CASE NO. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

In re CHARLES RUSSELL RHINES, *Petitioner*

On Petition for Original Writ of Habeas Corpus

APPLICATION FOR STAY OF EXECUTION

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR THE WEEK OF NOVEMBER 3, 2019

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Dated: November 1, 2019

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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 excuetion of Charles Rhines for the week of November 3, 2019, to November, 9, 2019. Mr. Rhines requests a stay of execution pending the consideration and disposition of his petition for a writ of habeas corpus that he is filing simultaneously with this application. That petition invokes the extraordinary jurisdiction of this Court because the traditional avenues for relief via the state and federal courts have not provided Mr. Rhines a forum to litigate his claim that jurors who sentenced him to death relied on his sexual orientation in making their sentencing decision, violating his due process and Eighth Amendment rights.

Mr. Rhines now seeks a stay of execution so that this Court can review his meritorious claim for relief.

MR. RHINES IS ENTITLED TO A STAY OF EXECUTION

Charles Rhines, pursuant to Supreme Court Rule 23, respectfully requests that this Court stay his execution pending consideration of his concurrently filed petition for an original writ of habeas corpus. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006). A motion for a stay of execution pending judicial review is analyzed according to the following four factors: (1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public

interest lies. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal citations and quotations omitted); *Hill v. McDonough*, 547 U.S. 573, 584 (2006). On balance, these factors weigh strongly in Mr. Rhines's favor.

I. His Petition Has a "Significant Possibility of Success on the Merits."

Mr. Rhines seeks an extraordinary writ. This Court possesses the power "to entertain original habeas petitions," *Felker v. Turpin*, 518 U.S. 651, 658 (1996), and to "transfer[] the application for hearing and determination" to a district court, § 2241(b). In *In re Davis*, the Court exercised that power because "[t]he substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing. Simply put, the case is sufficiently 'exceptional' to warrant utilization of this Court's Rule 20.4(a), 28 U.S.C. § 2241(b), and [its] original habeas jurisdiction." 557 U.S. 952, 952 (2009) (Stevens, J., concurring). In the same way, the substantial risk of executing a man whose death sentence was based on his sexual orientation, and jurors' pernicious stereotypes about how a gay man would view a lifetime in prison, justifies the exercise of that power and an evidentiary hearing.

Charles Rhines repeatedly has sought to prove that jurors who sentenced him to death relied on anti-gay prejudice in making their decision. Mr. Rhines sought an evidentiary hearing in the state and federal courts on the basis of multiple jurors' statements reflecting stereotypes and animus aimed at his sexual orientation.

One juror who had voted for death stated that "we also knew that [Mr. Rhines] was a homosexual and thought that he shouldn't be able to spend his life

with men in prison." A second juror indicated about deliberations: "One juror made . . . a comment that if he's gay, we'd be sending him where he wants to go if we voted for [life imprisonment without the possibility of parole]." And a third juror noted that there had been "lots of discussion of homosexuality" and "a lot of disgust."

No court has permitted a hearing to assess these statements or judged the constitutionality of Mr. Rhines's death sentence in light of them.

Mr. Rhines meets the criteria for the issuance of an extraordinary writ. A petitioner seeking one must demonstrate "that adequate relief cannot be obtained in any other form or from any other court," "that exceptional circumstances warrant the exercise of the Court's discretionary powers," and "that the writ will be in aid of the Court's appellate jurisdiction." *Id.* Mr. Rhines has attempted, without success, to obtain relief for the violation of his rights from the courts below. The lower courts reached that decision in spite of Mr. Rhines's efforts to seek relief after this Court had decided *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), but before he had completed appellate proceedings arising from the district court's denial of his initial federal habeas petition. App. 162-210.

Mr. Rhines has satisfied the exhaustion-of-state-remedies requirement. He unsuccessfully sought relief from judgment in the South Dakota Supreme Court, reconsideration of that court's prior review of the death sentence, and a hearing. *See* App. 3-4. No other remedies are available. The Governor of South Dakota has not exercised her powers to grant Mr. Rhines executive clemency.

Mr. Rhines cannot obtain "adequate relief . . . in any other form or from any other court." Sup. Ct. R. 20.4(a). As the habeas petition filed with this motion makes clear, if this Court grants Mr. Rhines a stay of execution, there is a strong likelihood that Mr. Rhines will ultimately succeed on the merits of his claim for relief. Pet. at 12-18.

II. The Balance of Harm Weighs in Mr. Rhines's Favor.

The second and third factors – whether the applicant will be irreparably injured absent a stay and whether issuance of the stay will substantially injure the other parties interested in the proceeding – weigh in Mr. Rhines's favor. The harm to Mr. Rhines of being put to death without ever having his meritorious claims decided is obvious. By contrast, the State's interest in securing Mr. Rhines's imminent execution is only minimally affected by the delay necessary for the Court to rule on his petition. A State's interest in carrying out an execution cannot outweigh the interest of Mr. Rhines and the public in ensuring that this important claim is decided on its merits.

III. The Pulic Has an Interest in Ensuring Mr. Rhines's Claim Is Heard.

Anti-gay bias, if left unaddressed in this case, risks systemic harm to the justice system. The public has a strong interest in ensuring that the merits of Mr. Rhines's claim are reviewed. The State of South Dakota will soon execute a man whose jurors considered his sexual orientation and longstanding, but deeply disturbing, stereotypes about how a gay man would experience imprisonment in making their decision to sentence him to death. The lack of judicial review of this

claim threatens the public's confidence in the criminal justice system. "[T]he appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016); *see also Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (relying on racist stereotypes "poisons public confidence in the judicial process," and undermines the legitimacy of "the law as an institution, the community at large, and the democratic ideal reflected in the processes of our courts" (with alterations)); *Pena-Rodriguez*, 137 S. Ct. at 869 (finding constitutional remedy for juror's racial bias is "necessary to prevent a systemic loss of confidence in jury verdicts").

* * *

For the foregoing reasons and those explained in his petition for habeas corpus, 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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