No. 18-8029

In The

Supreme Court of the United States

OCTOBER TERM 2018

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 8th Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE – NO DATE OF EXECUTION SET

QUESTIONS PRESENTED

Would reasonable jurists debate whether the district court abused its discretion in denying Rhines' motion to amend his petition for a writ of *habeas corpus* when his claim was new, unexhausted, procedurally defaulted, barred by state and federal statutes of limitations, beyond the jurisdiction of the district court, and unable to meet the *Pena-Rodriguez* exception?

Though Rhines' petition attempts to pose the question of whether he has made a substantial showing of jury bias, that question is not before this court because the district court never reached the merits of Rhines' jury bias claim. The only actionable question posed by Rhines' petition is the procedural question above. But even on the merits, reasonable jurists would not debate whether Rhines presented a valid claim of jury bias when the claim is unexhausted, procedurally defaulted, barred by both state and federal statutes of limitations, fails to meet criteria for the filing of a successive petition or a *Pena-Rodriguez* claim and is supported by dubious evidence that has never been subject to judicial review.

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STATEMENT OF THE CASE

Charles Russell Rhines was convicted of the March 8, 1992, murder of 22-year-old Donnivan Schaeffer. *State v. Rhines,* 1996 SD 55, ¶¶ 1-3, 548 N.W.2d 415, 424 (*Rhines I*). That night, Donnivan entered the donut shop where he worked after hours to retrieve supplies and caught Rhines burglarizing and robbing the store. *Rhines I,* 1996 SD 55 at ¶ 158, 548 N.W.2d at 451. Rhines stabbed Donnivan in the abdomen and back. Donnivan dropped to the floor, screaming and writhing in pain. *Rhines I,* 1996 SD 55 at ¶ 158, 548 N.W.2d at 451. Donnivan begged Rhines not to kill him. *Rhines I,* 1996 SD 55 at ¶ 158, 548 N.W.2d at 451. Rhines walked Donnivan to a dingy storeroom in the strip-mall donut shop and set him down on a wooden pallet. *Rhines I,* 1996 SD 55 at ¶ 158, 548 N.W.2d at 451. Rhines locked Donnivan's head between his knees and pounded a hunting knife into the base of Donnivan's skull, partially severing his brain stem. *Rhines I,* 1996 SD 55 at ¶ 158, 548 N.W.2d at 451.

Unaffected by the screams and blood and death, Rhines left the store with his loot to get something to eat at "Perkins. Up on LaCrosse [Street]. Had an order of french fries." Donnivan's body was found later that evening slumped forward on the pallet in a widening pool of his own blood, his hands tied behind his back. *Rhines I,* 1996 SD 55 at ¶ 158, 548 N.W.2d at 451. Donnivan Schaeffer lost his life so Rhines could make off with approximately $1,700 in cash and coins. *Rhines I,* 1996 SD 55 at ¶ 2, 548 N.W.2d at 424.

The jury sentenced Rhines to death. *Rhines I,* 1996 SD 55 at ¶ 3, 548 N.W.2d at 424. The South Dakota Supreme Court affirmed the conviction and sentence and the denial of Rhines' first petition for *habeas corpus*. *Rhines I,* 1996 SD 55 at ¶ 3, 548 N.W.2d at 424; *Rhines v. Weber,* 2000 SD 19, 608 N.W.2d 303 (*Rhines II*).

Following lengthy federal post-conviction proceedings not relevant here, Rhines filed a second state petition for *habeas corpus* challenging his conviction, sentence and method of execution. The petition was denied.

Rhines then obtained federal *habeas corpus* review of the claims denied in his first and second state *habeas corpus* petitions. The United States District Court for the District of South Dakota denied the petition in February of 2016. Rhines then filed a Fed.R.Civ.P. 59(e) motion to amend the judgment alleging a new claim that jurors had sentenced him to death because of his homosexuality. RULE 59(e) MOTION, Docket 323, *Rhines v. Young,* CIV # 00-5020 (D.Ct.S.D.).

The district court denied the motion to amend because "Rhines [ha]d not raise[d] previously his juror bias claim in any state or federal proceeding." ORDER DENYING MOTION TO AMEND, Docket 348, Respondent's Appendix at 117. The district court ruled that Rhines' motion was, in substance, a successive petition and that "Rhines [could] not use Rule 59(e) to circumvent [restrictions on successive petitions in 28 U.S.C.] § 2244(b) and

Pinholster." ORDER DENYING MOTION TO AMEND, Docket 348, Respondent's Appendix at 120.

Rhines filed a notice of appeal, but did not appeal the district court's denial of his Rule 59(e) motion as it related to his claim of jury bias.

Rhines was appointed new lawyers from the "Pennsylvania Federal Community Defender Office" (PFCDO). The PFCDO sought to revive the jury bias issues raised and lost in Rhines' Rule 59(e) motion by filing a Fed.R.Civ.P. 15(a)(2)/60(b)(6) motion to vacate the judgment denying his petition so that Rhines could amend his petition to add a new claim of jury bias. Rhines claimed to have "newly discovered" evidence of jury bias based on PFCDO interviews of jurors conducted in December of 2016. These "new" affidavits simply rehashed allegations of jury bias raised by Rhines' previous counsels' interviews of jurors in September 2015. Rhines' motion argued that the racial exception to the no-impeachment rule recently announced in *Pena-Rodriguez v. Colorado,* 137 S.Ct. 855 (2017), applied to sexual orientation bias.

The district court denied the motion because it had no jurisdiction to hear or rule on it. Citing the fact that the case was then on appeal to the circuit court, the district court ruled that its judgment was final. SECOND ORDER DENYING MOTION TO AMEND, Docket 399, Rhines Appendix at 9, 10. Consequently, the court had no "jurisdiction to allow Rhines to amend his habeas petition to add a new claim under Rule 15(a). Rather, based on

Eighth Circuit case law, Rhines' motion to amend (Docket 383) is a successive petition. And because Rhines ha[d] not received authorization from the Eighth Circuit to file a successive petition, [the district court could] not adjudicate the merits of his motion." SECOND ORDER DENYING MOTION TO AMEND, Docket 399, Rhines Appendix at 16.

Rhines requested a certificate from both the district and circuit courts for leave to appeal the denial of his motion to vacate/amend. Both courts denied the request. Rhines now petitions for a writ of *certiorari* from the denial of a certificate to appeal the finding that his Rule 60(b) motion was a successive petition.

ARGUMENT

This court should deny Rhines' petition because (1) there is no genuine circuit split requiring this court's attention and (2) Rhines' petition is an inappropriate vehicle for addressing any of the "questions" presented because his jury bias claim is unexhausted, procedurally defaulted, barred by both state and federal statutes of limitations, fails to meet the criteria for filing a successive petition or a *Pena-Rodriguez* claim, and is supported by dubious evidence that has never been subject to judicial review. Due to these incurable procedural and substantive defects, any ruling finding that Rhines' Rule 60(b) motion was not a successive petition would be advisory and futile.

