CAPITAL CASE – NO EXECUTION DATE SET

In The

# Supreme Court of the United States

No. 18-8029

**CHARLES RUSSELL RHINES,**

*Petitioner,*

v.

**DARIN YOUNG,** Warden, South Dakota State Penitentiary,

*Respondent.*

## RESPONSE TO MOTIONS FOR LEAVE TO FILE BRIEFS OF *AMICI CURIAE* LAW PROFESSORS AND *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND IN SUPPORT OF PETITIONER

Respondent Darin Young, by and through his counsel, Paul S. Swedlund, hereby files this response to the motions of various law professors and the NAACP to file *amici/amicus curiae* briefs. *Amici/amicus curiae* urge this Court to expand the scope of the Court's *Pena-Rodriguez* decision to include alleged discrimination based on sexual orientation. However, the question of expanding *Pena-Rodriguez* is not before this Court. As reflected in the following chronology, the issue of expanding *Pena-Ridriguez* was not raised or preserved in the proceedings below:

1. On February 22, 2000, Rhines' filed his federal petition for a writ of *habeas corpus.* It did not contain a jury bias claim.

2. On October 13, 2000, Rhines moved to amend his petition.

3. On October 18, 2000, Rhines was granted leave to file an amended petition. The court's order granting leave advised Rhines that it was "incumbent upon [him] to raise all known claims in the amended petition." ORDER EXTENDING TIME TO FILE AMENDED PETITION, Docket 72, Respondent's Appendix, No. 18-8030 at 00430. Rhines was informed that he would be "presumed to have deliberately waived his right to complain of any constitutional error or deprivation not raised in the amended petition." ORDER EXTENDING TIME TO FILE AMENDED PETITION, Docket 72, Respondent's Appendix No. 18-8030 at 00430.

4. On November 20, 2000, Rhines filed his amended federal petition. It did not contain a jury bias claim.

5. On December 19, 2005, Rhines was afforded an opportunity to file a second state *habeas corpus* petition. Rhines' second state *habeas corpus* petition did not contain a jury bias claim. ORDER GRANTING STAY AND ABEYANCE, Docket 150, Respondent's Appendix No. 18-8030 at 00433..

6. The issues adjudicated in Rhines' second state *habeas corpus* were consolidated into his pending federal petition. Rhines did not raise a jury bias claim at any time during the adjudication of his federal *habeas corpus* petition.

7. On February 16, 2016, the district court entered judgment denying Rhines' petition.

8. On March 15, 2016, Rhines filed a Rule 59(e) motion seeking to amend his complaint to add a jury bias claim.

9. On July 5, 2016, the district court denied the Rule 59(e) motion because, among other grounds, "Rhines ha[d] had roughly twenty years to develop the [jury bias] evidence he" offered. ORDER DENYING RULE 59(e) MOTION, Docket 348, Respondent's Appendix No. 18-8029 at 119. Rhines made "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 RULE 59(e) MOTION Docket 348, Respondent's Appendix, No. 18-8029 at 119.

10. Rhines appealed the denial of his petition for a writ of *habeas corpus* but did not appeal the denial of his motion to amend his petition to add a jury bias claim. The finding of Rhines' "lack of diligence" in developing his jury bias claim is now the law of the case.

11. Though *Peña-Rodriguez* had been decided on March 6, 2017, Rhines waited 7+ months, until September 28, 2017, to file a second motion to amend his complaint, this time pursuant to Rules 15(a) and 60(b), to again seek to add a jury bias claim.

12. On May 25, 2018, the district court denied the second motion to amend.

13. As Rhines has admitted, "the district court denied the motion on procedural grounds. It did not address the merits" of his jury bias claim. RHINES COA APPLICATION at 3, excerpt attached.

14. Rhines' *Peña-Rodriguez* claim was never added to his federal petition or adjudicated on the merits in either his state or federal *habeas corpus* proceedings. None of Rhines' proffered evidence of jury bias was introduced in the record of the state *habeas corpus* proceedings and, therefore, is not part of the record of the federal *habeas corpus* proceedings. *Cullen v. Pinholster,* 131 S.Ct. 1388 (2011)(barring admission of previously-discoverable, extra-record evidence in federal *habeas corpus*).

15. As detailed in respondent's opposition to Rhines' petition for a writ of *certiorari,* the only matters properly before this Court in regard to Rhines' jury bias claim are the "procedural grounds" on which his motion to amend was denied.

