 20 (Sheppard Exhibit 2 marked for
 21 identification.)
 22 Q. I'm handing you what's been marked Sheppard
 23 Exhibit 2. Can you identify what that is for me?
 24 A. DSM-IV.

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1 Mr. Fox that related to something other than --
 2 A. Yes, I did, yeah. By that time, he had -- he
 3 was owner of the home and had been for several years. I was
 4 surprised he called.
 5 Q. Okay. So you hadn't seen him in five years
 6 when he called you?
 7 A. It had been a long time.
 8 Q. Would you say it had been approximately five
 9 years since you had talked to him?
 10 A. Possibly.
 11 Q. To the best of your recollection?
 12 A. That's my recollection.
 13 Q. To the best of your recollection, it had been
 14 five years from the time you sold the house until the time
 15 he called you in or about 1995?
 16 A. Well, I might add one of my best friends lives
 17 right next door, so I may have seen him or said hello when I
 18 visited with her. So I'm not saying that I have not seen
 19 him at all, but there was no social contact with him.
 20 Q. Other than the call that had been made to you
 21 in 1995, you can't recall a specific conversation with him
 22 for approximately a five-year period preceding that call?
 23 A. Right, right.
 24 Q. Can you describe for me the phone conversation

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1 Q. And if you look at the pages that are attached
 2 to it -- just spend a few minutes taking a look at those.
 3 A. Okay.
 4 Q. Does that appear to be a list, a summary list,
 5 of a large number of mental illnesses?
 6 A. I guess you would call it that, yeah.
 7 Q. Okay. Stephen Fox was a tenant of yours,
 8 correct?
 9 A. Correct.
 10 Q. And he bought a house from you?
 11 A. Yes.
 12 Q. Did you have a personal relationship?
 13 A. No, it was a business relationship.
 14 Q. He wasn't your friend?
 15 A. I wouldn't call -- no, no, he was not a close
 16 friend. I mean, he was an acquaintance. I knew who he was
 17 and I knew his wife.
 18 Q. So your conversations, I assume, basically
 19 consisted of chitchat about the house that you were renting.
 20 correct?
 21 A. Well, yeah.
 22 Q. You didn't socialize together?
 23 A. Not at all.
 24 Q. Sometime in 1995, did you get a phone call from

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1 you had with Stephen Fox when he called you in -- first of
 2 all, let me ask you this. Have you spoken to Stephen Fox
 3 since 1995?
 4 A. No.
 5 Q. And other than the one phone call that you've
 6 already identified as taking place in 1995, can you remember
 7 any other phone calls made?
 8 A. No.
 9 Q. The one phone call that you recall between you
 10 and Stephen Fox in 1995, could you please describe for me
 11 the contents of that conversation?
 12 A. Well, it was just a very brief phone call. And
 13 he said, can you tell me what paranoid schizophrenia is, and
 14 I gave him a very brief description. I was concerned that
 15 perhaps he or his wife or someone, a relative, might have
 16 been diagnosed with it, so I was very cautious. I didn't
 17 question why he asked, and he simply said thank you and hung
 18 up.
 19 Q. How long is your recollection that the
 20 conversation actually took place?
 21 A. Gosh, under a minute I would say. There was no
 22 social context to it at all.
 23 Q. That wasn't a very good question of mine. So
 24 to the best of your recollection, the conversation between

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1 you and Stephen Fox in 1995 lasted how long?

2 A. About a minute.

3 Q. I think when you and I spoke on Friday, it was
4 your recollection that you basically told him that paranoid
5 schizophrenia is, if you suffered from that, basically meant
6 you couldn't -- you couldn't communicate with other people
7 because you weren't in touch with reality, correct?

8 A. No, those weren't my words. I said it was told
9 to me it was a communications disorder, that a person would
10 have difficulty communicating because of their lack of
11 reality, or they lost touch with reality. I did not say
12 they could not communicate.

13 Q. I apologize. Walk me through the brief
14 conversation you had with Stephen Fox.

15 A. Remember, this is five years ago. And what I
16 did in my mind was immediately separated paranoia from
17 schizophrenia. And I remember saying schizophrenia was
18 taught to me basically to be a communications disorder,
19 because the person couldn't communicate well. Because they
20 have lost touch of reality, there might be problems in
21 communicating.

22 And paranoia, I thought in my mind, is somebody
23 who feels persecuted, withdrawn. That was basically it,
24 and he said thank you and hung up.

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1 Q. Is there a reason, when we spoke on Friday, you
2 didn't mention that you had also -- you didn't mention to
3 Jane and I that you had told Mr. Fox that paranoia
4 schizophrenia is attendant with symptoms of persecution and
5 withdrawal?

6 A. Because I guess when you asked me you had the
7 words together as paranoid schizophrenia, and I really
8 didn't know a definition of that. But when I talked with
9 him, in my mind I gave him separate.

10 Q. Okay. So you don't know the definition of
11 paranoid schizophrenia today, correct?

12 A. I do not know together how DMS defined it, no.

13 Q. And you didn't know the definition of paranoia
14 schizophrenia in 1995, correct?

15 A. Only what I was able to share with him, which
16 may be incorrect.

17 Q. Okay. You drew -- in one minute, you drew a
18 distinction with him between schizophrenia and paranoia, or
19 you tried to work them together?

20 A. I guess I'm not understanding. I did not try
21 to work them together. He caught me totally off guard.
22 I've never been asked that question before in my life. I
23 was concerned about why he was asking. Without thinking, I
24 conjured up what I recalled from going to school in 1973.

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1 Q. Could you read that back to me?

2 (The record was read.)

3 Q. It's your testimony today that you told him
4 that people with paranoia feel persecuted and they are
5 withdrawn?

6 A. I was trying to think exactly what words I
7 used.

8 Q. When we talked to you earlier in the
9 deposition, I asked you if you could draw a distinction.
10 And you weren't drawing this distinction until I walked you
11 through the DSM. I want you to think specifically about
12 your communication with Stephen Fox.

13 A. So the question is about paranoia?

14 Q. I want to know generally, or specifically
15 actually, what conversation you had. You said it was a
16 brief conversation. I want to know exactly what you told
17 him.

18 A. Well, again, in my mind I separated the two
19 and gave him what I thought was a very conservative idea of
20 schizophrenia, and a very brief description of the paranoid
21 personality, usually feels persecuted or suspicious.

22 Q. And tell me exactly what you told him.

23 A. That is -- to my recollection, that's what I
24 said, because that's what I retained today.

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1 We're talking about 20 years later. That was the best I
2 could do, and there was no further questioning and no
3 further conversation.

4 Q. Why were you concerned?

5 A. Well, as I mentioned, I didn't know whether he
6 personally had been diagnosed with that, since I don't have
7 a personal relationship with him.

8 Q. Uh-huh.

9 A. I didn't know whether his wife had been
10 diagnosed. I didn't know if he has a mother-in-law that
11 perhaps could had been diagnosed. I was concerned, because
12 I was afraid maybe a family member had been diagnosed with
13 it and he was attempting to find out more as to what it was.

14 Q. Okay. So you agree you gave him a very
15 conservative definition?

16 A. Very, very.

17 Q. It sounds to me like your concern was that you
18 didn't want the information that you were going to give him
19 to be misused, because you recognized that it's difficult to
20 give a lay person a definition of a clinical medical
21 problem?

22 A. Definitely, correct.

23 Q. Did he ask you any questions?

24 A. Not at all. That was the only question he

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1 asked me. It was a very brief conversation.

2 Q. Okay. So I understand very clearly, can you
3 tell me again specifically what you told Mr. Fox?

4 A. To the best of my recollection, I mentioned
5 that schizophrenia was taught to me to be a communications
6 problem, that a person has difficulty in communicating
7 because of their lack of reality or has lost touch with
8 reality. And then I proceeded to say paranoia, usually a
9 person's paranoid, feels persecuted. Other than that, I
10 cannot recall.

11 Q. Do you agree that boiled-down definitions of --
12 real simple boiled-down definitions of mental illnesses are
13 misleading because of the lack of information that they
14 convey?

15 A. Since I had no idea for what purpose he asked,
16 I didn't feel I was misleading him.

17 Q. I certainly want to -- I'm sure at the time it
18 wasn't your intent to mislead him.

19 A. No.

20 Q. I just want to ask you, generally speaking, do
21 you agree that boiled-down definitions of complex mental
22 illnesses have a tendency to mislead people, correct?

23 MR. WILLE: I think I'm going to object to the
24 form of the question, speculative.

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1 A. Because I felt that something additional had to
2 be done, and he was calling just to find out if it were
3 worthy of pursuing and probably getting help for somebody.
4 And I wanted to give the impression that it probably is
5 worth pursuing, although we didn't discuss that since I had
6 no idea what the purpose was.

7 But I was conservative to at least give an idea
8 that it was something that probably was problematic for
9 whomever had been diagnosed that way.

10 Q. Did you tell him that it's problematic?

11 A. No, no, there wasn't time. The conversation
12 ended like that.

13 Q. Okay. I think you will agree with me, I think
14 what you told us on Friday, that the definition you gave Mr.
15 Fox was oversimplified and could be misleading?

16 A. I don't know what -- since I had no idea how he
17 intended to use the information, I didn't know whether I was
18 misleading him. That was not my intent, whether it was
19 used, to be misleading. It very well could happen.

20 Q. Well, let me ask you this. Did you tell Mr.
21 Fox that the essential feature of the paranoid type of
22 schizophrenia is the presence of prominent delusions or
23 auditory hallucinations?

24 A. Not in those words, no. No, I wouldn't have

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1 Q. You can answer.

2 A. I guess I don't understand boiled down.
3 Sorry. From a professional standpoint, I don't think a
4 professional would be asked to give a boiled-down
5 description, and I didn't realize that's what I was doing,
6 that I was being asked as a professional. I thought I was
7 being asked as an acquaintance of somebody he knew.

8 Q. It sounds like to me, correct me if I'm wrong,
9 the reason you gave him a conservative definition is because
10 you were concerned you would mislead him, correct?

11 A. Not mislead.

12 Q. That it would be misused, correct?

13 A. No, I wouldn't even say misused.

14 Q. Then why?

15 A. Let me think a minute. To give him a direction
16 in case there was a family member that needed additional
17 help, that needed psychological help. I wanted him to
18 understand that I -- that my feeling would be that this
19 would be worth pursuing.

20 Q. It sounds like that's why you are telling me
21 that's why you answered the question?

22 A. Yes.

23 Q. Why did you answer the question conservatively,
24 what was your reason?

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1 used those words.

2 Q. When you say --

3 A. No.

4 Q. -- it's not in those words, it's the qualifier
5 that trips me up. You will agree with me that you didn't
6 tell Stephen Fox that a symptom of paranoid schizophrenia is
7 the prominent presence of delusions or auditory
8 hallucinations, correct?

9 A. I did not say that.

10 Q. And again, if you could just let me finish my
11 question? Thank you. You did not tell him that features
12 associated with paranoid schizophrenia include anxiety, did
13 you?

14 A. Not that I recall.

15 Q. And you didn't tell him that anger is a symptom
16 associated with paranoid schizophrenia, did you?

17 A. No.

18 Q. You didn't tell him aloofness is a feature?

19 A. No.

20 Q. And you didn't tell him argumentativeness is a
21 feature associated with paranoid schizophrenia?

22 A. No.

23 Q. I'm correct that you did not advise Mr. Fox
24 that an individual suffering from paranoid schizophrenia may

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1 have a superior and patronizing manner, correct?

2 A. No.

3 Q. And you didn't tell him that a person who
4 suffers from paranoid schizophrenia may have either stilted
5 or extreme intensity in interpersonal interactions, did you?

6 A. No, I didn't.

7 Q. I'm correct that you didn't advise Stephen Fox
8 that people with schizophrenia may be predisposed to
9 violence, correct?

10 A. I offered no advice.

11 Q. You didn't inform Stephen Fox that people with
12 schizophrenia may be predisposed to violence, correct?

13 A. I did not.

14 Q. You didn't advise Stephen Fox that people with
15 schizophrenia generally show little or no impairment of
16 their neuropsychological or other cognitive abilities,
17 correct?

18 A. No.

19 Q. You didn't advise Stephen Fox that persons
20 suffering from paranoid schizophrenia tend to have a
21 preoccupation with one or more delusions, or frequent
22 auditory hallucinations, correct?

23 A. Correct.

24 Q. And you didn't advise Stephen Fox that none of

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1 beyond this witness's ability or personal knowledge
2 or expertise. Also it's speculative.

3 Q. You can answer the question.

4 MR. WILLE: You may answer.

5 A. I guess it could be.

6 Q. And will you agree that the definition you gave
7 is -- will you agree with me that paranoid schizophrenia is
8 a very complex mental illness?

9 A. Definitely.

10 Q. With a very complex set of symptoms that are
11 associated with it?

12 A. Yes, it is.

13 Q. You agree with me you gave a very simple, even
14 oversimplified definition of paranoid schizophrenia?

15 A. Conservative definition.

16 Q. Oversimplified, correct?

17 A. Yes.

18 Q. When we spoke on Friday, I asked you several
19 times if one of your concerns and one of the reasons why you
20 gave a conservative definition was because you didn't want
21 to mislead Stephen Fox. And my recollection was that you
22 answered the question yes.

23 Is it your testimony today that you gave a
24 conservative definition for a reason other than your concern

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1 the following characteristics are prominent in paranoid
2 schizophrenia, disorganized speech?

3 A. Are you saying that none of these are?

4 Q. Oh-huh.

5 A. No, I didn't discuss any of those.

6 Q. You didn't advise him that disorganized or
7 catatonic behavior is generally not associated with paranoid
8 schizophrenia?

9 A. I did not.

10 Q. Now, given that you didn't tell him any of that
11 information, and that you explained to him that
12 schizophrenia is a quote, unquote, communication disorder,
13 will you agree with me that the oversimplified explanation
14 you gave to Stephen Fox could be misleading?

15 A. I guess it could be. I'm not sure in what
16 direction --

17 Q. Will you agree in a capital murder trial where
18 the focus of a defense is the symptoms of paranoid
19 schizophrenia, that giving an oversimplified version of
20 paranoid schizophrenia where the focus of your explanation
21 is on the communication problems associated with, in your
22 mind, paranoid schizophrenia, that the definition you gave
23 could be misleading?

24 MR. WILLE: Objection, calls for a conclusion

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1 that you would mislead Stephen Fox?

2 A. I don't like using the word "mislead," because
3 my intent was not to mislead. My intent was just to give
4 him a very brief -- my very brief knowledge.

5 Q. I'm sure you didn't have an intention of
6 misleading him.

7 A. Not at all.

8 Q. And indeed, wasn't that the reason why you gave
9 such a boiled-down version, because you didn't want to --
10 you recognized the possibility of misleading a lay person in
11 giving any definition of paranoid schizophrenia?

12 A. No. I recognized my own limitations, too. I
13 had no idea in what context he asked me.

14 Q. Do you have any support for the notion that
15 paranoid schizophrenia is essentially a communication
16 disorder?

17 A. I wouldn't say essentially.

18 Q. Okay.

19 A. I don't understand. I'm not understanding your
20 question.

21 Q. Do you have any support for your
22 characterization that people with paranoid schizophrenia
23 generally can't communicate with other people?

24 A. No, they can communicate, it's just a

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1 communication, could be -- could be a communication problem.

2 Q. Okay. What is the support for your belief that
3 that is a symptom associated with paranoid schizophrenia?

4 A. I guess just past experience, classroom.
5 [Sheppard Exhibit 3 was marked for
6 identification.]

7 Q. Can you take a look at that for me and
8 identify it for me?

9 A. In what way identify it?

10 Q. Just take a brief --

11 A. Well, it's a diagnostic tool used by
12 psychiatrists and psychologists to identify disorders.

13 Q. I've handed you what's been marked as Sheppard
14 Exhibit 3, and it has on its cover, it says DSM-IV?

15 A. Correct.

16 Q. Are those excerpts of the DSM-IV?

17 A. Yes, they are.

18 Q. And what family of disorders does the excerpt
19 relate to?

20 A. Schizophrenia.

21 Q. What is the last page of Exhibit 3?

22 A. Paranoid type.

23 Q. Okay. You will agree with me that sufferers of
24 paranoid schizophrenia shouldn't be on death row?

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1 schizophrenia?

2 A. Ask the question again.

3 Q. Do you agree that disorganized speech is not a
4 characteristic associated with paranoid schizophrenia?

5 A. Is not a characteristic?

6 O. (Nodding head.)

7 A. I guess I'm not sure what disorganized speech
8 would be. I honestly don't know.

9 Q. Are you aware that flat or inappropriate
10 affect, catatonic and disorganized behavior are not
11 associated with paranoid schizophrenia?

12 A. Flat -- I guess my feeling would be it could
13 be.

14 Q. Will you agree with me that by representing
15 that people with paranoid schizophrenia have difficulty
16 communicating, that that statement could be misleading
17 because it could give the impression that people with
18 paranoid schizophrenia suffer from disorganized behavior
19 and/or speech?

20 A. I don't recall ever saying difficulty in
21 communicating. I simply said communication disorder. I
22 don't know.

23 Q. Okay. Well I've gotten a couple -- so now it's
24 your recollection that you advised him that paranoid

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1 MR. WILLE: Objection.

2 A. I personally don't believe in the death
3 penalty.

4 Q. I believe you testified to this on our break or
5 said this in our break that, in response to Stephen Fox's
6 question on the telephone, you should have advised him that
7 you were not qualified to give an answer to that question,
8 correct?

9 A. I have a hard time with that. Qualified to
10 give him a brief description, that's what I did.

11 Q. In our break, and I quote, you said, I should
12 have said I'm not qualified. Did you say that during our
13 break?

14 A. Had I known the purpose of the phone call, I
15 would have said that.

16 Q. Do you believe sitting here today that you're
17 qualified to give a definition of the symptomology of
18 paranoid schizophrenia?

19 A. No, I do not.

20 Q. Will you agree with me that you can't diagnose
21 a single mental illness as you sit here today?

22 A. That's correct.

23 Q. Are you aware of the fact that disorganized
24 speech is not a characteristic associated with paranoid

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1 schizophrenia was a communication disorder, correct?

2 A. Right.

3 Q. Will you agree with me that to characterize
4 paranoid schizophrenia as a communications disorder could be
5 misleading if, in fact, the definition of or symptoms
6 associated with paranoid schizophrenia generally do not
7 include disorganized speech?

8 It's really -- if I tell you the communication
9 disorder -- if I tell you that something is a communication
10 disorder, do you agree with me that that could generally be
11 interpreted as a disorder that could be associated with
12 disorganized speech?

13 A. Yes, I would agree with that.

14 Q. And you will agree with me that to describe
15 something as a communication disorder could give the
16 impression that persons that suffer from that mental illness
17 are persons with disorganized behavior as well?

18 A. I can't agree on the disorganized behavior with
19 disorganized speech.

20 Q. What other communication disorders are there?

21 A. My gosh.

22 Q. In your opinion.

23 A. I don't know.

24 Q. Do people that stutter have communication

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1 disorders?

2 A. No, that's a physiological problem.

3 Q. Okay. You don't believe that someone -- that
4 the word "communication disorder," based on all your
5 professional experience, could be interpreted as including
6 physiological problems, such as stuttering?

7 A. I guess it could.

8 Q. Would you take just a brief look at that?
9 I'll represent to you that is the trial testimony of Dr.
10 Jeffrey Smalden. Have you ever reviewed that before today?
11 That entire binder represents the --

12 A. I don't recall that I read the entire thing,
13 no.

14 Q. I'm sorry, I didn't hear the answer.

15 (The record was read.)

16 Q. Again, I'll represent to you it's over 100
17 pages long.

18 A. Okay..

19 Q. Do you believe that you would have recalled
20 reviewing 100 pages of trial testimony if, in fact, you had?

21 A. I don't recall.

22 Q. You have no recollection of reviewing this?

23 A. No, I'm sorry. I do not.

24 Q. Again, if you had thoroughly reviewed this 100

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1 A. I don't recall that I even came across the name
2 of Bobby Sheppard.

3 Q. I guess that's what I mean. You don't recall
4 this because you didn't read 100 pages?

5 A. Correct.

6 Q. Okay. Could you read that back to me please?

7 (The record was read.)

8 Q. In fact -- I just want to make sure it's
9 clear. I asked it a number of times, I believe. But as you
10 sit here today, it's your testimony that you did not review
11 the trial testimony of Dr. Jeffrey Smalden, correct?

12 A. I don't recall that, no.

13 Q. You don't recall that because you didn't do it,
14 correct?

15 A. Correct.

16 MR. MOUL: Why don't we take a quick break,
17 please?

18 (A recess was taken from 11:28 to 11:32.)

19 MR. MOUL: I don't have anything further.

20 MR. WILLE: Thank you, Mr. Moul. I will be
21 very brief, I'll try to be, although I'm sure you
22 heard that a few times before in your professional
23 life.

CROSS-EXAMINATION

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1 and -- over 100 pages worth of trial testimony of Jeffrey
2 Smalden, do you believe you would have recalled reviewing
3 it?

4 A. If I was sent that information and told to
5 review it, I reviewed it. I don't recall having been sent
6 100 pages of testimony.

7 Q. Okay. Have you ever reviewed a transcript of a
8 trial court proceeding?

9 A. It's --

10 Q. In your life?

11 A. Not at all.

12 Q. It's your recollection that you don't recall
13 ever reviewing any trial court transcript in any matter?

14 A. I would not have occasion to.

15 Q. Is it safe to say that given the fact that you
16 have -- it would be so unusual in your current professional
17 endeavors to review a trial transcript, that had you in fact
18 reviewed a trial transcript of over 100 pages of
19 psychological testimony, that you would recall reviewing
20 that testimony?

21 A. I should, yes. I've never had that occasion in
22 my business.

23 Q. Okay. So is it safe to say that you didn't in
24 fact review this trial testimony of over 100 pages?

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1 BY MR. WILLE:

2 Q. Dr. Jones -- is that all right if I call you
3 Dr. Jones?

4 A. That's quite all right.

5 Q. Dr. Jones, have we spoke before today?

6 A. No, we have not.

7 Q. Have you been contacted by anybody from the
8 Office of the Ohio Attorney General with reference to this
9 case?

10 A. No.

11 Q. When was the first time that you were made
12 aware as to this proceeding today?

13 A. I guess a phone call a couple weeks ago, three
14 weeks ago, maybe, that this was going to take place.

15 Q. Aside from, I take it, Mr. Moul and myself --
16 actually, aside from Mr. Moul, have you discussed this
17 matter with anyone else?

18 A. No.

19 Q. Mr. Moul asked you some questions with respect
20 to some things that he had sent to you. Do you remember
21 those questions?

22 A. The paperwork here, I assume?

23 Q. Yes.

24 A. Yes.

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1 Q. To be more specific, he asked you if you
2 reviewed anything before you came here today?

3 A. Yes.

4 Q. You mentioned two affidavits. Did you bring
5 those affidavits with you today?

6 A. Yes.

7 Q. Would you identify for the record, please,
8 those affidavits?

9 A. Okay.

10 MR. MOUL: Are you going to mark those? I
11 think we have copies, if you want.

12 MR. WILLE: I would like to identify it for the
13 record, what she was referring to.

14 Q. If I am correct, you are referring to two
15 affidavits. One is by yourself dated 29 August 1995, and an
16 affidavit dated 1 October 1995 by yourself?

17 A. Uh-huh.

18 Q. Is that a fair and accurate recitation?

19 A. Yes.

20 Q. Thank you. Now, Mr. Moul asked you some
21 questions with respect to your conversation with Mr. Fox. I
22 would like to again just ask you to tell me how long this
23 conversation was, to the best of your recollection?

24 A. Less than a minute.

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1 used suspicious.

2 Q. Would it be fair to say -- and I probably would
3 be asking you to speculate, but would it be fair to say that
4 a person -- a normal layperson might, in their mind,
5 associate paranoia with a person who felt persecuted?

6 A. I think so.

7 Q. Would it be fair to say that insofar as you
8 indicated that paranoia might indicate a person's feeling of
9 persecution, that that would be something many people would
10 know, generally?

11 MR. MOUL: Objection. You permitted her to
12 characterize what people think, even though you
13 objected that you didn't think she had the
14 qualifications to do that.

15 MR. WILLE: I'm asking her opinion whether a
16 person, layperson, might associate paranoia with a
17 feeling of persecution.

18 A. I don't think so.

19 MR. MOUL: We'll state the same objection, that
20 she's not qualified to give that opinion.

21 A. I don't think they would, I don't think they
22 would be knowledgeable enough.

23 Q. Do you recall us in the break, we were talking
24 about movies, we were talking about Citizen Kane?

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1 Q. About that time period, again, just tell us
2 briefly, if you could, how much contact -- or could you
3 describe how much contact you had with Mr. Fox around the
4 time of this conversation?

5 A. I had not had any personal contact.

6 Q. So, again, I'm reiterating somewhat what was
7 said on direct, but you would then say that he was an
8 acquaintance, but an acquaintance you very seldom had
9 contact with?

10 A. Very seldom, right.

11 Q. Now, again, during this conversation, did Mr.
12 Fox tell you in any way why he desired this information?

13 A. Not at all.

14 Q. Now, Mr. Moul asked you some questions about
15 paranoia and so forth. Do you recall those questions?

16 A. Yes.

17 Q. And you said to the effect -- tell me if I'm
18 wrong -- but you said to the effect that perhaps you
19 described paranoia as a person perhaps having suspicion or
20 being suspicious of others, is that a fair statement?

21 MR. MOUL: Object. Misstates prior testimony.

22 Q. You may answer the question.

23 A. I don't think I used the word suspicious. I
24 said feelings of persecution possibly. Perhaps -- I perhaps

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1 A. I wasn't paying any attention, I'm sorry.

2 Q. I see. We happened to be talking about Citizen
3 Kane and I'm a big movie buff. Have you ever heard of the
4 Gaine Mutiny?

5 A. I've heard of that, yes.

6 Q. Would it be fair to say that Captain Queeg in
7 that movie was considered to be a paranoid personality?

8 MR. MOUL: Objection.

9 A. I didn't see the movie.

10 Q. Okay, I will leave that alone. Now, did Mr.
11 Fox give you any indication at all of any facts or
12 circumstances which might have prompted his question?

13 A. Absolutely none.

14 Q. Now, Mr. Moul asked some questions about --
15 asked you to give your opinion as to whether something was
16 misleading. Do you remember those questions?

17 A. Uh-huh.

18 Q. Did Mr. Fox give you any indication at all
19 what, if any, other information he may have been given with
20 respect to the question he asked?

21 A. Not at all.

22 Q. So you would have no way of knowing whether, in
23 fact, what you said was consistent or inconsistent with
24 anything else --

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1 A. Correct.

2 Q. -- that he was told?

3 A. Correct.

4 Q. So would it be fair to say then that it's

5 certainly possible that if other information was given to

6 him which was consistent with what you said, to that extent

7 your information would not be misleading? Wouldn't that be

8 fair to say?

9 MS. PERRY: Objection, calls for speculation.

10 And the witness is not qualified to give the answer,

11 as Mr. Wille already pointed out.

12 Q. You may answer.

13 A. My intent was not to mislead him.

14 Q. Now, Mr. Moul asked you some questions with

15 respect to -- or at least one question with respect to a

16 reference to a capital proceeding. Do you recall that?

17 A. Yeah, I recall it.

18 Q. And he asked you some questions about reading a

19 trial transcript. Do you recall that?

20 A. Yes.

21 Q. Again, has anybody contacted you -- aside from

22 Mr. Moul, has anyone contacted you about this particular

23 matter?

24 A. Not at all.

1 C E R T I F I C A T E

2 STATE OF OHIO : SS

3 COUNTY OF CLERMONT :

4 I, Linda S. Mullen, RMR, the undersigned, a duly

5 qualified and commissioned notary public within and for the

6 State of Ohio, do hereby certify that before the giving of

7 her aforesaid deposition, HELEN B. JONES, Ph.D. was by me

8 first duly sworn to depose the truth, the whole truth and

9 nothing but the truth; that the foregoing is the deposition

10 given at said time and place by HELEN B. JONES, Ph.D.; that

11 said deposition was taken in all respects pursuant to

12 stipulations of counsel hereinbefore set forth; that I am

13 neither a relative of nor employee of any of their counsel,

14 and have no interest whatever in the result of the action.

15 IN WITNESS WHEREOF, I hereunto set my hand and

16 official seal of office at Cincinnati, Ohio, this 9th day

17 of March, 2001.

18

19

20

21 *Linda S. Mullen*

22 My commission expires: Linda S. Mullen, RMR
October 13, 2003. Notary Public - State of Ohio

23

24

1 Q. By the way, do you recall what time frame Mr.

2 Sheppard's trial was?

3 A. I have no idea. I did not even know it was

4 going on.

5 Q. From the time of your conversation with Mr. Fox

6 until this particular matter, did anyone contact you about

7 this case, aside from Mr. Moul?

8 A. Well, just the affidavits that we referred to

9 previously.

10 Q. Right. Aside from that?

11 A. No, no.

12 MR. WILLE: That's all the questions I have,

13 thank you.

14 MR. MOUL: Nothing further.

15

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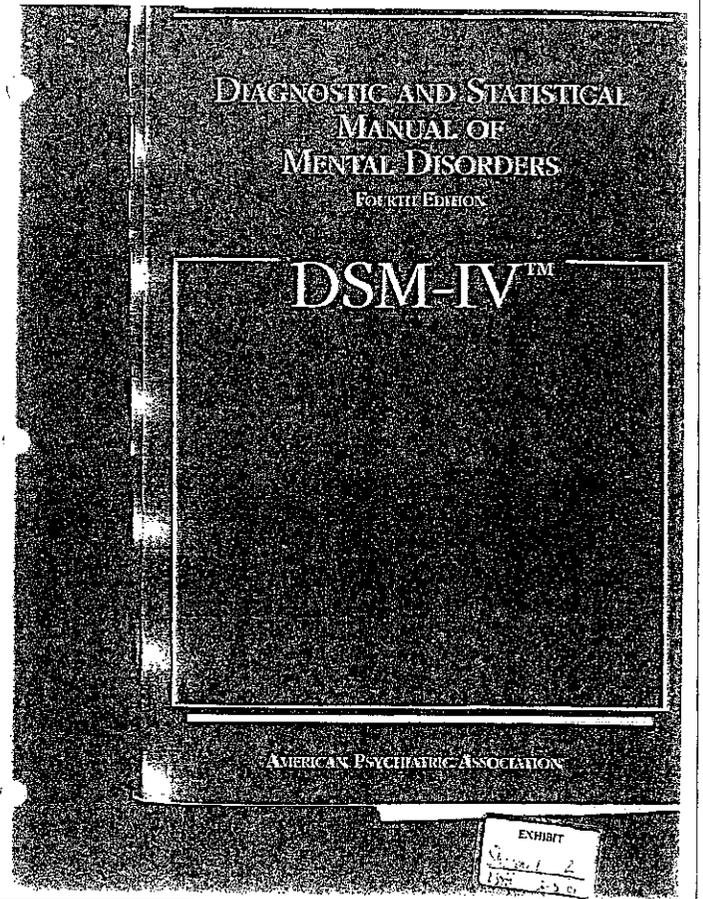
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Helen B. Jones, Ph.D.
HELEN B. JONES, Ph.D.

DEPOSITION CONCLUDED AT 11:40 A.M.



DSM-IV Classification

NOS = Not Otherwise Specified

An x appearing in a diagnostic code indicates that a specific code number is required.

An ellipsis (...) is used in the names of certain disorders to indicate that the name of a specific mental disorder or general medical condition should be inserted when recording the name (e.g., 293.0 Delirium Due to Hypothyroidism).

Numbers in parentheses are page numbers.

If criteria are currently met, one of the following severity specifiers may be noted after the diagnosis:

- Mild
- Moderate
- Severe

If criteria are no longer met, one of the following specifiers may be noted:

- In Partial Remission
- With Full Remission
- Discontinued

Disorders Usually First Diagnosed in Infancy, Childhood, or Adolescence (37)

MENTAL RETARDATION (39)

Note: These are coded on Axis II.

- 317 Mild Mental Retardation (11)
- 318.0 Moderate Mental Retardation (13)
- 318.1 Severe Mental Retardation (14)
- 318.2 Profound Mental Retardation (15)
- 319 Mental Retardation, Severity Unspecified (12)

LEARNING DISORDERS (40)

- 315.00 Reading Disorder (48)
- 315.1 Mathematics Disorder (49)
- 315.2 Disorder of Written Expression (51)
- 315.9 Learning Disorder NOS (53)

MOTOR SKILLS DISORDER

- 315.4 Developmental Coordination Disorder (54)

COMMUNICATION DISORDERS (55)

- 315.51 Expressive Language Disorder (55)
- 315.52 Mixed Receptive/Expressive Language Disorder (56)
- 315.6 Fluency Disorder (Stuttering) (57)
- 315.7 Communication Disorder NOS (58)

PERSASIVE DEVELOPMENTAL DISORDERS (59)

- 299.00 Autism Disorder
- 299.01 Rett's Disorder (61)

- 290.xx Dementia of the Alzheimer's Type, With Late Onset (also code 331.0 Alzheimer's disease on Axis III) (159)
- .0 Uncomplicated
- .1 With Delirium
- .2 With Delusions
- .3 With Depressed Mood
- .4 With Depressed Mood and With Depressed Mood

- 290.xx Vascular Dementia (163)
- .0 Uncomplicated
- .1 With Delirium
- .2 With Delusions
- .3 With Depressed Mood

- 294.9 Dementia Due to HIV Disease (also code 043.1 HIV infection affecting central nervous system on Axis III) (168)
- 294.1 Dementia Due to Head Trauma (also code 854.0 head injury on Axis III) (148)
- 294.1 Dementia Due to Parkinson's Disease (also code 332.0 Parkinson's disease on Axis III) (148)
- 294.1 Dementia Due to Huntington's Disease (also code 333.4 Huntington's disease on Axis III) (149)
- 290.10 Dementia Due to Pick's Disease (also code 331.1 Pick's disease on Axis III) (149)
- 294.1 Dementia Due to Creutzfeldt-Jakob Disease (also code 043.1 Creutzfeldt-Jakob disease on Axis III) (149)
- 294.1 Dementia Due to Prion Protein (also code 043.1 Prion protein on Axis III) (149)

- Substance-Induced Persistent Dementia (refer to Substance-Related Disorders for substance-specific codes) (152)
- 294.8 Dementia NOS (154)

- 294.8 Dementia NOS (154)

AMNESIC DISORDERS (160)

- 294.0 Amnesic Disorder Due to ... Indicated by General Medical Condition (158)
- Specify if Transient Global Amnesia
- Substance-Induced Persistent Amnesic Disorder (refer to Substance-Related Disorders for substance-specific codes) (161)
- 294.8 Amnesic Disorder NOS (160)

- 294.8 Amnesic Disorder NOS (160)

OTHER COGNITIVE DISORDERS (165)

- 294.9 Cognitive Disorder NOS (165)

Mental Disorders Due to a General Medical Condition Not Elsewhere Classified (166)

- 298.89 Catatonic Disorder Due to ... Indicated by General Medical Condition (166)
- 298.1 Personality Change Due to ... Indicated by General Medical Condition (171)
- 298.11 Personality Change Due to ... Indicated by General Medical Condition (171)
- 298.12 Personality Change Due to ... Indicated by General Medical Condition (171)
- 298.13 Personality Change Due to ... Indicated by General Medical Condition (171)
- 298.14 Personality Change Due to ... Indicated by General Medical Condition (171)
- 298.15 Personality Change Due to ... Indicated by General Medical Condition (171)
- 298.16 Personality Change Due to ... Indicated by General Medical Condition (171)
- 298.17 Personality Change Due to ... Indicated by General Medical Condition (171)
- 298.18 Personality Change Due to ... Indicated by General Medical Condition (171)
- 298.19 Personality Change Due to ... Indicated by General Medical Condition (171)

- 299.10 Childhood Disintegrative Disorder (73)
- 299.80 Asperger's Disorder (75)
- 299.80 Pervasive Developmental Disorder NOS (77)

ATTENTION-DEFICIT AND DISRUPTIVE BEHAVIOR DISORDERS (78)

- 314.xx Attention-Deficit/Hyperactivity Disorder (78)
- .01 Combined Type
- .02 Predominantly Inattentive Type
- .03 Predominantly Hyperactive-Impulsive Type
- 314.9 Attention-Deficit/Hyperactivity Disorder NOS (85)
- 312.8 Conduct Disorder (85)
- Specify type: Childhood-Onset Type/ Adolescent-Onset Type
- 313.81 Oppositional Defiant Disorder (91)
- 312.9 Disruptive Behavior Disorder NOS (94)

FEEDING AND EATING DISORDERS OF INFANCY OR EARLY CHILDHOOD (94)

- 307.51 Pica (95)
- 307.53 Rumination Disorder (96)
- 307.59 Feeding Disorder of Infancy or Early Childhood (98)

TIC DISORDERS (100)

- 307.23 Tourette's Disorder (101)
- 307.22 Chronic Motor or Vocal Tic Disorder (103)
- 307.21 Transient Tic Disorder (104) Specify if: Single Episode/Recurrent
- 307.20 Tic Disorder NOS (105)

ELIMINATION DISORDERS (106)

- 537.6 Enuresis (106)
- Specify: With Constipation and Overflow Incontinence
- Without Constipation and Overflow Incontinence
- 307.6 Enuresis (Not Due to a General Medical Condition) (108) Specify type: Nocturnal Only/ Diurnal Only/ Nocturnal and Diurnal

OTHER DISORDERS OF INFANCY, CHILDHOOD, OR ADOLESCENCE

- 309.21 Separation Anxiety Disorder (110) Specify if: Early Onset
- 313.23 Selective Mutism (114)
- 313.89 Reactive Attachment Disorder of Infancy or Early Childhood (116) Specify type: Inhibited Type/ Dissocial Type
- Specify: Stereotypic Movement Disorder (118) Specify if: With Self-Harmful Behavior
- 313.9 Disorder of Infancy, Childhood, or Adolescence NOS (121)

Delirium, Dementia, and Amnesic and Other Cognitive Disorders (123)

- DELIRIUM (124)
- 293.0 Delirium Due to ... Indicated by General Medical Condition (127)
- Substance Intoxication Delirium (refer to Substance-Related Disorders for substance-specific codes) (129)
- Substance Withdrawal Delirium (refer to Substance-Related Disorders for substance-specific codes) (130)
- Delirium Due to Multiple Etiologies (code each of the specific etiologies) (132)
- 780.05 Delirium NOS (133)
- DEMENTIA (133)
- 290.xx Dementia of the Alzheimer's Type, With Early Onset (also code 331.0 Alzheimer's disease on Axis III) (139)
- .10 Uncomplicated
- .11 With Delirium
- .12 With Delusions
- .13 With Depressed Mood
- Specify if: With Behavioral Disturbance

Substance-Related Disorders (175)

The following specifiers may be applied to Substance Dependence:

- With Physiological Dependence/Without Physiological Dependence
- Early Full Remission/Early Partial Remission
- Sustained Full Remission/Sustained Partial Remission
- On Agonist Therapy/in a Controlled Environment

The following specifiers apply to Substance-Induced Disorders as noted:

- With Onset During Intoxication/With Onset During Withdrawal

ALCOHOL-RELATED DISORDERS (194)

- Alcohol Use Disorders
- 303.90 Alcohol Dependence* (195)
- 305.00 Alcohol Abuse (196)
- Alcohol-Induced Disorders
- 303.00 Alcohol Intoxication (196)
- 291.8 Alcohol Withdrawal (197) Specify if: With Perceptual Disturbance
- 291.0 Alcohol Intoxication Delirium (139)
- 291.0 Alcohol Withdrawal Delirium (139)
- 291.2 Alcohol-Induced Persistent Dementia (152)
- 291.1 Alcohol-Induced Persistent Amnesic Disorder (161)
- 291.x Alcohol-Induced Psychotic Disorder (310)
- .5 With Delusions¹⁶
- .3 With Hallucinations¹⁶
- 291.8 Alcohol-Induced Mood Disorder¹⁶ (370)
- 291.8 Alcohol-Induced Anxiety Disorder¹⁶ (439)
- 291.8 Alcohol-Induced Sexual Dysfunction¹⁶ (519)
- 291.8 Alcohol-Induced Sleep Disorder¹⁶ (601)
- 291.9 Alcohol-Related Disorder NOS (204)

AMPHETAMINE (OR AMPHETAMINE-LIKE)-RELATED DISORDERS (204)

- Amphetamine Use Disorders
- 304.40 Amphetamine Dependence* (206)
- 305.70 Amphetamine Abuse (206)
- Amphetamine-Induced Disorders
- 292.89 Amphetamine Intoxication (307) Specify if: With Perceptual Disturbance
- 291.0 Amphetamine Withdrawal (208)
- 292.81 Amphetamine Intoxication Delirium (126)
- 292.xx Amphetamine-Induced Psychotic Disorder (310)
- .11 With Delusions
- .12 With Hallucinations
- 292.84 Amphetamine-Induced Mood Disorder¹⁶ (370)
- 292.89 Amphetamine-Induced Anxiety Disorder¹⁶ (439)
- 292.89 Amphetamine-Induced Sexual Dysfunction¹⁶ (519)
- 292.89 Amphetamine-Induced Sleep Disorder¹⁶ (601)
- 292.9 Amphetamine-Related Disorder NOS (211)

CAFFEINE-RELATED DISORDERS (212)

- Caffeine-Related Disorders
- 305.90 Caffeine Intoxication (212)
- 292.89 Caffeine-Induced Anxiety Disorder¹⁶ (439)
- 292.89 Caffeine-Induced Sleep Disorder¹⁶ (601)
- 292.9 Caffeine-Related Disorder NOS (215)

CANNABIS-RELATED DISORDERS (215)

- Cannabis Use Disorders
- 304.50 Cannabis Dependence* (216)
- 305.20 Cannabis Abuse (217)
- Cannabis-Induced Disorders
- 292.89 Cannabis Intoxication (217) Specify if: With Perceptual Disturbance
- 292.81 Cannabis Intoxication Delirium (128)

Substance-Induced Anxiety Disorder (refer to Substance-Related Disorders for substance-specific codes) (400)

Dissociative Disorders (400)

- 300.12 Dissociative Amnesia (400)
300.13 Dissociative Fugue (400)
300.14 Dissociative Identity Disorder (400)
300.15 Dissociative Disorder NOS (400)

Sexual and Gender Identity Disorders (600)

SEXUAL DYSFUNCTIONS (600)

The following specifies type of primary sexual dysfunction

- 302.71 Hypoactive Sexual Desire Disorder (600)
302.72 Female Sexual Arousal Disorder (600)
302.73 Male Erectile Disorder (600)
302.74 Female Orgasmic Disorder (600)
302.75 Male Orgasmic Disorder (600)
302.76 Premature Ejaculation (600)

Organic Disorders

- 302.76 Dyspareunia NOS Due to a General Medical Condition (600)
306.51 Vaginismus NOS Due to a General Medical Condition (600)

Sexual Dysfunction Due to a General Medical Condition (600)

- 302.8x Female Hypoactive Sexual Desire Disorder Due to a General Medical Condition (600)
302.8y Male Hypoactive Sexual Desire Disorder Due to a General Medical Condition (600)

300.00 Anxiety Disorder NOS (400)

Somatoform Disorders (400)

- 300.81 Somatization Disorder (400)
300.82 Undifferentiated Somatoform Disorder (400)
300.83 Conversion Disorder (400)
300.84 Pain Disorder (400)
300.85 Body Dysmorphic Disorder (400)
300.89 Somatoform Disorder NOS (400)

Factitious Disorders (400)

- 300.9x Factitious Disorder (400)
300.9y Factitious Disorder NOS (400)

SLEEP DISORDERS RELATED TO ANOTHER MENTAL DISORDER (500)

- 307.02 Insomnia Related to (Specify) (500)
307.14 Hypersomnia Related to (Specify) (500)

OTHER SLEEP DISORDERS

- 307.0x Sleep Disorder Due to (Specify) (500)
307.02 Insomnia Type (Specify) (500)
307.04 Hypersomnia Type (Specify) (500)
307.05 Parasomnia Type (Specify) (500)
307.09 Mixed Type (Specify) (500)
307.1x Substance-Induced Sleep Disorder (Specify) (500)

Personality Disorders (600)

- 301.0 Paranoid Personality Disorder (600)
301.2 Schizoid Personality Disorder (600)
301.3 Schizotypal Personality Disorder (600)
301.4 Antisocial Personality Disorder (600)
301.5 Borderline Personality Disorder (600)
301.6 Histrionic Personality Disorder (600)
301.8 Narcissistic Personality Disorder (600)
301.81 Avoidant Personality Disorder (600)
301.82 Dependent Personality Disorder (600)
301.83 Obsessive-Compulsive Personality Disorder (600)
301.9 Personality Disorder NOS (600)

Other Conditions That May Be a Focus of Clinical Attention (600)

PSYCHOLOGICAL FACTORS AFFECTING MEDICAL CONDITION (600)

- 316.0x Specific Psychological Factor Affecting (Specify) (600)
316.1x General Medical Condition (Specify) (600)
316.2x Psychological Factor Affecting Medical Condition (Specify) (600)

Impulse-Control Disorders Not Elsewhere Classified (600)

- 312.2x Intermittent Explosive Disorder (600)
312.3x Kleptomania (600)
312.31 Pyromania (600)
312.32 Pathological Gambling (600)
312.33 Trichotillomania (600)
312.34 Impulse-Control Disorder NOS (600)

Adjustment Disorders (600)

- 300.4x Adjustment Disorder (600)
300.41 With Depressed Mood (600)
300.42 With Anxiety (600)
300.43 With Mixed Anxiety and Depressed Mood (600)
300.44 With Disturbance of Emotions and Conduct (600)
300.45 Unspecified (600)

- 607.84 Male Erectile Disorder Due to (Specify) (600)
625.0 Female Dyspareunia Due to (Specify) (600)
608.89 Male Dyspareunia Due to (Specify) (600)
625.8 Other Female Sexual Dysfunction Due to (Specify) (600)
608.89 Other Male Sexual Dysfunction Due to (Specify) (600)

GENDER IDENTITY DISORDERS (600)

- 302.xx Gender Identity Disorder (600)
302.8x Gender Identity Disorder in Children (600)
302.8y Gender Identity Disorder in Adolescents or Adults (600)
302.9 Gender Identity Disorder NOS (600)
302.9 Sexual Disorder NOS (600)

Eating Disorders (600)

- 307.1 Anorexia Nervosa (600)
307.31 Bulimia Nervosa (600)
307.50 Eating Disorder NOS (600)

Sleep Disorders (500)

- 307.42 Primary Insomnia (500)
307.44 Primary Hypersomnia (500)
307.45 Breathing-Related Sleep Disorder (500)
307.46 Circadian Rhythm Sleep Disorder (500)
307.47 Dysomnia NOS (500)

Parasomnias (500)

- 307.46 Sleep Terror Disorder (500)
307.46 Sleepwalking Disorder (500)
307.47 Parasomnia NOS (500)

PARAPHILIAS (600)

- 302.4 Exhibitionism (600)
302.81 Fetishism (600)
302.89 Frotteurism (600)
302.2 Pedophilia (600)
302.83 Sexual Masochism (600)
302.84 Sexual Sadism (600)
302.3 Transvestic Fetishism (600)
302.81 Voyeurism (600)
302.9 Paraphilia NOS (600)

MEDICATION-INDUCED MOVEMENT DISORDERS (600)

- 332.1 Neuroleptic-Induced Parkinsonism (600)
333.92 Neuroleptic Malignant Syndrome (600)
333.7 Neuroleptic-Induced Acute Dystonia (600)
333.99 Neuroleptic-Induced Acute Akathisia (600)
333.82 Neuroleptic-Induced Tardive Dyskinesia (600)
333.1 Medication-Induced Postural Tremor (600)
333.50 Medication-Induced Movement Disorder NOS (600)

OTHER MEDICATION-INDUCED DISORDER

- 995.2 Adverse Effects of Medication NOS (600)

RELATIONAL PROBLEMS (600)

- 601.9 Relational Problem Related to a Mental Disorder or General Medical Condition (600)
601.20 Parent-Child Relational Problem (600)
601.1 Partner Relational Problem (600)
601.8 Sibling Relational Problem (600)
601.81 Relational Problem NOS (600)

PROBLEMS RELATED TO ABUSE OR NEGLECT (600)

- 601.21 Physical Abuse of Child (600)
601.21 Sexual Abuse of Child (600)
601.21 Neglect of Child (600)
601.1 Physical Abuse of Adult (600)
601.1 Sexual Abuse of Adult (600)

ADDITIONAL CONDITIONS THAT MAY BE A FOCUS OF CLINICAL ATTENTION (600)

- V15.81 Noncompliance With Treatment (600)
V62.2 Malingering (600)
V71.01 Adult Antisocial Behavior (600)
V71.02 Child or Adolescent Antisocial Behavior (600)
V62.89 Borderline Intellectual Functioning (600)
780.9 Age-Related Cognitive Decline (600)
V62.82 Bereavement (600)
V62.3 Academic Problem (600)
V62.2 Occupational Problem (600)
313.82 Identity Problem (600)
V62.89 Religious or Spiritual Problem (600)
V62.4 Acculturation Problem (600)
V62.89 Phase of Life Problem (600)

Additional Codes

- 300.9 Unspecified Mental Disorder (nonpsychotic) (600)
V71.09 No Diagnosis or Condition on Axis I (600)
799.9 Diagnosis or Condition Deferred on Axis I (600)
V71.09 No Diagnosis on Axis II (600)
799.9 Diagnosis Deferred on Axis II (600)

Multiaxial System

- Axis I Clinical Disorders
Axis II Personality Disorders
Axis III General Medical Conditions
Axis IV Psychosocial and Environmental Problems
Axis V Global Assessment of Functioning

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION

DSM-IV™

AMERICAN PSYCHIATRIC ASSOCIATION

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is equivalent to schizophrenia except for its duration (i.e., the disturbance lasts from 1 to 6 months and the absence of a requirement that there be a decline in functioning).

