CASE NO. _____ (CAPITAL CASE)

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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Dated: November 1, 2019

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United States Court of Appeals
For the Eighth Circuit

No. 18-2376

Charles Russell Rhines

Petitioner - Appellant

v.

Darin Young, Warden, South Dakota State Penitentiary

Respondent - Appellee

American Civil Liberties Union; American Civil Liberties Union of South Dakota; GLBTQ Legal Advocates and Defenders; Lambda Legal Defense and Education Fund; National Center for Lesbian Rights; National LGBT Bar

Amici on Behalf of Appellant

Appeal from United States District Court
for the District of South Dakota - Rapid City

Submitted: September 26, 2019
Filed: October 25, 2019
[Published]

Before LOKEN, GRUENDER, and KELLY, Circuit Judges.

PER CURIAM.

Charles Russell Rhines is an inmate at the South Dakota State Penitentiary, sentenced to death for the March 1992 murder of Donnivan Schaeffer at a donut shop in Rapid City, South Dakota. Rhines has exhausted all direct appeals and applications for state and federal post-conviction relief. See Rhines v. Young, 899 F.3d 482 (8th Cir. 2018). As briefed to this court in the fall of 2018 and argued to our panel in September, this appeal raises the question whether the district court erred in concluding that it has no authority under 18 U.S.C. § 3599 and the All Writs Act, 18 U.S.C. § 1651(a), to order South Dakota prison officials "to allow Rhines to meet with mental health experts retained by appointed counsel *for purposes of preparing a clemency application*."

Following oral argument, a majority of the panel tentatively concluded that we should affirm the district court. However, circumstances underlying the issue have changed, and we conclude that a decision on this narrow issue is no longer needed. We were advised by counsel for appellee earlier this year (i) that the South Dakota Board of Pardons and Paroles denied Rhines's petition for clemency in December 2018, and (ii) that the Circuit Court for the 7th Judicial Circuit of South Dakota has issued a warrant for Rhines's execution during the week of November 3-9, 2019. Whether Rhines deserves clemency is now properly in the hands of the Governor.

South Dakota law grants the Governor broad constitutional and statutory clemency authority. See Doe v. Nelson, 680 N.W.2d 302, 313 (S.D. 2004). Rhines has begun the statutory process under S.D.C.L. § 24-14. The Governor may consider any and all evidence she deems necessary to make her final decision, including the absence of relevant expert evaluations and tests. The Supreme Court has cautioned that, while "some minimal procedural safeguards apply to clemency proceedings," judicial intervention in state clemency proceedings is warranted only in rare, extreme cases. Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor,

J., concurring in part and concurring in the judgment). At the present time, with South Dakota clemency proceedings commenced and the time for granting or denying imminent, the issues raised by Rhines in this appeal are either moot or have not been fully exhausted. Accordingly, we dismiss the appeal.

KELLY, Circuit Judge, concurring.

The question presented to us in this case was whether a federal court has the authority to compel the State of South Dakota to allow Rhines access to mental health experts retained by his appointed counsel for purposes of preparing a clemency application. Based on the record before us, however, it appears that Rhines has not fully exhausted his clemency-based remedies.

The South Dakota constitution grants the Governor the pardon power, S. D. Const. art. IV, § 3, but the state's statutory scheme permits the Governor to delegate to the Board of Pardons and Paroles the authority to hear such applications. See Doe, 680 N.W.2d at 313 (South Dakota has a "two-pronged pardon system: a pardon granted by the Governor with input from the Board . . . or a pardon granted solely by the Governor with no outside involvement . . . ."). The parties have informed us that in December 2018 the Board declined to recommend Rhines for clemency. Thus, as the court notes, whether Rhines is deserving of clemency is now properly in the hands of the Governor.

The parties have identified no impediments to Rhines's asking the Governor to allow him access to his mental health experts, either in the course of considering the Board's failure to recommend clemency or in connection with a clemency request made directly to the Governor. It thus appears that Rhines still has an opportunity to seek and obtain relief by means of the State's statutory and/or constitutional framework. For this reason, I concur in the court's judgment.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2376

Charles Russell Rhines

Petitioner - Appellant

v.

Darin Young, Warden, South Dakota State Penitentiary

Respondent - Appellee

American Civil Liberties Union; American Civil Liberties Union of South Dakota; GLBTQ Legal Advocates and Defenders; Lambda Legal Defense and Education Fund; National Center for Lesbian Rights; National LGBT Bar

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)

JUDGMENT

Before LOKEN, GRUENDER, and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the appeal is dismissed in accordance with the opinion of this Court.

October 25, 2019

Order Entered in Accordance with Opinion:
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.

Darrin 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)

MANDATE

In accordance with the opinion and judgment of 10/25/2019, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

October 25, 2019

Clerk, U.S. Court of Appeals, Eighth Circuit

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

CHARLES RUSSELL RHINES,	)	
	)	**CIV. 5:00-5020-KES**
Petitioner,	)	
	)	
v.	)	
	)	
Darin Young, Warden,	)	
South Dakota State Penitentiary,	)	
	)	
Respondent.	)	

MOTION FOR EXPERT ACCESS

Charles Rhines moves this Court for an order requiring the Warden to produce Mr. Rhines for expert evaluations in support of a potential request for executive clemency. Mr. Rhines states the following in support of his motion:

1. Mr. Rhines is incarcerated at the South Dakota State Penitentiary under sentence of death.

2. On December 10, 2009, this Court appointed the Federal Public Defender for the Districts of South Dakota and North Dakota ("FPD") to represent Mr. Rhines in his pending habeas corpus proceedings. Docket Entry No. 184.

3. On February 16, 2016, the Court denied Mr. Rhines's petition for a writ of habeas corpus.

4. On July 29, 2016, the Court entered an order appointing the Federal Community Defender Office for the Eastern District of Pennsylvania ("FCDO") as co-counsel to represent Mr. Rhines. The Court indicated that the FPD would continue to represent him. Docket Entry Nos. 354, 355.

5. Mr. Rhines appealed this Court's order denying habeas relief on August 3, 2016. Docket Entry No. 357. The case has been argued in the Court of Appeals for the Eighth Circuit and is awaiting decision.

6. Mr. Rhines seeks an order allowing two mental health experts (a forensic psychiatrist, Richard G. Dudley, Jr., M.D., and a neuropsychologist, Dan Martell, Ph.D.) to enter the prison to evaluate him on behalf of his counsel. He has never received neuropsychological testing, nor an evaluation by a psychiatrist who had the benefit of an independent background investigation. Counsel plan to seek the experts' advice respecting a potential clemency application, should one become necessary, and other matters.[1] The Department of Corrections, pursuant to South Dakota statutory law, *see* SDCL 23A-27A-31.1, has indicated that it will not admit experts into the prison to evaluate Mr. Rhines in the absence of an order from the trial court.

[1] The results of the evaluation may also be relevant, for example, to issues now pending in the Eighth Circuit, if Mr. Rhines is successful in that appeal.

7. In earlier motion practice following this Court's denial of habeas relief in 2016, CJA counsel and the FPD sought an order authorizing expert access after the breakdown of protracted efforts to negotiate terms for a neuropsychological examination with the Department of Corrections. The motion maintained that the order was necessary to vindicate Mr. Rhines's statutory and constitutional right to counsel, including a constitutionally adequate mitigation investigation, and asserted that this Court, as a "trial" court, had the authority to grant the order under SDCL 23A-27A-31.1. Docket Entry No. 313-1 at 1–11. The State argued that the motion "seeks to circumvent state court jurisdiction," that any evidence the examination uncovered would not help the defense, that the Court had already denied the habeas petition, and that it would offend the principles of federalism to grant the motion before the petitioner had exhausted available state remedies. Docket Entry No. 312 at 1, 4–5.

8. This Court denied the motion because the governing statute required a prisoner to seek a court order from the state court, and principles of comity and federalism "caution against the assertion of power by one sovereign over another without a clear grant of that authority in the first instance." Docket Entry No. 334 at 6–11. It also ruled that the statute authorizing the appointment of counsel did not enable the Court to "command prison personnel," and that any evidence obtained would have been inadmissible in the already concluded habeas proceedings. *Id*.

9. Mr. Rhines has now addressed the prudent federalism concerns that partially motivated this Court's earlier ruling, and he now seeks an order granting expert access for a different reason. Specifically, he has sought relief in the South Dakota courts, which have denied him the necessary order. He seeks this Court's assistance for the purpose of preparing a potential clemency application to the Governor of South Dakota.

10. First, Mr. Rhines moved in the Seventh Judicial Circuit Court in Pennington County for a trial court order pursuant to SDCL 23A-27A-31.1. The court (1) recognized no constitutional obligation to provide expert access, "whatever *minimal* procedural safeguards might be guaranteed by the Due Process Clause in a clemency proceeding," and (2) refused to exercise its discretionary authority under the statute. It indicated that statutory provisions governing competence for execution adequately protected Mr. Rhines, and that expert access pursuant to SDCL 23A-27A-31.1 was unnecessary. The court accordingly denied the motion. *See* Exhibit A.

11. Mr. Rhines filed a notice of appeal, but the state moved to dismiss on the ground that the order was not appealable. The South Dakota Supreme Court dismissed the appeal on January 2, 2018. *See* Exhibit B.

12. Second, the experts' evaluations promise to yield information that will be relevant to Mr. Rhines's clemency investigation. On January 27, 2018, Dr.

Dudley signed a letter-report, based on a review of Mr. Rhines's records, previous expert reports, and a 2018 annotated social history of Mr. Rhines, concluding that "there is clear evidence that there are additional, differential diagnostic options that require further investigation by way of both a psychiatric and neuropsychological evaluation." *See* Letter of Richard G. Dudley, Jr., M.D., Jan. 27, 2018 (attached as Exhibit C). Among other things, Dr. Dudley noted evidence that Mr. Rhines suffered from a pattern of symptoms seen in children suffering from Autism Spectrum Disorder, that he was exposed to toxins known to have a negative impact on brain development, and that he suffered traumatic experiences—including a brutal rape by four other soldiers—after enlisting in the Army at age 17. Dr. Dudley also noted the Mr. Rhines endured the stress associated with being a closeted gay man in the military. Exhibit C at 3–4.

13. Dr. Dudley recommended that, in light of the newly available social history information he had reviewed, additional diagnostic options be explored: autism spectrum disorder, toxin exposure, the superimposition of military training and trauma, and the effects of self-medication with alcohol and other substances. Prior evaluators, who did not have the benefit of the social history information, had identified some of the same symptoms but attributed them to "more characterological psychiatric diagnoses." Exhibit C at 5–6. Dr. Dudley concluded that "this now available information is clearly critical to the credibility of any

mental health evaluation of Mr. Rhines, and that an evaluator, armed with this information, may end up with an opinion that is quite different than opinions previously given." Exhibit C at 6.