16. *Amici/amicus curiae's* suggestions to expand *Pena-Rodriguez* rest on the erroneous premise that the merits of Rhines' *Peña-Rodriguez* claim is before this Court. Since it is not, *amici/amicus curiae's* proffered briefs – like the PFCDO's gratuitous petition for a writ of *certiorari* in regard to an issue for which there is no merits ruling below – are apparently designed to inject sympathy for Rhines into the analysis of the purely procedural question of whether Rhines' Rule 15(a)/60(b) motion to amend was a successive petition.

17. Rhines is not a sympathetic figure:

a. At the time of the murder, Rhines was sexually involved with a 17-year-old boy. Rhines was very fixated on teenaged males who he could "break in gradual" to his violent, sadomasochistic sexual practices. HERNANDEZ AFFIDAVIT at ¶ 6, Respondent's Appendix No. 18-8030 at 00332. In a letter to a prior sexual partner, Rhines expressed frustration with the fact that this person had been unable to "handle just how rough that part of [Rhines] can be." HERNANDEZ AFFIDAVIT, Exhibit 1, Respondent's Appendix No. 18-8030 at 00335.

b. According to Rhines' autobiography, violent, sadomasochistic sex appeased his inner animal. While in Seattle, Rhines outfitted a "black room" or "dungeon" in Seattle by blocking the windows with plywood and painting the entire room in flat black paint. Rhines' autobiography relates how his animal self is only an inch below the surface and how, unlike "urbane/civilized" people, who bury their animal side "very deep" so that it "<u>never</u> gets out," Rhines said that his animal self "must" get out once in a while. "If he is kept suppressed for too long – he takes over." Rhines described the animal in him as "supremely dominant" during sex, when he is "inflicting pain and suffering as [he] wish[es]" on his allegedly consenting sexual partners. "Slapping a guy around/spanking are warm ups" to the "whipping and rape scenes" Rhines performed on his so-called partners during sex. "[W]hen it comes to abusing a guy as he wants it –

I'm fairly competent," Rhines wrote. RHINES AUTOBIOGRAPHY, Respondent's Appendix No. 18-8030 at 00044-00046.

c. In one of his letters to Hernandez, Rhines described himself as "a sexual predator" whose inner animal wanted to "face-f*ck" and "ass f*ck" and "grease [someone's] hole and f*ck" at all times. Rhines wanted this animal in him to be out "all the time . . . he doesn't want to be penned up or kept in at all." In Hernandez's view, Rhines' sexual partners were not even people to him. HERNANDEZ AFFIDAVIT at ¶ 3, Respondent's Appendix No. 18-8030 at 00331.

d. In his autobiography, Rhines wrote that letting his "raging animal" off its "leash" kept him on an "even keel." But, according to Rhines, "[a]fter about 18 months of no release," his animal self "was more than ready to act out. He got his chance March 8, 1992," when Rhines killed Donnivan Schaeffer. RHINES AUTOBIOGRAPHY, Respondent's Appendix No. 18-8030 at 00045.

e. Rhines ended his relationship with Hernandez with an unprintable string of archetypal sociopathic expletives and racial epithets revealing of his contempt for fellow members of the gay community, minorities and humanity in general. HERNANDEZ AFFIDAVIT, Respondent's Appendix No. 18-8030 at 00341.

18. Though these jaw-dropping declarations (a pinhole vignette of the sprawling sociopathic panorama of Rhines' life) were never introduced in Rhines' case

(because his trial counsel carefully tailored his mitigation case to keep from opening the door on them), Rhines' staggering and complete lack of empathy for other people did not escape the jury's notice. The jurors uniformly reported that Rhines' chilling laughter during his confession while comparing young Donnivan Schaeffer's death spasms to a decapitated chicken running around a barnyard, not his sexual orientation, was what drove them to impose a death sentence. GARLAND AFFIDAVIT at ¶¶ 3, 10, 15, 27, 36, 40, 43, 48, 50, Rhines Appendix No. 18-8029 at 77-82; SUPPLEMENTAL GARLAND AFFIDAVIT at ¶¶ 8, Rhines Appendix No. 18-8029 at 85.

