CASE NO. _____ (CAPITAL CASE) (18A612)

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

PETITION FOR A WRIT OF CERTIORARI

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Dated: February 15, 2019

QUESTIONS PRESENTED

CAPITAL CASE

After this Court decided *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), Charles Rhines sought relief on the basis of juror statements indicating that anti-gay stereotypes and animus had affected his jury's decision to sentence him to death. He moved a federal district court for leave to amend his initial petition for a writ of habeas corpus to include the statements while an appeal from the court's earlier denial of that initial petition was pending in the Eighth Circuit.

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."

The district court ruled that Mr. Rhines's motion constituted an unauthorized "second or successive" habeas petition, though the Courts of Appeals are divided on whether that 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. The court then declined to issue a certificate of appealability, as did the majority of a three-judge panel of the Eighth Circuit.

The questions presented are:

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?

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?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Rhines respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The September 7, 2018, order of the U.S. Court of Appeals for the Eighth Circuit that declined to issue a certificate of appealability (COA) is unpublished and appears in the Appendix at App. 1.[1] The September 18, 2018, order of the Eighth Circuit that denied a petition for panel rehearing also is unpublished, and appears in the Appendix at App. 2.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eighth Circuit declined to issue a COA on September 7, 2018, and denied a petition for panel rehearing on September 18, 2018. App. 1–2. On December 11, 2018, Justice Gorsuch extended the time to file this petition for a writ of certiorari until February 15, 2019.

[1] "App." refers to the appendix to this petition for certiorari. Mr. Rhines also is filing a separate petition for a writ of certiorari to the Eighth Circuit regarding its disposition of his appeal from the district court's denial of the initial federal petition, *see Rhines v. Young*, 18A654, and this petition cites the Appendix and Addendum to that Eighth Circuit appellate briefing as "CTA App." and "CTA Add."

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ."

The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, . . . nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the Constitution provides, in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28 United States Code § 2253(c)(1) provides, in part: "Unless a circuit justice or judge issues a [COA], an appeal may not be taken to the court of appeals from—(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." Section 2253(c)(2) provides: "A [COA] may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

Section 2244(b)(1) states: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." Section 2244(b)(2) then states: "A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—[a statutory exception is met]."

STATEMENT OF THE CASE

Concern about the potential for anti-gay bias to affect jurors' deliberations was present from the start of Charles Rhines's capital trial. Defense counsel

questioned potential jurors about whether they held any such bias. Jurors learned during the state's case for guilt that Mr. Rhines is gay. They eventually reached a guilty verdict and—when deciding whether to sentence him to life imprisonment or death—sent the trial judge a note with questions about life in prison. The note included questions about whether his jailers would allow him to "mix with the general inmate population[,]" "create a group of followers or admirers[,]" "discuss, d[e]scribe or brag about his crime to other inmates, especially new and[/]or young men jailed for lesser crimes . . . [,]" "marry or have conjugal visits[,]" or "be jailed alone or . . . have a cellmate." App. 30–32. In his direct appeal, Mr. Rhines relied on the note to argue that anti-gay prejudice had influenced their sentencing decision.

Since 2015, Mr. Rhines has sought an opportunity to demonstrate juror bias through multiple jurors' statements. This petition arises from his September 2017 motion to amend his initial federal habeas petition with three statements. One juror stated: "we also knew that he was a homosexual and thought that he shouldn't be able to spend his life with men in prison." App. 33. Another recalled a comment during deliberations "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]." App. 34. And a third juror remembered "lots of discussion of homosexuality. There was a lot of disgust." App. 35 (declaration of Katherine Ensler, Federal Community Defender Office, quoting the third juror) (some quotation marks omitted). The district court denied the motion as an unauthorized "second or successive" habeas petition. That ruling underlies this petition.

I. Trial And Direct Appeal

In January 1993, Mr. Rhines stood trial in the Seventh Judicial Circuit Court of Pennington County, South Dakota, for the murder of Donnivan Schaeffer.

Mr. Rhines filed a pretrial motion for authorization to retain a forensic communication expert to complete "a community attitude study and design a supplemental juror questionnaire . . . ." *See* CTA Add. 250. Counsel acted on a "concern[] that [Mr. Rhines's sexual orientation] would unfairly influence the jury, and . . . anticipated using the . . . survey and juror questionnaire to address this issue." CTA Add. 250. The trial court denied the motion. CTA Add. 250.

Mr. Rhines's lawyers asked all but one of the eventually-selected jurors whether they would harbor bias against him because he is gay. CTA Add. 251. "Ten of the jurors expressed neutral feelings about homosexuality, indicating it would have no impact on their decision making." CTA Add. 251. One "stated that she regards homosexuality as sinful. However, she also stated Rhines'[s] sexual orientation would not affect how she decided the case. . . ." CTA Add 251.

The state presented evidence of Mr. Rhines's sexual orientation during its guilt phase presentation. One witness testified that she had seen Mr. Rhines "cuddling" with her husband. *See* CTA App. 396. She further testified that Mr. Rhines had told her that he hated her because her husband loved her instead of Mr. Rhines. *See* CTA App. 398. A former partner of Mr. Rhines also testified that he had a "sexual" relationship with Mr. Rhines at one point in time. *See* CTA App. 326.

The jury found Mr. Rhines guilty of first-degree murder and third-degree burglary. CTA Add. 225. The state's penalty phase case consisted of its guilt phase

evidence and victim impact testimony. CTA App. 463–69; CTA App. 499–500. Mr. Rhines presented the testimony of his two sisters. CTA App. 469–98. One of his sisters testified that Mr. Rhines is gay and "struggl[ed] with his sexual identity . . . ." CTA App. 491–95.

The jurors began deliberating at 4:10 pm on January 25. CTA App. 575. On the morning of January 26, they sent the trial judge a note asking about what would happen to Mr. Rhines if they sentenced him to life in prison:

> Judge Kon[en]kamp,
>
> In order to award the proper punishment we need a clear p[er]spective on what "Life In Prison Without Parole" really means. We know what the Death Penalty means, but we have no clue as to the reality of Life Without Parole.
>
> The questions we have are as follows:
>
> 1. Will Mr. Rhines ever be placed in a minimum security prison or be given work release.
> 2. Will Mr. Rhines be allowed to mix with the general inmate population
> 3. [A]llowed to create a group of followers or admirers.
> 4. Will Mr. Rhines be allowed to discuss, d[e]scribe or brag about his crime to other inmates, especially new and[/]or young men jailed for lesser crimes (ex: Drugs, DWI, assault, etc.)
> 5. Will Mr. Rhines be allowed to marry or have conjugal visits.
> 6. Will he be allowed to attend college
> 7. Will Mr. Rhines be allowed to have or attain any of the common joys of life (ex[:] TV, Radio, Music, Telephone or hobbies and other activities allowing him distraction from his punishment).
> 8. Will Mr. Rhines be jailed alone or will he have a cellmate.
> 9. What sort of free time will Mr. Rhines have (what would his daily routine be).
>
> We are sorry, Your Honor, if any of these questions are inappropriate but there seems to be a huge gulf between our two alternatives. On one hand there is Death, and on the other hand what is life in prison w/out parole.

App. 30–32. *See* CTA App. 575–76.

The trial court instructed that "[a]ll the information I can give you is set forth in the jury instructions," CTA App. 576–78, after declining to follow a defense request to instruct the jury not to base its "decision on speculation or guesswork," CTA App. 577. Roughly eight hours later, at 6:40 pm, the jury returned a sentence of death. *See* CTA App. 579–80.

