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

APPENDIX

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APPENDIX CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2376

Charles Russell Rhines

Appellant

v.

Darin Young, Warden, South Dakota State Penitentiary

Appellee

Appeal from U.S. District Court for the District of South Dakota - Rapid City
(5:00-cv-05020-KES)

ORDER

With the district court's final order denying Charles Russell Rhines's federal petition for a writ of habeas corpus pending on appeal, Rhines filed in the district court a Rule 15(a)(2) motion for leave to amend the petition and a Rule 60(b) motion for relief from judgment. The 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 certificate of appealability. We deny Rhines's application for a certificate of appealability from that ruling. Judge Kelly would grant the certificate.

Rhines also filed a motion in the district court for an order requiring respondent to produce Rhines for evaluation by mental health experts retained by the defense to support a potential request for executive clemency, relief that the South Dakota state courts have denied. The district court denied relief on the merits and denied a certificate of appealability. We conclude that no certificate of appealability is required to appeal this issue. A separate order establishing a briefing schedule will be issued.

The motion for leave to file an amicus brief is hereby granted.

September 07, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2376

Charles Russell Rhines

Appellant

v.

Darin Young, Warden, South Dakota State Penitentiary

Appellee

American Civil Liberties Union, et al.

Amici on Behalf of Appellant(s)

Appeal from U.S. District Court for the District of South Dakota - Rapid City
(5:00-cv-05020-KES)

CORRECTED ORDER

This order corrects the Judge order entered 09/18/2018, denying the petition for rehearing.

The petition for rehearing by the panel is denied. Judge Kelly would grant the petition for rehearing.

September 18, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2376

Charles Russell Rhines

Appellant

v.

Darin Young, Warden, South Dakota State Penitentiary

Appellee

American Civil Liberties Union, et al.

Amici on Behalf of Appellant(s)

Appeal from U.S. District Court for the District of South Dakota - Rapid City
(5:00-cv-05020-KES)

ORDER

The petition for rehearing by the panel is denied.

September 18, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CHARLES RUSSELL RHINES, Petitioner, vs. DARIN YOUNG, WARDEN, SOUTH DAKOTA STATE PENITENTIARY; Respondent.	5:00-CV-05020-KES ORDER DENYING MOTION FOR LEAVE TO AMEND, DENYING MOTION FOR RELIEF FROM JUDGMENT, AND DENYING MOTION FOR EXPERT ACCESS

Petitioner, Charles Russell Rhines, moves the court for leave to amend his petition for habeas corpus under Fed. R. Civ. P. 15(a)(2), or in the alternative, moves the court for relief from judgment under Fed. R. Civ. P. 60(b)(6). Docket 383. Respondent, Darin Young, resists the motion on both grounds. Docket 389. In addition, Rhines moves the court for an order requiring Young to produce Rhines for two mental health expert evaluations in support of a potential clemency application to the South Dakota Governor. Docket 394. Respondent also opposes Rhines's motion for expert access. Docket 396.[1] For the following reasons, the court denies Rhines's motion to

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

amend under Rule 15(a)(2), denies Rhines's motion for relief from judgment under Rule 60(b)(6), and denies Rhines's motion for expert access.

BACKGROUND

The factual and procedural history of this case is more fully set forth in the court's February 16, 2016 order granting summary judgment in favor of respondent. *See* Docket 305. The court will briefly summarize the procedural history and then address any facts that are relevant to Rhines's pending motions throughout the analysis.

Rhines is an inmate at the South Dakota State Penitentiary in Sioux Falls, South Dakota. He was convicted of premeditated first-degree murder and third-degree burglary of a Dig'Em Donuts Shop in Rapid City, South Dakota. On January 26, 1993, a jury found that the death penalty should be imposed, and the trial judge sentenced Rhines to death by lethal injection. The South Dakota Supreme Court affirmed Rhines's conviction and sentence on direct appeal, and the United States Supreme Court denied further review in 1996. Rhines applied for a writ of habeas corpus in state court, raising numerous issues, which was denied in 1998 and affirmed by the South Dakota Supreme Court in 2000.

Rhines then filed a federal petition for a writ of habeas corpus in 2000. This court found several of Rhines's claims were unexhausted and granted a stay pending exhaustion in state court. Following respondent's appeal, the Eighth Circuit vacated the stay and remanded the case. Rhines filed a petition for a writ of certiorari in the United States Supreme Court, which granted

certiorari. After finding that a stay and abeyance is permissible under some circumstances, the Supreme Court remanded the case for further analysis not relevant to the pending motions. Ultimately, Rhines's petition in this court was stayed until he exhausted his state court claims. When this court lifted the stay, respondent moved for summary judgment. On February 16, 2016, this court granted respondent's motion for summary judgment, denied Rhines's amended habeas petition, and ruled on numerous other motions not relevant to the current motions. *See* Dockets 304, 305, 306. The court then denied Rhines's motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). Docket 348. On August 3, 2016, Rhines appealed this court's rulings to the Eighth Circuit Court of Appeals. Docket 357. Rhines has filed the two current motions during the pendency of his appeal.

DISCUSSION

I. Rhines's Motion for Leave to Amend Petition under Fed. R. Civ. P. 15(a)(2)

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), a petitioner must file his or her application for a writ of habeas corpus within one year of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

Because habeas proceedings are civil in nature, the Federal Rules of Civil Procedure apply. *See* 28 U.S.C. § 2242 ("[An application for a writ of habeas corpus] may be amended or supplemented as provided in the rules of procedure applicable to civil actions."). Federal Rule of Civil Procedure 15(a)(2) allows a party to amend its pleading with the opposing party's consent or the court's leave "when justice so requires." But a petitioner's amendment must meet the relation back requirements set forth in Federal Rule of Civil Procedure 15, which provides:

> (1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date of the original pleading when:
> (A) the law that provides the applicable statute of limitations allows relation back;
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading . . . .

Fed. R. Civ. P. 15(c); *see also McKay v. Purkett*, 255 F.3d 660, 660-61 (8th Cir. 2001) (applying Rule 15(c) to a petitioner's § 2254 amended petition and affirming the district court's dismissal of the amended claims because they did not relate back to petitioner's original claims). Thus, in the habeas context, any amendment to a timely filed habeas petition must be filed within AEDPA's one-year limitations period or the amendment must assert a claim that arose out of the conduct, transaction, or occurrence set out in the original petition.

The Supreme Court has addressed what the phrase "conduct, transaction, or occurrence" means under Fed. R. Civ. P. 15(c)(2) in the habeas framework. In *Mayle*, the Ninth Circuit, in agreement with the Seventh Circuit, had interpreted "conduct, transaction, or occurrence" to allow relation back to an original habeas petition when the petitioner's new claim stemmed from the petitioner's trial, conviction, or sentence. *Mayle v. Felix*, 545 U.S. 644, 656 (2005). The Supreme Court rejected that definition because it was too broad. *Id.* at 656-58. "An amended habeas petition, we hold, does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Id.* at 650.

The substance of Rhines's new claim is that some jurors from his trial have recently expressed the notion that a homosexual bias against Rhines "played a significant role in the decision to sentence him to death." Docket 383 at 1. And Rhines argues such juror bias is now admissible under the United States Supreme Court's recent decision in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). *Id.*

Because Rhines has appealed this court's denial of his habeas petition to the Eighth Circuit and that appeal is still pending, this court must first determine if it has jurisdiction over Rhines's current motion. Rhines maintains that this court still has jurisdiction to allow his amendment because "the judgment is not yet final." *Id.* at 3. Other than his reliance on *Nims v. Ault*, 251 F.3d 698 (8th Cir. 2001) and resistance to *Williams v. Norris*, 461 F.3d 999 (8th

Cir. 2006), which will be addressed below, *see infra* Section II.B., Rhines has not cited any Eighth Circuit precedent to establish that a judgment is not considered "final" until it is affirmed on appeal. In response, respondent contends that this court's judgment is final so the Eighth Circuit has exclusive jurisdiction over Rhines's case. Docket 389 at 7-9.

A. Judgment is Final

In general, a district court decision is final if "there is some clear and unequivocal manifestation by the trial court of its belief that the decision made, so far as [the court] is concerned, is the end of the case." *Waterson v. Hall*, 515 F.3d 852, 855 (8th Cir. 2008) (internal quotations omitted) (alteration in original). "A final decision is ordinarily one which disposes of all the rights of all the parties to an action." *Patterson v. City of Omaha*, 779 F.3d 795, 800 (8th Cir. 2015) (quotation omitted).

Here, judgment is final. In addition to the order granting respondent's motion for summary judgment and denying Rhines's petition for habeas corpus (Docket 305), this court entered a judgment denying Rhines's petition for habeas corpus relief on February 16, 2016. Docket 306. Entering a judgment clearly demonstrated the court's belief that Rhines's case was over. Rhines moved the court to alter or amend its judgment under Fed. R. Civ. P. 59(e) (Docket 323), which this court denied. Docket 348. Rhines then appealed several of this court's rulings, including this court's order granting summary judgment in favor of respondent (Docket 305) and judgment (Docket 306). Docket 357. *See Patterson*, 779 F.3d at 800 (noting that the Eighth Circuit's

jurisdiction is "limited to appeals taken from final decisions of the district courts."). If the Eighth Circuit affirms this court's order and judgment, nothing further will remain to be done. Thus, this court's judgment, which disposed of all claims in Rhines's petition for habeas corpus relief, was final.

B. Because this Court's Judgment was Final, Rhines's Motion to Amend is a Successive Petition.

AEDPA established a strict procedure that prisoners in custody under a state court judgment must follow in order to file a second or successive habeas corpus application challenging that custody. Under 28 U.S.C. § 2244(b)(2), a claim presented in a successive habeas petition under section 2254 that was not presented in the prior petition shall be dismissed unless:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

Before a district court can consider a successive petition, the petitioner "shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." *Id.* § 2244(b)(3)(A). There is no indication that Rhines has moved the Eighth Circuit Court of Appeals for an

order authorizing this court to consider Rhines's new claim of juror bias based on his homosexuality.[2]

Rhines argues that "[a]n amendment filed in the district court during the pendency of an appeal of the habeas petition, however, is not considered a second or successive petition." Docket 383 at 4. He relies on *Nims v. Ault*, 251 F.3d 698 (8th Cir. 2001) to support his position, arguing that *Nims* suggests "the addition of a juror misconduct claim after a district court's denial of a habeas petition, but before that petition is resolved on appeal, was not successive" because the *Nims* court considered the claim on its merits. *Id.*

Nims was convicted of kidnapping and sexually abusing an eight year old girl, which was affirmed by the Iowa Supreme Court on direct appeal. *Nims*, 251 F.3d at 700. After his post-conviction application for relief was denied,

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[2] On January 11, 2017, Rhines filed a protective petition for writ of habeas corpus while his application for authorization to file a successive petition was pending in the Eighth Circuit. Docket 377. The new claim raised in Docket 377, Rhines argues, is based on a new rule of constitutional law made retroactive to cases on collateral review that was announced in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Rhines contends that *Hurst* stands for the rule that a statute must require a jury to make death penalty findings beyond a reasonable doubt in order to comply with the Sixth Amendment, and South Dakota's death penalty statute violates this rule. Docket 377 at 4-6. The Eighth Circuit consolidated Rhines's petition for permission to file a successive habeas petition (*Rhines v. Young*, No. 17-1060 (8th Cir. application docketed Jan. 10, 2017)), with Rhines's appeal of this court's orders (*Rhines v. Young*, No. 16-3360 (8th Cir. appeal docketed Aug. 15, 2016)). *See* No. 17-1060; 16-3360, CLERK ORDER, docketed Feb. 16, 2017. "[T]he panel to which the consolidated cases are submitted for disposition on the merits shall determine whether to grant or deny the petition at the time it considers the appeal from the district court's order denying habeas relief in No. 16-3360." *Id.* This application for authorization, however, does not request authorization to file a successive petition on Rhines's new claim of sexual orientation bias by his state court jury.

Nims filed a federal habeas corpus petition, which was initially denied by the district court. *Id.* While that denial was on appeal to the Eighth Circuit, Nims requested the Eighth Circuit to remand the case to the district court so Nims could file an amended petition raising a newly-discovered claim of juror misconduct. *Id.* The Eighth Circuit dismissed the appeal without prejudice and remanded the case to the district court. *Id.*

The district court then dismissed Nims's amended petition without prejudice in order for Nims to fully exhaust his state remedies. *Id.* Following an unsuccessful attempt in front of the Iowa post-conviction court, Nims again filed a habeas petition in federal court, which was denied by the district court because the newly-discovered claim of juror misconduct was procedurally defaulted. *Id.* at 701. The district court issued a certificate of appealability, and the Eighth Circuit opinion, that Rhines currently relies on, followed.

After discussing Nims's failure to show cause for and prejudice from the default, the Eighth Circuit ultimately concluded that the district court did not err in finding that Nims's new claims were procedurally defaulted. *Id.* at 703. But because the Eighth Circuit considered Nims's new juror misconduct claim on its merits rather than on jurisdictional grounds for successive petitions, Rhines argues that *Nims* stands for the proposition that an amendment filed in the district court while an appeal is pending is not a successive petition. *See id.* at 703-06 (Bye, J., dissenting) (stating that Nims's petition should be considered successive and noting that "[t]he majority permits a prisoner to file a petition in district court, receive a complete adjudication on the merits,

appeal, dismiss the appeal to add a new claim, and start all over *without penalty*.") (emphasis in original). As an initial matter, the court does not read *Nims* to stand for the far-reaching proposition that Rhines suggests.

In *Williams v. Norris*, 461 F.3d 999 (8th Cir. 2006), on the other hand, the Eighth Circuit affirmed the district court's denial of a motion for relief from judgment after finding that it was a successive petition. The federal district court denied Williams's original petition for a writ of habeas corpus. *Id.* at 1000. Williams then filed a motion to alter or amend the judgment, or alternatively, for relief from judgment, but the district court denied Williams's motion as successive. *Id.* Then a renewed motion for relief from judgment was filed on Williams's behalf, raising a new claim based on a recent United States Supreme Court ruling. The district court determined it was also a successive habeas petition and denied the motion. *Id.* at 1000-01.

On appeal, the Eighth Circuit reviewed whether Williams's motion for relief from judgment constituted a successive habeas petition de novo. *Id.* at 1001. The first argument raised by Williams, and noted as the "strongest argument" by the Eighth Circuit, "revolve[d] around the fact that the district court did not file a separate judgment, as required by Rule 58, when denying Williams's initial petition." *Id.*[3] Williams thus argued that the denial of his

[3] As discussed above, *see supra* Section II.A., this court filed a judgment as a separate document in Rhines's case (Docket 306), suggesting Rhines's argument here is weaker than the argument raised by Williams. *See Williams*, 461 F.3d at 1001 (noting the district court's inadvertent failure to file a judgment as a separate document was Williams's "strongest argument").

petition was not a final judgment so his Rule 59(e) motions to alter or amend the judgment and his Rule 60(b) motions for relief from judgment "should have been treated as motions to amend the initial habeas petition under Rule 15." *Id.* Despite the clerical error, the Eighth Circuit found that the district court properly dismissed Williams's Rule 59(e) and Rule 60(b) motions as successive petitions because it was clear that the district court intended its order to dispose of Williams's petition on the merits. *Id.* at 1002. The court cited to and discussed *Bonin v. Calderon*, 59 F.3d 815 (9th Cir. 1995), where the Ninth Circuit refused to construe the petitioner's motion to amend a habeas petition, after the district court had denied the petition, as a Rule 15 motion merely because the district court had failed to file a separate judgment. Agreeing with this analysis, the Eighth Circuit in *Williams* refused to accept Williams's argument that his motion should be construed as a Rule 15 motion just because a final judgment was inadvertently not filed.