19. A letter Rhines wrote in 2015 reveals that the jury's visceral revulsion to Rhines' abject cruelty was hardly arbitrary or pretextual. In the letter to the incumbent Mayor of Rapid City, Sam Kooiker, who was being challenged for mayor by Steve Allender, the detective who investigated Rhines' case and arrested him, Rhines purported to have information that Kooiker would find "helpful" in defeating Allender. KOOIKER LETTER, Respondent's Appendix No. 18-8030 at 00529. Rhines characterized Donnivan's parents' enduring grief over the loss of their son as so much "yada, yada, yada." Rhines falsely accused his victim's parents of profiting from their son's death (they did not recover "$$$" from Dig'Em Donuts or its insurer "courtesy of their deceased son") as though he had done them some kind of favor murdering their child. Rhines sounds no less chilling in this letter than he did during his confession 22 years earlier. Rhines' disdain for the lives and dignity of other humans,

not his sexual orientation (or cognitive processing), is why the jury sentenced him to death.

## CONCLUSION

Rhines had numerous opportunities over the last 26 years to investigate and exhaust a jury bias claim. He did not do so. Nor could he have because none of what he claims is true. It took an extremist organization like the PFCDO – "unencumbered by concerns for accuracy, honesty, and candor" – to concoct such a claim from suspect "affidavits" and a warped promotion of Rhines as some poster child of homosexual persecution. *Commonwealth v. Spotz,* 99 A.3d 866 (Pa. 2014). In reality, Rhines is the Jussie Smollett of homosexual persecution, crying wolf in furtherance of a personal agenda.

Undersigned counsel commends the *amici curiae* for all their work and efforts in making the American system of justice fairer toward minority and homosexually-oriented citizens. Though not to the degree of racial minorities, there is no doubt that homosexual citizens of this and many other countries have suffered inexcusable indignities by societal institutions. Rhines' death sentence, however, is not such an instance.

The jury sentenced to death because he is a stone-cold killer, devoid of any remorse for his crime or empathy for the rights and dignity of other people. According to Rhines himself, he was "more than ready" to kill Donnivan Schaeffer to appease his inner animal. His 2015 letter shows that he has not changed. He is an unworthy object of popular sympathy and an incongruent face of any campaign to dispel "pernicious stereotypes" about homosexuals.

It is inarguable that *Peña-Rodriguez* did not create an exception for homosexual bias and equally inarguable that a successive petition is not an appropriate vehicle for extending a United States Supreme Court ruling beyond its express holding. Rhines' petition for a writ of *certiorari* in regard to his jury bias claim hinges on the singular procedural question of whether his motion to amend was or was not a successive petition. *Amici/amicus curiae* certainly offer no greater expertise on this question of civil procedure than is possessed by this Court. Nor do *amici/amicus curiae* offer any specialized insight into how this (or any) Court could ever reach the merits of Rhines' unexhausted and procedurally-defaulted jury bias claim in light of the trifecta of the state/AEDPA statutes of limitations and prohibitions on successive petitions and the introduction of extra-record evidence barring it.

As in *Tharpe v. Ford,* 586 U.S. ____ (2019)(Sotomayor, J. dissenting from denial of a writ of *certiorari*), and as admitted by Rhines himself, Rhines' jury bias "claim has never been adjudicated on its merits." RHINES COA APPLICATION at 3, excerpt attached. Unlike Tharpe, who waited only 7 years to raise a jury bias claim, Rhines waited more than 20. And, unlike Tharpe, Rhines was aware of the alleged factual predicate for the claim even before his sentence was handed down so he could have brought post-trial motions challenging his sentence and seeking to impeach the jury's verdict under state law if he really believed that homophobic bias infected the jury's deliberations. One of Rhines' jurors is now dead and another

suffers from dementia. Given this preservation issue, *amici curiae* briefs addressed to the merits of expanding *Pena-Rodriguez* are inapposite.

Respondent asks that this petition focus on the narrow procedural issue at hand and not become a *cause célèbre* for making Rhines of all people a false prophet of homosexual rights. Accordingly, *amici/amicus curiae's* motions for leave to file briefs in support of the petition for a writ of *certiorari* should be denied.

Dated this 25th day of March 2019.

**JASON R. RAVNSBORG**
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 25th day of March 2019 a true and correct copy of the foregoing response to the motion for leave to file brief of *amici curiae* law professors in support of petitioner was served on Richard Snyder at rsnyder@fredlaw.com, Daniel S. Harawa at dharawa@naacpldf.org, and Claudia Van Wyk at claudia_vanwyk@fd.org .

