CASE NO. 18-8029 (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES RUSSELL RHINES,
Petitioner,

v.

DARIN YOUNG, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Eighth Circuit

REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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Dated: March 22, 2019

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REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

The State's Brief in Opposition (BIO) argues that this case presents only one question and reframes the first of two questions Petitioner Charles Rhines has presented. Its approach, however, mischaracterizes the jurisdictional ruling that has prevented any federal court from considering Mr. Rhines's underlying motion and evidence that at least one sentencing juror relied on anti-gay stereotyping and animus during death penalty deliberations. And it fails to apply the proper two-part standard that governs the issuance of a certificate of appealability (COA).

The first question, properly framed, involves a split among the Circuits regarding when courts must treat a habeas petition as "second or successive" and subject to 28 U.S.C. § 2244(b). The State does not accurately analyze how or why that split persists today. Nor does the State address the role factual circumstances may play in answering the question and in deciding whether to issue a COA.

For both questions, the circumstances of this case matter. To obtain a COA, Mr. Rhines must show that reasonable jurists could debate whether the district court's procedural ruling was correct and whether he states a valid underlying substantive claim. *See Slack v. McDaniel,* 529 U.S. 473, 484 (2000). Mr. Rhines contested the procedural ruling and presented a claim of the denial of his right to an impartial sentencing jury. Rather than meaningfully apply the two-part COA test, the State previews affirmative defenses and factual disputes it would raise after the issuance of a COA. Those arguments are premature and should not affect this Court's decision to answer the distinct and important jurisdictional questions presented. Should this case be remanded, Mr. Rhines has replies to each.

I. This Court Should Grant Certiorari To Review The Eighth Circuit's Denial Of A COA And The Threshold Jurisdictional Question Presented.

A. After *Gonzalez v. Crosby,* The Circuits Remain Divided.

At the outset, the State reframes the first question[1] to ask whether denying a motion to amend a petition that may be subject to a variety of defenses and beyond a district court's jurisdiction constituted an abuse of discretion. BIO at ii. Such reframing mistakes the nature of the ruling that preceded the COA denial.

The lower court decided it lacked jurisdiction to consider Mr. Rhines's motion to amend his initial habeas petition while his appeal from the district court's denial of that petition was pending. *Cf. Burton v. Stewart,* 549 U.S. 147, 152 (2007) (per curiam) ("[B]ecause [a] petition [wa]s a 'second or successive' petition that [a petitioner] did not seek or obtain authorization to file . . . , the District Court never had jurisdiction to consider it in the first place."). A de-novo standard of review applied to that decision. *See, e.g., Nooner v. Norris,* 499 F.3d 831, 833 (8th Cir. 2007). Relying on the conclusion that it lacked jurisdiction, the district court had no occasion to, and did not, exercise any discretion to determine whether to grant the motion to amend. The State's references to an abuse-of-discretion standard and potential downstream affirmative defenses do not reflect the ruling below and, therefore, are not relevant to the first question presented.

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[1] "Could reasonable jurists debate whether a court may permit an amendment to an initial habeas corpus petition, without applying 28 U.S.C. § 2244(b)'s limitations on 'second or successive' petitions, when appellate proceedings after a denial of that initial petition are ongoing?" Petition (Pet.) at i.

Next, the State attempts to establish that the Circuits are not divided on this question. It appears to acknowledge that *Whab v. United States,* 408 F.3d 116, 118 (2d Cir. 2005), demonstrated a circuit split, but argues that *Gonzalez v. Crosby,* 545 U.S. 524, 530 (2005), "rejected *Whab*'s reasoning." *See* BIO at 6. In fact, multiple Circuits recognize that *Gonzalez* did not answer the question presented in *Whab* and confirm that the divide over the meaning of "second or successive" Mr. Rhines describes in his petition persists. *See* Pet. at 14–27. The Seventh Circuit has recognized that *Gonzalez* does not resolve the question. *See Phillips v. United States,* 668 F.3d 433, 435 (7th Cir. 2012).[2] The Second Circuit continues to apply *Whab. See Fuller v. United States,* 815 F.3d 112, 113 (2d Cir. 2016) (per curiam) (cited in Brian R. Means, Postconviction Remedies § 27:9 (July 2018 Update)).[3]

The *Gonzalez* Court addressed the meaning of "'habeas corpus application,'" *Gonzalez,* 545 U.S. at 530 (quoting § 2244(b)), not the meaning of "second or successive." Addressing the latter would have been unnecessary, because the petitioner had filed a Fed. R. Civ. P. 60(b) motion after both a dismissal of his initial

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[2] The State cites *Amodeo v. United States,* 743 F. App'x 381, 385 (11th Cir. 2018) (per curiam) (unpublished), *see* BIO at 9–10, but even *Amodeo* explains that unpublished dispositions in the **E**leventh Circuit have taken inconsistent positions on how to interpret finality for purposes of distinguishing an initial application from a "second or successive" one. *See Amodeo,* 743 Fed. App'x at 385 n.1.