1. There Is No Genuine Circuit Split Requiring This Court's Attention

According to Rhines, the circuit courts are split on the questions of what constitutes a second or successive petition and when a judgment becomes final for purposes of making a subsequent claim second or successive. There is no genuine circuit split requiring this court's attention.

With regard to the first question, *Gonzalez v. Crosby,* 545 U.S. 524, 529, 530 (2005), ruled that a Rule 60(b) motion "is in substance a successive habeas petition and should be treated accordingly" if it "seeks to add a new ground for relief" that "assert[s a] federal basis for relief from a state court's judgment of conviction." The district court found that Rhines' "new [jury bias] claim meets the very definition of 'claim' that was established in *Gonzalez."* SECOND ORDER DENYING MOTION TO AMEND, Docket 399, Rhines Appendix at 19. The district court found that "Rhines [wa]s doing exactly that – asserting a claim of error in his state conviction. Because Rhines' Rule 60(b)(6) motion is a successive petition and he did not seek or obtain the Eighth Circuit's authorization to file it, [the district court did] not have jurisdiction to entertain it on the merits." SECOND ORDER DENYING MOTION TO AMEND, Docket 399, Rhines Appendix at 20.

The court in *Blystone v. Horn,* 664 F.3d 397, 413 (3rd Cir. 2011), observed that *"Gonzalez* clearly delineated when 'a Rule 60(b) motion should be treated like a *habeas corpus* application.'" In *Sheppard v. Robinson,* 807 F.3d 815, 819

(6th Cir. 2015), the court had no trouble distilling *Gonzalez's* definition into a cogent analytical framework for determining if a Rule 60(b) motion is a successive petition. Thus, there is no confusion among the circuit courts over where "to draw the line between an initial federal habeas petition and a 'second or successive' one." Circuit courts all agree that a claim such as Rhines' – *i.e.* one that is new and asserts a federal basis for relief from the state court's judgment of his sentence – is a successive petition per *Gonzalez*.

With regard to the second question, Rhines asserts that the 2nd and 10th Circuits have split with the 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 11th Circuits over the question of when a judgment is final for purposes of 28 U.S.C. §§ 2244(b)(3)(A). A closer examination of Rhines' cited cases reveals that there is no genuine split over this question.

Rhines' assertion that the 2nd Circuit has split from other circuits relies on an outdated case predating *Gonzalez*. In finding a motion to amend to not be a successive petition, *Whab v. United States,* 408 F.3d 116, 119 (2nd Cir. 2005), decided one month before *Gonzalez,* reasoned that "the purpose of [not treating a motion to amend as a successive petition if filed while a petition was still on appeal] was to allow the petitioner the benefit of the more flexible standards of Federal Rule of Civil Procedure 15, rather than the 'more stringent standards' of AEDPA's rule of 'second or successive' petitions." *Gonzalez* expressly rejected *Whab's* reasoning, stating that a motion to amend cannot be used to

"circumvent" the AEDPA's successive petition restrictions. *Gonzalez,* 545 U.S. at 532.

While Rhines' lone post-*Gonzalez* case, *Douglas v. Workman,* 560 F.3d 1156 (10th Cir. 2009), did not treat a motion to amend as a successive petition, its reason for doing so was not because the underlying judgment denying the petition was not "final." To the contrary, the *Douglas* court stated that it "would not ordinarily permit a *habeas* petitioner to supplement his *habeas* petition in this way where, as here, his first *habeas* petition was already pending before this court on appeal from the denial of relief." *Douglas,* 560 F.3d at 1189. The *Douglas* court made an exception because the prosecutor had actively and improperly concealed the information necessary for Douglas to bring his *Brady* claim. *Douglas,* 560 F.3d at 1192 ("treat[ing] Douglas' *Brady* claim as a second or successive request for *habeas* relief . . . would be to allow the government to profit from its own egregious conduct").

Rhines has no similar claim to equity. No prosecutor prevented Rhines from developing the factual predicate for his jury bias claim. Also in *Douglas,* the *Brady* error raised by the proposed amendment was embodied within the generalized prosecutorial errors complained of in the original petition. Here, however, Rhines' claim of *jury* bias is not embodied within his claims that the *trial court* erred in failing to appoint a "communications expert" or responding to the jury's note about the conditions of Rhines' confinement. And unlike *Douglas,* "here any delay, inefficiency, or waste of judicial resources stems [not] from the

prosecution" but Rhines himself. ORDER DENYING MOTION TO AMEND, Docket 348, Respondent's Appendix at 119 (finding lack of diligence in presenting jury bias claim). And unlike in *Douglas,* Rhines' delay "does . . . implicate the concerns underlying Congress' enactment of AEDPA's severe restrictions on granting a *habeas* petitioner relief on second or successive petitions." *Douglas,* 560 F.3d at 1195.

Douglas' reasoning, in combination with the court's earlier decision in *Ochoa v. Sirmons*, 485 F.3d 538, 540 (10th Cir. 2007), squarely aligns the 10th Circuit with post-*Gonzalez* authorities that have uniformly held that "if the district court has already adjudicated the petition and entered judgment, any new petition challenging the same judgment may be treated as a second or successive petition governed by 28 U.S.C.A. § 2244(b)." MEANS, 1 *Postconviction Remedies* § 18:1 at 536 (2016); *Blystone,* 664 F.3d at 413; *United States v. Winestock,* 340 F.3d 200, 203-07 n.1 (4th Cir. 2003); *Williams v. Thaler,* 602 F.3d 291, 302-13 (5th Circ. 2010); *Moreland v. Robinson,* 813 F.3d 315, 326 (6th Cir. 2016)("Rule 60(b) motion . . . that seeks to raise *habeas* claims is a second or successive petition [if] filed after the petitioner has appealed"); *Phillips v. United States*, 668 F.3d 433, 435 (7th Cir. 2012)(determining that Rule 60(b) motion filed while defendant's 28 U.S.C. § 2255 motion to vacate was pending on appeal constituted a new application for collateral relief subject to second or successive petition restrictions); *Williams v. Norris,* 461 F.3d 999, 1004 (8th Cir. 2006);

Beaty v. Schriro, 554 F.3d 780, 783 n.1 (9th Cir. 2009); *United States v. Terrell*, 141 Fed.Appx. 849, 852 (11th Cir. 2005).

Because the 2nd Circuit's *Whab* decision predates *Gonazalez,* and the 10th Circuit is squarely aligned with the post-*Gonzalez* jurisprudence of every other circuit, there is no "circuit split" requiring this court's attention.