The South Dakota Supreme Court affirmed. *See* CTA Add. 200–82. Among other claims, Mr. Rhines relied on the jury's note and argued that it had sentenced him to death under the influence of passion, prejudice, and other arbitrary factors. *See* CTA Add. 269–70. He also argued that the trial court had abused its discretion by not appointing a communication expert regarding his sexual orientation. *See* CTA Add. 250–52. The court rejected these claims on the basis of the record of trial and voir dire, and concluded that the jury's note did not reflect anti-gay bias. *See* CTA Add. 269–70; CTA Add. 250–52.

II. State And Federal Postconviction Proceedings Before This Court's Merits Decision In *Pena-Rodriguez*

Mr. Rhines sought state and federal habeas relief through litigation that included review by this Court. *See Rhines v. Weber*, 544 U.S. 269 (2005); CTA Add. 283–303.

Mr. Rhines argued among other claims in his initial federal petition that the state court's decision on his motion to appoint an expert regarding community perceptions of sexual orientation had been contrary to, or involved an unreasonable application of, *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985). *See* CTA Add. 119–24. He

raised ineffective assistance of trial counsel, evidenced by the failure to exclude evidence of his sexual orientation. *See* CTA Add. 104–06; CTA Add. 186. And he argued that the trial court and trial counsel had erred under *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994), in responding to the jury's note. *See* CTA Add. 070–73; CTA Add. 106–08.

Between 2000 and 2015, the district court either disqualified or permitted withdrawal of a multitude of Mr. Rhines's attorneys because of career changes. *See* CTA App. 8; CTA App. 17–18. During this period, the court also issued a stay to permit Mr. Rhines to exhaust remedies for a set of claims. *See* CTA App. 13; CTA App. 16.

By 2009, the district court had appointed the Federal Public Defender Office for the District of South Dakota and the District of North Dakota. CTA App. 18. Then, in April 2015, the district court appointed a new attorney, Carol Camp, to represent Mr. Rhines alongside that office. *See* CTA App. 23–24.

The district court denied relief on Mr. Rhines's petition in February 2016. *See* CTA Add. 001–132.

The next month, Mr. Rhines filed a motion to alter or amend that judgment under Federal Rule of Civil Procedure 59(e) and included under seal two juror declarations. *See* CTA App. 1342–81. The motion explained that, before April 2015 and Camp's appointment, no attorney had attempted to speak with the jurors about their note or any other aspect of the case. *See* CTA App. 1342–48. That filing specifically alleged that one juror had referred to Mr. Rhines as "'[t]hat SOB queer,'" CTA App. 1345, and that this reference made other jurors "'fairly uncomfortable,'"

CTA App. 1345. The filing also quoted another juror's statements: "'One of the witnesses talked about how they walked in on Rhines . . . fondling a man in a motel room bed. I got the sense it was a sexual assault situation and not a relationship between the two men.'" CTA App. 1347. The juror also stated that, if sentenced to life imprisonment, Mr. Rhines might be "a 'sexual threat to other inmates and take advantage of other young men in or outside of prison.'" CTA App. 1347.

In April 2016, this Court granted a writ of certiorari in *Pena-Rodriguez v. Colorado*, 136 S. Ct. 1513 (2016), and Mr. Rhines requested that the district court hold his case in abeyance in light of that order, *see* Pet'r's Reply to Response to Mot. to Alter or Amend. Judgment, *Rhines v. Young*, No. 5:00-cv-05020-KES, ECF No. 340, PageID 5013–14 (D.S.D. filed Apr. 25, 2016).

The district court, however, denied his Rule 59(e) motion in July 2016, without awaiting the decision in *Pena-Rodriguez* or hearing live testimony from any jurors. *See* CTA Add. 178–96. The court concluded that, "regardless of whether the juror affidavits are admissible," the motion failed to meet the requirements of Rule 59(e) and any claim of juror bias would be subject to procedural default. *See* CTA Add. 182–86. Later that month, the court granted Camp's motion to withdraw and appointed the Federal Community Defender Office for the Eastern District of Pennsylvania in her place. *See* CTA App. 31. Mr. Rhines filed a timely notice of appeal from the district court's judgment. *See Rhines v. Young*, No. 16-3360 (8th Cir. filed Aug. 3, 2016).

In December 2016, juror interviews provided additional evidence for Mr. Rhines's suspicions of bias. As described above, a juror remembered that "[Mr.

Rhines] was a homosexual and thought that he shouldn't be able to spend his life with men in prison." App. 33. Others remembered a similar comment during deliberations, *see* App. 34, and "lots of discussion of homosexuality. There was a lot of disgust." App. 35 (quoting the third juror) (some quotation marks omitted).

In Mr. Rhines's Eighth Circuit appeal, he continued to assert that anti-gay bias had played an improper role in the jurors' deliberations, but limited his arguments to suspicions arising from their note. *See* Br. of Appellant, *Rhines v. Young*, No. 16-3360, 106 (8th Cir. filed Feb. 7, 2017) (citing the certiorari grant in *Pena-Rodriguez v. Colorado*, 136 S. Ct. 1513, in explaining that the note "reflected anti-gay bias and . . . concerns about Mr. Rhines's ability and opportunity to engage in same-sex sexual activity if sentenced to life").

III. State And Federal Postconviction Proceedings After This Court's Merits Decision In *Pena-Rodriguez*

This Court decided *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), in March 2017. Mr. Rhines later sought leave from the district court to amend his initial habeas petition with the three statements quoted above to prove that anti-gay prejudice unconstitutionally had played a role in the jury's decision to sentence him to death.[2] *See* App. 36–48; App. 49–72. In December 2017, Mr. Rhines gave

[2] In the alternative, he moved for relief under Federal Rule of Civil Procedure 60(b), but did not seek to appeal the district court's denial of that motion.

notice to the Eighth Circuit of his motion to amend in the district court. App. 73–74.[3]

The state opposed the motion. *See* Resp. Mot. Amend., *Rhines v. Young*, No. 5:00-cv-05020-KES, ECF No. 389, PageID 6178, 6182–86 (D.S.D. filed Nov. 27, 2017). It also submitted an affidavit signed by an investigator in November 2017 that described interviews with nine jurors. *See* App. 77–83. Later, the state submitted another affidavit signed by the same investigator in December 2017 that described two additional interviews. *See* App. 84–86.

The three jurors identified in Mr. Rhines's motion denied that they had based their decision to sentence him to death on his sexual orientation, *see* App. 80–86, though two confirmed that, during deliberations, a juror had "comment[ed] to the effect that [Mr.] Rhines might like life in the penitentiary among other men," App. 80–81.

More specifically, the state's investigator indicated that the third juror quoted above had "recalled a comment to the effect that Rhines might like life in the penitentiary among other men." App. 81. This juror opined to the investigator that "the comment was made as 'somewhat of a tension release'" and "that the foreman and everyone else on the jury agreed that Rhines was not on trial for being

[3] He also sought to introduce the evidence in state court in November of that year, but the South Dakota Supreme Court ruled 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. 87–88. This Court subsequently denied a petition for a writ of certiorari to the state supreme court in June 2018. *See Rhines v. South Dakota*, No. 17-8791, 2018 WL 2102800, at *1 (2018).

homosexual." App. 81. *See also* App. 81 (adding that "[t]he comment was just 'a one moment thing' which 'was never referred to again'").

