No. 17-8791

In The

Supreme Court of the United States

OCTOBER TERM 2017

CHARLES RUSSELL RHINES,

Petitioner

v.

STATE OF SOUTH DAKOTA,

Respondent

On Petition For A Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARTY J. JACKLEY, South Dakota Attorney General
PAUL S. SWEDLUND, Assistant Attorney General
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: 605-773-3215
Facsimile: 605-773-4106
paul.swedlund@state.sd.us

Attorneys for Respondent
State of South Dakota

CAPITAL CASE – NO DATE OF EXECUTION SET

QUESTION PRESENTED

There is no genuine question presented by this petition. Rhines' "question presented" was not adjudicated in the state or federal proceedings below. A ruling on the "question presented" would afford Rhines no relief because the "claim" it advances is unexhausted, procedurally defaulted and barred on independent and adequate state (and federal) law grounds. Any ruling on the merits of Rhines' "question presented" would be purely advisory.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED

OTHER CITED AUTHORITIES

STATEMENT OF THE CASE

Charles Russell Rhines was convicted of the March 8, 1992, murder of 22-year-old Donnivan Schaeffer. *State v. Rhines,* 1996 SD 55, ¶¶ 1-3, 548 N.W.2d 415, 424 (*Rhines I*). That night, Donnivan entered the donut shop where he worked after hours to retrieve supplies and caught Rhines burglarizing and robbing the store. *Rhines I,* 1996 SD 55 at ¶ 158, 548 N.W.2d at 451. Rhines incapacitated Donnivan by stabbing him in the abdomen and back. Donnivan dropped to the floor, screaming and writhing in pain. *Rhines I,* 1996 SD 55 at ¶ 158, 548 N.W.2d at 451. Donnivan begged Rhines not to kill him. *Rhines I,* 1996 SD 55 at ¶ 158, 548 N.W.2d at 451. Rhines walked Donnivan to a dingy storeroom in the strip-mall donut shop and set him down on a wooden pallet. *Rhines I,* 1996 SD 55 at ¶ 158, 548 N.W.2d at 451. Rhines locked Donnivan's head between his knees and pounded a hunting knife into the base of Donnivan's skull, partially severing his brain stem. *Rhines I,* 1996 SD 55 at ¶ 158, 548 N.W.2d at 451.

Unaffected by the screams and blood and death, Rhines left the store with his loot to get something to eat at "Perkins. Up on LaCrosse [Street]. Had an order of french fries." Donnivan's body was found later that evening slumped forward on the pallet in a widening pool of his own blood, his hands tied behind his back. *Rhines I,* 1996 SD 55 at ¶ 158, 548 N.W.2d at 451. Donnivan Schaeffer lost his life so Rhines could make off with approximately $1,700 in cash and coins. *Rhines I,* 1996 SD 55 at ¶ 2, 548 N.W.2d at 424.

The jury sentenced Rhines to death. *Rhines I,* 1996 SD 55 at ¶ 3, 548 N.W.2d at 424. The jurors have stated they were moved to a death sentence by the calloused and gruesome nature of the murder and, most of all, by Rhines' bloodcurdling confession, in which he cackles while comparing young Donnivan's death spasms to a beheaded chicken running around a barnyard.

The South Dakota Supreme Court affirmed the conviction and sentence. *Rhines I,* 1996 SD 55 at ¶ 3, 548 N.W.2d at 424.

Rhines petitioned for *habeas corpus* relief in state court, which was denied. *Rhines v. Weber,* 2000 SD 19, 608 N.W.2d 303 (*Rhines II*).

Following lengthy federal post-conviction proceedings not relevant here, Rhines filed a second state petition for *habeas corpus* relief challenging his conviction, sentence and method of execution. The petition was denied and the South Dakota Supreme Court declined to issue a certificate of appealability as to any of the issues raised in his second state *habeas corpus* petition.

Rhines then petitioned for *habeas corpus* relief in the United States District Court for the District of South Dakota. The court denied the petition, which is currently on appeal before the United States Court of Appeals for the 8th Circuit. *Rhines v. Young,* 2016 WL 615421 (D.Ct.S.D.).

Rhines then filed a motion in the South Dakota Supreme Court per SDCL 15-6-60(b), the state's counterpart to Fed.R.Civ.P. 60(b) (hereinafter referenced interchangeably as Rule 60(b)), for relief from the judgment of

conviction in his criminal case, *Rhines I.* Rhines' argued that the racial exception to the no-impeachment rule recently announced in *Pena-Rodriguez v. Colorado,* 137 S.Ct. 855 (2017), also applies to sexual orientation. The South Dakota Supreme Court's unpublished order denying the motion stated that "[a]ssuming, but not deciding, that this appellate court has original jurisdiction to grant relief from a circuit court's final judgment under SDCL 15-6-60(b)(6) based on an alleged change in conditions, and assuming but not deciding that the constitutional rule articulated in *Pena-Rodriguez* is to be retroactively applied, this court declines to apply *Pena-Rodriguez.* It is this court's view that neither appellant's legal theory (stereotypes or animus relating to sexual orientation) nor appellant's threshold factual showing is sufficient to trigger the protections of *Pena-Rodriguez.*" RHINES APPENDIX at 1-2.

Rhines now petitions for a writ of *certiorari* from the denial of his Rule 60(b) motion – though the South Dakota Supreme Court's order is not inconsistent with *Pena-Rodriguez.* The South Dakota Supreme Court, like *Pena-Rodriguez,* simply refused to extend the exception to "[a]ll forms of improper bias," such as bias based on gender, alienage or sexual orientation. *Pena-Rodriguez,* 137 S.Ct. at 869. Thus, Rhines would have this court not merely apply *Pena-Rodriguez* but expand it.

CORRECTIONS OF MISSTATEMENTS

Rhines' question presented, indeed his entire petition, is a gross misstatement because it is glossed to appear as though this case squarely presents the question of whether the constitution compels an exception to Fed.R.Evid. 606 or its state counterpart, SDCL 19-19-606 (hereinafter referenced interchangeably as Rule 606), for homophobic bias. It does not. Rhines' "question presented" was never presented to, or adjudicated by, any court in any proceeding below.

Rhines also misstates several "quotes" attributed to the jurors. Indeed, they are not quotes at all but paraphrasings of statements allegedly made to Rhines' attorneys or their investigators, including a "juror affidavit" signed by Rhines' investigator (not the juror himself) and another bearing the shaky signature of a juror suffering from dementia. Rhines' "quotes" and "affidavits" are not accurate juror statements.

SUMMARY OF ARGUMENT

Rhines' petition for writ of certiorari is an unsuitable vehicle for addressing the "question presented" for numerous reasons:

1. Rhines' "question presented" was never adjudicated below so no evidence of jury bias was ever introduced into the criminal or *habeas corpus* records. Consequently, there is no record for determining if Rhines' circumstances could even satisfy the standards of *Pena-Rodriguez* (assuming it is retroactive and extends to sexual orientation bias).