Williams also argued that his motions were not successive because the denial of his original petition was not yet affirmed on appeal. *Williams*, 461 F.3d at 1003. Relying on *Davis v. Norris*, 423 F.3d 868 (8th Cir. 2005), the Eighth Circuit disagreed with Williams. *Id.*

Rhines argues that *Williams* erroneously relied on *Davis*, a 2005 decision, rather than the 2001 *Nims* decision, because Eighth Circuit precedent directs a court to follow the earliest opinion when there is a conflict between panel opinions. Docket 383 at 4-5 (quoting *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc)). Notably missing from Rhines's argument,

however, is the Eighth Circuit's discussion of the potential conflict between *Nims* and *Davis* in *Williams*. The *Williams* court found *Nims* and *Davis* reconcilable because the *Nims* court remanded the petition to the district court in 1992, pre-AEDPA and with the expectation that "petitioner [would] be able to later raise both his original and amended claims on appeal[,]" whereas *Davis* was different "in that the petitioner's request for a remand occurred after the passage of AEDPA." *Williams*, 461 F.3d at 1004. The *Williams* court's discussion of the distinctions between *Nims* and *Davis* leads this court to conclude that there are not two conflicting panel decisions that are implicated here. So Rhines's argument that *Nims*, the earlier decision, is controlling, rather than *Williams* and its reliance on *Davis*, is misplaced. Because Rhines's petition was filed post-AEDPA, *Williams*'s reliance on *Davis*, and the subsequent decision to "reject Williams's claim that an amendment to a petition is not a successive habeas if it occurs after the petition is denied, but before the denial is affirmed on appeal," controls. *Id.* at 1004.

The other issue with Rhines's argument is that *Nims* is distinguishable from this case. In *Nims*, the Eighth Circuit panel remanded the petition to the district court before Nims's petition was heard on appeal because Nims requested a remand. *Nims*, 251 F.3d at 700. And Nims requested the remand pre-AEDPA, but his subsequent appeal was heard and adjudicated by the Eighth Circuit post-AEDPA. Rhines's petition, on the other hand, was adjudicated by this court post-AEDPA, appealed to the Eighth Circuit post-AEDPA, and there is no indication that Rhines has asked the Eighth Circuit to

remand his petition to this court in order to amend the petition with his new claim of juror bias. So even if *Nims* did stand "for the proposition that a new claim cannot be deemed successive until the denial of the underlying petition has been affirmed on appeal" just because the *Nims* panel adjudicated Nims's claim on the merits, as Rhines argues (Docket 383 at 5), *Nims* is factually distinct from Rhines's motion. Thus, *Nims* does not support Rhines's position, and, based on *Williams*, the court rejects Rhines's argument that an amendment filed in the district court while the appeal of his habeas petition is pending is not a successive petition.

The court concludes that because it entered a final judgment in Rhines's case and the appeal of that final judgment is still pending, it does not retain jurisdiction to allow Rhines to amend his habeas petition to add a new claim under Fed. R. Civ. P. 15(a). Rather, based on Eighth Circuit case law, Rhines's motion to amend (Docket 383) is a successive petition. And because Rhines has not received authorization from the Eighth Circuit to file a successive petition, this court cannot adjudicate the merits of his motion under Rule 15.

II. Rhines's Rule 60(b) Motion

A. Jurisdiction

Rhines argues that if the court finds it does not have jurisdiction to grant his motion under Rule 15(a)(2), it should alternatively review the motion under Rule 60(b)(6). Docket 383 at 5. Federal Rule of Civil Procedure 60(b) allows a court to relieve a party from a final judgment, order, or proceeding for various reasons, such as mistake, newly discovered evidence, or fraud, among others.

Rule 60 includes a catchall provision, which allows the court to relieve a party for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). In order for a court to grant a 60(b)(6) motion, the movant must show "extraordinary circumstances" to justify relief, and "[s]uch circumstances will rarely occur in the habeas context." *Buck v. Davis*, 137 S. Ct. 759, 772 (2017) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)). "A district court has discretion under Rule 60(b) to grant postjudgment leave to file an amended complaint if the motion is 'made within a reasonable time,' and the moving party shows 'exceptional circumstances' warranting 'extraordinary relief.' " *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737, 743 (8th Cir. 2014) (quoting Fed. R. Civ. P. 60(c)(1); *United States v. Young*, 806 F.2d 805, 806 (8th Cir. 1986)).

What constitutes a reasonable time depends on the facts of the particular case. *Watkins v. Lundell*, 169 F.3d 540, 544 (8th Cir. 1999). *See Moses v. Joyner*, 815 F.3d 163, 166-67 (4th Cir. 2016) (concluding that the district court did not abuse its discretion in ruling that a habeas petitioner's Rule 60(b)(6) motion for relief from judgment, based on a change in habeas procedural law 15 months after the Supreme Court's decision, was untimely under Rule 60(c)). While leave to amend under Rule 15(a) should be "freely given," post-judgment leave to amend under Rule 60(b) is subject to stricter standards. *See Gonzalez*, 545 U.S. at 535 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 873 (1988) (Rehnquist, C.J., dissenting)) (noting a " 'very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved' ").

The Federal Rules of Civil Procedure also provide that if a court lacks authority to grant a motion for relief from judgment because an appeal is pending, "the court may: defer considering the motion; deny the motion; or state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed. R. Civ. P. 62.1(a). Thus, although an appeal is pending, this court may rule on Rhines's Rule 60(b) motion consistent with Rule 62.1(a).

B. Second or Successive Petition

The Supreme Court has acknowledged that Rule 60(b) motions in the habeas context, while playing "an unquestionably valid role," must not conflict with AEDPA's standards. *Gonzalez*, 545 U.S. at 533. "Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction-even claims couched in the language of a true Rule 60(b) motion-circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Id.* at 531 (citing 28 U.S.C. § 2244(b)(2)).

> A Rule 60(b) motion is a second or successive habeas corpus application if it contains a claim. For the purpose of determining whether the motion is a habeas corpus application, claim is defined as an 'asserted federal basis for relief from a state court's judgment of conviction' or as an attack on the 'federal court's previous resolution of the claim on the merits.' *Gonzalez*, 545 U.S. at 530, 532. 'On the merits' refers 'to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d).' *Id.* at 532 n.4. When a Rule 60(b) motion presents a claim, it must be treated as a second or successive habeas petition under AEDPA.

> No claim is presented if the motion attacks 'some defect in the integrity of the federal habeas proceedings.' *Id.* at 532. Likewise, a motion does not attack a federal court's determination on the merits if it 'merely asserts that a previous ruling which precluded a merits determination was in error-for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.' *Id.* at n.4.

Ward v. Norris, 577 F.3d 925, 933 (8th Cir. 2009). In *Gonzalez*, the Rule 60(b) motion, which sought to challenge a statute of limitations ruling that had prevented review of the petitioner's initial habeas petition, did not require authorization from the court of appeals. *Gonzalez*, 545 U.S. at 533, 538.

Here, Rhines argues his Rule 60(b)(6) motion is not a claim, and thus not a successive petition, because he attacks a defect in the integrity of the federal habeas proceeding. Docket 383 at 7. Specifically, he argues, "a rule of evidence, now declared unconstitutional [by *Pena-Rodriguez*], precluded review" of his claim of juror bias based on Rhines's homosexuality, and thus, the Supreme Court has removed an obstacle to a merits review of his claim. *Id.*

After considering Rhines's Rule 60(b)(6) motion, the court concludes Rhines's is attempting to present a new claim, which means his motion is a successive petition. Rhines is attempting to assert a claim of sexual orientation bias by the jury based on the Supreme Court's decision in *Pena-Rodriguez*. In other words, Rhines is attempting to use a Supreme Court case, and extend the holding of that case to the facts of his case, as a basis for relief from his death penalty sentence in state court. Thus, Rhines's new claim meets the very definition of "claim" that was established in *Gonzalez*: "an asserted federal basis for relief from a state court's judgment of conviction[.]" *Gonzalez*, 545

U.S. at 530; *see also id.* at 538 ("We hold that a Rule 60(b)(6) motion in a § 2254 case is not to be treated as a successive habeas petition if it does not assert, or reassert, claims of error in the movant's state conviction."). Rhines is doing exactly that—asserting a claim of error in his state conviction. Because Rhines's Rule 60(b)(6) motion is a successive petition and he did not seek or obtain the Eighth Circuit's authorization to file it, this court does not have jurisdiction to consider it on the merits. *See Burton v. Stewart*, 549 U.S. 147, 152 (2007) (concluding that because petitioner filed a successive petition without appellate authorization, "the [d]istrict [c]ourt never had jurisdiction to consider it in the first place.").

III. Rhines's Motion for Expert Access

Rhines also moves the court for an order requiring respondent to produce Rhines for expert evaluations by Richard Dudley, Jr., M.D., a forensic psychiatrist, and Dan Martell, Ph.D., a neuropsychologist. Docket 394. He plans to use the advice of Dr. Dudley and Dr. Martell for a possible clemency application, should one become necessary. *Id.* The Department of Corrections, acting under SDCL § 23A-27A-31.1, will not allow the two experts to access Rhines in prison without a court order. *Id.*

Rhines previously moved this court for a different doctor's expert access as part of his habeas proceeding. Docket 313. The court denied Rhines's motion because Rhines is in a state penitentiary, not a federal penitentiary, and SDCL § 23A-27A-31.1 authorizes a state trial court—here, the Circuit Court for the Seventh Judicial Circuit of South Dakota—to order the

Department of Corrections staff to allow other persons not specified in the statute access to capital inmates. Docket 334 at 6. Based on the principles of comity and federalism, the court concluded SDCL § 23A-27A-31.1 did not authorize the court to grant Rhines's request. *Id.* at 7.

Rhines contends that he has now addressed the federalism concerns because he has sought relief in the South Dakota courts, which have denied his motion for expert access. Docket 394 at 4; *see also* Docket 394-1 (Circuit Court for the Seventh Judicial Circuit of South Dakota denial of Rhines's motion, dated Oct. 24, 2017); Docket 394-2 (South Dakota Supreme Court order dismissing Rhines's appeal, dated Jan. 2, 2018). As a legal basis for his motion, Rhines argues that this court's appointment of counsel under 28 U.S.C. § 3599 extends representation to clemency proceedings, which may also include expert services in support of such clemency proceedings. Docket 394 at 6. Rhines also argues he has a due process right to these expert services for his possible clemency request. *Id.* at 12.

A. Authorization for Representation under 18 U.S.C. § 3599

On Rhines's first argument, 28 U.S.C. § 3599 provides in relevant part:

> (a)(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).
>
> . . . .
>
> (e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so

> appointed shall represent the defendant throughout every subsequent stage of . . . all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

18 U.S.C. § 3599.

The Supreme Court has interpreted the phrase, "shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant" found in 18 U.S.C. § 3599. *Harbison v. Bell*, 556 U.S. 180, 185 (2009). The Court concluded that the plain language of the statute provides that federally appointed counsel's authorized representation for a habeas petitioner includes state clemency proceedings that are available to state petitioners. *Id.* at 185-86. In rejecting the government's argument that § 3599(e) refers only to federal clemency, the Court reasoned:

> To the contrary, the reference to "proceedings for executive or *other* clemency, § 3599(e) (emphasis added), reveals that Congress intended to include state clemency proceedings within the statute's reach. Federal clemency is exclusively executive: Only the President has the power to grant clemency for offenses under federal law. U.S. Const., Art. II, § 2, cl. 1. By contrast, the States administer clemency in a variety of ways. . . . Congress' reference to "other clemency" thus does not refer to federal clemency but instead encompasses the various forms of state clemency.

Id. at 186-87 (internal citations omitted).

The Supreme Court's holding in *Harbison* does not mandate federally funded counsel for a capital habeas petitioner to represent the petitioner in his state clemency proceedings, it merely authorizes such representation. *See*

Harbison, 556 U.S. at 194 ("We further hold that § 3599 authorizes federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation."). And authorizing a federally appointed and funded counsel's representation under § 3599 does not give this court the authority to supervise or control a state's clemency process. Thus, 18 U.S.C. § 3599's authorization for representation alone does not require this court to order respondent to produce Rhines for an evaluation by the two mental health experts in support of a clemency request.

B. Due Process Right to Expert Services for Clemency

Rhines states that he has never received neuropsychological testing to determine if he suffers from any brain disease or injury, and he has never been evaluated by a psychiatrist who engaged in an independent background investigation. Docket 394 at 13. Thus, he argues, it is his due process right to be evaluated by Dr. Dudley and Dr. Martell in support of his "potential clemency application." *Id.* at 2, 12.

The Supreme Court has recognized that "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Harbison*, 556 U.S. at 192 (quoting *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993)). And as the Eighth Circuit has explained, "clemency is extended mainly as a matter of grace, and the power to grant it is vested in the executive prerogative, [so] it is a rare case that presents a successful due process challenge to clemency procedures themselves." *Noel v. Norris*, 336 F.3d 648, 649 (8th Cir. 2003) (per

curiam). But in *Ohio Adult Parole Authority v. Woodard*, a divided Supreme Court acknowledged that "some *minimal* procedural safeguards apply to clemency proceedings." 523 U.S. 272, 289 (1998) (O'Connor, J., concurring) (plurality opinion) (emphasis in original).

Rhines has not presented the court with a case holding that a capital habeas petitioner has a due process right to expert evaluations in support of a potential clemency application. In *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), which Rhines relies on, the Supreme Court held that a capital defendant has a due process right to access a competent psychiatrist when the "defendant demonstrates . . . his sanity at the time of the offense is to be a significant factor at trial" so the psychiatrist can help the defendant prepare his defense. Rhines, on the other hand, is potentially seeking clemency relief. He is not preparing for trial, and his motion for expert access does not raise the issue of insanity at the time of the offense.

The other cases Rhines cites, and the cases this court has reviewed, all discuss the "minimal" due process rights afforded to petitioners in the act of applying for clemency to the respective executive branch—not the preparation leading to a possible application. *See Lee v. Hutchinson*, 854 F.3d 978, 981-82 (8th Cir. 2017) (per curiam) (denying capital inmates' motion to stay executions because the Arkansas Parole Board's clemency process, "despite the procedural shortcomings," afforded the inmates the "minimal due process guaranteed by the Fourteenth Amendment."); *Winfield v. Steele*, 755 F.3d 629, 631 (8th Cir. 2014) (per curiam) (concluding that inmate failed to demonstrate "a significant

possibility of success on his claim that the Missouri clemency process violated his rights under the Due Process Clause" when he claimed correctional employees threatened and pressured someone to not make statements in support of the inmate's clemency application); *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (holding that a city attorney's interference, in the form of witness tampering, with the petitioner's efforts to present evidence to the Missouri Governor in his clemency application was "fundamentally unfair" and required a stay of execution). *But see Winfield*, 755 F.3d at 631-32 (Gruender, J., concurring) (maintaining that *Young* "lacks support in relevant Supreme Court authority" and is an "outlier" compared to narrower approaches adopted by other circuits). *See also Turner v. Epps*, 460 F. App'x 322, 330-31 (5th Cir. 2012) (concluding that capital prisoner's motion for expert access to assist in "laying a foundation for a request for clemency" did not violate his due process right).