[3] Without explanation, the State cites a different section of an earlier edition of this treatise to argue there is no "genuine" circuit split. *See* BIO at 8. The current version, however, refers to the section of the treatise Mr. Rhines has cited to show the circuit split. *Compare* Pet. at 17–18 (citing Means, Postconviction Remedies § 27:9) *with* Means, Postconviction Remedies § 18:1 n.4 (stating: "*see, infra,* § 27:9").

petition and the conclusion of subsequent appellate proceedings. *See Gonzalez*, 545 U.S. at 527.

Here, the first question presented asks this Court to interpret the meaning of "second or successive," not the meaning of "habeas corpus application." *See* Pet. at 14–27. It does not concern an effort to re-open proceedings after the completion of appellate review. Instead, the question presents a divide among the Circuits regarding whether the "second or successive" term of art applies automatically after a district court has issued an appealable disposition of an initial petition, but before appellate proceedings as to that initial petition have concluded. *Gonzalez* did not address, and does not answer, this question.

The State's attempt to distinguish *Douglas v. Workman*, 560 F.3d 1156, 1176–96 (10th Cir. 2009) (per curiam), necessarily concedes Mr. Rhines's jurisdictional point. The Tenth Circuit interprets the "second or successive" term of art in a way that, like the Second Circuit, does not automatically apply § 2244(b) to any motion to supplement an initial petition when a petitioner files it while an appeal from a district court's denial of the initial petition is pending. Instead, the Tenth Circuit provides petitioners the opportunity to meet a multifactor—fact-intensive—test. Mr. Rhines has requested precisely that type of analysis in demonstrating his entitlement to a COA. *See* Pet. at 26–27.[4] By contesting the

[4] Any suggestion that the Tenth Circuit will limit this test to claims for relief under *Brady v. Maryland*, 373 U.S. 83 (1963), *see* BIO at 7, is at odds with *Douglas*'s text: "We do not hold that a habeas petitioner must establish all of these factors in order to be able to supplement his initial habeas petition; instead, we

application of the *Douglas* factors in this case, the State, in effect, endorses a court's jurisdiction to undertake such an analysis.

In this case, the Eighth Circuit denied a COA without addressing the need for any such fact-based analysis and provided no opportunity to demonstrate why the circumstances of this case warrant an outcome similar to *Douglas*'s. Should this Court remand the case, Mr. Rhines is prepared to show analogous circumstances.[5] To assert that he lacks a "similar claim to equity," BIO at 7, is to risk tolerating what should be intolerable: the likelihood that anti-gay stereotyping and animus affected at least one juror's vote for death. Jurists of reason could agree that no court should take that risk.

In sum, in light of the Second and Tenth Circuits' approaches, the Eighth Circuit should have granted a COA to decide whether the district court had jurisdiction to consider Mr. Rhines's motion.

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conclude only that, in this case, these are the factors that persuade us such supplementation is justified here." *Douglas*, 560 F.3d at 1190 n.20.

[5] Before the federal courts resolved Mr. Rhines's initial habeas claims, he presented evidence from multiple jurors that anti-gay stereotypes—about how a gay man would experience life imprisonment—impermissibly played a role in the deliberations and decision to sentence him to death. That the jurors were not prosecutors, *see* BIO at 7, does not weaken the case: "The jury is a quintessential government body." Jarod S. Gonzalez, *The New Batson: Opening the Door of the Jury Deliberation Room After* Peña-Rodriguez v. Colorado, 62 St. Louis U. L. J. 397, 408 (2018) (citing *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991)). His initial petition included allegations "closely correlated" to his claim of bias. *See Douglas*, 560 F.3d at 1190. On appeal from the denial of his initial petition, for instance, he argued that the trial court's response to the note the jury sent during deliberations "reflected anti-gay bias and . . . concerns about Mr. Rhines's ability and opportunity to engage in same-sex sexual activity if sentenced to life." Br. of Appellant, *Rhines v. Young*, No. 16-3360, 106 (8th Cir. filed Feb. 7, 2017).