Schizoaffective Disorder is a disturbance in which a mood episode and the active-phase symptoms of schizophrenia occur together and were preceded or are followed by at least 2 weeks of delusions or hallucinations without prominent mood symptoms.

Delusional Disorder is characterized by at least 1 month of non-bizarre delusions without other active-phase symptoms of schizophrenia.

Brief Psychotic Disorder is a psychotic disturbance that lasts more than 1 day and less than 1 month.

Shared Psychotic Disorder is a disturbance that develops in an individual who is influenced by someone else who has an established delusion with similar content.

In **Psychotic Disorder Due to a General Medical Condition**, the psychotic symptoms are judged to be a direct physiological consequence of a general medical condition.

In **Substance-Induced Psychotic Disorder**, the psychotic symptoms are judged to be a direct physiological consequence of a drug of abuse, a medication, or toxin exposure.

Psychotic Disorder Not Otherwise Specified is included for classifying psychotic presentations that do not meet the criteria for any of the specific Psychotic Disorders defined in this section or psychotic symptomatology about which there is inadequate or contradictory information.

Schizophrenia

The essential features of Schizophrenia are a mixture of characteristic signs and symptoms (both positive and negative) that have been present for a significant portion of time during a 1-month period (or for a shorter time if successfully treated), with seven signs of the disorder persisting for at least 6 months (Criteria A and C). These signs and symptoms are associated with marked social or occupational dysfunction (Criterion B). The disturbance is not better accounted for by Schizoaffective Disorder or a Mood Disorder With Psychotic Features and is not due to the direct physiological effects of a substance or a general medical condition (Criteria D and E). In individuals with a previous diagnosis of Autistic Disorder (or another Pervasive Developmental Disorder), the additional diagnosis of Schizophrenia is warranted only if prominent delusions or hallucinations are present for at least a month (Criterion F). The characteristic symptoms of Schizophrenia involve a range of cognitive and emotional dysfunctions that include perception, inferential thinking, language and communication, behavioral, mnemonic, affect, fluency and productivity of thought and speech, instinctive capacity, volition, drive, and attention. No single symptom is pathognomonic of Schizophrenia; the diagnosis involves the recognition of a constellation of signs and symptoms associated with impaired occupational or social functioning.

Characteristic symptoms (Criterion A) may be conceptualized as falling into two broad categories—positive and negative. The positive symptoms appear to reflect an excess or distortion of normal functions, whereas the negative symptoms appear to reflect a diminution or loss of normal functions. The positive symptoms (Criteria A1-A4) include delusions or overorganizations of inferential thinking (delusions), perceptual

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Hallucinations, language and communication (disorganized speech) and behavioral symptoms (grossly disorganized or catatonic behavior). These positive symptoms may comprise two distinct dimensions, which may in turn be related to different underlying neural mechanisms and clinical correlations: the "psychotic dimension" includes delusions and hallucinations, whereas the "disorganization dimension" includes disorganized speech and behavior. Negative symptoms (Criterion A5) include restrictions in the range and intensity of emotional expression (affective flattening), in the fluency and productivity of thought and speech (alogia), and in the initiation of goal-directed behavior (avolition).

Delusions (Criterion A1) are erroneous beliefs that usually involve a misinterpretation of perceptions or experiences. Their content may include a variety of themes (e.g., persecutory, referential, somatic, religious, or grandiose). Persecutory delusions are most common; the person believes he or she is being tormented, followed, stalked, spied on, or subjected to ridicule. Referential delusions are also common; the person believes that certain gestures, comments, passages from books, newspapers, song lyrics, or other environmental cues are specifically directed at him or her. The distinction between a delusion and a strongly held idea is sometimes difficult to make and depends on the degree of conviction with which the belief is held despite clear contradictory evidence. Although bizarre delusions are considered to be especially characteristic of Schizophrenia, "bizarreness" may be difficult to judge, especially across different cultures. Delusions are deemed bizarre if they are clearly implausible and not understandable and do not derive from ordinary life experiences. An example of a bizarre delusion is a person's belief that a stranger has removed his or her internal organs and has replaced them with someone else's organs without leaving any wounds or scars. An example of a nonbizarre delusion is a person's false belief that he or she is under surveillance by spying satellites or express loss of control over mind or body (i.e., those included among Schneider's list of "first-rank symptoms") are generally considered to be bizarre; these include a person's belief that his or her thoughts have been taken away by some outside force ("thought withdrawal"), that alien thoughts have been put into his or her mind ("thought insertion"), or that his or her body or actions are being acted on or manipulated by some outside force ("delusions of control"). If the delusions are judged to be bizarre, only this single symptom is needed to satisfy Criterion A for Schizophrenia.

Hallucinations (Criterion A2) may occur in any sensory modality (e.g., auditory, visual, olfactory, gustatory, and tactile), but auditory hallucinations are by far the most common and characteristic of Schizophrenia. Auditory hallucinations are usually experienced as voices, whether familiar or unfamiliar, that are perceived as distinct from the person's own thoughts. The content may be quite variable, although pejorative or threatening voices are especially common. Certain types of auditory hallucinations (i.e., two or more voices conversing with one another or voices maintaining a running commentary on the person's thoughts or behavior) have been considered to be particularly characteristic of Schizophrenia and were included among Schneider's list of "first-rank" symptoms. If these types of hallucinations are present, then only this single symptom is needed to satisfy Criterion A. The hallucinations must occur in the context of a clear awareness that they occur while falling asleep, awaking, or waking up (i.e., "perceptions") are considered to be within the range of normal experiences. Without experiences of hearing one's name called or experiences that lack the quality of an external source (e.g., a humming at one's head) are also not considered to be hallucinations characteristic of Schizophrenia. Hallucinations may also be a normal part of religious experience in certain cultural contexts.

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Disorganized thinking ("formal thought disorder," "loosening of associations") has been argued by some (Bleuler, in particular) to be the single most important feature of schizophrenia. Because of the difficulty inherent in developing an objective definition of "thought disorder," and because in a clinical setting inferences about thought are based primarily on the individual's speech, the concept of disorganized speech (Criterion A3) has been emphasized in the definition for Schizophrenia used in this manual. The speech of individuals with schizophrenia may be disorganized in a variety of ways. The person may "dig off the track" from one topic to another ("derailment" or "loose associations"); answers to questions may be abruptly related or completely unrelated ("irresponsibility"); and, rarely, speech may be so severely disorganized that it is nearly incomprehensible and resembles receptive apraxia in its linguistic disorganization ("incoherence" or "word salad"). Because mildly disorganized speech is common and nonspecific, the symptom must be severe enough to substantially impair effective communication. Less severe disorganized thinking or speech may occur during the prodromal and residual periods of schizophrenia (see Criterion C).

Grossly disorganized behavior (Criterion A4) may manifest itself in a variety of ways, ranging from childlike silliness to unpredictable agitation. Problems may be noted in any form of goal-directed behavior, leading to difficulties in performing activities of daily living such as organizing meals or maintaining hygiene. The person may appear markedly disheveled, may dress in an unusual manner (e.g., wearing multiple overcoats, scarves, and gloves on a hot day), or may display clearly inappropriate social behavior (e.g., public masturbation) or unpredictable and unengaged agitation (e.g., shouting or swearing). Care should be taken not to apply this criterion too broadly. Grossly disorganized behavior must be distinguished from behavior that is merely silly or generally unresponsive and from organized behavior that is motivated by delusional beliefs. Similarly, a few instances of restless, angry, or agitated behavior should not be considered to be evidence of schizophrenia, especially if the motivation is understandable.

Catatonic motor behaviors (Criterion A5) include a marked decrease in reactivity to the environment, sometimes reaching an extreme degree of complex negativism (catatonic stupor), remaining a rigid posture and resisting efforts to be moved (catatonic rigidity), active resistance to instructions or attempts to be moved (catatonic negativism), the assumption of inappropriate or bizarre postures (catatonic posturing), or purposeless and unstimulated excessive motor activity (catatonic excitement). Although catatonia has historically been associated with schizophrenia, the clinician should keep in mind that catatonic symptoms are nonspecific and may occur in other mental disorders (see Mood Disorders With Catatonic Features, p. 382), in general medical conditions (see Catatonic Disorder Due to a General Medical Condition, p. 169), and Medication-Induced Movement Disorders (see Neuroleptic-Induced Parkinsonism, p. 736).

The negative symptoms of Schizophrenia (Criterion A3) account for a substantial degree of the morbidity associated with the disorder. Three negative symptoms— affective flattening, alogia, and avolition—are included in the definition of Schizophrenia; other negative symptoms (e.g., anhedonia) are noted in the "Associated Features and Disorders" section below. Affective flattening is especially common and is characterized by the person's face appearing immobile and unresponsive, with poor eye contact and reduced body language. Although a person with affective flattening may smile and warm up occasionally, his or her range of nonverbal expressiveness is clearly diminished most of the time. It may be useful to observe the person interacting with peers to determine whether affective flattening is sufficiently persistent to meet the criterion. Alogia (poverty of speech) is manifested by brief, laconic, empty replies. The individual with alogia

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appears to have a diminution of thoughts that is reflected in decreased fluency and productivity of speech. This must be differentiated from an unwillingness to speak, a clinical judgment that may require observation over time and in a variety of situations. Avolition is characterized by an inability to initiate and persist in goal-directed activities. The person may sit for long periods of time and show little interest in participating in work or social activities.

Although quite ubiquitous in schizophrenia, negative symptoms are difficult to evaluate because they occur on a continuum with normality, are nonspecific, and may be due to a variety of other factors (e.g., as a consequence of positive symptoms, medication side effects, a mood disorder, environmental understimulation, or demoralization). Social isolation or impoverished speech may not be best conceived of as negative symptoms if they occur as a consequence of a positive symptom (e.g., a paranoid delusion or a prominent hallucination). For example, the behavior of an individual who has the delusional belief that he will be in danger if he leaves his room or talks to anyone may mimic alogia and avolition. Neuroleptic medications often produce extrapyramidal side effects that closely resemble affective flattening or avolition. The distinction between true negative symptoms and medication side effects depends on clinical judgment concerning the severity of negative symptoms, the nature and type of neuroleptic medication, the effects of dosage adjustment, and the effects of anticholinergic medications. The difficult distinction between negative symptoms and depressive symptoms may be informed by the other accompanying symptoms that are present and the fact that individuals with symptoms of depression typically experience an intense painful affect, whereas those with schizophrenia have a diminution or emptiness of affect. Finally, chronic environmental understimulation or demoralization may result in learned apathy and avolition. In establishing the presence of negative symptoms, perhaps the best test is their persistence for a considerable period of time despite efforts directed at resolving each of the potential causes described above. It has been suggested that enduring negative symptoms be referred to as "deficit" symptoms.

Criterion A for Schizophrenia requires that at least two of the five items be present concurrently for much of at least 1 month. However, if delusions are bizarre or hallucinations involve "voices commenting" or "voices conversing," then the presence of only one item is required. The presence of this relatively severe constellation of signs and symptoms is referred to as the "active phase." In those situations in which the active-phase symptoms remit within a month in response to treatment, Criterion A can still be considered to have been met if the clinician judges that the symptoms would have persisted for a month in the absence of effective treatment. In children, evaluation of the characteristic symptoms should include due consideration of the presence of other disorders or developmental difficulties. For example, the disorganized speech in a child with a Communication Disorder should not count toward a diagnosis of Schizophrenia unless the degree of disorganization is significantly greater than would be expected on the basis of the Communication Disorder alone.

Schizophrenia involves dysfunction in one or more major areas of functioning (e.g., interpersonal relations, work or education, or self-care) (Criterion B). Specifically, functioning is clearly below that which had been achieved before the onset of symptoms if the disturbance begins in childhood or adolescence. However, there may be a failure to achieve what would have been expected for the individual either from a development in functioning. Comparing the individual with unaffected siblings may be helpful in making this determination. Educational progress is repeatedly disrupted, and the individual may be unable to finish school. Many individuals are unable to hold a job or

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sustained periods of time and are employed at a lower level than their parents (Criterion D1). The majority (60%-70%) of individuals with schizophrenia do not marry, and men have relatively limited social contacts. The dysfunction persists for a substantial period during the course of the disorder and does not appear to be a direct result of any single feature. For example, if a woman quits her job because of the circumstances of a delusion that her boss is trying to kill her, this alone is not sufficient evidence for this criterion unless there is a more pervasive pattern of difficulties (usually in multiple domains of functioning).

Some signs of the disturbance must persist for a continuous period of at least 6 months (Criterion C). During that time period, there must be at least 1 month of symptoms or less than 1 month if symptoms are successfully treated) that meet Criterion A of Schizophrenia (the active phase). Prodromal symptoms are often present prior to the active phase, and residual symptoms may follow it. Some prodromal and residual symptoms are relatively mild or subthreshold forms of the positive symptoms specified in Criterion A. Individuals may express a variety of unusual or odd beliefs that are not delusional proportions (e.g., ideas of reference or magical thinking); they may have unusual perceptual experiences (e.g., sensing the presence of an unseen person or force in the absence of formed hallucinations); their speech may be generally understandable but grossly disorganized (e.g., mumbling to themselves, collecting odd and apparently worthless objects). In addition to these positive symptoms, negative symptoms are particularly common in the prodromal and residual phases and can often be quite severe. Individuals who had been socially active may become withdrawn; they lose interest in previously pleasurable activities; they may become less talkative and inquisitive; and they may spend the bulk of their time in bed. Such negative symptoms are often the first sign to the family that something is wrong; family members may ultimately report that they experienced the individual as "gradually slipping away."

Subtypes and Course Specifiers

The diagnosis of a particular subtype is based on the clinical picture that occasioned the most recent evaluation/admission to clinical care and may therefore change over time. Separate text and criteria are provided for each of the following subtypes:

295.30 Paranoid Type (see p. 287)

295.10 Disorganized Type (see p. 287)

295.20 Catatonic Type (see p. 288)

295.90 Undifferentiated Type (see p. 289)

295.60 Residual Type (see p. 289)

The following specifiers may be used to indicate the characteristic course of symptoms of Schizophrenia over time. These specifiers can be applied only after at least 1 year has elapsed since the initial onset of active-phase symptoms. During this initial 1-year period, no course specifiers can be given.

Episode With Interepisode Residual Symptoms. This specifier applies when the course is characterized by episodes in which Criterion A for Schizophrenia is met and there are clinically significant residual symptoms between the episodes. **With Prominent Negative Symptoms** can be added if prominent negative symptoms are present during these residual periods.

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Episode With No Interepisode Residual Symptoms. This specifier applies when the course is characterized by episodes in which Criterion A for Schizophrenia is met and there are no clinically significant residual symptoms between the episodes.

Continuous. This specifier applies when characteristic symptoms of Criterion A are met throughout all (or most) of the course. **With Prominent Negative Symptoms** can be added if prominent negative symptoms are also present.

Single Episode In Partial Remission. This specifier applies when there has been a single episode in which Criterion A for Schizophrenia is met and some clinically significant residual symptoms remain. **With Prominent Negative Symptoms** can be added if these residual symptoms include prominent negative symptoms.

Single Episode In Full Remission. This specifier applies when there has been a single episode in which Criterion A for Schizophrenia has been met and no clinically significant residual symptoms remain.

Other or Unspecified Pattern. This specifier is used if another or an unspecified course pattern has been present.

Recording Procedures

The diagnostic code for Schizophrenia is selected based on the appropriate subtype: 295.30 for Paranoid Type, 295.10 for Disorganized Type, 295.20 for Catatonic Type, 295.90 for Undifferentiated Type, and 295.60 for Residual Type. There are no fifth-digit codes available for the course specifiers. In recording the name of the disorder, the course specifiers are noted after the appropriate subtype (e.g., 295.30 Schizophrenia, Paranoid Type, Episode With Interepisode Residual Symptoms, With Prominent Negative Symptoms).

Associated Features and Disorders

Associated descriptive features and mental disorders. The individual with Schizophrenia may display inappropriate affect (e.g., smiling, laughing, or a silly facial expression in the absence of an appropriate stimulus), which is one of the defining features of the Disorganized Type. Anhedonia is common and is manifested by a loss of interest or pleasure. Depressive mood may take the form of depression, anxiety, or anger. There may be disturbances in sleep patterns (e.g., sleeping during the day and nighttime activity or awakenings). The individual may show a lack of interest in eating or may refuse food as a consequence of delusional beliefs. Often there are abnormalities of psychomotor activity (e.g., pacing, rocking, or aimless aimlessness). Difficulty concentrating is frequently evident and may reflect problems with focusing attention or distractibility due to preoccupation with internal stimuli. Although basic intellectual functions are classically considered to be intact in Schizophrenia, some indications of cognitive dysfunction are often present. The individual may be unaware of disturbances or may have memory impairment during a period of exacerbation of acute symptoms or in the presence of very acute negative symptoms. Lack of insight or awareness may be one of the last predictions to occur because it precludes the individual's cooperation with treatment. Depressive and manic symptoms are extreme concerns may occur and sometimes reach suicidal proportions. Many

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episode that is consistent with the active-phase symptoms of Schizophrenia, mood symptoms must be present for a substantial portion of the total duration of the disturbance, and delusions or hallucinations must be present for at least 2 weeks in the absence of prominent mood symptoms. In contrast, mood symptoms in Schizophrenia either have a duration that is brief in relation to the total duration of the disturbance, occur only during the prodromal or residual phases, or do not meet full criteria for a mood episode. When mood symptoms that meet full criteria for a mood episode are superimposed on Schizophrenia and are of particular clinical significance, an additional diagnosis of Depressive Disorder Not Otherwise Specified or Bipolar Disorder Not Otherwise Specified may be given. Schizophrenia, Catatonic Type, may be difficult to distinguish from a Mood Disorder With Catatonic Features.

By definition, Schizophrenia differs from Schizophreniform Disorder on the basis of duration. Schizophrenia involves the presence of symptoms (including prodromal or residual symptoms) for at least 6 months, whereas the total duration of symptoms in Schizophreniform Disorder must be at least 1 month but less than 6 months. Schizophreniform Disorder also does not require a decline in functioning. Brief Psychotic Disorder is defined by the presence of delusions, hallucinations, disorganized speech, or grossly disorganized or catatonic behavior lasting for at least 1 day but for less than 1 month.

The differential diagnosis between schizophrenia and Delusional Disorder rests on the nature of the delusions (nonsensate in Delusional Disorder) and the absence of other characteristic symptoms of Schizophrenia (e.g., hallucinations, disorganized speech or behavior, or prominent negative symptoms). Delusional Disorder is particularly difficult to differentiate from the Paranoid Type of Schizophrenia, because this subtype does not include prominent disorganized speech, disorganized behavior, or flat or inappropriate affect and is often associated with less decline in functioning than is characteristic of the other subtypes of Schizophrenia. When poor psychosocial functioning is present in Delusional Disorder, it arises directly from the delusional beliefs themselves.

A diagnosis of Psychotic Disorder Not Otherwise Specified may be made if insufficient information is available to choose between Schizophrenia and other Psychotic Disorders (e.g., Schizoaffective Disorder) or to determine whether the presenting symptoms are substance induced or are the result of a general medical condition. Such uncertainty is particularly likely to occur early in the course of the disorder.

Although Schizophrenia and Pervasive Developmental Disorders (e.g., Autistic Disorder) share disturbances in language, affect, and interpersonal relatedness, they can be distinguished in a number of ways. Pervasive Developmental Disorders are characteristically recognized during infancy or early childhood (usually before age 3 years), whereas such early onset is rare in Schizophrenia. Moreover, in Pervasive Developmental Disorders, there is an absence of prominent delusions and hallucinations more pronounced abnormalities in affect, and speech that is absent or minimal and characterized by stereotyped and abnormalities in prosody. Schizophrenia may occasionally develop in individuals with a Pervasive Developmental Disorder; a diagnosis of Schizophrenia is warranted in individuals with a preceding diagnosis of Autistic Disorder or another Pervasive Developmental Disorder only if prominent hallucinations or delusions have been present for at least a month. Childhood-onset Schizophrenia must be distinguished from childhood presentations combining disorganized speech (from a Communication Disorder) and disorganized behavior (from Attention-Deficit/Hyperactivity Disorder).

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Diagnostic criteria for Schizophrenia (continued)

duration has been brief relative to the duration of the active and residual periods.

E. *Substance/medication-induced condition exclusion:* The disturbance is not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication) or a general medical condition.

F. *Relationship to a Pervasive Developmental Disorder:* If there is a history of Autistic Disorder or another Pervasive Developmental Disorder, the additional diagnosis of Schizophrenia is made only if prominent delusions or hallucinations are also present for at least a month (or less if successfully treated).

Classification of longitudinal course can be applied only after at least 1 year has elapsed since the initial onset of active-phase symptoms.

Episodic With Interepisode Residual Symptoms (episodes are defined by the reemergence of prominent psychotic symptoms); also specify if:

With Prominent Negative Symptoms

Episodic With No Interepisode Residual Symptoms

Continuous (prominent psychotic symptoms are present throughout the period of observation); also specify if: **With Prominent Negative Symptoms**

Single Episode In Partial Remission; also specify if: **With Prominent Negative Symptoms**

Single Episode In Full Remission

Other or Unspecified Pattern

Schizophrenia Subtypes

The subtypes of Schizophrenia are defined by the predominant symptomatology at the time of evaluation. Although the prognostic and treatment implications of the subtypes are variable, the Paranoid and Disorganized Types tend to be the least and most severe, respectively. The diagnosis of a particular subtype is based on the clinical picture that occasioned the most recent evaluation or admission to clinical care and may therefore change over time. Not infrequently, the presentation may include symptoms that are characteristic of more than one subtype. The choice among subtypes depends on the following algorithm: Catatonic Type is assigned whenever prominent catatonic symptoms are present (regardless of the presence of other symptoms); Disorganized Type is assigned whenever disorganized speech and behavior and flat or inappropriate affect are prominent (unless Catatonic Type is also present); Paranoid Type is assigned whenever there is a preoccupation with delusions or frequent hallucinations are prominent (unless the Catatonic or Disorganized Type is present); Undifferentiated Type is a residual category describing presentations that include prominent active-phase

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Schizophrenic status features (e.g., paranoid ideation, magical thinking, social avoidance, and vague and digressive speech) with and may be preceded by Schizotypal, Schizoid, or Paranoid Personality Disorder. An additional diagnosis of Schizophrenia is appropriate when the symptoms are severe enough to satisfy Criterion A of Schizophrenia. The preceding Personality Disorder may be noted on Axis II, followed by "in parentheses (e.g., Schizotypal Personality Disorder (obsessive)).

Diagnostic criteria for Schizophrenia

A. *Characteristic symptoms:* Two (or more) of the following, each present for a significant portion of time during a 1-month period (or less if successfully treated):

- (1) delusions
- (2) hallucinations
- (3) disorganized speech (e.g., frequent derailment or incoherence)
- (4) grossly disorganized or catatonic behavior
- (5) negative symptoms, i.e., affective flattening, alogia, or avolition

Note: Only one Criterion A symptom is required if delusions are bizarre or hallucinations consist of a voice keeping a running commentary on the person's behavior or thoughts, or two or more voices conversing with each other.

B. *Social/occupational dysfunction:* For a significant portion of the time since the onset of the disturbance, one or more major areas of functioning such as work, interpersonal relations, or self-care are markedly below the level achieved prior to the onset (or when the onset is in childhood or adolescence, failure to achieve expected level of interpersonal, academic, or occupational achievement).

C. *Duration:* Continuous signs of the disturbance persist for at least 6 months. This 6-month period must include at least 1 month of symptoms (or less if successfully treated) that meet Criterion A (i.e., active-phase symptoms) and may include periods of prodromal or residual symptoms. During these prodromal or residual periods, the signs of the disturbance may be manifested by only negative symptoms or two or more symptoms listed in Criterion A present in an attenuated form (e.g., odd beliefs, unusual perceptual experiences).

D. *Schizoaffective and Mood Disorder exclusion:* Schizoaffective Disorder and Mood Disorder With Psychotic Features have been ruled out because either (1) no Major Depressive, Manic, or Mixed Episode have occurred concurrently with the active-phase symptoms, or (2) if mood episodes have occurred during active-phase symptoms, their total duration

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symptoms not meeting criteria for the Catatonic, Disorganized, or Paranoid Type, and Residual Type is for presentations in which there is continuing evidence of the disturbance, but the criteria for the active-phase symptoms are no longer met.

A dimensional alternative to the traditional Schizophrenia subtypes is described in Appendix B (see p. 710). The suggested dimensions are the psychotic dimension, the disorganized dimension, and the negative dimension.

295.30 Paranoid Type

The essential feature of the Paranoid Type of Schizophrenia is the presence of prominent delusions or auditory hallucinations in the context of a relative preservation of cognitive functioning and affect. Symptoms characteristic of the Disorganized and Catatonic Types (e.g., disorganized speech, flat or inappropriate affect, catatonic or disorganized behavior) are not prominent. Delusions are typically persecutory or grandiose, or both, but delusions with other themes (e.g., jealousy, religiosity, or somatization) may also occur. The delusions may be multiple, but are usually organized around a coherent theme. Hallucinations are also typically related to the content of the delusional theme. Associated features include anxiety, anger, aloofness, and argumentativeness. The individual may have a suspicious and paranoiac manner and either a silent, formal quality or extreme intensity in interpersonal interactions. The persecutory themes may predispose the individual to suicidal behavior, and the combination of persecutory and grandiose delusions with anger may predispose the individual to violence. Onset tends to be later in life than the other types of Schizophrenia, and the distinguishing characteristics may be more stable over time. These individuals usually show little or no impairment on neuropsychological or other cognitive testing. Some evidence suggests that the prognosis for the Paranoid Type may be considerably better than for the other types of Schizophrenia, particularly with regard to occupational functioning and capacity for independent living.

Diagnostic criteria for 295.30 Paranoid Type

A type of Schizophrenia in which the following criteria are met:

- A. Preoccupation with one or more delusions or frequent auditory hallucinations.
- B. None of the following is prominent: disorganized speech, disorganized or catatonic behavior, or flat or inappropriate affect.

295.10 Disorganized Type

The essential features of the Disorganized Type of Schizophrenia are disorganized speech, disorganized behavior, and flat or inappropriate affect. The disturbed speech

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abnormalities (e.g., grimacing, posturing, odd mannerisms, ritualistic or stereotyped behavior) are sometimes present. The life expectancy of individuals with Schizophrenia is shorter than that of the general population for a variety of reasons. Suicide is an important factor, because approximately 10% of individuals with Schizophrenia commit suicide. Risk factors for suicide include being male, age under 30 years, depressive symptoms, unemployment, and recent hospital discharge. There is conflicting evidence with regard to whether the frequency of violent acts is greater than in the general population. Comorbidity with Substance-Related Disorders (including Nicotine Dependence) is common. Schizotypal, Schizoid, or Paranoid Personality Disorder may sometimes precede the onset of Schizophrenia. Whether these Personality Disorders are simply prodromal to Schizophrenia or whether they constitute a separate earlier disorder is not clear.

Associated laboratory findings. No laboratory findings have been identified that are diagnostic of Schizophrenia. However, a variety of laboratory findings have been noted to be abnormal in groups of individuals with Schizophrenia relative to control subjects. Structural abnormalities in the brain have consistently been demonstrated in individuals with Schizophrenia as a group; the most common structural abnormalities include enlargement of the ventricular system and prominent sulci in the cortex. A variety of other abnormalities have also been noted using structural imaging techniques (e.g., decreased temporal and hippocampal size, increased size of the basal ganglia, decreased cerebellar size). Functional imaging techniques have indicated that some individuals may have abnormal cerebral blood flow or glucose utilization in specific brain regions (e.g., prefrontal cortex). Neuropsychological assessments may show a broad range of dysfunction (e.g., difficulty in changing response set, focusing attention, formulating abstract concepts). Neuropsychological findings include a slowing in reaction times, abnormalities in eye tracking, or impairments in sensory gating. Abnormal laboratory findings may also be noted as either a complication of Schizophrenia or of its treatment. Some individuals with Schizophrenia drink excessive amounts of fluid ("water intoxication") and develop abnormalities in urine specific gravity or electrolyte imbalances. Elevated creatine phosphokinase (CPK) may result from Neuroleptic Malignant Syndrome (see p. 739).

Associated physical examination findings and general medical conditions. Individuals with Schizophrenia are sometimes physically awkward and may display neurological "soft signs," such as left/right confusion, poor coordination, or mirroring. Some minor physical anomalies (e.g., highly arched palate, narrow- or wide-set eyes or subtle malformations of the ears) may be more common among individuals with Schizophrenia. Perhaps the most common associated physical findings are motor abnormalities. Most of these are likely to be related to side effects from treatment with antipsychotic medications. Motor abnormalities that are secondary to neuroleptic treatment include Neuroleptic-Induced Tardive Dyskinesia (see p. 747), Neuroleptic-Induced Parkinsonism (see p. 755), Neuroleptic-Induced Acute Akathisia (see p. 744), Neuroleptic-Induced Acute Dystonia (see p. 743), and Neuroleptic Malignant Syndrome (see p. 739). Spontaneous motor abnormalities resembling those that may be induced by neuroleptics (e.g., sniffing, tongue clicking, grunting) had been described in the preneuroleptic era and are also still observed, although they may be difficult to distinguish from neuroleptic effects. Other physical findings may be related to frequently associated disorders. For example, because Nicotine Dependence is so common in

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and definition. Hospital-based studies suggest a higher rate of Schizophrenia in males, whereas community-based surveys have mostly suggested an equal sex ratio. Broader definitions of Schizophrenia with respect to the boundary with Mood Disorders will yield a higher female-to-male ratio than the relatively narrow construct of Schizophrenia used in this manual.

Prevalence

There is variability in the reported prevalence of Schizophrenia because different studies have used different methods of ascertainment (e.g., rural versus urban, community versus clinic or hospital) and different definitions of Schizophrenia (narrow versus broad, criterion-based versus clinical). Estimates of prevalence have ranged from 0.2% to 2.0% across many large studies. Prevalence rates are similar throughout the world, but pockets of high prevalence have been reported in some specific areas. Taking all these sources of information into account, the lifetime prevalence of Schizophrenia is usually estimated to be between 0.5% and 1%. Because Schizophrenia tends to be chronic, incidence rates are considerably lower than prevalence rates and are estimated to be approximately 1 per 10,000 per year.

Course

The median age at onset for the first psychotic episode of Schizophrenia is in the early to mid-20s for men and in the late 20s for women. The onset may be abrupt or insidious, but the majority of individuals display some type of prodromal phase manifested by the slow and gradual development of a variety of signs and symptoms (e.g., social withdrawal, loss of interest in school or work, deterioration in hygiene and grooming, unusual behavior, outbursts of anger). Family members may find this behavior difficult to interpret and assume that the person is "going through a phase." Eventually, however, the appearance of some active-phase symptom marks the disturbance as Schizophrenia. The age at onset may have both pathophysiological and prognostic significance. Individuals with an early age at onset are more often male and have a poorer premorbid adjustment, lower educational achievement, more evidence of structural brain abnormalities, more prominent negative signs and symptoms, more evidence of cognitive impairment as assessed with neuropsychological testing, and a worse outcome. Conversely, individuals with a later onset are more often female, have less evidence of structural brain abnormalities or cognitive impairment, and display a better outcome.

Most studies of course and outcome in Schizophrenia suggest that the course may be variable, with some individuals displaying exacerbations and remissions, whereas others remain chronically ill. Because of variability in definition and ascertainment, an accurate summary of the long-term outcome of Schizophrenia is not possible. Complete remission (i.e., a return to full premorbid functioning) is probably not uncommon in this disorder. Of those who remain ill, some appear to have a relatively stable course, whereas others show a progressive worsening associated with severe disability. Early in the illness, negative symptoms may be prominent, appearing primarily as prodromal features. Subsequently, positive symptoms appear. Because these positive symptoms are particularly responsive to treatment, they typically diminish, but in many individuals, negative symptoms persist between episodes of positive symptoms. There is some suggestion that negative symptoms may become steadily more prominent in some individuals during

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Schizophrenia, these individuals are more likely to develop cigarette-related pathology (e.g., emphysema and other pulmonary and cardiac problems).

Specific Culture, Age, and Gender Features

Clinicians assessing the symptoms of Schizophrenia in socioeconomic or cultural situations that are different from their own must take cultural differences into account. Ideas that may appear to be delusional in one culture (e.g., severity and witchcraft) may be commonly held in another, visual or auditory hallucinations with a religious content may be a normal part of religious experiences (e.g., seeing the Virgin Mary or hearing God's voice). In addition, the assessment of disorganized speech may be made difficult by linguistic variation in narrative styles across cultures that affects the logical form of verbal presentation. The assessment of affect requires sensitivity to differences in styles of emotional expression, eye contact, and body language, which vary across cultures. If the assessment is conducted in a language that is different from the individual's primary language, care must be taken to ensure that alogia is not related to linguistic barriers. Because the cultural meaning of self-initiated, goal-directed activity can be expected to vary across diverse settings, disturbances of volition must also be carefully assessed. There is some evidence that clinicians may have a tendency to overdiagnose Schizophrenia (instead of Bipolar Disorder) in some ethnic groups. Cultural differences have been noted in the presentation, course, and outcome of Schizophrenia. Catastrophic behavior has been reported as relatively uncommon among individuals with Schizophrenia in the United States but is more common in non-Western countries. Individuals with Schizophrenia in developing nations tend to have a more acute course and a better outcome than do individuals in industrialized nations.

The onset of Schizophrenia typically occurs between the late teens and the mid-30s, with onset prior to adolescence rare (although cases with age at onset of 5 or 6 years have been reported). The essential features of the condition are the same in children, but it may be particularly difficult to make the diagnosis in this age group. In children, delusions and hallucinations may be less elaborated than those observed in adults, and visual hallucinations may be more common. Disorganized speech is observed in a number of disorders with childhood onset (e.g., Communication Disorders, Pervasive Developmental Disorders), as is disorganized behavior (e.g., Attention-Deficit/Hyperactivity Disorder, Stereotypic Movement Disorder). These symptoms should not be attributed to Schizophrenia without due consideration of these more common disorders of childhood. Schizophrenia can also begin later in life (e.g., after age 45 years). Late-onset cases tend to be similar to earlier-onset Schizophrenia, except for a higher ratio of women, a better occupational history, and a greater frequency of having been married. The clinical presentation is more likely to include paranoid delusions and hallucinations, and less likely to include disorganized and negative symptoms. The course is usually chronic, although individuals are often quite responsive to antipsychotic medications in lower doses. Among those with the illness age at onset (i.e., how age-related general sensory deficits (e.g., hearing loss) apparently occur more commonly than in the general adult population. Their specific role in pathogenesis remains unclear.

There are gender differences in the presentation and course of Schizophrenia. Women are more likely to have a later onset, more prominent mood symptoms, and a better prognosis. Although it has been held that males and females are affected at roughly equal numbers, estimates of sex ratio are confounded, by issues of ascertainment

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the course of the illness. Numerous studies have indicated a group of factors that are associated with a better prognosis. These include good premorbid adjustment, acute onset, later age at onset, being female, precipitating events, postulated mood disturbances, brief duration of active-phase symptoms, good interepisode functioning, minimal residual symptoms, absence of structural brain abnormalities, normal neurological functioning, a family history of Mood Disorder, and no family history of Schizophrenia.

Familial Pattern

The first-degree biological relatives of individuals with Schizophrenia have a risk for Schizophrenia that is about 10 times greater than that of the general population. Concordance rates for Schizophrenia are higher in monozygotic twins than in dizygotic twins. Adoption studies have shown that biological relatives of individuals with Schizophrenia have a substantially increased risk for Schizophrenia, whereas adoptive relatives have not increased risk. Although much evidence suggests the importance of genetic factors in the etiology of Schizophrenia, the existence of a substantial discordance rate in monozygotic twins also indicates the importance of environmental factors.

Differential Diagnosis

A wide variety of general medical conditions can present with psychotic symptoms. Psychotic Disorder Due to a General Medical Condition, delirium, or dementia is diagnosed when there is evidence from the history, physical examination, or laboratory tests that indicates that the delusions or hallucinations are the direct physiological consequence of a general medical condition (e.g., Cushing's syndrome, brain tumor) (see p. 306). Substance-Induced Psychotic Disorder, Substance-Induced Delirium, and Substance-Induced Persisting Dementia are distinguished from Schizophrenia by the fact that a substance (e.g., a drug of abuse, a medication, or exposure to a toxin) is judged to be etiologically related to the delusions or hallucinations (see p. 310). Many different types of Substance-Related Disorders may produce symptoms similar to those of Schizophrenia (e.g., suspended amphetamine or cocaine use may produce delusions or hallucinations; phenylethylamine use may produce a mixture of positive and negative symptoms). Based on a variety of features that characterize the course of Schizophrenia and Substance-Related Disorders, the clinician must determine whether the psychotic symptoms have been initiated and maintained by the substance use. Ideally, the clinician should attempt to observe the individual during a sustained period (e.g., a week) of abstinence. However, because such prolonged periods of abstinence are often difficult to achieve, the clinician may need to consider other evidence, such as whether the psychotic symptoms appear to be exacerbated by the substance and to diminish when it has been discontinued, the relative severity of positive symptoms or delusions in the amount and duration of substance use, and knowledge of the characteristic symptoms produced by a particular substance (e.g., amphetamines typically produce delusions and stereotyped, but not affective, blurring or prominent negative symptoms).

Distinguishing Schizophrenia from Mood Disorder With Psychotic Features and Schizoaffective Disorder is made difficult by the fact that mood disturbances can occur during the prodromal, active, and residual phases of Schizophrenia. If psychotic symptoms occur exclusively during periods of mood disturbance, the diagnosis is Mood Disorder With Psychotic Features. In Schizoaffective Disorder, there must be a manz

Exhibit 7

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UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF OHIO
 WESTERN DIVISION
 * * *

BOBBY T. SHEPPARD, :
 Plaintiff, :
 :
 -vs- : CASE NO. C 1-06-493
 : VOLUME II
 MARGARET BAGLEY, :
 Warden, :
 Defendant. :
 * * *

Evidentiary hearing before
 Magistrate Judge Merz, at the Federal Building,
 200 West Second Street, Dayton, Ohio, at
 9:18 a.m., on Tuesday, June 25 2002, before
 Monna J. McCormick, a Certified Real-Time
 Reporter, a Registered Professional Reporter and
 notary public within and for the State of Ohio.
 * * *

COPY

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1 APPEARANCES:

2

3 On Behalf of the Respondent:

4 Ohio Attorney General

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24 * * *

25

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09:18:46 1 THE COURT: We're ready to resume

09:18:48 2 in case C-1-2000-493, Bobby Sheppard versus

09:18:57 3 Margaret Bagley. I see Mr. Sheppard is not in

09:18:00 4 the courtroom. I presume Mr. Sheppard is in the

09:19:06 5 building. Have you seen your client?

09:19:11 6 MS. PERRY: I have seen the

09:19:12 7 corrections officer, but not Mr. Sheppard.

09:19:15 8 THE COURT: All right. We will

09:19:16 9 find Mr. Sheppard and we'll resume when we get

09:19:20 10 him here. Thank you. We're in recess.

09:19:48 11 (Thereupon, a recess was taken.)

09:35:48 12 THE COURT: You may call your next

09:35:49 13 witness.

09:35:51 14 MR. MOUL: Helen Jones.

09:35:53 15 HELEN JONES

09:35:52 16 of lawful age, Witness herein, having been first

09:37:07 17 duly cautioned and sworn, was examined and said

09:37:07 18 as follows:

09:37:07 19 THE COURT: Ma'am, would you state

09:37:08 20 your full name and spell your last name for the

09:37:11 21 record?

09:37:12 22 THE WITNESS: Helen B. Jones,

09:37:13 23 J-O-N-E-S.

09:37:15 24 THE COURT: Your witness, sir.

09:37:15 25 CROSS-EXAMINATION

09:37:18 1 BY MR. MOUL:

09:37:19 2 Q. Ms. Jones, I understand you just

09:37:20 3 got back from Europe, is that right?

09:37:22 4 A. Midnight last night.

09:37:23 5 Q. Thank you for coming. I apologize

09:37:25 6 for the little sleep I'm sure you're operating

09:37:29 7 on. Do you know who Stephen Fox is?

09:37:32 8 A. Yes.

09:37:33 9 Q. In fact, did you sell your house --

09:37:37 10 A. He was a tenant first and then when

09:37:39 11 I moved out, he wanted to buy the house.

09:37:42 12 Q. Can you tell the Court a little

09:37:44 13 about your educational background, really, just

09:37:48 14 secondary education, higher education?

09:37:51 15 A. Okay. Bachelor of Science from

09:37:55 16 Ohio State University. A master of education

09:38:00 17 from Wittenberg and a Ph.D. from Ohio State.

09:38:05 18 Q. And the Bachelor of Science, is

09:38:07 19 that in education?

09:38:09 20 A. Yes, it is.

09:38:09 21 Q. And the Ph.D. from OSU, is that in

09:38:13 22 education as well?

09:38:14 23 A. It's in the arts and sciences

09:38:15 24 department.

09:38:21 25 Q. And can you describe for the Court

MONNA MCCORMICK & ASSOCIATES * (937) 291-3334

09:39:31 1 Q. Prior to retiring -- you said you

09:39:32 2 retired. Prior to retiring, what was your

09:39:35 3 occupation?

09:39:37 4 A. Twenty-six years in education; and

09:39:39 5 after I completed my Ph.D., I eventually moved

09:39:43 6 into more industrial type consulting.

09:39:46 7 Q. And for the last 15 years prior to

09:39:48 8 retiring, with whom did you work?

09:39:51 9 A. I'm self-employed.

09:39:53 10 Q. What was the name of your company?

09:39:54 11 A. H. B. Jones & Associates.

09:39:56 12 Q. And what kind of work did you do?

09:39:58 13 A. Variety of things; I did

09:40:00 14 outplacement counseling, I did psychological

09:40:02 15 testing for individuals within corporations, I

09:40:06 16 did team building seminars, I did a human

09:40:09 17 resources audit for a company and outplacement

09:40:13 18 counseling, ran an education program for Proctor

09:40:16 19 & Gamble when they needed outplacement work.

09:40:20 20 Q. You were basically a human

09:40:22 21 resources consultant, correct?

09:40:24 22 A. Yes.

09:40:26 23 Q. You worked with businesses?

09:40:28 24 A. Yes, I did, and organizations.

09:40:33 25 Q. Focusing primarily on developing

MONNA MCCORMICK & ASSOCIATES * (937) 291-3334

09:38:23 1 what your areas of focus were in the Ph.D.

09:38:25 2 program?

09:38:31 3 A. Counseling, individual counseling,

09:38:33 4 group counseling, group therapy, I did a lot of

09:38:37 5 work in statistics, research.

09:38:50 6 Q. I think you just testified that

09:38:51 7 your Ph.D. was in arts and sciences. It

09:38:55 8 actually is from the Department of Education, is

09:38:57 9 that right?

09:38:57 10 A. Yes.

09:39:19 11 Q. What is your current occupation?

09:39:01 12 A. I'm retired as of last year.

09:39:05 13 Q. You do not have a Ph.D. in

09:39:07 14 psychology, is that right?

09:39:08 15 A. I'm not a licensed psychologist.

09:39:10 16 correct.

09:39:11 17 Q. Not only are you not a licensed

09:39:13 18 psychologist, you don't have a Ph.D. in

09:39:15 19 psychology, is that right?

09:39:16 20 A. My major field was entitled

09:39:22 21 psychology.

09:39:23 22 Q. Again, your Ph.D. is from the

09:39:26 23 department of education, it's in arts and

09:39:28 24 sciences, is that right?

09:39:30 25 A. Correct.

MONNA MCCORMICK & ASSOCIATES * (937) 291-3334

09:40:35 1 interpersonal skills?

09:40:37 2 A. And team building, those types of

09:40:39 3 things.

09:40:46 4 Q. Am I correct that at no time in the

09:40:47 5 last 25 years has any of your job

09:40:51 6 responsibilities included the diagnosis of

09:40:55 7 mental illness?

09:40:56 8 A. I have never been a licensed

09:40:59 9 psychologist or ever advertised myself as an

09:41:01 10 expert in that field, you're correct.

09:41:05 11 Q. But, again, in addition to not

09:41:07 12 advertising yourself or holding yourself out as

09:41:09 13 an expert, at no time during the last 25 years

09:41:12 14 have your job responsibilities included the

09:41:14 15 diagnosis of mental illness, is that correct?

09:41:17 16 A. Correct.

09:41:19 17 Q. So the record is clear, as you sit

09:41:21 18 here today, you don't believe that you're

09:41:23 19 qualified to give a professional opinion on

09:41:26 20 schizophrenia or other psychotic illnesses?

09:41:30 21 A. I was not asked to give a

09:41:31 22 professional opinion, correct.

09:41:32 23 Q. I didn't hear you because I think

09:41:36 24 we were talking at the same time. I apologize.

09:41:37 25 You will agree that at no time -- strike that.

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09:41:41 1 As you sit here today, you do not
09:41:43 2 believe you're qualified to give a professional
09:41:45 3 opinion on schizophrenia or any other psychotic
09:41:49 4 illness, is that correct?

09:41:50 5 A. Right, that's never been my
09:41:53 6 vocation.

09:41:54 7 Q. In 1995, you weren't qualified to
09:41:54 8 give that opinion, correct?

09:41:56 9 A. Correct.

09:41:57 10 THE COURT: When you say
09:41:57 11 professional opinion, can you -- your prior
09:42:01 12 questions were related to diagnosis. Can you
09:42:03 13 qualify? Is that the area to which you're
09:42:10 14 restricting your questions or are you asking a
09:42:12 15 broader question?

09:42:15 16 MR. MOUL: I'm not sure I
09:42:16 17 understand. Let me see if I --

09:42:18 18 THE COURT: I can give a
09:42:19 19 professional opinion with respect to
09:42:21 20 schizophrenia. My professional opinion is that
09:42:24 21 it is listed in the DSM-IV or whatever the
09:42:28 22 current version is. That's a professional
09:42:30 23 opinion about schizophrenia. It happens to be a
09:42:34 24 professional/legal opinion about it.