2. Rhines' Petition Is An Inappropriate Vehicle For Consideration Of The Successive Petition Question Because Any Ruling Would Be Merely Advisory Due To Incurable Procedural And Substantive Defects In Rhines' Jury Bias Claim

Rhines raised this identical *Pena-Rodriguez* claim last year in a petition for a writ of *certiorari* to the South Dakota Supreme Court in *Rhines v. South Dakota,* No. 17-8791. This court denied that petition. This court can deny Rhines' current petition as well because it is as unsuitable a vehicle for exploring the expansion of *Pena-Rodriguez* as his earlier petition.

Rhines' jury bias claim does not meet criteria for the filing of a successive petition. Even if it did, and Rhines were given leave to file a successive petition, it would be subject to immediate dismissal because the claim is unexhausted, procedurally defaulted and barred by both state and federal statutes of limitations. And even if Rhines' jury bias claims were not barred six ways to Sunday, his proffered jury bias evidence does not satisfy the criteria of the *Pena-Rodriguez* exception. Thus, any ruling that Rhines' Rule 60(b) motion was not a successive petition, or extending *Pena-Rodriguez* to sexual orientation, would be merely advisory and futile. *Amodeo v. United States,* 743 Fed.Appx. 381, 385-86

(11th Cir. 2018)(ruling finding motion not a successive petition would have been futile because time for amending petition had passed).

c. Rhines' Extra-Record Evidence Of Alleged Jury Bias Is Unreliable And Vigorously Disputed

Rhines' jury bias affidavits are inherently unreliable because they were procured by PFCDO attorneys without any judicial oversight. The PFCDO are not *real* federal attorneys employed by the federal government and accountable to a local federal judicial authority like the South Dakota Federal Public Defender Office. They pose as "feds" but the PFCDO is, essentially, a private law firm that contracts with the Administrative Office of the United States Courts to serve as appointed counsel to indigent federal defendants through grant funding and private contributions. It functions as a private, boutique, anti-death penalty law firm but, consequentially, without the economic constraints that generally preclude private law firms from pursuing fabricated or frivolous claims because its clients – death row inmates – are not paying for the hours the PFCDO bills.

As detailed in *Commonwealth v. Spotz,* 99 A.3d 866 (Pa. 2014), the PFCDO has exploited its private status – outside of the type of judicial oversight that generally restrains real federal public defenders from making frivolous claims or economic constraints that inhibit regular private practice attorneys from churning a file – "to impede the death penalty to indulge its private political viewpoint," by means that are "simply unethical and improper." *Spotz,* 99 A.3d at 904, 920, Respondent's Appendix at 009.

Here, the PFCDO procured the subject affidavits by ambushing jurors at their homes and "harass[ing]" them about their verdict, specifically asking if they had "changed" their minds or if they would vote "differently" if they were informed that the PFCDO had information that a pejorative term about homosexuals had been uttered by a fellow juror during deliberations – as though the PFCDO had inside information about the deliberations unknown to the jurors who were there. GARLAND AFFIDAVIT at ¶¶ 5, 42, Rhines Appendix at 77, 82. The PFCDO was "rude as hell," subjecting the jurors to "a lot of bad language" while "badgering" them to agree to PFCDO-fabricated falsehoods that a juror had referred to Rhines as a "fucking queer" or "faggot" during deliberations. GARLAND AFFIDAVIT at ¶¶ 35, 37, 47, Rhines Appendix at 81, 82.

In reality, every juror contacted by the South Dakota Division of Criminal Investigation (DCI) stated consistently and unequivocally that Rhines' homosexuality had absolutely no bearing on their decision to impose a death sentence. GARLAND AFFIDAVIT, Rhines Appendix at 77; GARLAND SUPPLEMENTAL AFFIDAVIT, Rhines Appendix at 84. Juror Cersosimo informed DCI that one juror made a joke that Rhines might like being locked in prison with other men. This "stab at humor" "did not go over well" with the jury and every juror agreed that Rhines' sexual orientation "was not even a consideration" and had nothing to do with their verdict. The juror who made the joke immediately admitted that it was "stupid" and "dumb" to say such a thing

and "that was the end of it." No other comments like that were made and Rhines' sexual orientation was not discussed again. GARLAND AFFIDAVIT at ¶ 24, Rhines Appendix at 80. The jurors uniformly report not only that the deliberations were conducted in an "extremely professional" manner but also that Rhines' homosexuality had "[n]ot one iota" of influence on the decision to impose a death sentence. GARLAND AFFIDAVIT at ¶¶ 3, 26, 38, 42, 44, 46, Rhines Appendix at 77, 80, 81, 82.

The PFCDO's assaultive tactics and scurrilous insinuations are no surprise considering the scathing indictment of its ethics practices (or lack thereof) in death penalty cases reported in the *Spotz* opinion. *Spotz* describes in detail the PFCDO's reputation for having an anti-death penalty "agenda beyond mere zealous representation, one which routinely pushes, and in frequent instances . . . far exceeds ethical boundaries." *Spotz,* 99 A.3d at 867, Respondent's Appendix at 009. One can practically turn to any random page of the *Spotz* decision and find judicial condemnation of the PFCDO's "contempt" for the courts, "lack of candor," "scurrilous" tactics, "contemptuous" conduct, "dubious" and "ethically questionable" behavior, "pervasive conduct in causing delay," "obstructionist agenda," penchant for "accusing Pennsylvania courts of incompetence or laziness, their argument unencumbered by concerns for accuracy, honest, and candor," "abuses in briefing," "war on its ethical duty of candor to the court," "extreme conduct and/or misconduct," and "strategy to subvert the proper role of state courts" that is "simply unethical and improper."

Spotz, 99 A.3d at 867, 871, 872, 875, 876 881, 883, 893, 896, 897, 898 n.21, 899, 900, 901, 902, 903, 911, 915, 920, *passim,* Respondent's Appendix at 009. Indeed, this very court referred one PFCDO operative to state disciplinary authorities for his role in a PFCDO scheme to file an unauthorized petition for writ of *certiorari* in a death penalty case. REFERRAL ARTICLE, Respondent's Appendix at 066; *Spotz,* 99 A.3d at 877, 913 n. 25, Respondent's Appendix at 009, 056.

Because of its extreme tactics, the PFCDO's affidavits are inherently unreliable. Here, as in *Tharpe v. Sellers,* 138 S.Ct. 545 (2018), there is a significant discrepancy between what the jurors allegedly said to PFCDO lawyers and investigators and what they have said to others. As in *Tharpe,* there is evidence here that the jurors were confronted in their homes by PFCDO lawyers who were "sneaky" about their purpose. SUPPLEMENTAL GARLAND AFFIDAVIT at ¶ 12, Rhines Appendix at 85. In *Tharpe,* defense investigators interviewed a juror while he was drunk on a 12-pack of beer and several shots of whiskey; here the PFCDO procured an affidavit from Juror Keeney, whose wife describes him as having problems with memory and dementia. Not surprisingly, the PFCDO neglected to mention Keeney's condition, which can only mean they knowingly exploited it in procuring his "affidavit" and wished to conceal it. SUPPLEMENTAL GARLAND AFFIDAVIT at ¶ 9, Rhines Appendix at 85. In *Tharpe,* the juror never signed or swore to his "affidavit;" here the PFCDO is similarly attempting to pass off unsworn and unsigned "statements" of Juror

Blake written and signed by a PFCDO investigator as a "juror affidavit." BLAKE "AFFIDAVIT," Rhines Appendix at 35.