2. What extra-record "facts" and "affidavits" Rhines offers purporting to show jury bias are unreliably sourced and vigorously disputed.
3. Even were Rhines to prevail on the merits here, there is an independent and adequate state law ground for dismissing Rhines' motion on remand. Rhines appeals from the denial of a *civil* Rule 60(b) motion brought to seek relief from the judgment in his *criminal* case. Since no such relief exists, any ruling on the merits of Rhines' "question presented" would be merely advisory.
4. Even were Rhines to prevail on the merits here, the open question of *Pena-Rodriguez's* retroactivity is an independent ground for dismissal on remand.
5. Due to the advanced procedural posture of this case, a ruling in Rhines' favor would have no practical effect. Rhines has exhausted his state and federal *habeas corpus* remedies without exhausting his jury bias claim. The claim is defaulted and time barred. Rhines has no forum left in which to avail himself of a ruling extending *Pena-Rodriguez* to sexual orientation.

ARGUMENT

1. Rhines' Extra-Record Evidence Of Alleged Jury Bias Is Unreliable And Vigorously Disputed

Rhines' affidavits are inherently unreliable. They were procured by attorneys from the self-styled "Pennsylvania Federal Community Defender's Office" (PFCDO). The PFCDO are not *real* federal attorneys employed by the federal government and accountable to a local federal judicial authority like the

South Dakota Federal Public Defender Office. They pose as "feds" but the PFCDO is, essentially, a private law firm that contracts with the Administrative Office of the United States Courts to serve as appointed counsel to indigent federal defendants through grant funding and private contributions. It functions as a boutique, anti-death penalty law firm.

As detailed in *Commonwealth v. Spotz,* 99 A.3d 866 (Pa. 2014), the PFCDO has exploited its private status – outside of the sort of judicial oversight that generally restrains real federal public defenders from making frivolous claims – "to impede the death penalty to indulge its private political viewpoint," by means that are "simply unethical and improper." *Spotz,* 99 A.3d at 904, 920, Respondent's Appendix at 009.

Here, the PFCDO procured the subject affidavits by ambushing jurors at their homes and "harass[ing]" them about their verdict, specifically asking if they had "changed" their minds or if they would vote "differently" if they were informed that the PFCDO had information that a pejorative term about homosexuals had been uttered by a fellow juror during deliberations – as though the PFCDO had inside information about the deliberations unknown to the jurors who were there. GARLAND AFFIDAVIT at ¶¶ 5, 42, Rhines Appendix at 83, 88. The PFCDO was "rude as hell," subjecting the jurors to "a lot of bad language" while "badgering" them to agree to PFCDO-fabricated falsehoods that a juror had referred to Rhines as a "fucking queer" or "faggot" during

deliberations. GARLAND AFFIDAVIT at ¶¶ 35, 37, 47, Rhines Appendix at 87, 88.[1]

In reality, every juror contacted by the South Dakota Division of Criminal Investigation (DCI) stated consistently and unequivocally that Rhines' homosexuality had absolutely no bearing on their decision to impose a death sentence. GARLAND AFFIDAVIT, Rhines Appendix at 83; GARLAND SUPPLEMENTAL AFFIDAVIT, Rhines Appendix at 90. Juror Cersosimo informed DCI that one juror made a joke that Rhines might like being locked in prison with other men. This "stab at humor" "did not go over well" with the jury and every juror agreed that Rhines' sexual orientation "was not even a consideration" and had nothing to do with their verdict. The juror who made the joke immediately admitted that it was "stupid" and "dumb" to say such a thing and "that was the end of it." No other comments like that were made and Rhines' sexual orientation was not discussed again. GARLAND AFFIDAVIT at ¶ 24, Rhines Appendix at 86. The jurors uniformly report not only that the deliberations were conducted in an "extremely professional" manner but also

---

[1] The PFCDO's tactics appear to be in derogation of both the South Dakota and Pennsylvania versions of Rule of Professional Conduct 3.5(c). It has harassed jurors, it has misrepresented itself as conducting a "federal" investigation into the verdict, it has falsely represented that epithets like "fucking queer" or "faggot" were uttered during deliberations, it has subjected jurors to subtle duress over their verdict, it has suggested that jurors could (and should) "change their minds," and it has implied means by which they could "change their minds" by floating PFCDO-fabricated epithets to jurors hoping they will take the bait. None did. GARLAND AFFIDAVIT at ¶¶ 35, 37, 47, Rhines Appendix at 87, 88. Such tactics do not merely violate professional ethics, they are a conspiracy to obstruct justice by attempting to turn jurors on false pretenses (and a case in point for why contacts with jurors should, as in *Pena-Rodriguez,* occur only "with [a] court's supervision"). *Pena Rodriguez,* 137 S.Ct. at 861.

that Rhines' homosexuality had "[n]ot one iota" of influence on the decision to impose a death sentence. GARLAND AFFIDAVIT at ¶¶ 3, 26, 38, 42, 44, 46, Rhines Appendix at 83, 86, 87, 88.

The PFCDO's assaultive tactics and scurrilous insinuations are no surprise considering the scathing indictment of its ethics practices (or lack thereof) in death penalty cases reported in the *Spotz* opinion. *Spotz* describes in detail the PFCDO's reputation for having an anti-death penalty "agenda beyond mere zealous representation, one which routinely pushes, and in frequent instances . . . far exceeds ethical boundaries." *Spotz,* 99 A.3d at 867, Respondent's Appendix at 009. One can practically turn to any random page of the *Spotz* decision and find judicial condemnation of the PFCDO's "contempt" for the courts, "lack of candor," "scurrilous" tactics, "contemptuous" conduct, "dubious" and "ethically questionable" behavior, "pervasive conduct in causing delay," "obstructionist agenda," penchant for "accusing Pennsylvania courts of incompetence or laziness, their argument unencumbered by concerns for accuracy, honest, and candor," "abuses in briefing," "war on its ethical duty of candor to the court," "extreme conduct and/or misconduct," and "strategy to subvert the proper role of state courts" that is "simply unethical and improper." *Spotz,* 99 A.3d at 867, 871, 872, 875, 876 881, 883, 893, 896, 897, 898 n.21, 899, 900, 901, 902, 903, 911, 915, 920, *passim,* Respondent's Appendix at 009. Indeed, this very court has referred one PFCDO lawyer to state disciplinary authorities for filing an unauthorized petition for writ of *certiorari* in a death

penalty case. REFERRAL ARTICLE, Respondent's Appendix at 066; *Spotz,* 99 A.3d at 877, 913 n. 25, Respondent's Appendix at 009.