*_Paul_S._Swedlund_____*

Paul S. Swedlund
ASSISTANT ATTORNEY GENERAL

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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| CHARLES RHINES,<br><br>Appellant,<br><br>v.<br><br>DARIN YOUNG,<br><br>Appellee. | : | No. 18-2376<br>(CAPITAL CASE) |

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## APPLICATION FOR CERTIFICATE OF APPEALABILITY

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(District Court Case No. 5:00-cv-05020-KES)


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Dated: July 26, 2018

## TABLE OF CONTENTS

Petitioner Charles Russell Rhines, through counsel, hereby applies for a certificate of appealability ("COA") on the district court's denial of his motion to amend, as explained in Sections I–II below. For the reasons explained in Section III below, a COA is unnecessary to appeal the denial of his motion for expert access.[1] In support of his application, Mr. Rhines states as follows:

## PROCEDURAL BACKGROUND

Charles Rhines is a gay man and a death-sentenced South Dakota prisoner whose appeal from the denial of federal habeas relief is pending in this Court. *See Rhines v. Young*, Docket Nos. 16-3360, 17-1060WE. In his appeal, among other claims, he challenges the trial court's refusal to give a curative instruction after the jurors submitted a series of questions that indicated their reliance on anti-gay stereotypes and animus in their penalty phase deliberations. *See* Appellant's Brief at 103–06.

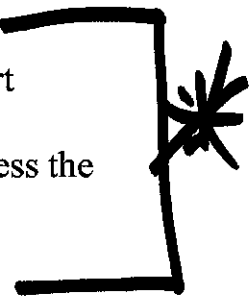
While the appeal was pending, the Supreme Court decided *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), holding that, "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a

[1] This filing adopts the following citation abbreviations:
Ex-: exhibits filed with this application
Add-: addendum to Mr. Rhines's brief on appeal in this Court under Docket Nos. 16-3360, 17-1060WE
App-: appendix to the brief on appeal

criminal defendant, the Sixth Amendment requires that the no-impeachment rule [under a state rule of evidence] give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Id.* at 869. In the wake of *Peña-Rodriguez*, Mr. Rhines moved in the district court for leave to amend his habeas petition or, alternatively, relief from judgment pursuant to Federal Rule of Civil Procedure 60(b).[2] He sought to introduce the statements of three of the jurors who had voted to sentence him to death, in support of a proposed amendment claiming juror bias and misconduct. One juror stated that the jury "knew that he was a homosexual and thought that he shouldn't be able to spend his life with men in prison." Ex-1. Two other jurors indicated that another deliberating juror had said that locking Mr. Rhines up with other men for life imprisonment without parole "would be sending him where he wants to go," Ex-2, and that there had been "lots of discussion of homosexuality" and "a lot of disgust," Ex-3 (quotation marks omitted). Mr. Rhines argued that *Peña-Rodriguez* required consideration of the statements and that the no-impeachment rule must give way to the demands of the Sixth and Fourteenth

[2] Mr. Rhines also sought to introduce the statements in the South Dakota Supreme Court, which denied relief on January 2, 2018. *See* Ex-4. The United States Supreme Court denied a petition for writ of certiorari to the South Dakota court in June 2018. *Rhines v. South Dakota*, No. 17-8791, 2018 WL 2102800 (2018).

Amendments. *See generally* Ex-5; Ex-6. On May 25, 2018, the district court denied the motion on procedural grounds. *See* Ex-7 at 3–17. It did not address the merits.



Concurrently, Mr. Rhines moved for an order to allow experts retained by his attorneys to evaluate him in the South Dakota State Penitentiary in contemplation of a potential petition for executive clemency. *See generally* Ex-8. The district court denied that motion in the same order that denied the amendment/Rule 60(b) motion, issued on May 25, 2018. *See* Ex-7 at 17–23.

Mr. Rhines sought a certificate of appealability ("COA") from the district court on the amendment/Rule 60(b) motion. As discussed below, a COA is unnecessary to appeal the denial of the expert access motion, but in an abundance of caution, Mr. Rhines also sought a COA on that ground from the district court. The district court denied a COA on June 21, 2018. *See* Ex-9.

Mr. Rhines filed a notice of appeal from the denial of both motions. *See* Ex-10. This Court set a due date of July 26, 2018, for his COA. *See* Ex-11.

## LEGAL STANDARD

Under 28 U.S.C. § 2253 and Federal Rule of Appellate Procedure 22(b), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a habeas petitioner who wishes to appeal from a final order of a