09:42:37 25 I would not think of myself as in

09:43:58 1 THE WITNESS: Yes, he called and he
09:44:00 2 said, do you know what paranoid schizophrenia
09:44:04 3 is? And I said, yes. I didn't question as to
09:44:06 4 why he called because I didn't know whether he
09:44:09 5 had been diagnosed that or a wife or a friend or
09:44:12 6 he's taking a college class. I didn't know, nor
09:44:14 7 did I ask. So I gave him a very, very brief
09:44:17 8 description and that was the end of our
09:44:19 9 conversation.

09:44:20 10 THE COURT: All right.

09:44:21 11 Q. What was the brief description that
09:44:23 12 you gave him?

09:44:23 13 A. I'm trying to remember. We're
09:44:24 14 talking about seven years ago. I know I said
09:44:27 15 something about communication with a
09:44:29 16 schizophrenic, because of the loss of reality.
09:44:32 17 It's hard to communicate with a person with
09:44:35 18 schizophrenia. Paranoid I'd still say today is
09:44:39 19 perception of persecution. Like I said, it's
09:44:44 20 the same thing that any person would find in the
09:44:47 21 dictionary or Psych 101.

09:44:53 22 Q. You're having trouble recalling
09:44:55 23 exactly what you told --

09:44:56 24 A. Well, yes, in exact words, yes, I
09:44:59 25 am.

09:42:40 1 any way qualified to diagnose a person from
09:42:43 2 examining their symptoms. And so it's important
09:42:47 3 that that distinction be retained. So try
09:42:51 4 again, please.

09:42:52 5 Q. Do you believe you're qualified to
09:42:57 6 describe the symptoms of paranoid schizophrenia?

09:43:01 7 A. As a layperson, yes, the
09:43:03 8 description I gave is what I found in Webster's
09:43:06 9 Dictionary.

09:43:11 10 Q. But you don't believe that you have
09:43:13 11 the training which would enable you to give an
09:43:16 12 opinion -- well, strike that.

09:43:19 13 At some point, did you speak with
09:43:16 14 Mr. Fox about paranoid schizophrenia?

09:43:17 15 A. In a very brief telephone call, I
09:43:19 16 can't recall how many years ago now.

09:43:17 17 Q. Was it at or about 1995?

09:43:18 18 A. Seven years was on my mind, yes;
09:43:17 19 about seven years ago, I received a phone call
09:43:20 20 in the evening with just a brief question and I
09:43:21 21 gave him a brief answer and that was the end of
09:43:22 22 our conversation.

09:43:23 23 THE COURT: Do you recall the
09:43:24 24 content of that conversation to the best of your
09:43:27 25 ability, please?

09:45:02 1 Q. Would it help to look at a
09:45:04 2 deposition transcript from the deposition?

09:45:06 3 A. I have read that.

09:45:07 4 Q. You read that prior to coming
09:45:08 5 today?

09:45:09 6 A. Yes -- no, not prior to coming
09:45:11 7 here, but I have read it.

09:45:21 8 Q. The exhibit book, Your Honor, would
09:45:24 9 you please hand that to the witness? I'm
09:45:32 10 referring to what's under tab 13, page 45.

09:45:46 11 A. Okay.

09:45:50 12 Q. If you would review the first
09:45:55 13 question, it starts with I think and then your
09:45:54 14 answer which says --

09:45:57 15 THE COURT: Page again?

09:45:58 16 MR. MOUL: Page 45. I think your
09:46:01 17 answer was: No, those weren't my words. And
09:46:03 18 then you go on. If you would review that for
09:46:05 19 me, I'd appreciate it.

09:46:13 20 THE WITNESS: Basically, it
09:46:24 21 consists of what I'm saying this morning.

09:46:25 22 Q. You essentially told him that
09:46:27 23 paranoid schizophrenia was a communication
09:46:30 24 disorder?

09:46:31 25 A. I broke it into two different

09:46:33 1 terms. I wasn't sure if he was asking me for
09:46:35 2 paranoid schizophrenia or schizophrenia and
09:46:40 3 paranoia. I thought he was talking about two
09:46:43 4 different things, evidently, because I broke it
09:46:45 5 into two different definitions.

09:46:47 6 Q. The definition that you gave for
09:46:50 7 schizophrenia?

09:46:51 8 A. As I mentioned, the person losing
09:46:54 9 reality and we paralleled communications going
09:46:58 10 on in class, two parallel communications going
09:47:02 11 on.

09:47:02 12 Q. The definition for paranoia?

09:47:05 13 A. Feeling persecuted, which is
09:47:07 14 exactly what it says here, yes.

09:47:08 15 Q. So someone who is feeling
09:47:20 16 persecuted who was having or suffered from a
09:47:34 17 communication disorder, is that correct?

09:47:35 18 A. If you want to combine those, yes.

09:47:39 19 Q. I'm trying to understand what
09:47:42 20 exactly is it that you told Mr. Fox.

09:47:43 21 A. I wish I could recall exactly what
09:47:55 22 I said in a phone conversation seven years ago,
09:47:59 23 but I have had many, many conversations since
09:48:01 24 then and many clients.

09:47:53 25 Q. Well, is it accurate to state that

09:48:44 1 book?

09:48:46 2 THE COURT: Yes, at the back of
09:48:47 3 your deposition, attached.

09:48:45 4 Q. It's still under tab 13, but at the
09:48:51 5 tail end of it, the bottom right-hand corner, it
09:48:54 6 will say exhibit and it says Sheppard 2. Do you
09:48:59 7 see that?

09:48:58 8 A. Yes.

09:49:01 9 Q. If you would turn the page to
09:49:04 10 what's marked at the bottom of page 13, it says
09:49:06 11 at the top, DSM-IV classification.

09:49:11 12 A. Yes.

09:49:15 13 Q. In the second column, if you'd turn
09:49:19 14 down to -- I think it's the fourth disorder
09:49:22 15 listed, can you identify what that disorder is?
09:49:24 16 Will you read that into the record, please?

09:49:27 17 A. If I'm looking at the right thing,
09:49:28 18 communication disorders.

09:49:30 19 Q. Can you read what the disorders are
09:49:31 20 that are listed under communication disorders?

09:49:34 21 A. Some. Expressive language, mixed
09:49:38 22 receptive language -- expressive language was
09:49:47 23 the first one.

09:49:43 24 Q. Disorder?

09:49:49 25 A. Yes, expressive language disorder,

09:47:36 1 you told him, quote, it was a communication
09:47:39 2 disorder that a person would have difficulty
09:47:41 3 communicating because of their lack of reality
09:47:43 4 or they've lost touch with reality?

09:47:46 5 A. Yes, that's what I had said.

09:47:48 6 Q. Are you familiar with the DSM?

09:47:50 7 A. I am.

09:47:52 8 Q. And can you describe for the Court
09:47:57 9 what the DSM is?

09:47:55 10 A. It's a reference book that
09:47:56 11 psychologists would use and it comes out about
09:48:00 12 every five years, I assume. I used the DSM-III
09:48:03 13 when I was in college. And it helps
09:48:06 14 particularly -- it helps the practitioner
09:48:08 15 determine exactly what category the person's
09:48:12 16 problem would be categorized in, I guess. It's
09:48:15 17 a reference book.

09:48:18 18 Q. I think you referred to it in your
09:48:22 19 deposition as the Bible of clinicians, is that
09:48:21 20 correct?

09:48:21 21 A. Yes, it is, right.

09:48:24 22 Q. If you would turn to the back of
09:48:26 23 your deposition, it's marked Sheppard Exhibit 2,
09:48:33 24 the cover says DSM-IV.

09:48:43 25 A. Am I looking for something in this

09:49:52 1 mixed receptive expressive language disorder,
09:49:55 2 which is the mixed communication I was referring
09:49:57 3 to. And I cannot read the next one.

09:50:03 4 THE COURT: Could the next one be
09:50:04 5 phonological, P-H-O-N-O-L-O-G-I-C-A-L, disorder?

09:50:12 6 MR. MOUL: I actually have the
09:50:13 7 original.

09:50:15 8 THE COURT: Oh, good.

09:50:19 9 THE WITNESS: Okay. Do you want me
09:50:20 10 to read these five?

09:50:22 11 Q. Yes, will you please read in the --

09:50:22 12 A. Yes, expressive language disorder,
09:50:27 13 mixed receptive expressive language disorder,
09:50:31 14 phonological disorder, stuttering, communication
09:50:36 15 disorder.

09:50:37 16 THE COURT: Actually, the last one
09:50:37 17 is communication disorder NOS, which means not
09:50:41 18 otherwise specified, correct?

09:50:43 19 THE WITNESS: Yes, it's a general
09:50:44 20 category.

09:50:51 21 Q. Those are the only five
09:50:51 22 communication disorders listed under the DSM-IV,
09:50:55 23 right?

09:50:55 24 A. Right, that's what it says.

09:51:02 25 Q. If you would turn to page 19 of

09:51:03 1 that table of contents. The second column, what
 09:51:15 2 is the title in the second column?
 09:51:18 3 A. Schizophrenia and other psychotic
 09:51:20 4 disorders.
 09:51:21 5 Q. Isn't it correct that the DSM
 09:51:23 6 actually classifies or actually differentiates
 09:51:26 7 between communication disorders and
 09:51:27 8 schizophrenia, is that correct?
 09:51:29 9 A. What I was referring to was a mixed
 09:51:31 10 receptive expressive language disorder under
 09:51:34 11 communication disorder and that is something
 09:51:36 12 that you will find, I think, in schizophrenia.
 09:51:42 13 Q. Would you point out to me where it
 09:51:43 14 is in the DSM-IV?
 09:51:45 15 A. I have to admit, I do not study the
 09:51:47 16 DSM. I've never been a clinician and I've never
 09:51:50 17 said that I was a clinician. If you're trying
 09:51:53 18 to say that I was incorrect, I will admit I was
 09:51:55 19 incorrect.
 09:51:56 20 Q. You were incorrect because
 09:51:59 21 schizophrenia is not, in fact, a communication
 09:52:02 22 disorder, is that correct?
 09:52:04 23 A. That's what I learned when I got my
 09:52:06 24 Ph.D. and that was 27 years ago.
 09:52:08 25 Q. As it stands today --

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09:53:12 1 THE COURT: Well --
 09:53:16 2 MR. MOUL: Contrary to what Mr.
 09:53:17 3 Wille says, the jurist specifically said what is
 09:53:22 4 paranoid schizophrenia and indeed Helen Jones
 09:53:26 5 then submitted an affidavit to the trial Court
 09:53:28 6 in which she indicated that she had reviewed Dr.
 09:53:31 7 Smalldon's testimony and that the information
 09:53:33 8 she had given to Juror Fox was entirely
 09:53:36 9 consistent with the testimony of Dr. Jeffrey
 09:53:42 10 Smalldon.
 09:53:42 11 And if you give me some leeway,
 09:53:44 12 she'll agree that she gave an oversimplified
 09:53:47 13 definition, if it was even close to being
 09:53:49 14 correct.
 09:53:50 15 THE COURT: Please remind me to
 09:53:51 16 when that affidavit was given to the trial
 09:53:53 17 Court.
 09:53:56 18 MR. MOUL: It was submitted as part
 09:53:57 19 of the state's memorandum in opposition to a
 09:54:00 20 motion for new trial. It looks like it's 158 --
 09:54:11 21 page 158 of the record.
 09:54:15 22 THE COURT: Thank you.
 09:54:16 23 MR. WILLE: May I respond just
 09:54:17 24 briefly, Your Honor?
 09:54:18 25 THE COURT: Of course.

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09:52:10 1 A. As it stands in DSM-IV, I wouldn't
 09:52:12 2 generally say it's a communication disorder, but
 09:52:15 3 certainly results in that. A psychologist would
 09:52:19 4 not call schizophrenia a communication disorder.
 09:52:23 5 It would be a legal diagnosis.
 09:52:27 6 Q. What are the symptoms of paranoid
 09:52:28 7 schizophrenia?
 09:52:29 8 A. I honestly do not know.
 09:52:31 9 Q. So you don't know --
 09:52:33 10 A. I don't know.
 09:52:35 11 Q. You don't know whether or not
 09:52:35 12 disorganized speech, for example, is a symptom?
 09:52:42 13 A. I was told that in college. They
 09:52:45 14 may have been wrong. I don't know.
 09:52:47 15 MR. WILLE: I would like to object
 09:52:48 16 to this line of questioning. I haven't objected
 09:52:51 17 thus far, but there's no indication that Mr. Fox
 09:52:54 18 asked any specific questions with respect to
 09:52:56 19 paranoid schizophrenia. The evidence seems to
 09:52:59 20 be that the conversation lasted possibly a
 09:53:02 21 minute.
 09:53:04 22 We would submit, Your Honor, that
 09:53:05 23 any detailed discussion of this witness'
 09:53:08 24 knowledge of paranoid schizophrenia is not
 09:53:11 25 relevant.

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09:54:18 1 MR. WILLE: It's our position, Your
 09:54:19 2 Honor, that that may well be so, that that
 09:54:22 3 affidavit was issued; however, unless he
 09:54:24 4 establishes that this witness actually told this
 09:54:27 5 information to Mr. Fox, therefore, unless he
 09:54:31 6 establishes that, then Mr. Fox didn't know that
 09:54:33 7 information; and, therefore, whether or not she
 09:54:35 8 told him -- whether or not she told him
 09:54:37 9 something was consistent or inconsistent with
 09:54:39 10 the trial testimony is irrelevant.
 09:54:42 11 THE COURT: Well, it may depend
 09:54:44 12 upon whether the trial Court in overruling the
 09:54:48 13 motion for a new trial relied in any way upon
 09:54:53 14 the witness' affidavit.
 09:54:55 15 Now, if the state is not relying
 09:54:59 16 upon the conclusion of the trial judge that a
 09:55:06 17 new trial was not merited as a basis for
 09:55:12 18 preclusion of that argument here in this habeas
 09:55:17 19 proceeding, then I might agree that -- I
 09:55:22 20 certainly would agree that the affidavit that
 09:55:24 21 cross-examination about the affidavit is
 09:55:28 22 irrelevant, but I don't know what your position
 09:55:31 23 is.
 09:55:31 24 MR. WILLE: One other thing, Your
 09:55:32 25 Honor, I'll address that momentarily, even so.

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09:55:36 1 if that were the case, if a trial judge still is
 09:55:38 2 basing his decision on whether something --
 09:55:41 3 whether something that was told a juror, even if
 09:55:44 4 he was basing it on an assessment of whether it
 09:55:46 5 was consistent or inconsistent with the trial
 09:55:49 6 testimony, there still has to be a foundation as
 09:55:52 7 to what was actually told that juror.

09:55:54 8 If anything else is irrelevant
 09:55:57 9 because the juror could not possibly have
 09:55:59 10 considered anything else in reaching his
 09:56:01 11 deliberations and the evidence seems to indicate
 09:56:03 12 this juror did not talk to the other jurors;
 09:56:06 13 aside from that, if Mr. Fox was told something,
 09:56:08 14 for example, Mr. Moul asked the question does
 09:56:11 15 this fit within the category of schizophrenia
 09:56:13 16 that's listed in the DSM and this witness said
 09:56:16 17 no and was mistaken, if he did not ask that
 09:56:19 18 question, Mr. Fox wouldn't have known that and
 09:56:21 19 therefore it couldn't have possibly affected his
 09:56:23 20 deliberations.

09:56:25 21 THE COURT: But it still strikes me
 09:56:27 22 that the witness' communication may have been
 09:56:29 23 relevant to this proceeding in two ways. First,
 09:56:31 24 whatever she said to Mr. Fox and the extent to
 09:56:33 25 which that was communicated to other jurors

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09:58:18 1 also marked as Sheppard Exhibit 3 to your
 09:58:20 2 deposition, will you just review the paragraph
 09:58:22 3 under section 295.30 to yourself briefly?

09:58:24 4 A. Okay.

09:58:26 5 Q. You will agree with me that
 09:58:28 6 paranoid schizophrenia is a very complex mental
 09:58:30 7 illness?

09:58:32 8 A. Of course.

09:58:34 9 Q. And you will agree that you gave an
 09:58:36 10 oversimplified definition?

09:58:40 11 A. Every bit of that, yes, very
 09:58:42 12 oversimplified. I didn't understand the purpose
 09:58:44 13 of the question that he asked me.

09:58:46 14 Q. You'll agree that your definition
 09:58:48 15 could be misleading, correct?

09:58:50 16 A. I cannot agree that it would be
 09:58:52 17 misleading.

09:58:54 18 Q. I'd ask you to refer to page 54 of
 10:00:00 19 your deposition.

10:00:02 20 A. I'm sorry. What general number?

10:00:04 21 Q. 54, that's under 13.

10:00:06 22 THE COURT: Still tab 13.

10:00:08 23 THE WITNESS: Yeah. 54?

10:00:10 24 THE COURT: Yes, ma'am.

10:00:12 25 Q. Didn't I ask you the question, if

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09:56:43 1 and/or influenced his state of mind; and,
 09:56:45 2 secondly of all, the extent to which the trial
 09:56:47 3 judge accepted her affidavit as expert testimony
 09:56:49 4 may have an impact; and, accordingly, the motion
 09:56:51 5 or the objection is overruled.

09:57:01 6 MR. WILLE: Thank you, Your Honor.

09:57:03 7 MR. MOUL: I have to apologize.

09:57:05 8 Can I have the court reporter read the last
 09:57:07 9 question?

09:57:10 10 (Thereupon, the following portion
 09:57:12 11 of the record the read by the court reporter:

09:57:14 12 "Question: You don't know whether or not
 09:57:16 13 disorganized speech, for example, is a
 09:57:18 14 symptom?"

09:57:20 15 Q. You don't know whether or not
 09:57:22 16 people that suffer from paranoid schizophrenia
 09:57:24 17 has, as one of their symptoms, disorganized
 09:57:26 18 speech characteristics, is that correct?

09:57:28 19 A. Unless I would actually deal with a
 09:57:30 20 client, no.

09:57:32 21 Q. As a general rule, you don't know
 09:57:34 22 whether that's a symptom, isn't that correct?

09:57:36 23 A. You're right.

09:57:38 24 Q. If you would turn to what's page
 09:57:40 25 287 in the hard copy that I gave you, which is

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10:00:46 1 you refer down to the middle: Now, given that
 10:00:48 2 you didn't tell him any of that information that
 10:00:50 3 you explained to him that schizophrenia is
 10:00:52 4 quote, unquote, a communication disorder, will
 10:00:54 5 you agree with me that the oversimplified
 10:00:56 6 definition that you gave to Stephen Fox could be
 10:00:58 7 misleading? And I asked you that question?

10:00:59 8 A. Well, I had no idea what he would
 10:01:01 9 do with that information, sir.

10:01:03 10 Q. Did I ask that question?

10:01:05 11 A. I don't know why he asked it. So
 10:01:07 12 it would be misleading in what direction, I do
 10:01:09 13 not know.

10:01:11 14 Q. Did I ask you that question?

10:01:13 15 A. Evidently, you did, yes.

10:01:15 16 Q. Did you give the answer: I guess
 10:01:17 17 it could be?

10:01:19 18 A. Yes, I will agree, I guess it could
 10:01:21 19 be depending on the reason he asked and I don't
 10:01:23 20 know how he's going to apply the information.

10:01:25 21 Q. Will you agree with me that to
 10:01:27 22 characterize paranoid schizophrenia as a
 10:01:29 23 communications disorder could be misleading if,
 10:01:31 24 in fact, the definition of symptoms associated
 10:01:33 25 with paranoid schizophrenia do not ordinarily

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10:01:50 1 include disorganized speech?
 10:01:52 2 A. I did not realize that I was
 10:01:54 3 defining paranoid schizophrenia.
 10:02:00 4 Q. I will ask the question again.
 10:02:02 5 Will you agree with me to characterize paranoid
 10:02:04 6 schizophrenia as a communication disorder could
 10:02:05 7 be misleading given the fact the symptoms with
 10:02:15 8 paranoid schizophrenia generally do not include
 10:02:18 9 disorganized speech?
 10:02:21 10 A. I'm not sure how to answer that,
 10:02:22 11 frankly.
 10:02:24 12 THE COURT: I think that may be
 10:02:25 13 inconsistent with the DSM-IV as well.
 10:02:27 14 MR. MOUL: That's right.
 10:02:30 15 THE WITNESS: I've never owned a
 10:02:31 16 DSM-IV. The last one I had was a DSM-II.
 10:02:35 17 Q. I refer you to page 60 of your
 10:02:38 18 deposition.
 10:02:44 19 A. Uh-huh.
 10:02:46 20 Q. If you will review the second
 10:02:48 21 question -- excuse me -- the first full question
 10:02:51 22 and your answer.
 10:02:57 23 A. Yes, I agreed with that.
 10:03:00 24 Q. So you agree with the statement
 10:03:11 25 that --

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10:04:30 1 A. Of course.
 10:04:31 2 Q. What are the other types?
 10:04:32 3 A. How would I know? I've never been
 10:04:34 4 a clinician. I don't memorize the DSM. I've
 10:04:37 5 never had a need to. I'm an organization
 10:04:40 6 specialist. I've never been asked to diagnose
 10:04:42 7 it.
 10:04:43 8 Q. If we look at Webster's Dictionary,
 10:04:45 9 you believe the phrase, quote-unquote, paranoid
 10:04:48 10 schizophrenia will state it's a communications
 10:04:51 11 disorder likely to --
 10:04:53 12 A. There's many things that it states
 10:04:55 13 besides. It doesn't give you paranoia
 10:04:57 14 schizophrenia. It gives you paranoia and
 10:05:00 15 schizophrenia. And that's the way I perceived
 10:05:02 16 it when he called me.
 10:05:17 17 Q. If you would again refer to the
 10:05:19 18 DSM, specifically page 287, section 295.30.
 10:05:33 19 A. Uh-huh.
 10:05:38 20 Q. Would you read the first sentence
 10:05:40 21 of 295.30 into the record, please?
 10:05:45 22 A. The essential feature of the
 10:05:46 23 paranoid type of schizophrenia is the presence
 10:05:48 24 of prominent delusions or auditory
 10:05:52 25 hallucinations in the context of a relative

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10:03:18 1 A. If, in fact, paranoid schizophrenia
 10:03:20 2 was considered strictly a communications
 10:03:22 3 disorder, it could be misleading, yes, I agree.
 10:03:28 4 Q. I'm not sure I understood the
 10:03:29 5 answer, but if you -- you will agree that to
 10:03:34 6 characterize paranoid schizophrenia as a
 10:03:36 7 communication disorder could be misleading, if,
 10:03:40 8 in fact, the definition of or symptoms
 10:03:42 9 associated with paranoid schizophrenia generally
 10:03:45 10 do not include disorganized speech, correct?
 10:03:48 11 A. I assume so. I am sorry. I'm
 10:03:51 12 having trouble because I was never really asked
 10:03:54 13 this in-depth question. We had a 60-second
 10:03:57 14 conversation. And what I gave him, you can find
 10:03:59 15 in Webster's Dictionary.
 10:04:10 16 Q. You believe Webster's Dictionary
 10:04:12 17 states that paranoid schizophrenia is a
 10:04:15 18 communication disorder?
 10:04:18 19 A. I looked it up this morning and I
 10:04:21 20 found paranoid and schizophrenia.
 10:04:21 21 Q. And the two together?
 10:04:23 22 A. And I never determined in my mind
 10:04:24 23 that the two went together.
 10:04:26 24 Q. Did you determine that
 10:04:27 25 schizophrenia was a subtype of schizophrenia?

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10:05:55 1 preservation of cognitive functioning and
 10:05:56 2 affect.
 10:06:08 3 THE COURT: To preserve context,
 10:06:10 4 the Court will read the second sentence.
 10:06:13 5 Symptoms characteristic of the disorganized and
 10:06:16 6 catatonic types, paren e.g., disorganized
 10:06:21 7 speech, flat or inappropriate affect, catatonic
 10:06:27 8 or disorganized behavior, close paren, are not
 10:06:32 9 prominent, period.
 10:06:38 10 Q. Did you not advise Stephen Fox on
 10:06:39 11 the phone call that persons suffering from
 10:06:42 12 paranoid schizophrenia tend to have a
 10:06:44 13 preoccupation with one or more delusions or
 10:06:47 14 present with auditory hallucinations, correct?
 10:06:51 15 A. No, I did not say those words,
 10:06:53 16 you're right.
 10:07:20 17 Q. If would you read down to the
 10:07:21 18 sentence that says --
 10:07:24 19 A. What page?
 10:07:26 20 Q. 287, disorganized features.
 10:07:35 21 A. What sentence?
 10:07:36 22 Q. It's about the middle of the
 10:07:37 23 paragraph in DSM page 287, it starts with
 10:07:41 24 associated features; would you read that out
 10:07:43 25 loud, please?

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10:07:48 1 A. Associated features include
 10:07:56 2 anxiety, anger, aloofness and argumentativeness.
 10:07:57 3 Q. Am I correct that you did not
 10:07:59 4 advise Mr. Fox that features associated with
 10:08:03 5 paranoid schizophrenia included anxiety, anger
 10:08:06 6 aloofness and argumentativeness?
 10:08:10 7 A. Correct.
 10:08:23 8 Q. If you would refer -- actually,
 10:08:25 9 it's the third sentence, it says: Delusions are
 10:08:28 10 typically persecutory or grandiose?
 10:08:31 11 A. Are typically persecutory or
 10:08:35 12 grandiose or both, but delusions with other
 10:08:38 13 themes may also occur.
 10:08:41 14 Q. So this states that there are
 10:08:42 15 typically delusions with people that suffer
 10:08:46 16 paranoid schizophrenia, correct?
 10:08:48 17 A. Well, I mentioned, yes, feelings of
 10:08:52 18 persecution, yes.
 10:08:55 19 THE COURT: And I don't think it's
 10:08:57 20 correct to draw the inference that your question
 10:08:59 21 implies. The inference I would draw from that
 10:09:05 22 sentence, if there are delusions, they are
 10:09:07 23 typically persecutory, not that there are
 10:09:10 24 delusions that are persecutory from that
 10:09:24 25 sentence.

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10:10:47 1 information that you gave Juror Fox actually
 10:10:47 2 included the statement that people with paranoid
 10:10:50 3 schizophrenia actually suffer from diminished
 10:10:52 4 cognitive ability; is that what you just
 10:10:55 5 testified to?
 10:10:56 6 A. I don't think diminished. Impaired
 10:10:59 7 possibly or impaired communication problems.
 10:11:01 8 Q. Impaired cognitive functioning,
 10:11:03 9 that's what you're trying to say?
 10:11:04 10 A. Okay.
 10:11:05 11 Q. Is that correct?
 10:11:05 12 A. I will agree with you.
 10:11:07 13 Q. Your statement gave the impression
 10:11:08 14 that people that suffer from paranoid
 10:11:10 15 schizophrenia have impaired cognitive affect and
 10:11:22 16 functioning, correct?
 10:11:26 17 A. I think in some cases, yeah.
 10:11:30 18 Q. If you could continue down about
 10:11:33 19 three-quarters of the way in the middle, there's
 10:11:36 20 a sentence that starts the persecutory --
 10:11:43 21 A. Where am I looking, please? Oh,
 10:11:46 22 yes.
 10:11:53 23 Q. Could you read that?
 10:11:51 24 A. Persecutory themes may predispose
 10:12:04 25 the person to suicide behavior and the

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10:09:35 1 Q. You didn't advise Stephen Fox that
 10:09:37 2 persons suffering from paranoid schizophrenia
 10:09:39 3 shall show little to no impairment in cognitive
 10:09:44 4 abilities, did you?
 10:09:45 5 A. Well, the cognitive abilities,
 10:09:46 6 right; and communication is a cognitive ability.
 10:09:49 7 Q. Communications -- in your opinion,
 10:09:50 8 communication is a cognitive ability?
 10:09:53 9 A. Yes, you have to be cognizant
 10:09:55 10 before you can communicate.
 10:09:57 11 Q. Cognitive ability?
 10:09:58 12 A. Same thing. Mental ability.
 10:10:12 13 Q. You disagree with the DSM that
 10:10:15 14 people that suffer from paranoid schizophrenia
 10:10:18 15 generally maintain a, quote, relative
 10:10:21 16 preservation of cognitive functioning?
 10:10:23 17 A. You asked me if I agree with that?
 10:10:26 18 Q. Do you disagree with that?
 10:10:27 19 A. I don't disagree that. It's a
 10:10:30 20 very, very complex --
 10:10:33 21 Q. Do you -- finish your answer.
 10:10:35 22 A. It's a very, very complex disorder.
 10:10:36 23 There are many symptoms.
 10:10:39 24 Q. You believe the statement that
 10:10:40 25 you -- I think if I understood you that the

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10:11:56 1 combination of persecutory and grandiose
 10:12:05 2 delusions with anger may predispose the person
 10:12:07 3 to violence.
 10:12:05 4 Q. You didn't advise Juror Fox that
 10:12:09 5 persons who suffer from paranoid schizophrenia,
 10:12:12 6 quote, may be -- may be predisposed to violence,
 10:12:16 7 did you?
 10:12:17 8 A. Never.
 10:12:20 9 Q. And you didn't advise Juror Fox
 10:12:22 10 that persons who suffer from paranoid
 10:12:25 11 schizophrenia may be predisposed to suicidal
 10:12:31 12 behavior?
 10:12:32 13 A. No, I did not.
 10:12:31 14 MR. MOUL: If I may approach, Your
 10:12:33 15 Honor. Judge, I'm going to hand her what is --
 10:12:35 16 I think the state will stipulate this is the
 10:12:37 17 trial testimony of Dr. Jeffrey Smalldon.
 10:12:38 18 THE COURT: All right.
 10:12:46 19 MR. MOUL: So the record is clear,
 10:12:57 20 the state does agree that that is the trial
 10:13:09 21 testimony of Dr. Jeffrey Smalldon, correct?
 10:13:32 22 MR. WILLE: Upon the representation
 10:13:33 23 of counsel, yes.
 10:13:37 24 Q. You don't recall ever reviewing
 10:13:39 25 that transcript, do you?

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10:13:40 1 A. I honestly can't recall that I did.
 10:13:43 2 Q. That's because you didn't review
 10:13:44 3 it, is that correct?
 10:13:45 4 A. I honestly don't remember.
 10:13:50 5 Q. Have you ever reviewed a trial
 10:13:51 6 transcript in your entire life?
 10:13:51 7 A. If I did, it would have been this
 10:13:55 8 one; otherwise, I have not.
 10:14:00 9 Q. I refer you to page 62 of your
 10:14:08 10 deposition.
 10:14:18 11 A. Okay.
 10:14:19 12 Q. Did I ask you the question: Have
 10:14:20 13 you ever reviewed a transcript of a trial court
 10:14:23 14 proceeding?
 10:14:30 15 THE COURT: Line seven, ma'am.
 10:14:32 16 THE WITNESS: The question again
 10:14:33 17 you're asking me is to repeat what -- if I ever
 10:14:36 18 received a transcript of a trial court
 10:14:38 19 proceeding.
 10:14:38 20 THE COURT: Reviewed is the word.
 10:14:41 21 THE WITNESS: Reviewed. Just my
 10:14:43 22 own when we were done.
 10:14:45 23 Q. Prior to receiving or reviewing --
 10:14:49 24 I think you're referring to your deposition
 10:14:50 25 transcript?

10:15:47 1 THE COURT: Is there a question,
 10:15:47 2 Mr. Moul?
 10:15:49 3 Q. Didn't I ask the question: "In
 10:15:50 4 fact -- I just want to make sure it's clear. I
 10:15:52 5 asked it a number of times, I believe. But as
 10:15:54 6 you sit here today, it's your testimony that you
 10:15:56 7 did not review the trial testimony of Dr.
 10:15:58 8 Jeffrey Smalldon, correct?"
 10:16:00 9 A. Evidently, yes, that's correct.
 10:16:01 10 Q. And then you give the answer: "I
 10:16:03 11 don't recall that, no." Correct?
 10:16:06 12 A. That's what it says.
 10:16:07 13 Q. And then the next question was:
 10:16:08 14 "You don't recall that because you didn't do it,
 10:16:10 15 correct?"
 10:16:11 16 A. And I said: "Correct."
 10:16:13 17 THE COURT: Where are we? Where
 10:16:16 18 are you reading from?
 10:16:18 19 MR. MOUL: Eight through 15.
 10:16:19 20 THE COURT: What page?
 10:16:21 21 MR. MOUL: 63.
 10:16:29 22 Q. So I understand, is it your
 10:16:30 23 testimony today that you simply don't recall
 10:16:33 24 whether you received the transcript?
 10:16:36 25 A. If you --

10:14:51 1 A. Yes, I am.
 10:14:53 2 Q. Other than your deposition
 10:14:53 3 transcript, have you ever reviewed a transcript
 10:14:56 4 of a trial court proceeding?
 10:14:58 5 A. No, not that I recall. I would not
 10:15:01 6 have had occasion to.
 10:15:03 7 Q. It's not that you haven't; you just
 10:15:05 8 don't recall, you, in fact, didn't review it,
 10:15:07 9 correct?
 10:15:08 10 A. Review this particular one.
 10:15:10 11 Q. Of Dr. Smalldon, correct?
 10:15:12 12 A. I can't recall that I read all of
 10:15:14 13 this. I can't honestly say that I did. If I
 10:15:17 14 was given that and you told me to read it, I did
 10:15:19 15 at the time. I just don't recall.
 10:15:21 16 Q. In 1995, did you review that?
 10:15:23 17 A. I do not remember.
 10:15:24 18 Q. I refer you to page 63 of your
 10:15:27 19 deposition, starting at line eight, down to line
 10:15:32 20 15.
 10:15:39 21 A. Well, we're going over the same
 10:15:43 22 thing.
 10:15:47 23 THE COURT: There's no question
 10:15:49 24 right now, ma'am.
 10:15:44 25 THE WITNESS: Yeah.

10:16:27 1 THE COURT: Asked and answered, Mr.
 10:16:27 2 Moul. She's answered the question several
 10:16:40 3 times. The Court finds her answer is consistent
 10:16:43 4 with her deposition testimony.
 10:16:56 5 Q. Well, isn't -- is the review of a
 10:16:59 6 transcript something that's ordinary and
 10:17:01 7 customary in your line of work?
 10:17:04 8 A. Review of a court transcript? No,
 10:17:07 9 it's not customary in my line of work.
 10:17:09 10 Q. You don't believe it's something
 10:17:10 11 that is so unusual that you would recall
 10:17:13 12 reviewing 100 pages' worth of trial court
 10:17:15 13 transcript?
 10:17:19 14 A. Unusual --
 10:17:20 15 THE COURT: The point is, since
 10:17:21 16 it's not customary in your work, isn't it likely
 10:17:24 17 that if you had reviewed --
 10:17:26 18 THE WITNESS: If I had been given
 10:17:27 19 it, yeah, I should have remembered it.
 10:17:30 20 THE COURT: Right.
 10:18:10 21 Q. So in 1995, would you have any
 10:18:13 22 basis to conclude that the explanation you gave
 10:18:16 23 Mr. Fox was consistent with the trial testimony
 10:18:20 24 of Dr. Jeffrey Smalldon?
 10:18:21 25 A. I would assume it would be

10:18:23 1 consistent, yeah, but very, very minimal.
 10:18:27 2 Q. What is that assumption based on?
 10:18:30 3 A. I don't understand.
 10:18:31 4 Q. You assume that it would be
 10:18:33 5 consistent?
 10:18:35 6 A. Well, if he studied psychology as I
 10:18:35 7 did, I assume we'd be reasonably in the same
 10:18:38 8 ballpark with what we were saying.
 10:18:40 9 Q. Okay.
 10:18:41 10 A. I don't think I said anything that
 10:18:42 11 would go against what he had -- what he would
 10:18:44 12 agree to.
 10:18:45 13 Q. You're not assuming that because
 10:18:48 14 you reviewed the transcript; just assuming that
 10:18:54 15 generally, you believe your professional opinion
 10:18:56 16 is probably consistent with another
 10:18:59 17 professional?
 10:19:00 18 A. I would hope.
 10:19:01 19 Q. But, again, that assumption is not
 10:19:03 20 based on the review of Jeffrey Smalldon's
 10:19:06 21 transcript?
 10:19:07 22 A. Correct.
 10:19:16 23 Q. So in 1995, you did not have an
 10:19:19 24 opinion as to whether or not the definition you
 10:19:23 25 gave Juror Fox contradicted the testimony of

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10:20:54 1 the summer.
 10:20:55 2 I did not get in an in-depth
 10:20:57 3 conversation when he called me. It was a
 10:20:59 4 surprise call in the evening out of the blue.
 10:21:01 5 I hadn't heard from him for years. I did not
 10:21:04 6 know why he called. I didn't want to know. I
 10:21:07 7 was concerned for him or his family. I tried to
 10:21:10 8 keep it as general as I could.
 10:21:15 9 Q. My question is: How can a person
 10:21:16 10 know whether or not the statement they made is
 10:21:19 11 consistent with the statement that another
 10:21:21 12 person made if they don't know what the other
 10:21:25 13 person's statement was?
 10:21:27 14 A. Well, if you're in the same field,
 10:21:28 15 I would assume you would, just like your legal
 10:21:31 16 field.
 10:21:33 17 Q. Are you in the field of --
 10:21:34 18 A. Not a clinician, no.
 10:21:37 19 Q. You're not in the field of clinical
 10:21:39 20 psychology?
 10:21:39 21 A. Right.
 10:21:40 22 Q. Do you believe that -- so you're
 10:21:48 23 not in the same field as Dr. Jeffrey Smalldon?
 10:21:50 24 A. I have never said that I was,
 10:21:51 25 correct.

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10:19:30 1 Jeffrey Smalldon, correct?
 10:19:33 2 A. Since I didn't know why he was
 10:19:35 3 calling, I don't know what a clinician might
 10:19:36 4 have said, yeah. I'm sure that what I said
 10:19:40 5 wasn't inconsistent with what he was told, but
 10:19:44 6 you have to understand, it wasn't -- I didn't
 10:19:45 7 know the reason he called me.
 10:19:50 8 Q. What?
 10:19:50 9 A. I didn't know the reason he called.
 10:19:51 10 Q. Did you have a basis to conclude
 10:19:52 11 the statements that you gave to Juror Fox were
 10:19:54 12 consistent with the statements that Jeffrey --
 10:19:58 13 A. A general description, I think,
 10:19:59 14 would have been consistent.
 10:20:01 15 Q. What is the basis for your --
 10:20:04 16 THE COURT: Asked and answered, Mr.
 10:20:04 17 Moul. Asked and answered.
 10:20:16 18 Q. How can a person conclude that a
 10:20:18 19 statement they made was consistent with a
 10:20:20 20 statement that another person made if they don't
 10:20:23 21 know what the other person's statement was?
 10:20:24 22 A. Because of the terms. Example,
 10:20:25 23 somebody says it's summer and you say it's going
 10:20:29 24 to be warm in the summer. You assume the person
 10:20:32 25 is going to be -- the other person is warm in

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10:21:54 1 Q. So if a person isn't in the same
 10:21:56 2 field as another person, how can -- if person A
 10:22:03 3 isn't in person B's field of expertise, how can
 10:22:07 4 person A conclude that person B's opinion or
 10:22:11 5 statement on a subject is consistent with the
 10:22:14 6 statement and description on the same subject
 10:22:17 7 given by person A?
 10:22:19 8 THE COURT: That's way too general
 10:22:20 9 to have any relevance, Mr. Moul.
 10:22:25 10 MR. MOUL: Your Honor, how could
 10:22:26 11 she --
 10:22:27 12 THE COURT: She's answered your
 10:22:28 13 specific question related to her reason for
 10:22:31 14 giving the answer she did about the consistency.
 10:22:35 15 Asking questions about how a person in general
 10:22:39 16 can give an opinion that is her opinion is
 10:22:41 17 consistent with somebody else's opinion is way
 10:22:43 18 too general to have any relevance to this
 10:22:45 19 proceeding.
 10:23:04 20 Q. In 1995, you did not know how Dr.
 10:23:06 21 Smalldon described the symptoms of paranoid
 10:23:08 22 schizophrenia, did you?
 10:23:10 23 A. I didn't even know there was a
 10:23:11 24 doctor like that when Steve called me.
 10:23:13 25 Q. But after Steve called you at any

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10:23:15 1 point in 1995, you were not aware of how Dr.
 10:23:18 2 Smalldon described the symptoms of paranoid
 10:23:20 3 schizophrenia, were you?
 10:23:22 4 A. No, I did not read that. I didn't
 10:23:25 5 specifically -- I mean, it's 112 pages.
 10:23:28 6 MR. MOUL: I have nothing further.
 10:23:31 7 THE COURT: Thank you. Cross.
 10:23:35 8 MR. WILLE: Just very briefly, Your
 10:23:37 9 Honor.
 10:23:38 10 CROSS-EXAMINATION
 10:23:38 11 BY MR. WILLE:
 10:23:43 12 Q. Dr. Jones, I know you've been asked
 10:23:52 13 this question many times, but again, could you
 10:23:53 14 just tell us how long the best you can recall
 10:23:57 15 now this conversation lasted with Mr. Fox?
 10:24:01 16 A. Not more than two minutes.
 10:24:07 17 Q. And, again, Mr. Fox didn't say
 10:24:09 18 anything at all about why he was asking these
 10:24:11 19 questions?
 10:24:11 20 A. Absolutely none, nor did I ask.
 10:24:14 21 Q. He didn't ask any detailed
 10:24:15 22 questions about --
 10:24:18 23 A. No.
 10:24:17 24 Q. -- about paranoid schizophrenia?
 10:24:18 25 A. Not at all, correct.

10:25:28 1 me at all. I think Mr. Moul is the only one I
 10:25:38 2 worked with.
 10:25:42 3 MR. WILLE: If I may have a moment,
 10:25:43 4 Your Honor.
 10:25:44 5 THE COURT: Of course.
 10:26:04 6 Q. Do you recall, Dr. Jones, giving an
 10:26:09 7 affidavit on August 29th, 1995 and it was
 10:26:15 8 witnessed by Mr. Robert Ranz?
 10:26:22 9 A. Would that have been in person
 10:26:23 10 or --
 10:26:24 11 Q. Just --
 10:26:25 12 A. I don't recall. I just don't
 10:26:27 13 recall.
 10:26:38 14 Q. Had you been asked any questions by
 10:26:39 15 Mr. Ranz with respect to what you told Mr. Fox,
 10:26:35 16 would you have told him truthfully?
 10:26:39 17 A. Well, I don't know why I wouldn't.
 10:26:41 18 Q. If Mr. Ranz had asked you questions
 10:26:43 19 with respect to the definition apparently of
 10:26:50 20 paranoid schizophrenia, much of the same
 10:26:52 21 questions that Mr. Moul asked you today, would
 10:26:53 22 you have answered him to the best of your
 10:26:55 23 ability, to the best you could?
 10:26:57 24 A. To the best of my ability.
 10:26:58 25 Q. If he had shown you the DSM at the

10:24:23 1 Q. He did not indicate in any way to
 10:24:21 2 you what other information you may have had on
 10:24:23 3 the subject?
 10:24:25 4 A. Right.
 10:24:27 5 Q. Let me ask you this, Dr. Jones, had
 10:24:29 6 Mr. Fox said to you, well, I heard that paranoid
 10:24:34 7 schizophrenics have delusions, what would you
 10:24:36 8 have said?
 10:24:39 9 A. I would have said it's a
 10:24:40 10 possibility.
 10:24:44 11 Q. If he said, can they feel
 10:24:45 12 persecuted, what would you have said?
 10:24:47 13 A. Well, they have feelings of
 10:24:48 14 persecution, yes.
 10:24:56 15 Q. Now, Dr. Jones, do you recall
 10:25:00 16 speaking with Mr. Ranz?
 10:25:06 17 A. Ranz?
 10:25:07 18 THE COURT: R-A-N-Z.
 10:25:12 19 Q. Were you aware at the time that
 10:25:15 20 this conversation came to light that Mr.
 10:25:17 21 Sheppard was represented by counsel?
 10:25:19 22 A. Not at all.
 10:25:21 23 Q. Do you recall giving an affidavit
 10:25:22 24 to Mr. Sheppard's counsel?
 10:25:26 25 A. That name doesn't ring a bell with

10:27:01 1 time and gone through, you would have attempted
 10:27:04 2 to explain, much as you have explained here to
 10:27:06 3 us, what it means?
 10:27:08 4 MR. MOUL: Objection. This whole
 10:27:09 5 line calls for speculation.
 10:27:12 6 THE COURT: Sustained.
 10:27:14 7 MR. WILLE: One more moment, Your
 10:27:17 8 Honor. I seem to have lost my place. I have
 10:27:18 9 nothing further, Your Honor.
 10:27:17 10 THE COURT: Mr. Moul?
 10:27:19 11 MR. MOUL: No redirect.
 10:28:00 12 THE COURT: Dr. Jones, you're going
 10:28:02 13 to be excused. I feel called upon, since I
 10:28:04 14 won't be writing on this for a while, to offer
 10:28:08 15 some explanation.
 10:28:09 16 It seems in many ways unfair that a
 10:28:13 17 person who just did a good deed by answering a
 10:28:16 18 question from a friend, sort of like if you were
 10:28:18 19 walking down the street and Usama Bin Ladin
 10:28:20 20 said, where is the World Trade Center, I don't
 10:28:24 21 know, you're probably a visitor in town, it's
 10:28:26 22 probably over there. So I want you to
 10:28:28 23 understand what Mr. Moul has done is perfectly
 10:28:32 24 appropriate because what Juror Fox did was
 10:28:34 25 completely inappropriate and very, very bad

10:28:38 1 business for a juror to be asking questions
10:28:42 2 during the course of deliberations. And he was,
10:28:44 3 of course, ordered not to do that. He didn't
10:28:46 4 tell you why he was calling.

10:28:48 5 THE WITNESS: That would have ended
10:28:49 6 it right then.

10:28:51 7 THE COURT: On behalf of the
10:28:52 8 system, I apologize for the inconvenience that
10:28:54 9 you have been put through. We thank you for
10:28:56 10 testifying repeatedly and under circumstances
10:28:58 11 where Mr. Moul was perfectly required to be
10:29:00 12 rather aggressive in his questioning. You're
10:29:02 13 excused, ma'am. I think we're ready for your
10:29:04 14 next witness.

10:29:13 15 MS. FERRY: Adele Shank.

10:29:17 16 THE COURT: Off the record.

17 (Thereupon, an off-the-record
18 discussion was held.)

19 ADELE SHANK

20 of lawful age, Witness herein, having been first
21 duly cautioned and sworn, was examined and said
22 as follows:

10:30:12 23 THE COURT: Will you state your
10:30:13 24 full name and spell your last name for the
10:30:15 25 record?

Exhibit 8

DAVID J. TENNENBAUM, PH.D., AND ASSOCIATES
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DECLARATION OF JEFFREY L. SMALLDON, Ph.D.

STATE OF OHIO
COUNTY OF FRANKLIN:

1. I am a psychologist licensed to practice in the State of Ohio. I am currently in private practice, specializing in clinical and forensic consultation. My practice is located at 5151 Reed Road, Columbus, Ohio, 43220. Since obtaining my Ph.D. from The Ohio State University in 1989, I have conducted thousands of evaluations, many of them in forensic contexts.

2. I testified as the defense psychological expert at the penalty phase of Bobby Sheppard's capital trial in 1995 in the Hamilton County Common Pleas Court. In preparation for my testimony I conducted seven clinical interviews with Mr. Sheppard; administered an extensive battery of psychological and neuropsychological tests/assessment procedures; reviewed the defendant's educational and medical records; interviewed various family members; reviewed records pertaining to the extensive history of psychiatric illness/treatment among his relatives; and reviewed an assortment of documents pertaining to the crime with which he was charged, including his own statements and a videotape that was made at the time of the instant offense.