14. Dr. Dudley's report provides a firm factual basis for this Court to grant Mr. Rhines an order giving access to his experts for evaluations. Further, as explained below, this Court's order appointing counsel authorizes both representation and necessary expert services in support of a state executive clemency application, and the Due Process Clause guarantees Mr. Rhines an opportunity for reasonable expert services in aid of his clemency investigation. His motion for an order of this Court, granting access for his experts, should accordingly be granted.

15. On February 2 and 3, 2018, undersigned counsel, Ms. Van Wyk, exchanged email messages with Assistant Attorney General Paul Swedlund, who indicated that the State opposes this motion.

BRIEF IN SUPPORT OF MOTION

A. This Court's Appointment of Counsel Pursuant to 28 U.S.C. § 3599 Extends to Representation and Expert Services Related to Clemency Litigation.

16. The governing statute, Supreme Court precedent, and guidance from the Administrative Office of the Courts all make clear that this Court's orders appointing the FPD and FCDO to represent Mr. Rhines extend to clemency proceedings in the State of South Dakota, and that the representation in clemency

may include the provision of expert services.[2] 18 U.S.C. § 3599 provides in relevant part:

> **(a)(1)** Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation *or investigative, expert, or other reasonably necessary services* at any time either--
>
> **(A)** before judgment; or
>
> **(B)** after the entry of a judgment imposing a sentence of death but before the execution of that judgment;
>
> 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 available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and 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.*
>
> **(f)** *Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on*

[2] As Federal Defender Organizations, the FPD and FCDO do not need to submit expenses to this Court for expert services because they receive funding for that purpose.

> *behalf of the defendant* and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g).

(emphases added).

17. The Supreme Court construed this provision in *Harbison*, "hold[ing] that § 3599 authorizes federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation." 556 U.S. at 194. The Court's conclusion was based upon a plain reading of § 3599(e). As explained by the Court:

> Under a straightforward reading of the statute, subsection (a)(2) triggers the appointment of counsel for habeas petitioners, and subsection (e) governs the scope of appointed counsel's duties. *See* § 3599(a)(2) (stating that habeas petitioners challenging a death sentence shall be entitled to "the furnishing of ... services in accordance with subsections (b) through (f)"). *Thus, once federally funded counsel is appointed to represent a state prisoner in § 2254 proceedings, she "shall also represent the defendant in such ... proceedings for executive or other clemency as may be available to the defendant." § 3599(e). Because state clemency proceedings are "available" to state petitioners who obtain representation pursuant to subsection (a)(2), the statutory language indicates that appointed counsel's authorized representation includes such proceedings*.

Id. at 5 (emphasis added).

18. The Administrative Office of the United States Courts has issued guidelines implementing § 3599 and *Harbison*. The guidelines for appointment of counsel in capital cases provide in relevant part:

> § 620.70 Continuity of Representation
>
> * * *

> (b) Under 18 U.S.C. § 3599(e) , unless replaced by an attorney similarly qualified under Guide, Vol 7A, § 620.60 by counsel's own motion or upon motion of the defendant, *counsel "shall represent the defendant throughout every subsequent stage of available judicial proceedings,"* [including . . .]
>
> - *proceedings for executive or other clemency.*

Similarly, the guidelines for clemency representation provide in relevant part:

> § 680 Clemency
>
> § 680.10 Clemency Representation by Counsel
>
> § 680.10.10 New Appointments
>
> *A new appointment for clemency representation is not necessary since, under 18 U.S.C. § 3599(e) , each attorney appointed to represent the defendant for habeas corpus proceedings under 28 U.S.C. § 2254, unless replaced by similarly qualified counsel, "shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant."*

Guide to Judiciary Policy, Vol. 7, Defender Services, Part A, Guidelines for Administering the CJA and Related Statutes, Chapter 6: Federal Death Penalty and Capital Habeas Corpus Representations, *available at* http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-6-ss-660-authorization-and-payment (visited June 27, 2017), and http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-6-ss-680-clemency (visited January 14, 2018) (emphasis added). The Guidelines contemplate the retention of experts for clemency work, providing:

> § 680.20.20 Processing of Clemency Vouchers

> All attorney compensation (Form CJA 30 (Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel)) and investigative, expert, or other services vouchers (Form CJA 31 (Death Penalty Proceedings: Ex Parte Request for Authorization and Voucher for Expert and Other Services)) pertaining to the clemency representation should be submitted to the district court, *regardless of whether the habeas corpus case is on appeal at the time.*

Id. (emphasis added).

19. These authorities make clear that this Court's appointment orders (Docket Entry Nos. 184, 355), authorize the FPD and FCDO to investigate, prepare, and represent Mr. Rhines in clemency proceedings, and that expert services in support of clemency fall within this Court's authority over the representation.

20. Denying Mr. Rhines the ability to meet with his own expert would render meaningless the guarantee of "reasonably necessary" expert services in § 3599(f). Congress's intent to allow district courts to fund experts for clemency includes, of necessity, an intent that the experts have a reasonable opportunity to employ their expertise. The Court has authority to issue such orders as are necessary in aid of its jurisdiction and pursuant to § 3599. *See McFarland v. Scott*, 512 U.S. 849, 858 (1994) (once petitioner invokes right to federally appointed counsel, federal court has jurisdiction to order stay of state court execution proceedings); *see also All Writs Act*, 28 U.S.C. § 1651 ("[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions."). Thus the authority to provide funding for both

representation and expert services for state clemency proceedings must logically include the authority to grant experts access to prisoners to perform their evaluations.

21. In its previous ruling denying an expert access order, this Court cited *Baze v. Parker*, 711 F. Supp. 2d 774, 776 (E.D. Ky. 2010), *aff'd* 632 F.3d 338 (6th Cir. 2011). The district court in *Baze*, however, did not consider *McFarland*, which upheld the grant of a stay of state court proceedings before the petitioner has filed a habeas petition. Furthermore, Baze sought intrusive relief against third parties who were agents of the state; he demanded that the state Department of Corrections make its employees available for clemency interviews focusing on Baze's conduct over the course of his years in prison. As the Sixth Circuit opinion described Baze's argument, he wanted the federal courts to "manage and enforce the collection of evidence in state clemency proceedings." *Baze*, 632 F.3d at 342; *see also Spisak v. Tibbals*, No. 1:95-cv-2675, 2011 WL 9614 (N.D. Ohio Jan. 3, 2011) (following *Baze*, without considering *McFarland*, and rejecting demand to compel recording of Parole Board's clemency interview of petitioner). Mr. Rhines, in contrast, merely seeks permission for his experts—his own attorneys' agents—to conduct evaluation visits, a foundational first step to forming their opinions.

22. It follows that the Court has authority to guarantee Mr. Rhines's experts the necessary access to him to conduct the evaluations.[3]

B. Mr. Rhines Has a Due Process Right to Expert Services For Clemency.

23. *Ake v. Oklahoma*, 470 U.S. 68, 84 (1985), held that a capital defendant has a due process right to appropriate expert assistance when his or her mental condition (there, sanity) is in issue. The Court has extended that right to other contexts. *See, e.g.*, *Ford v. Wainwright*, 477 U.S. 399, 414, 427 (1986) (competency for execution); *see also McWilliams v. Dunn*, 137 S. Ct. 1790, 1793 (2017) ("[W]hen certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense.'") (citation omitted). Furthermore, the minimum requirements of due process apply in state clemency proceedings. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288–89 (1998) (O'Connor, J., concurring). Applying these principles, the Eighth Circuit

[3] Habeas Rule 6 also gives a habeas court authority, for good cause, to authorize the petitioner to "conduct discovery under the Federal Rules of Civil Procedure." Rule 35(a)(1) of the rules of civil procedure allows the court to "order a party to produce for examination a person who is in its custody or under its legal control." If this Court grants Mr. Rhines's motion to amend his habeas petition (Docket No. 383), or if the Eighth Circuit remands for further habeas proceedings, Rules 6 and 35 will authorize the Court to grant his expert access motion. His need to conduct a clemency investigation and Dr. Dudley's opinion provide the requisite good cause.

has held that a state court's interference with a condemned inmate's efforts to secure a witness's testimony in support of clemency violated the Due Process Clause. *See Young v. Hayes*, 218 F.3d 850, 852–53 (8th Cir. 2000); *see also Noel v. Norris*, 336 F.3d 648,649 (8th Cir. 2003) ("[I]f 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.").

24. Mr. Rhines has never received neuropsychological testing to determine if he suffers from any disease of the brain, injury to the brain, or the effects of toxins on his brain. He has never received an evaluation by a psychiatrist who had the benefit of an independent background investigation. As described in Dr. Dudley's letter, the results of testing and evaluation by his experts may yield information highly relevant to the clemency decision. This Court should accordingly grant his request for an order directing the Warden to produce him for evaluation.

CONCLUSION

For these reasons, Mr. Rhines respectfully moves this Court for an order directing the Warden to produce Mr. Rhines at a mutually convenient time and under reasonable conditions for evaluations by his expert neuropsychologist and psychiatrist .

Respectfully submitted,

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Counsel for Petitioner, Charles Russell Rhines

Dated: February 7, 2018

CERTIFICATE OF SERVICE

This will certify that, on February 7, 2018, 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
Matthew W. Templar
Assistant Attorneys General
State of South Dakota
1302 East Highway 14, Suite 1
Pierre, SD 57501

/s/ Claudia Van Wyk
Claudia Van Wyk

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

CHARLES RUSSELL RHINES,	)	
	)	**CIV. 5:00-5020-KES**
Petitioner,	)	
	)	
v.	)	
	)	
Darin Young, Warden,	)	
South Dakota State Penitentiary,	)	
	)	
Respondent.	)	

EXHIBIT A
MOTION FOR EXPERT ACCESS

Seventh Judicial Circuit Court
P.O. Box 230
Rapid City SD 57709-0230
(605) 394-2571

CIRCUIT JUDGES
Craig A. Pfeifle, Presiding Judge
Matthew M. Brown
Jeffrey R. Connolly
Jeff W. Davis
Robert Gusinsky
Heidi L. Linngren
Robert A. Mandel
Jane Wipf Pfeifle

MAGISTRATE JUDGES
Scott M. Bogue
Todd J. Hyronimus
Bernard Schuchmann
Marya Tellinghuisen

COURT ADMINISTRATOR
Kristi W. Erdman

STAFF ATTORNEY
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October 24, 2017

Mr. Jason Tupman
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200 W. 10th Street, Suite 200
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Mr. Paul Swedlund
Office of the Attorney General
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Re: Case no. 51C93-000081A0

Dear Counsel:

The Court is in receipt of submissions from both parties regarding Defendant's Motion for Expert Access (filed 6/9/17) for the purposes of a clemency application. Defendant, Charles Rhines, requests permission to be evaluated by two mental health experts.[1] In support of the Motion, Defendant (1) sets forth a due process argument and (2) requests that the Court exercise discretionary authority under SDCL 23A-27A-31.1. The State opposes Defendant's request. For the reasons that follow, the Motion is denied.