In fact, the Eighth Circuit has rejected a due process argument for alleged interference with the ability to prepare for a clemency application. In *Noel v. Norris*, 336 F.3d 648, 649 (8th Cir. 2003) (per curiam), a capital prisoner in Arkansas claimed the State of Arkansas violated his due process right by interfering "with his ability to prepare and present his case for executive clemency." The Eighth Circuit noted that "if the state actively interferes with a prisoner's access to the very system that it has itself established for considering clemency petitions, due process is violated." *Id.* One argument Noel presented was that the state did not allow him to undergo a

particular brain-scan procedure to prove his brain damage should be considered in his clemency application. *Id.* But the Eighth Circuit rejected this argument, stating "we cannot say . . . that the state prohibited Mr. Noel from using the procedure that it had established." *Id.*

Rhines presents a similar claim to *Noel* in that he wants to undergo medical evaluations in order to prepare and present a clemency application. But the prisoner in *Noel* had already applied for, and been denied, clemency. Rhines, on the other hand, has construed his motion for expert access in his habeas case as a due process requirement for his "potential" clemency application. Unlike the cases discussed above where due process may be implicated by clemency procedures, Rhines has not initiated his clemency application. And he has not provided evidence that South Dakota has "arbitrarily denied [him] access to its clemency process." *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring) (plurality opinion). No Eighth Circuit case, South Dakota statute, or state or federal constitutional provision creates a due process right to accumulate all information that may lead to a clemency application, or to present a certain type of information in a clemency application. *See Turner*, 460 F. App'x at 331 (noting the lack of "a due process right to a more effective or compelling clemency application."). Because Rhines has not established a due process right to an expert evaluation in preparation for a possible clemency application, his request for this court to order respondent to produce Rhines for evaluations by Dr. Dudley and Dr. Martell is denied.

CONCLUSION

Rhines has appealed this court's final judgment to the Eighth Circuit, and that appeal is still pending. Thus, Rhines's Rule 15(a)(2) motion to amend is a successive petition, and Rhines has not received authorization to submit the successive petition to the district court. If construed to be a Rule 60(b)(6) motion, Rhine's motion is also a successive petition. But again, because he has not received authorization from the Eighth Circuit to file a successive petition raising the new claim of juror bias based on his homosexuality, this court does not have jurisdiction to rule on the merits of his motion. Finally, Rhines has failed to show he has a due process right under the Constitution to an expert evaluation in order to prepare for a potential clemency application to the South Dakota Governor. Thus, it is

ORDERED that Rhines's motion to amend, or in the alternative, motion for relief from judgment (Docket 383) is denied.

IT IS FURTHER ORDERED that Rhines's motion for expert access (Docket 394) is denied.

DATED this 25th day of May, 2018.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CHARLES RUSSELL RHINES, Plaintiff, vs. DARIN YOUNG, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, Defendant.	5:00-CV-05020-KES ORDER DENYING CERTIFICATE OF APPEALABILITY

Rhines moves for a certificate of appeability (COA) in order to appeal this court's order denying Rhines's motion for leave to amend, denying Rhines's motion for relief from judgment, and denying Rhines's motion for expert access. Docket 400 (referring to this court's order found at Docket 399). Under 28 U.S.C. § 2253, a habeas petitioner seeking to appeal from a final order of the district court must first obtain a COA before an appeal of that denial may be entertained. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). This certificate may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(2). A "substantial showing" is one that demonstrates "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Stated differently, "[a] substantial showing is a

showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997).

Rhines raised similar claims in related state court litigation, but the South Dakota Supreme Court dismissed his appeal. *See* Dockets 392-1, 392-2, 394-1. Rhines then petitioned the United States Supreme Court for a writ of certiorari to review the judgment of the South Dakota Supreme Court. On June 18, 2018, the United States Supreme Court denied Rhines's petition. *Rhines v. South Dakota*, --- S. Ct. ----, 2018 WL 2102800, at *1 (June 18, 2018). The court finds that Rhines has not made a substantial showing that his claims here are debatable among reasonable jurists, that another court could resolve the issues raised in his claims differently, or that a question raised by his claims deserves further proceedings. Thus, a certificate of appealability is not issued.

Dated June 21, 2018.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

CT EX # 5

Judge Konnekamp,

In order to award the proper punishment we need a clear prospective of what "Life In Prison Without Parole" really means. We know what the Death Penality 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 <u>ever</u> 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 allowed to create a group of followers or admirers.

④ will Mr Rhines be allowed to discuss, discribe or brag about his crime to other inmates, especially new and or young men jailed for lessed crimes (ex: Drugs, DwI, assault etc)

⑤ will Mr Rhines be allowed to Marry or have congigal 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.

Bea Brewer
Martha L. Anderson
Robert W Corrin - Harry Keeney
Mark Dean
Fran Cerasoni

Bobby Walton
Foreperson
Dot Ash
Barnett Blair
Judy Shafer
Delight McGriff
Wilma Woodson

DECLARATION OF Harry Keeney
PURSUANT TO 28 U.S.C. § 1746

I am positive Charles Rhines is guilty. We sentenced him to what he should get a long time ago. We deliberated and all thought he deserved death. I still think he does. We thought that the crime was intentional We also knew that he was a homosexual and thought that he shouldn't be able to spend his life with men in prison. I still believe he deserves the death penalty.

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Harry Keeney

DECLARATION OF Frances Cersosimo
PURSUANT TO 28 U.S.C. § 1746

I was a juror on Charles Rhines's case. I think we came to the right decision. I think his shot at redemption is waiving his appeals and being executed. We deliberated at both the guilt and penalty phases. We followed the judge's instructions. I remember we sent a note about life and death. We talked about that for a while. Our responsibility was profound and we took it seriously. One juror said it would be a deterrent to other criminals if Charles received a death sentence. After discussing this, we agreed the death penalty served no deterrent purpose. One juror made ~~an~~ a comment that if he's gay, we'd be sending him where he wants to go if we voted for LWOP. Rhine's confession jumped out, with his jarring laughter — a huge contrast to his otherwise soft voice. We had Donovan's picture in front of us - the one of his body as it was found. Rhines destroyed his freedom and that was a big thing. I think we made the right decision. Rhines had a fair trial, and deserves his sentence. I stand by my decision today. Rhines had a fair and compassionate jury - very fair. Nobody said he was evil. We judged his deeds, not his character. FC 12-11-16

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Frances Cersosimo 12-11-16

DECLARATION OF KATHERINE ENSLER
PURSUANT TO 28 U.S.C. § 1746 & 18 P.A. CONS. STAT. § 4904

I, Katherine Ensler, do hereby declare and verify as follows:

1. I spoke with Mr. Bennett Blake on December 10, 2010, over the phone with my colleague Alex Kursman.

2. Mr. Blake began the conversation stating that an investigator had called him recently, that his wife was a producer for KOTA, that he knows several defense attorneys, and that he has family in law enforcement.

3. Mr. Blake then stated that he had no remorse for the verdict or sentence.

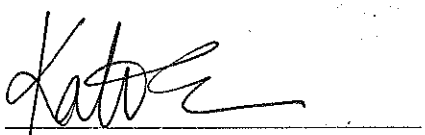
4. He stated that the jury had deliberated, and when asked to speak more about the deliberations, he immediately said, "There was lots of discussion of homosexuality. There was a lot of disgust. This is a farming community."

5. He stated that it was very clear that Mr. Rhines was a homosexual given the testimony at trial. He then said, "There were lots of folks who were like 'Ew, I can't believe that.'"

6. I let Mr. Blake know I was going to write down what he said to us about the case, which he said was fine.

7. Later the same day he sent my colleague a text message telling him he did not want to be contacted again.

8. I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information and belief, subject to 28 U.S.C. § 1746 and 18 Pa. Cons. Stat. § 4904.



Katherine Ensler, Esq.
Research and Writing Specialist
Federal Community Defender Office for the Eastern District of Pennsylvania

Date: December 12, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES,	)	
	)	**CIV. 5:00-5020-KES**
Petitioner,	)	
	)	
v.	)	**CAPITAL CASE**
	)	
DARIN YOUNG, Warden,	)	
South Dakota State Penitentiary,	)	
	)	
Respondent.	)	

MOTION FOR LEAVE TO AMEND PETITION FOR HABEAS CORPUS AND CONSOLIDATED BRIEF IN SUPPORT OF MOTION

Petitioner, Charles Rhines, by and through undersigned counsel, hereby seeks leave of this Court to amend his Petition for Habeas Corpus pursuant to Fed. R. Civ. P. 15(a)(2). In the alternative, Mr. Rhines requests that this Court construe this Motion as a Motion for Relief from Judgment Pursuant to Rule 60(b)(6). His proposed amendment is submitted as Exhibit 1 to this pleading.

Jurors from Mr. Rhines's trial have recently come forward to explain that a bias against Mr. Rhines because of his homosexual identity played a significant role in the decision to sentence him to death. Jurors rejected a sentence of life imprisonment because of an explicitly voiced concern that such a sentence would

effectively reward him with the opportunity to mingle with, and have sexual relations with, young male inmates.

Until recently, juror statements about their internal discussions and decision processes were always inadmissible and could never give rise to claims of juror misconduct. In *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017), however, the United States Supreme Court recently changed course, holding that such evidence is admissible when offered to prove a claim of juror bias. As described below, the new juror statements, combined with the change of law in *Pena-Rodriguez*, should provide Mr. Rhines the opportunity to show that there was juror bias that was not revealed in *voir dire*, and that he was sentenced to death, in part, because he is a homosexual.

BRIEF IN SUPPORT OF MOTION

I. THIS COURT HAS THE AUTHORITY TO GRANT LEAVE TO AMEND, AND AN AMENDMENT WOULD BE PROPER.

This Court has the authority to grant this motion to amend although the case is pending on appeal – both because it retains jurisdiction to amend until the conviction is final and because it may in any case grant relief pursuant to Rule 60(b) of the Rules of Civil Procedure. The circumstances support allowing the amendment.

A. New Evidence of Juror Bias

Newly discovered information has disclosed that Mr. Rhines's homosexuality was definitely a focal point of the deliberations.

Juror Frances Cersosimo recalled hearing an unidentified juror comment of Mr. Rhines "that if he's gay we'd be sending him where he wants to go if we voted for LWOP." Ex. B, Decl. of Frances Cersosimo.

Juror Harry Keeney stated that the jury "knew that [Mr. Rhines] was a homosexual and thought he shouldn't be able to spend his life with men in prison." Ex. C, Decl. of Harry Keeney.

Juror Bennett Blake confirmed that "[t]here was lots of discussion of homosexuality. There was a lot of disgust. This is a farming community. . . . There were lots of folks who were like, 'Ew, I can't believe that.'" " Ex. D, Decl. of Katherine Ensler.

All of the jurors who were asked, including Mr. Keeney and Mr. Blake, had told the Court in *voir dire* that they did not harbor anti-gay bias. *See, e.g.*, Trial Tr. at 327-28 (1/5/1993) (Keeney); 932 (1/8/1993) (Blake). The newly discovered information establishes that these assertions were false.

B. The Court Has Jurisdiction Because The Judgment Is Not Yet Final.

Because the judgment is not yet final, this motion does not qualify as a successive petition. 28 U.S.C. § 2244(b)(3)(A) requires that an applicant obtain

authorization from the Court of Appeals before filing a second or successive petition in the district court. An amendment filed in the district court during the pendency of an appeal of the habeas petition, however, is not considered a second or successive petition. *See Nims v. Ault*, 251 F.3d 698, 703 (8th Cir. 2001) (suggesting that the addition of a juror misconduct claim after a district court's denial of a habeas petition, but before that petition is resolved on appeal, was not successive, by considering that claim on its merits notwithstanding the jurisdictional prerequisites for filing second or successive petitions); *id.* at 705 (Bye, J., dissenting) ("The majority permits a prisoner to file a petition in district court, receive a complete adjudication on the merits, appeal, dismiss the appeal to add a new claim, and start all over *without penalty*.") (emphasis in original); *see also Whab v. United States*, 408 F.3d 116, 118-19 (2d Cir. 2005) (explaining that when a habeas petitioner raises a new claim, it is not successive so long as the habeas petition remains on appeal, and that the court should consider whether to permit the amendment under the flexible standards of Fed. R. Civ. P. 15(a), rather than the AEDPA standards governing second or successive petitions).

Later authority from this Circuit erroneously relied on the wrong panel opinion as precedent. In *Williams v. Norris*, 461 F.3d 999 (8th Cir. 2006), the panel held that an amendment to a habeas petition is a successive habeas petition if it occurs after the petition is denied by the district court but before the denial is affirmed on appeal. *Id.*

at 1004. The *Williams* Court declined to rely on *Nims*, and instead relied on *Davis v. Norris*, 423 F.3d 868 (8th Cir. 2005), a later panel opinion which conflicted with *Nims*. *Williams*, 461 F.3d at 1004. The Eighth Circuit has since ruled that "when faced with conflicting 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, 800 (8th Cir. 2011) (en banc). Here, the earliest opinion is *Nims*. Thus, the instant motion should be governed by *Nims* rather than *Williams*.

Because *Nims* stands for the proposition that a new claim cannot be deemed successive until the denial of the underlying petition has been affirmed on appeal, a district court retains discretion to permit an amendment under Fed. R. Civ. P. 15(a) while that petition is pending on appeal.

C. The Court Has Jurisdiction Under Rule 60(b) To Consider Whether An Obstacle To Merits Review Has Been Removed.

If this Court finds that it does not have jurisdiction to entertain this motion under the authority of *Nims* – although it should – it should nevertheless entertain this motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure. Rule 60(b)(6) provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). The statute requires the litigant to file a motion under Rule 60(b) within a "reasonable time[.]" Fed. R. Civ. P. 60(c).

"[A] Rule 60(b)(6) motion in a § 2254 case is not to be treated as a successive habeas petition if it does not assert, or reassert, claims of error in the movant's state conviction." *Gonzalez v. Crosby*, 545 U.S. 524, 538 (2005). Rather, upon a showing of extraordinary circumstances, Rule 60(b) is the proper vehicle where the "motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Id.* at 532, 535.

> If neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction, allowing the motion to proceed as denominated creates no inconsistency with the habeas statute or rules. Petitioner's motion in the present case, which alleges that the federal courts misapplied the federal statute of limitations set out in § 2244(d), fits this description.

Gonzalez , 545 U.S. at 533.