The state's supplemental affidavit also quoted this third juror as saying about Mr. Rhines: "I don't care if he's queer or not, it didn't matter, the crime was committed as far as I'm concerned." App. 85 (quotation marks omitted).

According to the state's investigator, the second juror quoted above also said that "one juror made a joke that Rhines might enjoy a life in prison where he would be among so many men." App. 80. The second juror opined to the investigator that the statement and Mr. Rhines's sexual orientation had not impacted the jurors' ultimate decision, submitted a journal, and asserted that the "'stab at humor' 'did not go over well.'" *See* App. 80; *see also* App. 80 ("The juror who made the joke said that what he had said was stupid or dumb or something to that effect and 'that was the end of it.'").[4]

The state investigator's supplemental affidavit described an interview involving him, an attorney for the state, the first juror, and that juror's wife, who said that her husband had problems with memory and dementia. App. 85–86. The juror reported that he had been honest during voir dire and denied that he had voted for death because Mr. Rhines is gay. App. 85–86. The affidavit also described the views and opinions of the juror's wife. App. 85–86.

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[4] The affidavit did not address the jurors' choice of language in their note to the trial judge about whether life imprisonment would allow Mr. Rhines, for example, to "mix with the general inmate population[,]" "create a group of followers or admirers[,]" or "discuss, d[e]scribe or brag about his crime to other inmates, especially new and[/]or young men jailed for lesser crimes . . . [,]" App. 30–32.

The jurors whose statements led to the underlying motion did not retract their earlier quoted statements, for example, one that "we also knew that he was a homosexual and thought that he shouldn't be able to spend his life with men in prison," App. 33.

The district court ruled that it lacked jurisdiction to consider Mr. Rhines's motion and that it amounted to a "second or successive" petition. *See* App. 8–16; *see also* App. 20 (citing *Burton v. Stewart*, 549 U.S. 147, 152 (2007), for the rule that a district court lacks jurisdiction to consider a "second or successive" petition unless a court of appeals has authorized its filing). It denied a COA. *See* App. 28–29. Mr. Rhines applied for a COA from the Eighth Circuit, which referred it to a three-judge panel. Two judges declined to issue one after noting that "[t]he district court denied relief on the ground that Rhines was seeking second or successive habeas relief that had not been authorized by the court of appeals, *see* 28 U.S.C. § 2244(b)(3)(A), and denied a [COA]." *See* App. 1. A third judge, however, "would [have] grant[ed] the certificate." App. 1.[5]

Mr. Rhines sought panel rehearing on the basis that a circuit judge would have issued a COA, which satisfied the plain text of 28 U.S.C. § 2253(c)(1), but the panel voted two-to-one to deny the petition for rehearing. *See* App. 2.

[5] The district court also denied a separate motion that sought permission to have Mr. Rhines evaluated by a set of experts in preparation for a potential application for executive clemency. Mr. Rhines appealed, and that appeal is pending in the Eighth Circuit under Docket No. 18-2376.

REASONS FOR GRANTING THE WRIT

Mr. Rhines was prepared to prove that jurors relied on anti-gay stereotypes and animus in sentencing him to death. He proffered a statement from a juror who remembered an invocation of a stereotype during deliberations: that, if a man is gay, a vote to imprison him for life without the possibility of parole would "be sending him where he wants to go . . . ." *See* App. 34. Another remembered "lots of discussion of homosexuality" and "a lot of disgust," App. 35 (quoting the third juror) (quotation marks omitted). And a third stated, "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." App. 33.

Mr. Rhines presented these statements and requested a hearing in light of *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017), in a motion to amend his initial federal habeas petition while a denial of that petition was pending on appeal. The district court, however, rejected the motion on jurisdictional grounds. The court applied 28 U.S.C. § 2244(b), and both it and the Eighth Circuit declined to issue a COA. Yet federal Courts of Appeals disagree over where Congress intended to draw a line between an initial federal habeas petition and a "second or successive" one subject to § 2244(b). Some circuits have permitted amendment or supplementation of an initial petition after a district court's denial of that petition, but before appellate proceedings following that denial have concluded, though most have applied § 2244(b)'s limitations on "second or successive" petitions.

When a district court has "denie[d] a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," *Slack v. McDaniel*,

529 U.S. 473, 484 (2000), the prisoner seeking a COA must "show[], at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling," *id.* This standard focuses on "the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El v. Cockrell,* 537 U.S. 322, 342 (2003).

In this case, both the procedural ruling that prevented the district court from considering the motion with Mr. Rhines's underlying claim and the claim itself—that at least one juror who sentenced him to death relied on bias against his sexual orientation—present debatable and important questions. This Court should grant certiorari.

I. Reasonable Jurists Could Debate, And The Circuits Are Divided Over, The Availability Of An Amendment Or Supplement To An Initial Federal Habeas Petition After A District Court's Denial Of That Petition, But Before The Conclusion Of Appellate Proceedings Following That Denial.

Mr. Rhines has attempted to litigate claims related to the role anti-gay bias played in his sentencing for over twenty years, but evidentiary and procedural rules have prevented meaningful review. Earlier, he relied on the jurors' note to the trial judge during sentencing deliberations because it asked—and offered an apology for—certain "inappropriate," irrelevant, and troubling questions about the nature of life in prison. *See* App. 30–32. After this Court decided *Pena-Rodriguez*, Mr. Rhines filed a motion to amend his initial federal habeas petition, arguing that he had a Sixth Amendment right to rely on the three statements quoted above about his sexual orientation and the invocation of a disturbing stereotype in support of an

impartial sentencing jury claim. The district court held that it lacked jurisdiction over the motion and that the motion amounted to a "second or successive" petition, after which that court and an Eighth Circuit panel declined to issue a COA.

Reasonable jurists could debate, however, whether the courts needed to apply § 2244(b)'s threshold limitations on "second or successive" petitions, because a petition does not automatically become "second or successive" while appellate proceedings on a "first" petition remain ongoing.

A. The Phrase "Second Or Successive" Is A Term Of Art And Does Not Refer To All Petitions Filed Later In Time Than An Initial Petition.

This Court has recognized two features of the phrase "second or successive." First, "'[it] is a term of art given substance in [the Court's] prior habeas corpus cases." *Slack*, 529 U.S. at 486. "The phrase originally arose in the federal context, *see* § 2255 (1946 ed., Supp. II), and applied only to applications raising previously *adjudicated* claims, *see Sanders v. United States*, 373 U.S. 1, 12 (1963)." *Magwood v. Patterson*, 561 U.S. 320, 337 (2010). In 1996, Congress used the term and set limitations on "[a] claim presented in a second or successive habeas corpus application . . . ." 28 U.S.C. § 2244(b)(1)–(2).

Since 1996, this Court has declined to "suggest the definition of second or successive [under pre-AEDPA law] would be different under AEDPA." *Slack*, 529 U.S. at 486.[6] "The phrase 'second or successive' is not self-defining." *Panetti v.*

[6] AEDPA "changed the standard used to determine when a petition properly classified as second or successive should be dismissed as an abuse of the writ." *Goodrum v. Busby*, 824 F.3d 1188, 1193 (9th Cir. 2016). "Congress did not, however,

Quarterman, 551 U.S. 930, 943 (2007). Rather, "[i]t takes its full meaning from [the Court's] case law, including decisions predating the enactment of the [AEDPA]." *Id.* at 943–44 (citation omitted). *See Magwood*, 561 U.S. at 332–34, 337.