[1] Counsel for Defendant states that "Mr. Rhines is not seeking funding from this Court. His federal counsel are representing him pursuant to appointments by the federal district court. This motion seeks only access for the experts already retained by his counsel." Petitioner's Reply Memorandum in Support of Motion for Expert Access, p. 1 n. 1 (filed 6/23/17).

1. Due Process

Defendant "maintains that he has a due process right to expert assistance to investigate his clemency petition." Petitioner's Reply Memorandum in Support of Motion for Expert Access, p. 3 (filed 6/23/17). In the case of *Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998), the United States Supreme Court discussed due process in the context of clemency proceedings. The Eighth Circuit Court of Appeals summarizes the opinion as follows:

> In *Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998), the Supreme Court addressed the application of the Due Process Clause to state clemency proceedings. A splintered Court rejected a claim that Ohio's clemency proceedings violated an inmate's constitutional right to due process. A plurality of four Justices emphasized that a request for clemency "is simply a unilateral hope," *id.* at 282, 118 S.Ct. 1244 (opinion of Rehnquist, C.J.) (internal quotation omitted), and suggested that the Due Process Clause has no application to the discretionary clemency process. A concurring opinion of four Justices concluded that "some *minimal* procedural safeguards apply to clemency proceedings," *id.* at 289, 118 S.Ct. 1244 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis in original), but rejected the inmate's challenge to Ohio's procedures. Justice O'Connor wrote that "[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* A separate opinion of Justice Stevens agreed with Justice O'Connor that some minimal procedural safeguards apply. *Id.* at 290–91, 118 S.Ct. 1244 (Stevens, J., concurring in part and dissenting in part).

Winfield v. Steele, 755 F.3d 629, 630–31 (8th Cir. 2014). After summarizing the *Woodward* opinion, the *Winfield* court went on to indicate that in the context of clemency proceedings there might exist some minimal procedural safeguards under the Due Process Clause. *Winfield*, 755 F.3d at 630 ("Whatever *minimal* procedural safeguards might be guaranteed by the Due Process Clause in a clemency proceeding are likely satisfied here.") In *Noel v. Norris*, 336 F.3d 648 (8th Cir. 2003), the Eighth Circuit addressed whether due process was violated when a request to undergo a particular kind of brain-scan procedure in connection with a clemency application was denied:

> Because clemency is extended mainly as a matter of grace, and the power to grant it is vested in the executive prerogative, it is a rare case that presents a successful due process challenge to clemency procedures themselves. *See Ohio Adult Parole Auth. v. Woodard,* 523 U.S. 272, 280–81, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998). On the other hand, 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. *See Young v. Hayes,* 218 F.3d 850, 853 (8th Cir.2000).

> Mr. Noel's claim seems to be a kind of amalgam. He asserts that state officials did not give him enough time to prepare for his clemency hearing and that the state would not allow him to undergo a particular kind of brain-scan procedure to prove his assertion that his brain damage ought to be considered on the question of whether he deserved clemency.
>
> We think that Mr. Noel's claim must be rejected. He presented a four-hundred page record to the state authority charged with making recommendations concerning clemency, and that authority denied his request. The materials that he presented included some evidence, though not the particular evidence that Mr. Noel sought to produce, of his brain damage. He does not claim that he was prevented from presenting any other kind of evidence. In the circumstances, we cannot say that the process was so arbitrary as to be unconstitutional or that the state prohibited Mr. Noel from using the procedure that it had established.

Noel, 336 F.3d at 649. Similar to the defendant in *Noel*, Mr. Rhines would like to undergo medical evaluation in connection with a clemency application and has access to some evidence regarding mental health, though not the particular evidence he is requesting.[2] Based on *Noel*, this Court concludes that access to the mental health professionals is not required under "[w]hatever *minimal* procedural safeguards might be guaranteed by the Due Process Clause in a clemency proceeding. . . ." *Winfield*, 755 F.3d at 631.

2. SDCL 23A-27A-31.1

Defendant asks the Court to exercise discretionary authority under SDCL 23A-27A-31.1 to grant the requested access to mental health experts. Petitioner's Reply Memorandum in Support of Motion for Expert Access, p. 2 (filed 6/23/17). SDCL 23A-27A-31.1 states as follows:

> From the time of delivery to the penitentiary until the infliction of the punishment of death upon the defendant, unless lawfully discharged from such imprisonment, the defendant shall be segregated from other inmates at the penitentiary. No other person may be allowed access to the defendant without an order of the trial court except penitentiary staff, Department of Corrections staff, the defendant's counsel, members of the clergy if requested by the defendant, and members of the defendant's family. Members of the clergy and members of the defendant's family are subject to approval by the warden before being allowed access to the defendant.

In support of the request for expert access, Defendant's counsel indicates concern for Defendant's current mental health:

> His current counsel have serious and substantial questions related to Mr. Rhines's mental health and condition, and the review of prior records and reports has not

[2] Defendant has previously been evaluated by mental health professionals in connection with court proceedings in both state and federal court. Response to Motion for Expert Access, Exhibits 1-8 (filed 6/15/2017).

> resolved these questions. Granting defense mental health experts access to visit and evaluate Mr. Rhines will allow counsel to look into, and possibly rule out, counsel's mental health concerns. This will enable counsel to prepare for and advise Mr. Rhines on a range of issues, including, but not limited to, a potential application for executive clemency, should such an application be warranted.

Motion for Expert Access p. 2 (filed 6/9/17). Ultimately, under South Dakota law a defendant must not to be put to death if found mentally incompetent to be executed, and the legislature has provided a statutory procedure to be used when counsel has concerns regarding a defendant's mental competency in this regard. SDCL 23A-27A-22 to 23A-27A-26. Consequently, since counsel for Defendant may utilize the procedure provided by statute to address concerns regarding Mr. Rhines' current mental health, the Court declines to grant the Motion under SDCL 23A-27A-31.1.

ORDER

Accordingly, the Motion for Expert Access is hereby DENIED.

Dated this 24 day of October, 2017

BY THE COURT:

Robert A. Mandel
Circuit Court Judge

ATTEST:

Ranae Truman
Clerk of Courts

By: Deputy

[SEAL]

Pennington County, SD
FILED
IN CIRCUIT COURT
OCT 24 2017
Ranae Truman, Clerk of Courts
By Deputy

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

CHARLES RUSSELL RHINES,	)	
	)	**CIV. 5:00-5020-KES**
Petitioner,	)	
	)	
v.	)	
	)	
Darin Young, Warden,	)	
South Dakota State Penitentiary,	)	
	)	
Respondent.	)	

EXHIBIT B
MOTION FOR EXPERT ACCESS

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, 2018.
Clerk of Supreme Court
Deputy

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
JAN - 2 2018
Clerk

STATE OF SOUTH DAKOTA, Plaintiff and Appellee, vs. CHARLES RUSSELL RHINES, Defendant and Appellant.	ORDER DISMISSING APPEAL #28460

Appellee having served and filed a motion to dismiss the appeal taken in the above-entitled matter, and appellant having served and filed a response thereto, and appellee having served and filed a reply in support of motion to dismiss appeal, and the Court having considered the motion, response and reply, now, therefore, it is

ORDERED that the appeal be and it is hereby dismissed.

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.

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

CHARLES RUSSELL RHINES,	)	
	)	**CIV. 5:00-5020-KES**
Petitioner,	)	
	)	
v.	)	
	)	
Darin Young, Warden,	)	
South Dakota State Penitentiary,	)	
	)	
Respondent.	)	

EXHIBIT C

MOTION FOR EXPERT ACCESS

27 January 2018

Stuart Lev
Assistant Federal Defender
FEDERAL COMMUNITY DEFENDER OFFICE
EASTERN DISTRICT OF PENNSYLVANIA
The Curtis Center, Suite 545 West
601 Walnut Street
Philadelphia, Pennsylvania 19106

RE: **Charles Rhines**

Dear Mr. Lev:

As requested, I have reviewed the records and documents that you sent to me regarding your client, Charles Rhines. I am writing to summarize my response to that review in light of your referral question. The conclusions that I express herein I hold to a reasonable degree of medical certainty.

Records and Documents Reviewed

- School records for Mr. Rhines
- The statements of Mr. Rhines, dated 19 June 1992 and 8 July 1992
- The report of a psychiatric evaluation of Mr. Rhines, performed by D.J. Kenelly, M.D. (who I understand was retained by Mr. Rhines' trial-level defense team from the Office of the Public Defender, but he was not called to testify at trial), dated 24 November 1992
- A "brief psychosocial history" (apparently based solely on an interview(s) with Mr. Rhines), prepared by Steve Dresback, MSW (since this history is on Dr. Kenelly's letterhead I presume he worked with or for Dr. Kenelly), dated 17 November 1992
- The report of a psychological evaluation of Mr. Rhines, performed by Bill H. Arbes, Ph.D. (performed upon a referral by Dr. Kenelly, and he was also not called to testify at trial), dated 1 December 1992
- The transcript of Mr. Rhines' January 1993 trial
- An affidavit, dated 11 June 2012, summarizing the findings of a psychological evaluation of Mr. Rhines, performed by Dewey J. Ertz, Ed.D. (who I understand was retrained by Mr. Rhines' post-conviction defense team from the Federal Public Defender), and also

summarizing Dr. Ertz's opinion regarding the legal team's decision to not call mental health experts at the trial level.

- A letter from Ronald D. Franks, M.D. (who I understand was retrained by the Attorney General's office during post-conviction proceedings), responding to/critiquing Dr. Ertz's report, dated 13 July 2012
- A letter from Thomas E. Schacht, Psy.D., ABPP (who I understand was also retained by the Attorney General's office during post-conviction proceedings), responding to/critiquing Dr. Ertz's report, dated 28 August 2012
- The affidavit of Robert D. Shaffer, Ph.D. (who I understand was retained by prior habeas counsel), dated 19 October 2015, in which he outlines what additional testing of Mr. Rhines is indicated and the reasons why such additional testing is indicated
- The declaration of Jesica Johnson, MSS, MLSP (an investigator and mitigation specialist), which is an annotated social history of Mr. Rhines (which I understand was developed at your request), dated 12 January 2018

In Summary

It is my understanding that your referral question is whether or not there is a need for further psychiatric and/or neuropsychological evaluation of Mr. Rhines in light of the social history information now available for Mr. Rhines.