Because of its extreme tactics, the PFCDO's affidavits are inherently unreliable. Here, as in *Tharpe v. Sellers,* 138 S.Ct. 545 (2018), there is a significant discrepancy between what the jurors allegedly said to Rhines' lawyers and investigators and what they have said to others. As in *Tharpe,* there is evidence here that the jurors were confronted in their homes by PFCDO lawyers who were "sneaky" about their purpose. SUPPLEMENTAL GARLAND AFFIDAVIT at ¶ 12, Rhines Appendix at 91. In *Tharpe,* defense investigators interviewed a juror while he was drunk on a 12-pack of beer and several shots of whiskey; here the PFCDO procured an affidavit from Juror Keeney, whose wife describes him as having problems with memory and dementia. Not surprisingly, the PFCDO neglected to mention Keeney's condition, which can only mean they knowingly exploited it in procuring his "affidavit" and wished to conceal it. SUPPLEMENTAL GARLAND AFFIDAVIT at ¶ 9, Rhines Appendix at 91. In *Tharpe,* the juror never signed or swore to his "affidavit;" here the PFCDO is similarly attempting to pass off unsworn and unsigned "statements" of Juror Blake written and signed by a PFCDO investigator as a "juror affidavit." BLAKE "AFFIDAVIT," Rhines Appendix at 56.

The PFCDO mendaciously asserts that the jurors have not "recanted" the statements attributed to them by the PFCDO, a self-serving choice of verb that assumes the jurors made the alleged statements in the first place, or made them

with the meaning the PFCDO draws from them. Blake has said that the PFCDO's assertions are "Not true." SUPPLEMENTAL GARLAND AFFIDAVIT at ¶ 6, Rhines Appendix at 91. There is nothing for Cersosimo to "recant." When asked if he voted for a death sentence because Rhines is gay, Keeney adamantly said "No, no, no. No I didn't do that." Keeney's statement certainly repudiates the homophobic inference that the PFCDO draws from the prepositional phrase (inserted *by the PFCDO itself*) "with men" within Keeney's otherwise generic statement that he believed that Rhines should not have been allowed to spend his life in prison. The PFCDO shamelessly exploited Keeney's condition by phrasing his affidavit to give it import and meaning that was not intended or understood by Keeney.

Accordingly, the veracity of any affidavits procured unilaterally by the PFCDO, an organization notorious for its disregard of ethical constraints and "lack of candor," is vigorously disputed. *Spotz,* 99 A.3d at 898 n. 21, 902.

2. Civil Rule 60(b)(6) Cannot Be Used To Set Aside A Criminal Judgment

To reach the merits of Rhines' argument, this court would have to first assume or decide that a Rule 60(b)(6) motion can be used to set aside a criminal judgment, and that an order denying such a facially defective motion on (nominally) constitutional grounds is reviewable. Otherwise, a ruling on the merits of Rhines' claim will simply be advisory.

Neither the rules of criminal or appellate procedure contemplate or authorize use of Rule 60(b) to obtain relief from a criminal judgment. SDCL 15-

6-1/Fed.R.Civ.P. 1 (rules apply only to "suits of a civil nature"); *Dubin v. Real*, 191 Fed.Appx. 528, 530 (9th Cir. 2006)("Rule 60(b) of the Federal Rules of *Civil* Procedure cannot be used to collaterally attack a *criminal* conviction")(emphasis in original); *United States v. Knowles*, 638 Fed.Appx. 977, 980 (11th Cir. 2016); *United States v. Gibson*, 424 Fed.Appx. 461, 465 (6th Cir. 2011).

Even if Rule 60(b) were applicable in a criminal case, the claim was time-barred under the rule. If Rhines' evidence of jury bias was indeed "newly discovered" as he claims, then he had to seek relief pursuant to Rule 60(b)(2). A Rule 60(b)(2) motion must be filed within one year of the judgment, a date long passed in this case. This court has underscored the stringency of Rule 60(b)(2) by holding that the catch-all provision, Rule 60(b)(6), is mutually exclusive of the grounds for relief in other provisions of Rule 60(b). *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 393 (1993)("a party who failed to take timely action due to [newly discovered evidence] may not seek relief more than a year after the judgment by resorting to subsection [60(b)](6)"). Rhines shoehorned his motion into Rule 60(b)(6) because it would have been time-barred if filed as the Rule 60(b)(2) claim that it is.

Also, "relief under Rule 60(b)(6) is available only in 'extraordinary circumstances.'" *Buck v. Davis*, 137 S.Ct. 759, 777-78 (2017). Extraordinary circumstances, warranting Rule 60(b)(6) relief, "'will rarely occur in the *habeas* context.'" *Sheppard v. Robinson*, 807 F.3d 815, 820 (6th Cir. 2015). Even assuming *Pena-Rodriguez* extends to sexual orientation bias, "a change in the

law that would have governed the dispute, had the dispute not already been decided, is not by itself an extraordinary circumstance." *Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc.*, 194 F.3d 922, 925 (8th Cir. 1999); *Gonzalez v. Crosby*, 545 U.S. 524, 538 (2005).

To avoid an advisory ruling, this court would have to assume or decide that civil Rule 60(b) can be used to set aside a criminal judgment, that Rhines' motion properly fell into the Rule 60(b)(6) category rather than Rule 60(b)(2) to avoid being time-barred and that, even if Rhines' motion was properly brought under Rule 60(b)(6), *Pena-Rodriguez* is an "extraordinary circumstance." Such holdings would be contrary to this court's precedent.

3. A Ruling Extending *Pena-Rodriguez* To Homophobic Bias Would Have No Practical Effect In This Case Because Rhines Has Exhausted His State And Federal Appellate And *Habeas Corpus* Remedies Without Ever Raising A Jury Homophobia Claim

Rhines' assertion that *Pena-Rodriguez* applies to him is incorrect for the obvious reason that *Pena-Rodriguez* did not create an exception for alleged homosexual bias. Rather, *Pena-Rodriguez* is narrowly tailored to reach only instances of a conviction based on "egregious and unmistakable" instances of *racial* stereotypes or *racial* animus.

Even assuming *Pena-Rodriguez* broadly covers sexual orientation bias, it would have no practical effect because Rhines has no remaining process by which to avail himself of a favorable ruling on his "question presented." Rhines has exhausted his state and federal appellate and *habeas corpus* processes.

