No. 19A-486

IN THE
Supreme Court of the United States

CHARLES RUSSELL RHINES,
Petitioner,
v.

SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, MIKE LEIDHOLT, SECRETARY, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, AND DARIN YOUNG AS WARDEN OF THE SOUTH DAKOTA STATE PENITENTIARY,
RESPONDENTS.

REPLY TO BRIEF IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

CAPITAL CASE: IMMINENT EXECUTION

November 4, 2019 at 1:30 PM (Central)

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REPLY TO BRIEF IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

I. RHINES WILL BE IRREPARABLY HARMED IF THE STATE OF SOUTH DAKOTA IS PERMITTED TO EXECUTE HIM IN VIOLATION OF HIS RIGHT TO SELECT THE METHOD OF EXECUTION THAT IS GUARANTEED BY SOUTH DAKOTA LAW.

South Dakota does not dispute that execution is irreparable injury. Brief in Opposition (Opposition) at 13.

II. SOUTH DAKOTA IS DENYING PETITIONER DUE PROCESS OF LAW IN REFUSING TO EXERCISE HIS STATE-LAW RIGHT TO CHOOSE THE MEANS OF HIS DEATH.

Respondents do not deny that in enacting SDCL § 23A-27A-32.1, considering the statutory structure, Rhines has a life interest that entitles him to be executed in the manner provided by South Dakota law at the time of the Rhines's conviction or sentence and that this life interest in being executed in this manner is protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. (Compl. ¶¶ 51-56.)

Instead, Respondents assert that Rhines cannot show that he has a liberty interest arising out of SDCL § 23A-27A-32.1 because he cannot show that execution by pentobarbital would impose an "atypical and significant hardship" on him, citing *Sandin v. Conner*, 515 U.S. 472 (1995). Yet *Sandin* is

distinguishable because it addressed only when due process liberty interests are created by internal prison regulations. *Id*. at 483. As the Ninth Circuit recognized in *McQuillion v. Duncan*, 306 F.3d 895, 903 (2002): "It is clear from the Court's framing of the problem in *Sandin*, and from the fact that *Sandin* cited [*Board of Pardons v. Allen*, 482 U.S. 369, (1987)] with approval… that *Sandin's* holding was limited to internal prison disciplinary regulations." See also *Wilkinson v. Austin*, 545 U.S. 2009 (2005) ("In *Sandin*, we criticized this methodology [in *Hewitt v. Helms*, 459 U.S. 460 (1983)] as creating a disincentive for States to promulgate procedures for prison management, and as involving the federal courts in the day-to-day management of prisons…. For these reasons, we abrogated the methodology of parsing the language of particular regulations.")

Rhines's case involves a statutory interest created by the South Dakota Legislature concerning the manner and method of death. The constitutional protection of such an interest is analogous to *Wolff v. McDonnell*, 418 U.S. 539, 556–558, (1974) where the Supreme Court held that a life or liberty interest may arise from an expectation or interest created by state laws or policies. *See id*. (liberty interest in avoiding withdrawal of state-created system of good-time credits); *Bagley v. Rogerson*, 5 F.3d 325, 328 (8th Cir. 1993) ("[S]tate law may create a 'liberty interest' protected by the Fourteenth Amendment… [i]f, for example, a state statute gives 'specific directives to the decision maker that if the [statute's] substantive predicates are present, a particular outcome must follow,' a 'liberty interest' protected by the Fourteenth Amendment is created.") (quoting *Kentucky*

Department of Corrections v. Thompson, 490 U.S. 454, 463 (1989)); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (Oklahoma statute providing jury could impose a sentence of no fewer than 10 years in prison created a liberty interest protected by the 14th Amendment in defendant having the jury apply that sentence). Accordingly, Rhines need not show an atypical and significant hardship, but merely that South Dakota created a right and Rhines was deprived of that right by South Dakota. *See Osloond v. Farrier*, 659 N.W.2d 20, 24 (S.D. 2003); *DeShaney v. Winnebago County Dep't of Soc. Servs*., 489 U.S. 189, 195, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249, 258 (1989). Here, in enacting SDCL § 23A-27A-32.1, the State of South Dakota created life and liberty interests that entitle Rhines to be executed in the manner provided by South Dakota law at the time of the Rhines's conviction or sentence. See SDCL § 23A-27A-32.1. The South Dakota Legislature enacted this provision in February of 2007 and made no changes to it when the Legislature amended portions of § 23A-27A-32 in 2008.

III. SOUTH DAKOTA'S INVOCATION OF *RES JUDICATA* TO BAR RHINES'S CLAIM IS AN UNCONSTITUTIONAL APPLICATION OF A STATE-LAW DOCTRINE.

The State argues that, "[i]f Rhines had wanted to protest that South Dakota's lethal injection protocol is an unlawful deviation from [the] statute, South Dakota's courts provided an appropriate venue for that suit." Opposition at 8. The State ignores that Rhines's claim *only* arose when the State refused to honor his election to use the 1993 protocol.

Mr. Rhines was not dilatory in seeking to enforce his statutory right to be executed according to the law in existence at the time of his conviction. To be clear, Mr. Rhines could not have brought the instant action to enforce his statutory right until the State informed him on October 17, 2019, that it would not comply with its statutory obligations. There was no foreseeable, let alone ripe, issue regarding the State's use of pentobarbital until the State indicated, on October 17, 2019, that it would not comply with its statutory obligations

Indeed, if anything, the State's October 24, 2011 Notice of Adoption of Revised Execution Policy and Protocol would have put Mr. Rhines on notice that the State *would* comply with the law in effect in 1993 if Mr. Rhines so elected, not that it would disregard the statute's plain language. And far from "provid[ing] an appropriate venue," the South Dakota trial court refused even to reach that question.

The irrationality of that application of *res judicata* is, as set forth in the Application, a federal due process question. The State offers no response to Rhines's argument, citing only to state *res judicata* law. The unavoidable truth is that *no* state court has *actually* decided the constitutional claim that Rhines has brought in this action.

Respectfully,

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