CASE NO. 17-8791 (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES RUSSELL RHINES,
Petitioner,

v.

STATE OF SOUTH DAKOTA,
Respondent.

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

REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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Dated: May 25, 2018

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I. The Brief In Opposition Sidesteps The Question Presented.

The state court's ruling in this case squarely presents the question Charles Rhines asks this Court to review. Mr. Rhines asked the South Dakota Supreme Court for relief from its direct appeal ruling that passion, prejudice, or any other arbitrary factor did not influence his jury's decision to sentence him to death. He argued that *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), allowed the court to consider jurors' statements showing that anti-gay bias was a significant motivating factor in the capital sentencing, despite the state's "no-impeachment" rule, South Dakota Rule of Evidence 606(b), which would ordinarily bar the admission of such statements. The state court chose to put aside any state-law procedural questions and rest its decision on a pure ruling of federal constitutional law—that *Peña-Rodriguez* did not apply. The court ruled:

> Assuming, but not deciding, that this appellate court has original jurisdiction to grant relief from a circuit court's final judgment, under SDCL 15-6-60(b)(6) based on an alleged change in conditions, and assuming but not deciding that the constitutional rule articulated in *Pena-Rodriguez* is to be retroactively applied, this Court declines to apply *Pena-Rodriguez*. It is this Court's view that neither Appellant's legal theory (stereotypes or animus relating to sexual orientation) nor Appellant's threshold factual showing is sufficient to trigger the protections of *Pena-Rodriguez*.

App. 1–2. The question presented asks this Court to decide whether that constitutional ruling was wrong:

> The question presented is whether *Peña-Rodriguez* applies to Petitioner's evidence that at least one juror relied on anti-gay stereotypes and animus to sentence him to death.

The state's brief in opposition ("BIO") barely disputes that this is an important question worthy of the Court's review. Instead, it attempts to establish that this case is an unsuitable vehicle for deciding the question or that, even if *Peña-Rodriguez* applies, this case does not satisfy its criteria for overriding a state "no-impeachment" rule. Because both attempts fail and the question is important, this Court should grant review.

II. This Case Is A Proper Vehicle To Resolve The Question Presented.

The BIO devotes most of its attention to arguments that this case is an improper vehicle. It relies either on factual allegations on which the state court never ruled or on arguments that are irrelevant in the case's current procedural posture.

A. The Factual Disputes That The State Attempts To Bring To This Court Are Irrelevant Unless The Court Resolves The Question Presented In The Petitioner's Favor, And Then Should Be Resolved By The State Court.

Mr. Rhines asked the South Dakota Supreme Court to order evidentiary development of his "passion-prejudice" claim. App. 79. The state court, however, never ruled on the request because it held as a matter of law that *Peña-Rodriguez* did not apply. App. 1–2.

Mr. Rhines provides copies of the juror statements on which he has based his claim (App. 54, App. 55, App. 56) and accurately describes their content in the petition for certiorari. *See* Petition at 8–9. The State accuses Mr. Rhines's counsel of "misstat[ing]" quotes attributed to jurors (BIO at 4). It does not claim counsel misrepresents what is in the juror statements, but rather claims—inaccurately—

that they do not reflect what the jurors actually said. The BIO devotes many pages to arguments that the proffered evidence is unreliable[1] and that jurors' self-assessments—denying that bias affected their decision—should be credited. BIO at 5–10, 28–34. Mr. Rhines disputes the BIO's characterizations of the juror interviews, its criticisms of his counsel, and its inferences about the jurors' deliberations.[2] But deciding the question presented will not require this Court to resolve those disputes. If *Peña-Rodriguez* applies to evidence of anti-gay bias, the state court should determine the facts. If *Peña-Rodriguez* does not apply, who said what during deliberations and what motivated the jurors will be moot.

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[1] The State's demeaning attacks on the ethics and conduct of attorneys from the Federal Community Defender Office ("FCDO"), in this case and unrelated cases, are inaccurate and unwarranted. This Court should disregard them. In particular, the State risks undermining the dignity of the Court with heated rhetoric derived partly from a Pennsylvania Supreme Court opinion, *Commonwealth v. Spotz*, 99 A.3d 866 (Pa. 2014), without advising the Court that *Spotz* was a one-judge opinion by the state court's former Chief Justice, Ronald Castille, and did not represent the views of any other justice. The BIO liberally quotes from *Spotz* a series of criticisms of the work of FCDO attorneys in Pennsylvania cases. *See* BIO at 6, 8, 10, 29. The attorneys who represent Mr. Rhines here were not named in the *Spotz* opinion. The Third Circuit subsequently rejected efforts to challenge the legality of FCDO's practice (which were founded in the criticisms the Chief Justice had employed in *Spotz*) in *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Philadelphia*, 790 F.3d 457 (3d Cir. 2015), *cert. denied* 136 S. Ct. 980 (2016).

In a similar vein, the State indicates that "this very court has referred one []FCDO lawyer to state disciplinary authorities . . . ." BIO at 8. That statement is inaccurate. The attorney referenced is employed by the Atlantic Center for Capital Representation, not the FCDO. *See* Respondent's Appendix at 066. That controversy has nothing to do with this case.