The PFCDO mendaciously asserts that the jurors have not "retracted" the statements attributed to them by the PFCDO, a self-serving choice of verb that assumes the jurors made the alleged statements in the first place, or made them with the meaning the PFCDO draws from them. Blake has said that the PFCDO's assertions are "Not true." SUPPLEMENTAL GARLAND AFFIDAVIT at ¶ 6, Rhines Appendix at 85. There is nothing for Cersosimo to "retract." When asked if he voted for a death sentence because Rhines is gay, Keeney adamantly said "No, no, no. No I didn't do that." SUPPLEMENTAL GARLAND AFFIDAVIT at ¶ 15, Rhines Appendix at 86. Keeney's statement certainly repudiates the homophobic inference that the PFCDO draws from the prepositional phrase (inserted *by the PFCDO itself*) "with men" within Keeney's otherwise generic statement that he believed that Rhines should not have been allowed to spend his life in prison. The PFCDO shamelessly exploited Keeney's condition by phrasing his affidavit to give it import and meaning that was not intended or understood by Keeney.

Accordingly, the veracity of any affidavits procured unilaterally by the PFCDO, an organization notorious for its disregard of ethical constraints and "lack of candor," is vigorously disputed. *Spotz,* 99 A.3d at 898 n. 21, 902.

d. A Ruling Extending *Pena-Rodriguez* To Homophobic Bias Would Have No Practical Effect In This Case Because Rhines Has Exhausted His State And Federal Appellate And *Habeas Corpus* Remedies Without Ever Raising A Jury Homophobia Claim

Even were this court to rule that *Pena-Rodriguez* broadly covers sexual orientation bias, it would have no practical effect because Rhines has no remaining process by which to avail himself of such a ruling. Rhines has exhausted his state appellate and *habeas corpus* processes and is presently barred from bringing a successive *habeas corpus* petition under state law because:

- He is beyond the South Dakota 2-year and federal 1-year statutes of limitations. SDCL 21-27-3.3; 28 U.S.C. § 2244(d)(1); and

- He cannot satisfy state criteria for a successive petition because (a) the factual predicate of his jury bias claim is not "new" and (b) his claim does not arise from a new, retroactive constitutional rule. SDCL 21-27-5.1.

Any ruling from this court that Rhines' motion to vacate/amend was not a successive petition would be futile because the claim is incurably unexhausted, procedurally defaulted and time barred in state and federal court. *Amodeo,* 743 Fed.Appx. at 385-86 (ruling finding motion not a successive petition would have been futile because time for amending petition had passed).

i. Rhines' Jury Bias Claim Is Time Barred

Rhines' jury bias claim is time-barred by SDCL 21-27-3.3's two-year and 28 U.S.C. 2244(d)(1)'s one-year statutes of limitations. Rhines filed two affidavits under seal in the United States District Court for the District of South

Dakota which purport to evidence homophobic bias. JUROR B and JUROR J AFFIDAVITS, Docket 323 (Attachments 2 and 10), *Rhines v. Young,* CIV # 00-5020 (D.Ct.S.D.). Those affidavits reflect that jurors had been interviewed about an alleged homophobic comment in September 2015 but Rhines did not move to amend his complaint before the end of September 2016 as required by 28 U.S.C. 2244(d)(1). *Amodeo,* 743 Fed.Appx. at 385-86 (motion to amend must be made within one year).

Rhines' knowledge of the factual predicate of his jury bias claim goes back even further than September 2015. Indeed, Rhines started asserting "jury bias" practically before the ink was dry on the verdict form 25 years ago. Rhines' legal team, in consultation with Rhines himself, decided to utilize his sexual orientation in mitigation by portraying Rhines as a lost soul marginalized by society's ostracization of homosexuals. *HABEAS CORPUS* TRANSCRIPT at 12/2-9, 92/19-22, 176/5-13, Respondent's Appendix at 068; TRIAL TRANSCRIPT at 2614/5, 2616/25, 2617/3, Respondent's Appendix at 074. Defense counsel laid the ground for this strategy by conducting pointed *voir dire* regarding each prospective juror's attitude about homosexuality. Wayne Gilbert, one of Rhines' trial attorneys, testified in the state *habeas corpus* proceedings that he "viewed the *voir dire* questioning as a way to weed out potential jurors who might be hostile to Rhines because of his sexuality." *HABEAS CORPUS* TRANSCRIPT at 115, 156-157, Respondent's Appendix at 068. All jurors, including those now the target of Rhines' allegations of homophobia, agreed that his sexual orientation

had no bearing on the case. *VOIR DIRE* TRANSCRIPTS, Respondent's Appendix at 236.

Nevertheless, Rhines argued on direct appeal that the trial court erred by refusing to appoint a forensic communications expert because he believed "*voir dire* alone [had been] an inadequate method for detecting and eliminating jurors with biases against homosexuality." Rhines also argued that a jury note to the judge inquiring into conditions of confinement for those serving life in prison "reflected homophobic sentiments that improperly affected jury deliberations." *Rhines I*, 1996 SD 55 at ¶ 105, 548 N.W.2d at 442. The South Dakota Supreme Court rejected Rhines' contentions that "the jury considered irrelevant or unfairly prejudicial matters when imposing the death penalty" or that the jury's questions "related to . . . Rhines' sexual orientation." *Rhines I,* 1996 SD at ¶ 170 n. 6, 548 N.W.2d at 443. Rhines did not further develop a claim of jury bias for his first (or second) state *habeas corpus* petition(s). *Rhines II,* 2000 SD 19, 608 N.W. 2d 303.

Rhines' knowledge of the predicate facts of his jury bias claim is deeper still. In a *pro se* complaint filed in state court on September 5, 2017, challenging the constitutionality of SDCL 21-27-3.3, Rhines stated that:

> During the plaintiff's [Rhines'] 24-year appeals process he has repeatedly attempted to urge his appointed counsels to interview the plaintiff's criminal trial jurors about a nine (9) question note they sent to the trial court judge during penalty phase deliberations. These questions ranged from the plaintiff's future dangerousness if he were ever placed in a minimum security prison or be allowed work release to what conditions of confinement the plaintiff could expect to incur if the [plaintiff] had

> been sentenced to life in prison rather than death, to whether or not the plaintiff would be allowed to have a cell-mate or associate with other inmates. During *voir dire* the jurors were informed that the plaintiff is a homosexual and each potential juror indicated this would play no part in their deliberations. However, the list of questions sent to the trial court judge during penalty phase deliberations seems to counterindicate those statements by these jurors and, subsequently the plaintiff urged each of his appointed counsels to interview these jurors about what they had meant with the 9 questions. During the nearly 23 ensuing years after trial and through 16 or so appointed counsels, none would interview the jury, *until 2015* when counsel from outside the area was appointed by the Honorable Karen E. Schreier as Learned Counsel for the Plaintiff's federal habeas petition. In *September 2015* Learned Counsel Carol R. Camp and investigator Mary K. Poirer began interviewing former jurors and discovered that apparently most of them had viewed the oaths they took in *voir dire* as merely a suggestion and the promise not to use the Plaintiff's homosexuality against him as being null and void.