Although there is considerable information about Mr. Rhines in the records and documents that I have reviewed, since I have not had the opportunity to examine him, I am not in a position to offer an independent diagnostic opinion regarding Mr. Rhines. However, based on my review of the above noted records and documents, there is clear evidence that there are additional, differential diagnostic options that require further investigation by way of both a psychiatric and neuropsychological evaluation.

More specifically, the annotated social history, prepared by Ms. Johnson based on records, documents, and information gathered from Mr. Rhines and others who have known him throughout his life, includes a considerable amount of extremely important information that was apparently not available to the above noted prior evaluators of Mr. Rhines and those who critiqued those prior evaluations. It is my opinion that had this additional information been available to prior evaluators and those who critiqued those prior evaluations, their differential diagnosis of Mr. Rhines would have been expanded to include significant and likely more accurate diagnoses other than those previously given. Therefore in my opinion, new psychiatric and neuropsychological evaluations of Mr. Rhines, informed by this additional information, are indicated.

Since all of the records and documents I have reviewed are available to you, I will not detail all of the information contained in those records and documents. Instead, I will focus on the questions raised by my review, the significance of those questions, and why those questions require further investigation through new psychiatric and neuropsychological evaluations of Mr. Rhines.

Childhood Difficulties

The information contained in the recently developed social history prepared by Ms. Johnson indicates that throughout his childhood years, Mr. Rhines exhibited a pattern of symptoms that is seen in children suffering from Autism Spectrum Disorder. More specifically, there are numerous examples of the type of persistent deficits in social communication and social interaction seen in this disorder; there are numerous examples of the type of restricted, repetitive patterns of interests and activities seen in this disorder; and these symptoms clearly caused significant impairment in virtually all aspects of his functioning. It should also be noted that Mr. Rhines has a family history of Autism Spectrum Disorder. It appears that none of this information was available to prior evaluators.

It appears that Mr. Rhines was always quite aware of the fact that he just didn't fit in. However, not surprisingly, he has lacked insight into the fact that the above noted symptoms seen in children suffering from Autism Spectrum Disorder existed and impaired his ability to interact with and fit in with peers; therefore, he was unable to report this information/describe these early symptoms to prior evaluators; and he focused primarily on the other childhood difficulties that he was aware of and that also impaired his social interaction. For example, he is quite aware of the fact that he was harassed and bullied for being overweight and otherwise unattractive. It also appears that at some level, even when he was a child and early adolescent, he was aware of the fact that he was attracted to other boys; he feared that others would recognize this fact; and this also made it more difficult for him to comfortably fit in with peers.

In addition, the information contained in the social history indicates that during his childhood years, Mr. Rhines was exposed to various toxins known to have a negative impact on brain development. It appears that this information was also unknown to Mr. Rhines and therefore would have only been known to prior evaluators had they had access to a well-developed social history. As Dr. Shaffer noted, knowledge of such exposure would have prompted a fuller neuropsychological evaluation of Mr. Rhines' cognitive capacity.

The range of psychiatric symptoms and functional impairments that Mr. Rhines evidenced during his childhood and adolescent years indicates that these childhood difficulties, as they interacted with each other, had a major impact on his development and in turn, his ability to function. As noted above, there were the symptoms seen in children suffering from Autism Spectrum Disorder and their impact on his ability to function. In addition, the social history indicates that there was considerable anxiety resulting from his emerging sense of his sexual orientation; there was mood instability, at times accompanied by suicidal ideation; there was self-medication with alcohol and other substances; and there was considerable difficulty with academic performance and other indications of impaired cognitive capacity.

Furthermore, these childhood difficulties and their impact on Mr. Rhines were made all the more severe by the fact that his parents failed to recognize and attempt to address any of his difficulties, despite the fact that his two sisters and others recognized that he was having

difficulty and his sisters attempted to encourage his parents to intervene. As a result, his difficulties continued unabated; they had a significant impact on his ability to function moving forward; and they were also then further complicated by additional difficulties he experienced later in his life.

Late Adolescent/Early Adult Years

The social history indicates that Mr. Rhines entered the Army in 1973, when he was only about 17 years old. Here too, while his sisters felt that he was unfit or at least poorly equipped for military service, his parents supported the move, feeling that it would be in his best interest.

Given Mr. Rhines' above noted combination of childhood difficulties, it is not surprising that his performance in the Army was uneven. Then, the fact that he was brutally raped by four other soldiers not long after entering the Army was most certainly traumatic in and of itself, and further exacerbated his pre-existing difficulties and their impact on his performance in the Army.

On the one hand, Mr. Rhines proved to be quite capable of learning everything required to engage in violent combat; the set of skills that he learned were concrete and easy to grasp; and as he mastered those skills, he could present as increasingly fearless. Then, his learning of those skills was most certainly reinforced during his about ten-month period of service in the Korean Demilitarized Zone, where the outbreak of life-threatening, active combat was a constant threat. On the other hand, he remained socially impaired/detached, with a limited range of options for responding to complicated social interactions other than withdrawal or this newly learned violence; he also remained a closeted gay man, fearful of being discovered and the retribution that might accompany such a discovery; and he was likely angry or at least resentful about still finding himself unable to fully fit in with peers. Mr. Rhines' uneven performance in the Army was then further complicated by his increased use of alcohol and other substances. In 1976, after multiple disciplinary infractions, he received a general discharge from the Army under honorable conditions.

Even in the absence of information about any pre-existing childhood difficulties, the impact of the traumatic experiences he endured in the Army, such as the brutal rape and his experiences in the Korean Demilitarized Zone, warrant further exploration, as does the stress associated with being in the military as a closeted gay man, and his use/abuse of alcohol and other substances. However, when Mr. Rhines' experiences in the Army are superimposed upon his childhood difficulties, there are additional concerns that require further exploration, especially with regard to how mastering and incorporating a newly learned combative, violent response into an otherwise extremely impaired and limited set of interpersonal responses to complicated social interactions impacted on Mr. Rhines' ability to function.

Recommendations

As noted above, the social history information now available about Mr. Rhines indicates that there are additional differential diagnostic options that need to be explored by way of further psychiatric and neuropsychological evaluation. Furthermore, given the nature of the diagnostic options that need to be considered, and the context of capital litigation, such further exploration must also focus on the impact of any identified psychiatric and neuropsychiatric difficulties on Mr. Rhines' adult and current functioning.

First, there is the question of whether or not Mr. Rhines, during his childhood years, suffered from Autism Spectrum Disorder and/or suffered from the effects of exposure to various toxins on the development of his brain. This question clearly requires further exploration. Either of these childhood difficulties would have further complicated his other childhood difficulties, including his distress about not fitting in, his distress about his emerging sense of his sexual orientation, the harassment and bullying he endured, and his academic difficulties, all of which he endured in the absence of adequate parental nurture, support and assistance. In addition, either of these childhood difficulties would have made it all the more difficult for him to cope with all of his childhood difficulties, thereby making it even clearer why he suffered from so much anxiety and mood instability, and why he turned to self-medication with substances. Furthermore, either of these childhood difficulties would have impaired his functioning in such a way that his military training, specifically his training in violent combat, could have ultimately had a negative impact on his ability to function, in that he learned a violent response to complicated interpersonal situations for which he had little-to-no alternative, more appropriate response.

Second, even if it becomes clear that Mr. Rhines suffered from Autism Spectrum Disorder and/or the effects of exposure to various toxins on his developing brain, further exploration is required to determine to what extent those difficulties did, in fact, impact on how his military training influenced his development. In so doing, the impact of the traumas he endured in the Army, such as the brutal rape and his experiences while in the Korean Demilitarized Zone, must also be considered.

Third, it appears that Mr. Rhines' self-medication with alcohol and other substances eventually became substance abuse difficulties. Further investigation is required to determine whether or not this is the case, and the extent to which substances further exacerbated his other psychiatric difficulties. In addition, it has been well established that in order for treatment to be successful, persons who suffer from substance abuse difficulties and some other major psychiatric difficulty require a 'dual-diagnosis' treatment program that coordinates and integrates the treatment of both difficulties. Therefore, if Mr. Rhines suffered from substance abuse difficulties and any of the other above noted major psychiatric difficulties, the fact that he did not receive such 'dual-diagnosis' treatment would help further explain why he received such a limited benefit from the one brief course of treatment he had.

In the absence of the social history information currently available for Mr. Rhines, the above described major psychiatric difficulties were not considered by prior evaluators. It is important to note that some of the symptoms of these difficulties were identified, such as his lack of appropriate social interaction with others, his impulsivity, his anxiety, his depression, and his substance abuse. However, in the absence of more information, these symptoms were readily attributed to more characterlogical psychiatric diagnoses (such as Antisocial Personality Disorder or Schizoid Personality Disorder), Generalized Anxiety Disorder, situational depression, or Attention Deficit-Hyperactivity Disorder. In addition, his substance abuse was viewed as unrelated to any other psychiatric difficulty, and his uneven performance in the Army was explained by a simple decision on his part to perform well in some ways and not perform well in other ways.

This case is a good example of why a vigorously developed social history is so critical to the performance of a competent mental health evaluation in capital proceedings. Mr. Rhines' social history includes information that he is unaware of and therefore unable to report, such as his exposure to toxins; it includes information for which he has no insight and is therefore unable to report, such as the symptoms he evidenced during his childhood years that are seen in children suffering from Autism Spectrum Disorder; and it includes information that he was likely aware of, but unlikely to spontaneously report (if not directly asked about it) in the absence of a well-developed working relationship with an interviewer, such as his early feelings about being gay, the brutal rape that he endured while in the Army, and the struggles and anxieties associated with being a closeted gay man.

I hope I have made it clear that this now available information is clearly critical to the credibility of any mental health evaluation of Mr. Rhines, and that an evaluator, armed with this information, may end up with an opinion that is quite different than opinions previously given.

Sincerely,

Richard G. Dudley, Jr., M.D,
Psychiatrist
Diplomate, American Board of Psychiatry & Neurology

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

CHARLES RUSSELL RHINES,	)	
	)	**CIV. 5:00-5020-KES**
Petitioner,	)	
	)	
v.	)	
	)	
Darin Young, Warden,	)	
South Dakota State Penitentiary,	)	
	)	
Respondent.	)	

ORDER

AND NOW, this _____ day of _____, 2018, IT IS HEREBY ORDERED that Petitioner's Motion for Expert Access is GRANTED. The South Dakota State Penitentiary shall produce Petitioner at a mutually convenient time and under reasonable conditions for evaluations by his expert neuropsychologist and psychiatrist.