This Court has recognized that a change in the law that had previously prevented a litigant from even bringing a claim can, in some circumstances, warrant a grant of Rule 60(b) relief. *See Cornell v. Nix*, 119 F.3d 1329, 1332-33 (8th Cir. 1997) (analyzing whether newly decided *Schlup v. Delo*, 513 U.S. 298 (1995), which recognized innocence exception to procedural rule that would otherwise bar review of Cornell's claim, was "extraordinary circumstance" entitling him to 60(b) relief); *Cox v. Wyrick*, 873 F.2d 200, 201-02 (8th Cir. 1989) ("A change in the law having retroactive application may, in appropriate circumstances, provide the basis for granting relief under Rule 60(b)[,]" but in this case new law "inapposite.").

In a case similar to this one, *Cox v. Horn*, 757 F.3d 113, 120-26 (3d Cir. 2014), the petitioner sought to raise an otherwise defaulted trial ineffective assistance claim, arguing that the Supreme Court's then-recent decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), now provided a means to establish cause and prejudice to overcome the default and allow habeas review of the merits. The Court of Appeals rejected an argument that a new decision, categorically, could never be sufficient to support a Rule 60(b) motion. It held that a district court has discretion to consider the change in the law, along with other factors, in making the equitable determination whether to grant relief. *Id.* at 124; *accord Ramirez v. United States*, 799 F.3d 845, 850-6 (7th Cir. 2015) (district court abused discretion in ruling petitioner categorically ineligible for 60(b) relief in light of *Martinez*, and in failing to consider multiple factors before making equitable decision).

Here, Mr. Rhines attacks a defect in the integrity of the federal habeas proceeding. Just as the statute of limitations in *Gonzalez* precluded the habeas court from reviewing any of the claims in the habeas petition, in this case a rule of evidence, now declared unconstitutional, precluded review of this claim.[1] Indeed, it was not even raised in Mr. Rhines's habeas petition. Mr. Rhines could not introduce

[1] Mr. Rhines attempted to raise a similar claim in his motion for relief from judgment pursuant to Rule 59 of the Rules of Criminal Procedure. Although this Court rejected the claim because it was inappropriate matter for a Rule 59 motion, it also suggested that juror affidavits were not even admissible. Order, July 5, 2016, Doc. 348, at 8.

the evidence he now proffers in either state or federal court to establish that he was prejudiced, because federal law and South Dakota law forbade jurors from offering testimony or affidavits concerning what occurred during the jurors' deliberations. *See* Fed. R. Evid. 606(b)(1); SDCL § 19-19-606. Additionally, *Tanner v. United States*, 483 U.S. 107 (1987), barred Mr. Rhines from introducing the evidence he now proffers as support for a claim that jurors were untruthful during *voir dire*, and as a result his right to an impartial jury was violated.[2]

The Supreme Court has now set aside these obstacles to merits review on constitutional grounds. In *Pena-Rodriguez*, 137 S. Ct. at 860, the Court held that due process requires the states to allow petitioners in certain circumstances to offer jurors' affidavits to obtain relief from judgment. As explained below, this case presents one of those circumstances. Therefore, as in *Gonzalez*, Mr. Rhines seeks a ruling that would remove an obstacle to merits review. The motion therefore does not constitute a second or successive petition.

---

[2] Mr. Rhines's stand-alone claim that his right to an impartial jury was violated is unexhausted in state court but not necessarily defaulted. In *Hughbanks v. Dooley*, 887 N.W.2d 319, 326 (S.D. 2016), the South Dakota Supreme Court construed the two-year statute of limitations provision in S.D.C.L. § 21-27-3.3 to allow an additional two-year period beginning on the statute's effective date July 1, 2012 for petitioners whose time to file had already lapsed. It did not determine whether the statute made any exception for capital cases, was subject to equitable tolling, or attempt to reconcile its well-settled case law. Thus, it remains unclear whether exhaustion of the new claims in state court would be futile.

The motion otherwise satisfies the criteria for Rule 60(b)(6) relief. Rule 60(b)(6) "confers broad discretion on the trial court to grant relief when appropriate to accomplish justice; it constitutes a grand reservoir of equitable power to do justice in a particular case and should be liberally construed when substantial justice will thus be served." *MIF Realty v. Rochester Assocs.*, 92 F.3d 752, 755 (8th Cir. 1996) ("Rule 60(b) is to be given a liberal construction so as to do substantial justice and to prevent the judgment from becoming a vehicle of injustice." (citations and quotation marks omitted)); *see also City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147, 1154 (8th Cir. 2013) (Rule 60(b)(6) "broadly permits relief" for any reason justifying it); *Thompson*, 580 F.3d at 444 (citations omitted) (granting Rule 60(b)(6) motion in capital habeas case); *Lasky v. Cont'l Prods. Corp.*, 804 F.2d 250, 256 (3d Cir. 1986) ("the Rule should be liberally construed for the purpose of doing substantial justice").

In *Buck v. Davis*, 137 S. Ct. 759 (2017), the Supreme Court reaffirmed a court's broad discretion to entertain Rule 60(b) motions and emphasized the range of factors that may properly be considered:

> In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863–864, 108 S. Ct. 2194, 100 L.Ed.2d 855 (1988).

137 S. Ct. at 777-78.

In *Buck*, the Court found extraordinary circumstances present because the petitioner had been sentenced to death in part because of his race. *Id.* at 778. "Our 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." *Id.* The *Buck* Court further noted that, as to the second factor, "[r]elying on race to impose a criminal sanction 'poisons public confidence' in the judicial process." *Id.* (citation and quotations omitted). "It thus injures not just the defendant, but 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the process of our courts.'" *Id.*

Mr. Rhines's case presents an extraordinary circumstance – he was sentenced to death, in part, due to his homosexuality, an immutable characteristic congruent to the one condemned in *Buck*. Furthermore, just as relying on race in capital sentencing undermines public confidence in the judicial process, so too does relying on a defendant's sexuality in deciding whether he lives or dies.

State and federal evidentiary rules barred Mr. Rhines from presenting evidence to support his claim that he was sentenced to death based on his sexuality. These barriers have now been removed. Rule 60(b) relief from the judgment should accordingly be granted.

D. The Criteria for Amendment Are Satisfied.

Rule 15(a)(2) provides that a district court "should freely give leave [to amend] when justice so requires." "Under the liberal amendment policy of Federal Rule of Civil Procedure 15(a), a district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving partly, futility of the amendment, or unfair prejudice to the non-moving party can be demonstrated." *Roberson v. Hayti Police Department*, 241 F.3d 992, 995-96 (8th Cir. 2001) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962); *cf. Griffin v. Delo*, 961 F.2d 793, 793–94 (8th Cir. 1992) ("In light of the death sentence under which appellant labors and our granting of permission for his second attorney to withdraw, we believe that a remand with directions to allow the petitioner to raise additional issues for consideration by the district court is the most prudent course.").

Justice requires this Court to grant Petitioner leave to file an amendment to his petition. The proposed claim was never presented or ruled upon during Mr. Rhines's state or federal habeas corpus proceedings because evidentiary rules made it unavailable to Mr. Rhines. If this Court denies Mr. Rhines's motion for leave to amend his petition, these meritorious claims of constitutional magnitude may never be heard in any courtroom, state or federal, and no court will be able to correct this substantial injustice. Leave to amend should accordingly be granted.

CONCLUSION

For these reasons, the Court should grant Mr. Rhines leave to file the proposed amendment to his petition for a writ of habeas corpus, and all other appropriate relief.

Respectfully submitted,

NEIL FULTON, Federal Public Defender

By: /s/ Jason J. Tupman

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Counsel for Petitioner, Charles Russell Rhines

Dated: September 28, 2017

CERTIFICATE OF SERVICE

This will certify that, on September 28, 2017, a true and correct copy of the foregoing has been electronically filed with the Clerk of the Court via CM/ECF to be served on the following persons authorized to be noticed:

Paul S. Swedlund
Assistant Attorney General
State of South Dakota
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Pierre, SD 57501

/s/ Jason J. Tupman
Jason J. Tupman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES,	)	
	)	**CIV. 5:00-5020-KES**
Petitioner,	)	
	)	
v.	)	**CAPITAL CASE**
	)	
DARIN YOUNG, Warden,	)	
South Dakota State Penitentiary,	)	
	)	
Respondent.	)	

PROPOSED AMENDMENT TO PETITION FOR HABEAS CORPUS

VII. MR. RHINES'S RIGHT TO AN IMPARTIAL JURY WAS VIOLATED BY THE ANTI-GAY BIAS OF MULTIPLE JURORS, WHICH THEY FAILED TO DISCLOSE DURING *VOIR DIRE*.

1. "The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on government power." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017).

2. But in some instances, a jury's "imperfections" strike at the heart of the justice system. In these cases—where a jury acts on the basis of discrimination rather than the evidence before it—the jury's behavior "is especially pernicious." *Id.* at 868 (citation omitted).

3. The jury at Mr. Rhines's trial knew he was gay. Almost all of the jurors were offered an opportunity to acknowledge their anti-gay biases during *voir dire*. They denied bias.[1]

4. But for at least some jurors, Mr. Rhines's sexual orientation made it impossible for them to provide him with the unbiased deliberations guaranteed by the Sixth and Fourteenth Amendments.

5. Instead, the decision between life and death became, at least in part, a referendum on whether a gay man should be afforded the purported benefit of living around other men in prison.

6. The jury's anti-gay bias and untruthful *voir dire* responses deprived Mr. Rhines of his right to a fair trial by an impartial jury. Relief is warranted.

A. The Jury's Knowledge of Mr. Rhines's Homosexuality

7. From before the beginning of Mr. Rhines's January 1993 trial, prospective jurors were informed that he was gay.

8. Mr. Rhines's own lawyers asked venirepersons if they harbored anti-gay bias. *See, e.g.*, Trial Tr. at 99 (1/5/1993) ("You are going to hear evidence that Mr. Rhines is gay, he's a homosexual, and you are going to hear that at least a couple of the people testifying in this case also are gay. Does that change your feelings about this case or sitting on this case in any way?").

[1] The one exception was juror Daryl Anderson, who was never asked how he felt about Mr. Rhines's sexual orientation. *See* Trial Tr. at 1326-50 (1/11/1993).

9. During the trial, the jury also heard evidence regarding Mr. Rhines's homosexuality.

10. For example, witness Heather Harter testified that she walked in on Mr. Rhines "cuddling" with her husband, Sam Harter, when she and Mr. Harter visited Mr. Rhines in Seattle. Trial Tr. at 2362 (1/19/1993).

11. Ms. Harter further testified that Mr. Rhines told her that he hated her because Mr. Harter loved her instead of him. Trial Tr. at 2364 (1/19/1993).

12. Mr. Rhines's ex-boyfriend Arnold Hernandez also testified that he had a "sexual" relationship with Mr. Rhines before Mr. Rhines lived with Mr. Harter. Trial Tr. at 2292 (1/19/1993).

B. "We'd Be Sending Him Where He Wants to Go."

13. Some of the jurors proved incapable of separating out their knowledge of Mr. Rhines's sexual orientation from their duty to serve impartially.

14. During penalty-phase deliberations, the jury debated the merits of a death sentence versus a sentence of life without parole ("LWOP").

15. On the second day of penalty deliberations, the jurors sent the trial judge a note that read as follows:

> 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, describe 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.

Ex. A, Jury Note.

16. The jury note suggested that anti-gay bias played a role in the jury's decision-making process. The jurors' concerns mirrored themes elicited in the testimony of Heather Harter and Arnold Hernandez and reflected commonly held stereotypes of gay men: they were worried that he might taint other inmates by "mingling" with general population, that he might develop "followers" or

"admirers," and that he might "brag" to young inmates or have "conjugal visits" or marry.

17. As newly discovered information has disclosed, Mr. Rhines's homosexuality was definitely a focal point of the deliberations.

18. Juror Frances Cersosimo recalled hearing an unidentified juror comment of Mr. Rhines "that if he's gay we'd be sending him where he wants to go if we voted for LWOP." Ex. B, Decl. of Frances Cersosimo.

19. Juror Harry Keeney stated that the jury "knew that [Mr. Rhines] was a homosexual and thought he shouldn't be able to spend his life with men in prison." Ex. C, Decl. of Harry Keeney.

20. Juror Bennett Blake confirmed that "[t]here was lots of discussion of homosexuality. There was a lot of disgust. This is a farming community. . . . There were lots of folks who were like, 'Ew, I can't believe that.'" Ex. D, Decl. of Katherine Ensler.

21. All of the jurors, including Mr. Keeney and Mr. Blake, told the court that they did not harbor anti-gay bias. *See, e.g.*, Trial Tr. at 327-28 (1/5/1993) (Keeney); 932 (1/8/1993) (Blake). The newly discovered information establishes that these assertions were false.

C. Mr. Rhines's Right to an Impartial Jury Was Violated.

22. The Sixth Amendment guarantees a defendant that each juror will be "indifferent as he stands unsworne." *Irvin v. Dowd,* 366 U.S. 717, 722 (1961) (citation omitted).

23. When a juror gives material false information during *voir dire* regarding possible bias, a defendant must be granted a new trial if the nondisclosure denies the defendant his right to an impartial jury. *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 549 (1984).

24. Under the *McDonough Power* standard, a defendant must be granted a new trial where (1) a juror provides false information during *voir dire* and (2) the truth, if known, would have provided the defense the basis for a successful cause challenge to that juror. *Id.* at 556.

25. Here, both Juror Keeney and Juror Blake satisfy the *McDonough Power* standard. First, they both provided false information during *voir dire*. Each testified that Mr. Rhines's sexual orientation would not affect his decision. *See* Trial Tr. at 328 (1/5/1993) ("I guess a man or lady has to live their own lives the way they see fit. . . . I don't see where that would have any variance on this case as far as I'm concerned."); 932 (1/8/1993) ("Q: [T]here will be some evidence here that will show that Mr. Rhines is a homosexual, he's gay and one or two of the witnesses who might be called in this case are also gay and have had relationship[s]

with Mr. Rhines. Knowing that, does that cause you to view Mr. Rhines differently at all? A: Not at all."). Based on their later statements regarding Mr. Rhines's homosexuality, each testified falsely.

26. Second, had each of the jurors answered the *voir dire* questions truthfully, Mr. Rhines and his attorneys would have known that each harbored anti-gay animus that he would not be able to put aside in judging Mr. Rhines's case. Thus, each could have been challenged for cause.

27. Separate from the *McDonough Power* standard, a defendant can show a violation of his Sixth Amendment rights where he can demonstrate actual bias on the part of a juror. *See Smith v. Phillips*, 455 U.S. 209, 215-16 (1982).

28. Here, Mr. Rhines can demonstrate actual bias against him on the part of Mr. Keeney, Mr. Blake, and the jury as a whole.

29. The jurors not only discussed Mr. Rhines's homosexuality during deliberations, they held it against him.

30. Eager to prevent him from receiving what they saw as the benefit of access to other men in prison, the jurors voted to impose a death sentence instead of LWOP.

31. Under *Smith*, the jurors who based their decision on anti-gay animus were biased against Mr. Rhines and thus deprived him of his right to fair trial under the Sixth and Fourteenth Amendments.

D. The "No-Impeachment Rule" Does Not Apply.

32. Like most jurisdictions, South Dakota employs a version of the "no-impeachment" rule. The rule, codified in South Dakota at SDCL § 19-19-606, provides that a juror may not testify or offer an affidavit "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 rule has several exceptions that are not relevant to this case.