REPLY TO "LAST WORD," Respondent's Appendix at 088-089 (emphasis added).

Because Rhines was aware of the factual predicate for his jury bias claim at the time of the jury's sentencing deliberations, he had until July 1, 2014, to file a successive state *habeas corpus* alleging jury bias. *Hughbanks v. Dooley*, 2016 SD 76, ¶ 16, 887 N.W.2d 319, 324. He did not. Even if the factual predicate for a jury bias claim had not been known to Rhines until September 2015 or December 2016, he did not timely file a successive state petition before the end of September 2017 or December 2018 or move to amend his pending federal petition before the expiration of the federal one-year statute at the end of September 2016. *Howard v. United States,* 533 F.3d 472, 475 (6th Cir. 2008)(claim raised in motion to amend subject to federal one-year statute of limitations). A ruling finding that Rhines' jury bias claim is not a successive

petition would be futile because it is incurably unexhausted, procedurally defaulted and time-barred.

ii. Rhines' Jury Bias Claim Does Not Satisfy The New Evidence And New, Retroactive Constitutional Rule Criteria For A Successive Petition

Since Rhines' own words and the record as a whole establish that he was aware of the factual predicate of his jury bias claim as long as 25 years ago but no later than September 2015, he cannot satisfy the "newly discovered evidence" criterion for a successive petition.

Indeed, in denying the identical jury bias claim Rhines raised in his Rule 59(e) motion, the district court observed that "Rhines ha[d] had roughly twenty years to develop the evidence he now offers. In fact, Rhines faults each of his attorneys for not developing this evidence sooner. But Rhines' allegations undermine the foundation of his motion. For Rhines to prevail, he must show that this evidence *could not have* been discovered earlier *despite* having exercised reasonable diligence to obtain it. Rhines, however, asserts that the evidence *should have* been discovered earlier *if* his attorneys were diligent. Rhines' contention is the inverse of what Rule 60(b)(2) is designed to address. He makes no showing that he had been unable to uncover the newly discovered evidence prior to the court's summary judgment ruling. Likewise, the decades-long period of delay while the evidence was obtainable indicates a lack of diligence. Because this evidence was available to Rhines, it should have been presented prior to the entry of judgment." ORDER DENYING MOTION TO

AMEND, Docket 348, Respondent's Appendix at 120; *Moreland,* 813 F.3d at 326 ("accusing counsel of ineffectiveness in not presenting . . . claims in trial-level state post-conviction proceedings . . . is necessarily acknowledging that, with due diligence, the evidence in support *could* have been presented then").

To the extent Rhines argues that Rule 606 was an insurmountable obstacle to developing jury bias evidence, he exaggerates . . . and *Pena-Rodriguez* itself is the proof. Rule 606 prohibits only the introduction of juror testimony or affidavits for the purpose of "an inquiry into the validity of a verdict." Rule 606 has *never* prohibited the introduction of juror testimony or affidavits for the purpose of challenging the constitutionality of the rule itself. The fact that Pena-Rodriguez succeeded in doing so in regard to racial bias proves that this avenue of exploring homophobic bias required no "change in the law." Unlike Pena-Rodriguez, Rhines did not timely challenge the constitutionality of Rule 606 as a means of investigating and exposing alleged jury bias against him.

Per *Smith v. Phillips*, 455 U.S. 209, 215 (1982), "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." According to *Smith*:

> The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

Smith, 455 U.S. at 217, 230. State statutes offer *Smith* avenues for relief. S.D.R.Evid. 606 (SDCL 19-19-606) has never completely foreclosed attacking a

jury's verdict on the grounds of "extreme . . . passion or prejudice," including by means of juror affidavits. *State v. Motzke,* 2006 SD 13, ¶ 14, 710 N.W.2d 433, 439. Like Pena-Rodriguez, Rhines could have sought relief from his state criminal judgment by filing:

- A motion for a new trial per SDCL 23A-29-1 within 10 days of the entry of judgment on the grounds of "irregularity in the proceedings of the . . . jury," "[m]isconduct by the jury," and "newly-discovered evidence," *Smith* and *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984); or

- A motion for relief from judgment per SDCL 23A-27-4.1 within one year of the judgment.

Rhines did not file either motion, though the jury note so central to Rhines' jury bias claim was known to him even before his sentence was delivered. If the note caused Rhines to genuinely doubt the jury's sincerity[1] or impartiality he could have conducted a post-trial investigation into the jury's alleged partiality per *Motzke* and *McDonough* and filed a motion for a new trial or for relief from judgment, or mounted a facial attack on Rule 606 itself. *Pena-Rodriguez,* 137 S.Ct. at 862. And though *Tharpe* shows that *habeas corpus* courts have, notwithstanding Rule 606, taken juror testimony on racial bias in capital cases, unlike Tharpe, Rhines did not develop his jury bias claim in either his first or

[1] Prospective jurors are presumed to be impartial and the answers they give in *voir dire* truthful. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

second state *habeas corpus* proceedings. *Tharpe v. Warden,* CIV # 10-433 (D.Ct.M.D.Ga. 2017)(unpublished), Respondent's Appendix at 133, 145, 146. Rhines is now well beyond his window for any form of relief, making any application of *Pena-Rodriguez* to sexual orientation bias in this case merely advisory.

Rhines asserts that *Pena-Rodriguez's* exception is a "new" constitutional rule that allows him to bring a successive petition per SDCL 21-27-5.1. But *Pena-Rodriguez* itself takes pains to point out that its exception is not exactly new, observing that "the *Reid* and *McDonald* cases [had] noted the possibility of an exception to the [no-impeachment] rule [for] the 'gravest and most important cases.'" *United States v. Reid,* 13 L.Ed. 1023 (1852); *McDonald v. Pless,* 238 U.S. 264 (1915). If, as Rhines contends, imposition of a death sentence (allegedly) on the ground of a defendant's sexual orientation violates "the plainest principles of justice," *McDonald* postulated a general exception for such occasions over 100 years ago. *McDonald,* 238 U.S. at 268; *Motzke,* 2006 SD 13 at ¶ 14, 710 N.W.2d at 439 (SDCL 19-19-606 does not foreclose attack on jury verdict in instances of "extreme . . . passion or prejudice").