3. Based on my interviews, testing, records review, and interviews with family members, I diagnosed Mr. Sheppard as suffering from Paranoid Schizophrenia, a sub-type of schizophrenia as described in the Diagnostic and Statistical Manual-IV (DSM-IV) that is published by the American Psychiatric Association.

4. I am aware that during the penalty phase of Mr. Sheppard's trial, one of the jurors spoke with a psychologist who was an acquaintance of his and asked her about Paranoid Schizophrenia. I have recently had the opportunity to read the transcript of

the in-chambers hearing with this juror, whose name is Stephen Fox, where he recounted his conversation with the psychologist in question. I have also read the two affidavits that were submitted by the psychologist, whose name is Helen Jones, as well as the entire transcript of my own testimony at the penalty phase of Mr. Sheppard's trial.

5. According to the transcript of the in-chambers hearing, juror Fox said that he asked Ms. Jones for a real "boiled down" definition of Paranoid Schizophrenia and she told him that people with that diagnosis "really are not in touch with reality." According to Ms. Jones' affidavit — she does not apparently have her doctorate since there are no specific credentials listed after her name — this "boiled down" definition of Paranoid Schizophrenia was in no way inconsistent with my testimony at Mr. Sheppard's trial.

6. As the professional who actually gave that testimony, I must respectfully disagree. The boiled down definition that she gave to juror Fox grossly distorts both the clinical picture of Paranoid Schizophrenia and what I had to say about the disorder during my testimony.

7. Paranoid Schizophrenia is, as noted above, one sub-type of schizophrenia. It differs from the other sub-types in a very important respect. Those individuals who suffer from it do not, as the DSM-IV clearly points out, usually exhibit disorganized speech or behavior. It is frequently the case that they can appear quite "normal" to the people around them; at least for relatively short periods of time, and that their behavior does not in any obvious way call attention to them as "psychotic" (which, in fact, they are) or even "mentally ill."

8. Unlike people who are diagnosed with other sub-types of schizophrenia, sufferers of Paranoid Schizophrenia — like Mr. Sheppard — do not typically walk around talking to themselves or engaging in obviously odd or disorganized-looking behavior. The very serious distortions for Mr. Sheppard were in his thinking and his ways of perceiving things, not in his outward behavior. Again, Ms. Jones' "boiled down" description of Paranoid Schizophrenia was, in my opinion, a grossly distorted — because so dramatically oversimplified — way of characterizing the expected clinical presentation of someone diagnosed with that disorder.

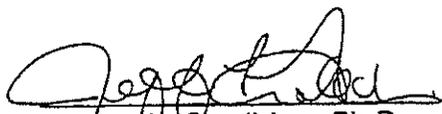
9. Telling juror Fox that someone with Paranoid Schizophrenia is "not really in touch with reality" was erroneous and very misleading because it played into the popular stereotype — accepted as "true" by many laypeople — that individuals diagnosed with schizophrenia act in a very disorganized and outwardly bizarre manner. Since the Bobby Sheppard that this juror saw on the crime scene videotape was not in any obvious way "out of touch with reality," juror Fox could reasonably

have inferred from his working definition of Paranoid Schizophrenia that the defendant was not really mentally ill.

10. The fundamental error in Ms. Jones' oversimplified definition was in her failure to distinguish between what someone with Paranoid Schizophrenia might look like and the grossly distorted, delusional thinking that is likely to dominate his/her inner world. The quality of Mr. Sheppard's inner world is not something that juror Fox could have inferred from the few minutes of action captured on the crime scene videotape.

11. It is, therefore, my professional opinion that the "boiled down" definition of Paranoid Schizophrenia that was given to juror Fox was an inaccurate, grossly misleading definition, and that it was very seriously at odds with the more detailed, far more nuanced description of Paranoid Schizophrenia that I attempted to convey to the jury during my testimony at the penalty phase of Mr. Sheppard's trial.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on this 15 day of June, 2000.


Jeffrey L. Smalldon, Ph.D.


Notary Public

EDNA G. CHANDLER
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES 4/29/00

Printed Name

My commission expires:

April 29, 2000

Exhibit 9

1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

ROBBY T. SHEPPARD,)
Petitioner,)
-vs-) Case #C-1-00-493
MARGARET BAGLEY,)
Respondent.)

EVIDENTIARY HEARING before United States
Magistrate Judge Michael R. Merz, United States
District Court, 200 West Second Street, Courtroom #3,
on Thursday, June 5, 2003, commencing at 1:30 o'clock
p.m.

ON BEHALF OF THE PETITIONER:

GEOFFREY J. MOUL, Esq.
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ON BEHALF OF THE RESPONDENT:

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Attorney General's Office,
Capital Crime Section
30 East Broad St., 23rd Floor
Columbus, OH 43215

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THE COURT: This is Case Number C-1-2000-493,
Bobby Terrell Sheppard versus Margaret Bagley.

We meet this afternoon to hear the testimony
of Dr. Jeffrey Smalldon.

Is the Petitioner ready to proceed?

MR. MOUL: Yes, Your Honor.

THE COURT: Very well. Mr. Wille, is the
Respondent ready to proceed?

MR. WILLE: Yes, sir.

THE COURT: Mr. Moul, you may call your
witness.

MR. MOUL: Thank you. Just as a preliminary
matter, the Petitioner would ask that the Court take
judicial notice of the DSM. I asked -- DSM-IV. And I
asked Chuck Wille if the State had an objection to
that. He did not have an objection. I have a Sixth
Circuit decision that supports the Court taking
judicial notice of the DSM. I think if you refer to
page 8 on that printed copy --

THE COURT: If it's good enough for the Sixth
Circuit, how can I possibly dissent? Judicial notice
taken thereof.

MR. MOUL: Thank you, Your Honor. The
Petitioner would like to call Dr. Jeffrey Smalldon.

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Dr. Jeffrey Smalldon				
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DR. JEFFREY SMALLDON,
a witness being of lawful age, having been duly
cautioned and sworn, did testify upon his oath as
follows:

DIRECT EXAMINATION

BY MR. MOUL:

Q Dr. Smalldon, would you please state
your name for the record?

A Yes. My name is Jeffrey L. Smalldon.

Q And, Dr. Smalldon, what is your current
address?

A 5151 Reed Road, Suite A, as in apple,
211. And that's Columbus 43220.

Q And you currently practice psychology in
the State of Ohio?

A Yes, I do.

Q With whom?

A I'm associated as an independent
contractor with David J. Tannenbaum and Associates.

Q The trial court transcript in this case
includes a wealth of information on your background,
but if you could briefly describe your educational
background for the Court starting with your
undergraduate studies.

A Okay. I received my undergraduate

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1 degree in 1975 from Valparaiso University in
 2 Valparaiso, Indiana. That was with a major in English
 3 and a minor in psychology. The following year, 1976, I
 4 received a Master's degree in English literature from
 5 Purdue. After receipt of that degree, I returned to
 6 Valparaiso and taught there in the English Department
 7 for a year. Then I received a graduate Fellowship for
 8 study of Modern Irish Literature at Trinity College at
 9 Dublin for a year, which I did. Returned in 1979, and
 10 taught for a year at a community college in western New
 11 York. In January of 1980 I began work toward a
 12 Master's degree in Health Services Administration at
 13 George Washington University. And it was for the
 14 second half of that degree, the residency portion, that
 15 I came to Columbus for the first time in June of 1981
 16 to do my residency at Riverside Methodist Hospital.
 17 Following the completion of that degree in 1982, I
 18 remained on at Riverside, for the last two years there
 19 between 1983 and 1985 serving as the Vice President for
 20 Mental Health and Alcoholism Services. In 1985 I began
 21 work toward my Ph.D. in psychology at Ohio State, and I
 22 completed that degree in 1989.

23 Q Is it appropriate to describe you as a
 24 clinical psychologist?

25 A Yes, it is.

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1 A I'm board-certified by the American
 2 Board of Forensic Psychology, which is one of the
 3 constituency boards of the American Board of
 4 Professional Psychology, in forensic psychology.
 5 That's one of a number of specialty areas in which it's
 6 possible to obtain board certification in psychology.

7 Q What is the process of obtaining the
 8 certification for forensic psychology?

9 A First, there's a threshold requirement
 10 that needs to be met in terms of number of hours worked
 11 in the forensic field under the supervision of a
 12 forensic psychologist. I believe that when I applied
 13 for board certification that number was a thousand,
 14 thousand hours of experience. The first step following
 15 the determination that you have that basic threshold
 16 requirement met is to submit an extensive set of work
 17 samples that are reviewed by two or three board-
 18 certified forensic psychologists. If those are found
 19 to pass muster, then the last stage in the process is a
 20 three-hour oral examination. It's conducted by three
 21 other board-certified forensic psychologists.

22 Q How many forensic psychologists that are
 23 board-certified exist in the State of Ohio?

24 A At last count -- and that's within the
 25 last year -- there were approximately 215 in the United

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1 Q And is the majority of your professional
 2 time spent in the assessment and treatment of
 3 individuals --

4 A Yes.

5 Q -- or in research?

6 A In the assessment and treatment of
 7 individuals rather than in research.

8 Q Are there areas of specialization within
 9 your clinical psychology practice?

10 A Yes. My primary area of specialization
 11 is forensic consultation or consultation at different
 12 points of intersection between psychology in both the
 13 criminal and civil justice systems.

14 Q Are these areas where you've obtained
 15 specialized knowledge, training and experience beyond
 16 that which would typically be obtained in the course of
 17 completing the requirements for a Ph.D.?

18 A Yes.

19 Q Are you currently licensed to practice
 20 psychology in the State of Ohio?

21 A Yes, I am.

22 Q Do you have any board certifications in
 23 any specialty areas?

24 A Yes, I do.

25 Q And what are those specialty areas?

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1 States and Canada.

2 Q How many in the State of Ohio, do you
 3 know?

4 A In the State of Ohio I believe there are
 5 approximately five.

6 Q Because I'm a lawyer, I don't know the
 7 answer to this question. So what is a forensic
 8 psychologist?

9 A As that term is used in psychology, it's
 10 a psychologist who provides consultation at points of
 11 intersection between both the criminal and the civil
 12 justice system. It can involve consultation in
 13 criminal matters. The largest part of my forensic
 14 practice is consultation where I'm the court's expert
 15 in cases of disputed custody. Personal injury case
 16 consultation is another area where forensic
 17 psychologists frequently work.

18 Q I take it the Psychology Department at
 19 OSU where you obtained your Ph.D. is accredited by the
 20 American Psychological Association?

21 A Yes, it is.

22 Q Are you currently active in any
 23 professional organizations or associations?

24 A Yes.

25 Q What are those?

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1 A I'm a member of the American
2 Psychological Association, including membership in two
3 of its constituent divisions, the Clinical
4 Neuropsychology Division and the Law Psychology
5 Division. I'm a member of the American College of
6 Forensic Psychology, the Ohio Psychological
7 Association, Central Ohio Psychological Association,
8 National Academy of Neuropsychology. I'm on the
9 consulting staff at Riverside Methodist Hospital in
10 Columbus. And I believe that my appointment is still
11 current. For approximately seven years between 1993
12 and 2000, I was an Adjunct Assistant Professor at Ohio
13 State where I taught a graduate-level seminar called
14 "Topics in Forensic Psychological Assessment." I
15 believe that that adjunct appointment is still current.

16 Q You participate regularly in continuing
17 education activities?

18 A Yes.

19 Q And you're required to do so to maintain
20 your license?

21 A Yes.

22 Q Do you have prior experience being
23 qualified as an expert witness?

24 A Yes.

25 Q In what field?

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1 professionals as the Bible for diagnosis of mental
2 disorders.

3 Q And is that the principal --

4 THE COURT: Lest we get too far ahead of
5 ourselves, let me interject. You wouldn't regard the
6 DSM-IV as a learned treatise, would you?

7 THE WITNESS: I wouldn't use that term for
8 it, no.

9 THE COURT: Go ahead, sir.

10 BY MR. MOUL (Continuing):

11 Q And is that a diagnostic tool that
12 guides you principally in the diagnosis of mental
13 illness?

14 A Yes.

15 Q And I take it that's constantly subject
16 to peer review?

17 A Yes.

18 Q Constantly being updated?

19 A Yes.

20 Q You're aware that one of the purposes of
21 this hearing is to determine or to facilitate in the
22 ultimate determination of whether or not Bobby Sheppard
23 received a fair trial in the State Court in his death
24 penalty trial; right?

25 A Yes.

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1 A Psychology. Specifically forensic
2 psychology.

3 Q Has the State of Ohio ever retained you
4 as an expert?

5 A Yes.

6 Q In what context?

7 A I've been retained by the State to do
8 evaluations of competency to stand trial and criminal
9 responsibility. I was also retained a number of years
10 ago by the State Attorney General's Office to provide
11 consultation on a civil matter. I've also been
12 retained by the State to perform evaluations of
13 juvenile waiver or juvenile bindover.

14 Q Based on your professional experience,
15 is there a particular manual or a guide or learned
16 treatise that is typically followed by the majority of
17 psychologists in America for diagnosing mental illness?

18 A Yes, there is.

19 Q And what is that?

20 A That is this tome, the DSM-IV. Now
21 there's a DSM-IV-R, actually a revised edition, but
22 that stands for the Diagnostic and Statistical Manual
23 of Mental Disorders. That's published by the American
24 Psychiatric Association, very frequently referred to
25 and universally regarded among mental health

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1 Q It's my understanding that you have some
2 personal and strong feelings with regard to the death
3 penalty; is that right?

4 A Yes.

5 Q And what is your position on the death
6 penalty?

7 A I'm personally opposed to the death
8 penalty.

9 Q Do those personal feelings towards the
10 death penalty in any way affect your ability to perform
11 consultation in this case?

12 A No.

13 Q And do those personal feelings in any
14 way affect your ability to evaluate what are the
15 standards for paranoid schizophrenia?

16 A No.

17 Q In any way affect your ability to
18 evaluate whether or not a particular definition that
19 somebody else may have given on paranoid schizophrenia
20 is consistent with the standards or features of
21 paranoid schizophrenia as generally recognized by
22 psychologists?

23 A No.

24 Q I'm correct that in or about 1995 you
25 testified as an expert witness at the sentencing phase

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1 for Bobby Sheppard --

2 A That's correct, yes.

3 Q -- in the matter of State of Ohio versus
4 Bobby Sheppard?

5 A Yes.

6 Q And can you without getting into great
7 detail -- because I know you testified at that trial
8 specifically what you did and what you considered --
9 but will you generally describe for the Court what you
10 considered in preparation for your testimony in 1995?

11 A Yes. Just very generally, I conducted
12 multiple interview testing sessions with Mr. Sheppard.
13 I believe seven in all. Conducted a very extensive
14 interview. Administered an extensive battery of
15 psychological and neuropsychological tests and
16 assessment procedures. I reviewed an extensive file
17 that included not only discovery, but medical records
18 and educational records. I reviewed quite an extensive
19 collection of records documenting the mental health
20 history of close relatives of Mr. Sheppard's. I also
21 conducted interviews with a number of collateral
22 sources of information, specifically family members.
23 And I think, generally speaking, that's the scope of
24 what I did in preparation for my testimony.

25 Q And again, the Court has that trial

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1 deposition and before this Court at an evidentiary
2 hearing during 2002. The two individuals whose
3 testimony I reviewed, both deposition and evidentiary
4 hearing testimony, were Helen Jones and a juror from
5 the Sheppard trial named Stephen Fox.

6 Q And I'm correct that you did that
7 because I asked you to do that to determine whether
8 Juror Fox was given an accurate description of paranoid
9 schizophrenia by Helen Jones and whether that was
10 consistent with the testimony you would give in a
11 trial?

12 A Yes.

13 Q Is that right?

14 A That's correct.

15 Q In your professional opinion, how is
16 "paranoid schizophrenia" defined?

17 A Well, in the DSM-IV there are very
18 specific diagnostic criteria that are used in
19 diagnosing any of the mental disorders in that book.
20 Paranoid schizophrenia is one of a number of subtypes
21 of schizophrenia, and in diagnosing it you begin with a
22 general set of diagnostic criteria for schizophrenia.
23 It's not specific to paranoid schizophrenia but for
24 schizophrenia in general.

25 Those diagnostic criteria basically consist

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1 testimony in the record of this case, but to give us
2 context for today's hearing can you generally summarize
3 what your testimony was in the matter of Ohio versus
4 Sheppard?

5 A Yes. I spoke of a significant history
6 of serious mental illness in Mr. Sheppard's family. I
7 diagnosed him as having paranoid schizophrenia. I
8 spoke during my testimony of that diagnosis and its
9 implications. I also spoke of an automobile accident
10 that he had been involved in in 1993 and the possible
11 implications of that accident for the emergence of
12 psychotic symptomatology in late 1993 and throughout
13 1994. I testified at some length about his
14 psychosocial history, his family constellation, his
15 educational history and so on. I also spoke during my
16 testimony about generally the results of some of the
17 psychological and the neuropsychological tests that I
18 administered.

19 Q And before you came here today to
20 testify, what did you do in preparation for this
21 hearing?

22 A Well, I reviewed the files of my work
23 from trial level consultation, and I also reviewed some
24 materials that were provided to me just recently by
25 defense counsel, specifically testimony given both at

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1 of six elements, the first of which has a few parts to
2 it. But I'll just very briefly review what those six
3 elements are of the schizophrenia diagnosis.

4 In order to be diagnosed with schizophrenia,
5 an individual needs to have demonstrated during a
6 period of a month two of five symptoms. Those five
7 symptoms are delusions, hallucinations, disordered
8 speech, disorganized behavior, and what are sometimes
9 referred to as negative symptoms. In the context of
10 schizophrenia, what that term means is symptoms like
11 withdrawal, flattening of affect and so on. So
12 typically an individual needs to have two of those five
13 symptoms over a period of at least a month. Now,
14 there's one exception to that, and that's if the
15 individual's delusions are thought to be of a
16 particularly bizarre variety or if the person reports
17 ongoing auditory hallucinations. Either of those
18 symptoms taken alone can meet that criteria.

19 The second criterion of the six is
20 significant diminishment of function in an important
21 domain of the individual's life. For example,
22 educational performance, vocational performance, or
23 interpersonal functioning.

24 The third of the six criteria is the duration
25 of the symptoms that I mentioned under the first

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1 criteria. And what that third criterion says is that
2 over a period of six months there have to have been
3 continuous signs of this disorder, some kinds of signs
4 that the individual was demonstrating the symptoms of
5 schizophrenia.

6 The last three of the criteria used in
7 diagnosing schizophrenia are kind of rule-out criteria,
8 in other words, criteria that say it's important that
9 the clinician discover that these presenting symptoms
10 are not a result of something else. Those three things
11 being a mood-related disorder, for example, major
12 depression, schizo-affective disorder, that they're not
13 the result of a medical condition or substance use.
14 And then the very last one is that if the individual
15 has previously been diagnosed with autism or some other
16 variety of pervasive developmental disorder, it has to
17 be demonstrated that the delusions and the
18 hallucinations that they've shown are prominent
19 symptoms of their presentation beyond the features of
20 those other disorders. So those are the six criteria
21 that are used in diagnosing schizophrenia.

22 Now, beyond that, as I said, paranoid
23 schizophrenia is one subtype, and in the DSM-IV there
24 are two specific criteria that are used in diagnosing
25 that subtype. Those criteria are the presence either

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1 schizophrenia" was. He indicated that he wanted one
2 additional some thing beyond the testimony that he had
3 heard during the trial before making his decision about
4 what penalty to vote for. Those were the things that
5 he indicated that he was looking for when he placed the
6 call.

7 Q Sure.

8 THE COURT: This is from the hearing testimony;
9 is that right?

10 THE WITNESS: That's from his testimony, both
11 at the evidentiary hearing and at his deposition.

12 BY MR. MOUL (Continuing):

13 Q I want to look at -- I want to focus on
14 the different descriptions of what Helen Jones stated
15 and break it down from "This is what Juror Fox
16 testified he was told" and "This is what Helen Jones
17 stated that she was told." And that's sort of the
18 dichotomy of the analysis I want to go through. So if
19 we could start with Helen Jones's testimony. What is
20 your understanding as to what Helen Jones has testified
21 to in this case as -- with regard to how she described
22 paranoid schizophrenia to Juror Fox?

23 A It's a little bit difficult to answer
24 that question because of inconsistencies in her
25 testimony. At one point, for example, she indicates

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1 of prominent delusions or hallucinations and the
2 absence -- and this is one of the features of paranoid
3 schizophrenia that distinguishes it from the other
4 subtypes. The absence in the case of paranoid
5 schizophrenia of obviously disordered speech,
6 disorganized behavior or dramatically flattened affect
7 or emotional presentation.

8 Q Again, to provide us some context for
9 your testimony, what based on your review of the
10 depositions taken in this habeas case and the trial
11 transcript from the evidentiary hearing taken in this
12 case was your understanding of what Juror Fox was
13 looking for when he called on Helen Jones during the
14 deliberations?

15 A Well, I'm going to rely on Mr. Fox's
16 testimony in answering that question. As I said, I've
17 read his testimony at deposition and in the evidentiary
18 hearing before this court, and he identified a number
19 of things that he intended to accomplish when he made
20 that telephone call. He said that he wanted to relieve
21 himself of the burden of the decision that he needed to
22 make as a juror. He indicated that he wanted to feel
23 good with himself in the role that he was being asked
24 to play as a member of the jury. He indicated that he
25 wanted to find out what the term "paranoid

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1 that she doesn't know the definition of paranoid
2 schizophrenia, but then she goes on to say, "I gave him
3 a definition anyway." She indicated that she described
4 it recollecting, as she said in her testimony,
5 something that she had heard in a psychology class
6 approximately 20 years earlier that it was a
7 communication disorder. That was the phrase that she
8 used to communicate the description that she offered to
9 Mr. Fox she recalled.

10 Q Is it correct to say that paranoid
11 schizophrenia is a communication disorder?

12 A No.

13 Q Is there a family of diseases that are
14 recognized in the field of psychology as communication
15 disorder?

16 A Yeah. I hesitate a little before use of
17 the term "disease," but there's a category of disorders
18 that is included in the DSM-IV under the heading
19 Communication Disorders, yes. That's a discrete
20 category of disorders.

21 Q And what are some examples of those
22 disorders?

23 A My best recollection is that there are
24 five of those. Two of the five are stuttering, which
25 refers to a disorder of speech fluency. Another one is

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1 called phonological disorder, which refers to a
2 disorder in the ability to actually articulate words
3 correctly. Those are two of the five communications
4 disorders.

5 Q I believe you testified earlier that
6 disorganized speech is not a feature typically
7 associated with paranoid schizophrenia?

8 A That's correct.

9 Q And paranoid schizophrenia is not a
10 communication disorder?

11 A It's not, though I would add to that
12 that in Helen Jones's testimony she indicates at one
13 point that her understanding is that one characteristic
14 of paranoid schizophrenia is mixed expressive receptive
15 aphasia disorder. Whether she actually communicated
16 that level of specificity to Mr. Fox is not clear from
17 her testimony, but it's absolutely incorrect that
18 that's a feature of paranoid schizophrenia.

19 Q In your professional opinion as a
20 psychologist, to refer to paranoid schizophrenia as a
21 communication disorder is that -- is that to diminish
22 the severity of paranoid schizophrenia?

23 A Dramatically.

24 MR. WILLE: Objection, Your Honor.

25 THE COURT: Sustained.

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1 question like apart from the accuracy -- the technical
2 accuracy -- to ask a broad question like, "Well, how
3 would you describe that aside from inaccurate?" that
4 answer could be based on numerous considerations. The
5 circumstances, the facts involved, the personal
6 opinions of the testifying person other than his
7 expertise. All of these things would not be based on
8 the witness's expertise, but rather his assessment of
9 how a particular lay person might regard something and
10 how that lay person would interpret something said by
11 something (sic) else. We would object, Your Honor,
12 because that's beyond the expertise of the witness.

13 THE COURT: I don't think that question has
14 been asked. And so accepting the validity of your
15 point, I don't think that -- I don't think that's the
16 question before the witness, but it does somehow need
17 to be related to the DSM.

18 MR. MOUL: Thank you, Your Honor.

19 Picking up on what Mr. Wille said, based on
20 your professional experience in relying on the DSM-IV,
21 what effect do you think that a description of paranoid
22 schizophrenia as a communication disorder may have on
23 the listener?

24 MR. WILLE: Object.

25 THE COURT: Sustained. This is a clinical

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1 MR. MOUL: Do you believe that definition
2 distorts the definition of paranoid schizophrenia?

3 MR. WILLE: Objection, Your Honor.

4 THE ARBITRATOR: Hang on just a second. Form
5 of the question. Sustained.

6 MR. MOUL: Using an adjective other than
7 "inaccurate," how would you describe the definition of
8 -- or the explanation that paranoid schizophrenia is a
9 communication disorder?

10 THE COURT: Referring it now to the DSM-IV?

11 MR. MOUL: I'm not sure I understood.

12 THE COURT: The question is not what the
13 witness's -- well, there's a problem with the witness
14 just saying in blank his opinion about inaccurately
15 distorted, whatever. It has to be related to -- at
16 least to the foundation of the DSM-IV. Mr. Wille, you
17 may have something more. I don't know.

18 MR. WILLE: Yes, sir. Just to object to the
19 line of questioning, I think the issue here is not
20 whether two experts or one expert would agree that
21 another expert's definition of the psychological term
22 is accurate or correct according to psychological
23 standards. The issue is what impact, if any, any
24 misinformation would have on a lay person communicated
25 to that lay person. Therefore, in asking a broad

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1 psychologist, not an experimental psychologist, you
2 have on the witness stand.

3 MR. MOUL: Is the statement that paranoid
4 schizophrenia is a communication disorder consistent
5 with what you testified to at trial in the matter of
6 Ohio versus Sheppard?

7 THE WITNESS: No.

8 MR. WILLE: Again, objection, Your Honor.
9 His opinion, whether it's consistent or inconsistent
10 from an expert's standpoint, is irrelevant. The
11 question is whether a lay person would regard it as
12 consistent or inconsistent.

13 THE COURT: Overruled. That may be the
14 ultimate question, but this is a decent foundation for
15 it.

16 BY MR. MOUL (Continuing):

17 Q Turning now to other testimony in the
18 record as to what description was given to Juror Fox, I
19 want to focus on this -- well, let me back up. You've
20 read Juror Fox's testimony --

21 A Yes.

22 Q -- in the matter. And again, just to
23 provide us some context, what is your understanding as
24 to how Juror Fox has described his conversation between
25 he and Helen Jones?

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1 A Juror Fox in his testimony indicated
2 that Helen Jones described the disorder of paranoid
3 schizophrenia as meaning someone doesn't have a grasp
4 of reality. He also used the phrase in summarizing
5 what she told him or what he understood her to tell him
6 as meaning that someone was kind of off. That was the
7 phrase that he used. At one point in one of his
8 testimonies, either at deposition or in the evidentiary
9 hearing, he describes coming away from his conversation
10 with Helen Jones with a sense that paranoid
11 schizophrenia meant that someone was out of touch with
12 reality.

13 Q And does the phrase "out of touch with
14 reality" capture the essential features of paranoid
15 schizophrenia?

16 A In my opinion, it does not.

17 Q What features of schizophrenia doesn't
18 it capture accurately?

19 THE COURT: Schizophrenia or paranoid
20 schizophrenia?

21 MR. MOUL: Paranoid schizophrenia. Pardon
22 me.

23 THE WITNESS: One of the serious problems
24 that I have with that phrase is how weakened and
25 watered down that is as a description of the clinical

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1 BY MR. MOUL (Continuing):

2 Q Does the statement "kind of off" capture
3 the essential features of paranoid schizophrenia --

4 A No.

5 Q -- as you understand?

6 A No.

7 MR. MOUL: One minute, Your Honor.

8 (Pause.)

9 I have nothing further, Your Honor.

10 THE ARBITRATOR: Cross?

11 MR. WILLE: Thank you, Your Honor.

12 CROSS EXAMINATION

13 BY MR. WILLE:

14 Q Dr. Smalldon, Mr. Moul asked you on
15 Direct a question with respect to a specific -- some
16 specific information or the information that was
17 provided by Miss Jones to Juror Fox, and you indicated
18 that you were not sure whether that particular bit of
19 information had been communicated. Do you recall that
20 question and answer?

21 A Yes.

22 Q What is your understanding as to the
23 length of the conversation between Juror Fox and Miss
24 Jones?

25 A As I recall, both their testimony

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1 reality of paranoid schizophrenia. Something I didn't
2 mention before, but that maybe I can include now, is
3 that Juror Fox also said that what he asked Helen Jones
4 for was a boiled down -- that was the phrase he used --
5 boiled down definition of paranoid schizophrenia. To
6 me "boiled down" suggests kind of distilled to its
7 essence. And to then receive the definition "out of
8 touch with reality," that's a phrase that is sort of a
9 colloquialism like whacked or whacked out or nuts or out
10 of it and does not capture the reality of the very
11 rigidly held false beliefs that are typically part of
12 the inner life of someone with paranoid schizophrenia
13 but that are not evident in relatively superficial
14 interactions with them. To say that someone is out of
15 touch with reality, in my opinion, implies a very
16 different kind of presentation behaviorally and so on
17 than what one typically sees with paranoid
18 schizophrenia.

19 MR. WILLE: Your Honor, I would just object
20 to the last part of his testimony that his opinion that
21 this to his mind reflects a certain view as to the
22 meaning of the particular statement "out of touch with
23 reality."

24 THE COURT: The objection is taken under
25 advisement.

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1 estimates varied between one and five minutes.

2 Q Would it be fair to say that on one
3 occasion she said it was two minutes at most during her
4 testimony?

5 A I think I recall her saying that.

6 Q On another occasion, she went so far as
7 to say it was 60 seconds in duration?

8 A I think I recall that, too.

9 Q Now, Dr. Smalldon, assume that a lay
10 person hears one expert talking about his subject or
11 her subject of expertise. Now, assume that the same
12 lay person hears another expert on a different occasion
13 talking about the same area of expertise. Now, isn't
14 it fair to say -- and assume that those two expert
15 opinions conflict. Now, isn't it fair to say that a
16 lay person may have no idea whatsoever that those two
17 opinions are in actual conflict, having no knowledge of
18 the underlying subject?

19 MR. MOUL: Objection to form, Your Honor.

20 THE COURT: Sustained. Even though this is
21 Cross Examination, this is still a clinical and not an
22 experimental psychologist you have on the stand.

23 BY MR. WILLE (Continuing):

24 Q So would it be fair to say as a matter
25 of common understanding that a person who has no

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1 particular expertise in an area may not have the
2 understanding or capacity to determine whether a
3 particular subject is technically accurate or
4 inaccurate?

5 A Yes.

6 Q Now, you testified during Mr. Sheppard's
7 mitigation hearing, did you not --

8 A Yes. Sorry.

9 Q -- that people with paranoid
10 schizophrenia are often very quiet --

11 A Yes.

12 Q -- do you recall that testimony? Now,
13 based on -- not on perhaps expert testimony, but on
14 common understanding, would it be fair to say that an
15 ordinary person might consider a person who is quiet to
16 have a communications problem?

17 A I wouldn't think they would. That would
18 be sort of a far-reaching inference to draw from the
19 fact that someone is quiet in my opinion.

20 Q So your testimony would be that if a
21 person said, "Well, he's a pretty quiet guy," an
22 ordinary person might not think -- he might have a
23 little -- he might be shy? A person who's quiet might
24 be shy?

25 MR. MOUL: Your Honor, I'm going to object.

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1 A They might.

2 Q So, therefore, that person might think
3 that they have a communications problem; right?

4 A Well, I'm not sure how you're using -- I
5 think you used the phrase a minute ago "communication
6 disorder," and I think that implies a level of severity
7 that goes far beyond the kinds of behavioral
8 characteristics that you've just described. Sort of
9 quiet social presence, for example.

10 Q Dr. Smalldon, correct me if I'm wrong,
11 but --

12 MR. MOUL: I'm going to object to the
13 continuing line of questioning. I don't think that on
14 Direct he testified as to how ordinary people would
15 interpret certain behaviors and could reasonably
16 interpret the meaning of certain statements.

17 THE COURT: Mr. Wille?

18 MR. WILLE: Your Honor, again insofar as his
19 testimony -- insofar he was permitted to testify with
20 respect to any hint as to using one term would indicate
21 a more severe disorder versus another, I was attempting
22 to get into that area as well.

23 THE COURT: I don't think it's necessary.

24 MR. WILLE: Your Honor, I'll move on.

25 Now, Dr. Smalldon, again you recall

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1 I don't believe that the expert has been qualified to
2 testify as to how an ordinary person would and could
3 interpret statements that are being made by another
4 individual. I'm happy to do so because I think it will
5 actually help us, but I don't think that's --

6 THE COURT: Sustained.

7 MR. WILLE: May I just respond briefly, Your
8 Honor? There was a very general question asked in
9 which the Court did not sustain the objection in terms
10 -- he was asked a very general question particularly
11 with respect to how a particular bit of communication
12 might be viewed by the recipient or a lay person. My
13 questions were directed only insofar as he answered
14 that particular question.

15 THE COURT: All right. I'll allow that.

16 THE WITNESS: Is there a question?

17 MR. WILLE: Yes, let me repeat my question.

18 BY MR. WILLE (Continuing):

19 Q Would it be fair to say an ordinary
20 person who thought of somebody as quiet would also
21 think that the person was shy?

22 A They might.

23 Q They might also think that the person
24 had problems -- or had difficulty talking to other
25 people?

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1 testifying at Mr. Sheppard's mitigation hearing. Would
2 you say, Doctor, that in your professional judgment
3 would it be the obligation of a mitigation witness, a
4 psychologist, to testify to the jury with respect to
5 what the psychologist believes is a mitigating or not a
6 mitigating factor in the case?

7 MR. MOUL: Objection, Your Honor.

8 THE COURT: Grounds?

9 MR. MOUL: I'm not sure what relevance that
10 has to the testimony here today. The only thing it's
11 beyond this scope of Direct, and it certainly has
12 nothing to do with the purpose for us being here today.

13 THE COURT: Mr. Wille?

14 MR. WILLE: One of the things Your Honor --
15 as Your Honor knows that one of the questions presented
16 by this witness's testimony is the effect, if any, that
17 a particular bit of information outside the evidence
18 might have had. Now, our position, of course, is this
19 witness has nothing relevant to say about that.
20 However, to the extent on Direct Examination that he
21 was offered as an expert witness with respect to
22 presenting evidence in mitigation cases and so forth,
23 just want to make it plain where -- in fact if he does
24 have a particular view as to his role and how that
25 might impact on his testimony here.

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1 THE COURT: Might go to bias. Overruled.

2 THE WITNESS: I think I understand your
3 question.

4 BY MR. WILLE (Continuing):

5 Q Let me ask it again. Then in your
6 professional judgment, do you think a psychologist who
7 testifies in a death penalty case it is the
8 psychologist's role to tell the jury what the --
9 whether the psychologist regards mental illness as
10 mitigating or nonmitigating?

11 A Can I respond with a qualified no --

12 Q Yes.

13 A -- but explain what I mean?

14 Q Yes.

15 A I don't believe when I appear as a
16 witness in mitigation that it's part of my role to
17 offer a persuasive argument about what the jurors or
18 the trier of facts should see as mitigating. I see
19 that has a role for the attorneys. However, if, for
20 example, I'm asked the question like, "Dr. Smalldon,
21 you've diagnosed this defendant with this particular
22 mental disorder. Is that a mental disease as you
23 understand that term in Ohio law?" and, obviously,
24 that's one of the mitigating criteria, "Yes, it is."
25 And so indirectly I would be identifying that diagnosis

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1 MR. WILLE: You know, Your Honor, I don't
2 have the page reference in my notes.

3 "Is it correct to say that in your
4 professional opinion that Bobby Sheppard has a severe
5 mental illness of the kind that would qualify as a
6 potential mitigating factor under Ohio law?"

7 And answer, "He does have that sort of mental
8 illness."

9 MR. MOUL: Objection, Your Honor. I'm not
10 sure if he's impeaching him. I'm not sure what kind of
11 examination this is.

12 THE COURT: I'm certainly not certain either.
13 Where are you headed?

14 MR. WILLE: Your Honor, again this is to show
15 on Direct Examination it was brought up that -- rather
16 forthrightly that Dr. Smalldon has opinions against the
17 death penalty. What I'm trying to do, I'm trying to
18 put his testimony in regard to his opinion as to
19 whether something is -- whether a particular
20 description of a mental term is accurate or inaccurate,
21 I'm trying to put that in the framework of whether he
22 has any bias or any inclination to have his testimony
23 affected by his personal beliefs.

24 THE COURT: I'll allow it. On that basis
25 I'll allow it.

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1 as falling under one of the statutorily defined
2 mitigating factors, but certainly not arguing how much
3 the jury should weight it for what they should do with
4 it.

5 Q In this particular case is it not true
6 that you were asked a specific question, "Is the mental
7 disease of paranoid schizophrenia in this case is that
8 a mitigating factor under Ohio law?" Do you recall
9 being asked that question?

10 MR. MOUL: Objection. I believe the record
11 speaks for itself

12 THE COURT: I think it's foundational.
13 Overruled.

14 THE WITNESS: I don't recall that specific
15 question, but I'd be pleased to look at the testimony
16 in context. I'm sure that the point I was trying to
17 make is that, yes, my understanding is that this is a
18 mental disorder of a severity that Ohio courts have
19 found to fall under the B.3 mitigating factor, and in
20 that sense it's a factor for the trier of fact to
21 consider.

22 MR. WILLE: In fact -- and I will need my
23 notes from the transcript. You were asked the
24 following question --

25 THE COURT: Page reference?

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1 BY MR. WILLE (Continuing):

2 Q In fact, in this case you did offer a
3 direct opinion that something was a mitigating factor?

4 A I don't recall that exchange exactly,
5 but as you read it that sounded to me like a pretty
6 carefully worded question that I wouldn't have a
7 problem responding. Yes, it's my understanding that
8 this kind of mental disorder that I have diagnosed in
9 this defendant is the kind of mental disorder that
10 based on my reading of decisions by Ohio courts has
11 been found to fall under that B.3 mitigating factor. I
12 see that as a very different thing from saying, "Yes,
13 trier of fact, I think you should weight this very
14 heavily in deciding whether to sentence this person to
15 death." I would certainly never engage in that
16 persuasive appeal. I don't have a problem -- I think I
17 would answer that exact same way again if I was asked
18 that particular question.

19 Q So, in your opinion, it would be
20 improper for a professional psychologist to offer any
21 opinion with respect to whatever weight or possible
22 effect that something had on the trier of fact in their
23 considerations; wouldn't that be fair to say?

24 A That's not something I see as part of
25 the role of an expert witness to indicate how much

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1 weight should be accorded findings of the mental health
2 professional, no.

3 Q It's beyond your professional expertise
4 then -- as to whatever effect, if any, any improper
5 information Juror Fox obtained in this case, that would
6 be beyond your expertise to offer any professional
7 opinion?

8 A There was a jump there that I didn't
9 follow between the last question and that question.
10 I'm sorry. I'm not sure that I'm following that.

11 Q Well, then I think I'm finished, Your
12 Honor.

13 THE COURT: Very good. Redirect?

14 MR. MOUL: One minute, Your Honor, please.

15 THE COURT: Surely.

16 REDIRECT EXAMINATION

17 BY MR. MOUL:

18 Q Does a paranoid schizophrenic generally
19 exhibit symptoms of being, quote, unquote, "out of
20 touch with reality"?

21 A Not as I would understand the phrase
22 "out of touch with reality," no.

23 Q And you understand that phrase to mean
24 what?

25 A I think that that phrase implies a

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1 schizophrenics have hallucinations?

2 MR. MOUL: I would object.

3 MR. WILLE: Did you testify to that at the
4 mitigation hearing?

5 THE COURT: Your objection is it's beyond the
6 scope?

7 MR. MOUL: Of my Redirect.

8 THE COURT: Sustained.

9 MR. WILLE: Your Honor, on Redirect the
10 question was asked with respect to whether he thought
11 that "communication disorder" adequately described Mr.
12 Sheppard's behavior. I was just simply following that
13 up and saying -- going at it and explore what else he
14 testified to with respect to the disorder and so forth.

15 THE COURT: It is indeed beyond the scope.

16 MR. WILLE: Thank you.

17 EXAMINATION

18 BY THE COURT:

19 Q I understand that you have consulted in
20 approximately 150 to 160 death penalty cases; is that
21 correct?

22 A Roughly. It might be even a few more
23 than that at this point.

24 Q But have testified in only ten to 12?

25 A No. It would be certainly more than

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1 presentation that's characterized by disorganized
2 behavior, signs that would tell an observer -- that
3 would signal to an observer this person has some sort
4 of serious mental disorder.

5 Q In your professional opinion, does Bobby
6 Sheppard suffer from a communication disorder?

7 A No.

8 Q And does he exhibit --

9 THE COURT: Again within the understanding of
10 that phrase "communication disorder" in the DSM-IV?

11 THE WITNESS: That's correct, Your Honor.

12 BY MR. MOUL (Continuing):

13 Q And does he exhibit symptoms of
14 communication disorder as that phrase is defined within
15 the DSM-IV?

16 A No.

17 MR. MOUL: I have nothing further.

18 THE COURT: Thank you. Anything more, Mr.
19 Wille?

20 MR. WILLE: Just one question, Your Honor.
21 Perhaps two.

22 RECROSS EXAMINATION

23 BY MR. WILLE:

24 Q Now, you did recall testifying at the
25 hearing -- at the mitigation hearing that paranoid

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1 that at this point. I don't know the exact number. I
2 would -- my guess is over the last eleven or 12 years
3 I've maybe testified 40 times roughly. That's just an
4 estimate off the top of my head.

5 Q When you are retained as a psychologist
6 in a capital case, you do not consider yourself a
7 member of the defense team; is that correct?

8 A I don't.

9 Q Would it surprise you to learn that a
10 mitigation specialist in one of the cases in which you
11 were so retained described you as a member of the
12 defense team?

13 A No, it wouldn't at all. And, in fact,
14 such to my own chagrin, in one of the early death
15 penalty cases that I consulted on I carelessly referred
16 to myself that way during my testimony, but I don't
17 consider myself a member of the defense team.

18 Q Make the distinction for me.

19 A Well, I mean, I don't even like the
20 language, "Dr. Smalldon, did you testify on behalf of
21 the defense?" I see myself as a consultant to the
22 defense, a consultant to the court. It's true that I
23 meet with defense counsel. I share my findings, review
24 in advance what the essentials of my testimony are
25 going to be, but I don't see myself as a person who's

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1 sort of involved in the same goal which the attorneys
2 do to save their client from the death penalty at all
3 costs. That's not part of my role.

4 Q You don't see yourself as having an
5 advocacy role at all?

6 A No. Except for my opinion.

7 Q You do understand -- do you understand
8 that your communication with defense counsel cannot be
9 -- strike that.

10 Do you understand that your conversations
11 with defense counsel are subject to the work product
12 privilege?

13 A That's my understanding, yes.

14 Q Is it common for lawyers to talk to you
15 about strategy?

16 A It's not uncommon.

17 Q You may or may not know the answer to
18 this question.

19 THE COURT: Gayle, would mark this document
20 as Court's Exhibit 1, please?

(WHEREUPON, Court Exhibit
21 Number 1 was marked for purposes
22 of identification.)

23 THE COURT: And show it to both sets of
24 counsel first.
25

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1 Kevin Durkin. Does Petitioner's counsel know when this
2 affidavit became part of the record?

3 MR. MOUL: As I stand here today, no, Your
4 Honor.

5 THE COURT: Well, it appears to me obvious
6 that it could not have been submitted in support of the
7 Motion for new trial for this case because the Motion
8 for new trial was filed in 1995.

9 MR. MOUL: I would agree that it's unlikely
10 -- I can only say that Kevin Durkin didn't represent
11 Bobby Sheppard in 1995. He represented Bobby Sheppard
12 in his postconviction proceedings.

13 THE COURT: Very good. Okay.

14 BY THE COURT (Continuing):

15 Q Dr. Smalldon, do you recall having been
16 asked to provide any additional testimony, either live
17 or by affidavit, after your testimony in this case
18 after your testimony in the penalty phase?

19 A I do, Your Honor.

20 Q Tell me about that, please.

21 A And I had my memory refreshed as I was
22 reviewing my file. I believe that there's an affidavit
23 that I executed I believe it's in the year 2000.

24 Q Okay.

25 A And it was an affidavit, as I recall its

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1 (Whereupon, Court's Exhibit Number 1 was
2 reviewed by counsel.)

3 Q I've had the Clerk hand you what's been
4 marked as Court's Exhibit 1 for identification. That's
5 an affidavit of yours, I believe; am I correct?

6 A Can I take a second, Your Honor, to go
7 over it?

8 Q Sure.

9 A (Nodding in the affirmative.)

10 Q It is indeed your affidavit?

11 A That's my signature. I, frankly, don't
12 remember signing this affidavit. But, yes, it is.

13 Q Is there an indication at the end of
14 what date it was notarized?

15 A June I think it's 6th, 1998.

16 Q '98.

17 THE COURT: Would you hand that back to the
18 Petitioner's counsel, please?

19 Do you concur with the witness's reading of
20 the date of execution?

21 MR. MOUL: I can only say that from the copy
22 I have it purports to say June 6th -- the 6th day of
23 June, 1998.

24 THE COURT: May I see it again, please?
25 It's a typed date as well, and it bears the jurat of

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1 content, that was primarily addressing the issue that
2 I've been discussing today, the Juror Fox/Helen Jones
3 contact.

4 Q That would have been an affidavit filed
5 in this proceeding after it entered federal court, I
6 presume, at least in anticipation of its being filed in
7 this Court. You were not asked to testify in the trial
8 court at any time after your mitigation testimony?

9 A No, I wasn't.

10 Q Just so I'm careful about that, not only
11 did you not testify further in the trial court, but no
12 one asked you to testify further in the trial court; is
13 that correct?

14 A By "testify" you're referring to live
15 testimony?

16 Q Either live or provide an affidavit.

17 A Well, there's that affidavit that you
18 just showed me in '98 --

19 Q Right.

20 A -- and the one in 2000.

21 Q I'm talking only about the trial court.

22 A No, I don't believe. I have no
23 recollection of ever receiving that request.

24 Q What's the basis of your opposition to
25 the death penalty?

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1 A Hmm.

2 Q Let me explain -- give you a context for

3 the question. A person might oppose a death penalty

4 because it's too expensive. It costs roughly ten times

5 as much to execute someone as to imprison them for

6 life. It's not cost efficient. A person might oppose

7 the death penalty because it doesn't work, if "work"

8 means to deter. All kinds of studies -- depending upon

9 whether one is liberal or conservative, one's

10 interpretation of them may differ, but there are lots

11 and lots of studies that purport to indicate that the

12 death penalty has no deterrent. One might oppose it on

13 the grounds it doesn't work. One might oppose it for

14 moral reasons. The Pope has recently within the last

15 ten years proclaimed it as not exactly doctrine that

16 has to be believed by Catholics on pain of

17 ex-communication, but pretty close, that the death

18 penalty's wrong, shouldn't be used in modern

19 industrialized nations. I presume one would

20 characterize that as a moral opposition. There may be

21 other moral bases. Can you characterize the basis for

22 your opposition in any one of those ways or a number of

23 them?

24 A I'll try to.

25 Q Thank you.

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1 schizophrenia is disorganized thought?

2 A I don't --

3 Q If not, please help me.

4 A I don't think so, Your Honor. Paranoid

5 schizophrenic individuals oftentimes are unusually

6 intelligent. I don't think Bobby Sheppard is unusually

7 intelligent, but a relatively high number compared with

8 the other subcategories of schizophrenia are of above

9 average intelligence and very capable of engaging in,

10 you know, planful sequential behavior. That disorder

11 doesn't necessarily mean that they're incapable of

12 doing that.

13 THE COURT: All right. Any additional

14 questions sparked by mine, Mr. Moule?