33. However, under the Supreme Court's recent decision in *Pena-Rodriguez*, there are circumstances where the no-impeachment rule must give way to allow a court to consider evidence that purposeful discrimination has infected the deliberation process.

34. In *Pena-Rodriguez*, the defendant was charged with sexual assault. According to two jurors, a fellow juror commented during deliberations that he believed the defendant to be guilty of the sexual assault because "Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." 137 S. Ct. at 862. The Colorado courts ruled that they could not consider the evidence of racial bias because the no-impeachment rule barred the jurors from providing evidence regarding the internal process of deliberations. *Id.* at 862-63.

35. The Supreme Court reversed, holding that "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 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." 137 S. Ct. at 869.

36. The Court acknowledged other instances in which it had declined to find exceptions to the no-impeachment rule, including cases where jurors harbored generalized bias in favor of one side or abused drugs and alcohol. *Id.* at 868. The Court stressed that the no-impeachment rule remained generally applicable to help the jury system avoid "unrelenting scrutiny." *Id.*

37. But the Court concluded that racial bias was different because "if left unaddressed, [it] would risk systemic injury to the administration of justice." *Id.* The Court noted that its decisions "demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns" and added: "An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy." *Id.*

38. The logic of *Pena-Rodriguez* applies in this case. Like racial discrimination, discrimination on the basis of sexual orientation risks systemic, rather than case-specific, injury to the administration of justice.

39. Like racial discrimination, discrimination on the basis of sexual orientation implicates unique historical, constitutional and institutional concerns. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (recognizing right to same-sex marriage); *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (striking down as unconstitutional provision in Defense of Marriage Act that defined marriage as between man and woman); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding unconstitutional law criminalizing private homosexual sexual conduct); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (declaring unconstitutional state constitutional amendment that banned laws which themselves banned discrimination against gays and lesbians).

40. And, like the effort to eradicate racial discrimination, an effort to rid the justice system of discrimination on the basis of sexual orientation is not an exercise in perfecting the jury but rather an attempt to ensure that the legal system provides equal treatment under law.

41. Finally, as with attitudes about race, opinions about sexual orientation are not necessarily easy to unmask. *See Pena-Rodriguez*, 137 S. Ct. at 869. That was the case here, where the jurors deliberated regarding Mr. Rhines's sexual

orientation despite having pledged during *voir dire* that it would have no impact on their decision.

42. There is no principled reason to relax the no-impeachment rule to root out racial discrimination but enforce it where sexual-orientation-based animus is alleged. The no-impeachment rule should not apply here.

E. This Claim Is Timely.

43. Federal law provides that a claim is timely if it is filed within one year of the "date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Diligent counsel would not have questioned the jurors on their deliberations because at the time of state post-conviction and federal habeas corpus proceedings, no statements made during a jury's deliberations were admissible. *See Pena-Rodriguez*, *supra*.

44. The factual predicates for the claims were developed during conversations between counsel for Mr. Rhines and jurors on December 10 and 11, 2016. *See* Exs. B-D. This petition is being filed within one year of the date of those conversations; the claim is therefore timely.

F. Conclusion

45. Mr. Rhines was "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Parker v. Gladden*, 385 U.S. 363, 366 (1966).

46. The involvement of biased jurors in the deliberation and decision of Mr. Rhines's case violated his right to a fair trial by an impartial jury. Mr. Rhines respectfully requests that this Court grant the writ, conditioned on a new trial of Mr. Rhines's guilt or innocence and/or penalty.

CONCLUSION

For these reasons, the Court should grant Mr. Rhines's petition for a writ of habeas corpus and all other appropriate relief.

Respectfully submitted,

NEIL FULTON, Federal Public Defender

By: /s/ Jason J. Tupman

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Counsel for Petitioner, Charles Russell Rhines

Dated: September 28, 2017

CERTIFICATE OF SERVICE

This will certify that, on September 28, 2017, a true and correct copy of the foregoing has been electronically filed with the Clerk of the Court via CM/ECF to be served on the following persons authorized to be noticed:

Paul S. Swedlund
Assistant Attorney General
State of South Dakota
1302 East Highway 14, Suite 1
Pierre, SD 57501

/s/ Jason J. Tupman
Jason J. Tupman

Exhibit A

COURT'S EXHIBIT #5

about 10:45 A.M 1/26/93

Judge Konnekamp,

In order to award the proper punishment we need a clear prospective of what "Life In Prison Without Parole" really means. We know what the Death Penality 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. allowed to create a group of followers or admirers.

④ will Mr Rhines be allowed to discuss, discribe 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 conjigal 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.

[illegible] Brown

Bobby Walton
Foreperson

Matthew L. Anderson

[illegible]

Robert W Corrin - Harry Keeney

Bennett Blake

[illegible]

Judy Shafer

Fran Cersosimo

Delight McGuff

Wilma Wood[illegible]

Exhibit B

DECLARATION OF Frances Cersosimo
PURSUANT TO 28 U.S.C. § 1746

I was a juror on Charles Rhines's case. I think we came to the right decision. I think his shot at redemption is waiving his appeals and being executed. We deliberated at both the guilt and penalty phases. We followed the judge's instructions. I remember we sent a note about life and death. We talked about that for a while. Our responsibility was profound and we took it seriously. One juror said it would be a deterrent to other criminals if Charles received a death sentence. After discussing this, we agreed the death penalty served no deterrent purpose. One juror made ~~an~~ a comment that if he's gay, we'd be sending him where he wants to go if we voted for LWOP. Rhine's confession jumped out, with his jarring laughter — a huge contrast to his otherwise soft voice. We had Donovan's picture in front of us - the one of his body as it was found. Rhines destroyed his freedom and that was a big thing. I think we made the right decision. Rhines had a fair trial, and deserves his sentence. I stand by my decision today. Rhines had a fair and compassionate jury - very fair. Nobody said he was evil. We judged his deeds, not his character. FC 12-11-16

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Frances Cersosimo 12-11-16

Exhibit C

DECLARATION OF Harry Keeney
PURSUANT TO 28 U.S.C. § 1746

I am postive Charles Rhines is guilty. We sentenced him to what he should get a long time ago. We deliberated and all thought he deserved death. I still think he does. we thought that the crime was intentional We also knew that he was a homosexual and thought that he shouldn't be able to spend his life with men in prison. I still believe he deserves the death penalty.

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Harry Keeney

Exhibit D

DECLARATION OF KATHERINE ENSLER
PURSUANT TO 28 U.S.C. § 1746 & 18 P.A. CONS. STAT. § 4904

I, Katherine Ensler, do hereby declare and verify as follows:

1. I spoke with Mr. Bennett Blake on December 10, 2010, over the phone with my colleague Alex Kursman.

2. Mr. Blake began the conversation stating that an investigator had called him recently, that his wife was a producer for KOTA, that he knows several defense attorneys, and that he has family in law enforcement.

3. Mr. Blake then stated that he had no remorse for the verdict or sentence.

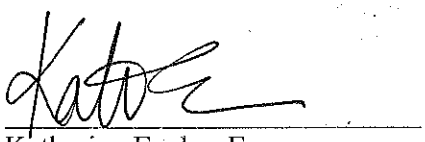
4. He stated that the jury had deliberated, and when asked to speak more about the deliberations, he immediately said, "There was lots of discussion of homosexuality. There was a lot of disgust. This is a farming community."

5. He stated that it was very clear that Mr. Rhines was a homosexual given the testimony at trial. He then said, "There were lots of folks who were like 'Ew, I can't believe that.'"

6. I let Mr. Blake know I was going to write down what he said to us about the case, which he said was fine.

7. Later the same day he sent my colleague a text message telling him he did not want to be contacted again.

8. I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information and belief, subject to 28 U.S.C. § 1746 and 18 Pa. Cons. Stat. § 4904.



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Date: December 12, 2016

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DEFENDER

December 13, 2017

BY ECF and Regular Mail

Michael E. Gans
Clerk of Court
United States Court of Appeals
For the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street, Room 24.329
St. Louis, MO 63102

Re: *Charles Russell Rhines v. Darin Young*, No. 16-3360

Dear Mr. Gans:

In order to inform this Court of other pending litigation arising from Mr. Rhines's conviction and death sentence, I am writing to give notice of the following related litigation:

1. Mr. Rhines has moved in the district court for permission to amend the habeas petition to include the statements of jurors – newly admissible under *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) – that reflect anti-gay bias displayed during penalty phase deliberations. Alternatively, he has moved for relief from judgment pursuant to F.R. Civ. P.

60(b). *Rhines v. Young*, Civ. No. 5:00-5020-KES, Doc. Nos. 383, 389, 391. The motion is awaiting the district court's decision.

2. Mr. Rhines has moved for relief from judgment, on the basis of the same juror statements showing anti-gay bias, in the South Dakota Supreme Court. The State's response to the motion is due on December 18. A motion by Lambda Legal Defense Fund for permission to file a brief as *amicus curiae* is awaiting decision. *State v. Charles Russell Rhines*, Motion for Relief from Judgment Pursuant to SDCL 15-6-60(b), No. 28444 (S.D. S. Ct.).

3. Mr. Rhines has also appealed to the South Dakota Supreme Court an order of the Seventh Judicial Circuit Court that denied his application for authorization for his mental health experts to enter the prison to evaluate him. The State has moved to dismiss the appeal, Mr. Rhines has responded, and the State's motion is awaiting the State's reply (if any) and the Supreme Court's decision. *State v. Charles Russell Rhines*, Motion to Dismiss Appeal, No. 28460 (S.D. S. Ct.).

Respectfully submitted,

/s/ Claudia Van Wyk

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CERTIFICATE OF SERVICE

This will certify that, on December 13, 2017, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court via CM/ECF to be served on the following persons authorized to be noticed:

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Pierre, SD 57501

/s/Claudia Van Wyk
Claudia Van Wyk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CHARLES RUSSELL RHINES,	*	
Petitioner,	*	
v.	*	CIV 00-5020-KES
DARIN YOUNG, Warden, South Dakota State Penitentiary,	*	
Respondent.	*	

AFFIDAVIT OF BRETT GARLAND

Affiant, after first being sworn upon his oath, states as follows:

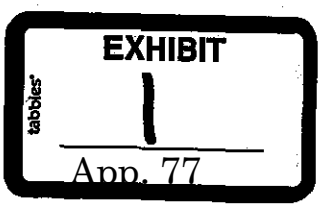
1. Affiant is a Special Agent for the South Dakota Department of Criminal Investigation. At the direction of the Office of the Attorney General, affiant attempted to contact all jurors in the matter of ***State v. Rhines,* CR 93-81 (Cir.Ct.S.D.7th),** in order to determine if the sentence of death was imposed due to homophobic bias. Affiant learned that one juror, **Martha Anderson,** is deceased.

2. The jurors were uniformly annoyed or uncomfortable about being contacted to discuss their deliberations and verdict, whether by affiant or Rhines' defense team. Some were willing to discuss the experience with affiant, others were not.

3. The jurors uniformly described the deliberations as serious and professional. The jurors were complimentary of their fellow jurors' conscientiousness, and of the foreman's professionalism in particular. The jurors uniformly reported that Rhines' sexual orientation had no influence on their decision to impose a death sentence. Rather, the jurors reported that it was the brutality of the killing and Rhines' remorseless confession that caused them to believe a death sentence was warranted.

4. On May 2, 2017, affiant contacted **Bobby Charles Walton** by telephone. Juror Walton served as **foreman** of the jury.

5. When contacted by affiant, Juror Walton stated that "four or five people" from the Rhines defense team had "come last year knocking on [his] door or calling" him. Juror Walton stated that "these people" were asking if he had "changed" his mind about the case. Juror Walton was audibly frustrated with people "trying to get [jurors] involved again" and was



"tired of being harassed." Juror Walton told Rhines' defense team that he had "nothing else to say or do in that matter."

6. Juror Walton also refused to meet with affiant or any representative from the South Dakota Office of the Attorney General.

7. Juror Walton did inform affiant over the phone that he did not "recall anybody saying anything like [SOB queer] when we were in the deliberation phase." Juror Walton said the allegation that a juror had said "SOB queer" during deliberations was "news to me." When asked if anyone was influenced to hand down the death sentence based on Rhines' homosexuality, Juror Walton responded "No. No."

8. Juror Walton recalled being asked during *voir dire* about whether he had any "qualms" with "people being . . . gay." Juror Walton remembers telling them that he could not "care less about who is gay or who is whatever." Juror Walton's attitude toward a person's sexual orientation was "To each his own."

9. When asked if he felt that anyone tried to influence his decision at all based on sexual orientation or religion, Juror Walton said "No. No. None of that was brought up." When asked if he remembered any conflict at all with any specific individual or individuals in that jury room as it related to religion, sexual orientation or anything like that, Juror Walton said "No. No."

10. Juror Walton stated that his decision was based on the evidence, Rhines' taped confession, and "what [Rhines] did to that young boy. He could have spared that boy's life." Juror Walton stated that the jury arrived at its verdict "as a group."

11. On April 28, 2017, affiant interviewed **Mark Thomas Dean.**

12. Juror Dean was advised that affiant was investigating an allegation of a homophobic statement made during the jury deliberations. Before the interview, Juror Dean was not told the reason affiant wanted to talk to him or made aware of the "SOB queer" statement attributed to him in the affidavit of "Juror B" on file in this case. DOCKET 323, Exhibit B. Juror Dean was directed to Paragraph 7 of Juror B's affidavit to read the allegation for himself so that affiant could witness his reaction.

13. After reading Paragraph 7 of Juror B's affidavit, Juror Dean stated that he had no recollection of any such statement and could not imagine that he would have made any such statement. Juror Dean said "I would never say something like that in a situation like that." Juror Dean knew that Rhines' homosexuality had no bearing on any decision he had to make.

14. Juror Dean stated that he is not homophobic. He stated that he believed people have the right to live in the way they want. Juror Dean said "I honest to God can say I don't remember saying anything like that in that

room, or wherever." Juror Dean said a person's sexual orientation is not something he would judge them by. Juror Dean said a person's sexual orientation was none of his business.

15. Juror Dean said he voted for the death penalty based on the guidelines of the law provided by the judge, the type of crime and the way it was committed, and the brutality of the crime.

16. Juror Dean stated that the jury followed guidelines of what the law required them to do. Juror Dean described the jury foreman, Bobby Walton, as a "ramrod" strict military man who conducted the deliberations in a non-nonsense manner. According to Juror Dean, the jury found that the crime was premeditated and that Rhines deserved the maximum sentence. Juror Dean stated that nobody on the jury wanted to have someone's life in their hands and that the jury struggled with the decision.

17. When asked if he felt anyone on the jury was influenced to return a death sentence because of Rhines' homosexuality, Juror Dean said "Honestly, no." Juror Dean said Rhines' homosexuality did not matter to him and had nothing to do with the crime.