Indeed, nothing proves that no "new" rule was needed to mount an impeachment challenge quite like the fact that Rhines' counsel were out drumming up juror affidavits two years before this court even issued the *Pena-Rodriguez* decision. JUROR B AFFIDAVIT at ¶ 14 and JUROR J AFFIDAVIT at ¶ 10, Docket 323 (Attachments 2 and 10), *Rhines v. Young,* CIV # 00-5020

(D.Ct.S.D.). Since *Pena-Rodriguez* did not create a new exception for sexual orientation, and since the general exceptions of *Reid, McDonald* and *Motzke* were "previously available" to Rhines for the purpose of impeaching his sentence on the grounds of alleged homosexual bias, Rhines cannot meet the "new constitutional rule" criterion for a successive petition of either SDCL 21-27-5.1 or 28 U.S.C.A. § 2244(b).

Even assuming *Pena-Rodriguez* created a "new" constitutional rule as applied to Rhines, this court would have to assume or decide that it has retroactive effect for Rhines to meet the criteria for a successive petition under SDCL 21-27-5.1 and 28 U.S.C.A. § 2244(b). Otherwise, any ruling in this case would be merely advisory.

The test for determining retroactivity is set forth in *Teague v. Lane*, 489 U.S. 288 (1989). As described in *Montgomery v. Louisiana*, 136 S.Ct. 718, 728 (2016):

> First, courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules include "rules forbidding criminal punishment of certain primary conduct," as well as "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense" . . . Second, courts, must give retroactive effect to new "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceedings.

"Such a rule must be one 'without which the likelihood of an accurate conviction is seriously diminished.'" *Teague,* 489 U.S. at 313. A "watershed" rule must not just improve the accuracy of a trial, it must function as an "absolute prerequisite to fundamental fairness." *Teague,* 489 U.S. at 313; *Sawyer v. Smith,* 497 U.S.

227, 243 (1990); MEANS, *Federal Habeas Manual: A Guide to Federal Habeas Corpus Litigation*, § 7:39 (2017)(a watershed "rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding").

To underscore the rarity of "watershed" rules, this court has invoked the sweeping rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963), as the "paradigmatic example" of the "primacy and centrality" a new rule must have to concepts of procedural fairness and accuracy in order to qualify as "watershed." *Gray v. Netherland,* 518 U.S. 152, 170 (1996); MEANS, *Federal Habeas* at § 7:39. This court has repeatedly remarked that it is "unlikely" for many rules with the "primacy and centrality" of *Gideon* to emerge from a criminal justice system already so well ordered around concepts of due process and fairness as America's. MEANS, *Federal Habeas* at § 7:39. The "watershed" exception is, thus, so "extremely narrow" that in the years since *Teague* this court has repeatedly rejected claims of new rules meeting the exception even in capital cases.[2] MEANS, *Federal Habeas* at § 7:39.

Pena-Rodriguez does not meet the "watershed rule" exception per the language and reasoning of the *Pena-Rodriguez* decision itself:

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[2] *Beard v. Banks,* 542 U.S. 406 (2004)(declining to find *Mills* rule re: jury instructions in capital cases a "watershed" rule); *Schriro v. Summerlin,* 542 U.S. 348 (2004)(declining to find *Ring/Apprendi* rule "watershed"); *Lambrix v. Singletary,* 520 U.S. 518 (1997); *Gray v. Netherland,* 518 U.S. 152, 170 (1996); *Graham v. Collins,* 506 U.S. 461 (1993); *Sawyer v. Smith,* 497 U.S. 227 (1990); *Saffle v. Parks,* 494 U.S. 484 (1990); *Butler v. McKellar,* 494 U.S. 407 (1990); see also *Whorton v. Bockting,* 549 U.S. 406 (2007)(declining to find *Crawford* rule a "watershed" rule in child sexual assault case).

a. In *Pena-Rodriguez,* a defendant was tried on a charge of sexual assault. During deliberations a juror stated that he believed the defendant was guilty "because he's Mexican." *Pena-Rodriguez*, 137 S.Ct. at 862. The juror told other jurors that, from his experience as a police officer, the "sense of entitlement" he had observed in Mexican men was behind their being physically controlling of and aggressive toward women and young girls. The juror also stated that he believed the defendant's alibi witness was not credible because he was "an illegal," *i.e.* Mexican. *With the court's supervision,* Pena-Rodriguez obtained affidavits from other jurors describing these statements. *Pena-Rodriguez*, 137 S.Ct. at 861. The record revealed that in *voir dire* Pena-Rodriguez's counsel had asked only "generic questions about juror impartiality" without asking any specific questions regarding any juror's attitude about race generally or Mexicans in particular. *Pena-Rodriguez*, 137 S.Ct. at 861, 869.

b. This court "granted *certiorari* to decide whether there is a constitutional exception to [Rule 606] for instances of racial bias." *Pena-Rodriguez*, 137 S.Ct. at 863. *Pena-Rodriguez* began by examining the history of many "stark and unapologetic" examples of "race-motivated outcomes" in jury cases in the United States. *Pena-Rodriguez*, 137 S.Ct. at 867. Despite the country's aspirations to "purge racial prejudice from the administration of justice" – dating at least from amendments to the constitution in the wake of the Civil War – the court found that "race-motivated outcomes" of trials

were a "recurring evil" that "implicate[d] unique historical, constitutional and institutional concerns."

c. From the "distinct" role race has historically played in thwarting aspirations of equality in America,[3] *Pena-Rodriguez* fashioned a narrow exception to Rule 606 for admission of "clear and explicit statements indicating that racial animus was a significant motivating factor" in the jury's verdict. *Pena-Rodriguez*, 137 S.Ct. at 861.

The express limitation of the *Pena-Rodriguez* exception to the "distinct" issue of race in and of itself proves that it is no "watershed" rule of any application here:

a. Sexual orientation is not immutable to the same extent as race or gender. A black or Mexican defendant's race is immutable to the eyes of a jury while Rhines could have tried his defense without the jury knowing of his homosexuality.

b. Sexual orientation does not implicate the same "unique historical, constitutional and institutional concerns" as race. American history is not replete with "stark and unapologetic" anti-homosexual jury verdicts. No

[3] See *Young v. Davis*, 860 F.3d 318, 333 (5th Cir. 2017)("The [Supreme] Court's emphasis on our long struggle against racial prejudice, and the 'constitutional and institutional concerns' attending that history, evince its constrained relaxing of the traditionally inviolate [no-impeachment] rule."); *United States v. Robinson*, 2017 WL 4325019, *6-7 (6th Cir. 2017)(refusing to extend *Pena-Rodriguez* to racial comments made by jury foreperson to two African-American jurors who initially had doubts regarding defendant's guilt).