BY THE COURT:

_____
The Honorable Karen E. Schreier
United States District Court Judge

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

CHARLES RUSSELL RHINES, Petitioner, v. DARIN YOUNG, Warden, South Dakota State Penitentiary, Respondent.	)	CIV. 00-5020-KES PETITIONER'S AMENDED MOTION FOR EXPERT'S ACCESS TO CONDUCT EVALUATION CAPITAL CASE

Petitioner, Charles Russell Rhines, moves by and through undersigned counsel for an order allowing Robert Shaffer, Ph.D, access to the Jameson Unit of the South Dakota State Penitentiary located in Sioux Falls, South Dakota, on **March 16-18, March 29-30, or April 26-28, 2016**, to conduct a comprehensive neuropsychological evaluation of Petitioner. In support of his motion, the following is stated:

1. Under 18 U.S.C. § 3599(e), attorneys who are appointed to represent petitioners in capital habeas corpus proceedings "shall represent the defendant throughout every subsequent stage of available judicial proceedings, including . . . 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."

2. Since her appointment, learned counsel has been diligently investigating this case in accordance with her professional duties, and continues to do so. *See* American Bar Association,

Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Rev. Ed. 2003), Guideline 10.7(A), available at www.abanet.org/deathpenalty (hereinafter "ABA Guidelines") ("counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty"). The ABA Guidelines have long served as a guide for the Supreme Court of the United States in assessing the performance of counsel in death penalty cases. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005). The Guidelines "apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings and any connected litigation." ABA Guidelines, Guideline 1.1(B). They instruct that "[c]ounsel should provide high quality legal representation in accordance with these Guidelines for so long as the jurisdiction is legally entitled to seek the death penalty." *Id.*, Guideline 10.2. Thus, counsel have a professional obligation to conduct themselves in accordance with the ABA Guidelines as long as Mr. Rhines remains under a sentence of death.

3. In conformity with their obligations under prevailing professional standards of practice in death penalty cases, counsel respectfully and in good faith request that this Court enter an Order allowing neuropsychologist Robert Shaffer, Ph.D, (*see* Curriculum Vitae, attached hereto as Exhibit A), access to the Jameson Unit of the South Dakota State Penitentiary, located in Sioux Falls, South Dakota, on **March 16-18, March 29-30, or April 26-28, 2016**, to conduct a comprehensive neuropsychological evaluation of Petitioner, pursuant to the requirements Dr. Shaffer has outlined in the attached "Conditions Required for Jail Evaluation." (Exhibit B).

4. "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). This individualization doctrine is rooted in the notion that, in determining whether to fix the ultimate punishment at death, the process must not exclude from consideration "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Id.* at 304. At stake is the "reliability in the determination that death is the appropriate punishment in a specific case." *Id.* at 305. This means that the sentencer in a capital case must "'not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)) (emphasis in original). Accordingly, it is firmly established that a defendant has a constitutional right, not only to place before the sentence any relevant evidence in mitigation of punishment (*Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Skipper v. South Carolina*, 476 U.S. 1 (1986)), but to have the sentencer meaningfully consider and give effect to all relevant mitigating circumstances. *Abdul-Kabir v. Quarterman*, 530 U.S. 223 (2007).

5. In order to ensure that these constitutional requisites under the Eighth Amendment are fully realized, defense counsel has an obligation to thoroughly investigate his or her client's life history for mitigating evidence. *See Williams v. Taylor*, 529 U.S. 362, 396 (2000). While *Strickland v. Washington*, 466 U.S. 668, 691 (1984), creates a general presumption of validity of counsel's informed strategy decisions, the Supreme Court of the United States specifically imposed a duty on counsel to conduct a reasonable investigation before making strategic

judgments. Counsel's decisions in this case are reasonable only if based upon a reasonable investigation:

> Choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 691. Where facts known to counsel suggest particular investigation would be fruitful, the failure to investigate results from "inattention, not reasoned strategic judgment." *Wiggins v. Smith*, *supra*, 539 U.S. at 526. Thus, if evidence in support of a defense to the charge or mitigation of punishment is potentially available to a defendant based upon the foregoing legal framework, counsel is under an affirmative duty to conduct a reasonable investigation into that evidence.

6. The duty to conduct a thorough mitigation investigation is an integral part of the standards for performance of counsel in death penalty cases under the Sixth and Fourteenth Amendments. The Supreme Court of the United States, in several cases, has found trial defense counsel ineffective for failure to investigate potential mitigating evidence. In *Williams v. Taylor*, *supra*, the Court found trial counsel ineffective for failing to investigate readily available mitigation evidence. In *Wiggins v. Smith*, the Court found trial counsel ineffective for limiting their investigation to a narrow set of records, and noted that "standard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report." *Wiggins*, *supra*, at 524. In *Rompilla v. Beard*, 545 U.S. 374, 391 (2005), trial counsel were found ineffective for failing to follow up on "red flags" in school, medical and prison records that pointed to the need for further mental health testing. The Court further found that counsel had a duty in turn to follow up on the findings in those records and obtain additional records,

including Rompilla's juvenile records. It was also found unreasonable for the trial attorneys to limit their investigation to interviewing Rompilla's parents and two of his five siblings. As a result of this narrow, incomplete investigation, the three mental health experts retained by Rompilla's trial counsel concluded, erroneously, that Mr. Rompilla was anti-social and did not suffer from any mental disease. A later, thorough investigation produced evidence establishing that Rompilla suffers from Fetal Alcohol Syndrome, borderline mental retardation, and possibly schizophrenia and post-traumatic stress disorder. In *Porter v. McCollum*, 558 U.S. 30 (2009) and *Sears v. Upton*, 130 S.Ct. 3259 (2010), the Court found that state court decisions denying ineffective assistance of counsel claims were objectively unreasonable where trial counsel abandoned potentially fruitful avenues of mitigating evidence without investigating them.

7. In *Strickland*, *supra*, the Court recognized that "[p]revailing norms of practice as reflected in American Bar Association stands and the like, *e.g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable." In *Wiggins*, the Court again recognized the ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* as "[p]revailing norms of practice" that serve as "guides to determining what is reasonable" in evaluating the performance of capital defense counsel. *Wiggins*, *supra*, at 522, 524. Although professional standards are "only guides," *Strickland*, *supra*, at 688, and not "inexorable commands," *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009), "these standards may be valuable measures of the prevailing professional norms of effective representation." *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010). The ABA Guidelines have been cited with approval repeatedly by the Supreme Court as reflecting prevailing norms that serve as guides to determining what is reasonable. *See Williams v. Taylor*, *supra*, at 396; *Rompilla*, *supra*, at 387.

8. The ABA Guidelines (rev. ed. 2003) state unequivocally that lead counsel at any stage of capital representation (trial or post-conviction) should assemble a defense team as soon as possible with no fewer than two lawyers, one investigator, and one mitigation specialist, which should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. Guideline 10.4. *See also* Guideline 10.11 ("As set out in Guideline 10.7(A), counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation"). Similarly, the previous Guidelines adopted in 1989 (and which were in effect at the time of Petitioner's trial) required counsel to begin investigation immediately upon counsel's entry into the case and "to discover all reasonably available mitigating evidence" and retain experts for investigation and preparation of mitigation. Guideline 11.4.1 (1989). Notably, the 1989 Guidelines specifically stated that "the investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered." *Id.* One expert in professional performance standards has noted that "the core principles expressed in the ABA Guidelines, commentary, and Supplementary Guidelines are no more than detailed, contextualized explanations of counsel's existing obligations under the *Model Rules of Professional Conduct*." Lawrence J. Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 HOFSTRA L. REV. 775, 776 (2008) (italics in original).

9. Even though the responsibility for conducting a thorough investigation of the defendant's life history squarely on the shoulders of defense counsel, counsel cannot fulfill that function without qualified help. In *Rompilla*, *supra*, although the Court observed that Mr. Rompilla was represented by "two committed criminal defense attorneys," 545 U.S. at 396, and

Rompilla's wife had referred to his lawyers as "superb human beings" who fought hard for her husband, *id.* at 399, the Court nevertheless found their performance deficient and prejudicial. The two lawyers were assisted by an experienced investigator who helped them question Rompilla about his upbringing and background, and they arranged for Rompilla to be examined by "the best forensic psychiatrist around here, [another] tremendous psychiatrist and a fabulous forensic psychologist." *Id.* at 398. Yet, notwithstanding trial counsels' talent and work ethic, it was undisputed that they failed to uncover significant mitigating evidence in Mr. Rompilla's life history that ultimately persuaded decisionmakers to spare his life. The Court provided a summary of the evidence that Rompilla's attorneys, investigators and mental health experts failed to uncover:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

Id., at 391-392. This is the type of evidence critical to "a reasoned moral response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

10. The trial lawyers, investigator and mental health experts in *Rompilla* also failed to find significant life history records which "pictured Rompilla's childhood and mental health very differently from anything defense counsel had seen or heard." *Rompilla*, *supra*, at 390. Mental

health experts found "plenty of 'red flags'" in school, medical, and prison records "pointing up a need to test further." *Id.* Indeed, further testing established that Rompilla "suffers from organic brain damage, an extreme mental disturbance significant impairing several of his cognitive functions." *Id.* Experts also found that "Rompilla's problems relate back to his childhood, and were likely caused by fetal alcohol syndrome [and that] Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense." *Id.* An appropriately-skilled investigation into Mr. Rompilla's life history made a substantial difference in the mitigation case that could have been presented – skills that Rompilla's defense team lacked, and which a qualified mitigation specialist would have brought to the case.

11. Similarly, in Mr. Rhines's case, the evidence developed by trial counsel encompassed only a narrow set of sources. No social history report has ever been prepared. Even within the narrow set of records obtained by counsel, there are obvious "red flags" pointing to the need, not only for a thorough life history investigation, but for further mental health testing, which counsel – including state habeas corpus counsel – failed to follow up on or investigate. No independent mitigation investigation was conducted by state habeas corpus counsel.

12. Attached to this motion is the curriculum vitae of neuropsychologist Robert D. Shaffer, Ph.D (Exhibit A), as well as a list from Dr. Shaffer entitled "Conditions Required for Jail Evaluation" (Exhibit B), which sets forth the circumstances he requires to conduct an effective, comprehensive neuropsychological evaluation.