18. Juror Dean said it was disturbing to read Paragraph 7 of Juror B's affidavit. Juror Dean said that the jurors all got along with each other. He stated that each juror was allowed to think on their own. Juror Dean said neither he nor anyone else tried to sway a juror to vote for a death sentence against their moral or religious beliefs. Juror Dean said that the mood in the room was that nobody was wanting to "lay anything on one person's shoulder" that they would later regret. Juror Dean said that the goal of the deliberations was to let everyone make their own decision so when they walked out of the jury room they could live with themselves.

19. Juror Dean's wife, Patricia, sat at the table during the interview. She mentioned that she met Juror Dean shortly after the trial. She said the only thing that Juror Dean had ever said to her about the case was that it was a very brutal murder. Patricia said the topic of Rhines' homosexuality had never come up in the entire time she has known Juror Dean. Patricia said that she did not even know that Rhines was homosexual before the interview with affiant. Patricia said it was not like her husband to throw around careless words like those alleged.

20. Juror Dean stated that persons from Rhines' defense team had come to his door and had called him. He told them that the trial was done and that he had done what he thought was right, and that he did not want to talk about it. Juror Dean stated he did not want to have to come to court to testify about the case.

21. Contrary to Juror B's characterization of Juror Dean as "a masculine, self-assured guy who . . . saw things in a very black and white way,"

affiant found him to be a soft-spoken and thoughtful individual who described performing his duties as a juror in a conscientious manner and who was sensitive to the opinions and feelings of his fellow jurors and the magnitude of the decision he and his fellow jurors were tasked with.

22. Affiant spoke with **Frances Cersosimo** on May 4, 2017.

23. Like other jurors, Cersosimo was aware that Rhines is a homosexual. She stated this fact was "abstract from the reality of what we were even basing anything on."

24. According to Cersosimo, one juror made a joke that Rhines might enjoy a life in prison where he would be among so many men. This "stab at humor" "did not go over well" and everyone agreed that Rhines' sexual orientation "was not even a consideration" and had nothing to do with their verdict. 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." According to Cersosimo, there were no other comments like that and Rhines' sexual orientation was not discussed again.

25. Cersosimo kept a journal of her jury service. DOCKET 340, Exhibit N. After each day of proceedings or deliberations in the case, Cersosimo recorded her thoughts and impressions in her journal. Cersosimo stated that if she had felt that Rhines' homosexuality influenced the sentencing determination in any way, she would have recorded it in her journal. The court can review DOCKET 340, Exhibit N, to see if her journal contains any mention of Rhines' homosexuality influencing the deliberations.

26. Cersosimo stated that the jury was instructed against basing its sentencing determination on bias or prejudice and that the jury followed that instruction by giving Rhines' sexual orientation no weight in consideration of a death sentence. When asked what bearing Cersosimo believed Rhines' sexual orientation had on the verdict she said "Not one iota. Not one iota."

27. Cersosimo said she did not observe any juror being pressured in any way for any reason by any other juror to return a death sentence. Cersosimo said her own sentencing determination was based on the relevant evidence and the nature of the crime itself, not Rhines' sexual orientation.

28. When asked her thoughts on the allegation that the jury sentenced Rhines to death because he is gay, Cersosimo said it "ludicrous."

29. Affiant spoke with **Robert Corrin** on June 6, 2017.

30. When asked if he felt that he or any of the jurors reached their decision to impose the death penalty based on any prejudices in regard to Rhines' sexual orientation, Corrin stated that "No. None of that went on."

31. Corrin said that the jury foreman did a very good job. There was no friction between the jurors on any matters.

32. In regard to a person's sexual orientation, Corrin stated that it did not matter to him who a person is. He said that every person has the same rights as everyone else and he went into the trial with an open mind and the thought that Rhines was innocent. The jury's verdict, he said, was based on the evidence presented. Corrin believed that a death sentence was the only option that seemed fair and right and that Rhines' actions warranted the penalty.

33. Corrin was approached by members of Rhines' defense team. He was uncomfortable talking to them and felt that they were "grasping at straws." He was concerned that his statements to them would be "taken the wrong way."

34. Affiant spoke with **Bennett Blake** at his home on June 6, 2017.

35. Blake stated that people from Rhines' defense team, one an attorney who identified himself as an "Assistant Federal Defender" from Philadelphia, came to his home in October of 2016. They were "rude as hell." He did not invite them into his house.

36. They wanted to know if he now thought that life in prison would be acceptable. Blake stated that he told them it would as long as Rhines never got out. Blake stated that he felt Rhines had committed a "horrible crime" for just "chump change."

37. Blake stated that Rhines' defense team kept badgering him about homosexuality. Like Cersosimo, Blake recalled a comment to the effect that Rhines might like life in the penitentiary among other men. Blake felt the comment was made as "somewhat of a tension release." Blake said that the foreman and everyone else on the jury agreed that Rhines was not on trial for being homosexual. The comment was just "a one moment thing" which "was never referred to again."

38. Blake said that, though he believed that some religious jurors disapproved of homosexuality, no juror attempted to influence his decision to vote for the death penalty based on any prejudices. Blake said "everything was done very professionally."

39. Blake had no recollection of anyone referring to Rhines as an "SOB queer." Blake said there was no friction between the jurors. He said everyone was uncomfortable with making a life and death decision. When asked if he believed the decision to impose a death sentence was reached based on Rhines' race, ethnicity or sexual orientation, Blake said that it was not. Blake said he had a difficult time distinguishing what was said during the guilt phase deliberations from what was said in the penalty phase deliberations.

40. When asked if he felt he was influenced to impose a death sentence based on Rhines' homosexuality, Blake answered "No sir." Blake stated that Rhines' crime of "splitting a kid's head open with a hunting knife" for "$200-$300 in change" was "deplorable" to him. He thought the death penalty was appropriate based on the evidence presented.

41. Affiant spoke with **Judy Shafer/Rohde** on June 6, 2017.

42. Like other jurors, Rohde was contacted by Rhines' defense team who said they were trying to find something that would get Rhines out of the death penalty. They asked if anyone on the jury had referred to Rhines in pejorative terms such as "faggot" and, if so, if that made her feel differently about the outcome. Rohde stated that nothing like that happened. Rohde stated that everything about the deliberations was "all good and clean." She said everyone did the job they were supposed to in a very professional manner.

43. Rohde remembers some religious jurors having difficulty with imposing a death sentence. She remembers one such juror waivering on the decision until she looked at the pictures from the trial and other evidence, at which time she stated "Yes, he deserves to die."

44. Rohde stated that no juror tried to influence her or anyone else to reach any decision based on race, ethnicity, sexual orientation or religion. She said everyone was taking the job very seriously and that all the jurors were "real professional."

45. Rohde stated that nothing like "SOB queer" was ever said during deliberations. When asked if any statements regarding Rhines' sexual orientation were made during deliberations she said that "Nothing. Absolutely nothing." Rohde said she would have been offended if she had heard someone talk like that in that situation.

46. Rohde said the deliberations were "extremely professional." She said she was impressed with all the extra care and thought people put into it. Rohde said the process was very serious. The jury foreman did a good job and kept everyone on task. Rohde said that neither she nor anyone else was influenced to hand down a death sentence based on Rhines' homosexuality.

47. Rohde said that when Rhines' defense team talked to her about the deliberations, they were more "vocal" than affiant and "used a lot of bad language." Rohde said she did not typically talk that way, but Rhines' defense team asked her if anyone referred to Rhines as a "fucking queer" and things like that. Rohde said there was no talk like that among the jurors. Rhines' defense team tried to get her to tell them that some aspersion about homosexuality may have been made that would have influenced somebody or the outcome of the deliberations. Rohde said that she did not think that the jury ever discussed Rhines' sexual orientation whatsoever. She had no memory of any "flippant comments"

being made about homosexuality during the deliberations. Rohde said Rhines' sexual orientation did not matter, that it had no bearing on what happened.

48. Rohde said that she has no personal feelings one way or the other about homosexuality. Rohde said the jury based its decision in the fact that Rhines had "brutally killed that kid, and intended to." She mentioned that Rhines had even commented on how he could shove a knife through a person's head to a certain point to kill them because he was military trained. Rohde remembered that, at one point, Rhines laughed because it did not kill the victim right away like Rhines thought it would. She said it was an awful thing to think about someone doing.

49. On June 6, 2017, affiant made contact with **Harry Keeney.** Affiant identified himself. When asked if he had served on the Rhines jury, Keeney stated he had but that it was a long time ago. Keeney then said goodbye, and hung up.

50. On October 27, 2017, affiant contacted **Delight McGriff.** McGriff stated that she is not personally comfortable with the death penalty but she voted in favor of it because Rhines showed no remorse for the murder whatsoever in his confession and kind of bragged about it on the tapes.

51. When asked if she recalled Rhines' sexual orientation being brought up during the deliberations, McGriff said "No." McGriff said that Rhines' sexual orientation made no difference as far as she was concerned. When asked if she felt pressured to hand down a death sentence based on Rhines' homosexuality, McGriff said "Oh, absolutely not. No."

52. McGriff said the deliberations were about the murder itself and that her decision was based on the facts of the case and the confession tapes.

53. On November 1, 2017, affiant contacted **William Brown.** Brown said that Rhines' sexual orientation had no bearing on his decision to vote in favor of a death sentence.

54. Affiant made several calls in an effort to contact jurors **Wilma Woodson** and **Daryl Anderson** but was unable to contact either.

Dated this 22nd day of November 2017.

Brett Garland, Special Agent
South Dakota Division of Criminal Investigation

Subscribed to and sworn before me this 22 day of November 2017.

Notary Public
My Commission Expires: 6/1/22

SEAL

LORI ANTONSEN NOTARY SEAL PUBLIC STATE OF SOUTH DAKOTA

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CHARLES RUSSELL RHINES,

Petitioner,

v.

DARIN YOUNG, Warden,
South Dakota State Penitentiary,

Respondent.

CIV 00-5020-KES

SUPPLEMENTAL AFFIDAVIT OF BRETT GARLAND

Affiant, after first being sworn upon his oath, states as follows:

1. Affiant is a Special Agent for the South Dakota Department of Criminal Investigation. At the direction of the Office of the Attorney General, affiant attempted to contact all jurors in the matter of ***State v. Rhines*, CR 93-81 (Cir.Ct.S.D.,7th)**, in order to determine if the sentence of death was imposed due to homophobic bias. The results of affiant's investigation are reported in his initial affidavit.

2. Affiant was further tasked to attempt to re-interview Jurors Blake and Keeney in regard to specific allegations in Rhines' motion that these jurors had lied during *voir dire* in response to questions about whether either harbored homosexual bias which affected their deliberations as jurors.

3. On December 7, 2017, affiant and Assistant Attorney General Paul S. Swedlund made contact with **Bennett Blake** at his home. Rather than characterize the allegations made against Blake, AAG Swedlund provided Blake a copy of Rhines' motion for Blake to read for himself. Blake read out loud an excerpt from the top of Page 3 of the brief (copy attached) alleging that "two jurors have now stated under penalty of perjury that they were not neutral, and that a desire to prevent Mr. Rhines from serving a life sentence 'around other men' or enjoying 'conjugal visits' played a strong role in their decision." While reading this, Blake stated "Oh really?" After he finished reading the allegation, Blake said "I know I wasn't one of them."

4. Blake then read out loud a passage on Page 7 singling him out as someone who had allegedly falsely "told the court in *voir dire* that they did not harbor anti-gay bias that would affect their verdict." Blake

EXHIBIT 2 tabbies

responded that he did not care if anyone was gay. Blake said that "[Rhines'] lifestyle was his lifestyle."

5. Blake momentarily became offended. He somewhat angrily asked affiant "So you say I'm anti-gay now, is that what you're saying?" Blake was informed that these were allegations being made in Rhines' brief and was directed to Page 10 of the brief to read further.

6. Reading the allegations on Page 10 of the brief, Blake exclaimed "I did not provide false information." Blake said that the allegations in the brief were "Not true. I don't have anti-gay sentiments or anything like that." To the contrary, Blake said that his deceased brother was gay and that he had no adversity to his brother's lifestyle.

7. Blake next reviewed the document entitled "Declaration of Katherine Ensler" which purports to describe homophobic statements made by Blake or other jurors. After reading Ensler's "declaration," Blake stated "I don't care if he's homosexual or not." Blake said that he was not influenced in his vote for the death penalty by Rhines' homosexuality. Blake said "I don't even see how the sexual orientation of the man came to play in this case."

8. Blake stated that Rhines "killed a guy with a pocket knife for 50 bucks in quarters or something like that." Blake said "I don't care if he's queer or not, it didn't matter, the crime was committed as far as I'm concerned."

9. On December 7, 2017, affiant made contact with **Harry Keeney** and his wife Janet at their home. AAG Swedlund stated that they needed to ask some questions about the Rhines case. Janet said that her husband has problems with dementia and that she did not believe that her husband could remember much. Keeney seemed confused through parts of the conversation.

10. AAG Swedlund provided Janet with the same excerpts from Rhines' brief that had previously been provided to Blake. Janet said the allegations in the brief were a "bunch of nonsense."

11. Janet gave the excerpts to her husband to read. Keeney stated that he served on the Rhines jury. Janet reminded Keeney that everyone present knew that already. After reading the excerpts, AAG Swedlund asked Keeney if he had been honest when he was asked questions in *voir dire* and Keeney stated "You bet I was." Keeney stated that he believed his vote was true.

12. Janet stated that she did not find out that Rhines was gay until Rhines' attorneys showed up at their house asking questions about it. Janet said she then asked Keeney if homosexuality was ever brought up and he said "Not during the trial. That was not an issue." Janet said that groups of people came to their house and did not really say who they were representing or the purpose for meeting with them. "They were kind of sneaky in their regards, I guess." Nobody from the state had

previously visited the Keeney home so Janet could only have been referring to members of Rhines' defense team.

13. AAG Swedlund asked Keeney to examine the document titled "Declaration of Harry Keeney," copy attached hereto. Janet said Keeney did not write the document, that it had already been prepared when "they" came back.

14. Keeney said that from what he could remember of Rhines' trial, the jury was "very fair." That nobody hesitated, they discussed the case, and everybody agreed 100%. Keeney said that "Nobody said 'Well, I don't know . . .'"

15. When asked if he voted for the death penalty because Rhines was homosexual, Keeney answered that he had voted for the death penalty. When Janet explained to Keeney that the question asked whether he voted for the death penalty because Rhines is homosexual, Keeney stated "No, no, no. No, I didn't do that."

Dated this 15th day of December 2017.

Brett Garland, Special Agent
South Dakota Division of Criminal Investigation

Subscribed to and sworn before me this 15th day of December 2017.