Rhines is presently barred from bringing a successive *habeas corpus* petition under state or federal law because:[2]

- He is beyond the South Dakota 2-year and federal 1-year statutes of limitations. SDCL 21-27-3.3; 28 U.S.C. § 2244(d)(2); and
- He cannot satisfy state and federal criteria for a successive petition because (a) the factual predicate of his jury bias claim is not "new" and (b) his claim does not arise from a new, retroactive constitutional rule. SDCL 21-27-5.1; 28 U.S.C.A. § 2244(b).

a. Rhines Jury Bias Evidence Is Not "New"

No "new evidence" of juror bias exists. In support of a Fed.R.Civ.P. 59(e) motion in his federal *habeas corpus,* Rhines filed two affidavits under seal in the United States District Court for the District of South Dakota which purport to evidence homophobic bias. JUROR B and JUROR J AFFIDAVITS, Docket 323 (Attachments 2 and 10), *Rhines v. Young,* CIV # 00-5020 (D.Ct.S.D.). Those affidavits reflect that jurors had been interviewed about an alleged homophobic comment in September 2015.

---

[2] Even when brought in the proper context of civil *habeas corpus* proceedings, a Rule 60(b) motion that seeks a favorable redetermination on the merits is a successive petition subject to the limitations on successive petitions. *Gonzalez v. Crosby,* 545 U.S. 524, 532 (2005). MEANS, 1 *Postconviction Remedies* § 18:1 at 536 (2016)("[I]f the district court has already adjudicated the petition and entered judgment, any new petition challenging the same judgment may be treated as a second or successive petition governed by 28 U.S.C.A. § 2244(b)"); *Phillips v. United States*, 668 F.3d 433, 435 (7th Cir. 2012)(determining that Rule 60(b) motion constituted a new application for collateral relief subject to second or successive petition restrictions).

Rhines' knowledge of the factual predicate of his jury bias claim goes back even further than September 2015. Indeed, Rhines started asserting "jury bias" practically before the ink was dry on the verdict form 25 years ago. Rhines' legal team, in consultation with Rhines himself, decided to utilize his sexual orientation in mitigation by portraying Rhines as a lost soul marginalized by society's ostracization of homosexuals. *HABEAS CORPUS* TRANSCRIPT at 12/2-9, 92/19-22, 176/5-13, Respondent's Appendix at 068; TRIAL TRANSCRIPT at 2614/5, 2616/25, 2617/3, Respondent's Appendix at 074. Defense counsel laid the ground for this strategy by conducting pointed *voir dire* regarding each prospective juror's attitude about homosexuality. Wayne Gilbert, one of Rhines' trial attorneys, testified in the state *habeas corpus* proceedings that he "viewed the *voir dire* questioning as a way to weed out potential jurors who might be hostile to Rhines because of his sexuality." *HABEAS CORPUS* TRANSCRIPT at 115, 156-157, Respondent's Appendix at 068. All jurors, including those now the target of Rhines' allegations of homophobia, agreed that his sexual orientation had no bearing on the case. *VOIR DIRE* TRANSCRIPTS, Respondent's Appendix at 236.

Nevertheless, Rhines argued on direct appeal that the trial court erred by refusing to appoint a forensic communications expert because he believed "*voir dire* alone [had been] an inadequate method for detecting and eliminating jurors with biases against homosexuality." Rhines also argued that a jury note to the judge inquiring into conditions of confinement for those serving life in prison

"reflected homophobic sentiments that improperly affected jury deliberations." *Rhines I*, 1996 S.D. 55 at ¶ 105, 548 N.W.2d at 442. The South Dakota Supreme Court rejected Rhines' contentions that "the jury considered irrelevant or unfairly prejudicial matters when imposing the death penalty" or that the jury's questions "related to . . . Rhines' sexual orientation." *Rhines I*, 1996 S.D. at ¶ 170 n. 6, 548 N.W.2d at 443. Rhines did not further develop his claim of jury bias for his first state *habeas corpus* claim. *Rhines II*, 2000 S.D. 19, 608 N.W. 2d 303.

Rhines' font of prior knowledge regarding alleged homosexual bias is deeper still. In a pleading filed on September 5, 2017, in Rhines' pending *pro se* complaint challenging the constitutionality of SDCL 21-27-3.3 in state court, Rhines stated that:

> During the plaintiff's [Rhines'] 24-year appeals process he has repeatedly attempted to urge his appointed counsels to interview the plaintiff's criminal trial jurors about a nine (9) question note they sent to the trial court judge during penalty phase deliberations. These questions ranged from the plaintiff's future dangerousness if he were ever placed in a minimum security prison or be allowed work release to what conditions of confinement the plaintiff could expect to incur if the [plaintiff] had been sentenced to life in prison rather than death, to whether or not the plaintiff would be allowed to have a cell-mate or associate with other inmates. During *voir dire* the jurors were informed that the plaintiff is a homosexual and each potential juror indicated this would play no part in their deliberations. However, the list of questions sent to the trial court judge during penalty phase deliberations seems to counterindicate those statements by these jurors and, subsequently the plaintiff urged each of his appointed counsels to interview these jurors about what they had meant with the 9 questions. During the nearly 23 ensuing years after trial and through 16 or so appointed counsels, none would interview the jury, *until 2015* when counsel from outside the area

> was appointed by the Honorable Karen E. Schreier as Learned Counsel for the Plaintiff's federal habeas petition. In *September 2015* Learned Counsel Carol R. Camp and investigator Mary K. Poirer began interviewing former jurors and discovered that apparently most of them had viewed the oaths they took in *voir dire* as merely a suggestion and the promise not to use the Plaintiff's homosexuality against him as being null and void.[3]

REPLY TO "LAST WORD," *Rhines v. South Dakota,* CIV # 14-979 (2nd Jud.Cir.S.D.), Respondent's Appendix at 088-089 (emphasis added).

Despite his (self-serving) suspicions about the jury's alleged dishonesty in *voir dire* and partiality in deliberations, Rhines failed to raise any such claims on direct appeal or in his state or federal *habeas corpus* actions. Since Rhines' own words and the record as a whole establish that Rhines was aware of the factual predicate of his jury bias claim as long as 25 years ago but no later than September 2015, he cannot satisfy the "newly discovered evidence" criterion for a successive petition.

Indeed, in March of 2016 Rhines brought an identical jury bias claim in a Fed.R.Civ.P. 59(e) motion after the federal court denied *habeas corpus* relief. RULE 59(e) MOTION, Docket 323, *Rhines v. Young,* CIV # 00-5020 (D.Ct.S.D.). The district court denied the motion in part because "Rhines ha[d] had roughly

---

[3] Even if his trial or state *habeas corpus* counsel had refused to pursue the matter as he claims, Rhines could have filed a *pro se* petition alleging the claim. Rhines' *pro se* complaint in state court demonstrates that he is capable of bypassing his own lawyers and preparing and filing *pro se* pleadings. SUMMONS/COMPLAINT, *Rhines v. South Dakota,* CIV # 14-979 (2nd Jud.Cir.S.D.), Respondent's Appendix at 091. Indeed, other South Dakota inmates have obtained relief from *habeas corpus* petitions filed *pro se*. *Hughbanks v. Dooley*, 2016 S.D. 76, 887 N.W.2d 319. Despite his knowledge of the factual predicate for a "jury bias" claim for in excess of 20 years, Rhines did nothing about it.

twenty years to develop the evidence he now offers. In fact, Rhines faults each of his attorneys for not developing this evidence sooner. But Rhines' allegations undermine the foundation of his motion. For Rhines to prevail, he must show that this evidence *could not have* been discovered earlier *despite* having exercised reasonable diligence to obtain it. Rhines, however, asserts that the evidence *should have* been discovered earlier *if* his attorneys were diligent. Rhines' contention is the inverse of what Rule 60(b)(2) is designed to address. He makes no showing that he had been unable to uncover the newly discovered evidence prior to the court's summary judgment ruling. Likewise, the decades-long period of delay while the evidence was obtainable indicates a lack of diligence. Because this evidence was available to Rhines, it should have been presented prior to the entry of judgment." ORDER DENYING RULE 59(e) MOTION, Docket 348, *Rhines v. Young,* CIV # 00-5020 (D.Ct.S.D.), Respondent's Appendix at 119-120.