Second, the Court "has declined to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application." *Panetti*, 551 U.S. at 944.

Two examples illustrate this feature. First, the *Panetti* Court held that "Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a . . . § 2254 application raising a *Ford*-based[7] incompetency claim filed as soon as that claim is ripe." *Panetti*, 551 U.S. at 945. There, the Court expressed its "willingness to look to the 'implications for habeas practice . . . .'" *Id.* at 945 (quoting *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998)). It confirmed its ultimate conclusion by "consider[ing] AEDPA's purposes," *id.* at 945, and "the practical effects of [its] holdings . . . ," *id.* It also noted the lack of any "argument that petitioner's actions constituted an abuse of the writ, as that concept is explained in [its] cases." *Id.* at 947.[8]

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alter the set of rules federal habeas courts had developed to determine whether a petition is second or successive." *Id.*

[7] *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

[8] *See also Salinger v. Loisel*, 265 U.S. 224, 230–32 (1924) (describing effect of petitioners gaining a right to appellate review from a court's judgment on an application) (cited in Randy Hertz and James S. Liebman, 2 Federal Habeas Corpus Practice and Procedure § 28.2 (2018)); *Wong Doo v. United States*, 265 U.S. 239, 241

For another example, the *Slack* Court held that "a habeas petition which is filed after an initial petition was dismissed without adjudication on the merits for failure to exhaust state remedies is not a 'second or successive' petition as that term is understood in the habeas corpus context." *Slack*, 529 U.S. at 478.

Today, as one circuit has summarized, "a petition will not be deemed second or successive unless, at a minimum, an earlier-filed petition has been finally adjudicated." *Goodrum*, 824 F.3d at 1194.

Courts do not agree, however, on what "finally adjudicated" means. One treatise explains: "Naturally, in order for a petition or motion to be 'second or successive,' it must be 'filed subsequent to the conclusion of a proceeding that counts as the first.' The question is at what point does the 'first' proceeding conclude for purposes of the second or successive petition rule?" Brian R. Means, Second or successive defined—Conclusion of "first" proceeding required, Postconviction Remedies § 27:9 (July 2018 Update) (footnote and some quotation marks omitted).

(1924) ("To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of habeas corpus. No reason for not presenting the proof at the outset is offered."); *Sanders*, 373 U.S. at 15–17 (explaining one rule for petitions that raise grounds that had been subject to earlier hearings and determinations and a second rule to apply the "abuse of the writ doctrine" if a "new application" presented a "different ground"); *Kuhlmann v. Wilson*, 477 U.S. 436, 445 n.6 (1986) (plurality op.) ("The terms 'successive petition' and 'abuse of the writ' have distinct meanings. A 'successive petition' raises grounds identical to those raised and rejected on the merits on a prior petition." (citing *Sanders*, 373 U.S. at 15–17)).

B. The Second And Tenth Circuits Recognize Circumstances When 28 U.S.C. § 2244(b) Does Not Apply As Soon As A District Court Files An Appealable Disposition Of An Initial Habeas Petition.

Two circuits have entertained a proposed amendment or supplement to an initial petition while appellate proceedings for that petition were pending.

The Second Circuit has held that, "so long as appellate proceedings following [a] district court's dismissal of [an] initial petition remain pending when a subsequent petition is filed, the subsequent petition does not come within AEDPA's gatekeeping provisions for 'second or successive' petitions." *Whab v. United States*, 408 F.3d 116, 118 (2d Cir. 2005). There, a pro se petitioner applied to the circuit to file a subsequent 28 U.S.C. § 2255 petition, while awaiting a decision on an application for a COA from a district court's earlier denial of an initial § 2255 petition. *See id.* The court reasoned "that for a subsequent petition to be considered 'second or successive' . . . the disposition of an earlier petition must qualify as an adjudication on the merits." *Id.* "[This] law allows every petitioner 'one full opportunity' for collateral review." *Id.* (quoting *Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002) (Sotomayor, J.)); *see also Fuller v. United States*, 815 F.3d 112, 113 (2d Cir. 2016) (per curiam) (continuing to apply this precedent, as discussed in Means, Postconviction Remedies § 27:9). It therefore "transfer[red the subsequent petition] to the district court for whatever further action the district court finds appropriate, ..." *Whab*, 408 F.3d at 119 (citation and footnote omitted).

The Second Circuit has seen no conflict with AEDPA in this approach and has noted that courts maintain discretion to deny such filings in accordance with the Rules of Civil Procedure. *See Ching*, 298 F.3d at 177 (citing *Littlejohn v. Artuz*,

271 F.3d 360, 362 (2d Cir. 2001) (per curiam)); *see also Whab*, 408 F.3d at 119 n.2 ("Traditional doctrines, such as abuse of the writ, continue to apply.").

The Tenth Circuit also has declined to treat a district court's judgment on an initial petition as dispositive of whether a subsequent filing is a "second or successive" petition. To reach that result, it relied on a set of factors to identify "unusual circumstances" that justified permission, during an appeal, "to supplement [a] previously asserted prosecutorial misconduct claim with [new *Brady v. Maryland*, 373 U.S. 83 (1963),] allegations . . . ." *Douglas v. Workman*, 560 F.3d 1156, 1189–90 (11th Cir. 2009) (per curiam).[9]

In *Douglas*, all of the factors were present, *Douglas*, 560 F.3d at 1176–96, and warranted an exception to the circuit's usual rule that would apply § 2244's limitations to a supplement to an initial petition while the petition "was already pending before th[e circuit court] on appeal from the denial of relief," *id.* at 1189 (discussing *Ochoa v. Sirmons*, 485 F.3d 538, 541 n.3 (10th Cir. 2007) (per curiam)). The court explained: (a) an appeal from the denial of an initial petition "remained pending," *id.* at 1190; (b) the previously-presented and new claims were "closely correlated" to one another, *id.* at 1190–92; (c) a prosecutor had committed "willful and intentional [misconduct]," *id.* at 1192; (d) the prosecutor "took affirmative actions to conceal his tacit agreement with the state's key witness until it was too late, procedurally, for [the petitioner] to use that undisclosed agreement

[9] "On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d).

successfully [in earlier proceedings,]" *id.* at 1192–94; (e) "th[e] case involve[d] the death penalty," *id.* at 1194; (f) a codefendant had received "habeas relief on the very same *Brady* claim . . . [,]" *id.* at 1194–95; and (g) permitting a supplement "d[id] not implicate the concerns underlying . . . AEDPA's severe restrictions on granting . . . relief on second or successive petitions," *id.* at 1195.

This Court should recognize that both circuits properly have interpreted the meaning of "second or successive." A motion filed while an appeal from an earlier district court judgment on an initial habeas petition remains ongoing or appellate remedies remain available should not automatically be subject to § 2244(b). Lower courts should be permitted to exercise their discretion in deciding how to rule on such a motion and to take into account why a petitioner filed a motion after a district court had entered a judgment.

C. Six Circuits Have Applied The Limitations On "Second Or Successive" Applications After Either A District Court Issued An Appealable Order Regarding An Initial Petition Or A Petitioner Filed A Notice Of Appeal (Or Ran Out Of Time To Do So) From Such An Order. The Eleventh Circuit Has Taken Inconsistent Positions.