[2] Many of the BIO's complaints about the juror statements and the inferences they support were anticipated and addressed in the petition at 8–9 and 22–24.

B. The State's Attempts To Raise State And Federal Procedural Issues That The State Court Has Not Addressed Are Misplaced.

The State makes multiple procedural arguments that either anticipate state law rulings that the state court has not made or do not apply at all to the current posture of this case.

First, the question presented arises from Mr. Rhines's motion for relief from the state court's direct appeal judgment under S.D. Codified Laws § 15-6-60(b)(6). *See* App. 71–73. The state court assumed, without deciding, that it did have jurisdiction, but ruled as a matter of law that *Peña-Rodriguez* did not apply. App. 1–2. The BIO maintains that a Rule 60(b) motion would be unavailable under state law and that, therefore, the petition seeks only an advisory opinion. BIO at 10–12. But the state court did not decide the procedural issues the State attempts to raise here, let alone include a "plain statement that the decision below rested on an adequate and independent state ground," *Michigan v. Long*, 463 U.S. 1032, 1044 (1983). A ruling by this Court would not be advisory. *See id.* 1040–42 (1983) ("[This Court's] requirement of a 'plain statement' that a decision rests upon adequate and independent state grounds does not in any way authorize the rendering of advisory opinions.").

Next, any issue regarding a retroactive application of *Peña-Rodriguez* to cases that arise in a habeas posture amounts to a hypothetical, and one that this Court can leave to the state court to address in the first instance. *See Danforth v. Minnesota*, 552 U.S. 264, 277 (2008). Contrary to any suggestion otherwise, *see* BIO at 20–27 (citing *Teague v. Lane*, 489 U.S. 288 (1989)), "[a] close reading of the

Teague opinion makes clear that the rule it established was tailored to the unique context of federal habeas and therefore had no bearing on whether States could provide broader relief in their own postconviction proceedings than required by that opinion," *Danforth*, 552 U.S. at 277. The state court expressly declined to address any issues of retroactivity and did not cite *Teague*. *See* Petition at 10 n. 6; App. 2. Whether the state court down the road would decide to apply *Teague* to this case and, if it were to do so, how it would conduct such an analysis both remain hypothetical issues for future litigation and for the state court itself. Neither affects this Court's review of the state court's answer to the question presented.

Although many of the State's arguments focus on whether Mr. Rhines's evidence and legal theory are "new," *see* BIO at 13–20, those arguments are not relevant to whether this Court should answer the question presented. Mr. Rhines has sought to litigate juror bias issues since trial, leading to the state court direct appeal decision from which he seeks relief. *See* Petition at 5–8. State evidentiary law has stood in the way at each stage. *See* S.D. Codified Laws § 19-19-606(b)(1); *see also* Petition at 7–9 nn. 4–5 (describing separate federal court litigation, unsuccessful under Fed. R. Civ. P. 59, and still pending under Fed. R. Civ. P. 60 and, alternatively, a request to amend a federal habeas petition). But *Peña-Rodriguez* demonstrated why the state evidentiary law should have given way, and only that point is at issue in this Court's review of the state court judgment. *See* Petition at 8–10.

III. The Question Presented Is Important.

The State contrasts visible historical prejudice based on sexual orientation with that based on race. *See* BIO at 24–25. The State does not, however, identify any systemic harms that would follow from recognizing that the logic and principles of *Peña-Rodriguez* apply to anti-gay bias in capital jury sentencing, address this Court's precedents regarding bias in capital jury sentencing, or discuss pertinent state and federal precedent regarding the nature of, and harm from, anti-gay bias. *See* Petition at 12–14, 16–20.[3] Instead, its position appears similar to one this Court heard when addressing gender-based discrimination in jury selection: "Respondent suggests that 'gender discrimination in this country . . . has never reached the level of discrimination' against African-Americans, and therefore gender discrimination, unlike racial discrimination, is tolerable in the courtroom," *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994) (quoting Brief for Respondent at 9). There, the Court explained that it "need not determine . . . whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our Nation's history," in light of the scrutiny applied to gender-based classifications and the *Batson*-related question presented. *Id.* at 136. The Court should follow a similar course to protect confidence in jury sentencing in this context.

The State asserts that "[s]exual orientation is not an immutable characteristic like race or even gender," BIO at 24. Yet, recently, "psychiatrists and

[3] The State cites cases interpreting Title VII of the Civil Rights Act, *see* BIO at 24, but does not note the current split on whether discrimination on the basis of one's sexual orientation constitutes a form of cognizable sex discrimination under that statute, e.g., because it involves discrimination on the basis of the sex of one's preferred partner or gender stereotyping, *see* Petition at 19–20 n. 12.

others recognized that sexual orientation is both a normal expression of human sexuality and immutable," *Obergefell v. Hodges,* 135 S. Ct. 2584, 2596 (2015). And, for much of this Nation's history, gay individuals kept their sexual orientation "unspoken" to avoid condemnation by the state, *id.*, the force of the criminal law, *id.*, denial of "dignity in their own distinct identity," *id.*, and various prohibitions on active public involvement, *id. See also Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."); *id.* at 597 (Scalia, J., dissenting) ("There are 203 prosecutions for consensual, adult homosexual sodomy reported in the West Reporting system and official state reporters from the years 1880–1995. There are also records of 20 sodomy prosecutions and 4 executions during the colonial period." (citations omitted)).