B. This Case Is A Proper Vehicle To Resolve The Question.

The State asserts that this case is not "suitable" to resolve the question presented, but, rather than identify problems with the case as a vehicle to decide the question, points to hypothetical affirmative defenses it might raise down the road if a court were to grant Mr. Rhines a COA and consider his motion. None of the State's defenses—exhaustion of state-court remedies, procedural default, and two statutes of limitations—amounts to a jurisdictional bar like the one the district court imposed, and each is premature at this stage. *See, e.g., Day v. McDonough*, 547 U.S. 198, 205 (2006).

No lower court was in a position to address such defenses, because of the Eighth Circuit's position on the circuit split and the procedural ruling below. Whether the State will raise affirmative defenses in an appeal after issuance of a COA and/or before a court with jurisdiction does not speak to whether this case presents a good vehicle to interpret the meaning of "second or successive" in § 2244(b).

In other cases, this Court has interpreted "second or successive," while leaving potential merits- or procedure-related issues for remand. *See, e.g., Magwood v. Patterson*, 561 U.S. 320, 342 (2010) (concluding that a lower court had erred in interpreting § 2244(b), then declining to address both "whether [a particular] claim [wa]s procedurally defaulted" and a merits-related argument the petitioner had raised); *Slack*, 529 U.S. at 489–90 ("Whether Slack [wa]s otherwise entitled to the issuance of a COA [wa]s a question to be resolved first upon remand.").

Circuit Courts take a similar approach. When asked whether a petition constitutes a "second or successive" one, their task is limited: "Having determined that [the] petition is a first petition, we may proceed no further. We transfer the petition to the district court to consider it as a first petition." *Turner v. Baker*, 912 F.3d 1236, 1241 (9th Cir. 2019). *See also, e.g., In re Caldwell*, No. 18-6074, 2019 WL 1087329, at *4 (6th Cir. Mar. 8, 2019) (Sutton, J.) (denying, with regard to one conviction, "[a] motion to file a second or successive habeas petition as unnecessary and transfer[ring] [a] petition back to the district court so that [the petitioner] can proceed with that challenge.").

In sum, reasonable jurists could debate the jurisdictional issue that has split the Circuits, particularly in light of the factual circumstances of this case and evidence that anti-gay prejudice affected a capital sentencing jury's decision.

II. Mr. Rhines Has Made A Substantial Showing Of A Denial Of His Right To Be Sentenced By An Impartial Jury.

The State argues that Mr. Rhines's second question presented[6] "is not before the [C]ourt because the district court never reached the merits of Rhines'[s] jury bias claim." BIO at ii. Yet a petitioner seeking a COA must meet the second part of the two-part test: whether "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right . . . ." *Slack*, 529 U.S. at 484. Mr. Rhines has satisfied this requirement with evidence that anti-gay

[6] "Could reasonable jurists debate whether Petitioner has made a substantial showing of a violation of his right to an impartial jury with evidence that at least one juror relied on anti-gay stereotypes and animus in sentencing him to death?" Pet. at i.

stereotypes about imprisonment and related animus affected his sentencing. After *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017), no rule of evidence should prevent a court from considering this evidence.

A. The State Presents Issues That Are Not Appropriately Resolved At The COA Stage.

The State raises factual disputes and presents affirmative defenses. *See* BIO at 9–37. Yet, in doing so, it ventures beyond the COA standard. No federal court has considered whether Mr. Rhines may present evidence from the jurors, let alone whether to grant a hearing to resolve any factual disputes. *Cf. Tennard v. Dretke*, 542 U.S. 274, 283 (2004) ("Rather than examining the District Court's analysis . . . , [the Fifth Circuit] invoked its own restrictive gloss on *Penry* [*v. Lynaugh*, 492 U.S. 302 (1989).]").

In addition, contrary to the State's arguments, *see* BIO at 15–29, Mr. Rhines need not "meet the criteria for a successive petition under SDCL 21-27-5.1 and 28 U.S.C.A. § 2244(b)," BIO at 23, because he sought a COA to appeal a dismissal of his motion to amend his *initial* petition. The State's discussion of whether *Pena-Rodriguez* helps to satisfy § 2244(b)(2)'s gatekeeping requirements, *see, e.g.*, BIO at 23–29, is inapplicable.