Notary Public
My Commission Expires: 6-1-22

SEAL

LORI ANTONSEN NOTARY SEAL PUBLIC STATE OF SOUTH DAKOTA

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

STATE OF SOUTH DAKOTA, **Plaintiff and Appellee,**	)	**ORDER**
	)	**#28444**
vs.	)	
CHARLES RUSSELL RHINES, **Defendant and Appellant.**	)	

Appellant having served and filed a motion for relief from the circuit court's judgment in the above-entitled matter, and appellee having served and filed a response thereto along with a motion to file exhibits under seal, and appellant having served and filed a reply thereto, and Lambda Legal Defense and Education Fund having served and filed a motion for leave to file a brief of amicus curiae, and the Court having considered said motions, responses, and replies, and being fully advised in the premises, now, therefore, it is

ORDERED that Appellee's motion to file exhibits under seal is granted;

ORDERED that Appellant's motion for relief from the circuit court's judgement is denied. Appellant cites *Pena-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017), arguing that the jury improperly considered his sexual orientation in the penalty phase of his trial. Assuming, but not deciding, that this appellate Court has original jurisdiction to grant relief from a circuit court's final judgment under SDCL 15-6-60(b)(6) based on an

alleged change in conditions, and assuming but not deciding that the constitutional rule articulated in *Pena-Rodriguez* is to be retroactively applied, this Court declines to apply *Pena-Rodriguez*. It is this Court's view 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*; and it is

ORDERED that Lambda Legal Defense and Education Fund's motion for leave to file a brief of amicus curiae is denied as moot.

DATED at Pierre, South Dakota, this 2nd day of January, 2018.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

(Justice Janine M. Kern disqualified.)

PARTICIPATING: Chief Justice David Gilbertson, Justices Steven L. Zinter, Glen A. Severson and Steven R. Jensen.

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

JAN - 2 2018

Clerk

STATE OF SOUTH DAKOTA
In the Supreme Court
I, Shirley A. Jameson-Fergel, Clerk of the Supreme Court of South Dakota, hereby certify that the within instrument is a true and correct copy of the original thereof as the same appears on record in my office. In witness whereof, I have hereunto set my hand and affixed the seal of said court at Pierre, S.D. this 2nd day of Jan, 20 18.

Clerk of Supreme Court

Deputy

182681

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

v. JURY TRIAL

CHARLES RUSSELL RHINES, 93-81

Defendant. VOLUME II OF

PROCEEDINGS: The following matters were had before the HONORABLE JOHN K. KONENKAMP, Circuit Judge at Rapid City, South Dakota, on the 5th day of January, 1993.

APPEARANCES: MR. DENNIS GROFF, MR. JAY MILLER, and MR. MARK VARGO
State's Attorney's Office
Pennington County
Rapid City, South Dakota

FOR THE STATE

MR. JOSEPH BUTLER
Attorney at Law
PO Box 2670
Rapid City, South Dakota and

MR. WAYNE GILBERT
Attorney at Law
3202 West Main Street
Rapid City, South Dakota and

MR. MICHAEL STONEFIELD
Public Defender
Pennington County
Rapid City, South Dakota

FOR THE DEFENDANT

defense counsel and based upon the statutes, the State would challenge for cause the disqualification because of his current circumstance of being under the felony conviction and currently on probation.

THE COURT: Any objection?

MR. STONEFIELD: No.

THE COURT: Mr. Miessner, we will excuse you on this case.

You were previously sworn and you are still under oath. Defense may inquire.

(Prospective Juror HARRY KEENEY, having previously been sworn, testified as follows:)

EXAMINATION BY MR. GILBERT:

Q State your name please?

A Harry Keeney.

Q Mr. Keeney, I'm Wayne Gilbert and along with me here is Joe Butler and Mike Stonefield. The three of us are the defense attorneys for Charles Rhines. As you look around the courtroom here, both in front of the bar and behind it, do you see anyone you recognize or know?

A No, sir.

Q Mr. Keeney, we have, both sides have had access to the questionnaire you filled out approximately a month ago and I notice in that questionnaire that you

have seen some newspaper and television accounts of the events that led up to this case, is that right?
A Yes.
Q Do you subscribe to the Rapid City Journal?
A Yes.
Q Do you watch the local news stations, the three television stations for the news medium area?
A Yes, sir.
Q Can you tell us from what you have read in the newspaper and what you have seen on the news what you have heard about this case before you came to Court?
A About the only thing I could say is that the young gentleman that was killed was an extremely nice young man, and outside of that, you know, the place where he was killed at Dig 'Em Donuts and I recall he was tied up and knifed in the back of the head, I believe they said and outside of that I don't know anything else to speak of that I can recall right offhand.
Q Do you have any feelings, a philosophy or opinions about the death penalty?
A Well, I would say in some cases it's justified, the death penalty in some cases would be justified in some individuals.
Q Based on what you have heard about the case at this point, do you feel that the death penalty would be

justified if someone were to be convicted of first degree murder because of the facts and circumstances as you heard them to be?

A I haven't heard any facts either way on that, so you know, I don't know. I guess I haven't formed an opinion on that to be honest with you because I haven't heard the facts one way or the other. I just don't know.

Q I understand that, and I appreciate that answer. I'm wondering, based on what you have heard in terms of you heard news reports that the victim was tied up and stabbed in the back of the head as you said, based upon those facts...

MR. GROFF: Objection, because those are not facts.

MR. GILBERT: Facts -- I'll rephrase it.

MR. GROFF: I want to finish my objection.

THE COURT: He said he's going to rephrase rather than getting into that.

Q Based upon what you have heard, have you at this point formed any opinion as to whether the death penalty would be appropriate in this case?

A I guess not. I haven't heard enough of it to form an opinion one way or the other.

Q Would you say that there are certain types of cases in which you favor the death penalty?

A Yes.
Q Have you had a chance to think about what types of cases those are?
A I would say anyone that premeditated a murder, planned it out, I would say definitely would say they should be put to death. As far as accidents or something like that I wouldn't say that, but really premeditated murder would be a cause for me to think of a person that would deserve that penalty.
Q Now, let me take a couple of minutes to tell you about the process that's involved in a case like this. Mr. Rhines has been charged with first degree murder and we are now selecting a jury that would sit and decide this case. Now, when a person is charged with first degree murder and when the prosecutor has decided to seek the death penalty, there is a trial at which the guilt or innocence of the Defendant is determined. In other words, if you were selected to sit on the jury you would hear evidence as to whether or not the crime of first degree murder was committed and as to whether or not Charles Rhines was the person who committed the crime. And if you were satisfied as a jury unanimously, beyond a reasonable doubt that Mr. Rhines were guilty of first degree murder then there'd be a second trial. Now, if on

the other hand, the jury was not satisfied that the case had been proved beyond a reasonable doubt and returned a verdict of not guilty, then it would be over as far as the sentencing and the jury's involvement and the case would be concerned. Going back to if there is a conviction, if there is a conviction then the same jury would reconvene and hear evidence on what they call aggravating circumstances. The State of South Dakota would be obligated to attempt to prove beyond a reasonable doubt that there are one or more aggravating circumstances. And in this case the Court would instruct you in detail about those aggravating circumstances, and if you as a jury were to find beyond a reasonable doubt that one or more of these aggravating circumstances exist, then you could impose the death penalty. You would not be obligated to, but you could, and that would be the jury's decision. And I should tell you, if the jury's decision is to impose the death penalty, the death penalty would be imposed and there is no chance that there'd be a commutation or somebody would step in at the last minute. You'd have to assume that it would be carried out if the death penalty were not imposed. In South Dakota life imprisonment does not have a

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possibility of parole, did you know that?
A I guess I didn't know.
Q That is in South Dakota, life imprisonment means just that. Knowing about this procedure and getting back to, you said that in a case of planned out premeditated murder, the death penalty would be appropriate or would be justified. If at the end of the first trial you were satisfied beyond a reasonable doubt that there had been a premeditated murder, would you go into the second phase of the trial leaning toward the death penalty?
A I would say I'd have to weigh a lot of circumstances and see what the evidence really was, I mean, you know. It's hard for me to give you a correct answer on that, sir, because I would think there'd be a lot of variations on that and I want to give you an honest answer, so I at this time I'll be honest with you, I couldn't give you a good honest answer because I don't know. It would depend on the evidence and things that was, you know, presented to me at that time. Would I need to go in with an open mind, is that what you are saying?
Q Yes, that's what I'm getting at.
A Well, I guess I'd have to see what the evidence was.
Q When you say that, do you have in mind the process

that I described, the two stages?
A I think -- it's all new to me. Yeah. Like I say, the differential between the two things isn't real clear, to be honest with you.
Q Well, let me put it this way. If at the end of the first trial, if you in your mind, and the jury was unanimous, that Mr. Rhines was guilty of premeditated murder, and if at that point, no further evidence was offered on aggravating circumstances, would you consider the death penalty at that point?
A I would think so. I mean, you know, if everything pointed that way and -- I would say I would, yes.
Q If you were instructed that you had to find beyond a reasonable doubt that there was an aggravating circumstance over and above any evidence that was presented at stage one of the trial, in other words, more evidence on an aggravating circumstance, if you were instructed that you had to find this aggravating circumstance beyond a reasonable doubt, and no additional evidence....
MR. GROFF: Objection. May we approach the bench?
(Side bar discussion was had.)
THE COURT: I'll sustain the objection to the form of the question.
Q If at the close of the first stage of the trial you

concluded beyond a reasonable doubt that Mr. Rhines was guilty of premeditated murder, and you were instructed that there was an additional aggravating circumstance that had to be found beyond a reasonable doubt before you could consider the death penalty, and in that event would you consider the death penalty, based solely on the premeditated finding that you had made?

A Well, if I was instructed I had to find, been presented with enough evidence to convince me that it was premediated, I would say that I would have to be convinced that there was, like you say...

Q If you were convinced that it was premeditated, would that be alone enough in your mind to justify the death penalty?

A Well, if I was instructed at this second trial I had to be convinced that it was premeditated, I guess I don't know how to answer you really.

Q I'll try and simplify it a little. Do you think that the fact that you would find a murder was premeditated, that fact in and of itself alone would cause you to consider imposing the death penalty?

A If it was well planned out and premeditated I would say, yes. If he said he planned it out and everything else and that was his desire and his aim

I'd say, yes, and he carried it out.

Q Do you know the aggravating circumstances that we have talked about, I haven't identified them for you as to specifically what they are, but would you be able to follow the Court's instructions in that regard as long as you understand them, in other words, more specifically, if the Court provided you with definitions of the aggravating circumstances and they did not include something like planned out as you have described it, would you still lean toward the death penalty, even if that was not included as an aggravating circumstance in the Court's instructions?

A I guess I don't see where you are headed there. I guess, am I correct in saying that you are saying if the instructions were not towards the premeditated side and he hadn't planned it out, would I still aim towards the death penalty and I would say that it would depend on other circumstances and other evidence.

Q And the Court's instructions?

A Right.

Q Have you ever served as a juror before in any other type of case?

A No, sir.

Q Had you ever heard the concept of presumption of innocence before yesterday?
A Well, that was what I thought, everybody in the United States, that everybody is innocent until they're proven guilty.
Q So you heard about it before?
A Sure.
Q As we sit here today, since I have asked you a lot of questions about the death penalty and you know that the State has decided to seek the death penalty, does that make you think that maybe Mr. Rhines is guilty since we are so concerned about the death penalty in this case?
A Not necessarily, because I don't have any idea of the circumstances. I mean, I guess I'd have to hear all the evidence and all the circumstances and make up my own mind because I don't know anything about Mr. Rhines or anything involved in the case at all. I don't have any idea what's going on or what happened and I'd have to hear everything and weigh everything out in my own mind and go from there.
Q If you had to vote right now without hearing any evidence, if you had to vote right now as to whether Mr. Rhines was guilty or not guilty, how would you vote?

A Right now I don't know anything about it. I mean I couldn't vote intelligently right now because I don't know. I want to know more about it.

Q Would you expect -- do you understand that the defense does not have to offer any evidence of any kind or nature, that it has no burden of proof or persuasion, that it can rely on and argue that the State has not met its burden of proof, that the defense is not obligated at all to bring any evidence forward?

A I didn't realize that, I guess, no.

Q Would you expect the defense to bring some evidence forward in a criminal case?

A I would expect they'd try to prove the gentleman was innocent and what he was charged with and everything wasn't true.

Q If the defense didn't try to prove that, would you take that into account and hold that against the defense?

A Well, I think it would be leaving -- I'd be honest with you, I think it would be failing.

Q It would be what?

A I would think that the lawyers that he had would be doing a poor job, to be real honest with you, you know.

Q And if you thought that, would you take that into consideration and in how you viewed the evidence at the close of the case?
A That's a hard question. There's too many circumstances involved there to answer a question like that as far as I'm concerned. You know, there could be so many variances in there, I couldn't give you an honest answer on it, you know. I don't know.
Q Would you expect Mr. Rhines himself to take the witness stand?
A I would say that's up to him and the lawyer as far as -- you know -- I don't know that much about this system to make a decision on that.
Q If Mr. Rhines didn't take the witness stand, would you think from that fact in and of itself that he must be trying to hide something important, must be guilty or he would have taken the stand?
A I wouldn't say that would be necessary, you know. A person -- lot of people handle pressure in different ways. Some people can handle pressure and some people can't. There could be a lot of variance there too.
Q There is going to be some evidence in this case that Mr. Rhines is a homosexual and one or two of the witnesses that may be called are also homosexuals.

Do you have any opinions about homosexuals as to whether that's sinful or a wrong lifestyle or course of conduct?

A I guess a man or lady has to live their own lives the way they see fit and the way they are directed and the way they live it is entirely up to them and so, you know, I don't see where that would have any variance on this case as far as I'm concerned.

Q Were you ever in the military?

A Yes.

Q What branch?

A Air Force.

Q How long?

A Four years.

Q Were you stationed overseas?

A No, sir.

Q So you didn't see any combat duty or anything like that?

A No, sir.

Q How do you feel about president-elect Clinton's plan to allow homosexuals into the armed services?

A Well, he's the Commander In Chief, you know, and I guess to be real honest with you, I don't know that much about homosexuals one way or the other. I really don't.

Q So you don't have any strong feelings?
A No. Like I say, I don't know what they believe or what they do or how they do it or whatever, I just don't know.
Q You have four children?
A Yes, sir.
Q They live in the Rapid City area?
A One daughter does.
Q The others have moved to other parts of the country?
A Yes, sir.
Q You keep in close contact with all four of them?
A Yes, sir.
Q You get together when you can on holidays and that sort of thing?
A Yes, sir.
Q In front of you on the witness stand there is a paper that has a list of names of people who might be called as witnesses in this case. Could you take a minute and look that over and see if any of the names are familiar to you. Have you had a chance to look at that?
A Yes, sir. No names that I recognize.
MR. GILBERT: Thank you. I appreciate your honesty in answering the questions.
EXAMINATION BY MR. GROFF:

Q Mr. Keeney, I have a few questions before you leave. Mr. Gilbert was asking you questions about evidence and things like that and you understand that in a criminal case the burden is on the State to prove its case beyond a reasonable doubt?
A Yes, sir.
Q And really the burden is on us to produce all the evidence to convince you of that and the Defendant doesn't have to produce any evidence and he can rely on our inability to prove our case; it's his choice whether or not he wants to testify and if he doesn't testify that can't be used against him and that's his right?
A Yes, sir.
Q Can you follow instructions on all those areas from the Court, the jury instructions?
A Yeah, I can.
Q In South Dakota here it is not enough to just have a first degree murder in terms of imposing the death penalty, not even enough to have a premeditated murder we have what are called aggravating circumstances that have to be proven in that second stage. Do you think you can wait and consider all the evidence in the second stage, should you decide Mr. Rhines is guilty of first degree murder; can you

wait until the second stage and consider all the evidence then and determine whether or not an aggravating circumstance has been proven beyond a reasonable doubt and whether or not, secondly, whether the death penalty is appropriate? Do you think you can wait and make that decision then?