The nature of the stereotyping, disgust, and animus in this case also undercuts the effectiveness of other judicial safeguards in exposing this type of juror bias and preventing it from arising in capital sentencing. *Compare Peña-Rodriguez*, 137 S. Ct. at 869 (explaining the difficulty in relying on voir dire or juror reports during deliberations to address racial bias) *with, e.g.*, *United States v. Bates*, 590 F. App'x 882, 886–87 (11th Cir. 2014) (unpublished) (citing cases and 2013 survey data regarding the potential for unfair prejudice when admitting evidence of one's homosexuality before jurors)*, and State v. Jonas*, 904 N.W.2d 566, 571–74 (Iowa 2017) (discussing cases and secondary literature that show difficulty in questioning

veniremembers who actually express bias, particularly anti-gay bias, during voir dire). In fact, alternative safeguards failed in this case. *See* Petition at 16–17.

IV. The Proffered Evidence Satisfies The *Peña-Rodriguez* Criteria.

The BIO maintains that, even if *Peña-Rodriguez* applies to anti-gay bias, Mr. Rhines cannot satisfy the exception to the "no-impeachment" rule. BIO at 27–32. The proffered evidence, in fact, shows that he can. For example, Juror Keeney declared under penalty of perjury that the jury "also knew that [Mr. Rhines] was a homosexual and thought that he shouldn't be able to spend his life with men in prison," App. 54. Critically, the State sidesteps whether this statement satisfies the applicable test by raising factual disputes that do not pertain to whether it is a "clear statement" that "exhibits overt . . . bias" and "tend[s] to show that [anti-gay] animus was a significant motivating factor" in at least one "juror's vote" to sentence Mr. Rhines to death, *see Peña-Rodriguez*, 137 S. Ct. at 869. *See* BIO at 29–33. The statement meets that test, as do the other statements Mr. Rhines has submitted.

The State's own evidence corroborates that a juror during deliberations made "a comment to the effect that Rhines might like life in the penitentiary among other men," App. 87, but the State argues that this amounted to "an 'offhand comment'" that other jurors rejected as such. *See* BIO at 28–30 (quoting *Pena-Rodriguez*, 137 S. Ct. at 869). The statement's roots in pernicious stereotypes and its similarity to other disturbing comments and the jury's note to the trial court undermine that argument and meet the criteria set out in *Peña-Rodriguez*. *See* Petition at 22–24. Moreover, Juror Blake said to an attorney for Mr. Rhines: "'There was *lots* of discussion of homosexuality. There was *a lot* of disgust. This is a farming

community.' . . . ¶ 'There were *lots of folks* who were like[,] Ew, I can't believe that.'" App. 56 (quoting the third juror) (some quotation marks omitted) (emphases added). At the very least, the State presents a factual dispute to be addressed on remand.

The BIO points to jurors' denials, in interviews with the State's investigator, that Mr. Rhines's homosexuality influenced their vote for death. *See* BIO at 7–10, 27–32. Yet the denials do not amount to recantations of statements that a gay man facing death "shouldn't be able to spend his life with men in prison," App. 54 (showing reliance on stereotypes regardless of Juror Keeney's self-assessment of why he had voted for death); that a juror had made a comment during deliberations indicating stereotyping and bias, *see* App. 55, App. 86–87; and that jurors had discussed, and expressed disgust toward, homosexuality, *see* App. 56.

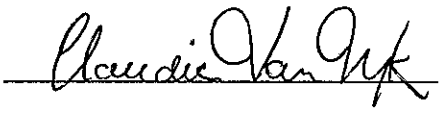
Moreover, jurors' post hoc assessments of their decision-making are not dispositive. *Compare Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) ("Gattie's remarkable affidavit—which he never retracted—presents a strong factual basis for the argument that Tharpe's race affected Gattie's vote for a death verdict.") *with id.* at 548 (Thomas, J., dissenting) ("In [a] second affidavit, Gattie stated that he 'did not vote to impose the death penalty because [Tharpe] was a black man,' but instead because the evidence presented at trial justified it and because Tharpe showed no remorse.") *and id.* (Thomas, J., dissenting) ("The ten jurors who testified all said that race played no role in the jury's deliberations. The eleventh juror did not mention any consideration of race either."). Even a single juror's demonstration of bias suffices, particularly in light of the broad discretion afforded to capital

sentencing jurors. *See id.* at 546. And "[b]ias is easy to attribute to others and difficult to discern in oneself," *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016). *See* Petition at 22–24.

CONCLUSION

For these reasons and those in Mr. Rhines's petition for certiorari, the Court should grant the writ to resolve the question presented.

Respectfully submitted,



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