Nevertheless, Mr. Rhines has responses to each affirmative defense the State previews to this Court, which he can raise at the appropriate time. For example, Mr. Rhines argued in the district court that the State had raised a South Dakota statute of limitations defense without raising the AEDPA statute of limitations, which indicates waiver or forfeiture of the latter. *Compare* Reply in Supp. of Mot.

Amend., *Rhines v. Young*, No. 5:00-cv-05020-KES, ECF No. 391, PageID 6588 *with* Response to Mot. Amend., *Rhines*, No. 5:00-cv-05020-KES, ECF No. 389, PageID 6178.

The State refers to exhaustion of remedies and procedural default, but does not address the potential effect of a merits adjudication from the Supreme Court of South Dakota on such an analysis.[7] After Mr. Rhines filed his motion in federal court, the state court determined "that neither [Mr. Rhines]'s legal theory (stereotypes or animus relating to sexual orientation) nor [Mr. Rhines]'s threshold factual showing is sufficient to trigger the protections of *Pena-Rodriguez*." App. 88. "If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available." *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991).

Finally, Mr. Rhines has another basis to overcome any procedural bar or statute of limitations defense. To execute a man without federal-court consideration of evidence that at least one juror who voted for his death sentence invoked or

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[7] The State quotes a state case observing that a court may set aside a jury verdict "'in extreme cases where it is the result of passion or prejudice or the jury has palpably mistaken the rules of law.'" *State v. Motzko*, 710 N.W.2d 433, 439 (S.D. 2006). *See* BIO at 21, 22. Yet the State omits two critical points. First, Mr. Rhines raised this type of challenge in state court during his direct appeal—relying on the jurors' note—and in his more recent motion for relief from judgment—relying on *Pena-Rodriguez*, the Sixth Amendment, the Fourteenth Amendment, and the juror declarations presented in this litigation—to argue that his sentence was imposed under the influence of prejudice or an arbitrary factor. Second, *Motzko* went on to explain: "[The state's Rule of Evidence 606(b)] only allows juror evidence regarding extraneous prejudicial information or outside influences that are improperly brought to the jury's attention." *Motzko*, 710 N.W. at 439.

considered disturbing stereotypes about "an immutable characteristic" to justify that sentence would constitute a fundamental miscarriage of justice. *Cf. Buck v. Davis,* 137 S. Ct. 759, 778 (2017) ("Dispensing punishment on the basis of an immutable characteristic flatly contravenes th[e] guiding principle" that "[o]ur law punishes people for what they do, not who they are."); *Waldrop v. Comm'r, Alabama Dep't of Corr.,* 711 F. App'x 900, 925 (11th Cir. 2017) (unpublished) (Martin, J., concurring in judgment) (agreeing that a petitioner could not meet the standard for showing innocence, but stating: "I am at a loss to otherwise explain how a person being sentenced to death based on his race could be anything other than a fundamental miscarriage of justice.").

B. Mr. Rhines Supports His Claim With Reliable Evidence.

The State argues that the proffered evidence is unreliable and that a court should credit jurors' self-assessments, denying that bias affected their ultimate decision. As discussed above, answering the questions presented will not require this Court to resolve those disputes. If this Court were to remand the case, the district court could consider the reliability of the evidence in the first instance. Mr. Rhines disputes the State's characterizations of the juror interviews, its criticisms of his counsel, and the inferences it seeks to draw.[8]

No-impeachment rules must give way "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant." *Pena-Rodriguez,* 137 S. Ct. at 869. In this case, multiple

[8] Many of the State's factual disputes and inferences were anticipated and addressed in the Petition at 8–12 and 36–38.

jurors have made clear statements indicating that least one juror relied on a disturbing anti-gay stereotype about how a gay man might view a lifetime in prison. The statements connected the stereotype about his sexual orientation to the ultimate sentencing decision, choosing death instead of life imprisonment without the possibility of parole. And they call into doubt jurors' earlier statements during voir dire about whether they could consider the case impartially.

The State asserts that "[s]exual orientation is not immutable to the same extent as race or gender," BIO at 26, but it does not address this Court's recognition that "sexual orientation is both a normal expression of human sexuality and immutable," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015). Moreover, the State introduced evidence about Mr. Rhines's sexual orientation during its guilt phase case-in-chief, undermining the assertion that he "could have tried his defense without the jury knowing of his homosexuality," BIO at 26. *See* Pet. at 4.