15 MR. MOUL: Not from the Petitioner, Your

16 Honor.

17 THE COURT: Mr. Wille?

18 MR. WILLE: No, Your Honor.

19 THE COURT: Finally -- and off the record.

20 (Thereupon, a discussion was held off the

21 record.)

22 THE COURT: My notes indicate that the

23 next thing that needs to happen in this case in terms

24 of filings is the traverse. When can the traverse be

25 filed?

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1 A I don't know that I've been asked that

2 question in a way that makes me feel that I need to

3 offer a basis for my personal opposition to the death

4 penalty. It's not a cost-related consideration for me.

5 I'm Lutheran, not Catholic, but my church has taken a

6 stand against the death penalty that I agree with just

7 out of a moral respect for human life. And I haven't

8 seen evidence that's convinced me that it's worked

9 effectively as a deterrent. I've seen many studies

10 that have raised very troubling questions in my mind

11 about whether it's fairly -- whether it can be applied

12 in a fair and unbiased way, not only whether it is

13 across all jurisdictions, but whether it can be no

14 matter how hard we would work to even out whatever

15 inequalities might exist.

16 Q Okay. At trial you testified that the

17 apparent planning of the aggravated robbery that was

18 the underlying felony for Mr. Sheppard's conviction

19 that that planning was not inconsistent with the

20 diagnosis of paranoid schizophrenia. Am I recalling

21 your testimony correctly?

22 A I think so. I recall an exchange about

23 that, yes.

24 Q Let me just put it simply. Isn't that

25 somewhat inconsistent with the notion that a symptom of

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1 MR. MOUL: At the risk of not answering the

2 question, my response is I'm a little unclear as to

3 whether or not there's still this open issue -- and I

4 think actually your questions were directed towards it

5 -- as to whether or not there's some issue as to how

6 the due diligence requirement applies to anything that

7 we've heard in any of the evidentiary hearings. And I

8 don't know if that's something that we should be

9 briefing in some posthearing brief or --

10 THE COURT: Not separately, no. We'll put

11 that all in one big package.

12 MR. MOUL: Then the same applies to -- he had

13 mentioned some objection to the testimony from Juror

14 Fox as at least under the Aliunde Rule and you had

15 reserved a ruling on that. I'm happy to wrap that all

16 into a merit brief that I think you referred to as the

17 traverse.

18 THE COURT: I'm not sure as I think I mentioned

19 to you -- and this may not have been on the record

20 before -- but I committed a mistake in this case which

21 I've committed in some others, which I do not intend to

22 repeat, which is to allow the filing of the traverse to

23 come after the evidentiary hearing. And that's because

24 we're learning how to do this as we go along. So I

25 understand from your last comment that you're prepared

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1 to file a document that would essentially be both
 2 pleading responding to whatever affirmative defenses
 3 Mr. Wille has raised and also argument?

4 MR. MOUL: I would prefer to do it as
 5 efficiently as possible, so one brief would be
 6 preferable to me.

7 THE COURT: Very good. And the date by which
 8 that can be done?

9 MR. MOUL: Today is the 5th of June. I would
 10 anticipate that we could do that within two months.

11 THE COURT: August the 5th. And to respond,
 12 Mr. Wille?

13 MR. WILLE: Thirty days, Your Honor, would be
 14 appropriate.

15 MR. MOUL: At the risk of doing what lawyers
 16 always do, which is say they don't need enough time, I
 17 would ask 90 days, Your Honor, because I have a trial
 18 in July and I'm actually scheduled to be out of the
 19 country in July as well.

20 THE COURT: 9/5. And yours on 10/5. And
 21 then Petitioner's reply 11/5. And the case will then
 22 be ripe. We're in recess.

23 (The taking of the proceedings concluded at 2:50
 24 o'clock p.m.)
 25

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1 STATE OF OHIO)
 2) SS: C-E-R-T-I-F-I-C-A-T-E
 3 COUNTY OF MIAMI)

4 I, SUSAN L. BICKERT, a Certified Shorthand
 5 Reporter and Notary Public in and for the State of Ohio
 6 at large, duly commissioned and qualified,

7 DO HEREBY CERTIFY that the foregoing
 8 proceedings were reduced to writing by me
 9 stenographically and thereafter reduced to typewriting
 10 and was taken at the time and place hereinafter set
 11 forth, pursuant to Notice and Agreement of Counsel.

12 I FURTHER CERTIFY that I am not a relative
 13 nor attorney for either party herein, nor in any manner
 14 interested in the event of this action.

15 IN WITNESS WHEREOF, I have hereunto set my
 16 hand and seal of office this 12th day of June, 2003.

17
 18 
 19 SUSAN L. BICKERT
 20 Notary Public, State of Ohio
 21 My Commission expires: 8-23-03
 22
 23
 24
 25

Monna McCormick & Assoc. 937/291-3334

Exhibit 10

1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

* * *

BOBBY T. SHEPPARD, :
Plaintiff, :

-vs- : CASE NO. C 1-00-493

MARGARET BAGLEY, WARDEN, :
Defendant. :

* * *

Evidentiary hearing in front of
Magistrate Judge Merz, at the Federal Building,
Dayton, Ohio at 8:45 a.m., on Monday, June 24,
2002, before Julie Hohenstein, a Registered
Professional Reporter and notary public within
and for the State of Ohio.

* * *

COPY

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13:43:05 1 move in Limina to exclude any testimony with
13:43:09 2 respect to the deliberative processes of Mr. Fox
13:43:13 3 in relation to the extraneous information that
13:43:17 4 was presented to him.

13:43:18 5 We would cite, your Honor, the case
13:43:19 6 of Gall versus Parker, 231 F Third 265 333,
13:43:27 7 Sixth Circuit, 2000, in which the Court held
13:43:30 8 that even when a juror testifies as to external
13:43:34 9 evidence, that testimony must be parsed of all
13:43:38 10 references regarding the effect of that
13:43:41 11 information on the juror's mental processes or
13:43:43 12 the jury's deliberation; and they are quoting
13:43:46 13 Bibbins versus Dalsheim, D-A-L-S-H-E-I-M, and
13:43:50 14 that's at 21 F Third 13, 17, Second Circuit,
13:43:54 15 1994.

13:43:56 16 In addition, your Honor, we would
13:43:57 17 cite Doan versus Brigano, which is at 237 F
13:44:04 18 Third 722 735, Sixth Circuit, 2001, which the
13:44:10 19 Court held indicee, we decline to apply Federal
13:44:15 20 Rule of Evidence 606 B in this case since the
13:44:19 21 District Court did not hold an evidentiary
13:44:20 22 hearing.

13:44:20 23 By way of -- by way then -- by
13:44:22 24 implication had an evidentiary hearing been
13:44:26 25 held, 606 B would apply.

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12:08:09 1 court suspended me. Because I know I didn't
12:08:12 2 have to deal with it anymore.

12:08:14 3 MS. PERRY: Thank you.

12:08:15 4 THE WITNESS: Thank you.

12:08:16 5 MAGISTRATE JUDGE MERZ: Recross?

12:08:17 6 MR. WILLE: No, your Honor.

12:08:18 7 MAGISTRATE JUDGE MERZ: Thank you,
12:08:18 8 Mr. Stidham, you may step down. You are
12:08:22 9 excused.

12:08:24 10 THE WITNESS: Thank you, your
12:08:24 11 Honor.

12:08:26 12 MAGISTRATE JUDGE MERZ: We're in
12:08:27 13 recess until 1:30.

12:08:27 14 (WHEREUPON, a discussion was held
12:08:27 15 off the record.)

13:42:50 16 MAGISTRATE JUDGE MERZ:
13:42:50 17 Ms. Perry, you may call your next witness.

13:42:54 18 MR. MOUL: Stephen Fox.

13:42:55 19 MR. WILLE: Your Honor, if I may.
13:42:56 20 I'm sorry. I like to make another objection in
13:43:00 21 the form of a Motion in Limine outside the
13:43:03 22 presence of the witness.

13:43:03 23 MAGISTRATE JUDGE MERZ:
13:43:04 24 All right. Go ahead.

13:43:05 25 MR. WILLE: Your Honor, we would

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13:44:28 1 Also we cite United States versus
13:44:30 2 Lloyd 269 F Third 228 237, that's a Third
13:44:35 3 Circuit case in 2001, again, citing the general
13:44:39 4 rule that although a juror may testify as to the
13:44:41 5 nature of extraneous information he received,
13:44:45 6 he's not permitted to testify as to how that
13:44:46 7 information affected his mental processes or
13:44:48 8 deliberations of the jury.

13:44:50 9 MAGISTRATE JUDGE MERZ: Thank you.
13:44:50 10 Mr. Moul.

13:44:51 11 MR. MOUL: Well, that's all in
13:44:52 12 good, but the trial judge in this case relied on
13:44:55 13 the deliberative process as did the Court of
13:44:59 14 Appeals.

13:45:00 15 We certainly would ask at a minimum
13:45:03 16 we have a right to brief the issue. We would
13:45:05 17 ask while we're here today, we certainly be
13:45:08 18 allowed to inquire into it.

13:45:10 19 MAGISTRATE JUDGE MERZ: We'll take
13:45:10 20 the evidence subject to the objection.

13:45:12 21 MR. MOUL: Thanks you, your Honor.

22 WHEREUPON:
23 STEPHEN FOX,
24 of lawful age, a witness herein, being first
25 duly sworn as hereinafter certified, testified

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1 as follows:

13:46:10 2 MAGISTRATE JUDGE MERZ: Sir, would

13:46:10 3 you state your full name and spell your last

13:46:13 4 name for the record, please?

13:46:14 5 THE WITNESS: Stephen E. Fox,

13:46:14 6 F-O-X.

13:46:17 7 MAGISTRATE JUDGE MERZ: Your

13:46:18 8 witness, sir.

13:46:18 9 DIRECT EXAMINATION

13:46:19 10 BY MR. MOUL:

13:46:19 11 Q. Mr. Fox, where are you employed?

13:46:21 12 A. Tren Tech Incorporated.

13:46:23 13 Q. And what is your occupation?

13:46:24 14 A. Mechanical designer.

13:46:27 15 Q. Can you describe for me your

13:46:28 16 educational background?

13:46:30 17 A. I have approximately two and a half

13:46:33 18 years of engineering at Ohio University or Ohio

13:46:33 19 State.

13:46:42 20 Q. In Athens?

13:46:42 21 A. Yes.

13:46:47 22 Q. And where do you currently reside?

13:46:49 23 A. At 8965 Plainfield Road, in

13:46:52 24 Cincinnati.

13:46:55 25 Q. How long have you lived there?

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13:47:41 1 A. Yes.

13:47:44 2 Q. And who was that?

13:47:45 3 A. The prosecutor was Mr. Deters, and

13:47:51 4 the plaintiff, I guess, Mr. Sheppard.

13:47:54 5 Q. Okay. But the prosecutor was the

13:47:55 6 Hamilton County Prosecutor's Office?

13:48:00 7 A. Yeah, okay.

13:48:00 8 Q. Case was State versus Sheppard; is

13:48:00 9 that right?

13:48:04 10 A. Yes.

13:48:04 11 Q. Do you remember what kind of case

13:48:05 12 it was? Was it a theft, murder, what kind of

13:48:10 13 case?

13:48:10 14 A. It was a capital murder case.

13:48:13 15 Q. Do you remember what kind of

13:48:14 16 penalty the State was seeking?

13:48:16 17 A. The death penalty.

13:48:17 18 Q. And was the jury sequestered in

13:48:20 19 that case?

13:48:21 20 A. For one evening.

13:48:23 21 Q. And do you remember when the jury

13:48:25 22 was sequestered?

13:48:27 23 A. It was the last night, I guess, of

13:48:30 24 the penalty phase.

13:48:31 25 Q. You weren't sequestered in the

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13:46:57 1 A. Since 1988.

13:47:01 2 Q. And who is your neighbor?

13:47:04 3 A. I have a neighbor on each side.

13:47:07 4 Norman and Anne Flanagan and the Longs.

13:47:11 5 Q. And Anne Flanagan works where?

13:47:14 6 A. She works for the district

13:47:16 7 attorney's office downtown Cincinnati.

13:47:19 8 Q. Hamilton County Prosecutor's

13:47:21 9 Office?

13:47:22 10 A. Yes.

13:47:22 11 Q. And was she your neighbor in 1995?

13:47:22 12 A. Yes.

13:47:25 13 Q. Have you ever served as a juror?

13:47:25 14 A. Yes.

13:47:27 15 Q. And do you remember the name of the

13:47:30 16 defendant in the case that you served as a

13:47:32 17 juror?

13:47:32 18 A. Yes.

13:47:33 19 Q. And who was that?

13:47:35 20 A. Sheppard.

13:47:36 21 Q. And do you remember who, do you

13:47:37 22 remember his first name?

13:47:38 23 A. Bobby.

13:47:39 24 Q. And do you remember who the

13:47:41 25 plaintiff was and the prosecutor was?

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13:48:35 1 guilt phase?

13:48:35 2 A. No.

13:48:35 3 Q. So there were two phases?

13:48:36 4 A. Yes.

13:48:44 5 Q. And you deliberated separately on

13:48:46 6 each?

13:48:46 7 A. Yes.

13:48:46 8 Q. Do you recall during the penalty

13:48:49 9 phase sort of the crux of the defendant's

13:48:51 10 argument as to why he shouldn't be put to death?

13:48:51 11 A. Yes.

13:48:55 12 Q. And what was that?

13:48:58 13 A. I guess there was an argument made

13:48:58 14 that he may have suffered from paranoid

13:49:01 15 schizophrenia.

13:49:03 16 Q. And do you recall whether Mr.

13:49:07 17 Sheppard put on any expert testimony on the

13:49:12 18 issue of paranoid schizophrenia?

13:49:12 19 A. Yes, I believe he did.

13:49:12 20 Q. And do you remember the name of the

13:49:21 21 doctor that he called?

13:49:21 22 A. No, I don't recall.

13:49:21 23 Q. Do you recall whether the State put

13:49:21 24 on any evidence?

13:49:23 25 A. I don't believe so.

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13:49:25 1 Q. Do you recall the Court instructing
13:49:27 2 you not to consider any evidence introduced
13:49:30 3 outside of, excuse me -- strike that.

13:49:33 4 Do you recall the Court instructing
13:49:34 5 you to consider only evidence introduced in the
13:49:37 6 trial Court in your deliberations?

13:49:37 7 A. Yes.

13:49:39 8 Q. And do you recall the Court
13:49:41 9 instructing you not to contact third parties
13:49:44 10 until after you, excuse me, until after you had
13:49:45 11 deliberated in the case?

13:49:45 12 A. Yes.

13:49:51 13 Q. And do you understand those
13:49:53 14 instructions were important?

13:49:53 15 A. Yes.

13:49:54 16 Q. And did you follow those
13:49:56 17 instructions?

13:49:57 18 A. No, I guess not.

13:50:01 19 Q. Can you describe for me how you
13:50:06 20 breached those instructions and failed to follow
13:50:10 21 those instructions?

13:50:13 22 A. I made a phone call to a Mrs. Helen
13:50:17 23 Jones.

13:50:19 24 Q. Who is she?

13:50:21 25 A. She was the lady I purchased my

13:51:57 1 the best of your recollection. It was after the
13:51:57 2 defense put on all of their evidence?

13:51:59 3 And did you give the answer: I
13:52:01 4 believe so?

13:52:01 5 A. I may have. I was quite ill during
13:52:06 6 that deposition. I had the flu, which I think I
13:52:09 7 told you. Maybe you don't recall everything I
13:52:14 8 said.

13:52:14 9 Q. Well, is it safe to say it was
13:52:16 10 after Dr. Smalldon testified?

13:52:20 11 A. I, I can't be sure about that
13:52:21 12 either. Maybe so. I don't, the chronology I'm
13:52:25 13 not for sure about.

13:52:26 14 Q. When you made the call, you
13:52:30 15 understood you weren't supposed to do so, is
13:52:32 16 that correct?

13:52:32 17 A. Yes.

13:52:34 18 Q. And, in fact, you so understood
13:52:38 19 that you weren't supposed to do so that you
13:52:40 20 specifically refused to tell Ms. Jones the
13:52:43 21 purpose of your call; isn't that right?

13:52:48 22 A. Yes.

13:52:50 23 Q. Can you tell me what you asked Ms.
13:52:50 24 Jones without getting into what she told you?
13:52:52 25 Can you just tell me and tell the Court what it

13:50:23 1 home from.

13:50:26 2 Q. And why Helen Jones as opposed to
13:50:30 3 your neighbor four houses down? What was it
13:50:33 4 about Helen Jones that made you call her?

13:50:36 5 A. Well, I knew she had some
13:50:38 6 background in, in psychological, psychiatry, you
13:50:45 7 know, type field.

13:50:46 8 Q. You thought she was a psychologist?

13:50:48 9 A. I really wasn't sure what, what she
13:50:51 10 is. If she's a psychiatrist or psychologist.

13:50:55 11 Q. But you thought she had some type
13:50:57 12 of extensive training in the field of
13:50:59 13 psychology; is that right?

13:51:01 14 A. Well, I mean, I, I understood that
13:51:02 15 to be so, yeah.

13:51:04 16 Q. Okay. And do you remember when
13:51:08 17 during the trial you contacted Mrs. Jones?

13:51:12 18 A. It was during the penalty phase.

13:51:26 19 Q. Was it after the defendant had put
13:51:28 20 on its entire defense in the penalty phase?

13:51:25 21 A. I can't be sure of that.

13:51:48 22 Q. Did I take your deposition on
13:51:49 23 February 5 of 2001?

13:51:52 24 A. Yes.

13:51:53 25 Q. And did I ask you the question: To

13:52:55 1 is that you asked Ms. Jones in that telephone
13:52:57 2 call?

13:52:57 3 A. I, I simply told her that, you
13:53:01 4 know, I wanted to ask her a question, that I
13:53:03 5 couldn't tell her anything other than I just
13:53:05 6 wanted her to give me a boiled down, you know,
13:53:09 7 layman's definition of paranoid schizophrenia.

13:53:23 8 Q. And, again, this was on the phone?

13:53:23 9 A. Yes.

13:53:27 10 Q. Was this in the evening?

13:53:27 11 A. Yes.

13:53:27 12 Q. And this was before you guys had,
13:53:31 13 before the jury had moved into deliberations?

13:53:34 14 A. Yes. It would have been, I
13:53:37 15 believe, it was the night before we were
13:53:39 16 sequestered.

13:54:04 17 Q. Can you tell the Court why you
13:54:06 18 called Ms. Jones?

13:54:10 19 A. I guess I just had to have, you
13:54:14 20 know, have a good feeling that, you know, I
13:54:18 21 understood, you know, what I was dealing with.
13:54:20 22 It was, it was kind of a burden to me.

13:54:26 23 Q. So is it safe to say you called her
13:54:28 24 because you were uncomfortable with exactly what
13:54:36 25 paranoid schizophrenia was?

13:54:40 1 A. Or, you know, I guess more
 13:54:42 2 uncomfortable with my lack of understanding.
 13:54:46 3 Q. Okay. So you did so because you
 13:54:47 4 didn't understand what paranoid schizophrenia
 13:54:51 5 was; is that right?
 13:54:51 6 A. Yes.
 13:54:52 7 Q. And you felt it was important that
 13:54:53 8 you understand what paranoid schizophrenia was
 13:54:57 9 in order for you to make your determination;
 13:54:57 10 correct?
 13:54:59 11 A. Yes, I guess.
 13:55:01 12 Q. You would agree that at the time
 13:55:04 13 you made the call, you had some doubt as to
 13:55:05 14 whether or not Mr. Sheppard was, in fact,
 13:55:08 15 paranoid schizophrenic, didn't you?
 13:56:00 16 A. I must have. I mean, it's --
 13:56:02 17 Q. You weren't sure one way or the
 13:56:04 18 other --
 13:56:04 19 A. No.
 13:56:05 20 Q. -- at that point; correct?
 13:56:05 21 A. No.
 13:56:09 22 Q. And you'll agree that if Dr. Jones
 13:56:11 23 had told you something that would have enabled
 13:56:14 24 you to conclude that Mr. Sheppard did suffer
 13:56:17 25 from paranoid schizophrenia, that you wouldn't

13:57:41 1 have led you to believe that, in fact, Bobby
 13:57:43 2 Sheppard was paranoid schizophrenic, do you
 13:57:45 3 agree with me you wouldn't have sentenced him to
 13:57:50 4 die? And you gave the answer, that's a
 13:57:50 5 possibility, yes.
 13:57:53 6 A. Well, it's, it is, but, I mean,
 13:57:55 7 that wasn't, you know, it was no specifics. I
 13:58:01 8 was not asking her to make, you know, provide me
 13:58:05 9 with information to make a determination.
 13:58:11 10 Q. Then why were you calling her?
 13:58:13 11 A. Just so I could understand what,
 13:58:14 12 what I was dealing with, what, to try to get a
 13:58:17 13 better understanding what the situation was and
 13:58:21 14 --
 13:58:21 15 Q. And, again, if that
 13:58:21 16 understanding -- I think I understand what
 13:58:24 17 you're saying, but if that understanding led you
 13:58:25 18 to believe he was, in fact, paranoid
 13:58:28 19 schizophrenic, it's at least, I quote you, a
 13:58:31 20 possibility?
 13:58:31 21 A. Uh-huh.
 13:58:31 22 Q. You would not have sentenced or not
 13:58:34 23 recommended a sentence, that Mr. Sheppard be
 13:58:37 24 sentenced to die; correct?
 13:58:42 25 A. Possible.

13:56:21 1 have sentenced him to die; is that correct?
 13:56:26 2 A. You know, I guess, you know, I
 13:56:27 3 asked her for a definition. I, I didn't, was
 13:56:32 4 not going to call and have her, you know, what
 13:56:37 5 she told me influence anything.
 13:56:39 6 You know, that I would -- I was
 13:56:43 7 not calling her to try to make a determination.
 13:56:48 8 It was I was trying to understand what I was
 13:56:51 9 dealing with.
 13:56:53 10 Q. But I just, I'm not sure that I
 13:56:56 11 understood your response. Am I correct that had
 13:56:58 12 she told you something that would have led you
 13:57:00 13 to conclude that Mr. Sheppard did suffer from
 13:57:01 14 paranoid schizophrenia, you would not have
 13:57:01 15 sentenced him to die; is that correct?
 13:57:01 16 A. Well, the question, I don't really
 13:57:02 17 get the question too much, because she didn't, I
 13:57:07 18 didn't give her any specifics or anything. It
 13:57:09 19 was just I asked her for a definition and she
 13:57:24 20 was not giving me opinion on anything.
 13:57:29 21 Q. Again, you recall when I took your
 13:57:31 22 deposition in February; do you recall?
 13:57:31 23 A. Yes.
 13:57:37 24 Q. And do you recall the question: If
 13:57:39 25 Dr. Jones had said something to you that would

13:58:42 1 Q. And can you tell me what Ms. Jones
 13:58:44 2 told you in response to your question?
 13:58:48 3 A. Best of my recollection she told me
 13:58:48 4 basically it was somebody that didn't have a
 13:58:51 5 grasp of reality.
 13:58:54 6 Q. And what does that mean to you,
 13:58:56 7 someone doesn't have a grasp on reality?
 13:59:01 8 A. Well, maybe somebody's just not
 13:59:03 9 aware of, you know, you know, what's going on
 13:59:07 10 and how to deal with things.
 13:59:12 11 Q. I'll try to quote you. It's
 13:59:14 12 someone that doesn't understand what's going on
 13:59:17 13 around them; is that correct?
 13:59:17 14 A. Yeah.
 13:59:19 15 Q. That's what you interpreted her
 13:59:22 16 statement to mean?
 13:59:22 17 A. Uh-huh.
 13:59:22 18 MAGISTRATE JUDGE MERZ: Indicating
 13:59:23 19 yes.
 13:59:26 20 BY MR. MOUL:
 13:59:27 21 Q. You'll agree with me that the, Dr.
 13:59:31 22 Jones, or Mrs. Jones's response to your question
 13:59:34 23 influenced your verdict, wouldn't you?
 13:59:39 24 A. I think I'd already made my mind
 13:59:42 25 up. I think I'd maybe said that to you before,

13:59:46 1 that I, I just needed to feel that I was doing
 13:59:49 2 the right thing and I kind of understood --
 13:59:56 3 Q. I don't believe you answered my
 13:59:57 4 question. You do agree with me that the
 14:00:01 5 information that Ms. Jones gave to you
 14:00:03 6 influenced your verdict, is that correct?
 14:00:05 7 A. I'm sure to some degree, small
 14:00:07 8 degree.
 14:00:07 9 Q. So the answer's yes?
 14:00:07 10 A. Yes.
 14:00:11 11 Q. And, again, to use your words, you
 14:00:14 12 agree that it contributed to your verdict of
 14:00:15 13 death; is that correct?
 14:00:17 14 A. If that's, yeah, if that's what I
 14:00:18 15 said.
 14:00:19 16 Q. Well, irrespective whether that's
 14:00:21 17 what you said, as you sit here today you agree
 14:00:24 18 it contributed to your verdict?
 14:00:25 19 A. Yes, it must have.
 14:00:28 20 Q. And, again, you agree that
 14:00:30 21 actually, you said before, you believe you may
 14:00:32 22 have already come to some non-final conclusion
 14:00:37 23 of how you were going to vote.
 14:00:39 24 My understanding is at a minimum,
 14:00:41 25 it enabled you to affirm your conclusion that

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14:02:12 1 Q. Did you tell any of the other
 14:02:19 2 jurors about your conversation?
 14:02:25 3 A. No.
 14:02:25 4 Q. Now, do you recall the trial judge
 14:02:26 5 asking you some questions about your
 14:02:27 6 conversation?
 14:02:27 7 A. Yes.
 14:02:32 8 Q. Do you recall him asking you
 14:02:33 9 whether that conversation had an effect on your
 14:02:44 10 deliberations or your decision?
 14:02:49 11 A. Sir, I don't. I can't say that I
 14:02:50 12 remember specifically what I said during that,
 14:02:55 13 with Judge Crush.
 14:02:58 14 Q. Did you at the time answer all of
 14:03:03 15 his questions truthfully to the best of your
 14:03:04 16 recollection at the time?
 14:03:04 17 A. Yes.
 14:03:13 18 Q. Did that conversation you had with
 14:03:16 19 Ms. Jones in your mind bias you against Mr.
 14:03:20 20 Sheppard?
 14:03:20 21 A. No.
 14:03:25 22 Q. Did it make you feel that you could
 14:03:29 23 not listen to his side of the case?
 14:03:29 24 A. No.
 14:03:32 25 Q. Did it make you feel that the

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14:00:45 1 Mr. Sheppard was not paranoid schizophrenic; is
 14:00:48 2 that correct?
 14:00:48 3 A. Yes.
 14:00:52 4 Q. So will you agree with me that the
 14:00:54 5 information given to you by Mrs. Jones made it
 14:00:58 6 easier for you to vote for death?
 14:01:01 7 A. I guess, yes.
 14:01:19 8 MR. MOUL: I have no further
 14:01:29 9 questions.
 14:01:20 10 MAGISTRATE JUDGE MERZ: Cross?
 14:01:25 11 MR. WILLE: Thank you, your Honor.
 14:01:25 12 CROSS-EXAMINATION
 14:01:27 13 BY MR. WILLE:
 14:01:33 14 Q. Mr. Fox, could you tell us how long
 14:01:35 15 the conversation lasted that you had with Mrs.
 14:01:38 16 Jones, or Ms. Jones?
 14:01:45 17 A. It was, it was very short. A
 14:01:47 18 minute, maybe two minutes, if that much.
 14:01:49 19 Q. Now, again, did you tell Ms. Jones
 14:01:52 20 that you were a juror?
 14:01:52 21 A. No.
 14:01:59 22 Q. And did you say, did you ask her
 14:02:01 23 anything at all or indicate to her why you were
 14:02:03 24 asking the questions?
 14:02:05 25 A. No.

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14:03:35 1 evidence that he presented would be less worthy
 14:03:38 2 of your consideration?
 14:03:40 3 A. No.
 14:03:48 4 MR. WILLE: Nothing further, your
 14:03:48 5 Honor.
 14:03:51 6 MAGISTRATE JUDGE MERZ: Thank you.
 14:03:52 7 Before we take a redirect, I have an initial
 14:03:53 8 appearance. Mr. Knief and the file, please?
 14:03:57 9 MR. MOUL: If it helps Mr. Fox, we
 14:04:01 10 have no redirect, your Honor.
 14:04:02 11 MAGISTRATE JUDGE MERZ: Oh, thanks.
 14:04:03 12 You may step down, Mr. Fox.
 14:04:11 13 (WHEREUPON, a discussion was held
 14:07:40 14 off the record.)
 14:07:01 15 MAGISTRATE JUDGE MERZ: And Ms.
 14:07:41 16 Perry or Mr. Moul, your next witness.
 14:07:44 17 MR. MOUL: We would ask the Court
 14:07:45 18 for a five minute recess.
 14:07:47 19 MAGISTRATE JUDGE MERZ: Of course.
 14:07:47 20 We'll recess.
 14:07:48 21 MR. MOUL: Thank you very much.
 22 (WHEREUPON, a discussion was held
 23 off the record.)
 24 WHEREUPON:
 25 ANNE S. FLANAGAN,

MONNA McCORMICK & ASSOCIATES * (937) 291-3334

Exhibit 11

1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BOBBY T. SHEPPARD, :
Petitioner, :
vs. : CASE NO. :
MARGARET BAGLEY, WARDEN, : C-1-00-493 :
Respondent. :

DEPOSITION OF: STEPHEN E. FOX

TAKEN: By the Petitioner
Pursuant to Subpoena

DATE: February 5, 2001

TIME: Commencing at 11:44 a.m.

PLACE: Ace Reporting Services
Sixth Floor
216 East Ninth Street
Cincinnati, Ohio 45202

BEFORE: Linda S. Mullen, RPR, RMR
Notary Public - State of Ohio

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513-241-2200

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(No exhibits.)

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APPEARANCES:

On behalf of the petitioner:

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and

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On behalf of the respondent:

Charles L. Wille, Esq.
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DEPOSITION OF STEPHEN E. FOX

4

1 STEPHEN E. FOX

2 of lawful age, a witness herein, being first duly sworn as

3 hereinafter certified, was examined and deposed as follows:

4 CROSS-EXAMINATION

5 BY MR. MOUL:

6 Q. Would you state your name for the record,

7 please?

8 A. Stephen E. Fox.

9 Q. What's your address?

10 A. 8966 Plainfield Road.

11 Q. Is that Cincinnati?

12 A. It's Sycamore Township.

13 Q. Ohio?

14 A. Yes.

15 Q. And how old are you?

16 A. 43.

17 Q. What do you do for a living?

18 A. I'm a manufacturing engineer for DF

19 Electronics.

20 Q. Just as a way of background, my name is Geoff

21 Moul, and I represent Bobby Sheppard, who has filed a

22 federal habeas corpus petition. This is my co-counsel, Jane

23 Perry, and this is Charles Wille. He represents the State

24 of Ohio.

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1 We're here for a deposition, which means
2 essentially I'm going to ask you questions. The state may
3 also ask questions when it's all said and done. If at any
4 time you don't understand something that I ask you, please
5 tell me you don't understand my question. Do you
6 understand?

7 A. Uh-huh.

8 Q. You just gave me an uh-huh.

9 A. Yes.

10 Q. In order for her to take down something that,
11 subsequent to this proceeding, can be used in a meaningful
12 way -- I know when you say uh-huh it might mean yes, but if
13 you don't give yes, no, verbal responses, subsequent to this
14 we'll never be able to interpret what uh-huh meant.

15 A. I understand.

16 Q. So if you could just make sure of that, and
17 I'll try to remind you. I do the same thing in my speech.
18 But I'll try to remind you if you don't, hopefully the court
19 reporter will remind us as well.

20 Have you ever been deposed before?

21 A. No.

22 Q. Have you had any conversations with anyone
23 about coming to this deposition today? Who did you tell
24 that you were coming to this deposition today?

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1 A. Since September of 1988.

2 Q. What does Anne do, do you know?

3 A. I believe she works with the district
4 attorney's office.

5 Q. Do you know Joe Deters?

6 A. I do not know him personally. He was the
7 attorney involved in the case.

8 Q. What case?

9 A. The Bobby Sheppard case.

10 Q. Have you ever met Joe Deters?

11 A. No, no, I never met him during the case.

12 Q. Did you ever see him at Anne Flannigan's house?

13 A. Not that I can recall.

14 Q. How about Mr. Pete Meyer?

15 A. I know him as associated with the case, but not
16 socially.

17 Q. You didn't know him or meet him at Anne
18 Flannigan's ever?

19 A. No, not that I can recall.

20 Q. We're talking about the case. You served as a
21 juror on Ohio versus Bobby Sheppard?

22 A. Yes.

23 Q. Do you remember when that was?

24 A. Yeah. It was in the spring of 1995.

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1 A. I had spoke with my neighbor, Norm Aubin, just
2 after I had received the notice. And I just asked him, you
3 know -- said that I had gotten this information.

4 Q. Is he a lawyer?

5 A. Yes, sir.

6 Q. I certainly don't want to get into your
7 conversations with your attorney. Anyone else you talked
8 to?

9 A. His wife was aware of it. She had been deposed
10 as well, I believe.

11 Q. Uh-huh.

12 A. Anne Flannigan.

13 Q. Okay. Anne Flannigan is your neighbor?

14 A. Yes.

15 Q. I see. Okay. You spoke with Anne Flannigan
16 about it?

17 A. I had -- we had just basically exchanged the
18 information that we both received, you know, the deposition.

19 Q. Other than talking about the fact that the
20 deposition was going to take place, did you talk with Anne
21 about anything else?

22 A. We didn't discuss any particulars of the case
23 or nothing like that, no.

24 Q. How long have you lived next to Anne Flannigan?

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1 Q. How many jurors were on that case, do you
2 remember?

3 A. I believe there was 12, and then two
4 alternates.

5 Q. And how long did jury deliberations last, do
6 you remember, on the guilt phase?

7 A. Boy, I couldn't tell you, it was a while ago.
8 It was -- I would say it went into two days, just my best
9 recollection.

10 Q. And on the penalty phase, the jury met
11 separately as well?

12 A. Yes.

13 Q. Do you remember how long the jury met on the
14 penalty phase?

15 A. I can't give you hours, but I think it ran into
16 two days.

17 Q. So the jury deliberated for about four days,
18 correct?

19 A. Total, yes.

20 Q. How long did the trial last?

21 A. Well, from beginning to end, it was -- three
22 weeks was the duration.

23 Q. Okay. Do you know Helen Jones?

24 A. Yes.

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1 Q. Who is she?

2 A. She's a former landlord of mine, that I had
3 purchased the house from her that I was renting.

4 Q. The house you live in now you purchased from
5 her?

6 A. The house I live in, yes.

7 Q. At some point during the trial of Ohio versus
8 Bobby Sheppard, while you served on the jury, did you have
9 an opportunity to speak with Dr. Jones?

10 A. Yes.

11 Q. And can you tell me how that conversation was
12 initiated?

13 A. I had -- this was after the original phase of
14 the case, this was during the punishment phase, I guess,
15 there towards the end of it. And I had phoned her.

16 Q. You were at your house?

17 A. Yes.

18 Q. Was anyone else present during the
19 conversation?

20 A. No.

21 Q. What time of day was that?

22 A. It was in the evening.

23 Q. Was it after a day of trial testimony?

24 A. Yeah.

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1 A. The jury was, yes.

2 Q. How long were you sequestered?

3 A. Just one evening.

4 Q. Do you know why you were sequestered?

5 A. No, I don't.

6 Q. The trial was when, 1995?

7 A. Yes.

8 Q. And you bought your house when?

9 A. Oh, it was in '92 or -- I can't say, '92.

10 Q. Okay. Between '92 and '95, had you had an
11 opportunity to talk with Dr. Jones?

12 A. Upon occasion, yeah. I would -- she lived
13 fairly close to where I lived and I would do things, move a
14 piece of furniture or something for her.

15 Q. Why did you call her during the trial?

16 A. Well, I believe at that time I understood my
17 obligation to the court as far as, you know, our
18 instructions, as to, you know, what sentence, you know, the
19 jury was supposed to come up with based on everything.
20 And I felt that I was somewhat maybe -- just
21 was a little uncomfortable with it, and I was kind of -- had
22 to feel good with myself that, you know, what I was going to
23 do, you know. I took it very seriously.

24 Q. But I guess I don't understand. What were you

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1 Q. So this was -- you made this phone call on --
2 it sounds like on a weeknight, sometime during the penalty
3 phase of the trial, correct?

4 A. Yes.

5 Q. Was this after all of the evidence had been put
6 in on the penalty phase?

7 A. I believe it was after the defense had, you
8 know, finished with theirs.

9 Q. So this was after -- do you remember who -- the
10 name of the doctor that the defense put on?

11 A. No, I don't.

12 Q. The conversation you had with Helen Jones took
13 place after the defense had put on -- after the defense put
14 on their psychologist?

15 A. I can't say for sure.

16 Q. To the best of your recollection?

17 A. I would -- yeah, I guess so.

18 Q. To the best of your recollection, it was after
19 the defense put on all of their evidence?

20 A. I believe so, yes.

21 Q. Was it before or after closing arguments?

22 A. Well, we were sequestered the last evening, so
23 that would have been -- it would have been before, I guess.

24 Q. You were sequestered?

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1 looking to get from Dr. Jones that you didn't get out of the
2 trial?

3 A. I just asked her -- you know, I had called her.
4 I told her I had a question for her. I said, I can't tell
5 you anything, you know, other than just asking you this one
6 question. And I had asked her just what is the boiled-down
7 version of paranoid schizophrenic. And she answered that
8 question, basically said that it's just a -- someone doesn't
9 have a grasp of reality, and that was basically the end of
10 it. We had made some small talk after that.

11 Q. I want to certainly go through that. How long
12 did the conversation take place, five minutes?

13 A. Probably not even that.

14 Q. Your best estimate?

15 A. I would say maybe two to three, four minutes,
16 something like that.

17 Q. Okay. You talked about things other than this
18 question?

19 A. Yeah, we had talked about the house and things.

20 Q. You didn't tell her you were in trial?

21 A. No, I didn't.

22 Q. You didn't tell her why you were asking the
23 question?

24 A. No.

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1 Q. And she told you, to the best of your
2 recollection, that it was what, paranoid schizophrenia was
3 what?

4 A. Just kind of a layman's version of someone that
5 didn't have, you know, a grasp of reality.

6 Q. And I guess I'm asking, why did you call and
7 ask for that boiled-down definition? What question were you
8 trying to -- what uncertainty were you trying to answer?

9 A. It really wasn't so much uncertainty, I just
10 needed to feel, you know, I felt right with, you know, what
11 I felt was my obligation to the court.

12 Q. What did that mean to you, it's not in touch
13 with reality?

14 A. Well, I mean, it almost defined itself,
15 someone that doesn't -- doesn't have, you know, a grasp on
16 reality in the real world.

17 Q. That's somebody that shows some disorganized
18 behavior, acts like they're crazy?

19 A. Well, I guess it could manifest itself in a
20 number of ways, but I wouldn't, you know, say it's somebody
21 that acts crazy necessarily.

22 Q. I guess I want to understand what that meant to
23 you, someone that's not in touch with reality.

24 A. I don't know. To me, it's self-explanatory.

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1 A. Could you kind of restate that again?

2 Q. I think you just gave the opinion that -- or
3 the testimony that, in your opinion, Bobby Sheppard didn't
4 suffer from paranoid schizophrenia, correct?

5 A. No, I don't know that one way or the other, and
6 I don't think I felt that way at the time.

7 Q. At the time, it wasn't your opinion that he in
8 fact suffered from paranoid schizophrenia?

9 A. Like I said, I had really no strong feeling one
10 way or another. Without knowing -- I didn't know him.

11 Q. Well, then, what was the purpose of making the
12 phone call, what were you trying to find out?

13 A. I was, I guess, just trying to confirm my --
14 you know, what I felt was my obligation to the court.

15 Q. What was your obligation to the court?

16 A. Well, our instructions were to, you know -- if
17 we found, you know, through the instructions that we were to
18 go one way or the other with the penalty phase, that we were
19 told during the beginning that, you know, it is your
20 obligation to basically, you know, go with the instructions
21 of the court.

22 Q. Right. But what did Helen Jones have to do
23 with the instructions of the court?

24 A. Nothing.

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1 It's somebody that's, you know, kind of off. You know, they
2 don't maybe understand what's going on around them, what
3 they're doing.

4 Q. Okay, I am still trying to understand -- and
5 maybe everyone else does and I'm slow. I'm still trying to
6 understand the purpose of the call. That wasn't an
7 explanation you were given in trial?

8 A. No, I guess --

9 Q. Why did you?

10 A. I guess it was for my own -- kind of for my own
11 selfish reasons. Because I was going to have to, you know,
12 live with, you know, this decision. I took it very
13 seriously and I guess I just needed to feel comfortable for
14 my own piece of mind.

15 Q. Did you think Bobby Sheppard suffered from
16 paranoid schizophrenia?

17 A. I don't know.

18 Q. You didn't have an opinion one way or the
19 other?

20 A. Not -- I guess not.

21 Q. And was part of your opinion based on your
22 understanding that paranoid schizophrenia is someone that's
23 not in touch with reality? You thought he was in touch with
24 reality?

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1 Q. So then why did you call Helen Jones?

2 A. I guess it was more -- it was just for my own
3 peace of mind, that, you know, I needed to feel, you know,
4 in my heart, I was going to be doing the right thing.

5 Q. And did she tell you you were doing the right
6 thing?

7 A. No. She basically told me what I had said,
8 that boiled-down definition. And that was the end of it.

9 Q. All right. But why did you want another
10 definition of paranoid schizophrenia?

11 A. I guess just so, you know, I was going to feel
12 comfortable with, you know, my part of the case.

13 Q. Was -- I mean, you were attempting to make an
14 assessment as to whether Bobby Sheppard was paranoid
15 schizophrenic, and so you wanted to make sure you had a
16 proper understanding of paranoid schizophrenia, was that
17 your objective?

18 A. You know, I don't believe so. Like I said, I
19 think I had already made a determination and then was going,
20 you know, under the instructions of the court. And I
21 just -- I guess I just needed one more something just for
22 me.

23 Q. You already made a determination on what?

24 A. Well, I believed, you know, that he was guilty.

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1 And I believe that under the instructions of the court, that
2 it was, you know, my obligation to, you know, go through the
3 penalty phase as instructed by the court.

4 Q. I'm with you. I'm going to be here all day
5 until I get an answer to this question. I don't understand
6 why you felt obligated to call Helen Jones. I'm not trying
7 to make you nervous, I'm trying to understand. Why did you
8 call Dr. Jones? Why did you want that information? What
9 did you hope to do with that information?

10 A. I guess I just wanted to feel good that I was
11 doing the right thing. You know, it's a tough decision that
12 I was going to have to live with for the rest of my life. A
13 man's life was, you know, on the line. And I didn't take it
14 lightly, I guess. And I just -- you know, in my heart, I
15 felt like that I needed to feel comfortable with myself and
16 in what I was going to do.

17 Q. I guess I'm trying to understand. Was your
18 decision on whether to vote for death or not based on
19 whether you concluded he was paranoid schizophrenic?

20 A. No.

21 Q. Okay. Then why did it matter what the
22 definition of paranoid schizophrenia was? Why did you need
23 an answer to that question from Helen Jones?

24 A. I don't know. I guess it might have been just

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1 a juror very seriously, right?

2 A. Yes.

3 Q. And so I'm having a hard time reconciling those
4 facts with the notion that you would violate your obligation
5 as a juror just willy-nilly on something that wasn't
6 important to you?

7 A. Well, it wasn't, you know, willy-nilly. And it
8 -- it was important to me. I guess it was, you know -- it's
9 hard to explain. I really needed to feel in my heart that I
10 was doing the right thing. And there was maybe a lingering
11 question of some little speck of doubt. But like I said, I
12 don't even believe it was. It didn't influence me. It
13 basically made me -- I felt that I was doing the right thing
14 and could live with it.

15 Q. You believe it confirmed what you already knew?

16 A. Not so much that, as it -- it was -- it was
17 making it, you know, easier, I guess, for me. It was mostly
18 a selfish act on my part.

19 Q. It was making it easier. So I understand why,
20 were you applying that definition to what you saw every day
21 out of Bobby Sheppard? I mean, were you comparing what she
22 said with what you were seeing every day with Bobby
23 Sheppard? Is that how you were using the information?

24 A. No. I mean, I look back on this now and it was

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1 curiosity and just to be able to feel that, you know, I
2 understood what was going on.

3 Q. Well, was psychological testimony something you
4 talked about during your deliberations? It must have been.
5 I assume it was.

6 A. I don't recall, you know, all the details of
7 it. I imagine there was some -- you know, some talk of that
8 during the deliberations.

9 Q. Okay. I guess something doesn't make sense to
10 me. I'm getting the impression that you're trying to give
11 the testimony that actually the psychological testimony
12 wasn't too important on the one hand, it wasn't a
13 determining factor in your jury verdict. It didn't matter
14 one way or another whether he was paranoid schizophrenic.
15 But on the other hand, you called Helen Jones and asked her
16 a question about that.

17 Did you understand the court's admonitions not
18 to call outside people, not to talk to third parties about
19 the testimony in the case?

20 A. Yes.

21 Q. And to base your decision only on evidence that
22 you heard in trial?

23 A. Yes.

24 Q. And it sounds like you took your obligation as

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1 a very stupid thing for me to do. I admit that. There was
2 no reason for me to do that. I shouldn't have done it.

3 Q. I'm not --

4 A. That's beside the fact.

5 Q. That's not the purpose of the deposition. I'm
6 not trying to accuse you or anything, I'm trying to
7 understand --

8 A. Yeah.

9 Q. -- what happened, why it happened. And so -- I
10 mean, you said it was important, you said you needed to, it
11 was going to make it easier, you needed to understand. And
12 I want to know, is what you did is you took her definition
13 and you applied it to what you were seeing every day out of
14 Bobby Sheppard, and then made a decision in your own mind as
15 to whether or not he looked like someone that was out of
16 touch with reality?

17 A. No. I -- like I said, it was -- I had
18 understood, I think, what, you know, the situation was. And
19 you know, to this day, I guess I really don't understand why
20 I had done it, other than for my own peace of mind.

21 Q. Did you tell anybody in the jury that you had
22 had this conversation?

23 A. No.

24 Q. Did you talk about this conversation? Did you

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1 relay the contents of the conversation to anyone in the
2 deliberations?

3 A. No.

4 Q. You did talk about the defense's claim of
5 mental illness as part of the deliberations, correct?

6 A. Yeah. I was kind of a quiet juror, I didn't,
7 you know -- I more or less kind of listened a lot. I didn't
8 get involved in a lot of the deliberation, you know,
9 conversation.

10 Q. Uh-huh. I want to sort of take that to -- will
11 you agree with me that everything that was said to you in
12 trial, as well as what Dr. Jones said to you and what the
13 other jurors said to you, was all collectively information
14 that you considered in coming to your verdict, correct?

15 A. Yeah, predominantly, you know, the trial and
16 our deliberations.

17 Q. But you did --

18 A. And my conversation with Helen Jones, I believe
19 was a negligible -- had negligible, you know, contribution.

20 Q. Right. But it certainly is something that you
21 considered as part of your deliberations? I mean, you were
22 looking -- I'm sorry, your answer is yes?

23 A. Oh, like I said, I believe it was negligible,
24 if any.

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1 contributions here and there, but --

2 Q. Was your testimony more accurate on May 30th
3 of 1995 regarding these events or more accurate today, to
4 the extent there are inconsistencies?

5 A. Well, I would say, you know, the one closest to
6 the actual trial would be the most accurate. You know, it's
7 been six years or so.