Courts in this category that have addressed the question have drawn bright lines, but some have recognized that this Court's case law does not identify where to draw them. Nearly all rely on *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005), to support the conclusion that an "application" for habeas relief filed after the time for filing a notice of appeal, or later, constitutes a "second or successive" application. *Gonzalez*, however, addressed "whether a Rule 60(b) motion filed by a habeas petitioner is a 'habeas corpus application' as the statute uses that term." *Gonzalez*, 545 U.S. at 530. It did not explain how to determine whether an "application"

amounts to a "second or successive" one. The petitioner in that case had filed a Rule 60(b) motion with no remaining avenue to appeal an earlier district court dismissal of an initial petition as untimely. *Id.* at 527. Thus, *Gonzalez* did not settle the question presented here.

The Seventh Circuit treats a habeas application a petitioner files after having filed a notice of appeal (or the expiration of time to do so) as a "second or successive" one. *See Phillips v. United States*, 668 F.3d 433, 435–36 (7th Cir. 2012). For instance, one petitioner "filed his Rule 60(b) motion not only after an appeal had been filed, but also about six months after the time for appeal had run out," and the court concluded that "the motion cannot be treated as suspending the judgment's finality . . . ." *Id.* at 435–36 (citing Fed. R. App. P. 4(a)(4)). The court, however, appeared to recognize that *Gonzalez*, by itself, did not dictate that result. *See Phillips*, 668 F.3d at 435 ("Under *Gonzalez*, the motion was an 'application' for collateral relief. ¶ But was it a *second* application? The first was still pending on appeal."). The court also discussed the possibility of a remand to render a judgment non-final, if the district court had issued a favorable indicative ruling. *See id.* at 436.

The Third and Sixth Circuits follow a similar course, but read *Gonzalez* as dispositive for Rule 60(b) motions. In *Blystone v. Horn*, 664 F.3d 397 (3d Cir. 2011), the Third Circuit reasoned that, although *Gonzalez* "did not explicitly address . . . whether a Rule 60(b) motion, which constitutes a habeas corpus petition, is properly treated as a second or successive one," *id.* at 413, any Rule 60(b) motion properly treated as such "*must* be a second or successive petition because, the judgment

having become final, the petitioner has expended the 'one full opportunity to seek collateral review' that AEDPA ensures," *id.* (quoting *Urinyi v. United States*, 607 F.3d 318, 320 (2d Cir. 2010)). This reasoning aligns the Third Circuit with the Sixth Circuit. *See Howard v. United States*, 533 F.3d 472, 474–75 (6th Cir. 2008); *Moreland v. Robinson*, 813 F.3d 315, 324–25 (6th Cir. 2016). Still, both circuits distinguish Rule 59(e) motions. *See Blystone*, 664 F.3d at 415; *Howard*, 533 F.3d at 475; *see also* Means, Postconviction Remedies § 27:13 (noting split among courts on *Gonzalez*'s application to Rule 59(e) motions).

The Fifth Circuit, by contrast, has applied *Gonzalez* without grappling with the issues presented here—whether a motion relates to an initial habeas application that itself has not been finally adjudicated and whether an "application" constitutes a "second or successive" one. Instead, the Fifth Circuit analyzes whether any Rule 59 or Rule 60 motion presents grounds for federal habeas relief and, if one does, treats it as a "second or successive" petition without further analysis. *See Williams v. Thaler*, 602 F.3d 291, 302–13 (5th Cir. 2010). The Fourth Circuit seems to have taken this approach as well. *See United States v. Winestock*, 340 F.3d 200, 203–07 & n.1 (4th Cir. 2003); *see also United States v. Martin*, 132 F. App'x. 450, 451 (4th Cir. 2005) (per curiam) (unpublished) (addressing a Rule 59 motion, cited in *Williams*, 602 F.3d at 302 n.5).

In addition, the Ninth Circuit has concluded "that [a petitioner] cannot . . . amend his petition after the district court has ruled and proceedings have begun in th[e] court [of appeals] (much less after the Supreme Court denied certiorari on the claims on which [the court of appeals] had already ruled)." *Beaty v.*

Schriro, 554 F.3d 780, 783 n.1 (9th Cir. 2009); *cf. Rishor v. Ferguson*, 822 F.3d 482, 490–93 (9th Cir. 2016) ("hold[ing] that a Rule 59(e) motion that raises entirely *new* claims should be construed as a second or successive habeas petition . . . .").

Finally, the Eleventh Circuit recently noted that it "has no published opinion establishing when the adjudication of a § 2255 motion becomes final such that the 'second or successive' limitation applies to all future motions." *Amodeo v. United States*, 743 F. App'x 381, 385 (11th Cir. 2018) (per curiam) (unpublished). Two unpublished decisions "appear to have taken opposite positions." *Id.* at n.1.

D. The Eighth Circuit Initially Reached Conflicting Conclusions About The Availability Of Amendment While Appealing A Denial Of An Initial Petition, But Now Has Aligned Itself With The Majority Of The Circuits.

Before AEDPA, the Eighth Circuit treated a habeas petitioner's motion for a remand "to amend his petition extensively and obtain an evidentiary hearing on a number of new issues" as "the functional equivalent of a second or successive petition for habeas corpus." *Smith v. Armontrout*, 888 F.2d 530, 540 (8th Cir. 1989) (going on to conclude that the "abuse of the writ" standard would apply).

After Congress passed AEDPA in 1996, a different panel took an approach in line with the one the Second Circuit eventually adopted. *In Nims v. Ault*, 251 F.3d 698 (8th Cir. 2001), a petitioner filed an initial habeas petition, which a district court denied on the merits in 1991. *See id.* at 700. Then, he learned of "potential juror misconduct" and sought a remand to file an amended petition. *Id.* "[The circuit] dismissed [his pending] appeal without prejudice . . . and remanded . . . ." *Id.* Eventually, the circuit applied AEDPA to the amended petition and denied relief because he could not overcome procedural default for his juror misconduct claim.

See id. at 700–03. One judge dissented on a jurisdictional basis: "[b]ecause [the petitioner] received an adjudication on the merits of all issues raised in a prior petition," the judge concluded that the petitioner needed § 2244(b) authorization to file a "second or successive" petition. *See id.* at 703–05 (Bye, J., dissenting).

Later, without addressing *Nims*, another panel applied the earlier *Smith* rule to deny a petitioner's motion for a remand that would have permitted him to amend an initial habeas petition with a new claim. It concluded that such a motion constituted "the functional equivalent of a second or successive petition . . . ." *Davis v. Norris*, 423 F.3d 868, 878 (8th Cir. 2005) (citing *Smith*, 888 F.2d at 540, and *Guinan v. Delo*, 5 F.3d 313, 316–17 (8th Cir. 1993)).

Finally, a fourth panel sought to reconcile the inconsistent precedents by treating *Davis* as binding. The court reasoned in part: "Although we granted a remand in *Nims*, we did so in 1992, prior to the passage of AEDPA. As such, at the time of the remand we expected the petitioner to be able to later raise both his original and amended claims on appeal." *Williams v. Norris*, 461 F.3d 999, 1004 (8th Cir. 2006) (citing dissenting opinion of Bye, J., in *Nims*, 251 F.3d at 705). It added that "*Davis* presented a different situation in that the petitioner's request for a remand occurred after the passage of AEDPA." *Id.*; *see also id.* ("elect[ing] to follow *Davis* as it is more recent, it offers a more detailed analysis of this specific issue, and it is more similar to Williams's case . . . .").[10]

[10] In 2011, the Eighth Circuit adopted a rule "that when faced with conflicting panel opinions, the earliest opinion must be followed, 'as it should have controlled the subsequent panels that created the conflict.'" *Mader v. United States*, 654 F.3d 794,

Today, although the Eighth Circuit has aligned itself with the majority of circuits, its uneven course and the continuing circuit split reflect that reasonable jurists could debate the procedural issue in Mr. Rhines's case.

