CASE NO. _____ (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

APPLICATION FOR STAY OF EXECUTION

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To the Honorable Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit:

The State of South Dakota has scheduled the execution of Charles Russell Rhines for the week beginning November 3, 2019. Mr. Rhines respectfully requests a stay of execution pending consideration and disposition of the petition for writ of certiorari that he is filing concurrently with this application.

MR. RHINES IS ENTITLED TO A STAY OF EXECUTION

Mr. Rhines respectfully requests that this Court stay his execution, pursuant to Supreme Court Rule 23 and 28 U.S.C. § 2101(f), pending consideration of his concurrently filed petition for writ of certiorari. *See Barefoot v. Estelle*, 463 U.S. 880, 889 (1983) ("Approving the execution of a defendant before his [petition] is decided on the merits would clearly be improper."); *see also Lonchar v. Thomas*, 517 U.S. 314, 320 (1996) (holding that a court may stay an execution if needed to resolve issues raised in initial petition).

The standards for granting a stay of execution are well-established. Relevant considerations include the prisoner's likelihood of success on the merits, the relative harm to the parties, the extent to which the prisoner has unnecessarily delayed his or her claims, and public interest. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004); *Barefoot*, 463 U.S. at 895. All four factors weigh strongly in Mr. Rhines's favor.

I. The Equities Support a Stay in this Case.

Mr. Rhines has been seeking access to his psychiatric and neuropsychological experts since 2017 and has never delayed in bringing this action. Accordingly, he has brought this claim well within the time "to allow consideration of the merits without requiring entry of a stay." *Hill*, 547 U.S. at 584. There is no "strong equitable presumption against the grant of a stay." *Id.*

In 2017, even while his federal habeas appeal was pending in the Court of Appeals for the Eighth Circuit, Mr. Rhines began preparations for a potential clemency petition. Because Mr. Rhines had never been evaluated by a psychiatrist with the benefit of a complete social history or neuropsychologist, his counsel retained two mental health experts to evaluate him. Those experts were barred from entering the prison to access Mr. Rhines to conduct those evaluations. Mr. Rhines then moved in the state trial court for an order for his experts to be able to access him, and was denied. The South Dakota Supreme Court dismissed his appeal in January 2018.

Mr. Rhines turned to the federal courts, and in February 2018 moved the district court for access to his experts, relying on 18 U.S.C. § 3599, the All Writs Act, 18 U.S.C. § 1651(a), and the Due Process Clause. In support of this action, counsel submitted a letter report from a forensic psychiatrist who, based on a review of Mr. Rhines's records, previous expert reports, and an annotated social history, concluded that "there is clear evidence that there are additional, differential diagnostic options that require further investigation by way of both a psychiatric and neuropsychological evaluation." The district court denied the

motion, and Mr. Rhines appealed to the Eighth Circuit. Briefing in the Eighth Circuit was completed in November 2018. The Eighth Circuit finally scheduled oral argument in September 2019 and did not issue the decision from which Mr. Rhines seeks certiorari until October 25, 2019, a week ago.

The record shows that Mr. Rhines has been diligent and relentless in seeking access to his experts. He anticipated over two years before his scheduled execution that these experts will be helpful in clemency proceedings and has litigated for access to those experts at every level of state and federal court available to him over those two years. Moreover, a stay will not substantially injure the State, which continues to bar Mr. Rhines from seeing his experts so that he can be evaluated for his clemency proceedings. Accordingly, the balance of equities weigh heavily in Mr. Rhines's favor.

II. Mr. Rhines Has Demonstrated a Significant Possibility of Success on the Merits.

This case presented to the Eighth Circuit an important question regarding the nature of Mr. Rhines's rights to expert assistance under § 3599. Rather than deciding that question, the Eighth Circuit grafted a novel exhaustion requirement onto the provisions of § 3599 and dismissed Mr. Rhines's appeal for failure to satisfy it. There is a strong likelihood that this Court will reject the novel exhaustion requirement that the Eighth Circuit has imposed on Mr. Rhines because it already rejected a requirement with similar effects in *Ayestas v. Davis*, 138 S. Ct. 1080, 1088 (2018).

Mr. Rhines appealed to the Eighth Circuit as a § 3599 applicant seeking authorization "to obtain [expert] services" from psychiatric and neuropsychological experts to evaluate Mr. Rhines to reach professional diagnoses in aid of his petition for executive clemency. *Cf.* § 3599(e) (referring to "proceedings for executive or other clemency as may be available to the defendant"). The Eighth Circuit, however, did not address whether the district court had the authority to grant the § 3599 motion. Instead, it relied on the fact that Mr. Rhines, as a § 3599 applicant, had not "fully exhausted" the issues with regard to state executive clemency proceedings. *Rhines v. Young*, No. 18-2376, 2019 WL 5485274, at *1 (8th Cir. 2019).

To be meaningful in practice, and thus to honor congressional intent, access to § 3599 services must *precede* the exhaustion of available clemency remedies. The Eighth Circuit's novel requirement that a § 3599 applicant exhaust the remedies in the very proceedings for which she seeks the aid of § 3599 services would deprive § 3599 of Congress's intended meaning and impact. *See Ayestas,* 138 S. Ct. at 1094 ("To be clear, a funding applicant must not be expected to *prove* that he will be able to win relief if given the services he seeks."). The Eighth Circuit's novel exhaustion requirement thus employs circular logic similar to that already rejected by this Court in *Ayestas*.

Just as the Fifth Circuit in *Ayestas* improperly created a "substantial need" test on top of the "reasonably necessary for the representation" requirement in the text of § 3599, the Eighth Circuit here has improperly created an "exhaustion-of-state-remedies" requirement on top of the textual requirements in § 3599. *See Ayestas,* 138 S. Ct. at 1092–93. In all relevant respects, the Eighth Circuit's

additional exhaustion requirement is similar to the Fifth Circuit's requirement that a § 3599 applicant overcome the obstacle of procedural default *before* a district court "may authorize the [applicant]'s attorneys to obtain such services . . . ." *Id.* at 1094. The Eighth Circuit's additional exhaustion requirement undoubtedly is "more demanding" than the test provided in § 3599 itself, and it frustrates the power of a federal court to authorize legal representation and enable appointed counsel to obtain expert services pursuant to § 3599. *Ayestas*, 138 S. Ct. at 1088.

For the same reasons the Court already rejected the additional "substantial need" requirement in *Ayestas*, the Court likely also will reject the Eighth Circuit's exhaustion requirement, and Mr. Rhines will prevail on the merits of his claim.

III. Mr. Rhines Will Suffer Irreparable Harm Absent a Stay of Execution.

Mr. Rhines will be irreparably harmed absent a stay because he will be executed without ever having received expert assistance in clemency proceedings, to which he should have been granted the right of access under § 3599. Irreparable injury "is necessarily present in capital cases." *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985).

IV. The Public Interest Weighs in Favor of Granting a Stay.

The public has a strong interest in ensuring that the merits of Mr. Rhines's claim are heard. Congress enacted 18 U.S.C. § 3599 to allow federal courts to authorize indigent capitally sentenced state prisoners "to obtain [expert] services" in conjunction with issues relating to their sentences, including executive clemency. The public has a strong interest in the State's compliance with laws passed by the legislature and with general conformance to these laws in a manner that honors

congressional intent. This interest is greatly magnified when the State is carrying out the ultimate criminal penalty—death.

CONCLUSION

For the foregoing reasons and those explained in his petition for certiorari, Mr. Rhines respectfully requests that the Court stay his execution pending its consideration of his meritorious claim for relief.

Respectfully submitted,

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