8 Q. Did you tell somebody about this conversation?

9 A. With Helen Jones?

10 Q. In 1995.

11 A. I believe I had mentioned something about it.

12 Q. To whom?

13 A. I can't recall. I'm sure, you know, at some
14 time after I had a get-together at my house with some
15 friends, I can't recall who was all there. And someone had
16 asked me about it. That was, you know -- this was long
17 after it was over. Just basically kind of curious about
18 things, and you know, I was just telling them it was a
19 difficult process and it was not something I wanted to do.

20 Q. At some point it came out during the trial that
21 you had made this call to Helen Jones, right?

22 A. No, this was afterwards.

23 Q. Okay. How long afterwards?

24 A. I don't know, I would say maybe a couple of

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1 Q. But it was -- you were looking for some
2 reassurance to make you feel better so you understood the
3 process. And you will agree that it was information that
4 you considered as part of your deliberations, correct?

5 A. I guess, you know, it had to have some little
6 inkling.

7 Q. Okay. You will agree that you took place in
8 the deliberations, albeit as one of the more quiet jurors,
9 with respect to discussions about Bobby Sheppard's alleged
10 mental illness, correct?

11 A. I actually don't recall that I ever
12 participated in any of the conversations involved with that.

13 Q. Might you have?

14 A. I tell you, I would doubt it, because like I
15 said, I pretty much -- there were a lot of people that were
16 much more vocal, and I was kind of more inclined to listen
17 to everyone.

18 Q. Okay. But you -- I believe you testified in
19 chambers on May 30 of 1995 that you may have, quote,
20 discussed the psychological testimony with other jurors. Do
21 you remember giving that testimony?

22 A. I guess, yeah. I mean, it's -- I may have, but
23 I don't recall, you know, any specifics or anything like
24 that. I think everybody kind of made their little

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1 weeks.

2 Q. Okay. And how did it come out? Do you know
3 how the trial court learned that you had made this call to
4 Dr. Jones?

5 A. Well, Norm Aubin and Anne Flannigan are my
6 neighbors. We had invited them over to this party that my
7 fiancée and I were giving. And they were present in the
8 room. I believe we were in the kitchen. And they
9 overheard that -- I was talking to someone, and they had
10 overheard that I was telling this friend of mine that I had
11 made this call to Helen.

12 Q. Who was the friend that you had told?

13 A. I can't tell you, I don't remember.

14 Q. Okay. To the best of your knowledge, who was
15 it? I mean --

16 A. It could have been any number. I had some
17 friends of mine from work, some other friends I think from
18 the neighborhood were there, some friends of my wife were
19 there. Like I said, I don't recall exactly who it was.

20 Q. Did you ever talk to your wife about this
21 conversation with Helen Jones?

22 A. After the fact, you know, after -- basically
23 after it had -- about the time of the party, I guess, is
24 when she had learned about it.

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1 Q. She learned about it at the party?
 2 A. Yeah.
 3 Q. Did anyone else learn about it at the party?
 4 A. You know, anybody that may have been within
 5 earshot of my conversation.
 6 Q. How many people are at this party?
 7 A. Oh, there were, I don't know, maybe 15 to 20
 8 or --
 9 Q. Okay. And why did this conversation come up?
 10 Why did the conversation with Helen Jones come up in the
 11 course of your social gathering?
 12 A. I guess, to the best of my recollection, was
 13 that someone was kind of curious, and was, you know, asking
 14 me, you know, just -- you know, just curious questions.
 15 Someone had never been in a situation like that. And I was
 16 just explaining to them how difficult, you know, the
 17 situation was. And we kind of -- maybe he just asked me a
 18 couple more questions, and I had mentioned to him, you know,
 19 that I found it very difficult and that I had, you know,
 20 called Helen and just asked her a real simple question.
 21 Q. I guess -- I mean, it sounds to me like that
 22 was an important highlight of the whole event of your
 23 involvement with the trial of Bobby Sheppard. I say that --
 24 I mean, it sounds to me like despite the judge's

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1 A. No, I don't believe so. I know -- you know, I
 2 think I knew what I was going to do, my obligation to the
 3 court. What I had done with Helen Jones was something I did
 4 just so I could feel good with myself in doing that and
 5 making that recommendation. That's as simple as I can put
 6 it to you.
 7 Q. I'm trying to understand. Did her conversation
 8 make you feel good, it confirmed something or it clarified
 9 some confusion?
 10 A. No. It's basically going to -- I guess at the
 11 time I felt I was going to have to live, you know, with this
 12 decision I made. And I just -- I needed some -- something
 13 to say, you know, okay, you're doing the right thing.
 14 Q. Okay. And she provided you that closure with
 15 her definition?
 16 A. Well, I felt comfortable with what I was going
 17 to do. I mean, I knew -- you know, it was just something I
 18 had to -- I guess I felt I had to do for my own peace of
 19 mind.
 20 Q. When Anne Flannigan learned about this, what
 21 did she say?
 22 A. I don't believe she said anything at the time.
 23 They had come over the next day, and she made me aware that
 24 she overheard this conversation, and told me that she -- it

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1 admonitions, you called Helen Jones. It's three weeks after
 2 the fact, you're still talking about the fact that you
 3 called Helen Jones at a party.
 4 And so -- I mean, I need to know, candidly, if
 5 the psychological testimony of Dr. Smalden and the
 6 allegation of mental illness, was this a critical issue that
 7 you were wrestling with in trying to determine whether or
 8 not you should recommend a sentence of death? And if not --
 9 and I know this is not the shortest question, and we can
 10 walk through it one at a time -- if not, why would you have
 11 made the phone call to Helen Jones? And then why would you
 12 be talking about it three weeks later at a party?
 13 A. Okay. I want to -- that was kind of the -- I
 14 guess when I had mentioned that, that was kind of the end of
 15 the story, so to speak, you know, my discussion with this
 16 friend, that -- you know, everything was pretty much all
 17 over with, and I had just made some reference that I had,
 18 you know, called Helen and asked her for this boiled-down
 19 definition. Just -- just so I could feel, you know,
 20 comfortable with what I had pretty much already determined
 21 was the situation.
 22 Q. Okay. That was sort of the last -- your
 23 decision was made at the conclusion of that conversation
 24 then?

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1 was her obligation to report it to the court.
 2 Q. Did she said anything else to you?
 3 A. That was the gist of it, I believe, that I'm
 4 going to have to report this to the court.
 5 Q. And how did you respond to that?
 6 A. I told her, I said, well, you know, if I need
 7 to do something, you know, obviously I would be willing to
 8 do whatever, as far as how you want to put it, face the
 9 music or whatever.
 10 Q. Who else was present in that conversation?
 11 A. I believe her husband, Norm, had accompanied
 12 her to my house.
 13 Q. Anybody else?
 14 A. We had the discussion outside, there was no one
 15 else outside.
 16 Q. You remember being brought into the judge's
 17 chambers?
 18 A. Yes.
 19 Q. After you had disclosed to Anne Flannigan that
 20 you had called Dr. Jones?
 21 A. Yes.
 22 Q. And was that after jury deliberations had
 23 concluded or before?
 24 A. It was well after, yes.

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1 Q. Okay. So after you were called into chambers,
2 you didn't -- at no time did you go back into the secret
3 jury deliberations with your fellow jurors?

4 A. Could you repeat that, please?

5 Q. Had the jury already been released by then?

6 A. Oh, yes, yes.

7 MR. MOUL: Can we take a break for a couple
8 minutes?

9 [A recess was taken from 12:28 to 12:33.]

10 Q. I don't understand what obligation to the
11 court you were trying to satisfy by calling Helen Jones. I
12 still don't understand why you called her, and I need to get
13 an answer to that. I think you're being evasive and I want
14 an answer. Let's go through it again. What obligation to
15 the court were you satisfying when you called Helen Jones?

16 A. Well, let's answer it this way. My obligation
17 to the court would be to determine, you know, whether or not
18 the death sentence should be invoked, you know, based upon,
19 you know, what we had heard in trial and at our
20 deliberations. That was, you know, what I considered my
21 obligation.

22 Q. Okay. And how did you feel you were satisfying
23 that obligation by calling Dr. Jones?

24 A. It's hard for me to explain to you, but I don't

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1 the time. Thinking back on it, I know that I had done it
2 just because I needed to feel comfortable with what I was
3 doing.

4 Q. Okay. That's what I want. The crux of the
5 matter is that you needed to have an understanding of
6 whether or not Bobby Sheppard was in fact mentally ill,
7 correct?

8 A. I guess you can -- you know, if you can look at
9 it that way, that I needed to understand, you know.

10 Q. And the entire decision on whether or not to
11 recommend a sentence of death turned on whether or not you
12 believed he suffered from a mental illness, correct?

13 A. That was not the only -- I mean, there was a
14 lot more to it.

15 Q. But that was a decisive issue, correct?

16 MR. WILLE: Objection, asked and answered. He
17 said that there was other considerations involved.

18 Q. That was a decisive issue, correct, or you
19 wouldn't have made the phone call, because you believe the
20 phone call was necessary for you to satisfy your obligation
21 to the court, is that correct? You've testified to that 15
22 times.

23 A. Okay. Obviously, it must have had some small
24 part of it. It was not decisive, as you say. I'm trying to

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1 feel that that was -- that was part of it. I had felt that
2 I had -- was going to fulfill my obligation, but I was
3 looking for something that -- that I could personally, you
4 know, feel comfortable that I was going to be doing the
5 right thing in doing that.

6 Q. Doing what?

7 A. Fulfilling my obligation.

8 Q. Okay. And is it that you believe you needed an
9 understanding of paranoid schizophrenia in order to satisfy
10 your obligation to the court?

11 A. No, I don't believe so.

12 Q. Then what did you hope to get from Helen Jones
13 that would enable you to satisfy your obligation to the
14 court?

15 A. I guess I was just needing to find something in
16 my heart that I felt comfortable with my, you know, decision
17 I was going to make.

18 Q. Okay. And because the most important decision
19 on mitigation was whether or not he was -- the most
20 important issue that you needed to resolve was whether he
21 had a mental illness, is that correct?

22 A. Well, there may have been -- you know, there's
23 always doubt about everything. And there may have been some
24 small amount of doubt that, you know, that I may have had at

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1 explain it to you the best I can.

2 Q. And no one in this room believes you. Please
3 explain it again.

4 A. You know, maybe I had some doubt about that,
5 there's always an inkling of doubt in anything. But I had
6 decided, I think, what was required of me, and I guess, for
7 my own reasons, I needed to just have, you know, a basic,
8 you know, definition of what we were looking at there, to
9 confirm, you know, what -- what I believed to be true.

10 Q. So I'm correct that you believed that your
11 decision turned on whether or not Bobby Sheppard in fact was
12 mentally ill, and the only way you could come to a decision
13 on whether he was mentally ill was if you could have an
14 accurate understanding of what meant -- what paranoid
15 schizophrenia was. And in order for you to find out what
16 paranoid schizophrenia was, you felt obligated to go find
17 out from Dr. Helen Jones, right?

18 A. I don't know if I thought -- I mean, that's --
19 you know, it may sound like an illogical progression, but I
20 think there was more of an emotional need on my part, you
21 know, during that process.

22 Q. Well, what other issues were important besides
23 his mental illness in the mitigation phase?

24 A. Well, there was, you know, the facts of the

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1 case. You know, the crime that was committed, the evidence
2 of, you know, what was done, and you know, the -- that was
3 the main thing there.

4 Q. Did you call anyone else besides Dr. Helen
5 Jones to talk about those other issues?

6 A. No.

7 Q. So you only violated the court's directives not
8 to talk about the case and not to engage in jury misconduct
9 with respect to the psychological testimony of the defense
10 psychologist, correct?

11 A. Yeah, I guess that's true.

12 Q. And you're not willing to sit here and concede
13 that you violated that oath with respect to that issue
14 because that was the central issue on which you made the
15 decision whether or not to recommend that Bobby Sheppard be
16 put to death or that his life be spared?

17 A. I truly believe it was not the central issue.

18 Q. But it was -- you're not willing to concede it
19 was a decisive issue?

20 A. I had -- I said it already, that I'm sure it
21 has -- it had some negligible contribution to it, but I
22 don't feel it was --

23 Q. It's the word "negligible" that I'm hung up on.

24 A. It was a very -- to me, it wasn't the big load,

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1 reaffirmance from Dr. Jones that mental illness meant
2 someone being not in touch with reality, as opposed to what
3 Dr. Smalden in trial was telling you paranoid schizophrenia
4 meant, right?

5 A. It had -- you know, it had some influence. But
6 I had -- like I said, I believe I had already made up my
7 mind and it was just some inkling, you know, of concern or
8 doubt.

9 Q. Okay. Just so I understand, you called her up.
10 You apparently didn't believe the testimony of Dr. Smalden
11 as to what paranoid schizophrenia was, correct?

12 A. I can't say that, that I believed or
13 disbelieved him. There may have been some doubt in my mind
14 as to, you know, that testimony. But, you know, it's --

15 Q. I'm sitting here and I think you're talking in
16 tongues. Why did you make the phone call? I don't
17 understand why you made the phone call. What kind of
18 information were you getting? I might be the only one in
19 the room, and I might be wasting a lot of time, but it
20 doesn't make any sense to me.

21 A. Well, you know, the only thing that I have a
22 problem with what you're saying, you're trying to make it
23 that that phone call was the determining factor in what I
24 did, as far as my recommendation, and it was not.

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1 you know, as far as that wasn't the -- that was like the
2 straw, I guess, you know, that maybe put me, you know, on
3 the path to say I feel that, you know, what I'm about to do
4 is right.

5 Q. What does the word "negligible" mean to you?

6 A. Well, to me it means it has a very small
7 impact.

8 Q. Then why make the phone call at all if it
9 wasn't important?

10 A. Well, I believe it was more important to me,
11 you know, for me personally than -- more important to me
12 than it was in making any determinations in the case.

13 Q. I don't understand that. If it was of
14 negligible importance, then why make the phone call? You
15 said because it was important. So you're talking in
16 riddles.

17 A. It was important to me, you know, to my peace
18 of mind. You know, I knew what I was going to do with this
19 and just had to feel that I was going to have to live with
20 this decision, and I guess I just -- I don't know, it's -- I
21 guess it's very hard to explain.

22 Q. You had to live with the decision as to whether
23 or not you believed accurately he was not mentally ill, and
24 in order to live with that decision, you needed to get some

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1 Q. Well, let's follow that line of thought. If
2 she had said something to you that would have led you to
3 believe that in fact he was paranoid schizophrenic, would
4 you have decided that he shouldn't be put to death?

5 A. Kind of rephrase that for me so I can
6 understand exactly.

7 Q. If Dr. Jones had said something to you that
8 would have led you to believe that in fact Bobby Sheppard
9 was paranoid schizophrenic, do you agree with me you
10 wouldn't have sentenced him to die?

11 A. That's a possibility, yes.

12 Q. And that was the reason why you made the call,
13 because you needed to ultimately come to a conclusion on the
14 issue of whether or not he was mentally ill, correct?

15 A. I believe I had to feel comfortable with my
16 decision, yes.

17 Q. So in that sense it was determinative, because
18 had you concluded, based on your conversation with Dr.
19 Jones, that he was in fact mentally ill, you would have then
20 recommended that he not be put to death, correct?

21 A. I can't say that for sure.

22 Q. Isn't that what follows?

23 A. Well, maybe by, you know, this logical
24 progression you're trying to develop. But I can't say right

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1 now what, you know -- what that may have, you know, done.
 2 I'm not trying to skirt you, I'm trying to be honest with
 3 you. That, you know, what you've laid out, may be a
 4 progression, that that's what follows, but that's not -- to
 5 me, that's not always the case when it comes to humans and
 6 the way they feel. I can't say for sure.

7 Q. And you don't remember the name of the person
 8 that you told at your party that you had about this -- this
 9 extraneous conversation with Dr. Jones about?

10 A. No, I don't. Like I said, there were a number
 11 of people there.

12 Q. You don't remember a -- was it a guy?

13 A. I believe so.

14 Q. And you don't remember who that -- you do
 15 remember the sex, but you can't remember who it was?

16 A. There were a lot of people there, I don't -- I
 17 don't recall who I was talking to at the time. We were -- I
 18 know we were in the kitchen, but the kitchen was pretty much
 19 filled up and everybody was mingling.

20 Q. Well, how long did this conversation take place
 21 in which somebody who had never served on a jury before
 22 asked you to describe the process, and during the course of
 23 the conversation you felt compelled to tell the person you
 24 had engaged in jury misconduct? How long did that

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1 But as I recall, it was -- it was not like, oh, I had to do
 2 this, you know, I had to make this call in order to make my
 3 decision. You know, that was not it.

4 Q. But it was a highlight of -- apparently it was
 5 a highlight of your involvement with the Bobby Sheppard
 6 trial, correct?

7 A. I don't think I look at it as a highlight. I
 8 don't look at any of it as a highlight.

9 Q. Apparently in the course of the 15 or 20 things
 10 that you recall about -- most important things you recall
 11 about the trial, it was something you felt compelled to
 12 disclose to somebody as a highlight, correct?

13 A. I guess, yeah.

14 Q. We're not going anywhere because you're not
 15 going to answer the question truthfully.

16 A. I would agree with that. It had some
 17 influence, I guess, but it's not as much as I feel you're
 18 putting upon it.

19 Q. Are you still married?

20 A. Yes.

21 Q. Married to the same woman that you were married
 22 to in 1995?

23 A. Well, we were engaged at that point.

24 Q. Okay. You weren't married then?

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1 conversation take place?

2 A. I don't believe it was very long. I think
 3 there were other things going on. This was just kind of a
 4 passing little conversation that might have lasted two or
 5 three minutes and then somebody's off on something else.

6 Q. It only lasted two or three minutes, and as
 7 part of your two or three minute description about a
 8 three-week trial you felt compelled to talk about a
 9 telephone call that you had made in violation of a court
 10 order to a psychologist, that's what your testimony is,
 11 correct?

12 A. Yes.

13 Q. And isn't it because that was -- that was a
 14 very important and critical telephone call and the
 15 information you were given was of critical importance in
 16 your deliberations?

17 MR. WILLE: I'll just state for the record an
 18 objection, asked and answered numerous times,
 19 argumentative. He answered the question the best he
 20 can, over and over again.

21 Q. Your obligation is to answer the question.

22 A. It may. You know, I had brought this up in
 23 conversation with -- you know, I can't remember who it was.
 24 And that was kind of the -- you know, I had mentioned that.

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1 A. No.

2 Q. Okay. If we depose your wife and ask your wife
 3 about conversations that you and she had had about the
 4 conversation with Dr. Helen Jones, what is she going to tell
 5 us? Because we may do that if I can't get an answer out of
 6 you.

7 A. To the best of my knowledge, she wasn't aware
 8 of that until -- until Norm and Anne had come over and told
 9 me that they had overheard.

10 Q. So you told this person in passing in your
 11 kitchen about the call to Helen Jones and the two or three
 12 minute conversation, but despite the fact that you're
 13 engaged to be married, you never talked about your trial
 14 experience with her, and if you did, apparently that wasn't
 15 in the top 15 events of the trial, it was number 16 and you
 16 decided not to tell her, is that what I'm supposed to
 17 believe here?

18 A. I can't recall if I ever told her or not.

19 Q. Okay.

20 A. She did not -- she did not really want to hear
 21 a whole lot about it.

22 Q. Do you recall Helen Jones telling you that
 23 paranoid schizophrenia is a communication disorder?

24 A. Not specifically, no.

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1 Q. Do you remember her telling you that people
 2 with paranoid schizophrenia have trouble communicating?
 3 A. To the best of my recollection, you know, the
 4 boiled-down version that she gave me was that it's someone
 5 that doesn't have a grasp on reality, and that's what I took
 6 from it.
 7 Q. What did you do with that information, just so
 8 I understand again? How did you use that information?
 9 A. Well, I guess, I had -- I had made, you know, I
 10 think my determination on, you know, what the appropriate
 11 sentence would be. And I guess this was just something that
 12 I needed maybe to affirm, you know, what I was going to do
 13 is going to be right. I guess at that point I decided, you
 14 know, he did have a grasp on reality, you know, he did
 15 understand, and I felt that before.
 16 Q. So you used that information to conclude that
 17 he did have a grasp on reality, correct? You just testified
 18 to that.
 19 A. Well, to affirm it, not to confirm.
 20 Q. Okay.
 21 MR. MOUL: I don't have anything further.
 22 MR. WILLE: Mr. Fox, I promise to be brief, I
 23 just want to ask you some very basic questions.
 24 CROSS-EXAMINATION

1 what you did, is that a fair statement?
 2 A. Yes.
 3 Q. And after you did it, you were aware that you
 4 did something wrong, is that a fair statement?
 5 A. Yes.
 6 Q. As you sit here today, can you tell me that you
 7 were aware of your obligation to decide this case on what
 8 was in the courtroom, and can you tell me that you feel you
 9 fulfilled that obligation? And I ask that you question
 10 sincerely.
 11 A. Yes, I believe I did.
 12 MR. WILLE: That's all I have.
 13 MR. MOUL: I don't have anything further.
 14
 15
 16
 17 (Signature waived.)
 18 STEPHEN E. FOX
 19
 20
 21
 22 ---
 23 DEPOSITION CONCLUDED AT 12:53 P.M.
 24 ---

1 BY MR. WILLE:
 2 Q. Perhaps to reiterate some of the areas that Mr.
 3 Moul asked you about. Do you recall speaking to the trial
 4 judge about this matter?
 5 A. Yes.
 6 Q. And do you recall him asking you questions with
 7 respect to the telephone call, so forth?
 8 A. Yes.
 9 Q. Did you at that time tell him to the best of
 10 your recollection the information that pertained to that
 11 telephone call?
 12 A. Yes.
 13 Q. Now, Mr. Moul asked you some questions about
 14 something being determinative, using those words. He also
 15 asked you some questions about your obligation. Did you
 16 recognize at that time that it was your obligation to decide
 17 the case based on what was presented in court?
 18 A. Yes.
 19 Q. Did you understand that obligation?
 20 A. Yes.
 21 Q. Did you follow that obligation?
 22 A. Yes, I believe so. You know, I realized that I
 23 had made a mistake.
 24 Q. You were aware that you were not supposed to do

1 CERTIFICATE
 2
 3 STATE OF OHIO :
 4 : SS
 5 COUNTY OF CLERMONT :
 6 I, Linda S. Mullen, RMR, the undersigned, a duly
 7 qualified and commissioned notary public within and for the
 8 State of Ohio, do hereby certify that before the giving of
 9 his aforesaid deposition, STEPHEN E. FOX was by me first
 10 duly sworn to depose the truth, the whole truth and nothing
 11 but the truth; that the foregoing is the deposition given at
 12 said time and place by STEPHEN E. FOX; that said deposition
 13 was taken in all respects pursuant to stipulations of
 14 counsel hereinbefore set forth; that I am neither a relative
 15 of nor employee of any of their counsel, and have no
 16 interest whatever in the result of the action.
 17 IN WITNESS WHEREOF, I hereunto set my hand and
 18 official seal of office at Cincinnati, Ohio, this 20th day
 19 of February, 2001.
 20
 21
 22
 23 My commission expires: Linda S. Mullen
 24 October 13, 2003. Linda S. Mullen, RMR
 Notary Public - State of Ohio

Exhibit 12

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

BOBBY T. SHEPPARD	)	Case No. 1:00-cv-493
)	
Petitioner,)	
	)	District Judge Gregory L. Frost
v.	)	Magistrate Judge Michael R. Merz
)	
NORM ROBINSON, Warden,¹)	
)	
Respondent.	)	<u>THIS IS A DEATH PENALTY CASE</u>

Petitioner Sheppard’s Motion For Relief From Judgment Under Rule 60 To Allow Reconsideration Of One Portion Of Ground For Relief Nine In Light Of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), And Motion For Entry Of An Indicative Ruling From The District Court In Accordance With Rule 62.1

Petitioner Bobby Sheppard, through counsel, respectfully requests relief from judgment under Rule 60(b)(6) to allow reconsideration of this Court’s decision as to the sixth subclaim of Sheppard’s Ninth Ground for Relief, in light of the Supreme Court’s opinion in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). That claim asserts that Sheppard received ineffective assistance of trial counsel when his trial counsel failed to offer evidence in support of their motion for a new trial on the basis of juror misconduct. The Magistrate Judge recommended denying the claim as procedurally defaulted because Sheppard raised it in state court only as part of an untimely and

¹ Warden Robinson is the Warden at Chilicothe Correctional Institution, where Sheppard is now held. Robinson is automatically substituted for the previous Respondent, Margaret Bagley as the person in whose custody Sheppard is currently held.

successive post-conviction petition. (Report and Recommendation, Doc. No. 94, p. 85-92.)²

This Court, after a *de novo* review of the claim, (Opinion, Doc. No. 131, p. 83-84),³ reached the same conclusion. Consequently, no court ever reviewed Sheppard's claim on the merits.

This injustice is precisely the scenario the *Martinez* Court found compelling enough to recognize an exception to well-settled law that ineffective assistance of state post-conviction counsel can suffice as cause to excuse a procedural default. *Martinez*, 132 S. Ct. at 1315. Accordingly, Sheppard hereby requests that this Court grant relief from its judgment under Rule 60(b)(6), and reconsider its ruling that Sheppard's sixth subpart of his Ninth Ground for Relief is procedurally defaulted.

Sheppard also requests that this Court enter an "indicative ruling" for the purpose of seeking remand of the above-captioned case from the Sixth Circuit, pursuant to Federal Rule of Civil Procedure 62.1(a)(3), stating that this Court would reconsider its decision denying relief on Sheppard's Ninth Ground for Relief, or, in the alternative, stating that the motion for reconsideration raises a substantial issue. Sheppard would then seek remand from the Sixth Circuit so that this Court may exercise jurisdiction to consider Sheppard's Ninth Ground for Relief in light of *Martinez*.⁴

² There is no PageID pagination for this document.

³ There is no PageID pagination for this document.

⁴ This portion of Sheppard's motion may become moot, as explained in Section V. (*See* p. 48 n.9, below.)

The factual and legal arguments in support of this motion are more fully set forth below in the accompanying memorandum in support.

Respectfully submitted,

/s/ Allen L. Bohnert

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1. Sheppard’s post-conviction counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, when counsel failed to raise the obvious and compelling extrinsic evidence/jury misconduct IAC claim in Sheppard’s first post-conviction petition. 32

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MEMORANDUM IN SUPPORT

This Court previously noted that “every court” that reviewed Sheppard’s substantive claim of juror misconduct for soliciting and receiving extrinsic evidence concluded that the juror committed misconduct. (Opinion and Order, Doc. No. 131, 62 of 84, Mar. 4, 2009.) This Court then concluded that Sheppard had failed to produce evidence to support a finding of prejudice from the juror’s misconduct. The Sixth Circuit, in turn, held that Sheppard failed to diligently develop any evidence to support his juror misconduct claim because his trial counsel and post-conviction counsel failed to make reasonable efforts to develop the evidence. *Sheppard v. Bagley*, 657 F.3d 338, 343-44 (6th Cir. 2011).

This Court previously found procedurally defaulted Sheppard’s ineffective-assistance-of-counsel (IAC) claim related to juror misconduct and counsel’s failures attendant thereto, presented in the sixth subpart of Sheppard’s Ground Nine for Relief. Critically, the Sixth Circuit’s discussion of Sheppard’s substantive juror misconduct claim precisely illustrates why Sheppard’s IAC claim must be considered by a court—any court—contrary to the current situation. *See Martinez v. Ryan*, 132 S.Ct. 1309 (2012). Counsel’s failures to know and apply the correct controlling law, and failures to raise the claims on further review, amounted to insufficient performance in light of the prevailing professional norms at the time of Sheppard’s trial, direct appeal, and post-conviction proceedings. Furthermore, these failures prejudiced Sheppard in his state and federal proceedings by preventing a grant of relief on a clearly meritorious claim.

Extraordinary circumstances exist that allow this Court to reopen its final judgment. The Supreme Court issued its opinion in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), after this Court’s

judgment in Sheppard's case, and *Martinez* changes the calculus on Sheppard's IAC claim.

Additionally, no court—state or federal—to date has reviewed Sheppard's IAC claim, and absent this Court reviewing the claim, no court will ever review it. Moreover, the devastating effects of state initial-review collateral proceedings counsel's unreasonable failures in this death penalty case cannot be any clearer when Sheppard's substantive extrinsic evidence/jury misconduct claims failed solely because trial counsel failed to investigate and develop evidence in support of the new trial motion that would have undoubtedly altered the state court's consideration of the substantive claims.

In *Martinez*, the Court dramatically changed the landscape of what was believed to be well-settled federal habeas law under *Coleman v. Thompson*, 501 U.S. 722 (1991). Under *Coleman*, the ineffective assistance of post-conviction counsel was of no effect for federal habeas proceedings. *See Coleman*, 501 U.S. at 752-53. Thus, at the time of this Court's judgment finding Sheppard's IAC claim procedurally defaulted, the *Coleman* rule was widely understood in the Sixth Circuit to render frivolous any argument of ineffective assistance of post-conviction counsel as a procedural default defense. *See Byrd v. Collins*, 209 F.3d 486, 516 (6th Cir. 2000) (explaining that ineffective assistance of post-conviction counsel is "clearly not a sufficient ground" for cause to excuse procedural default, because "the Supreme Court has held that ineffective assistance of post-conviction counsel cannot constitute 'cause.'"); *see also Ritchie v. Eberhart*, 11 F.3d 587, 592 (6th Cir. 1993) (explaining what could constitute cause sufficient to excuse procedural default, and that *Coleman* "rejected, flat out, an argument that 'where there is no constitutional right to counsel . . . it is enough that a petitioner demonstrate that his attorney's conduct would meet the *Strickland* standard, even though no independent

Sixth Amendment claim is possible.”); *Neal v. Bowlen*, No. 94-5765, 1995 U.S. App. LEXIS 4821, *7 (6th Cir. Mar. 9, 1995) (holding that a state prisoner “cannot establish cause based on alleged ineffective assistance of counsel received in state post-conviction proceedings as there is simply no constitutional right to counsel in such proceedings”) (citation omitted); *Davie v. Mitchell*, 291 F. Supp.2d 573, 588 n.1 (N.D. Ohio 2003) (“Ineffective assistance of post-conviction counsel cannot be asserted as cause for a default attributable to such counsel) (citing *Coleman*, 501 U.S. at 755-57).

Indeed, the Sixth Circuit explicitly condemned the argument that post-conviction counsel’s failures might have effect in federal habeas proceedings, and harshly characterized attempts to raise the argument: “To hold otherwise . . . would not only be contrary to well-settled law, but also would establish a blueprint for delay by other capital defendants. This we are unwilling to do.” *Byrd*, 209 F.3d at 516.

But *Martinez* wrought a sea-change to that well-settled law by holding that the ineffective assistance of initial-review collateral proceedings counsel could serve to excuse procedural default when the petitioner raised claims of ineffective assistance of trial counsel. *Martinez*, 132 S. Ct. at 1315 (holding that “it is necessary to modify the unqualified statement in *Coleman* that an attorney’s ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default” and that *Martinez* “qualifies *Coleman* by recognizing a narrow exception” to the rule).

Accordingly, Petitioner Bobby Sheppard respectfully requests that the Court grant him relief from judgment under Rule 60(b)(6), and reconsider its ruling, in light of *Martinez*, that Sheppard procedurally defaulted the sixth subpart of his Ninth Ground for Relief. *Martinez*

establishes that procedural default can be excused by demonstrating ineffective assistance of initial-review collateral proceedings counsel. *Martinez*, 131 S. Ct. at 1315. *Martinez* is directly on point with Sheppard's IAC claim, which has never received *any* court review on the merits. Indeed, Sheppard's successive post-conviction petitions explicitly argued that his initial-review collateral proceedings counsel was ineffective for failing to raise this issue in Sheppard's first post-conviction petition. (ROW Apx. Vol. III at 29-31, 40-45, 154-56, 165-70; *see also* ROW Apx. Vol. II at 150-56 (raising claim in a motion for relief from judgment under Oh.R.Civ.P. 60(b).) The same reasoning applies here to excuse the procedural default and allow this Court to consider Sheppard's claim on the merits. Considered on its merits, Sheppard's IAC claim is compelling and justifies habeas sentencing relief.

I. Summary of the Arguments Presented in This Memorandum.

In accordance with Local Rule 7.2(a)(3), Sheppard's memorandum includes the following. First, Sheppard will first explain why this Court should grant relief from judgment under Rule 60(b)(6) as that Rule is applied in the Sixth Circuit. (*See* Section II below, pp. 11-24.) Section II.A provides relevant background information that is necessary to consider Sheppard's motion. In Section II.B, Sheppard explains the applicable extraordinary circumstances necessary to grant his Rule 60(b)(6) motion based on an intervening change in law in *Martinez*, along with any "special circumstances" that may be necessary in the Court's view.

Second, Sheppard will demonstrate that he can satisfy the two-part *Martinez* standard. (*See* Section III below, pp. 24-47.) Within Section III, Sheppard first explains the pertinent holding and reasoning in *Martinez*, and that *Martinez* is directly on point with his case, along

with setting out the applicable standard for relief under *Martinez*. (See Sections III.A-C, pp. 24-31.) Then, in subsections III.D and E, Sheppard demonstrates why he can satisfy the first *Martinez* prong—that initial-review collateral proceedings counsel provided ineffective assistance of counsel under *Strickland v. Washington*. (See Sections III.D-E, below, pp. 31-40.) In subsection III.D, Sheppard first demonstrates why he can satisfy *Strickland* if the pertinent counsel is his initial post-conviction counsel. (See Section III.D below, pp. 31-35). Subsections within subsection III.D demonstrate why counsel was ineffective for failing to raise a claim for IAC related to trial counsel’s failures to investigate and develop evidence of extrinsic evidence/jury misconduct in support of Sheppard’s new trial motion. Then, in subsection III.E, Sheppard demonstrates why he can satisfy *Strickland* if the pertinent counsel is his counsel for his application to reopen his direct appeal (his “*Murnahan* counsel”). (See Section III.E below, pp. 35-40). Subsections within subsection III.E demonstrate why Sheppard’s direct appeals counsel was ineffective for failing to raise the IAC claim, (Section III.E.1.a), and why his *Murnahan* counsel was, in turn, ineffective for failing to allege a claim of ineffective assistance of appellate counsel, (Section III.E.1-2). Finally, Sheppard demonstrates why he can satisfy the second *Martinez* factor—that his trial counsel IAC claim is “substantial.” (See Section III.F below, pp. 40-47.) Subsections within subsection III.F explain why Sheppard’s trial counsel’s assistance was both deficient and prejudicial. (Section III.F.1.a-b, pp. 41-47.)

Third, Sheppard explains why the Supreme Court’s ruling in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), does not alter the proper result here, primarily because a change in

well-established Supreme Court precedent as in this case with *Martinez* is markedly different from a Supreme Court opinion clarifying a circuit split as in *Gonzalez*. (See Section IV below, pp. 47-49.)

Fourth, Sheppard explains why this Court should issue an Indicative Ruling under Federal Rule of Civil Procedure 62.1, if necessary. (See Section V below, p. 49.)

II. This Court Should Grant Relief From Judgment Under Rule 60(b)(6) So That This Court May Reconsider Its Decision That Sheppard's IAC Claim Is Procedurally Defaulted.

A juror committed misconduct by soliciting extrinsic evidence during penalty-phase deliberations in Bobby's Sheppard's capital trial. After Sheppard presented evidence in mitigation of his paranoid schizophrenia and the prosecutor vigorously attacked this evidence, the juror asked an outside source to provide a definition of paranoid schizophrenia. Once this misconduct came to light, trial counsel moved for a new trial, but failed to present evidence available at the time to demonstrate the prejudice Sheppard suffered through the juror's receipt of this extrinsic evidence. In federal habeas proceedings, this Court ruled that a claim of ineffective-assistance-of-trial-counsel related to this failure was procedurally defaulted because it was not raised below in state-court proceedings.

A. Factual background

The impact of Sheppard's paranoid schizophrenia was the core of his mitigation presentation at trial. (See Trial Tr. at 1018-1135 (testimony of Dr. Smalldon); 1192 (defense counsel argued that "probably the most important thing for you to consider here . . . is Bobby's mental illness"); 1180-88 (defense argument discussing mental illness); 1192-96 (same); 1201-

04 (same).) Defense counsel demonstrated that the year before the crime, Sheppard had experienced dramatic changes in personality and behavior following a head injury during a car accident. (*See* Trial Tr. at 963-64; 972-73; 981-83). Unrebutted testimony from expert psychologist Dr. Jeffrey Smalldon explained that head injuries like the one Sheppard suffered can trigger the onset of paranoid schizophrenia. (Trial Tr. at 1077-81.) Defense counsel also presented evidence of a striking, multi-generational history of mental illness in Sheppard's family, including instances of paranoid schizophrenia. (*See* Trial Tr. at 964-65; 983-85; 1056-58.)

Dr. Smalldon testified that Sheppard suffered from paranoid schizophrenia at the time of the crime. (Trial Tr. at 1060.) He explained the disorder's features and Sheppard's family history of severe mental illness. (Trial Tr. at 1056-1064; 1081-84.) He also explained how the disorder could manifest in a previously "normal" individual after a head injury like Sheppard suffered, and why the features of the disorder would not be apparent from a brief encounter like the one recorded on the surveillance tape of the crime in this case. (Trial Tr. at 1063-64; 1082; 1102-03.) The prosecution declined to present any rebuttal expert testimony.

During closing, the prosecution repeatedly attacked Sheppard mental-health evidence, over multiple objections. (*See* Trial Tr. at Tr. 1173-74, 1177-78, 1209-16, 1226-27.) The prosecutor said Sheppard, his lawyers, and his expert witness were dishonest and "slick" and disparaged the mental-health evidence as "ludicrous," "junk," "imaginary," "pathetic," and "absolute sham mitigation." The prosecutor implied that Sheppard was faking his mental illness; he stated that if Sheppard really did suffer from any disorder, then he would have claimed an insanity defense during the guilt phase of trial, but that he did not so as to prevent the State's

expert from having a chance to examine him. The prosecutor also told the jurors to disregard the defense's un rebutted expert testimony and encouraged them to reject the expert's diagnosis of paranoid schizophrenia by evaluating Sheppard's conduct during the brief surveillance videotape of the crime, suggesting that he was not afflicted because he did not appear to be suffering from any disorder. The jury returned a death verdict. (Trial Tr. at 1249.)

Agreeing with this Court's assessment that the prosecution's statements were "improper," "extensive," "deliberate," and also "likely to mislead the jury and prejudice Sheppard," (Opinion and Order, Doc. 131 at 45), the Sixth Circuit also expressed "no quarrel" with the state court's characterization of the prosecutor's comments as "troublesome." *Sheppard*, 657 F.3d at 346. But the Sixth Circuit also agreed with this Court that the state court's reweighing of the sentencing factors served to cure the prosecutorial misconduct. *Id.*

Nevertheless, as a result of the prosecution's efforts, at least one juror was left confused about Bobby's mitigation defense. Juror Fox ignored the court's instructions and telephoned an acquaintance—Ms. Jones—seeking additional information about paranoid schizophrenia. This misconduct came to light after the jury's verdict, and the judge, counsel, and the juror briefly discussed the matter in chambers. (See Trial Tr. at 1254-59.) There, Juror Fox stated that Ms. Jones, "a psychologist," had given him a short definition of paranoid schizophrenia, stated that "those kind of people just are not really in touch with reality," and that this information had not influenced his verdict. (Trial Tr. at 1254-57.)

Shortly after the judge sentenced Sheppard to death, he moved for a new trial. (ROW Vol. II at 1.) He later submitted an affidavit from Ms. Jones stating that she had given Juror Fox "a brief description and explanation of paranoid schizophrenia." (ROW Vol. II at 40.) The State

then obtained another affidavit from Ms. Jones—in which she claimed to have “thoroughly reviewed” the transcript of Sheppard’s mitigation expert regarding paranoid schizophrenia and stated that what she had told Juror Fox was “totally consistent” with that testimony—and submitted it in opposition to Sheppard’s motion. (ROW Vol. II at 53.) Two days later, the trial court denied the new-trial motion. (ROW Vol. II at 58). The Ohio Supreme Court affirmed Sheppard’s conviction and sentence on direct appeal. *State v. Sheppard*, 91 Ohio St. 3d 329, 703 N.E.2d 286 (1998).

Sheppard’s state post-conviction counsel filed an initial and several amended petitions for relief under Ohio Revised Code § 2953.21, eventually raising a total of five causes of action. (See ROW Vol. II at 68–74.) Post-conviction counsel failed to raise, however, trial counsel’s ineffectiveness in failing to submit evidence demonstrating that Sheppard was prejudiced by Fox’s misconduct. (See *id.*) Later, new counsel attempted to raise this claim in a successive post-conviction petition, asserting trial counsel was constitutionally ineffective for not having “submitted at least some evidence, by affidavit or testimony, to support their motion for new trial on the basis of juror misconduct.” (ROW Vol. III at 181.) The trial court refused to consider this claim, however, holding it procedurally barred. (ROW Vol. III at 195). The state appellate court affirmed that holding on appeal, *State v. Sheppard*, No. C-000665, 2001 WL 331936 at *2 (Ohio App. 1st Dist. April 6, 2001), and the Ohio Supreme Court declined review, *State v. Sheppard*, 751 N.E.2d 483 (2001).

Meanwhile, volunteer counsel filed an application to reopen Sheppard’s direct appeal on the basis of ineffective assistance of Sheppard’s direct-appeal counsel under Ohio Rule of Appellate Procedure 26(b) and *State v. Murnahan*, 584 N.E.2d 1204 (Ohio 1992). (ROW Vol. V

at 75-85.) This application did not assert, however, that Sheppard's direct-appeal counsel was ineffective for not raising a claim of ineffective-assistance-of-trial-counsel for failing to submit evidence demonstrating the extent of prejudice to Sheppard as a result of Fox's misconduct.

(*See id.*)

In federal habeas proceedings before this Court, Sheppard raised the ineffectiveness of his trial counsel as the sixth subpart of his Ninth Ground for Relief. (First Amended Petition, Doc. No. 77, at 46-49.) Sheppard asserted that his trial counsel should have submitted at least some evidence to support their new-trial motion based on juror misconduct, and argued that this failure to show that the juror's deliberations were contaminated by misinformation was unreasonable and prejudicial to Sheppard. (*Id.* at 48.)

This Court held an evidentiary hearing where Juror Fox, Ms. Jones, and Dr. Smalldon testified. (*See* Doc. Nos. 63, 64, and 84.)

During the hearing, Ms. Jones admitted that she had not reviewed the trial transcript and did not even know what Bobby's expert had said about paranoid schizophrenia, despite what was contained in the affidavit the State submitted to the trial court. (Doc. No. 64, Evid. Hr'g Tr. at 194, 197-98.) She also testified that she did not know the symptoms of the illness. (*Id.* at 175.) She had not consulted a clinical reference source, but rather had looked up the definitions of "paranoia" and "schizophrenia" in Webster's dictionary. (*Id.* at 167-170.) In addition, she had told Juror Fox that paranoid schizophrenia was a communication disorder and that those suffering from the illness experience difficulties in communication. (*Id.* at 171.) She also admitted that she had never been a licensed psychologist, did not work in clinical psychology,

and did not consider herself qualified to give a professional opinion on schizophrenia. (*Id.* at 163-66.)

Juror Fox's federal testimony contradicted his state-court responses. He testified he might not have voted for death if Jones had given him a definition that indicated Sheppard was paranoid schizophrenic. (Doc. No. 63, Evid. Hr'g Tr. at 135.) Jones's opinion allowed Fox to confirm that Sheppard did not suffer from paranoid schizophrenia, and this made it "easier" for him "to vote for death." (*Id.* at 137-38.) Fox also testified that Jones's information "influenced" his verdict, and that it "must have" "contributed to" his vote. (*Id.*)

Dr. Smalldon testified that Jones's description of paranoid schizophrenia as a communication disorder was incorrect, (Doc. No. 84, Evid. Hr'g Tr. at 20), and inconsistent with his testimony, and that using the phrase "out of touch with reality" to describe paranoid schizophrenia did not comport with the clinical reality, (*id.* at 24-26). He explained, "the very rigidly held false beliefs that are typically part of the inner life of someone with paranoid schizophrenia" "are not evident in relatively superficial interactions" and that, in his opinion, to say someone is "out of touch with reality" "implies a very different kind of" behavioral presentation "than what one typically sees with paranoid schizophrenia." (*Id.* at 26.) He also stated that, in his professional opinion, Sheppard did not suffer from a communication disorder, (*id.* at 38), and testified that paranoid schizophrenics are often "unusually intelligent" and "very capable of engaging" in "planful sequential behavior," (*id.* at 47).

In support of his ineffective-assistance-of-trial-counsel claim, Sheppard argued that trial counsel could have obtained the additional evidence generated at the federal evidentiary hearing and submitted it in support of Sheppard's new-trial motion to show the wholly misleading and

inaccurate nature of the information Juror Fox impermissibly obtained from Jones during deliberations. (Traverse, Doc. No. 89, at 108-09, PageID 123-24.)

This Court, however, held that this claim was procedurally defaulted and therefore did not address it on the merits. The Magistrate Judge noted that the claim had only been raised in an untimely successive post-conviction petition and was therefore barred under state procedural rules and thus procedurally defaulted in federal court. (R&R, Doc. No. 84, at 85, 89.) On *de novo* review of this recommendation, the District Court likewise concluded that this ineffective-assistance-of-counsel claim was procedurally defaulted. (Opinion and Order, Doc. No. 131, at 67.) This Court also denied Sheppard's substantive extrinsic evidence/jury misconduct claims after concluding that the state court's rejection of those claims did not contravene or unreasonably apply clearly established federal law. (*Id.* at 63.)

The Sixth Circuit subsequently affirmed this Court's judgment denying Sheppard's habeas petition. *Sheppard v. Bagley*, 657 F.3d 338, 343-44 (6th Cir. 2011). On June 11, 2012, the Supreme Court of the United States denied Sheppard's petition for certiorari. *Sheppard v. Robinson*, No. 11-9887, 2012 U.S. LEXIS 4312 (June 11, 2012).

Sheppard now seeks relief from this Court's judgment to correct a "defect in the . . . proceedings," *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005), namely that the procedural default of his sixth subpart of his Ninth Ground for Relief should be excused such that the claim can be considered on the merits.

B. Relief from judgment via Rule 60(b)(6) should be granted.

Rule 60(b) “confers broad discretion on the trial court to grant relief when appropriate to accomplish justice; it constitutes a grand reservoir of equitable power to do justice in a particular case . . . and should be liberally construed when substantial justice will thus be served.”

Thompson v. Bell, 580 F.3d 423, 444 (6th Cir. 2009) (citation omitted); *see also D’Ambrosio v. Bagley*, 688 F. Supp.2d 709, 733 (N.D. Ohio 2010), *aff’d by D’Ambrosio v. Bagley*, 656 F.3d 379 (6th Cir. 2011). Rule 60(b)(6) provides that “[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding” for one or more of five specifically enumerated reasons, or for a sixth “catchall” reason: “any other reason that justifies relief.” Fed.R. Civ. P. 60(b). This Court’s decision to grant a Rule 60(b) motion is reviewed for abuse of discretion. *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 453–54 (6th Cir. 2008).

Moreover, “Rule 60(b) has an unquestionably valid role to play in habeas cases.”