E. Reasonable Jurists Could Debate Whether Mr. Rhines's Motion Is A "Second Or Successive" Petition.

The Court should grant review to resolve the competing interpretations of § 2244. At a minimum, the nature of the issue and the circuit split demonstrate that Mr. Rhines has satisfied the first requirement for a COA by showing that reasonable jurists could debate the issue.

Further, the Eighth Circuit's reasoning in *Davis* and *Williams*—that Congress intended to change the meaning of "second or successive" through AEDPA—is in tension with this Court's precedents. Yet the district court applied that reasoning and ruled that Mr. Rhines's motion constituted a "second or successive" petition without the requisite circuit authorization. *See* App. 8–16. It used the same approach to conclude that it lacked jurisdiction if the motion arose under Federal Rule of Civil Procedure 60(b). *See* App. 16–20.[11]

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800 (8th Cir. 2011) (en banc) (quoting *T.L. ex rel. Ingram v. United States*, 443 F.3d 956, 960 (8th Cir. 2006)).

[11] In addition, the district court indicated that an application is "second or successive" if a petitioner files it after a district court issues a final, appealable judgment. *See* App. 9–10. *But see Ching*, 298 F.3d at 178 (explaining that "adjudication of an initial habeas petition is not necessarily complete, such that a subsequent filing constitutes a 'second or successive' motion, simply because the district court rendered a judgment that is 'final' within the meaning of 28 U.S.C. § 1291").

The district court also indicated that Mr. Rhines did not seek a remand from the Eighth Circuit after the appellate court gained jurisdiction over the case, App. 15–16, but such reasoning should not have precluded the issuance of a COA. Mr. Rhines attempted to navigate a circuit split and the course of Eighth Circuit law. *See* App. 38–40.[12] Before filing a notice of appeal, he filed a Rule 59(e) motion and asked the district court to postpone ruling on it until after this Court decided *Pena-Rodriguez*. *See* Pet'r's Reply to Response to Mot. to Alter or Amend. Judgment, *Rhines v. Young*, No. 5:00-cv-05020-KES, ECF No. 340, PageID 5013–14 (D.S.D. filed Apr. 25, 2016). Later, he gave notice to the Eighth Circuit of his motion to amend in the district court. App. 73–74.

If Mr. Rhines's motion is not automatically subject to the limitations of § 2244(b) as a threshold matter, the district court had jurisdiction to consider whether to grant it. The extraordinary circumstances of this case and Mr. Rhines's impartial sentencing jury claim discussed in detail below—combined with the claim in his initial petition aimed at the trial court's response to the jury's penalty phase note about life in prison—at least warrant an opportunity to meet the sort of multifactor analysis the Tenth Circuit applies. Moreover, his appeal from the denial of his initial petition remained pending when this Court decided *Pena-Rodriguez* and he filed his motion in the district court. Thus, the Second Circuit would not

[12] Federal Rule of Civil Procedure 62.1 also permits district courts to issue indicative rulings while a case is pending on appeal. *See* Fed. R. Civ. P. 62.1(a)(3); *See also* Fed. R. App. P. 12.1(b) ("If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal.").

have automatically treated his motion a "second or successive" petition under its approach to filings received when "the earlier petition had not been finally adjudicated," *Whab*, 408 F.3d at 120.

Accordingly, this Court should conclude that jurists of reason could debate whether § 2244(b) applied as a threshold matter and precluded the district court from considering Mr. Rhines's motion. A COA should have issued to address this procedural ground that is subject to a dispute among the circuits. The procedural ruling prevented Mr. Rhines from having an opportunity to prove that anti-gay stereotyping and animus unconstitutionally affected his sentencing, as discussed in further detail below. *See Slack*, 529 U.S. at 484.

II. Mr. Rhines Has Made A "Substantial Showing" Of A Violation Of His Right To Be Sentenced By An Impartial Jury With Jurors' Statements Indicating That Anti-Gay Stereotypes And Animus Infected Their Deliberations And Decision To Sentence Him To Death Instead Of Life Imprisonment. Rule Of Evidence 606(b) Should Pose No Barrier To A Court's Consideration Of Those Statements.

Mr. Rhines seeks to litigate questions that are worthy of this Court's review: Could reasonable jurists debate whether (1) the evidence he proffered demonstrates that bias against his sexual orientation played an impermissible role in a jury's decision to sentence him to death and (2) the Sixth Amendment requires that no-impeachment rules give way in light of evidence that anti-gay bias infected a jury's death sentence, as it requires when a juror indicates a reliance on racial bias to reach a guilt phase verdict? *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017).

The jurors' statements Mr. Rhines included with his motion to amend, if credited, along with the jury's note during sentencing deliberations, would have demonstrated that the state obtained a death sentence in violation of the right to an impartial sentencing jury. As described above, one juror stated 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. 33. A second juror recalled hearing a juror invoke a stereotype during deliberations: if a man is gay, to imprison him for life without the possibility of parole would "be sending him where he wants to go . . . ." *See* App. 34. And a third juror recalled "lots of discussion of homosexuality," and "a lot of disgust.'" App. 35 (quoting the third juror) (quotation marks omitted).

Until *Pena-Rodriguez*, however, statements from the jurors would have been inadmissible under either the Federal Rules of Evidence or South Dakota's rules, both of which provide:

> During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

Fed. R. Evid. 606(b)(1); *see* S.D. Codified Laws § 19-19-606(b)(1) (same).

Mr. Rhines argued in the district court that *Pena-Rodriguez* gave him a Sixth Amendment right to rely on the statements in support of an impartial jury claim. This Court should consider whether reasonable jurists could debate this question and whether Mr. Rhines's proffer, if credited, states a valid claim for sentencing relief. *See Slack*, 529 U.S. at 484.

A. Anti-Gay Bias Poses An Intolerable Threat To Impartial Jury Sentencing.

Pena-Rodriguez arose "at the intersection of the Court's decisions endorsing the no-impeachment rule and its decisions seeking to eliminate racial bias in the jury system." *Pena-Rodriguez*, 137 S. Ct. at 868. Two jurors came forward to state that a third juror, during deliberations on guilt in a noncapital case, "had expressed anti-Hispanic bias toward [a] petitioner and [the] petitioner's alibi witness." *Id.* at 861. The Court held:

> where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule [under a state rule of evidence] give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Id. at 869. It distinguished instances of juror "drug and alcohol abuse" and "pro-defendant bias," *id.* at 868, by stressing the "systemic injury to the administration of justice" that would be risked if juror-based racial discrimination were "left unaddressed," *id.*

Anti-gay bias, if left unaddressed, risks systemic harm to the justice system and, in particular, capital jury sentencing.

Prejudice based on sexual orientation is long-standing and deeply rooted. "Until the mid–20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015); *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)).

Historically, "[g]ays and lesbians did not identify themselves as such because . . . being openly gay resulted in significant discrimination. The machineries of discrimination . . . were such that explicit exclusion of gay individuals was unnecessary—homosexuality was 'unspeakable.'" *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 485 (9th Cir. 2014) (citing and quoting Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 814–36 (2002)).