civil war has been fought over it. No nationwide pogrom has been perpetrated for the enslavement, eradication or extreme persecution of homosexuals. Homosexuals have not served as scapegoats for pressing socio-economic problems with consequences felt by the population at large – such as loss of jobs or rising incidents of street crime. No politician has ever proposed constructing a wall to keep homosexuals out of the country. The acceptance of equality in regard to non-racial distinctions has occurred largely peaceably and with comparatively greatly less conflict.

c. *Pena-Rodriguez's* premise that race has played a "unique" role in social upheaval and violence in the nation's history is corroborated by the fact that sexual orientation is not afforded the heightened protections extended to race in the nation's civil rights laws. For example, employment discrimination based on sexual orientation is not actionable under Title VII of the Civil Rights Act. *Evans v. Georgia Regional Hospital*, 850 F.3d 1248, 1255 (11th Cir. 2017).[4] And, unlike race, classifications based on sexual orientation are not subject to strict scrutiny. *Romer v. Evans*, 517 U.S. 620, 631-33 (1996)(applying rational

[4] See also *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 293 (3rd Cir. 2009)(claim for sexual orientation discrimination is not cognizable under Title VII); *Kiley v. American Soc. For Prevention of Cruelty to Animals*, 296 Fed.Appx. 107 (2nd Cir. 2008)(discrimination based on sexual orientation is not prohibited by Title VII); *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 762 (6th Cir. 2006)("sexual orientation is not a prohibited basis for discriminatory acts under Title VII").

basis not strict scrutiny to law alleged to discriminate on basis of sexual orientation).[5]

d. The *Pena-Rodriguez* court was hardly oblivious to other potential forms of improper bias in jury deliberations. The decision was expressly cognizant that "[a]ll forms of improper bias pose challenges to the trial process," but it singled out race and race alone for the "added precaution" of a Rule 606 exception. *Pena-Rodriguez*, 137 S.Ct. at 869. A broader exception addressed to "[a]ll forms of improper bias" would have necessitated a declaration that Rule 606 is wholly unconstitutional, something *Pena-Rodriguez* did not do.

e. Having expressly declined to fashion an exception for "[a]ll forms of improper bias," *Pena-Rodriguez* is not a "watershed" ruling as applied to Rhines. By singling out race, the *Pena-Rodriguez* court implicitly recognized that a similar exception in regard to other "forms of improper bias" is *not* an "absolute prerequisite to fundamental fairness" in our system of justice or a rule "without which the likelihood of an accurate

[5] See also *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006)(noting homosexuality is not suspect classification); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004)(noting that neither the Supreme Court nor the circuit has recognize sexual orientation as a suspect class); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 n. 16 (11th Cir. 2004)(noting that all circuits that have addressed issue have held homosexuals are not a suspect class); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997)(homosexuals are not a suspect class); *Habozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996)(noting that in the military context the Seventh Circuit has subjected homosexual discrimination to rational basis scrutiny); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996)(holding homosexual military personnel are not a suspect class).

conviction is seriously diminished." *Teague,* 489 U.S. at 313; *Sawyer,* 497 U.S. at 243.

Consistent with these observations, "no reasonable jurist could argue that *Pena-Rodriguez* applies retroactively on collateral review." *Tharpe,* 138 S.Ct. at 551. (Thomas dissenting).

Finally, even if *Pena-Rodriguez* is a watershed rule as to race, an argument for extending it to sexual orientation does not satisfy the criterion of a "new constitutional rule" for a successive petition. A successive petition "cannot be used as a vehicle to create constitutional rules of criminal procedure not dictated by existing precedent." *Robinson v. Wilson,* 2001 WL 289884 (D.Ct.N.D.Ill.); *Candelario v. Warden,* 592 Fed.Appx. 784 (11th Cir. 2014); *Echols v. Ricci,* 2011 WL 3678821, *33-34 (D.Ct.N.J.)("clearly established" Supreme Court law for purposes of *habeas corpus* review is the holding of a case rather than an extension of the case to analogous circumstances that may follow from the reasoning of an opinion).

c. Even If *Pena-Rodriguez* Extends To Homophobic Bias And Is Retroactive, Rhines' Evidence Does Not Satisfy The Exception

Even if *Pena-Rodriguez* did apply to claims of alleged homosexual bias, Rhines' proffered evidence does not satisfy the exception.

a. Unlike in *Pena-Rodriguez, voir dire* in Rhines' case went beyond generic questions about impartiality to include specific questions regarding any potential juror's homosexual bias. *VOIR DIRE* TRANSCRIPTS, Respondent's Appendix at 236. The fact that all jurors specifically

responded that they would not hold Rhines' homosexuality against him significantly decreases the potential that it was a significant motivating factor in their deliberations. *VOIR DIRE* TRANSCRIPTS, Respondent's Appendix at 236.

b. *Pena-Rodriguez* requires "clear and explicit statements indicating that racial animus was a significant motivating factor" in the jury's verdict. *Pena-Rodriguez*, 137 S.Ct. at 861. Unlike in *Pena-Rodriguez,* the alleged juror comments here are not clear and explicit expressions of animus toward homosexuals. At best, they fall into the category of an "offhand comment" that one might expect to hear in a case where Rhines' homosexuality was proffered by his defense as a mitigating circumstance.[6] *Pena-Rodriguez,* 137 S.Ct. at 869 (not every "offhand comment indicating racial bias" will justify exception to Rule 606).

c. Unlike in *Pena-Rodriguez* and *Tharpe,* the PFCDO's questioning of the jurors was not conducted "with the court's supervision" or "in the presence of the court." *Pena Rodriguez,* 137 S.Ct. at 861; *Tharpe v. Warden,* CIV 10-

[6] Arguably, one finds proof that Rhines' counsel succeeded in empaneling a jury that was not phased by, or even convinced of, Rhines' homosexuality in the jury's question to the judge asking whether Rhines would be "allowed to marry or have conjugal visits" if sentenced to life. What jury conceived of gay marriage in 1992? The jurors' question inherently suggests that they did not believe Rhines' homosexual mitigation narrative if they were concerned that he might marry and have conjugal visits with a woman. And the fact that the jurors asked about Rhines' access to conjugal visits with visitors from *outside* the prison walls also belies Rhines' assertion that they believed prison would afford him a harem of male sexual companions.