Gonzalez, 535 U.S. at 534.⁵ This is so even after the Supreme Court has denied certiorari, such

⁵ When a Rule 60(b) motion attempts to set aside a petitioner’s state conviction, it is really a second- or -successive habeas petition subject to strict restrictions under the Antiterrorism and Effective Death Penalty Act of 1996. *Gonzalez*, 535 U.S. at 529. By contrast, Sheppard’s Rule 60(b) motion is not attempting to set aside his state conviction. Instead his motion is focused on this Court’s opinion and order; Sheppard is simply attempting to correct an error, in light of *Martinez*, in this Court’s opinion and order that found his IAC claim procedurally defaulted. Granting the Rule 60(b) motion will not, by itself, result in habeas relief for Sheppard. Accordingly, this is a straightforward Rule 60(b) motion that may “proceed as denominated.” *See id.* at 533; *see also Brown v. United States*, No. 00-CV-1650, 2008 U.S. Dist. LEXIS 94649, at *8–9 (N.D. Ohio Nov. 20, 2008) (O’Malley, J.) (“A Rule 60(b) motion that does not assert an error in the underlying conviction and would not constitute a federal basis for relief is not to be construed as a second or successive habeas petition.”).

as in Sheppard's case. See *Leavitt v. Arave*, No. 12-35427, 2012 U.S. App. LEXIS 11711, *2 (9th Cir. June 8, 2012). In *Leavitt*, the petitioner filed a Rule 60(b) motion after the Supreme Court denied his petition for certiorari. *Id.* at *1. The petitioner argued that *Martinez* "renders him eligible to pursue ineffective assistance of counsel claims on which he had ostensibly defaulted." *Id.* The Ninth Circuit affirmed the district court's denial of the Rule 60(b) motion, after considering the petitioner's *Martinez* claims and finding them wanting, because the record was sufficient to conclude that the petitioner could not demonstrate post-conviction counsel was ineffective under *Strickland*. *Id.* at *2-3. The court acknowledged, however, that when the record "is devoid of sufficient information necessary to evaluate whether [initial-review collateral proceedings] counsel was ineffective," further consideration by the district court pursuant to *Martinez* "would be necessary." *Id.* at *2 (citation and original brackets omitted, brackets added).

The catchall provision in Rule 60(b)(6) requires the movant to demonstrate "extraordinary circumstances" to justify relief from the judgment. See *Carter v. Anderson*, 585 F.3d 1007, 1011 (6th Cir. 2009) (citing *Gonzalez*, 545 U.S. at 532). What constitutes "extraordinary circumstances" has never been defined with precision by the Sixth Circuit, and is generally left to the district court to decide in a case-by-case basis. *Stokes v. Williams*, 475 F.3d 732, 736 (6th Cir. 2007) (citing *Blue Diamond Coal Co. v. Trs. of UMWA Combined Benefit Fund*, 249 F.3d 519, 529 (6th Cir. 2001)).

In *D'Ambrosio*, the district court granted relief under Rule 60(b)(6) after finding the extraordinary circumstance of the death of a key witness during habeas proceedings that materially prejudiced the petitioner. *D'Ambrosio*, 688 F. Supp.2d at 729-32. Another set of

extraordinary circumstances which can justify relief under Rule 60(b)(6), and which arises after a petitioner's habeas petition is decided by the district court, is an intervening change in the law, generally when "coupled with some other special circumstance." *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 373-74 (6th Cir. 2007) (citing *Blue Diamond Coal*, 249 F.3d at 524). Moreover, it is possible "that *only* a change in decisional law might, in some circumstances, merit" relief under Rule 60(b)(6), without any additional factors or "special circumstances." *Stokes*, 475 F.3d at 736; *see also Buck v. Thaler*, No. 11-70025, 452 Fed. App'x 423, 430 (5th Cir. Sept. 14, 2011) (suggesting that circumstances giving rise to a "new or novel" concept or argument might be the necessary extraordinary circumstances needed to justify granting relief under Rule 60(b)(6)).

Ultimately, the "decision to grant Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court to intensively balance numerous factors, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *Stokes*, 475 F.3d at 736 (citations and internal quotation marks omitted).

While the precise contours of "extraordinary circumstances" remain undefined, the Sixth Circuit has nevertheless made clear that, when truly extraordinary circumstances *are* present, a district court has considerable equitable powers under Rule 60(b)(6). *Thompson*, 580 F.3d at 444; *Gumble v. Waterford Twp.*, 171 Fed. App'x. 502, 505 (6th Cir. 2006) ("Where a party seeks relief under Rule 60(b)(6), the district court's discretion 'is especially broad given the underlying equitable principles involved.'" (quoting *Johnson v. Dellatifa*, 357 F.3d 539, 543 (6th Cir. 2004))); *McDowell v. Dynamics Corp. of Am.*, 931 F.2d 380, 383 (6th Cir. 1991) (finding same

and citing *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989)); *D'Ambrosio*, 688 F. Supp.2d at 734.

Here, like in *D'Ambrosio*, there is an extraordinary circumstance that arose after the district court issued its final judgment on Sheppard's habeas petition; *Martinez* represents an intervening change in the law, a dramatic change to well-settled Supreme Court habeas jurisprudence. *Martinez*, 132 S. Ct. at 1315. *Martinez* recognized for the first time that ineffective assistance of initial-review collateral proceedings counsel could serve as an excuse for procedural default of an IAC claim. *See id.* This was an explicit, critical modification from the Court's previous jurisprudence that had long held that ineffective assistance of post-conviction counsel had no significance whatsoever for purposes of federal habeas. *See id.*

The sea-change nature of *Martinez* as it applies here should constitute sufficient extraordinary circumstances and suggests that Sheppard's Rule 60(b)(6) motion should be granted to ensure that justice is "done in light of all the facts" of his case. While *Leavitt* is not binding authority in the Sixth Circuit, it is significant that the *Leavitt* court proceeded directly to assess the merits of the petitioner's *Martinez* arguments rather than analyze whether the petitioner had shown extraordinary circumstances. This strongly suggests that *Martinez* itself is a sufficient development to justify a Rule 60(b) motion if a petitioner can satisfy the *Martinez* standard.

Even if "special circumstances" are needed to couple with *Martinez*'s intervening change in law, Sheppard can satisfy that standard as well. First, and most obviously, Sheppard's case is a death penalty case. Second, the change in law in *Martinez* precisely addresses the issue with Sheppard's IAC claim. *Martinez* permits the federal habeas courts to excuse a petitioner's

procedural default, if the petitioner's initial-review collateral proceedings counsel provided ineffective assistance. That change is directly connected to the situation in Sheppard's case, in which Sheppard is arguing that his initial-review collateral proceedings counsel's ineffective assistance excuses the procedural default of his IAC claim.

Third, Sheppard's *Martinez* claim is strong, both in terms of *Martinez*'s policy concerns and *Martinez*'s requirements to prevail. The policy concern driving the Court's decision in *Martinez* was the harsh injustice inherent when a petitioner's claim might never be heard by any court because of counsel's failures. *Martinez*, 132 S. Ct. at 1316-17. And that is exactly what occurred in Sheppard's case. Moreover, the merits of Sheppard's *Martinez* claim are strong, as discussed more fully below. The IAC claim was inherently bound up with the underlying substantive extrinsic evidence/jury misconduct claims. Every court that considered the substantive claims condemned the juror's misconduct, but found no evidence of prejudice. Sheppard's IAC claim was found procedurally defaulted without any excusing cause and prejudice, and thus was never heard on the merits by any court, even as the federal courts found that Sheppard could not demonstrate prejudice from the juror misconduct *precisely* because his trial and post-conviction counsel failed to develop and present evidence of prejudice.

Sheppard's underlying substantive extrinsic evidence/jury misconduct claims were doomed by the failures of his counsel to ensure that evidence of prejudice from the misconduct was investigated and developed in state court, and those failures were deemed procedurally defaulted because of initial-review collateral proceedings counsel's ineffectiveness. This case, therefore, is the converse to other cases in which courts denied Rule 60(b)(6) motions following *Martinez* because the underlying substantive claim was denied on the merits, and thus a

defaulted IAC claim for failing to raise the substantive claim would have necessarily failed as well. *See, e.g., Leavett*, 2012 U.S. App. LEXIS 11711 at *1-2.

Stated differently, Sheppard's IAC claim was decided under well-settled Supreme Court precedent, and his substantive juror misconduct claims were denied because of a lack of evidence that was the direct result of his trial and post-conviction counsel's ineffectiveness. The Supreme Court has now changed the law, based primarily on concerns that are manifest in Sheppard's death penalty case. Because of the ineffectiveness of his initial-review collateral proceedings counsel, Sheppard will never receive any court review of his compelling IAC claim, and because of his trial counsel's ineffective assistance, the evidence that would have likely allowed Sheppard to prevail on his substantive extrinsic evidence/juror misconduct claim was never investigated and presented to the state court, nor considered by the federal habeas court.

These are all special circumstances that arose following the district court's final judgment, just like in *D'Ambrosio*, which, when coupled with the change in intervening law, strongly suggest that relief under Rule 60(b)(6) is appropriate to ensure that justice is done.

The "competing polic[y] of the finality of judgments" should not alter the final calculus. The Supreme Court just recently issued its landmark *Martinez* opinion, and Sheppard's petition for certiorari was only denied on June 11, 2012.

In consideration of all of these factors, this Court should grant relief under Rule 60(b)(6) by vacating its final judgment to allow reconsideration of Sheppard's IAC claim.

III. This Court should reconsider Sheppard's IAC claim and find, in accordance with *Martinez*, that ineffective assistance of Sheppard's initial-review collateral proceedings counsel excuses the procedural default.

Under *Martinez*, this Court can find sufficient cause and prejudice excusing the procedural default of Sheppard's IAC claim in the sixth subpart of his Ninth Ground for Relief.

A. The pertinent holding and reasoning in *Martinez v. Ryan*

In *Martinez*, the Supreme Court concluded that the absence of counsel, or the ineffective assistance of such counsel, in a state post-conviction proceeding may establish cause to overcome a procedural default. 132 S. Ct. at 1315, 1318-19. *Martinez* applies to "initial-review collateral proceedings." The Court explained that such proceedings are ones which present "the first place a prisoner can present a challenge to his conviction," including raising claims of ineffective assistance of counsel. *Id.* at 1315. The Court recognized that in certain circumstances, the "collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective assistance claim." *Id.* at 1317. It follows, then, when the right to the effective assistance of counsel is so critical, identifying and developing claims of ineffective assistance of counsel is of particular import. *Id.*

The Court acknowledged, however, that proving claims of ineffective assistance of counsel often requires development of evidence outside the appellate and trial record, including conducting significant investigation and having a working understanding of counsel's strategy. *Id.* Habeas petitioners are often "ill equipped" to effectively represent themselves in such proceedings. *Id.* at 1312.

The facts of *Martinez* involved the ineffective assistance of an attorney who had been appointed to handle both the direct appeal and the state post-conviction proceeding. *Martinez*, 132 S. Ct. at 1314. After Martinez was convicted at trial, new counsel was appointed to represent him on the direct appeal. *Martinez*, 132 S. Ct. at 1314. Appellate counsel filed an appeal on Martinez's behalf, challenging the evidence. *Id.* (In Arizona, counsel was precluded from raising claims of ineffective assistance of counsel at trial in the direct appeal proceedings.) Counsel also initiated state habeas proceedings. *Id.* Counsel failed to file any claims of ineffective assistance of counsel, however, and instead filed a statement claiming she did not identify any colorable claims. *Id.*

In his second state habeas action, Martinez raised a claim of ineffective assistance of counsel of his prior attorney, for failing to raise any claims of the ineffective assistance of trial counsel. *Id.*

Ultimately, the Supreme Court of the United States agreed with Martinez, holding that the ineffective assistance of his first state habeas counsel—who also served as his direct appeals counsel—could serve as cause to overcome procedural default. *Id.* at 1315. To protect the right to the effective assistance of counsel, the “foundation for our adversary system,” the Court held, equity may demand that a federal habeas court hear an ineffective-assistance-of-counsel claim, even if it might be procedurally defaulted. *Id.* at 1317-18. Such a scenario arises “when an attorney’s errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding” such that the initial-review collateral proceeding “may not have been sufficient to ensure that proper consideration was given to a substantial claim.” *Id.*

It follows, the Court held, that when a State requires a prisoner to raise an IAC claim in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance in certain circumstances. *Id.* at 1320. One such circumstance is where the prisoner did not have counsel for the initial-review collateral proceedings and thus the ineffective assistance claim was not raised. *Id.* at 1317-18. A second circumstance is “where appointed counsel in the initial review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984).” *Id.*

In reaching its holding in *Martinez*, the Court acknowledged and modified its holding in *Coleman v. Thompson*, 501 U.S. 722, 754 (1991), explaining that “an attorney’s errors during an appeal on direct review may provide cause to excuse a procedural default, for if the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State’s procedures and obtain an adjudication on the merits of his claims.” *Martinez*, 132 S. Ct. at 1317. Further, the *Martinez* Court reasoned that when claims of ineffective assistance of counsel cannot be raised on direct appeal—as in the case of raising certain claims of ineffective assistance of trial counsel and all IAAC claims in Ohio—the petitioner should be afforded counsel and an opportunity to fully investigate, develop and raise such claims in a collateral proceeding. *Id.* at 1317-18.

The fundamental concern animating the *Martinez* Court’s holding is that “[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner’s claim.” *Id.* at 1316. Furthermore, “if counsel’s errors in an initial-review

collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." *Id.*

Thus, although *Martinez* dealt explicitly with ineffective assistance of trial counsel, there is no reason to believe that its reasoning and holding will not and do not apply in other contexts, such as the ineffective assistance of appellate counsel. Indeed, federal courts have already applied *Martinez* to analyze cause to excuse procedural default related to claims other than ineffective assistance of trial counsel. *See, e.g., Williams v. Alabama*, No. 1:07-cv-1276, 2012 US Dist. LEXIS 51850, at *177-*184 (N.D. Ala. Apr. 12, 2012) (applying *Martinez* to assess cause to excuse default of IAAC claim).

Moreover, Justice Scalia in his dissent cogently explained why the reasoning in *Martinez* applies with equal force to IAAC claims as to trial counsel IAC claims; to conclude anything to the contrary "insults the reader's intelligence." *Martinez*, 131 S. Ct. at 1321 (Scalia, J., dissenting). Justice Scalia recognized that ineffective assistance of appellate counsel claims must necessarily be included within the majority's rationale. *Martinez*, 131 S. Ct. at 1321 (Scalia, J., dissenting). He explained: "[t]here is not a dime's worth of difference in principle between [ineffective-assistance-of-trial-counsel] cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised: claims of 'newly discovered' prosecutorial misconduct, for example, *see Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), claims based on 'newly discovered' exculpatory evidence or 'newly discovered' impeachment of prosecutorial witnesses, and claims asserting ineffective assistance of appellate counsel." *Id.*

After all, Justice Scalia explained, there is no difference “between cases in which the State *says* that certain claims can only be brought on collateral review and cases in which those claims *by their nature* can only be brought on collateral review, since they do not manifest themselves until the appellate process is complete,” such as claims of ineffective assistance of appellate counsel. *Id.* at 1321 & n.1 (emphasis in original) (Scalia, J., dissenting).

B. *Martinez* applies to Sheppard’s IAC claim because the ineffective assistance of initial-review collateral proceedings counsel meant that the claim was never heard by any court.

The same concerns that animated the *Martinez* Court’s reasoning and holding apply to Sheppard as well. Accordingly, this Court should reconsider its opinion, order and judgment that Sheppard’s IAC claim was procedurally defaulted and consider Sheppard’s arguments in light of *Martinez*.

Martinez applies to the ineffective assistance of counsel during “initial-review collateral proceedings.” *Martinez*, 132 S. Ct. at 1318. The Court defined “initial-review collateral proceedings” as the proceeding in which a claim “should have been raised.” *Id.* Similar to the situation under Arizona law in *Martinez*, Ohio law mandated that Sheppard raise claims involving evidence outside the trial record in post-conviction proceedings. *See, e.g., State v. Hunter*, 960 N.E.2d 955, 966, ¶46 (Ohio 2011); *State v. Cooperrider*, 448 N.E.2d 452, 454 (Ohio 1983); *Williams v. Anderson*, 460 F.3d 789, 799 (6th Cir. 2006). In Sheppard’s case, evidence outside the record is required to demonstrate trial counsel’s ineffectiveness related to the extrinsic evidence/juror misconduct claim. Presenting evidence outside the record can only be done under Ohio law in a petition for post-conviction relief. Accordingly, Sheppard’s post-

conviction counsel would be the pertinent “initial-review collateral proceedings” counsel under *Martinez*.

On the other hand, Ohio law also mandates that claims based on evidence solely within the record must be raised on direct appeal. *See, e.g., State v. Lentz*, 639 N.E.2d 784, 785 (Ohio 1994) (citing *State v. Perry*, 226 N.E.2d 104 (Ohio 1967)). It is clearly established Supreme Court law that a post-verdict, pre-appeal motion for a new trial is a “critical stage” of trial at which the Sixth Amendment right to effective counsel attaches. *See Rodgers v. Marshall*, No. 10-55816, ___ F.3d ___, 2012 U.S. App. LEXIS 9922, *15-25 (9th Cir. May 17, 2012) (citing, *inter alia, Penson v. Ohio*, 488 U.S. 75, 84 (1988), and listing circuit court cases holding the same). If Sheppard’s direct appeal counsel was required to raise the IAC claim on direct appeal based on the record from the new trial motion proceedings, appellate counsel’s failures were ineffective assistance.

In turn, Ohio law mandated that Sheppard could only raise IAAC claims by way of a collateral review proceeding. At the time of Sheppard’s case, the first and only mechanism to raise IAAC claims was via an application to reopen the direct appeal filed pursuant to Ohio Rule of Appellate Procedure 26(B) (a “*Murnahan* application”). *State v. Murnahan*, 584 N.E.2d 1204 (Ohio 1992). Thus, a *Murnahan* application fits within the definition of “initial-review collateral proceedings” as defined by the *Martinez* Court. A *Murnahan* application represented Sheppard’s one and only opportunity to raise an IAAC claim alleging direct appeals counsel’s ineffectiveness for failing to raise the extrinsic evidence/juror misconduct IAC claim in state court. So to the limited extent that the IAC claim could have been raised on direct appeal but was not, the pertinent initial-review collateral proceedings counsel under *Martinez* would be

Sheppard's *Murnahan* counsel; ineffective assistance of appellate counsel would excuse the default of the underlying IAC claim, and ineffective assistance of Sheppard's *Murnahan* counsel would, in turn, excuse the default of the IAAC claim.

Regardless of which counsel is at issue here, however, the crux of the matter is that none of Sheppard's counsel raised the IAC claim in state court initial-review collateral proceedings. Not until Sheppard's later-appointed counsel filed a late second-or-successive post-conviction petition did any of his counsel raise the IAC claim. But the state court refused to consider Sheppard's second post-conviction petition because it did not meet the stringent requirement for a successive petition, because it was untimely, and because ineffective assistance of post-conviction counsel was not a cognizable claim under Ohio law. (ROW Apx. Vol. III at 295.)

Consequently, the state courts never heard Sheppard's IAC claim related to the jury's misconduct in seeking out and injecting prejudicial extrinsic evidence into the sentencing deliberations. Nor did any federal court consider the claim, because it was deemed procedurally defaulted, and ineffective assistance of initial-review collateral proceedings counsel did not, at that time, excuse procedural default.

Thus, whether the appropriate counsel whose effectiveness must be assessed under *Martinez* is Sheppard's post-conviction counsel or his *Murnahan* counsel, the net effect remains consistent; Sheppard's initial-review collateral proceedings counsel's ineffectiveness precluded Sheppard's compelling IAC claim from being heard by any court, precisely the core concern the Court sought to remedy in *Martinez*. Counsel's ineffectiveness must be considered as excusing default of Sheppard's IAC claim.

C. The controlling *Martinez* standard to overcome procedural default.

The *Martinez* Court held that a petitioner alleging the ineffective assistance of initial-review collateral proceedings counsel overcomes any alleged procedural default if he demonstrates two things: (1) that the petitioner had no initial-review collateral proceedings counsel, or that initial-review collateral proceedings counsel rendered ineffective assistance of counsel under the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); and, (2) that the underlying substantive claim is a substantial one, “which is to say that the prisoner must demonstrate that the claim has some merit,” in this respect equating the relevant standard to those necessary for issuance of a certificate of appealability. *See Martinez*, 132 S. Ct. at 1318-19 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)).⁶

D. Sheppard can satisfy the first prong of the *Martinez* standard if his state post-conviction petition is considered his initial-review collateral proceedings, because he received the ineffective assistance of post-conviction counsel.

Under the first *Martinez* prong, claims of ineffective assistance of initial-review collateral proceedings counsel that are raised to cure a procedural default are governed by the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1986). *Martinez*, 132 S. Ct. 1318-19. Sheppard can

⁶*Miller-El* reiterates the rule that “a COA does *not* require a showing that the appeal”—or, by analogy to the instant case, that a petitioner’s claim of ineffective assistance of counsel—“will succeed.” 537 U.S. at 337 (emphasis added). It is sufficient that a petitioner “‘show that reasonable jurists could debate whether . . . the issues presented were ‘adequate to deserve encouragement to proceed further,’” even if “every jurist of reason might agree after . . . the case has received full consideration[] that petitioner will not prevail.” *Id.* at 336-38 (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000); further internal quotation marks omitted).

satisfy the first *Martinez* prong if post-conviction counsel is considered his initial-review collateral proceedings counsel.

1. ***Sheppard's post-conviction counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, when counsel failed to raise the obvious and compelling extrinsic evidence/jury misconduct IAC claim in Sheppard's first post-conviction petition.***

The extrinsic evidence/jury misconduct during Sheppard's trial was—and is—highly disturbing and offensive to notions of fairness and justice. The prevailing professional norms at the time of Sheppard's initial post-conviction petition proceedings mandated that counsel raise even arguably meritorious issues, let alone any claims related to an obvious and egregious violation of a defendant's rights such as the jury misconduct here. *See, e.g.*, A.B.A. Guideline 11.9.3(C) (1989). Even given the wide measure of discretion given to counsel's actions when reviewed under *Strickland*, Sheppard's initial post-conviction counsel's performance was woefully and unreasonably insufficient when measured against the prevailing professional norms.

Counsel filed Sheppard's initial post-conviction petition, in which counsel raised a single claim, which was a record-based claim and therefore barred as a post-conviction petition claim anyway. (ROW Apx. Vol. II at 124.) One week later, counsel filed an amended petition raising three record-based claims, including a claim related to the juror misconduct. (*Id.* at 61-67.) But, inexplicably, counsel did not simultaneously include a claim alleging ineffective assistance of trial counsel based on counsel's failure to investigate and develop the evidence to demonstrate prejudice from the misconduct with Sheppard's motion for new trial.

Then, counsel filed yet another amended petition, eighteen months after filing the initial petition, in which counsel raised only five claims. Three of the claims were the same record-based claims barred by res judicata that were raised in the previous iterations of the petition. The fourth claim, for ineffective assistance of trial counsel, was unsupported by any evidence outside the record, leaving it vulnerable to mandatory dismissal. The fifth claim alleged that Sheppard was insane and incompetent to be executed, but that is not a cognizable claim in post-conviction proceedings. After the state filed its motion to dismiss, Sheppard's counsel tried to file a further amended petition, without leave of court, which was eventually struck because of counsel's failure to seek leave to amend.⁷

In short, Sheppard's post-conviction counsel filed five claims: three were record-based claims clearly barred by res judicata; one was not cognizable in the post-conviction process; and the only remaining claim—the only cognizable claim—was unsupported by any documentary evidence outside the record and thus automatically subject to dismissal. Post-conviction counsel inexcusably failed to seek leave to amend Sheppard's petition after the state filed its response, causing the amended petition to be stricken. At no point in Sheppard's initial post-conviction proceedings did counsel allege ineffective assistance of trial counsel based on trial counsel's failures to investigate and develop evidence in support of the motion for new trial.

⁷After the trial court dismissed Sheppard's post-conviction petition, counsel inexplicably appealed only a procedural issue, rather than any of the substantive claims, thereby failing to preserve any substantive issues for the post-conviction appeal.

The representation Sheppard received was deficient when measured against the prevailing professional norms at the time. His post-conviction counsel failed to investigate, prepare, and properly present numerous grounds for relief. Those grounds for relief included an IAC claim for failing to investigate and develop evidence in support of the motion for new trial that stuck out like a sore thumb. Well-settled Supreme Court principles at that time demonstrated that the Sixth Amendment right to effective representation applied to a post-verdict, pre-direct appeal motion for a new trial. *See Rodgers v. Marshall*, No. 10-55816, ___ F.3d ___, 2012 U.S. App. LEXIS 9922, *15-25 (9th Cir. May 17, 2012). Thus it should have been obvious to post-conviction counsel that Sheppard had a right to effective assistance of counsel for purposes of his motion for new trial, and that his rights were denied by trial counsel's ineffective assistance. The IAC claim was obvious, and it was stronger than the other claims counsel raised. Indeed, how could it not have been, when four of the five claims counsel raised were not cognizable claims in post-conviction proceedings? Moreover, counsel at least recognized the juror misconduct issue by raising at least one claim related to it, and there was no prejudice to Sheppard in raising the claim, so counsel's failure to raise the IAC claim was all the more objectively unreasonable.

2. *Sheppard was prejudiced by his post-conviction counsel's deficient performance.*

Sheppard was prejudiced by his post-conviction counsel's deficient performance. Because counsel failed to raise the IAC claim in Sheppard's initial post-conviction petition, the claim never received any review by any court. The state courts refused to consider the claim as raised by different counsel in a second post-conviction petition because, the courts concluded,

the second petition did not meet the stringent requirements for a successive petition, it was untimely, and because claims of ineffective assistance of post-conviction counsel were barred under Ohio and federal law. *State v. Sheppard*, Hamilton App. No. C-000665, 2001 WL 331936 (Ohio App. Apr. 6, 2001). And this Court cited the state court's conclusion to find that Sheppard had defaulted his IAC claim. By failing to raise the IAC claim in Sheppard's initial post-conviction petition, counsel ensured that Sheppard would not receive "proper consideration . . . of a substantial claim" by the state courts—and then the federal courts—in any subsequent proceeding because of the procedural default attributed to the claim. *See Martinez*, 132 S. Ct. at 1318.

Sheppard was also prejudiced because a post-conviction evidentiary hearing was his last remaining chance to develop evidence about the extrinsic evidence/jury misconduct matter in the state courts. But counsel did nothing, so Sheppard lost that opportunity. Finally, it cannot be emphasized enough that the state courts found that Juror Fox's conduct was, in fact, impermissible juror misconduct. All that remained was demonstrating prejudice. Armed with evidence to demonstrate the erroneous nature of the state courts' factual findings on the substantive claim, it is reasonably likely that Sheppard would have prevailed on his IAC claim.

E. Sheppard can satisfy the first prong of the *Martinez* standard if his *Murnahan* application is considered his initial-review collateral proceedings, because he received the ineffective assistance of counsel.

Sheppard can also satisfy the first *Martinez* prong if *Murnahan* counsel is considered his initial-review collateral proceedings counsel. Sheppard received ineffective assistance of appellate counsel when his attorney failed to raise the extrinsic evidence/jury misconduct IAC claim that was available on the record and that was related to claims counsel actually raised.

Had counsel raised the claim, there is at least a reasonable probability that the outcome of Sheppard's direct appeal would have been different. And in turn, Sheppard's *Murnahan* counsel was ineffective under *Strickland* for failing to allege appellate counsel's ineffectiveness.

1. ***Sheppard's Murnahan counsel's performance fell below an objective standard of reasonableness under prevailing professional norms when counsel failed to allege in a Murnahan application appellate counsel's ineffectiveness for failing to raise the obvious and compelling extrinsic evidence/jury misconduct IAC claim in Sheppard's direct appeal.***

The deficient performance of Sheppard's *Murnahan* counsel is tied directly to his appellate counsel's deficient performance. Counsel's failure to raise an issue on appeal can amount to constitutionally ineffective assistance. *See, e.g., Goff v. Bagley*, 601 F.3d 445, 464 (6th Cir. 2010).

- a. *Sheppard's direct appeal counsel's failure to raise the IAC claim was objectively unreasonable and prejudiced Sheppard.*

Appellate counsel raised substantive claims in Sheppard's direct appeal to the Supreme Court of Ohio related to the extrinsic evidence/jury misconduct issue. Counsel failed, however, to raise an IAC claim related to the failure to investigate and develop evidence in support of the motion for new trial. Sheppard's direct appeal counsel was the same counsel who litigated Sheppard's motion for a new trial. And as explained below in § II.F.1.a below, counsel was ignorant on the governing law to successfully raise an extrinsic evidence/jury misconduct claim. The same failure to understand what the law required likewise renders appellate counsel's performance objectively unreasonable.

Counsel's fundamental misunderstanding of the law is vividly highlighted in the subheadings in Sheppard's direct appeal merit brief filed in the Supreme Court of Ohio:

1. Deliberate contact by a juror amounting to investigation, and receipt of "evidence" not adduced in court during the proceedings, is misconduct, *and it is presumptively prejudicial.*
2. Contact by a juror with an individual outside the jury and court officials during the penalty phase of a capital murder trial, concerning a controverted issue in that trial, is misconduct, *and is presumptively prejudicial.*
3. *The state has the burden of overcoming the presumption of prejudice that arises where a juror undertakes his own investigation of matters in issue, and the mere statement of the juror that his decision was not affected by what he discovered from the investigation and his interview with the outside source. [sic]*
4. *Where juror misconduct in the nature of independent out of court investigation or inquiry by a juror as to a mitigating factor occurs during the penalty phase of a capital prosecution, in order to satisfy its burden of proving the misconduct harmless, the state must demonstrate that the misconduct (1) did not affect the jury's finding as to whether the mitigating factor exists and (2) did not affect the weighing process upon which the verdict depends.*

(ROW App'x, Vol. VI at 55-60 (emphases added).)

The substantive arguments presented in support of these assertions confirmed that counsel believed that the law allowed for a presumption of prejudice that the state bore the burden to disprove. (*See, e.g., id.* at 56 (asserting that "the state fell far short of demonstrating the harmlessness of the juror misconduct"); 57 ("Since the state has the burden of demonstrating the harmlessness of the juror misconduct, it was up to the state, or the trial court, and most assuredly *not* the defense, to present whatever evidence was available that the verdict was not influenced by juror Fox's misconduct."); 60 (asserting that Juror Fox's contribution to the

deliberative process was presumed by the law to be tainted); and *id.* (“Under these circumstances, considering that it is *the state* which bears the burden of demonstrating the harmlessness of the juror misconduct, it is impossible to conclude that the state has met its burden of so demonstrating, and Appellant is, accordingly, entitled to reversal of his death sentence, and resentencing to life imprisonment”).)

Armed with this mistaken understanding of the law, appellate counsel raised no claim for ineffective assistance of trial counsel for failing to investigate and present evidence in support of the new trial motion. Because counsel’s failures were rooted in counsel’s misunderstanding of the law as it existed at that time, they cannot be construed as strategic choices to which deference might be owed under *Strickland*. *Blackburn v. Foltz*, 828 F.2d 1177, 1182 (6th Cir. 1987) (explaining that counsel’s “recitation of the law . . . was clearly wrong” and thus counsel’s actions were not a strategy entitled to deference under *Strickland*). Likewise, counsel’s omission of the IAC claim cannot be a reasonable tactical decision when there was no possible prejudice to Sheppard in raising the omitted claim. *See Joshua v. Dewitt*, 341 F.3d 430, 441 (6th Cir. 2003) (citation omitted). Counsel did raise other IAC claims, making the failure to raise the IAC claim at issue here all the more unreasonable. *Cf. Mapes v. Tate*, 388 F.3d 187, 192-93 (6th Cir. 2004). Counsel’s performance was deficient under *Strickland*.

Prejudice from appellate counsel’s deficient performance is self-evident from the Supreme Court of Ohio’s opinion. That court noted that, contrary to counsel’s understanding, there is no longer a presumption of prejudice from extrinsic evidence and juror misconduct in Ohio, and the defendant bears the burden to demonstrate prejudice. *State v. Sheppard*, 91 Ohio St. 3d 329,233-34 (citations omitted). With no other evidence in the record to rebut the

statements from Fox and the contents of Ms. Jones's second affidavit, the state supreme court found no prejudice from the juror misconduct. On the other hand, there is at least a reasonable likelihood that Sheppard might have prevailed on direct appeal if his counsel had raised the IAC claim, since the evidence that trial counsel would have presented would have directly disproved the only two bases on which the state court found no prejudice from the juror misconduct.

b. *Sheppard's Murnahan counsel's performance was deficient.*

In Sheppard's *Murnahan* application, his counsel alleged ineffective assistance of appellate counsel for failing to raise nine different issues on direct appeal. (ROW Apx. Vol. V at 75-84.) None of the allegations concerned the extrinsic evidence/jury misconduct IAC claim. As explained below, the trial counsel IAC claim was a strong claim, in turn making the IAAC claim a strong claim as well. After all, under *Murnahan*, counsel did not need to show that Sheppard would prevail on his IAAC claim, only that there was a "'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *Sheppard*, 91 Ohio St. 3d at 330 (citations omitted). Certainly there was at least a genuine issue as to whether Sheppard had a colorable claim of IAAC when appellate counsel's failures meant that Sheppard lost his chance to present evidence that would have directly contradicted and disproved the evidence the state courts relied upon to find no prejudice from the juror misconduct. *Murnahan* counsel failed to raise the claim, however. And the facts that counsel raised nine other IAAC claims, and that there was no prejudice to Sheppard in raising this IAAC claim makes the failure to raise the IAAC claim related to the extrinsic evidence/jury misconduct even more objectively unreasonable.

2. *Sheppard was prejudiced by his Murnahan application counsel's deficient performance.*

Sheppard was prejudiced by his *Murnahan* application counsel's deficient performance in failing to raise his IAAC claim. The Supreme Court of Ohio declined to follow the state appeals court's rejection of Sheppard's *Murnahan* application on grounds of untimeliness. Instead, the state supreme court afforded Sheppard's application a merits review. There was no IAAC claim related to the extrinsic evidence/juror misconduct matter for the court to review in Sheppard's *Murnahan* application, however. If there were, there is a reasonable probability that Sheppard's appeal would have been reopened, because of the disturbing nature of the extrinsic evidence/jury misconduct claim; because the state courts had already decided half of the substantive claim by finding juror misconduct; and because the evidence would have directly undermined the bases of the court's no-prejudice finding. In turn, there is a reasonable probability that the Supreme Court of Ohio, confronted with evidence from Fox, Jones and Smalldon that belied the trial court's prejudice findings, would have reached a different conclusion on a reopened direct appeal.

Additionally, counsel, by failing to allege the IAAC claim in question here, prejudiced Sheppard by ensuring that Sheppard would not receive "proper consideration . . . of a substantial claim" by the state or federal courts in any subsequent proceeding because of purported procedural default. *See Martinez*, 132 S. Ct. at 1318.

F. *Sheppard can satisfy the second prong of the Martinez standard because his defaulted extrinsic evidence/jury misconduct IAC claim is substantial.*

Sheppard can satisfy the second *Martinez* prong, regardless of which counsel was his initial-review collateral proceedings counsel, because his defaulted IAC claim is substantial. *See Leavett*, 2012 U.S. App. LEXIS 11711 at *1-2. Sheppard's trial counsel was ineffective

under *Strickland v. Washington*, 466 U.S. 668 (1986), for failing to investigate and submit evidence in support of their motion for a new trial on the basis of extrinsic evidence/juror misconduct. Sheppard's defaulted IAC claim goes directly to the evidentiary heart of his extrinsic evidence/jury misconduct claims.

Martinez adopted the standards applicable to certificates of appealability for determining whether or not a claim is substantial. *See Martinez*, 132 S. Ct. at 1318-19 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). This is not a difficult standard to meet. The requirements of 28 U.S.C. § 2253(c) are "non-demanding." *Wilson v. Belleque*, 554 F.3d 816, 826 (9th Cir. 2009). A COA should be granted unless the claim presented is "utterly without merit." *Id.*, quoting *Jefferson v. Welborn*, 222 F.3d 286, 289 (7th Cir. 2000). Furthermore, in cases where the death penalty is at issue, any doubts regarding the propriety of a COA must be resolved in the petitioner's favor. *Skinner v. Quarterman*, 528 F.3d 336, 341 (5th Cir. 2008) (citations omitted). Far from being "utterly without merit," Sheppard's IAC claim is compelling.

1. ***Sheppard's trial counsel provided ineffective assistance of counsel when they failed to offer evidence in support of the motion for new trial on the basis of extrinsic evidence/juror misconduct.***

The familiar two-part test established in *Strickland* applies to assess trial counsel's effectiveness. First, the petitioner must demonstrate that counsel's performance was deficient. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003), citing *Strickland*. This requirement is satisfied if counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Id.* Second, the petitioner must show a reasonable probability that counsel's deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 694. A petitioner need not establish prejudice by a preponderance of the evidence, or show that it is more likely than not

that, but for counsel's deficient performance, the result would have been different. *Porter v. McCollum*, 130 S. Ct. 447, 455-56 (2009); *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Instead, a petitioner need only show a probability sufficient to undermine confidence in the outcome of the case. *Id.*

Furthermore, in determining whether a defendant has demonstrated a reasonable probability of a more favorable outcome, the cumulative prejudice arising from all of counsel's errors must be considered. *Cargle v. Mullin*, 317 F.3d 1196, 1212 (10th Cir. 2003) (citations omitted); *Stewart v. Wolfenbarger*, 468 F.3d 338, 361 (6th Cir. 2004) ("When determining prejudice, the Court must consider the errors of counsel in total, against the totality of the evidence in the case.").

Here, Sheppard's trial counsel's performance was insufficient, and he was prejudiced as a result.

- a. *Trial counsel's performance was insufficient because counsel failed, based on ignorance of well-settled law, to investigate or present evidence in support of the new trial motion.*

It is glaringly clear that Sheppard's trial counsel failed to know and understand the law governing extrinsic evidence/juror misconduct claims. From the moment the misconduct came to light in the court's chambers minutes before sentencing, the record clearly reflects that counsel had no plans to conduct any investigation or present any substantive evidence with their motion for a new trial. (ROW Tr. Vol. VII at 1254 et seq.) And counsel presented the same (flawed) understanding of the law later, at the oral argument on Sheppard's motion for a new trial. As counsel argued to the trial court on both occasions and in their motion for a new trial, they believed that *Remmer v. United States*, 347 U.S. 227, 229 (1954), and its progeny required only

that the defendant present some evidence of extrinsic evidence reaching the jury, and that this minimal showing gave rise to presumptive prejudice which the government was then required to disprove. (ROW 10/6/1995 Tr. at 4-10.) In accordance with this erroneous understanding of the law in Ohio at that time, trial counsel presented the first Jones affidavit establishing that Juror Fox had indeed contacted Jones to inquire about paranoid schizophrenia following Sheppard's mitigation presentation. (*Id.* at 10.) At that point, trial counsel believed, counsel's job was done, and there was no need for Sheppard to present any other evidence to prevail on his motion. The *Remmer* presumption of prejudice was established, imposing the burden of proof on the state to prove that the extrinsic evidence and juror misconduct was harmless. (*Id.* at 5-6, 9.)

But counsel's understanding of the law was critically wrong. That was not the law in Ohio at the time of Sheppard's trial, as the Supreme Court of Ohio noted in Sheppard's direct appeal. The state court explained that *Smith v. Phillips*, 455 U.S. 209 (1982), had been interpreted to modify the *Remmer* presumption of prejudice. *Sheppard*, 84 Ohio St. 3d at 233 (“*Smith v. Phillips* modified the concept of presumed prejudice and required the party complaining about juror misconduct to prove prejudice.” (citing *Smith*, 455 U.S. at 215-217, and *United States v. Zelinka*, 862 F.2d 92, 95 (6th Cir. 1988)); *see also Sheppard v. Bagley*, 657 F.3d 338, 348-49 (6th Cir. 2011) (Batchelder, J., concurring) (“*Remmer* was abrogated in part by the Supreme Court in *Smith v. Phillips*, which held that the defendant has the burden to show that there has been *actual* prejudice”). And other caselaw from the Ohio courts in existence during Sheppard's trial likewise placed the burden on the defendant to demonstrate prejudice from an external communication with the jury. *Sheppard*, 84 Ohio St. 3d at 233 (citing, *inter alia*, *State v. Hipkins*, 69 Ohio St. 2d 80, 83 (1982)).

It is “quintessentially the duty of counsel” to be familiar with the controlling law and the requirements thereof, especially when it is readily available to counsel. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1484 (2010). “Ignorance of well-defined legal principles is nearly inexcusable.” *Smith v. Singletary*, 170 F.3d 1051, 1054 (11th Cir.1999). Counsel’s affirmative actions or omissions taken in reliance on ignorance or a faulty understanding of well-established law “cannot be said to constitute reasonable strategy” by counsel. *Blackburn v. Foltz*, 828 F.2d 1177, 1182 (6th Cir. 1987) (when counsel’s understanding of the law was wrong, counsel’s actions taken in accordance with that faulty understanding were not a strategy entitled to deference under *Strickland*).

Such ill-informed actions or omissions by counsel “clearly satisfy[y] the first prong of the *Strickland* analysis.” *Padilla*, 130 S. Ct. at 1484 (citation omitted); *see also Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012)⁸; *Dando v. Yukins*, 461 F.3d 791, 798-99 (6th Cir. 2006) (finding an attorney rendered deficient performance when he provided advice that was “flatly incorrect”); *Maples v. Stegall*, 340 F.3d 433, 439 (6th Cir. 2003) (holding that providing “patently erroneous” legal advice is deficient performance); *Magana v. Hofbauer*, 263 F.3d 542, 550 (6th

⁸ In *Cooper*, the Sixth Circuit found counsel’s performance “obviously deficient” because it was based on an “incorrect legal rule.” *Cooper v. Lafler*, No. 09-1487, 376 Fed. App’x 563, 570-71 (6th Cir. May 11, 2010). On appeal in the Supreme Court, the Court focused only on the question of prejudice and the appropriate remedy, because “all parties agree[d] the performance of respondent’s counsel was deficient.” *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012). Accordingly, although the Supreme Court vacated the Sixth Circuit’s judgment as to the remedy after the Court found *Strickland* satisfied does not undermine the reasoning by which the Sixth Circuit found counsel’s performance deficient. The same reasoning applies to Sheppard’s case.

Cir. 2001) (holding that counsel's "complete ignorance of the relevant law under which his client was charged, and his consequent gross misadvice to his client regarding the client's potential prison sentence, certainly fell below an objective standard of reasonableness under prevailing professional norms").

Sheppard's counsel's failure to investigate and then offer substantive evidence in support of their motion for new trial, based on their erroneous reliance on the inapplicable *Remmer* presumption, was plainly based on an incorrect legal rule. And counsel's actions flew in the face of settled law at that time. Thus counsel's performance was "obviously deficient" under *Strickland's* first prong.

- b. *Trial counsel's deficient performance prejudiced Sheppard by leaving the evidentiary record critically and misleadingly underdeveloped, when a full and accurate record would have likely lead to a different outcome.*

Trial counsel's deficient performance also prejudiced Sheppard. The state courts accepted without much argument that Juror Fox's actions constituted misconduct. *Sheppard*, 84 Ohio St. 3d at 233. The only remaining consideration was whether the misconduct prejudiced Sheppard. Counsel offered no evidence with their new trial motion to demonstrate prejudice from the juror misconduct. As discussed above, counsel did not believe they even bore the burden to demonstrate prejudice. Consequently, they offered no evidence beyond Ms. Jones's first affidavit, which was offered to establish the only fact for which counsel believed they bore the burden; to demonstrate that extrinsic evidence had reached the jury.

Without evidence to demonstrate prejudice, it is hardly surprising that the trial court denied the motion for new trial. The trial court relied on Juror Fox's personal account of his contact with Ms. Jones, as well as Ms. Jones's second affidavit attesting that she had read the

trial transcript, and that everything she told Fox was completely consistent with the evidence presented at trial. The Supreme Court of Ohio affirmed those findings, and additionally found that Sheppard could not have been prejudiced because Ms. Jones's information, which was allegedly "totally consistent" with Dr. Smalldon's testimony at trial, "reinforced" Dr. Smalldon's testimony.

In a federal court hearing, however, Sheppard demonstrated that those factual findings were clearly erroneous; Fox admitted that his verdict was affected by the extrinsic evidence, and Ms. Jones admitted that she had never read the trial transcript and had no basis for averring that everything she told Fox was consistent with Dr. Smalldon's trial testimony. Dr. Smalldon also testified that Ms. Jones's characterization of paranoid schizophrenia was critically wrong and misleading, and that her statements to Fox were not, in fact, consistent with his testimony at all. All of this evidence directly contradicted the state courts' findings as to prejudice.

Had Sheppard's trial counsel investigated the extrinsic evidence/juror misconduct issue, they would have been able to present affidavits or live testimony from all of these individuals to the state trial court to demonstrate prejudice from the misconduct. Without testimony or affidavits from Juror Fox, Ms. Jones, and Dr. Smalldon in support of his motion for a new trial, Sheppard was shackled to the truncated, misleading evidentiary record from which the state courts concluded that he was not prejudiced by the misconduct.

The state courts relied exclusively on the evidence produced during the truncated, in-chambers "hearing" at which the trial court heard from Juror Fox, and the blatantly false second affidavit from Ms. Jones, to find no prejudice. Accordingly, there is an overwhelming probability that the result of the new trial motion or Sheppard's direct appeal would have been

different if evidence disproving Fox's testimony and the contents of Jone's second affidavit would have been investigated and presented.

Sheppard's IAC claim is clearly meritorious, and therefore satisfies the COA standard, and *Martinez's* second prong. Because Sheppard can satisfy both *Martinez's* prongs, procedural default of the sixth subpart of his Ninth Ground for Relief should be excused, and the Court should consider the IAC claim on its merits.

IV. *Gonzalez v. Crosby* does not dictate a different result.

The Supreme Court's opinion in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), provides the standard by which Sheppard's Rule 60(b) motion should be reviewed. *Gonzalez*, 545 U.S. at 535 (“[O]ur cases have required a movant seeking relief under Rule 60(b)(6) to show ‘extraordinary circumstances’ justifying the reopening of a final judgment.”). But *Gonzalez* does not dictate an unfavorable result in Sheppard's case. Sheppard acknowledges that *Gonzalez*, like in this case, involved a petitioner seeking to reopen his habeas case following a Supreme Court ruling that rendered one part of the federal courts' adjudication of his claims erroneous. But the similarities to Sheppard's case end there.

In *Gonzalez*, the Eleventh Circuit had applied its settled law on the interpretation of 28 U.S.C. § 2244(d)(2) to bar the petitioner's claim on statute-of-limitations grounds. 545 U.S. at 536. But there was a circuit split on the issue, because other circuits had disagreed with the Eleventh Circuit's “unduly parsimonious interpretation of § 2244(d)(2).” *Id.* In that light, the Court held that “[i]t is hardly extraordinary that subsequently, after petitioner's case was no

longer pending, this Court” rejected the Eleventh Circuit’s interpretation. *Id.* The Court thus held that this situation weighed strongly against a finding of extraordinary circumstances. *Id.*

The nature of the intervening change of law at issue here differs markedly, however, from the situation at issue in *Gonzalez*. Here, it was settled law that post-conviction counsel’s effectiveness was irrelevant to establishing cause for procedural default. *Coleman*, 501 U.S. at 756-57. In *Martinez*, however, the Supreme Court “qualifie[d] *Coleman* by recognizing a narrow exception.” 132 S. Ct. at 1315. Unlike the “hardly extraordinary” development of the Supreme Court resolving an existing circuit split as in *Gonzalez*, 545 U.S. at 536, the Supreme Court’s development in *Martinez* constitutes a significant and remarkable development in the Court’s equitable jurisprudence following the final judgment in Sheppard’s case. As explained above, this Court should grant Sheppard’s Rule 60(b) motion; *Gonzalez* does not affect that conclusion.

V. Motion for Indicative Ruling

Because the mandate as to Sheppard's appeal has not issued at this time, his appeal is still pending before the Sixth Circuit. Accordingly, jurisdiction over Sheppard's instant motion in the above-captioned case lies with the Sixth Circuit, not with this Court.⁹ The Federal Rules of Civil Procedure and Sixth Circuit caselaw set forth the specific procedures to follow in this type of situation. Fed. R. Civ. P. 62.1; *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 359 n.1 (6th Cir. 2001); *First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343, 346 (6th Cir. 1976).