13. Learned counsel previously attempted to schedule a neuropsychological evaluation of Mr. Rhines by Dr. Shaffer in October 2015. Also attached to this motion is an

email that undersigned counsel received from Ms. Catherine Schlimgen, an attorney for the South Dakota Department of Corrections, on October 1, 2015, denying learned counsel's request for Dr. Shaffer to be able to conduct a comprehensive neuropsychological evaluation of Petitioner on October 8 and 9, 2015. (Exhibit C). Undersigned counsel received this email after the repeated efforts of Ms. Jann Brakke, a paralegal employed by the Federal Public Defender's office in Sioux Falls, South Dakota, to communicate with Jameson personnel about Dr. Shaffer's evaluation protocol proved to be unsuccessful.

14. Upon receiving Ms. Schlimgen's email on the morning of October 2, 2015, learned counsel called Ms. Schlimgen twice, once at approximately 10 a.m. and again at 11:44 a.m., requesting that Ms. Schlimgen contact her as soon as possible to determine whether undersigned counsel could satisfactorily address the Department of Corrections' concerns about Dr. Shaffer's protocol.

15. Ms. Schlimgen returned learned counsel's telephone call on the afternoon of October 5, 2015. After this conversation, Ms. Schlimgen sent an email to learned counsel (Exhibit D) outlining the additional information that the South Dakota Department of Corrections needed to address any security concerns that may arise as a result of the requested evaluation.

16. Ms. Schlimgen's rationale for denying Dr. Shaffer access to the prison to evaluate Petitioner was based upon a narrow reading of SDCL §23A-27A-31.1, which identifies the individuals who are allowed access to a prisoner without a court order. Specifically, this statutory provision allows "the defendant's counsel" to access an incarcerated client. Undersigned counsel respectfully contends that an expert such as Dr. Shaffer, who has been specifically retained by defense counsel to evaluate Petitioner, is a member of the defense team

and an agent of defense counsel and therefore should not be required to obtain a court order to gain access to Petitioner in order to conduct a comprehensive neuropsychological evaluation. *See, e.g.,* ABA Guidelines, Guideline 4.1(A)(2)(rev. ed. 2003)(mandating that "[t]he defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments"); Guideline 10.4(C)(2)(c)(rev. ed. 2003)(stating that the defense team includes "any other members needed to provide high quality representation").

17. Moreover, as the October 1, 2015 letter from Dr. Shaffer to Petitioner's counsel Tim Langley, (attached hereto as Exhibit E) explains, "[f]ree range of hand motion for both hands, and use of a variety of computing and electronic players" are necessary to ensure that a competent, comprehensive neuropsychological evaluation of Petitioner can be achieved. Exhibit E at 2. The equipment that Dr. Shaffer is requesting to bring into the Jameson unit, as well as his request that Petitioner's hands be unshackled during the evaluation, are essential to accomplishing this objective.

18. The requested evaluation was unable to be scheduled in October 2015 due to the delayed response received from the South Dakota Department of Corrections, as well as learned counsel's surgery on October 7, 2015. Undersigned counsel have renewed their request to schedule a neuropsychological evaluation of Mr. Rhines by Dr. Shaffer for **March 16-18, March 29-30, or April 26-28, 2016**. Undersigned counsel Timothy Langley has corresponded with Ms. Schlimgen by phone and by email to discuss the testing protocol. Additionally, on March 1, 2016 at approximately 2:07 p.m., learned counsel attempted to contact Ms. Schlimgen but was unable to reach her. Learned counsel also emailed Ms. Schlimgen the photographs of Dr. Shaffer's testing equipment and his requirements for hands-free testing that she had previously

requested. A copy of learned counsel's March 1, 2016 email to Ms. Schlimgen, as well as copies of the photographs of Dr. Shaffer's testing equipment that were attached to it, is attached hereto as Exhibit F. In an email received at 4:00 p.m. on March 3, 2016, South Dakota Department of Corrections Attorney Catherine Schlimgen wrote: "when I spoke to [Petitioner's counsel] Tim [Langley], I believed we discussed the motion being filed in federal court. However, in reexamining SDCL 23A-27A-31.1, the statute says the order must come from the trial judge." Petitioner does not agree with this reading of the statute. First, the statute is located in the section of Chapter 23A that addresses the protocol for lethal injection once a prisoner has an active, pending execution warrant, which is not true in the instant case. Second, the statute does not say *state* trial court. Third, the state trial court no longer has jurisdiction over Petitioner's habeas proceedings: this Court does.

19. Although counsel for Petitioner and prison administration officials have been making reasonable efforts to accommodate the needs of the other party in settling the details of the examination protocol, and given that prison administration officials have advised Petitioner's counsel that a court order pursuant to SDCL 23A-27A-31.1 authorizing Dr. Shaffer to have exceptional access to the Petitioner for the purpose of conducting the evaluation is required, and due to the expert's availability as well as to the limited time frame within which this Court will continue to have jurisdiction over Petitioner's case, counsel for Petitioner respectfully request that this Court enter the proposed Order contained herein.

20. In order to perform a valid comprehensive neuropsychological evaluation of Mr. Rhines, Dr. Shaffer requires that both of Mr. Rhines's hands be unshackled for three tests lasting a total of approximately 20 minutes. Additionally, Dr. Shaffer needs to administer tests that require Mr. Rhines to alternate the use of his hands (which requires that the hand currently being

used to be unshackled) for approximately three and one-half hours. The remaining estimated four hours of testing requires that Mr. Rhines's dominant hand remain unshackled so that the test results will be valid. Undersigned counsel do not object to a correctional officer being present in the examination room during the twenty minutes that require both of Mr. Rhines's hands to be unshackled.

WHEREFORE, for the foregoing reasons, undersigned counsel respectfully request that this Court enter an Order allowing Robert D. Shaffer, Ph.D, access to the Jameson Unit located in Sioux Falls, South Dakota, on **March 16-18, March 29-30, or April 26-28, 2016**, pursuant to the conditions set forth in Exhibit B, including administering hands-free testing and/or one hand free testing when required, to conduct a comprehensive neuropsychological evaluation of Petitioner in accordance with prevailing professional and ethical standards. Additionally, if the Court needs to hear additional argument before it can make a decision, Petitioner requests the Court set an expedited hearing in order to ensure that the evaluation can be completed in a timely fashion, and grant Petitioner leave to supplement the record in this matter and the State additional time to respond if necessary.

Dated this 9th day of March, 2016.

Respectfully submitted,

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Federal Public Defender

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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 MEMORANDUM OPINION AND ORDER

Petitioner, Charles Rhines, moves the court to seal his motion for expert access and his reply brief. Rhines's motion for expert access seeks an order from this court allowing Dr. Robert D. Shaffer to conduct a neuropsychological examination of Rhines. Respondent opposes the motions to seal and the motion for expert access. For the following reasons, the court denies the motions to seal and denies the motion for expert access.

BACKGROUND

The 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. Docket 305. The following facts are relevant to Rhines's pending motion:

Rhines is a capital inmate at the South Dakota State Penitentiary in Sioux Falls, South Dakota. He was convicted of premeditated first-degree murder for the death of Donnivan Schaeffer and of third-degree burglary of a Dig'Em Donuts Shop in Rapid City, South Dakota. A jury found that Rhines

should be subject to death by lethal injection, and a state circuit court judge imposed the sentence. On February 16, 2016, this court granted respondent's motion for summary judgment and denied Rhines's federal petition for habeas corpus. On March 9, 2016, Rhines moved the court for an order allowing Dr. Schaffer to conduct a comprehensive neuropsychological evaluation of Rhines at the penitentiary.[1]

Rhines argues that Dr. Shaffer should be permitted to conduct his examination because Dr. Shaffer's evaluation is a component of Rhines's federal habeas proceeding. Dr. Shaffer requires as a part of his examination that Rhines's hands remain unshackled and that Rhines be allowed to use his hands during several tests. Rhines argues that he attempted to schedule the evaluation through the South Dakota Department of Corrections (DOC), but DOC personnel insist that Rhines first obtain a court order before Dr. Shaffer can be given access to Rhines at the prison.

Correspondence between Rhines's attorneys and DOC personnel is attached to Rhines's motion. In that correspondence, DOC personnel state that the reason Dr. Shaffer cannot receive the type of access that Rhines requests is because of prison safety concerns. More specifically, DOC policy requires that capital inmates such as Rhines remain restrained in the presence of visitors. DOC personnel are concerned by Rhines's behavior while he has been incarcerated and believe that he may pose a danger to others.

[1] Rhines filed a substantively similar motion on March 7, 2016. Docket 310. The present motion is styled as an amended motion. Thus, the court considers the March 7 motion mooted by the filing of the amended motion.

DOC personnel also argue–and respondent agrees–that Dr. Shaffer cannot be given access to Rhines for any reason unless Rhines complies with SDCL 23A-27A-31.1. That statute provides:

> From the time of delivery to the penitentiary until the infliction of the punishment of death upon the defendant, unless lawfully discharged from such imprisonment, the defendant shall be segregated from other inmates at the penitentiary. *No other person may be allowed access to the defendant without an order of the trial court except penitentiary staff, Department of Corrections staff, the defendant's counsel, members of the clergy if requested by the defendant, and members of the defendant's family*. Members of the clergy and members of the defendant's family are subject to approval by the warden before being allowed access to the defendant.

SDCL 23A-27A-31.1 (emphasis added). Respondent contends that Dr. Shaffer is not a member of the penitentiary staff, DOC staff, defendant's counsel, a member of the clergy, or a member of Rhines's family. Thus, respondent argues that DOC personnel do not have the authority to grant Dr. Shaffer access to Rhines. Rather, Rhines must first obtain a court order. Although Rhines disagrees with respondent's contention,[2] Rhines asks this court to issue an order allowing Dr. Shaffer to conduct his examination.

[2] Rhines argues that Dr. Shaffer is a member of "the defendant's counsel" because Dr. Shaffer has been hired as an expert. The court is unaware of any authority interpreting SDCL 23A-27A-31.1. The court concludes that the statute's "No other person" language precedes and, therefore, explicitly limits the individuals who can be given access to a capital inmate without a court order. Thus, the language pertaining to "the defendant's counsel" is limited to the defendants' attorneys and does not include other members of the defense team generally.

DISCUSSION

I. Motions to Seal

Rhines originally filed his motion for expert access *ex parte*. The court denied the motion and directed Rhines to serve a copy of the motion on respondent because Rhines's request may implicate the legitimate penological interests of the state of South Dakota. Rhines now requests that his motion and his reply brief be sealed because their contents implicate the attorney-client privilege or attorney work product doctrine.

The public has a "general right to inspect and copy public records and documents, including judicial records and documents." *In re Neal*, 461 F.3d 1048, 1053 (8th Cir. 2006) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978)). The public right, however, is not absolute. *Id.* (quoting *id.* at 598). The Eighth Circuit has held that " 'only the most compelling reasons can justify non-disclosure of judicial records.' " *Id.* (quoting *In re Gitto Global Corp.*, 422 F.3d 1, 6 (1st Cir. 2006)). Whether court records should be sealed is a matter committed to the discretion of the district court. *Webster Groves Sch. Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371, 1376 (8th Cir. 1990).