To the extent Rhines argues that Rule 606 was an insurmountable obstacle to developing jury bias evidence, he exaggerates . . . and *Pena-Rodriguez* itself is the proof. Rule 606 prohibits only the introduction of juror testimony or affidavits for the purpose "an inquiry into the validity of a verdict." Rule 606 has *never* prohibited the introduction of juror testimony or affidavits for the purpose of challenging the constitutionality of the rule itself. The fact that Pena-Rodriguez succeeded in doing so in regard to racial bias proves that this avenue of exploring homophobic bias required no "change in the law." And unlike Pena-

Rodriguez, Rhines did not timely challenge the constitutionality of Rule 606 as a means of investigating and exposing alleged jury bias against him.

Per *Smith v. Phillips*, 455 U.S. 209, 215 (1982), "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." According to *Smith*:

> The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

Smith, 455 U.S. at 217, 230. Like Pena-Rodriguez, Rhines could have sought relief from his state criminal judgment by filing:

- A motion for a new trial per SDCL 23A-29-1 within 10 days of the entry of judgment on the grounds of "irregularity in the proceedings of the . . . jury," "[m]isconduct by the jury," and "newly-discovered evidence," *Smith* and *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 556 (1984); or
- A motion for relief from judgment per SDCL 23A-27-4.1 within one year of the judgment.

Rhines did not file either motion, though the jury note so central to Rhines' jury bias claim was known to him even before his sentence was delivered. If the note caused Rhines to genuinely doubt the jury's sincerity[4] or impartiality he could

[4] Prospective jurors are presumed to be impartial and the answers they give in *voir dire* truthful. *Irvin v. Dowd,* 366 U.S. 717, 723 (1961).

have conducted a post-trial investigation into the jury's alleged partiality and filed a motion for a new trial or for relief from judgment, or mounted a facial attack on Rule 606 itself. *Pena-Rodriguez,* 137 S.Ct. at 862. Rhines is now well beyond his window for such relief, making any ruling on his petition merely advisory.

And though *Tharpe* shows that *habeas corpus* courts have, notwithstanding Rule 606, taken juror testimony on racial bias in capital cases, unlike Tharpe, Rhines did not develop his jury bias claim in either his first or second state *habeas corpus* proceedings. *Tharpe v. Warden,* CIV # 10-433 (D.Ct.M.D.Ga. 2017) (unpublished), Respondent's Appendix at 133, 145, 146. Again, Rhines is now barred from any *habeas corpus* avenues of relief, making any ruling on the merits of his petition merely advisory.

b. A Rule 606 Exception Is Not New

Rhines asserts that *Pena-Rodriguez's* exception is a "new" constitutional rule that allows him to bring a successive petition per SDCL 21-27-5.1. But *Pena-Rodriguez* itself takes pains to point out that its exception is not exactly new, observing that "the *Reid* and *McDonald* cases [had] noted the possibility of an exception to the [no-impeachment] rule [for] the 'gravest and most important cases.'" *United States v. Reid,* 13 L.Ed. 1023 (1852); *McDonald v. Pless,* 238 U.S. 264 (1915). If, as Rhines contends, imposition of a death sentence (allegedly) on the ground of a defendant's sexual orientation violates "the plainest principles of

justice," *McDonald* postulated a general exception for such occasions over 100 years ago. *McDonald,* 238 U.S. at 268.

Indeed, nothing proves that no "new" rule was needed to mount an impeachment challenge quite like the fact that Rhines' counsel were out drumming up juror affidavits two years before this court even issued the *Pena-Rodriguez* decision. JUROR B AFFIDAVIT at ¶ 14 and JUROR J AFFIDAVIT at ¶ 10, Docket 323 (Attachments 2 and 10), *Rhines v. Young,* CIV # 00-5020 (D.Ct.S.D.). Since *Pena-Rodriguez* did not create a new exception for sexual orientation, and since the general exception of *McDonald* was "previously available" to Rhines for the purpose of impeaching his sentence on the grounds of alleged homosexual bias, Rhines cannot meet the "new constitutional rule" criteria for a successive petition of either SDCL 21-27-5.1 or 28 U.S.C.A. § 2244(b).

c. *Pena-Rodriguez* Is Not Retroactively Applicable

Even assuming *Pena-Rodriguez* created a "new" constitutional rule as applied to Rhines, this court would have to assume or decide that it has retroactive effect for Rhines to meet the criteria for a successive petition under SDCL 21-27-5.1 and 28 U.S.C.A. § 2244(b). Otherwise, any ruling in this case would be merely advisory. The test for determining retroactivity is set forth in *Teague v. Lane,* 489 U.S. 288 (1989). As described in *Montgomery v. Louisiana,* 136 S.Ct. 718, 728 (2016):

> First, courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules include "rules forbidding

> criminal punishment of certain primary conduct," as well as "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense" . . . Second, courts, must give retroactive effect to new "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceedings.

"Such a rule must be one 'without which the likelihood of an accurate conviction is seriously diminished.'" *Teague,* 489 U.S. at 313. A "watershed" rule must not just improve the accuracy of a trial, it must function as an "absolute prerequisite to fundamental fairness." *Teague,* 489 U.S. at 313; *Sawyer v. Smith,* 497 U.S. 227, 243 (1990); MEANS, *Federal Habeas Manual: A Guide to Federal Habeas Corpus Litigation,* § 7:39 (2017)(a watershed "rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding").