Whereas the State would have this Court compare the role of anti-gay prejudice in this country's history with that of racial prejudice, the Court has explained that it need not compare suffering when faced with intolerable bias in jury trials: "We 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 question presented after *Batson v. Kentucky*, 476 U.S. 79 (1986). *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994). The need to protect confidence in the system of capital jury sentencing calls for the same approach here.

The State also attempts to distinguish *Pena-Rodriguez* by noting that jurors in this case answered voir dire questions about their potential to harbor bias on the basis of one's sexual orientation. *See* BIO at 29–30. That jurors answered those questions and at least one still invoked a stereotype during deliberations, however, lends support for a concern the *Pena-Rodriguez* Court shared: "[M]ore pointed questions 'could well exacerbate whatever prejudice might exist without substantially aiding in exposing it.'" *Pena-Rodriguez*, 137 S. Ct. at 869 (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 195 (1981) (Rehnquist, J., concurring in result)).

The State points to jurors' denials, in interviews with the State's investigator, that Mr. Rhines's sexual orientation influenced their vote for death. *See* BIO at 14.[9] Yet the denials do not amount to recantations of statements that a juror, during deliberations, had invoked a stereotype about gay men in prison, *see* App. 34, App. 80–81; that a juror thought a gay man facing death "shouldn't be able to spend his life with men in prison," App. 33 (showing reliance on stereotypes regardless of a juror's self-assessment of why he had voted for death); and that jurors had discussed, and expressed disgust toward, Mr. Rhines's sexual orientation, *see* App. 35. Further, a juror's later self-assessment is not dispositive of whether the juror harbored impermissible bias. *See* Pet. at 37 n.16.

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[9] Mr. Rhines disputes the State's investigator's characterizations about the manner of the interviews conducted on behalf of Mr. Rhines. At the same time, none of the jurors that investigator interviewed disavowed their earlier statements. Nor should the opinion of a nonjuror, *see* BIO at 35 (quoting a spouse of a juror regarding "a 'bunch of nonsense'"), properly be presented in the lower court.

The State characterizes the statement during deliberations as "'an offhand comment' that one might expect to hear in a case where Rhines'[s] homosexuality was proffered by his defense as a mitigating circumstance." BIO at 30. This position begs the question of whether the State would say the same about use of "[a]nti-Semitic 'humor' [that] is by its very nature an expression of prejudice on the part of the maker. . . ." *United States v. Heller*, 785 F.2d 1524, 1527–28 (11th Cir. 1986). The statement speaks for itself, involves a disturbing stereotype, and exists alongside the unsettling questions in the jury's note and other jurors' statements.[10]

Finally, the State's 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. The State has made these types of allegations throughout the course of these habeas proceedings. In response to similar allegations in connection with a set of motions before the district court, that court concluded:

> Contained in respondent's briefs in opposition to Rhines's motions[11] are numerous ethical allegations against the Pennsylvania Federal Community Defender's Office. Such claims have no relevance to Rhines's case, the law pertinent to Rhines's motions, or the particular attorneys appointed to represent Rhines. Rhines's motions appear to the court to be no more than zealous representation of Rhines, which is what this court expects from court appointed counsel. Respondent's ethical allegations are stricken as scandalous.

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[10] The State's own evidence corroborates that, during deliberations, a juror made "a comment to the effect that Rhines might like life in the penitentiary among other men." App. 81.

[11] Mr. Rhines had filed a motion to gain access to experts to evaluate him alongside his motion to amend his initial habeas petition.

App. 4–5.[12]

In sum, reasonable jurists could debate whether Mr. Rhines has stated a valid claim of a denial of the right to an impartial capital sentencing jury.

[12] 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 single-justice opinion by the state court's former Chief Justice, Ronald Castille, and did not represent the views of any other justice. The State quotes from *Spotz* a series of criticisms of the work of FCDO attorneys in Pennsylvania cases. 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 Chief Justice Castille 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 [C]ourt referred one [FCDO] operative to state disciplinary authorities for his role in a . . . scheme to file an unauthorized petition for a writ of certiorari in a death penalty case." BIO at 13. The attorneys who represent Mr. Rhines were not named in that matter. And the "operative" the State references 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.

CONCLUSION

For these reasons and those in Mr. Rhines's petition, this Court should grant a writ of certiorari to resolve the questions presented.

Respectfully submitted,

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