Generally, the attorney-client privilege extends to confidential communications exchanged between a client and his or her attorney. *See In re Grand Jury Proceedings*, 791 F.2d 663, 666 (8th Cir. 1986). "Confidential communications encompass that information communicated on the understanding that it would not be revealed to others[.]" *Id.* By contrast, the work product doctrine protects factual information compiled by an attorney or

the attorney's "mental impressions, conclusions, opinions or legal theories." *Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000). A party "must show the materials were prepared in anticipation of litigation, *i.e.*, because of the prospect of litigation" for work product protection to apply. *PepsiCo, Inc. v. Baird, Kurtz, & Dobson LLP*, 305 F.3d 813, 817 (8th Cir. 2002).

Rhines argues only generally that the attorney-client privilege or the work product doctrine applies. The bulk of Rhines's motion and reply consists of citations to caselaw involving a criminal defendant's Sixth Amendment right to counsel and the American Bar Association's guidelines for defense attorneys. Rhines presumably included this information as legal authority for why his motion should be granted. The arguments do not, however, involve communications between an attorney and Rhines. Similarly, they are not entitled to work product protection any more than an ordinary brief to the court. The other major component of Rhines's submissions consists of descriptions and copies of emails sent between Rhines's attorneys and DOC personnel discussing whether Dr. Shaffer will be allowed to conduct his examination. Also included are pictures of Dr. Shaffer's equipment and descriptions of the tests he would perform. These emails are not attorney-client communications but rather communications involving third-parties to which the privilege does not apply. *United States v. Hatcher*, 323 F.3d 666, 674 (8th Cir. 2003). Likewise, the communications are not entitled to work product protection because they are not materials prepared in anticipation of litigation.

The public has a right to inspect court records and documents. Rhines's bare desire for secrecy is not sufficient to overcome the public's interest. Thus, the court will not seal Rhines's motion or his reply brief.

II. Motion for Expert Access

Rhines argues that this court may enter an order under SDCL 23A-27A-31.1 and direct the DOC to give Dr. Shaffer access to Rhines at the penitentiary. The court disagrees. Rhines is confined in a state penitentiary, not a federal penitentiary. The statute that Rhines contends authorizes access is a state law, not a federal law. It provides for "other person[s]" not specified in the statute to seek "an order of the trial court" before those persons can be afforded access to the inmate "at the penitentiary." In Rhines's case, the trial court is the Circuit Court for the Seventh Judicial Circuit of South Dakota. Rhines has not attempted to obtain an order from the state trial court.

Principles of comity and federalism caution against the assertion of power by one sovereign over another without a clear grant of that authority in the first instance. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). "Congress enacted [the Antiterrorism and Effective Death Penalty Act of 1996] to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases and to further the principles of comity, finality, and federalism." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (internal citations and quotations omitted). Also, the DOC's safety concerns are not easily disregarded because courts "must accord substantial deference to the professional judgment of prison administrators, who bear a significant

responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *see also Procunier v. Martinez*, 416 U.S. 396, 405 (1974) ("Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities"), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989). The court concludes that SDCL 23A-27A-31.1 does not authorize this court to grant Rhines the access he requests.

Rhines has not otherwise provided a statute or rule of law that enables this court to direct the DOC to provide Dr. Shaffer access to Rhines at the penitentiary. Rather, Rhines cites generally to a criminal defendant's Sixth Amendment right to receive the effective assistance of counsel. There is not, however, a constitutional right to counsel in federal habeas actions. *Ryan v. Gonzales*, 133 S. Ct. 696, 703-04 (2013). Section 3599(a)(2) of title 18 provides a statutory right for indigent capital inmates to receive federally funded representation and investigative services. 18 U.S.C. § 3599(a)(2). The court may also authorize federal funding "if reasonably necessary" for the purpose of hiring an expert to conduct a mental health examination. 18 U.S.C. § 3599(f); *see Edwards v. Roper*, 688 F.3d 449, 462 (8th Cir. 2012). But Rhines is not asking for additional funds, however, and nothing in the statute enables the court to command state prison personnel in the manner Rhines suggests. *Cf. Baze v. Parker*, 711 F. Supp. 2d 774, 779 (E.D. Ky. 2010) (holding § 3599(f) "does not give the Court the authority to issue an order granting a defendant

access to certain state officials or others in the hopes that they will provide information relevant to the clemency process") *aff'd* 632 F.3d 338 (6th Cir. 2011).

The essence of Rhines's motion is that Dr. Shaffer should be allowed to conduct his examination because Dr. Shaffer's findings would be a component of Rhines's federal habeas proceeding. More specifically, Dr. Shaffer's findings could be used to support Rhines's arguments that Rhines received ineffective assistance of counsel because his state court trial attorneys inadequately investigated and presented mitigating evidence. *See* Docket 313-1 at 8 ("Similarly, in Mr. Rhines's case, the evidence developed by trial counsel encompassed only a narrow set of sources.").

Even if this court had the authority to facilitate Rhines's request, it would decline to exercise that authority for several reasons. First, the court has already denied all of Rhines's claims for federal habeas relief, including his ineffective assistance claims. *See* Docket 305 at 81-117. Second, Rhines was denied leave previously to supplement the record and to amend his federal habeas petition to include new evidence in support of his exhausted ineffective assistance claims.[3] That evidence included "affidavits from three experts who have reviewed Rhines's case file and records" and who "made their own findings and conclusions concerning Rhines, his background, his mental health, and the effectiveness of Rhines's trial counsel's mitigation efforts."

[3] The court has also twice rejected Rhines's argument that the narrow exception for presenting unexhausted ineffective assistance claims announced in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), applies in Rhines's case. See Docket 272 at 12-13; Docket 304 at 16-20.

Docket 304 at 8. Dr. Shaffer was one of those experts who submitted an affidavit and related findings. Docket 281-2; Docket 282-2. The court denied Rhines's motions in light of the Supreme Court's decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011). Specifically, the court found that

> Rhines's case is indistinguishable from *Pinholster*. Here, like in *Pinholster*, Rhines argued that his trial attorneys ineffectively investigated and presented mitigation evidence. As in *Pinholster*, Rhines's arguments were raised and rejected on the merits in his state habeas. Similar to *Pinholster*, Rhines was permitted to return to state court after this court determined that Rhines's federal petition contained both exhausted and unexhausted claims. As in *Pinholster*, Rhines received an adjudication on the merits of all of his claims in state court before returning to federal court. And now, like in *Pinholster*, Rhines seeks to bolster his exhausted ineffective assistance claims with new evidence that was not presented to or considered by the state court. Just like in *Pinholster*, this new evidence consists of contemporary expert opinion evidence that suggests Rhines's trial attorneys failed to investigate and present additional mitigation evidence. But, as the Court held in *Pinholster*, this court's review of Rhines's exhausted claims is subject to § 2254(d) and is limited to the evidence that was before the state court that adjudicated the claims.

Docket 304 at 18-19. The court could not, therefore, consider Dr. Shaffer's findings even if the court had not already denied Rhines's claims. *Id.* at 22 ("Consequently, this court cannot consider this new evidence").

Finally, construing Rhines's motion as one for an evidentiary hearing would obtain the same result. Section 2254(e)(2) governs the circumstances in which an evidentiary hearing may be held. *Williams v. Taylor*, 529 U.S. 420, 437 (2000). That section provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

> (A) the claim relies on--
>
> > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim 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. § 2254(e)(2). The Supreme Court has held that "[s]ection 2254(e)(2) imposes a limitation on the discretion of federal habeas courts to take new evidence in an evidentiary hearing." *Pinholster*, 563 U.S. at 186.

The Eighth Circuit's decision in *Wright v. Bowersox*, 720 F.3d 979 (2013) is instructive on this issue. The *Wright* decision involved a § 2254 petitioner who waived his right to counsel and was allowed to represent himself at trial. *Id.* at 982. He was convicted by a jury. Wright argued in state and federal habeas that the state trial court erred in determining that he was competent to stand trial and to waive his right to counsel. *Id.* at 982-83. Wright also moved for an evidentiary hearing in federal court to present testimony and a report from Dr. Stephen Peterson in support of his argument that he was not competent at the time of his trial. *Id.* at 987. The district court denied Wright's request, and the Eighth Circuit affirmed. The Eighth Circuit held

> Second,[4] this hypothetical rebuttal evidence, even if it were to prove Wright's incompetence, would still not entitle him to habeas relief on his asserted grounds. Even assuming Dr. Peterson's testimony demonstrated Wright to have been incompetent at the time of his trial and waiver of counsel, the testimony was not available to the state court at the time of its decision. Accordingly, this testimony would have no bearing on whether the state court's decision was based on an unreasonable determination of the facts because the testimony was not available for consideration by the state court. *Cullen v. Pinholster,* ––– U.S. ––––, 131 S.Ct. 1388, 1398–1401, 179 L.Ed.2d 557 (2011).

Id. Thus, the court could not consider Dr. Shaffer's findings even if the court granted Rhines an evidentiary hearing.

CONCLUSION

Rhines has not attempted to comply with the state statute governing access to capital inmates in the state penitentiary. Rhines has also not identified an applicable statute or rule of law enabling this court to direct the DOC personnel to give Dr. Shaffer access to Rhines in lieu of complying with the state statute. And assuming the court has the authority to do so, Rhines has not identified adequate grounds justifying the relief that he seeks. Accordingly, it is

ORDERED that Rhines's motion to seal (Docket 310) is denied as moot.

IT IS FURTHER ORDERED that Rhines's motion to seal (Docket 313 and Docket 315) is denied. The motions will be unsealed in five days, unless they are withdrawn within five days.

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[4] The Eighth Circuit first observed that Wright "has not established he was unable to develop his claim in state court." *Wright*, 720 F.3d at 987; *see* 18 U.S.C. § 2254(e)(2). Rhines has similarly not made such a showing.

IT IS FURTHER ORDERED that Rhines's motion for expert access (Docket 313-1) is denied.

Dated April 12, 2016.

BY THE COURT:

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

United States Court of Appeals
For the Eighth Circuit

No. 16-3360
No. 17-1060

Charles Russell Rhines

Petitioner - Appellant

v.

Darin Young

Respondent - Appellee

Appeals from United States District Court
for the District of South Dakota - Rapid City

Submitted: January 11, 2018
Filed: August 3, 2018

Before LOKEN, GRUENDER, and KELLY, Circuit Judges.