Among the "[s]tereotypes of gays and lesbians" that courts have recognized as having "pernicious effects" are that they are "promiscuous, . . . 'disease vectors' or child molesters." *SmithKline*, 740 F.3d at 486 (citation omitted).

The Court has recognized that classifications other than those on the basis of race require court intervention in an analogous context, jury selection. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994) (applying *Batson v. Kentucky*, 476 U.S. 79, 100 (1986), to peremptory strikes on the basis of gender). And Justice Kennedy's concurrence in *J.E.B.* noted concerns about gender bias in jury deliberations: "We do not prohibit racial and gender bias in jury selection only to encourage it in jury deliberations. Once seated, a juror should not give free rein to some racial or gender bias of his or her own." *Id.* at 153 (Kennedy, J., concurring).

Moreover, "[t]he wise limitation on the authority of courts to inquire into the reasons underlying a jury's verdict does not mean that a jury ought to disregard the court's instructions. A juror who allows racial or gender bias to influence assessment of the case breaches the compact and renounces his or her oath." *Id.* (Kennedy, J., concurring).

In addition, the pragmatic concerns the Court addressed in *Pena-Rodriguez* apply here. *Compare Pena-Rodriguez*, 137 S. Ct. at 869 (explaining the difficulty in relying on voir dire), *with, e.g.*, *People v. Pena-Rodriguez*, 412 P.3d 461, 474 (Colo. App. 2012) (explaining that "while some prospective jurors may be hesitant to admit racial bias, prospective jurors may be hesitant to admit gender bias, . . . [and] bias based on sexual orientation, . . ."), *aff'd sub. nom. Pena-Rodriguez v. People*, 350 P.3d 287, 293 (Colo. 2015), *rev'd and remanded sub nom. Pena-Rodriguez*, 137 S. Ct. at 871. In fact, Mr. Rhines's lawyers asked all but one of the jurors if they could treat him fairly after learning that he is gay. Despite the jurors' assurances of fairness, evidence now shows that the fact of Mr. Rhines's sexual orientation played an impermissible role in their sentencing deliberations.

"The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations." *Pena-Rodriguez*, 137 S. Ct. at 869. That remains true for anti-gay bias, and trial courts' usual safeguards doubly failed in this case. The jurors wrote a note to the trial court that suggested their improper consideration of sexual orientation, but did not report the inappropriate use of stereotypes and animus that had occurred. *See* App. 30–32. And the trial court told the jury to keep deliberating without addressing, let alone

disapproving of, the suggestion in the note that jurors inappropriately were discussing sexual orientation. *See* CTA App. 575–78.

Lower courts have recognized the need for similar protections against discrimination and stereotyping on the basis of one's sexual orientation.

For example, the Ninth Circuit, applying *United States v. Windsor*, 570 U.S. 744, 751–52 (2013), has held that *Batson* applies when an attorney exercises peremptory strikes on the basis of a potential juror's sexual orientation, stressing that "in its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review." *SmithKline,* 740 F.3d at 481, 486.[13]

Other courts, considering the facts of each case, have reached conflicting conclusions regarding whether a party must be permitted to question veniremembers about their potential anti-gay bias.[14] For example, in *United States*

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[13] The U.S. Attorney's Manual stated in February 2018: "The attorney for the government should oppose attempts by the court to impose any sentence that is: . . . (5) based on a prohibited factor, such as race, religion, gender, ethnicity, national origin, *sexual orientation*, or political association, activities, or beliefs." U.S. Dep't of Just., U.S. Atty's Manual No. 9-27.745, Unreasonable or Illegal Sentences (last updated Feb. 2018) (emphasis added). And, in 2012, the U.S. Department of Justice adopted a policy that "[*Batson*] should be interpreted to extend to juror strikes based on sexual orientation." C.J. Williams, *To Tell You the Truth, Federal Rule of Criminal Procedure 24(a) Should Be Amended to Permit Attorneys to Conduct Voir Dire of Prospective Jurors*, 67 S.C. L. Rev. 35, 69 n.35 (2015) (quoting Memorandum to All Department Employees from Eric H. Holder, Jr., Attorney General, on Department Policy on Ensuring Equal Treatment for Same-Sex Married Couples (Feb. 10, 2014)).

[14] The Supreme Judicial Court of Maine stated in 1982: "It is axiomatic that a juror who admittedly harbors anti-homosexual prejudice should be subject to inquiry at the trial of an individual who is or may be perceived to be a homosexual." *State v.*

v. Bates, 590 F. App'x 882 (11th Cir. 2014) (unpublished), the Eleventh Circuit held that a federal district court in a noncapital case had been constitutionally required to permit voir dire on bias when a defendant's "sexual activity and gender non-conforming conduct" were "'inextricably bound up' with the issues to be resolved at trial." *Id.* at 887 (quoting *Ristaino v. Ross*, 424 U.S. 589, 597 (1976)). Later, in *Berthiaume v. Smith*, 875 F.3d 1354 (11th Cir. 2017), the circuit reversed a federal district court for a similar failure when "the sexual orientation of [a plaintiff in a civil case] and his witnesses [were] central facts at trial and were 'inextricably bound up' with the issues to be resolved at trial," *id.* at 1358 (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981)); *cf. State v. Jonas*, 904 N.W.2d 566, 571–75 (Iowa 2017) (discussing "cases in which potential jurors expressed bias related to gay people in cases with sexual context," and concluding that a trial court abused its discretion in denying a for-cause challenge when a veniremember had expressed "actual bias against gay people in the original questionnaire and during voir dire"); Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 Harv.

Lovely, 451 A.2d 900, 902 (Me. 1982); *cf. State v. Rulon*, 935 S.W.2d 723, 726 (Mo. Ct. App. 1996) ("If we assume that the *Ham* [*v. South Carolina*, 409 U.S. 524 (1973),] requirements apply to prejudice against homosexuals, there is nothing indicating that issue was inextricably bound up with the conduct of the trial."). *But see United States v. Click*, 807 F.2d 847, 849–50 (9th Cir. 1987) (affirming trial court's denial of a gay defendant's request for questioning in a noncapital case regarding "bias against homosexuals," reasoning that "the effect of asking such a question is sufficiently problematic to justify its avoidance by the trial court"); *Kemp v. Ryan*, 638 F.3d 1245, 1262 (9th Cir. 2011) (concluding, in an AEDPA case in which a state court judge, not a jury, had sentenced the defendant to death: "[the petitioner] has not offered any case law holding that homophobia should be elevated to the same level as racial prejudice").

J. L. & Gender 407, 427–34 (2014) (discussing cases involving veniremembers' expressions of potential bias on the basis of sexual orientation during voir dire).[15]

B. Providing Sentencing Discretion To Capital Jurors Creates A Special Risk That They Will Invoke Intolerable Bias During Their Deliberations.