433 (D.Ct.M.D.Ga. 2017)(unpublished), Respondent's Appendix at 133, 145, 146. This left the PFCDO free to ambush, harass and badger jurors, engage in suggestive interview techniques, put words in the jurors' mouths, lay a guilt trip on them for imposing a death sentence, insinuate a scheme by which jurors could change their minds by following the PFCDO's lead, engage in selective reporting and presentation and generally subvert the proper administration of justice in all the ways for which the PFCDO is famous. *Spotz,* 99 A.3d at 867, *passim*, Respondent's Appendix at 009. The Cersosimo and Keeney affidavits were self-evidently not written out by the affiants themselves. SUPPLEMENTAL GARLAND AFFIDAVIT at ¶ 13, Rhines Appendix at 86. There are obvious differences in the handwriting in the heading and body of the affidavits and the handwriting of the signatures at the bottom of the page – particularly Keeney's shaky signature and the straight, precise handwriting in the heading and body of the affidavit. Use of the lawyer acronym for life without parole (LWOP) in the body of the Cersosimo affidavit proves that it was written by a PFCDO interviewer. Not phrasing the affidavits in the jurors' own words allowed the PFCDO to lace the affidavits with loaded words they could later spin with homophobic meaning not intended by the affiants, *e.g.* insertion of the prepositional phrase "with men" into Keeney's affidavit or failing to report that Cersosimo characterized the comment about Rhines being with men

in prison as a "stab at humor" that was roundly condemned by the other jurors and promptly recanted by the juror who said it. It is noteworthy that when Cersosimo was interviewed by the PFCDO's predecessor counsel in 2015 and 2016, the resulting affidavit contained no statements of a homophobic nature whereas the PFCDO's later affidavit does, starkly exposing how the PFCDO is putting words in juror's mouths and spinning their meaning into a false narrative of homophobia. Compare JUROR N (Cersosimo) AFFIDAVIT, Docket 340 (Attachment 2), *Rhines v. Young,* CIV # 00-5020 (D.Ct.S.D.) with CERSOSIMO AFFIDAVIT, Rhines Appendix at 34. The Blake "affidavit" is not even signed by Blake. The absence of court supervision of the PFCDO's methods of questioning as occurred in *Pena-Rodriguez* and *Tharpe*, and the obvious selectivity and spin brought to what the PFCDO reports, renders the affidavits anything but clear and explicit expressions of animus against homosexuals.

d. This is especially true in the case of Juror Keeney, who suffers from memory impairments and dementia. SUPPLEMENTAL GARLAND AFFIDAVIT at ¶ 9, Rhines Appendix at 85. Both Keeney and Blake deny the words the PFCDO has put into their mouths, and the bias the PFCDO ascribes to their thoughts. The PFCDO clearly did not actually talk to Bennett Blake or they would have singled out a different juror to accuse of homophobic bias than one who is a lifelong democrat, whose deceased brother was gay and who grew belligerent when he believed that the DCI

investigator was suggesting he was anti-gay (when it was actually the PFCDO making the suggestion). *VOIR DIRE* TRANSCRIPTS,

Respondent's Appendix at 264; SUPPLEMENTAL GARLAND AFFIDAVIT at ¶ 6, Rhines Appendix at 86. Affidavits procured unilaterally by the PFCDO, an organization notorious for its disregard of ethical constraints and "lack of candor," are anything but clear and explicit expressions of homosexual bias.

e. Even if taken at face value, Rhines' affidavits are conspicuously devoid of any evidence that the alleged statements were "a significant motivating factor" in his sentence. *Pena-Rodriguez,* 137 S.Ct. at 869. Juror Cersosimo kept a daily journal of the deliberations and it does not reflect that Rhines' sexual orientation played any role in the deliberations. CERSOSIMO JOURNAL, Respondent's Appendix at 155. Whereas Pena-Rodriguez demonstrated that at least one juror voted to find him guilty "because he's Mexican," no such causal evidence has been proffered in Rhines' affidavits. Rhines' affidavits do not reflect that the jurors were asked if they or anyone else voted for a death sentence "because" Rhines is a homosexual – probably because Rhines knows full well the answer is no. Rather than ask the operative question, Rhines expects this court simply to *infer* motive from some alleged offhand comment(s) unreliably reported by the PFCDO. *Pena-Rodriguez* requires more than lawyerly insinuation for proof of *significant* motivation; it requires "clear and explicit" evidence, which is lacking.

CONCLUSION

Rhines' petition is not a suitable vehicle for addressing any of the questions it presents. The PFCDO is petitioning for an advisory and futile ruling.

Janet Keeney spoke for the entire jury in calling Rhines' claim of homophobic bias a "bunch of nonsense." SUPPLEMENTAL GARLAND AFFIDAVIT at ¶ 10, Rhines Appendix at 85. Juror Cersosimo's journal describes the work of a conscientious jury appreciative of the gravity of their decision. CERSOSIMO JOURNAL at 000030, 000044, 000052, Respondent's Appendix at 155. She describes a jury sophisticated enough to agree that the emotions of Donnivan Schaeffer's or Rhines' family for death or life would not drive the sentencing determination. CERSOSIMO JOURNAL at 000067, Respondent's Appendix at 155. She describes a jury whose sentencing determination was instead driven by a concern to deliver "justice for Donnivan" and the need "to remember all the rights and dreams he had that Rhines so selfishly took from him." CERSOSIMO JOURNAL at 000067, Respondent's Appendix at 155. She describes a jury sophisticated enough to agree that none of them would speak to the press because "a few words could not begin to describe the magnitude of [their] experience" as jurors. CERSOSIMO JOURNAL at 000069, Respondent's Appendix at 155. She describes a jury animated by the principle that "No one

should die the way Donnivan did." CERSOSIMO JOURNAL at 000054, Respondent's Appendix at 155. She describes a jury moved by rehearing the tape of Rhines' bloodcurdling confession, with his "jarring laughter" while comparing young Donnivan's death spasms to a beheaded chicken running around a barnyard, from an 8-4 split in favor of death to unanimous in the decision. CERSOSIMO JOURNAL at 000066-67, Respondent's Appendix at 155; CERSOSIMO AFFIDAVIT, Rhines Appendix at 34; GARLAND AFFIDAVIT at ¶ 48, Rhines Appendix at 83 (Juror Rohde describing how Rhines laughed because stabbing Donnivan in the base of his skull did not kill him right away like he thought it would). She describes a jury focused on all the right and humane concerns of a jury charged with such a consequential decision. Since Cersosimo was so clearly committed to not judging Rhines based on his homosexuality, one would expect her journal to faithfully document any overt homophobia or homophobic undercurrent in the jury's deliberations. But no mention of juror homophobia of any kind is found in Cersosimo's journal. Despite the slanders of the jury fabricated by Rhines' overzealous lawyers, Cersosimo's journal is contemporaneous proof, unadulterated by PFCDO scheming, that the jury judged him for what he did, not who he is.

Rhines has now eluded justice for longer than he allowed Donnivan Schaeffer to live his life; there is no justice in further delaying the imposition of

Rhines' deserved death sentence. Rhines' petition for writ of certiorari should be summarily and unceremoniously DENIED.

Dated this 13th day of March 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of March 2019 a copy of the foregoing response to petition for writ of certiorari was served on Claudia Van Wyk, 601 Walnut Street, Suite 545 West, Philadelphia, PA 19106 and Timothy J. Langley, Assistant Federal Public Defender, 200 West 10th Street, Suite 200, Sioux Falls, SD 57104 via U.S. Mail first class prepaid.

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