To underscore the rarity of "watershed" rules, this court has invoked the sweeping rule of *Gideon v. Wainwright,* 372 U.S. 335 (1963), as the "paradigmatic example" of the "primacy and centrality" a new rule must have to concepts of procedural fairness and accuracy in order to qualify as "watershed." *Gray v. Netherland,* 518 U.S. 152, 170 (1996); MEANS, *Federal Habeas* at § 7:39. This court has repeatedly remarked that it is "unlikely" for many rules with the "primacy and centrality" of *Gideon* to emerge from a criminal justice system already so well ordered around concepts of due process and fairness as America's. MEANS, *Federal Habeas* at § 7:39. The "watershed" exception is, thus, so "extremely narrow" that in the years since *Teague* this court has

repeatedly rejected claims of new rules meeting the exception even in capital cases.[5] MEANS, *Federal Habeas* at § 7:39.

Pena-Rodriguez does not meet the substantive rule exception of *Teague* because it does not forbid punishment for certain conduct or forbid a category of punishment for a class of defendants. Nor does it meet the "watershed rule" exception per the language and reasoning of the *Pena-Rodriguez* decision itself:

a. In *Pena-Rodriguez,* a defendant was tried on a charge of sexual assault. During deliberations a juror stated that he believed the defendant was guilty "because he's Mexican." *Pena-Rodriguez*, 137 S.Ct. at 862. The juror told other jurors that, from his experience as a police officer, the "sense of entitlement" he had observed in Mexican men was behind their being physically controlling of and aggressive toward women and young girls. The juror also stated that he believed the defendant's alibi witness was not credible because he was "an illegal," *i.e.* Mexican. *With the court's supervision,* Pena-Rodriguez obtained affidavits from other jurors describing these statements. *Pena-Rodriguez*, 137 S.Ct. at 861. The record revealed that in *voir dire* Pena-Rodriguez's counsel had asked only "generic questions about juror impartiality" without asking any specific

---

[5] *Beard v. Banks,* 542 U.S. 406 (2004)(declining to find *Mills* rule re: jury instructions in capital cases a "watershed" rule); *Schriro v. Summerlin,* 542 U.S. 348 (2004)(declining to find *Ring/Apprendi* rule "watershed"); *Lambrix v. Singletary,* 520 U.S. 518 (1997); *Gray v. Netherland,* 518 U.S. 152, 170 (1996); *Graham v. Collins,* 506 U.S. 461 (1993); *Sawyer v. Smith,* 497 U.S. 227 (1990); *Saffle v. Parks,* 494 U.S. 484 (1990); *Butler v. McKellar,* 494 U.S. 407 (1990); see also *Whorton v. Bockting,* 549 U.S. 406 (2007)(declining to find *Crawford* rule a "watershed" rule in child sexual assault case).

questions regarding any juror's attitude about race generally or Mexicans in particular. *Pena-Rodriguez*, 137 S.Ct. at 861, 869.

b. This court "granted *certiorari* to decide whether there is a constitutional exception to [Rule 606] for instances of racial bias." *Pena-Rodriguez*, 137 S.Ct. at 863. *Pena-Rodriguez* began by examining the history of many "stark and unapologetic" examples of "race-motivated outcomes" in jury cases in the United States. *Pena-Rodriguez*, 137 S.Ct. at 867. Despite the country's aspirations to "purge racial prejudice from the administration of justice" – dating at least from amendments to the constitution in the wake of the Civil War – the court found that "race-motivated outcomes" of trials were a "recurring evil" that "implicate[d] unique historical, constitutional and institutional concerns."

c. From the "distinct" role race has historically played in thwarting aspirations of equality in America,[6] *Pena-Rodriguez* fashioned a narrow exception to Rule 606 for admission of "clear and explicit statements indicating that racial animus was a significant motivating factor" in the jury's verdict. *Pena-Rodriguez*, 137 S.Ct. at 861.

---

[6] See *Young v. Davis*, 860 F.3d 318, 333 (5th Cir. 2017)("The [Supreme] Court's emphasis on our long struggle against racial prejudice, and the 'constitutional and institutional concerns' attending that history, evince its constrained relaxing of the traditionally inviolate [no-impeachment] rule."); *United States v. Robinson*, 2017 WL 4325019, *6-7 (6th Cir. 2017)(refusing to extend *Pena-Rodriguez* to racial comments made by jury foreperson to two African-American jurors who initially had doubts regarding defendant's guilt).

The express limitation of the *Pena-Rodriguez* exception to the "distinct" issue of race in and of itself proves that it is no "watershed" rule of any application here:

a. Sexual orientation is not an immutable characteristic like race or even gender. Rhines could have tried his defense without the jury knowing of his homosexuality and without using his homosexuality as a mitigating circumstance. A black or Mexican defendant's race is immutable to the eyes of a jury.

b. Sexual orientation does not implicate the same "unique historical, constitutional and institutional concerns" as race. American history is not replete with "stark and unapologetic" anti-homosexual jury verdicts. No civil war has been fought over it. No nationwide pogrom has been perpetrated for the enslavement or eradication of homosexuals. Homosexuals have not served as scapegoats for pressing socio-economic problems with consequences felt by the population at large – such as loss of jobs or rising incidents of street crime. No politician has ever proposed constructing a wall to keep homosexuals out of the country. The acceptance of equality in regard to non-racial distinctions has occurred largely peaceably and with comparatively greatly less conflict.

c. *Pena-Rodriguez's* premise that race has played a "unique" role in social upheaval and violence in the nation's history is corroborated by the fact that sexual orientation is not afforded the heightened protections

extended to race in the nation's civil rights laws. For example, employment discrimination based on sexual orientation is not actionable under Title VII of the Civil Rights Act. *Evans v. Georgia Regional Hospital*, 850 F.3d 1248, 1255 (11th Cir. 2017).[7] And, unlike race, classifications based on sexual orientation are not subject to strict scrutiny. *Romer v. Evans*, 517 U.S. 620, 631-33 (1996)(applying rational basis not strict scrutiny to law alleged to discriminate on basis of sexual orientation).[8]

d. The *Pena-Rodriguez* court was hardly oblivious to other potential forms of improper bias in jury deliberations. The decision was expressly cognizant

---

[7] See also *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 293 (3rd Cir. 2009)(claim for sexual orientation discrimination is not cognizable under Title VII); *Kiley v. American Soc. For Prevention of Cruelty to Animals*, 296 Fed.Appx. 107 (2nd Cir. 2008)(discrimination based on sexual orientation is not prohibited by Title VII); *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 762 (6th Cir. 2006)("sexual orientation is not a prohibited basis for discriminatory acts under Title VII").