This Court long has recognized the "special context of capital sentencing." *Lockhart v. McCree*, 476 U.S. 162, 182–83 (1986) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 519, 520–21 (1968), and *Adams v. Texas*, 448 U.S. 38, 46, 50 (1980)). Inherent in this "special context" is that states have given juries "broad discretion to decide whether or not death *is* 'the proper penalty' in a given case, ..." *Id.* (quoting *Witherspoon*, 391 U.S. at 519). To look away from evidence that jurors invoked deeply-rooted and socially-harmful prejudice in exercising that discretion risks a

[15] Further, when jurors perceive a male capital defendant's relationship with another man with bias, stereotypes, or disgust, but they would not have that same perception of a female capital defendant's relationship with a man, then they are biased because of sex and applying gender stereotypes. *Cf. Pena-Rodriguez*, 137 S. Ct. at 869 (indicating that its decision involved "racial stereotypes" in addition to "animus"); *J.E.B.*, 511 U.S. at 146 ("When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized."). Two circuits sitting en banc now have concluded in Title VII cases that discrimination on the basis of sexual orientation is a form of sex discrimination, following reasoning from *Loving v. Virginia*, 388 U.S. 1, 7–12 (1967), and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 238–58 (1989), among other cases. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 113–15, 124–28 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 342, 345–49 (7th Cir. 2017) (en banc); *see also Hively*, 853 F.3d at 341–42, 350 (collecting cases regarding this issue); *cf. Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018) (panel decision concluding that "[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex"). Petitions for writs of certiorari are pending in *Altitude Express v. Zarda*, No. 17-1623, and *R.G. & G.R. Harris Funeral Homes*, No. 18-107.

"systemic loss of confidence" in capital jury sentencing. *See Pena-Rodriguez*, 137 S. Ct. at 869.

This Court's jurisprudence regarding constitutional requirements associated with voir dire reflects its particular concern that juror bias might operate more freely in capital sentencing than in other contexts. The Court has noted the difficulty in assessing voir dire on appeal, but "ha[s] not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections." *Morgan v. Illinois*, 504 U.S. 719, 730 (1992) (citing *Turner v. Murray*, 476 U.S. 28, 36–37 (1986); *Ham v. South Carolina,* 409 U.S. 524, 526–27 (1973)). In *Ristaino v. Ross*, a noncapital case, it explained that "questioning about racial prejudice" must be allowed as a matter of constitutional law under particular circumstances. *See Ross,* 424 U.S. at 596–97 (discussing *Ham*, 409 U.S. at 527). Subsequently, after *Turner*, courts must treat capital cases involving interracial crimes as presenting the necessary circumstances. *See Turner*, 476 U.S. at 36–37.

Reasonable jurists could debate whether the logic of *Pena-Rodriguez* applies not only to racial bias in jury factfinding respecting guilt, but also to anti-gay bias in capital jury sentencing. Indeed, the Government of the United States conceded during oral argument for *Pena-Rodriguez* that "capital cases do present Eighth Amendment considerations . . . . The Court has often suggested under the Eighth Amendment different sets of rules apply, and there may be different considerations in that context," *Pena-Rodriguez*, No. 15-606, Tr. of Oral Arg. 51 (Oct. 11, 2016). Just as the Court considered Fourteenth Amendment principles in *Pena-Rodriguez*,

137 S. Ct. at 867–68, reasonable jurists could consider the "'recogni[tion] that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination,'" *Turner*, 476 U.S. at 35 (plurality opinion) (quoting *California v. Ramos*, 463 U.S. 992, 998–99 (1983)).

C. Reasonable Jurists Could Debate The Scope Of Mr. Rhines's Sixth Amendment Right In Light Of The Juror Statements That Reflect Anti-Gay Prejudice.

Three factors further demonstrate that the Eighth Circuit should have issued a COA.

First, Mr. Rhines presented statements from jurors reflecting stereotypes and animus aimed at an immutable characteristic, his sexual orientation. *See Obergefell*, 135 S. Ct. at 2596 (citing expert recognition "that sexual orientation is both a normal expression of human sexuality and immutable"). The statements in this case also confirm his suspected interpretation of the jury note. *See* App. 30–32.

To the extent jurors now characterize statements as poorly chosen jokes or deny their effect on the deliberations, this Court should recognize that the nature of the statements and willingness to make them in deciding whether a man should live or die betrays any attempt to minimize their weight. As the Eleventh Circuit explained in a similar context: "[A]nti-Semitic 'humor' 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). Moreover, "[i]t is inconceivable that by merely denying that they would allow their earlier prejudiced comments to influence their

verdict deliberations, the jurors could have thus expunged themselves of the pernicious taint of anti-Semitism." *Id.* (footnote omitted).[16]

Second, jurors' statements in this case evidence a clear and disturbing nexus between intolerable bias and the choice of a death sentence to, in one juror's words, keep Mr. Rhines from "life with men in prison" or, as another commented with regard to his sexual orientation, from "where he wants to go." *Compare* App. 33–35, *and Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (per curiam) (reversing a COA decision, in part, because "[a juror's] remarkable affidavit—which he never retracted—presents a strong factual basis for the argument that [the petitioner]'s race affected [the juror]'s vote for a death verdict"), *with Tharpe*, 138 S. Ct. at 553 (Thomas, J., dissenting) (noting that jurors "testified that they did not consider race and that race was not discussed during their deliberations").[17]

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[16] Courts assess whether improper bias arose even when jurors do not expressly recognize or admit that they harbor such bias. *See, e.g., Murphy v. Florida,* 421 U.S. 794, 800–03 (1975); *Smith v. Phillips*, 455 U.S. 209, 221–23 (1982) (O'Connor, J., concurring). Rather, assessing the role of bias involves factual determinations. *See Phillips*, 455 U.S. at 215; *see also Wellons v. Hall,* 558 U.S. 220, 221–26 (2010) (per curiam) (granting a petition for a writ of certiorari, vacating a judgment in light of an erroneous ruling on procedural default, and remanding to consider whether a petitioner would be entitled to discovery and a hearing regarding claims of juror and court bias and misconduct).

[17] On remand, the Eleventh Circuit again denied a COA. *See Tharpe v. Warden*, 898 F.3d 1342, 1344 (11th Cir. 2018). It reasoned that *Pena-Rodriguez* did not apply to that case because the conviction had become final before the *Pena-Rodriguez* decision and that the petitioner had not overcome procedural default. *See id.* It did not address the "second or successive" issue that led the courts in Mr. Rhines's case to decline to consider his motion. A petition for a writ of certiorari to the Eleventh Circuit is pending. *See Tharpe v. Ford,* No. 18-6819.

Third, Mr. Rhines can demonstrate actionable bias, *see Phillips*, 455 U.S. at 215–16, and juror misconduct in the form of providing material false information during voir dire, *see McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 549 (1984).[18] Two of the jurors whose statements Mr. Rhines has proffered indicated during voir dire that his sexual orientation would not affect their decision. *See* App. 101–03 (first juror quoted in this petition); App. 111–12 (third juror quoted in this petition). Yet Mr. Rhines has proffered evidence of actionable bias by at least one juror: a desire to prevent him from "spending his life with men in prison" and expressions of "disgust" about his sexual orientation. Had each juror answered voir dire questions honestly, Mr. Rhines could have raised at least one successful for-cause challenge.

To allow a juror to vote for a man's death using anti-gay stereotypes and animus unquestionably violates the Sixth and Fourteenth Amendments, along with the foundational principle that "[o]ur law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle," *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (applying the Sixth Amendment guarantee of effective assistance of counsel when an attorney injected race-based testimony into a jury's sentencing determination). For the reasons discussed above, Mr. Rhines has made "a substantial showing of the

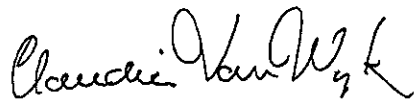
[18] Under *McDonough Power*, a new trial is necessary if (1) "a juror failed to answer honestly a material question on voir dire," and (2) "a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556.

denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and this Court should grant the petition for a writ of certiorari.

CONCLUSION

For the reasons discussed above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,



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Dated: February 15, 2019