When a party seeks to have the district court act on a motion after jurisdiction has transferred to the court of appeals, "the proper procedure is for that party to file the motion in the district court." *Bovee*, 272 F.3d at 359 n.1 (citations omitted); *see also* Fed. R. Civ. P. 62.1. Then, if the district judge is inclined to grant the motion or believes that the motion raises a substantial question that warrants consideration, the district judge is to enter an "indicative ruling" stating just that. *See id.* The movant then files a motion to remand with the circuit court, so that the district court may reassume jurisdiction and thereupon may grant relief. *See id.*¹⁰

⁹ At the time of this filing, the Sixth Circuit has not yet issued the mandate, although the Supreme Court of the United States issued its order denying certiorari on June 11, 2012, and the order was filed with the Sixth Circuit clerk's office the next day. Sheppard filed a motion with the Sixth Circuit on June 8, 2012 asking that court to stay issuance of the mandate if the Supreme Court denied certiorari. The Sixth Circuit has not yet ruled on Sheppard's motion. If the mandate does issue, jurisdiction will be returned to this Court, rendering moot Sheppard's request for an indicative ruling. *See* 6 Cir. I.O.P. 41 ("The mandate is the document by which this court relinquishes jurisdiction and authorizes the originating district court or agency to enforce the judgment of this court.").

¹⁰ Rule 62.1 essentially codified what was already the standard procedural practice in the Sixth Circuit pursuant to *Hirsch*, commonly called a "*Hirsch* remand."

Here, Sheppard requests that this Court enter an “indicative ruling” under Rule 62.1, stating that the Court, if the Sixth Circuit remanded the above-captioned case, would grant relief from its judgment under Rule 60(b)(6) so that the Court would reconsider its order, opinion and judgment finding Sheppard’s IAC claim procedurally defaulted. Or, in the alternative, Sheppard requests that this Court enter an indicative ruling under Rule 62.1 stating that Sheppard’s motion raises a substantial issue that warrants consideration.

When this Court issues its indicative ruling, Sheppard will, in accordance with Rule 62.1, immediately file a notice of the indicative ruling along with a motion for remand with the Sixth Circuit. The Sixth Circuit will then make its own determination on whether to remand the case in part or in whole such that this Court obtains jurisdiction for further proceedings on Sheppard’s motion for reconsideration.

Alternatively, if this Court decides, under Rule 62.1(a)(2), to deny this motion, Sheppard respectfully requests that the Court issue a Certificate of Appealability in conjunction with any such denial.

VI. Conclusion

Sheppard seeks reconsideration, in light of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), of this Court’s opinion, order and judgment finding that his sixth subpart of Ground Nine for Relief is procedurally defaulted. The scope of the reconsideration is limited, but the matter on which reconsideration is sought is critical. Sheppard’s trial and initial-review collateral proceedings counsel failed to understand the controlling law regarding evidentiary burdens in extrinsic evidence/juror misconduct claims, and failed to litigate associated claims thereafter. And as a

result, Sheppard was unable to develop and present to the state courts evidence that would have created a drastically different evidentiary picture than that which the state courts considered in denying his extrinsic evidence/juror misconduct claim. The lack of a state-court factual record then doomed Sheppard's substantive extrinsic evidence/jury misconduct claims in federal habeas proceedings, while counsel's failures to present the IAC claim to the state courts doomed his IAC claim procedurally. Only with this Court's reconsideration of Sheppard's IAC claim following *Martinez* will his IAC claim be subjected to any court review at all. The Supreme Court explicitly condemned this kind of injustice in *Martinez*, and this Court should rectify the injustice in Sheppard's case by granting reconsideration.

Sheppard also seeks a statement from this Court in accordance with Rule 62.1 that would facilitate that reconsideration following remand of jurisdiction from the Sixth Circuit.

As this is not a Motion "to which other parties might reasonably be expected to give their consent" pursuant to Local Rule 7.3(b), counsel for Respondent has not been consulted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2012, I electronically filed the foregoing **Petitioner Sheppard's Motion For Relief From Judgment Under Rule 60 To Allow Reconsideration Of One Portion Of Ground For Relief Nine In Light Of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), And Motion For Entry Of An Indicative Ruling From The District Court In Accordance With Rule 62.1** with the Clerk of the United States District Court for the Southern District of Ohio using the CM/ECF system, which will send notification of such filing to the email address of opposing counsel on file with the Court.

/s/ Allen L. Bohnert

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Exhibit 13

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

BOBBY T. SHEPPARD	)	Case No. 1:00-cv-493
)	
Petitioner,)	
	)	District Judge Gregory L. Frost
v.	)	Magistrate Judge Michael R. Merz
)	
NORM ROBINSON, Warden,)	
)	
Respondent.	)	<u>THIS IS A DEATH PENALTY CASE</u>

**Petitioner Sheppard’s Memorandum in Reply to the Warden’s Memorandum In
Opposition to Sheppard’s June 15, 2012 Motion for Relief From Judgment**

I. Introduction

Petitioner Bobby Sheppard, through counsel, submits the following memorandum in reply to the Warden’s memorandum, (Doc. No. 151), opposing Sheppard’s Rule 60(b) motion, (Doc. No. 150), for relief from judgment in light of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). The Warden opposes Sheppard’s motion on two bases: 1) that Sheppard’s ineffective-assistance-of-trial-counsel claim is outside the “limited exception” recognized in *Martinez*, (Doc. No. 151, at PageID 949-52, p. 6-9); and 2) that Sheppard’s IAC claim is not “substantial or even of arguable merit,” (*id.* at PageID 952-53, p. 9-10).

But the Warden’s arguments in opposition to Sheppard’s motion are limited. Significantly, the Warden does not contest Sheppard’s argument that his trial counsel’s performance was deficient under *Strickland v. Washington*, 466 U.S. 668 (1986), and that

Sheppard was prejudiced by his trial counsel's deficient performance as well. Likewise, the Warden does not challenge Sheppard's argument that his initial-review collateral proceedings counsel's performance was deficient under *Strickland* and *Martinez*. The Warden argues only that *Martinez* does not apply in circumstances in which a claim must be raised on direct appeal rather than in a post-conviction petition, (Doc. No. 151, at PageID 949-51, p. 6-8), and that Sheppard cannot demonstrate the prejudice element under *Strickland*, (*id.* at 952, p. 9).¹

Conversely, the Warden concedes Sheppard's direct appeal counsel was ineffective under *Strickland* when counsel failed to raise the trial counsel IAC claim on direct appeal, and that Sheppard's *Murnahan* counsel performed deficiently by failing to allege that appellate counsel provided ineffective assistance by failing to raise the trial counsel IAC claim on direct appeal. (*Id.* at PageID 951-52, p. 8-9.) Furthermore, the Warden presents no arguments opposing Sheppard's arguments that Rule 60(b) relief is procedurally appropriate here following an intervening change of law and under *Gonzalez v. Crosby*, 545 U.S. 524 (2005).

Accordingly, the areas of dispute that remain for this Court's resolution in deciding Sheppard's motion are narrow.

¹ It is unclear whether the Warden is arguing that Sheppard cannot demonstrate the *Strickland* prejudice element regarding initial-review collateral proceedings counsel, or regarding his trial counsel. Either argument, however, is mistaken and should be rejected, as explained below.

II. The Warden's arguments are unavailing and should be rejected.

The Warden's arguments should be rejected for the reasons Sheppard presented in the memorandum in support of his motion, (Doc. No. 150), and for the following reasons as well.

A. *Martinez* directly applies to Sheppard's claim that his trial counsel provided ineffective assistance of counsel when they failed to present evidence of prejudice from the undisputed jury misconduct.

The Warden first argues that Sheppard's motion should be denied because his trial counsel IAC claim is outside the "limited exception" recognized in *Martinez*. The Warden's arguments in support of this proposition are either mistaken, or they support Sheppard's position. Significantly, the Warden does not contest Sheppard's demonstration, (Doc. No. 151, at PageID 922-29, p. 32-39), that his initial-review collateral proceedings counsel's performance was deficient under *Strickland*. The Warden also concedes that Sheppard's appellate counsel was ineffective under *Strickland*, and that Sheppard's *Murnahan* counsel performed deficiently.

As Sheppard identified in his motion, two different types of counsel could potentially be considered the applicable initial-review collateral proceedings counsel for *Martinez* purposes. (Doc. No. 150, at PageID 918-20, p. 28-30.) Although Sheppard noted in his motion that his "direct appeal counsel was *the same counsel* who litigated [his] motion for a new trial," (Doc. No. 150, at PageID 926, p. 36 (emphasis added)), the Warden ignores this reality. Instead, the Warden contends that *Martinez* does not apply to Sheppard's trial counsel claim because Sheppard was "required to raise the claim on direct appeal" when he was "represented by *new counsel* on appeal" and the evidence in support of his motion for new trial "or lack thereof" was "apparent on the record." (Doc. No. 151, at PageID 949, p. 6 (emphasis added).) Thus, the Warden argues, Sheppard's claim is not like the claim in *Martinez* in which the state had barred

the inmate from raising an IAC claim on direct appeal. The Warden is mistaken not only as a matter of fact, but also as a matter of law.

Sheppard's case presents an abnormal set of circumstances concerning his various state-court counsel, principally because the same attorney litigated Sheppard's post-trial motions and handled Sheppard's direct appeal. Sheppard was represented at trial by Attorney Robert Ranz and Attorney Ralph Crisci. (Return of Writ App'x Vol. I, 16.) The trial court sentenced Sheppard on May 30, 1995. (ROW App'x Vol. I, 397.) The trial court also initially appointed Attorneys Ranz and Crisci as Sheppard's direct appeal counsel on that same day. (*Id.* at 398.) Then, on June 2, 1995, the trial court replaced this placeholder appointment by appointing Attorney Fred Hoefle and Attorney Chuck Stidham to represent Sheppard in his direct appeal. (*Id.* at 399.) Before direct appeal proceedings began, Attorney Ranz filed a motion for a new trial on the basis of jury misconduct on June 13, 1995. (ROW App'x Vol. II, 1.) Two days later, on June 15, 1995, Attorneys Hoefle and Stidham filed a notice of appeal of Sheppard's conviction and sentence. (*Id.* at 24.)

On August 29, 1995, Attorney Ranz filed an affidavit from Dr. Jones in support of the motion for a new trial, in which Jones averred that she received a phone call from Juror Fox asking for information about paranoid schizophrenia and that she gave him a description and explanation of the mental illness. (*Id.* at 40.) On September 29, 1995, Attorney Hoefle and Attorney Ranz filed a motion to resentence Sheppard to life imprisonment. (*Id.* at 42). In that motion, counsel argued, among other things, that Sheppard was presumptively prejudiced by the juror misconduct in receiving extrinsic evidence from Dr. Jones, rendering his death sentence unconstitutional. (*Id.* at 42-44).

On October 6, 1995, the trial court heard oral argument from the prosecutor and Attorney Hoefle on the motion for a new trial and the motion for resentencing. (*See* Trial Tr., Oct. 6, 1995, 2-14 (attached here as Exhibit 1).) During the oral argument, Attorney Hoefle also made an oral motion to strike any testimony about the subjective effects of the misconduct on Juror Fox. (*Id.* at 4.) Attorney Hoefle argued to the trial court that “it is presumptively prejudicial when juror misconduct of this sort occurs and it is the burden of the State or the prevailing party to show that it was not prejudicial.” (*Id.* at 5:11-15.) Attorney Hoefle also clarified that he was litigating the motion for new trial, the oral motion to strike subjective testimony, *and* the motion for resentencing. (*Id.* at 9-10.) Attorney Hoefle argued that the “[b]asic thrust of the motion for a new trial and the motion that I filed to re-sentence with respect to that issue is the same, basically that there was juror misconduct and that it is presumptively prejudicial error” (*Id.* at 9.)

The trial court orally denied the motions following counsel’s arguments at the October 6, 1995 hearing. (*Id.* at 13-14.) The trial court then docketed handwritten orders on October 10, 1995, denying the oral motion to strike, (ROW App’x Vol. II, 57), the written motion for a new trial, (*id.* at 58), and the written motion for resentencing, (*id.* at 59). Attorney Hoefle filed a notice of appeal of the trial court’s judgments denying those motions on the same day. (*Id.* at 60.) Attorneys Hoefle and Stidham proceeded to represent Sheppard during the course of his direct appeal proceedings. (*See* ROW App’x Vol. VI, 1-2.)

Attorney Hoefle thus represented Sheppard during part of his trial proceedings—namely the litigation over the motions for a new trial and for resentencing in light of the jury misconduct—*and* for Sheppard’s direct appeal. Accordingly, Sheppard arguably could have

only raised the ineffectiveness of his trial counsel's handling of the motions related to his jury-misconduct claim in a post-conviction petition. *See State v. Hutton*, 100 Ohio St. 3d 176, 183 (2003) (holding "that the doctrine of *res judicata* does not apply to bar a claim of ineffective assistance of appellate counsel not previously raised in an appeal where a defendant was represented on appeal by the same attorney who allegedly earlier provided the ineffective assistance"); *see also State v. Lentz*, 70 Ohio St. 3d 527, 529-30 (1994) (explaining that *State v. Cole*, 2 Ohio St.3d 112, 114, fn.1 (1982), recognizes that "since counsel cannot realistically be expected to argue his own incompetence, *res judicata* does not act to bar a defendant represented by the same counsel at trial and upon direct appeal from raising a claim of ineffective assistance of counsel in a petition for postconviction relief," and that "*res judicata* does not apply when trial and appellate counsel are the same, due to the lawyer's inherent conflict of interest").

If Sheppard could not have raised on direct appeal his claim of IAC for failing to develop and present evidence in support of his motion for new trial, *Martinez* directly applies; post-conviction counsel would be the applicable initial-review collateral proceedings counsel to have raised the underlying trial counsel IAC claim. (*See* Doc. No. 150, at PageID 918-20, p. 28-30.) But even if Attorneys Hoefle and Stidham could have raised the trial counsel IAC claim on direct appeal, they failed to do so, and their ineffective assistance excuses the default of the trial counsel IAC claim. Indeed, the Warden even concedes this. (*See* Doc. No. 151, at PageID 951, p. 8 (explaining that "assuming that Sheppard defaulted his claim of ineffective assistance of trial counsel by failing to present it on direct appeal, the constitutional ineffectiveness of his appellate counsel could have established 'cause' to excuse the default").) Following the holding and reasoning in *Martinez*, the ineffective assistance of Sheppard's *Murnahan* counsel—in failing to

raise a claim alleging Attorneys Hoefle and Stidham provided ineffective assistance of appellate counsel by failing to raise the trial counsel IAC claim—excuses the default of the IAAC claim. That ineffective assistance of appellate counsel, in turn, excuses the default of the trial counsel IAC claim. Accordingly, the Warden’s argument is unavailing under either scenario.

The Warden also accuses Sheppard of previously arguing “that because it related to a motion for new trial, trial counsel’s alleged ineffectiveness could *not* be raised in state post-conviction.” (Doc. No. 151, at PageID 950, p. 7.) To the extent that the Wardens intends to reference the fact that Sheppard previously argued that he could not have raised his underlying substantive jury misconduct claim in state post-conviction proceedings because it was a claim that arose before his appeal, and it was litigated in a motion for new trial, the Warden’s accusation is misplaced. Sheppard’s underlying substantive jury misconduct claim is not the issue here. Rather, Sheppard seeks reopening for reconsideration of his claim of trial counsel’s ineffectiveness for failing to present evidence in support of the motion for new trial. Although Sheppard attempted to argue in his Traverse that his trial counsel IAC claim was not procedurally defaulted, this Court declined to accept Sheppard’s argument by finding the IAC claim procedurally defaulted. (*See* Report and Recommendations, Doc. No. 94, p. 85-90; Opinion and Order, Doc. No. 131, p. 66-67.) It is well-settled that habeas petitioners may present alternative arguments. *Gonzalez v. Thaler*, 132 S. Ct. 641, 654 (2012); *Amadeo v. Zant*, 486 U.S. 214, 225 (1988). The Warden’s accusation is therefore irrelevant to the issues now before the Court.

Sheppard’s Rule 60(b) motion clearly acknowledges the question of which counsel is properly considered the initial-review collateral proceedings counsel. (Doc. No. 150, at PageID

918-20, p. 28-30.) Sheppard's motion presents the Court with two alternative means of rectifying the same injustice. Sheppard's argument before—and now—shows only the Catch-22 situation in which Sheppard found himself before the state court in terms of how to present the evidence of prejudice from jury misconduct, which is an important element of his trial counsel IAC claim.

The evidence in the record in support of Sheppard's motions for a new trial and for resentencing was insufficient to demonstrate prejudice from the jury misconduct, since the law placed the burden to prove prejudice on Sheppard, contrary to counsel's erroneous understanding, and counsel failed to present the evidence to the state court. (*See* Trial Tr., Oct. 6, 1995, 5, 9-10.) Accordingly, the state courts on direct appeal found no evidence of prejudice based on the record of the state court proceedings. (*See State v. Sheppard*, 84 Ohio St. 3d 230, 232-33 (1998).

Sheppard's efforts in post-conviction to raise the IAC claim related to counsel's failure to develop and present evidence in support of the new trial motion were also unsuccessful. First, Sheppard's efforts were unsuccessful because of the ineffective assistance of his first post-conviction counsel in failing to raise the claim in Sheppard's initial post-conviction proceedings. (*See* Doc. No. 150, at PageID 904, p. 14; PageID 922-25, p. 32-35.) Second, when newly appointed post-conviction counsel sought to present the IAC claim in a second post-conviction petition, the appellate court affirmed dismissal of Sheppard's petition. The appellate court found

that: (1) Sheppard could have raised his IAC claim in his first post-conviction petition;² (2) the ineffective assistance of his first post-conviction counsel was irrelevant for whether Sheppard's second petition could satisfy the stringent requirements for litigating such petitions under Ohio law, and (3) Sheppard could not satisfy those requirements and thus the trial court had no jurisdiction over the petition. (See ROW Supp. to App'x Vol. III, 68-69.)

It is clear that additional evidence beyond that contained in the trial court record was necessary to demonstrate prejudice from the jury misconduct and, by extension, trial counsel's ineffective assistance for failing to develop and present that evidence. The evidence outside the record that clearly demonstrates prejudice from the misconduct—and that clearly undermines the state courts' factual findings upon which the no-prejudice holding was based—can be found in the live hearing testimony from witnesses who testified in federal court about objective factual matters as well as subjective matters. The Sixth Circuit explained that the evidence of prejudice that Sheppard presented in federal habeas proceedings was available to present in state court proceedings, but concluded that counsel made insufficient efforts to present the evidence to the state courts. *Sheppard v. Bagley*, 657 F.3d 338, 343-44 (6th Cir. 2011).

Thus, the fundamental point remains, regardless of whether Sheppard could have or should have presented the trial counsel IAC claim in direct appeal or post-conviction proceedings; Sheppard's trial counsel failed to present to the state courts the evidence necessary to demonstrate prejudice from the undisputed juror misconduct. The state courts then found that

² This finding alone rebuts the Warden's contention that Sheppard was required to raise his trial counsel IAC claim on direct appeal.

juror misconduct occurred, but concluded there was no prejudice. The state court finding of no prejudice was based on what were later proven to be erroneous factual findings. Counsel's failure to present the evidence demonstrating prejudice from the juror misconduct was therefore ineffective assistance of counsel under *Strickland*.

Had trial counsel been effective, they would have presented the evidence—later developed in federal court—demonstrating that the facts in the trial court record suggesting Sheppard was not prejudiced were false. But that trial counsel IAC claim was never presented to the state courts, regardless of what proceeding constituted the initial-review collateral proceeding in which it should have been presented. Consequently, the trial counsel IAC claim was procedurally defaulted in federal habeas proceedings. And it is that procedural default that is excused by the ineffective assistance of initial-review collateral proceedings counsel following *Martinez*. The Warden's arguments fail to address this fundamental element of Sheppard's Rule 60(b) motion.

The Warden also contends that "the concerns which gave rise to *Martinez v. Ryan*'s limited exception obviously are absent here." (Doc. No. 151, at PageID 951, p. 8.) But none of the examples unaffected by *Martinez* that the Warden quotes, (*id.* (quoting *Martinez*, 132 S. Ct. at 1320)), address the holding in *Edwards v. Carpenter*, 529 U.S. 446 (2000), about direct appeal counsel's ineffectiveness.

Moreover, in allegedly supporting his (inaccurate) assertion, the Warden proves Sheppard's point for him.³ The Warden acknowledges that Sheppard had a constitutional right to effective representation on direct appeal, and that if Sheppard failed to raise his trial counsel IAC claim on direct appeal, that constitutional ineffectiveness could establish cause to excuse the default. (Doc. No. 151, at PageID 951, p. 8.) And then, the Warden explains, Sheppard could have preserved that appellate IAC claim by including it in his *Murnahan* application to reopen his direct appeal. (Doc. No. 151, at PageID 951-52, p. 7-8.) The Warden's analysis stops there, (Doc. No. 151, at PageID 952, p. 8), so it is unclear what point the Warden attempted to make.

But Sheppard can complete the Warden's line of reasoning. The appellate IAC claim was not preserved by Sheppard's *Murnahan* counsel, which was ineffective assistance of counsel under a *Strickland* analysis, as Sheppard clearly explained in his Rule 60(b) motion. (See Doc. No. 150, at PageID 925-37, p. 35-47.) And under *Martinez*, the ineffective assistance of Sheppard's *Murnahan* counsel is sufficient cause to excuse the default of the IAAC claim. (See generally, *id.* at PageID 914-21, p. 24-31; PageID 925-37, p. 35-47.) That, in turn, provides the necessary cause to excuse the default of the underlying IAC claim for failing to present evidence in support of the motion for new trial based on undisputed jury misconduct. (*Id.*) Accordingly,

³ It is unclear to what "concerns" from *Martinez* the Warden alludes, but his strained attempt to cabin *Martinez*'s core concern is incorrect in any event. The core concern that underpins *Martinez* is that an inmate will not be able to have *any* court hear his substantive claim, through no fault of the inmate's, if, at the first opportunity to raise the claim, the claim was not raised due to counsel's ineffectiveness, and then the federal courts refused to review the claim because it was procedurally defaulted in state court. *Martinez*, 132 S. Ct. at 1317-18. That is precisely what has occurred here. That injustice will remain in place, contrary to *Martinez*, unless this Court reopens Sheppard's petition to allow federal court review of his IAC claim.

the Warden's arguments concede that Sheppard's appellate counsel provided ineffective assistance under *Strickland*, and that Sheppard's *Murnahan* counsel's performance was deficient under *Strickland* for *Martinez* purposes.

In sum, the Warden's first argument is either mistaken, or it directly supports Sheppard's position that the ineffective assistance of his *Murnahan* counsel can ultimately excuse the procedural default of Sheppard's trial counsel IAC claim. Neither is a basis for denying Sheppard's Rule 60(b) motion.

B. Sheppard's underlying IAC claim satisfies the *Martinez* standard because it is substantial and meritorious.

The Warden's second argument purports to address the second *Martinez* prong, namely whether the underlying IAC claim is substantial. (*See* Doc. No. 151, at PageID 952, p. 9 (“Second, Sheppard's underlying ineffective-assistance-of-trial-counsel claim can hardly be described as substantial or even of arguable merit.”).) Notably, however, the Warden fails to contest either *Strickland* prong of Sheppard's underlying trial counsel IAC claim beyond this above-quoted sentence. (*See* Doc. No. 151, at PageID 952, p. 9.) The Warden offers nothing to refute Sheppard's demonstration, (*see* Doc. No. 150, at PageID 932-35, p. 42-45), that his trial counsel's performance was deficient under *Strickland*. This is not surprising, given that the Sixth Circuit has already said as much in finding that Sheppard's counsel failed to investigate and present evidence that was available to support the claims in state court, and that counsel “did virtually nothing to present to the Ohio courts the evidence [that was] presented to the federal courts seven years later.” *Sheppard*, 657 F.3d at 343-44. Likewise, the Warden does not attempt

to counter Sheppard's demonstration, (*see* Doc. No. 150, at PageID 935-37, p. 45-47), that his trial counsel's deficient performance was prejudicial under *Strickland*.

Instead, in his only attempts to address the second *Martinez* prong, the Warden offers an irrelevant observation and two misplaced arguments. First, the Warden observes that Sheppard did not object to the Magistrate Judge's recommendation to deny the IAC claim, and that this Court did not certify the claim for appeal. (Doc. No. 151, at PageID 952, p. 9.) But the Warden's observation is nothing more than that: an observation. It is not an argument in opposition to Sheppard's motion, because it provides no further analysis to explain the significance of these (irrelevant) facts.

It is true, as Sheppard noted, (Doc. No. 150, at PageID 931, p. 41); that *Martinez's* "substantial claim" standard equates to the standard governing issuance of a COA. But even if the Warden is attempting to tie the denial of a COA on Sheppard's sixth subclaim of his Ninth Ground for Relief to the *Martinez* "substantial claim" standard, that argument would still be confusing Sheppard's trial counsel IAC "claim" with a "claim" that the IAC claim should not be denied as procedurally defaulted. The question under *Martinez* is whether Sheppard's trial counsel IAC claim is potentially meritorious substantively. *See Martinez*, 132 S. Ct. at 1318-19. Here, however, there was no assessment of the merits of Sheppard's trial counsel IAC claim because this Court had found the claim procedurally defaulted, without any excusing cause and prejudice. Accordingly, any COA related to Sheppard's IAC claim would not have addressed whether the substantive merits of his IAC claim were substantial or of arguable merit. Rather, any COA would have been on the issue of whether this Court's procedural default ruling was correct. Thus, even if the Warden actually presented this substantive argument in his opposition

memorandum—which he did not—the denial of a COA on the procedural default of Sheppard’s trial counsel IAC claim is irrelevant for determining whether, substantively, Sheppard’s trial counsel IAC claim is substantial or arguably meritorious as *Martinez* requires.

For the same reasons, the Warden’s citation to authority holding that a party’s failure to object to a magistrate judge’s report operates as a waiver of appeal, and his observation that Sheppard did not appeal this Court’s denial of a COA related to his IAC claim, are both irrelevant to determining that Sheppard’s IAC claim is substantial or arguably meritorious. The Warden’s observation is also irrelevant because, at that time, *Coleman v. Thompson*, 501 U.S. 722 (1991), clearly established that objecting to a procedural default ruling on the basis of initial-review collateral proceedings counsel’s ineffectiveness would have been futile. (See Doc. No. 150, at PageID 897-98, p. 7-8 (citing *Byrd v. Collins*, 209 F.3d 486, 516 (6th Cir. 2000); *Ritchie v. Eberhart*, 11 F.3d 587, 592 (6th Cir. 1993); *Neal v. Bowlen*, No. 94-5765, 1995 U.S. App. LEXIS 4821, *7 (6th Cir. Mar. 9, 1995); and *Davie v. Mitchell*, 291 F. Supp.2d 573, 588 n.1 (N.D. Ohio 2003)).)

In short, whether a COA issued on the question of whether Sheppard’s trial counsel IAC claim was procedurally defaulted is inapposite to the question of whether Sheppard’s trial counsel IAC claim is substantial or arguably meritorious. Accordingly, the Warden’s observations are misplaced and irrelevant.

Second, the Warden asserts that there “remains nothing that calls into question the well-established law relied upon by the Court in holding that Sheppard’s claim is procedurally defaulted.” (Doc. No. 151, at PageID 952, p. 9.) But the Warden’s assertion ignores the entire point of Sheppard’s motion following *Martinez*. After all, it is *Martinez* itself that “calls into

question” this Court’s holding that Sheppard’s trial counsel IAC claim is procedurally defaulted. The ineffective assistance of initial-review collateral proceedings counsel can excuse the default following *Martinez*, as Sheppard demonstrated in his Rule 60(b) motion. (*See, e.g.*, Doc. No. 150, at PageID 914-18, p. 24-28.)

Third, the Warden contends that Sheppard cannot show a reasonable probability that the outcome of his state-court proceedings would have been different but for his post-conviction counsel’s failure to present additional evidence of prejudice. (Doc. No. 151, at PageID 952, p. 9.) The Warden relies on the Sixth Circuit’s observation that testimony presented years after the fact is not necessarily more accurate or truthful than contemporaneous testimony. (*Id.*) But the Warden again misses the point. Initially, the Warden explicitly argues that Sheppard’s *initial-review collateral proceedings counsel*’s performance was not prejudicial under *Strickland*. (*Id.* (“Moreover, if, as Sheppard argues, state post-conviction was the ‘initial-review collateral proceeding’ where his claim should have been raised, it cannot be said that counsel in *that* proceeding was ineffective” under *Strickland*. (emphasis added).) But the *Martinez* “substantial claim” element as applied to Sheppard’s case is not concerned with the effectiveness of initial-review collateral proceedings counsel, but rather with that of Sheppard’s *trial* counsel. *Martinez*, 132 S. Ct. at 1318-19 (explaining that the second element to overcome a procedural default is that “a prisoner must also demonstrate that the *underlying*” trial counsel IAC claim is a “substantial one,” *i.e.*, that the underlying claim “has some merit”) (emphasis added).

Additionally, had Sheppard’s counsel presented the evidence to the state courts, the state courts would have been considering contemporaneous testimony; they would *not* have been considering evidence “years later.” And the Sixth Circuit’s comments are not fairly read to

apply to the later-presented evidence that was objective, factual evidence about what happened. The evidence upon which Sheppard relies to prove prejudice from the juror misconduct—and to prove the falsity of the facts supporting the state courts’ no-prejudice finding—is not testimony about the witnesses’ subjective feelings about the misconduct and its effect on the verdict. Instead, it is testimony concerning objective facts that is not as susceptible to the distorting effects of time or other pressures, including the following:

- Ms. Jones was not a licensed psychologist;
- Ms. Jones did not believe herself qualified to give a professional opinion on paranoid schizophrenia;
- Ms. Jones believed paranoid schizophrenia to be a “communication disorder,” but it is not;
- Ms. Jones did not know the symptoms of paranoid schizophrenia;
- Ms. Jones did not consult a clinical text to inform her understanding of paranoid schizophrenia when talking with Fox, but rather looked up separate definitions for “paranoia” and “schizophrenia” in Webster’s dictionary;
- Ms. Jones told Fox that one who suffers from paranoid schizophrenia experiences difficulties in communication and is out of touch with reality;
- Ms. Jones never read the trial transcript of Dr. Smalldon’s mitigation-stage testimony, despite averring to having done so in her second affidavit, so she had no basis on which to declare that everything she told Fox was perfectly consistent with Dr. Smalldon’s testimony;
- Ms. Fox gave Fox critically incorrect information about paranoid schizophrenia.

All of this objective evidence would have been the same—if the witnesses testified truthfully—whether presented seven days, seven months or seven years afterwards.

Consequently, the Warden’s argument is unavailing. The objective evidence also directly undermined the scant factual findings on which the state courts relied to conclude that Sheppard had not demonstrated prejudice from the juror misconduct.

In the end, then, the Warden fails entirely to address and/or refute Sheppard's arguments that he can satisfy *Martinez's* second prong. The Warden does not contest that Sheppard's trial counsel's assistance was both deficient and prejudicial under *Strickland*. The Warden offers only an irrelevant observation involving this Court's procedural default ruling rather than addressing whether Sheppard's underlying IAC claim is substantial on its merits. The Warden inexplicably ignores the impact of *Martinez* on procedural default matters. The Warden does not contest Sheppard's argument that his state post-conviction counsel's performance was deficient under *Strickland*, in the process of lodging an insufficient—and irrelevant for purposes of the second *Martinez* prong—attack on Sheppard's arguments that this deficient performance prejudiced Sheppard.

III. Conclusion

Petitioner Bobby Sheppard seeks reconsideration, in light of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), of this Court's opinion, order and judgment finding that his sixth subpart of Ground Nine for Relief is procedurally defaulted. The Supreme Court's holding in *Martinez* is directly applicable to Sheppard's case. *Martinez* allows this Court to consider, for the first time, whether the ineffective assistance of initial-review collateral proceedings counsel can excuse Sheppard's procedural default of his IAC claim.

Every court that has reviewed Sheppard's case has condemned the jury misconduct that occurred following the close of Sheppard's mitigation phase. But absent relief on Sheppard's motion, no court will ever consider Sheppard's claim that his counsel's failure to present evidence in support of their motions based on the jury misconduct was ineffective assistance in

violation of Sheppard's constitutional rights. The Supreme Court explicitly condemned this kind of injustice in *Martinez*, and this Court should rectify the injustice in Sheppard's case by granting reconsideration. The Warden's only two arguments in opposition to Sheppard's motion are unavailing or inapposite; Sheppard's IAC claim is squarely within the ambit of *Martinez*'s holding, and Sheppard's underlying IAC claim presents a clear instance of ineffective assistance of counsel under *Strickland*. Moreover, the Warden concedes or does not contest several of Sheppard's key points.

For all the reasons in Sheppard's memorandum in support of his motion and in this reply memorandum, the Court should grant Sheppard's motion, reconsider its holding that the sixth subclaim of Sheppard's Ninth Ground for Relief is procedurally defaulted without excusing cause, reopen the above-captioned case, and allow Sheppard to litigate the merits of his trial counsel IAC claim.⁴

⁴ Because the Sixth Circuit's mandate has now issued, (Doc. No. 154), and jurisdiction therefore returned to this Court, there is no need for this Court to issue an indicative ruling in accordance with Federal Rule of Civil Procedure 62.1.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2012, I electronically filed the foregoing **Petitioner Sheppard's Memorandum in Reply to the Warden's Memorandum In Opposition to Sheppard's June 15, 2012 Motion for Relief From Judgment** with the Clerk of the United States District Court for the Southern District of Ohio using the CM/ECF system, which will send notification of such filing to the email address of opposing counsel on file with the Court.

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Exhibit 14

Statement of the Case and Facts

In May of 1995, Petitioner Bobby T. Sheppard (hereinafter “Sheppard”) was convicted in Hamilton County, Ohio, of aggravated murder with capital specifications and sentenced to death. *See State v. Sheppard*, 84 Ohio St. 3d 230 (1998). After his conviction and sentence, Sheppard filed a motion for new trial in which he alleged that Juror Fox committed misconduct by consulting a psychologist during the trial. The trial judge denied the motion. Upon direct appeal, the Ohio Court of Appeals and the Supreme Court of Ohio affirmed. *See State v. Sheppard*, 1997 Ohio App. LEXIS 2501 (June 11, 1997), Hamilton App. Nos. C-950402 and C-950744, unreported; *State v. Sheppard*, 84 Ohio St. 3d 230, 703 N.E.2d 286, certiorari denied, *Sheppard v. Ohio*, 527 U.S. 1026 (1999). Additionally, the trial court dismissed Sheppard's third amended petition for post-conviction relief, and the court of appeals affirmed. *State v. Sheppard*, 1999 Ohio App. LEXIS 1179 (Mar. 26, 1999), Hamilton App. No. C-980569, unreported. The Supreme Court of Ohio then declined to accept Sheppard's appeal. *State v. Sheppard* (1999), 86 Ohio St. 3d 1437 (1999), certiorari denied, *Sheppard v. Ohio*, 528 U.S. 1168 (2000).

On March 9, 2000, Sheppard filed an application with the court of appeals to reopen his appeal from his convictions pursuant to App.R. 26(B) and *State v. Murnahan*, 63 Ohio St. 3d 6 (1992), alleging ineffective assistance of appellate counsel before that court. However, the court of appeals found that Sheppard had failed to show good cause for filing his application more than ninety days after that court's judgment was journalized, as required by App.R. 26(B)(2)(b). *State v. Sheppard* (Oct. 2, 2000), Hamilton App. Nos. C950402 and C-950744, unreported. On April 11, 2011, the Supreme Court of Ohio affirmed the judgment of the Ohio Court of Appeals, on the alternate “merits” ground that Sheppard failed to show a genuine issue with respect to appellate counsel’s effectiveness. *State v. Shepard*, 91 Ohio St. 3d 329 (2001).

In the meantime, on May 23, 2000, Sheppard filed with the trial court a second or successive petition for post-conviction relief, in which he presented for the first time a claim that trial counsel rendered constitutionally ineffective assistance in failing to support the motion for new trial with additional evidence. The trial court dismissed the petition for want of jurisdiction. Upon Sheppard's appeal, the Ohio Court of Appeals affirmed, holding that "where, as here, the petitioner's claims for relief could have been raised in his first post-conviction petition, a successive petition was insufficient to invoke the trial court's jurisdiction to entertain his claims." *State v. Sheppard*, 2001 Ohio App. LEXIS 1611 (April 6, 2001), Hamilton County No. C-000665, unreported, Slip Opinion at * 5 - *6, citing *State v. Murawski*, 1999 Ohio App. LEXIS 3723 (Aug. 12, 1999), Cuyahoga App. No. 74581, unreported (applying Ohio's doctrine of res judicata to second post-conviction petition). The Supreme Court of Ohio subsequently dismissed Sheppard's discretionary appeal. *State v. Sheppard*, 92 Ohio St. 3d 1445 (2001).

On June 20, 2000, Sheppard filed with this Court a petition for a writ of habeas corpus (Document 4) in which he challenged his conviction and sentence on constitutional grounds. In furtherance of sub-claim (6) of his Ninth Ground in support of relief, Sheppard alleged, among other things, that trial counsel rendered constitutionally ineffective assistance in "failing" to support a motion for new trial, on the basis of juror misconduct, with documentary or other evidence. Recommending denial of relief on sub-claim (6) of the Ninth Ground, the United States Magistrate Judge found that the Ohio Court of Appeals denied relief on adequate and independent state grounds of decision which constituted a procedural default precluding "merits" review in federal habeas corpus. The Magistrate Judge cited not only Sheppard's failure to satisfy the State's statutory requirements for filing a second post-conviction petition, as found by the trial court, but also the Ohio Court of Appeals' invocation of Ohio's res judicata doctrine.

Report and Recommendations (Doc. 94), PAGEID#s 293-298.

On March 4, 2009, the Court issued an Opinion and Order (Doc. 131) and final judgment (Document 132) dismissing Sheppard's petition. Adopting the Magistrate Judge's recommended disposition, the Court found that sub-claim (6) was procedurally defaulted "[f]or the reasons set forth by the Magistrate Judge and because Petitioner did not object." Also, in declining to certify the Ninth Ground for appeal, the Court again noted Sheppard's failure to object to the Magistrate Judge's recommended denial of the claim. Opinion and Order (Doc. 131), pages 66, 67, PAGEID#s 677, 678. On September 13, 2011, the U.S. Court of Appeals for the Sixth Circuit affirmed this Court's judgment. *Sheppard v. Bagley*, 657 F.3d 338 (6th Cir. 2011). On June 11, 2012, the Supreme Court of the United States denied Sheppard's petition for a writ of certiorari. *Sheppard v. Robinson*, __ U.S. __, 2012 U.S. LEXIS 4312.

On June 15, 2012, Sheppard filed with this Court a "Motion For Relief From Judgment Under Rule 60 To Allow Reconsideration of One Portion Of Ground For Relief Nine In Light Of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), And Motion For Entry Of An Indicative Ruling From The District Court In Accordance With Rule 62.1."

Argument in Opposition

Assuming solely for the purposes of argument that a motion under Rule 60(b) may be used to correct an allegedly erroneous finding that a claim asserted in a first habeas corpus petition is procedurally defaulted, Sheppard cannot satisfy the requirements of *Martinez v. Ryan*, __ U.S. __, 132 S. Ct. 1309 (2012).

Rule 60(b) applies in § 2254 habeas proceedings only "to the extent that [it is] not inconsistent with" applicable federal statutes and rules. *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005), citing 28 U.S.C. § 2254 Rule 11, Fed. Rule Civ. Proc. 81(a)(2). The Supreme Court of the United States has not addressed directly whether a motion under Civil Rule 60(b) may be

used to correct an allegedly erroneous finding that a claim asserted in a first habeas corpus petition is procedurally defaulted. See *Gonzalez v. Crosby*, *supra*, 545 U.S. at 532, n. 4 (suggesting in dicta that a motion under Rule 60(b), which asserts that a claim in a previous habeas corpus petition was erroneously found to be procedurally defaulted, does not present a claim “on the merits” for the purposes of 28 U.S.C. § 2244(b)).

In *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012), the Supreme Court of the United States held:

[W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. Cf. *Miller-El v. Cockrell*, 537 U. S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (describing standards for certificates of appealability to issue).

Martinez v. Ryan, *supra*, 132 S. Ct. at 1318-1319.

In *Coleman v. Thompson*, 501 U. S. 722, 753-754 (1991), the Supreme Court had previously held that the failure of an attorney to present a claim of constitutional error to the state courts is not “cause” to excuse the default unless the failure itself constituted a violation of the petitioner’s constitutional right to the effective assistance of counsel. Thus, where the first available opportunity to present a claim is in state post-conviction, *Coleman* suggested that this may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings. In *Ryan v. Martinez*, the Court did not find it necessary “to resolve whether that exception exists as a constitutional matter. The precise question here is whether ineffective

assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding.” *Martinez v. Ryan, supra*, 132 S. Ct. at 1315. In recognizing an exception to *Coleman*, the Supreme Court ultimately and emphatically limited that exception to the specific circumstances presented. “Our holding here addresses only the constitutional claims presented in this case, where the State barred the defendant from raising the claims on direct appeal.” *Id.* at 1320.

For the reasons explained below, assuming solely for the sake of argument that it is procedurally permissible, Sheppard’s Rule 60(b) motion is wholly without merit.

First, Sheppard’s ineffective assistance of trial counsel claim on its face falls outside the limited exception recognized by *Martinez v. Ryan*. Sub-claim (6) of the Ninth Ground is based on trial counsel’s alleged failure to present evidence to show that Sheppard was prejudiced by the improper conduct of Juror Fox. Sheppard’s trial counsel raised Juror Fox’s alleged misconduct via a motion for new trial, which was denied by the trial court. The evidence in support of that motion – or lack thereof – was apparent on the record. Sheppard was represented by new counsel on appeal. *Sheppard therefore was required to raise the claim on direct appeal.* “In Ohio, *res judicata* has long been held to bar consideration of constitutional claims in post-conviction proceedings brought under Ohio Rev. Code Ann. section 2953.21 when those claims have already been or could have been fully litigated either before judgment or on direct appeal from that judgment. “ *Monzo v. Edwards*, 281 F.3d 568, 576 (6th Cir. 2002), citing *State v. Perry*, 10 Ohio St. 2d 175, 226 N.E.2d 104, 105-06 (Ohio 1967). “It is also settled that *res judicata* applies when a defendant who is represented by new counsel on direct appeal fails to raise the issue of ineffective assistance of trial counsel, and the issue could fairly have been determined without resort to evidence outside the record.” *Id.* at 576-577, citing *State v. Cole*, 2

Ohio St. 3d 112, 443 N.E.2d 169, 170 (Ohio 1982). In other words, the limited exception recognized in *Ryan v. Martinez* where the State barred the defendant from raising a claim of ineffective trial counsel on direct appeal by its plain terms does not apply to the specific claim presented by Sheppard.

In moving for relief under Rule 60(b), Sheppard argues that evidence outside the record was required to show trial counsel's alleged ineffectiveness and that therefore his claim could and should have been raised in post-conviction. Motion (Doc. 150), PAGEID# 918. But for the reasons noted above, that is not the case. Moreover, Sheppard previously argued that because it related to a motion for new trial, trial counsel's alleged ineffectiveness could *not* be raised in state post-conviction. Merit Brief / Traverse (Doc. 89), PAGEID# 124 ("*State v. Walden*, 19 Ohio App. 3d (141) (1984) establishes that a claim presented on a motion for new trial may not be heard on a post-conviction claim in the state of Ohio. See DKT 53, Dec. & Or. Denying Renw. Motion to Call Smalldon, at 7."). Thus, the conclusion is inescapable that in order to "fit" his case into *Martinez v. Ryan*, Sheppard now advances a legal argument diametrically opposed to the argument he previously made to the Court.

Sheppard argues in the alternative that his appellate counsel was constitutionally ineffective for not presenting on direct appeal the claim that trial counsel was ineffective in not further supporting the motion for new trial. It is well-established that ineffective assistance of appellate counsel cannot establish "cause" to excuse the failure to present a claim on direct appeal if the appellate ineffectiveness claim itself is procedurally defaulted. *See Edwards v. Carpenter*, 529 U. S. 446, 450-451 (2000) ("Petitioner contends that the Sixth Circuit erred in failing to recognize that a procedurally defaulted ineffective-assistance-of-counsel claim can serve as cause to excuse the procedural default of another habeas claim only if the habeas

petitioner can satisfy the 'cause and prejudice' standard with respect to the ineffective-assistance claim itself. We agree.”). Sheppard concedes that he did not present this particular claim of appellate ineffectiveness in his application to reopen his direct appeal, Ohio’s procedure for challenging the effectiveness of counsel on direct appeal. According to Sheppard, *Martinez v. Ryan* can be extended to allow the ineffectiveness of the counsel who represented him in his proceedings to reopen to establish “cause” for his failure to present to the state courts the allegation of appellate ineffectiveness itself. Then, the ineffectiveness of appellate counsel can in turn excuse his failure to properly present to the state courts the underlying claim of ineffective trial counsel. Motion (Doc. 150), PAGEID#s 919-920.

It should almost go without saying that given the express limitations of *Martinez v. Ryan*, Sheppard’s arguments are wholly mistaken. It is doubtful, to say the least, that *Martinez v. Ryan* was intended to alter the well-established rule of *Edwards v. Carpenter, supra*. See 132 S. Ct. at 1320 (“The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State’s appellate courts.”). Moreover, the concerns which gave rise to *Martinez v. Ryan*’s limited exception obviously are absent here. Sheppard had a Sixth Amendment right to counsel in appealing the trial court’s denial of his motion for a new trial. Thus, assuming that Sheppard defaulted his claim of ineffective assistance of trial counsel by failing to present it on direct appeal, the constitutional ineffectiveness of his appellate counsel could have established “cause” to excuse the default consistent with *Coleman*. Further, Sheppard could have preserved his ineffective assistance of appellate counsel claim for habeas corpus review, e.g., his claim that appellate counsel was

ineffective for not raising trial counsel's alleged ineffectiveness, by simply including it in his application to reopen his direct appeal.

Second, Sheppard's underlying ineffective-assistance-of-trial-counsel claim can hardly be described as substantial or even of arguable merit. Sheppard did not object to the Magistrate Judge's recommended denial of the claim, and, consistent with Sheppard's lack of objection, the Court did not certify the claim for appeal. Opinion and Order (Doc. 131), pages 66, 67, PAGEID#s 677, 678. There remains nothing that calls into question the well-established law relied upon by the Court in holding that Sheppard's claim is procedurally defaulted. On these grounds alone, further review of the claim is not warranted. *Martinez v. Ryan, supra*, 138 S. Ct. at 1318-1319 (referring to standards for certificates of appealability to issue); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981) (establishing rule that party's failure to object to magistrate's report within specified time operates as waiver of appeal). Moreover, if, as Sheppard argues, state post-conviction was the "initial-review collateral proceeding" where his claim should have been raised, it cannot be said that counsel in that proceeding was ineffective under the standards of *Strickland v. Washington*, 466 U. S. 668 (1984). It is not reasonably probable that the trial court would have found testimony presented in post-conviction proceedings years later more accurate or truthful than the testimony given promptly after the trial. See *Sheppard v. Bagley*, 657 F. 3d 338, 344 (6th Cir. 2011) ("And we further note—contrary to a second assumption underlying Sheppard's argument—that there is no reason to think that testimony given seven years after the relevant events is necessarily more accurate or truthful than testimony given promptly after those events.").

In sum, assuming solely for the purposes of argument that a motion under Rule 60(b) may be used to correct an allegedly erroneous finding that a claim asserted in a first habeas

corpus petition is procedurally defaulted, Sheppard cannot satisfy the requirements of *Martinez v. Ryan*.

Therefore, Sheppard's motion should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of DEFENDANTS' MEMORANDUM IN OPPOSITION was filed electronically this 26th day of June, 2012. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Charles L. Wille
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