[8] See also *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006)(noting homosexuality is not suspect classification); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004)(noting that neither the Supreme Court nor the circuit has recognize sexual orientation as a suspect class); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 n. 16 (11th Cir. 2004)(noting that all circuits that have addressed issue have held homosexuals are not a suspect class); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997)(homosexuals are not a suspect class); *Habozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996)(noting that in the military context the Seventh Circuit has subjected homosexual discrimination to rational basis scrutiny); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996)(held military personnel that are homosexual are not a suspect class); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed.Cir. 1989)(held homosexuality is neither suspect or quasi-suspect class); *Padula v. Webster*, 822 F.2d 97, 101-04 (D.C.Cir. 1987)(held homosexuality is neither suspect or quasi-suspect class); *Davis v. Prison Health Services*, 679 F.3d 433, 438 (6th Cir. 2012)(prisoner's equal protection challenge grounded on anti-gay animus subject to rational basis review).

that "[a]ll forms of improper bias pose challenges to the trial process," but it singled out race and race alone for the "added precaution" of a Rule 606 exception. *Pena-Rodriguez*, 137 S.Ct. at 869. A broader exception addressed to "[a]ll forms of improper bias" would have necessitated a declaration that Rule 606 is wholly unconstitutional, something *Pena-Rodriguez* did not do.

e. Having expressly declined to fashion an exception for "[a]ll forms of improper bias," *Pena-Rodriguez* is not a "watershed" ruling as applied to Rhines. By singling out race, the *Pena-Rodriguez* court implicitly recognized that a similar exception in regard to other "forms of improper bias" is *not* an "absolute prerequisite to fundamental fairness" in our system of justice or a rule "without which the likelihood of an accurate conviction is seriously diminished." *Teague,* 489 U.S. at 313; *Sawyer,* 497 U.S. at 243.

Consistent with these observations, "no reasonable jurist could argue that *Pena-Rodriguez* applies retroactively on collateral review." *Tharpe,* 138 S.Ct. at 551. (Thomas dissenting).

Finally, even if *Pena-Rodriguez* is a watershed rule as to race, an argument for extending the *Pena-Rodriguez* rule into new areas does not satisfy the criterion of a "new constitutional rule" for a successive petition (or Rule 60(b) motion). A successive petition "cannot be used as a vehicle to create constitutional rules of criminal procedure not dictated by existing precedent."

Robinson v. Wilson, 2001 WL 289884 (D.Ct.N.D.Ill.); *Candelario v. Warden,* 592 Fed.Appx. 784 (11th Cir. 2014); *Echols v. Ricci,* 2011 WL 3678821, *33-34 (D.Ct.N.J.)("clearly established" Supreme Court law for purposes of *habeas corpus* review is the holding of a case rather than an extension of the case to analogous circumstances that may follow from the reasoning of an opinion).

d. Regardless Of Whether Rhines' Jury Bias Evidence Is New, His Jury Bias Claim Is Time Barred

Even if Rhines' evidence of alleged jury bias were new, his claim is time-barred by SDCL 21-27-3.3's two-year statute of limitations. Because Rhines was aware of the factual predicate for his jury bias claim at the time of the jury's sentencing deliberations, Rhines had until July 1, 2014, to file any *habeas corpus* claim he may have had. *Hughbanks v. Dooley,* 2016 S.D. 76, ¶ 16, 887 N.W.2d 319, 324. He did not. Even if the factual predicate for a jury bias claim was not known to Rhines until September 2015, he did not timely file a successive petition before the end of September 2017. Rhines is accordingly barred from further state, and thus federal, *habeas corpus* relief because his jury bias claim is barred, unexhausted and procedurally defaulted.

4. Even If *Pena-Rodriguez* Extends To Homophobic Bias And Is Retroactive, Rhines' Evidence Does Not Satisfy The Exception

Even if *Pena-Rodriguez* did apply to claims of alleged homosexual bias, Rhines' proffered evidence does not satisfy the exception.

a. Unlike in *Pena-Rodriguez, voir dire* in Rhines' case went beyond generic questions about impartiality to include specific questions regarding any potential juror's homosexual bias. *VOIR DIRE* TRANSCRIPTS,

Respondent's Appendix at 236. The fact that all jurors specifically responded that they would not hold Rhines' homosexuality against him significantly decreases the potential that it was a significant motivating factor in their deliberations. *VOIR DIRE* TRANSCRIPTS, Respondent's Appendix at 236.

b. *Pena-Rodriguez* requires "clear and explicit statements indicating that racial animus was a significant motivating factor" in the jury's verdict. *Pena-Rodriguez*, 137 S.Ct. at 861.

c. Unlike in *Pena-Rodriguez*, the alleged juror comments here are not clear and explicit expressions of animus toward homosexuals. At best, they fall into the category of an "offhand comment" that one might expect to hear in a case where Rhines' homosexuality was proffered by his defense as a mitigating circumstance.[9] *Pena-Rodriguez*, 137 S.Ct. at 869 (not every "offhand comment indicating racial bias" will justify exception to Rule 606).

---

[9] Arguably, one finds proof that Rhines' counsel succeeded in empaneling a jury that was not phased by, or even convinced of, Rhines' homosexuality in the jury's question to the judge asking whether Rhines would be "allowed to marry or have conjugal visits" if sentenced to life. As remote as Rhines' trial was from the sea change in American society's acceptance of homosexuality that took hold during the decade after Rhines' trial, the concept of gay marriage was remoter still. What jury conceived of gay marriage in 1992? The jurors' question inherently suggests that they did not believe Rhines' homosexual mitigation narrative if they were concerned that he might marry and have conjugal visits with a woman. And the fact that the jurors asked about Rhines' access to conjugal visits with visitors from *outside* the prison walls also belies Rhines' assertion that they believed prison would afford him a harem of sexual companions.

d. Unlike in *Pena-Rodriguez* and *Tharpe,* the PFCDO's questioning of the jurors was not conducted "with the court's supervision" or "in the presence of the court." *Pena Rodriguez,* 137 S.Ct. at 861; *Tharpe v. Warden,* CIV 10-433 (D.Ct.M.D.Ga. 2017)(unpublished), Respondent's Appendix at 133, 145, 146. This left the PFCDO free to ambush, harass and badger jurors, engage in suggestive interview techniques, put words in the jurors' mouths, lay a guilt trip on them for imposing a death sentence, insinuate a scheme by which jurors could change their minds by following the PFCDO's lead, engage in selective reporting and presentation and generally subvert the proper administration of justice in all the ways for which the PFCDO is famous. *Spotz,* 99 A.3d at 867, *passim*, Respondent's Appendix at 009. The Cersosimo and Keeney affidavits were self-evidently not written out by the affiants themselves. SUPPLEMENTAL GARLAND AFFIDAVIT at ¶ 13, Rhines Appendix at 92. There are obvious differences in the handwriting in the heading and body of the affidavits and the handwriting of the signatures at the bottom of the page – particularly Keeney's shaky signature and the straight, precise handwriting in the heading and body of the affidavit. Use of the lawyer acronym for life without parole (LWOP) in the body of the Cersosimo affidavit proves that it was written by a PFCDO interviewer. Not phrasing the affidavits in the jurors' own words allowed the PFCDO to lace the affidavits with loaded words they could later spin with