A I would think so, you know.

Q Once again, would you follow the Court's instructions and consider all that evidence?

A Yes.

MR. GROFF: That's all I have today. Thank you. Pass for cause.

THE COURT: All right, Mr. Keeney we will be in touch with you. If you don't hear from us by next Tuesday at noon, I would appreciate you calling the Clerk's Office to check on the status of the case and see if you are still on the final jury list. And it's very important now that you are still a prospective juror here that you not talk to anybody about this case or allow anyone to talk to you about it or not read or listen to any media accounts about it. Can you promise that you'll do that?

HARRY KEENEY: Yes, sir. I should call in to check if I need to check in on any other jury duty or does this take preference?

THE COURT: This takes preference. Just check in next Tuesday. Could I speak with counsel?

(Side bar discussion was had.)

THE COURT: Mr. Meier, you were previously sworn and you are still under oath now. Defense may inquire.

(Prospective Juror JACK MEIER, having previously been sworn, testified as follows:)

EXAMINATION BY MR. GILBERT:

Q State your name so we have a record.

A Jack Meier.

Q Mr. Meier, you filled out a questionnaire a month ago and we have had a chance to look at it. You finished high school in Falkton?

A Yes.

Q When did you move to this area?

A September, 1972.

Q Just shortly after you finished high school?

A Yeah, two years.

Q You have lived here ever since?

A I lived in Kearney, Nebraska for a while.

Q Between '72 and now?

A Yeah, for a year.

Q When was that?

A '80, I think.

Q Since you filled out the questionnaire, have you

182687

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

v. JURY TRIAL

CHARLES RUSSELL RHINES, 93-81

Defendant. VOLUME V

PROCEEDINGS: The following matters were had before the HONORABLE JOHN K. KONENKAMP, Circuit Judge at Rapid City, South Dakota, on the 8th day of January, 1993.

APPEARANCES: MR. DENNIS GROFF, MR. JAY MILLER, and MR. MARK VARGO
State's Attorney's Office
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Rapid City, South Dakota

FOR THE STATE

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MR. WAYNE GILBERT
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MR. MICHAEL STONEFIELD
Public Defender
Pennington County
Rapid City, South Dakota

FOR THE DEFENDANT

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
JUN 08 1995
Clerk

Pennington County, SD
FILED
IN CIRCUIT COURT
APR 23 1993
Lorrie Fitzgerald, Clerk
By: Deputy

ORIGINAL

inquire.

MR. GILBERT: Thank you, your Honor.

(Prospective Juror BENNETT BLAKE, having previously been sworn, testified as follows:)

EXAMINATION BY MR. GILBERT:

Q State your name please.

A Bennett Blake.

Q I'm Wayne Gilbert and I'm one of the attorneys for Charles Rhines and he's sitting at the table here with Mike Stonefield and Joe Butler who are also representing him. Good morning, sir. You filled out a questionnaire a month ago and the lawyers for both sides have had a chance to look at it. You have been in the Air Force approximately eight years?

A Yes, sir.

Q And were you born and raised in Texas?

A Yeah.

Q In the eight years you have been in the Air Force where have you been?

A Two years in Germany.

Q And six at Ellsworth?

A Yup.

Q I noticed you obtained an Associate's Degree at a college in Huntsville, Texas?

A I think -- well, I cannot remember. I went to a

couple different colleges and I ran track in college and when my grade point average from a regular college and junior college -- my major was in sociology.

Q Before you went in the Air Force?

A Yes.

Q What attracted you to sociology?

A The fact that I liked the study of the behavior of people and trying to figure out what is inside a person maybe, stuff like that.

Q What do you do in the Air Force?

A I'm personnel specialist and I used to work on the minuteman missles and I have this missing finger that happened before I came in the service at a summer job when I went to school and now I work in the personnel office out there.

Q What kind of things do you do?

A Separations. We have had a lot of that lately.

Q With the early-out type?

A Yes.

Q You have had a lot of activity and it's in the news and are you snowed under at work, is that the kind of thing if you were called upon to sit as a juror in this case that would effect...

A Not at all.

Q That wouldn't be a concern being called away from your work a month or so or four or five weeks?
A Not a problem.
Q You are also active in the Democratic Party and is there a difference between a Texas Democrat and a South Dakota Democrat?
A Texas was a Democratic state and I said, hey, let's go cross the board; let's make it a Democratic Party.
Q Were your parents Democrats?
A Yes, they were.
Q In front of you there is a witness list of people who might be called as some of the witnesses in this case. Would you take look at that and see if there are any names you may recognize?
A Certainly; one for sure and one maybe.
Q Who is the for sure?
A Jerry Hammerquist, he's the Rapid Valley Irrigation Supervisor and Harrold Plooster, my wife is from eastern South Dakota, and I can only assume that they may be related.
Q Let me ask you about Harrold Plooster first. If Harrold Plooster were to testify in this case, would there be any reason, based on what you know, that you would believe...
A No. I wouldn't even know what he looked like. I

just had a passing acquaintance with his son. There was a Plooster assigned and we might have had lunch on a chance meeting, and it was a chance meeting that we started talking one day. But, no...

Q How about Jerry Hammerquist, would you tend to give his testimony more or less weight because of any contacts you have had with him?

A Not a bit.

Q The evidence, there will be some evidence here that will show that Mr. Rhines is a homosexual, he's gay and one or two of the witnesses who might be called in this case are also gay and have had relationship with Mr. Rhines. Knowing that, does that cause you to view Mr. Rhines differently at all?

A Not at all.

Q Do you happen to have any acquaintances or friends or relatives that are gay?

A Not that I know of.

Q If you were to find out today that one of your friends is gay, would it make any difference towards you as far as your friendship is concerned?

A Not really.

Q How do you feel about the proposal to allow homosexuals into the armed services?

A I feel they have been there for some time.

Q To make it official wouldn't make any difference to you?
A Not at all.
Q Would you say you are in favor of that proposal?
A Leaning more toward indifference than favorable. I think if it's a decision of our superiors, well let's just say you'd have to live with it.
Q You have never served on a jury before?
A No, I haven't.
Q Have you heard over the years about the presumption of innocence and the burden of proof and reasonable doubt?
A I have seen enough Perry Mason.
Q One thing about Perry Mason is also a defense lawyer and he always has something to put on as evidence or does something to show his clients are innocent. Now, do you understand that the burden of proof and guilt beyond a reasonable doubt is actually on the State at all stages of the case and the burden never shifts?
A That's correct.
Q So that the Defendant is not obligated or expected to put on any evidence of any kind at all; he has three lawyers and we can decide not to put on a thing and you can't hold that against Mr. Rhines; do you agree

with that?
A Yes, sir. Absolutely.
Q Have you had a chance, through your studies or over the years in your life, to give any thought to the death penalty?
A Yes, I have.
Q Have you come to any opinions or conclusion?
A I think it should be a case-by-case basis. I can't say that it should be arbitrary for every crime.
Q On the other hand, you are not opposed to it, so it should never be permitted?
A You could say this.
Q In South Dakota in a criminal case where the State has decided that they want to ask for the death penalty, there could be two trials. There is the trial which the jury is asked to determine whether they think guilt has been proved beyond a reasonable doubt. Here Mr. Rhines is charged with first degree murder, so it would be the State's obligation to prove at the trial that we are now concerned with that he's guilty of first degree murder beyond a reasonable doubt. If they don't prove first degree murder beyond a reasonable doubt, then the jury's function as far as Mr. Rhines in further proceedings is concerned is over. If they do prove guilt beyond

a reasonable doubt, then the jury is asked to consider whether there are certain aggravating circumstances that the Judge will instruct you about and define for you, and if the jury in this second part of the trial finds beyond a reasonable doubt that one or more of these aggravating circumstances are present, then the jury considers whether to impose a death sentence. And we hear in the news about how people are sentenced to death and it goes on for years and years and there are appeals and commutations, but the fact is, the death penalty in South Dakota is carried out. So this is not a thing that the jury could be thinking, if we sentence him to death, something else will happen. And the jury is not required to sentence him to death, even if they find an aggravating circumstance. If the jury finds an aggravating circustance but concludes the death penalty is not appropriate, then there is life imprisonment. In South Dakota that means life without possibility of parole. If Mr. Rhines was sentenced to life, he'd never get out and if the jury finds that there are not aggravating circumstances proved beyond a reasonable doubt, then it would be a life imprisonment situation instead of the death penalty. Now, since you have had a chance to think

about the death penalty over the years, do you think that there are any types of cases that come to mind where it is appropriate?

A Yes.

Q What comes to mind?

A Well, if it's indeed a heinous, let's say a crime that goes beyond -- I don't know what we'd consider normal, maybe a normal, something that society is more in tune with, something that's so bizarre and outlandish or something that basically that the jury warrants that the death penalty be imposed.

Q It may be that if the jury should get to the second phase after the trial and you listen to the Court define and list these aggravating circumstances, it may be that some of the aggravating circumstances would be as bad as what you just described. It wouldn't necessarily have to be a bizzare type of thing or something that is just horrible or something that's hard to describe; would you be able to follow the Court's instructions and give serious consideration to an aggravating circumstance that maybe doesn't rise to this horrible...

A I guess we would have to wait and see what is presented there.

Q After you had seen what is presented, would you be

able to follow the Court's instructions?
A Yes.
Q As long as you understood them you'd be able to follow them?
A Yes.
Q I try to make -- I just interrupted you.
A Heck, no, don't worry about it. I finished. I just wanted to say, yes, I could make a decision if so instructed.
Q And you'd be able to give serious consideration both to the death penalty and the aggravating circumstances that you would be instructed about as well as going the other way and life without parole?
A Once the evidence is presented.
Q Have you got an idea in your mind right now as you think would be the worse sentence to give a person, death or life without parole?
A In my opinion the worst sentence would be life without parole.
Q Do you hold that view so strongly that you think an execution might be doing a Defendant a favor?
A Not necessarily. It depends on the circumstances, you know.
Q And maybe in your mind if you somehow hypothetically were in a situation you might even want to be

executed instead of doing life without parole?
A Possibly.
Q Have you heard anything about this case?
A Initially some standard stuff, but it just went by the wayside. We had a lot of work come up in the office and worked a lot of nights and I didn't keep up with it in the last few months and to be honest it was a surprise to get called in, a real surprise.
Q When you got called in, did the name Charles Rhines mean anything to you at all?
A Yeah, it did.
Q What do you recall hearing about Mr. Rhines before you were called here for jury duty?
A The stuff that was in the news and stuff like that, bringing him in from Washington State back to be Rapid City. I figured there'd be a trial at some point, but as far as the specifics of it, no.
Q Any other more specifics or more detailed things you can recall as us sit here today?
A No, just standard stuff. Again, I remember it when the night back in March it happened because I had to drive to Colorado, and other than that just went into kind of a blur.
Q How about since Monday, have you heard anything or read anything?

A I followed the Judge's instructions when the local news came on, and I went in the other room and I noticed that the newspaper really cut down in today's paper what they had about it and I don't think there was anything at all. I was more interested in the sport's page to be honest with you.

Q Because of anything that you might have read or heard or discussed with friends or family people at work, do you come here today with any ideas one way or the other whether Mr. Rhines is guilty or not guilty of this offense?

A Not at all.

MR. GILBERT: Thank you. That's all the questions I have

EXAMINATION BY MR. GROFF:

Q Mr. Bennett, I'm the State's Attorney?

A Good morning, sir.

Q It's going to be my job during the next couple of weeks to argue the case. I want to ask you just a few questions. I was interested in your sociology degree. Before you pursued that sociology degree, did you think that was what you were going to go into?

A I went there with general studies in mind.

Q I think what you told me, were you interested in the behavior of people and why they do things?

A Yeah, basically, really interested in maybe like more of the co-dependent -- you see a lot of that and my wife has a degree in sociology and we can get into some heated conversations.
Q Co-dependency is a very interesting concept, very interesting. I want to talk to you a little bit about the military, and you have been in the military for eight years?
A Just went over eight in November.
Q Military as you were talking before has a lot of rules?
A Absolutely.
Q One of the things you get used to doing is following the rules?
A Without a doubt.
Q Maybe that's something that ties us in with the Court and the Court has the rules which we call instructions and I think Mr. Gilbert cleared this with you that no matter what circumstances you thought might be circumstances which would justify the imposition of the death penalty, you would follow the Court's instructions as to what the aggravating circumstances are in South Dakota, is that right?
A Yes, sir.
Q As I understand you were down in Texas for how long?

A I was born there in '60. I have been in the service 24 years.
Q Twenty-four years?
A Yeah.
Q Recalling when you were down in Texas, do you recall hearing about death cases?
A Yes.
Q That's not something unusual for you?
A No, sir.
Q Before I go any further, I need to ask you about visualizing yourself on the jury, but first, could you be a little more specific? You were telling Mr. Gilbert about matters that came up in your mind which you thought could justify imposing the death penalty. I think you used the word heinous?
A Well, I believe that first of all I have to look at maybe, was it a spontaneous type of thing or premeditated type of thing or what would influence me.
Q When it comes to premeditation, can you follow the Court's instructions, what that means under South Dakota law?
A Well, I can interpret it in my way. I'm not sure what South Dakota law says, but yeah, I could.
Q You were explaining, I'm sorry?

A Again, this is an individual decision that I feel, you know, and together it will come together, if it warranted it by the evidence that we will see, I guess, yeah; just breaking it down.

Q What you are saying is if the evidence warranted imposing death on this Defendant, Mr. Rhines, you could visualize yourself doing that?

A Yes.

MR. GROFF: That's all I have. Pass for cause.

THE COURT: All right, sir, you remain a prospective juror on this case and we will be in touch with you when we need you to come back, and if you make the final jury panel. In the meantime, it is very important that you continue not to watch, read or listen to any media accounts concerning this case and that you not discuss this case with anyone or allow anyone to discuss it with you or in your presence. Can you promise me you'll not do these things?

BENNETT BLAKE: Certainly.

THE COURT: If you have not heard from us by Tuesday at noon, I'd ask that you call the Clerk's Office to check in and make sure that we are able to reach you. Thank you, very much. Let's take a ten minute recess.

(Recess was taken 9:25 to 9:40.)

THE COURT: Defense may exercise. Record will show that the defense has exercised its tenth peremptory and the Clerk will summon another juror.

Good morning, Mr. Blair. You were previously sworn in and you remain under oath now?

WILLIAM BLAIR: Yes.

THE COURT: Defense may inquire.

(Prospective Juror, WILLIAM BLAIR, having previously been sworn, testified as follows:)

EXAIMINATION BY MR. GILBERT:

Q For the record state your name please.

A William Blair.

Q Mr. Blair, I'm Wayne Gilbert, and I'm one of the lawyers for Charles Rhines and he is the man seated at the middle of the table, and the other lawyers are Mike Stonefield and Joe Butler and the three of us represent Mr. Rhines. The questionnaire you filled out a month ago we've had copies of that and have had a chance to look at it and you have not served on jury duty before?

A No, I never have.

Q Have you ever been called at all?

A No.

Q Some of the questions that you will be asked by both sides this morning are probing and may seem kind of