homophobic meaning not intended by the affiants, *e.g.* insertion of the prepositional phrase "with men" into Keeney's affidavit or failing to report that Cersosimo characterized the comment about Rhines being with men in prison as a "stab at humor" that was roundly condemned by the other jurors and promptly recanted by the juror who said it. It is noteworthy that when Cersosimo was interviewed by the PFCDO's predecessor counsel in 2015 and 2016, the resulting affidavit contained no statements of a homophobic nature whereas the PFCDO's later affidavit does, starkly illustrating how the PFCDO is putting words in juror's mouths and spinning their meaning into a false narrative of homophobia. Compare JUROR N (Cersosimo) AFFIDAVIT, Docket 340 (Attachment 2), *Rhines v. Young,* CIV # 00-5020 (D.Ct.S.D.) with CERSOSIMO AFFIDAVIT, Rhines Appendix at 55. The Blake "affidavit" is not even signed by Blake. The absence of court supervision of the PFCDO's methods of questioning as occurred in *Pena-Rodriguez* and *Tharpe*, and the obvious selectivity and spin brought to what the PFCDO reports, renders the affidavits anything but clear and explicit expressions of animus against homosexuals.

e. This is especially true in the case of Juror Keeney, who suffers from memory impairments and dementia. SUPPLEMENTAL GARLAND AFFIDAVIT at ¶ 9, Rhines Appendix at 91. Both Keeney and Blake deny the words the PFCDO has put into their mouths, and the bias the PFCDO ascribes to their thoughts. The PFCDO clearly did not actually talk to

Bennett Blake or they would have singled out a different juror to accuse of homophobic bias than one who is a lifelong democrat and whose deceased brother was gay. *VOIR DIRE* TRANSCRIPTS, Respondent's Appendix at 264; SUPPLEMENTAL GARLAND AFFIDAVIT at ¶ 6, Rhines Appendix at 91. Affidavits procured unilaterally by the PFCDO, an organization notorious for its disregard of ethical constraints and "lack of candor," are anything but clear and explicit expressions of homosexual bias.

f. Even if taken at face value, Rhines' affidavits are conspicuously devoid of any evidence that the alleged statements were "a significant motivating factor" in the sentence. *Pena-Rodriguez,* 137 S.Ct. at 869. Juror Cersosimo kept a daily journal of the deliberations and it does not reflect that Rhines' sexual orientation played any role in the deliberations. CERSOSIMO JOURNAL, Respondent's Appendix at 155. Whereas Pena-Rodriguez demonstrated that at least one juror voted to find him guilty "because he's Mexican," no such causal evidence has been proffered in Rhines' affidavits. Rhines' affidavits do not reflect that the jurors were asked if they or anyone else voted for a death sentence "because" Rhines is a homosexual – probably because Rhines knows full well the answer is no. Rather than ask the operative question, Rhines expects this court simply to *infer* motive from some alleged offhand comment(s) unreliably reported by the PFCDO. *Pena-Rodriguez* requires more than lawyerly insinuation

for proof of *significant* motivation; it requires "clear and explicit" evidence, which is lacking.

CONCLUSION

As in *Ballard,* the PFCDO has again brought its brand of abjectly frivolous litigation to this court's door. It hardly matters if the South Dakota Supreme Court misread *Pena-Rodriguez* or not because, procedurally, a Rule 60(b) motion is not a mechanism for overturning a criminal judgment. Even a favorable ruling on the merits extending *Pena-Rodriguez* to sexual orientation would have no practical effect because Rhines' jury bias claim is unexhausted and procedurally defaulted in the state and federal *habeas corpus* courts. Rhines has exhausted his state and federal *habeas corpus* remedies and is time barred from bringing further proceedings. The PFCDO is petitioning for an advisory ruling.

Janet Keeney spoke for the entire jury in calling Rhines' claim of homophobic bias a "bunch of nonsense." SUPPLEMENTAL GARLAND AFFIDAVIT at ¶ 10, Rhines Appendix at 91. Juror Cersosimo's journal describes the work of a conscientious jury appreciative of the gravity of their decision. CERSOSIMO JOURNAL at 000030, 000044, 000052, Respondent's Appendix at 155. She describes a jury sophisticated enough to agree that the emotions of Donnivan Schaeffer's or Rhines' family for death or life would not drive the sentencing determination. CERSOSIMO JOURNAL at 000067, Respondent's Appendix at 155. She describes a jury whose sentencing determination was instead driven by a concern to deliver "justice for Donnivan" and the need "to

remember all the rights and dreams he had that Rhines so selfishly took from him." CERSOSIMO JOURNAL at 000067, Respondent's Appendix at 155. She describes a jury sophisticated enough to agree that none of them would speak to the press because "a few words could not begin to describe the magnitude of [their] experience" as jurors. CERSOSIMO JOURNAL at 000069, Respondent's Appendix at 155. She describes a jury animated by the principle that "No one should die the way Donnivan did." CERSOSIMO JOURNAL at 000054, Respondent's Appendix at 155. She describes a jury moved by rehearing the tape of Rhines' confession, with his "jarring laughter" about Donnivan's death spasms, from an 8-4 split in favor of death to unanimous in the decision. CERSOSIMO JOURNAL at 000066-67, Respondent's Appendix at 155; CERSOSIMO AFFIDAVIT, Rhines Appendix at 55; SUPPLEMENTAL GARLAND AFFIDAVIT at ¶ 48, Rhines Appendix at 89 (Juror Rohde describing how Rhines laughed because stabbing Donnivan in the base of his skull did not kill him right away like he thought it would). She describes a jury focused on all the right and humane concerns of a jury charged with such a consequential decision. Since Cersosimo was so clearly committed to not judging Rhines based on his homosexuality, one would expect her journal to faithfully document any overt homophobia or homophobic undercurrent in the jury's deliberations. But no mention of juror homophobia of any kind is found in Cersosimo's journal. Despite the slanders of the jury fabricated by Rhines' overzealous lawyers,

Cersosimo's journal is contemporaneous proof, unadulterated by PFCDO scheming, that the jury judged him for what he did, not who he is.

Rhines has now eluded justice for longer than he allowed Donnivan Donnivan to live his life; there is no justice in further delaying the imposition of Rhines' deserved death sentence. Rhines' petition for writ of certiorari should be summarily and unceremoniously DENIED.

Dated this 15th day of May 2018.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

Paul S. Swedlund
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: 605-773-3215
Facsimile: 605-773-4106
paul.swedlund@state.sd.us

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of May 2018 a copy of the foregoing response to petition for writ of certiorari was served on Claudia Van Wyk, 601 Walnut Street, Suite 545 West, Philadelphia, PA 19106 and Timothy J. Langley, Assistant Federal Public Defender, 200 West 10th Street, Suite 200, Sioux Falls, SD 57104 via U.S. Mail first class prepaid.

Paul S. Swedlund