LOKEN, Circuit Judge.

Charles Russell Rhines brutally murdered Donnivan Schaeffer while burgling a donut shop in Rapid City, South Dakota, on March 8, 1992. A state court jury convicted Rhines of murder and burglary and sentenced him to death. The Supreme Court of South Dakota affirmed the conviction and sentence, State v. Rhines, 548

N.W.2d 415, 424 (S.D.), cert. denied, 519 U.S. 1013 (1996), and subsequently affirmed the denial of state post-conviction relief. Rhines v. Weber, 608 N.W.2d 303, 305 (S.D. 2000). The district court[1] denied his federal petition for a writ of habeas corpus but issued a certificate of appealability on multiple claims. See 28 U.S.C. § 2253(c). On appeal in Case No. 16-3360, Rhines argues six issues, one relating to the guilt phase and five to the penalty phase of the trial. We affirm.

I. A Guilt Phase Issue.

Rhines argues that the state courts violated his federal constitutional privilege against self-incrimination by admitting at trial prejudicial inculpatory statements he made after warnings that he claims did not comply with Miranda v. Arizona, 384 U.S. 436 (1966). Miranda held that, before a person in custody can be interrogated, he must be warned:

> that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation.

Id. at 479. The Supreme Court of South Dakota considered this issue at length on direct appeal and denied relief, concluding that Rhines was given constitutionally adequate warnings. Rhines, 548 N.W.2d at 424-29.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), when a claim has been "adjudicated on the merits in State court proceedings," a federal writ of habeas corpus will not be granted:

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[1]The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota.

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> unless the adjudication of the claim -- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Rhines argues, as he did to the district court, that the South Dakota Supreme Court's determination that the warnings were adequate was an objectively unreasonable application of Miranda.

We recite the relevant facts as detailed in the Supreme Court of South Dakota's opinion. In February 1992, Rhines was terminated as an employee at the Dig 'Em Donuts Shop in Rapid City. On March 8, the body of employee Schaeffer was found in the Dig 'Em Donut Shop storeroom with his hands bound and stab wounds. Approximately $3,300 was missing from the store. On June 19, Rhines was arrested in Seattle for a burglary in Washington State. After a local police officer read a Miranda warning, Rhines asked, "Those two detectives from South Dakota are here, aren't they?" He was placed in a holding cell without questioning.

That evening, Rapid City Police Detective Steve Allender and Pennington County Deputy Sheriff Don Bahr arrived to question Rhines about the Dig 'Em Donuts burglary and the murder of Schaeffer. During a suppression hearing prior to trial, Detective Allender recalled informing Rhines of his Miranda rights as follows:

> [Allender]: You have the continuing right to remain silent. Do you understand that?
> [Rhines]: Yes.
> [Allender]: Anything you say can be used as evidence against you. Do you understand that?
> [Rhines]: Yes.

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> [Allender]: You have the right to consult with and have the presence of an attorney, and if you cannot afford an attorney, an attorney can be appointed for you free of charge. Do you understand that?
> [Rhines]: Yes.
> [Allender]: Having these rights in mind, are you willing to answer questions?
> [Rhines]: Do I have a choice?
> [Allender]: Yes [you do] have a choice, in fact [you do] not have to talk with us at all.
> [Allender again asked Rhines if he wanted to talk with the detectives]
> [Rhines]: I suppose so, I'll answer any questions I like.

After these warnings, Rhines gave the officers permission to tape record his statement and made a chilling confession to committing the Dig 'Em Donuts burglary and killing Schaeffer. On June 21, after Allender and Bahr gave the same warnings, Rhines again confessed to the burglary and killing.

At trial, over Rhines's objections, the prosecution introduced Detective Allender's testimony regarding Rhines's statements during the untaped portion of the June 19 interview, and recordings of the June 19 and June 21 interviews. From the recordings, the jury heard that Rhines broke into Dig 'Em Donuts to burglarize it. During the burglary, Schaeffer entered the store to retrieve money and supplies for another store. Rhines stabbed Schaeffer in the stomach. With Schaeffer "thrashing around and screaming," Rhines stabbed him in the upper back, then "help[ed] him up and walk[ed] him into the back room and s[a]t him down on the pallet and walk[ed] him forward, he goes rather willingly like he's decide it's time to go." In the back room, Rhines stabbed Schaeffer in the head, attempting to "stop bodily function." After that, with Schaeffer still breathing, Rhines "tied his hands behind him" and went back to the office to finish collecting money. A medical examiner testified that Schaeffer's wounds were consistent with Rhines's confession.

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On direct appeal, Rhines argued the Miranda warnings were constitutionally deficient in three ways: (i) he was informed of his "continuing right to remain silent," but not his right to cut off questioning whenever he wished; (ii) he was informed of "the right to consult with and have the presence of an attorney," but not his right to an attorney before and during questioning; and (iii) he was informed that "an attorney can be appointed for you free of charge," but not that an attorney would or must be appointed. The Supreme Court of South Dakota concluded the warnings were sufficient, applying the standard in Duckworth v. Eagan, 492 U.S. 195, 203 (1989) ("[t]he inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by Miranda"). The Court reasoned that the interview transcript demonstrated that Rhines understood his right to cut off questioning at any time; indeed, he turned off the recorder when asked about a topic he did not wish to discuss. 548 N.W.2d at 427. Rhines was told of his right to an attorney at the beginning of each interview, a warning that "plainly communicated the right to have an attorney present at that time." Id. And the totality of the warning given "reasonably conveyed the right to appointed counsel." Id. at 428. The Court noted that "[t]he words of Miranda do not constitute a ritualistic formula which must be repeated without variation in order to be effective." Id. at 426, quoting Evans v. Swenson, 455 F.2d 291, 295 (8th Cir.), cert. denied, 408 U.S. 929 (1972).

The district court, reviewing the decision under AEDPA, concluded that "the South Dakota Supreme Court did not unreasonably apply clearly established federal law when it determined that Rhines received effective Miranda warnings prior to his June 19 and 21, 1992 interviews." Relying on Duckworth, the district court concluded that "the initial warnings given to Rhines touched all the bases required by Miranda." In reviewing a district court's denial of a § 2254 petition, we review the district court's findings of fact for clear error and its conclusions of law de novo. Middleton v. Roper, 455 F.3d 838, 845 (8th Cir. 2006) (standard of review).

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Rhines cites no clearly established federal law that the warnings given to him were inadequate under Miranda. He simply disagrees with the South Dakota Supreme Court's application of Miranda and clearly established federal cases interpreting Miranda. That Court carefully considered each alleged deficiency in light of the warnings given and the circumstances surrounding the warnings, applying the proper Supreme Court standard and considering relevant precedent from this court. Rhines makes the conclusory assertion that the warnings did not reasonably convey his rights. But he does not explain why the warnings given were objectively unreasonable in these circumstances. Reviewing de novo, the district court did not err in concluding that Rhines is not entitled to relief on this claim under AEDPA.

II. Penalty Phase Issues.

Two of the five penalty phase issues raised on appeal concern claims of ineffective assistance of trial counsel (IAC) at the penalty phase. These federal claims have a long and complicated procedural history.

The trial court appointed three attorneys to represent Rhines at trial -- Joseph Butler and Wayne Gilbert, both in private practice, and Michael Stonefield, a local public defender. After the jury found Rhines guilty of first-degree murder and third-degree burglary, the case proceeded to the sentencing phase. The prosecution incorporated evidence from the guilt phase and rested. The defense presented testimony of Rhines's two sisters. They described his academic, behavioral, and social struggles as a child and teenager. They testified that he dropped out of school in early high school, was not helped by enlisting in the military at age seventeen, and struggled with his sexuality as a gay man who grew up in a conservative, Midwestern family. Consistent with South Dakota law, the jury found that one or more statutory aggravating circumstances existed and sentenced Rhines to death.

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After his conviction and sentence were affirmed on direct appeal, Rhines applied to the state trial court for a writ for habeas corpus. Represented by new, independent appointed counsel, the Second Amended Application raised forty-six issues, including ten claims of IAC by trial and appellate counsel. The ninth claim was that trial counsel "failed to investigate his background for mitigation evidence." After an evidentiary hearing at which the three trial attorneys testified and the subsequent submission of deposition testimony by a defense attorney expert, the trial court denied the application in a lengthy letter ruling discussing many allegations of trial counsel IAC. With respect to the penalty phase claim, Judge Tice wrote:

> **(24) Failure to investigate defendant's background to provide effective mitigation.**
>
> As discussed earlier, there were substantial efforts made to develop mitigation evidence. Trial counsel used reasonable efforts to do so. There is no evidence to support a belief that any further efforts would have been fruitful.

Rhines appealed this ruling to the Supreme Court of South Dakota. Regarding the penalty phase IAC claim, Rhines argued that his trial attorneys' billing records "showed that only a cursory amount of work was devoted to mitigation witnesses. The problem is we do not know if there is mitigation evidence favorable . . . because the work was not done." The Supreme Court of South Dakota affirmed in February 2000. After lengthy review of three guilt phase IAC issues, the Court stated:

> Rhines raises several other issues relating to ineffective assistance of counsel in his brief. However, these remaining instances are either conclusions, which are wholly unsupported by the record, or sound trial strategy when judged by the circumstances facing trial counsel at the time of their decisions. . . . Rhines has not proven either prong of the [IAC] test in regard to these claims.

Rhines, 608 N.W.2d at 313.

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Rhines immediately filed a federal habeas petition; a First Amended Petition filed in November 2000 alleged thirteen grounds for relief. The district court concluded that numerous grounds were unexhausted and stayed the petition pending exhaustion of Rhines's state court remedies. The State appealed, we reversed; the Supreme Court, resolving a conflict in the circuits, held that, "in limited circumstances," the district court "has discretion to stay the mixed petition to allow the petitioner to present his unexhausted claims to the state court . . . and then to return to federal court for review of his perfected petition." Rhines v. Weber, 544 U.S. 269, 271-72, 277 (2005), rev'g 346 F.3d 799 (8th Cir. 2003). We then remanded to the district court for further consideration under the Supreme Court's new standards. Rhines v. Weber, 409 F.3d 982, 983 (8th Cir. 2005). In December 2005, the district court granted a stay. The court concluded that two penalty phase IAC issues were claims that may not have been exhausted in Rhines's state habeas proceeding -- that trial counsel's presentation of mitigation evidence was "tepid," and that counsel failed to hire a mitigation expert.

Rhines then returned to the South Dakota state courts and exhausted his unexhausted claims, including these two penalty phase IAC claims, in a successive state habeas proceeding. Based on the evidentiary record from the initial state habeas proceeding, and extensive affidavits and exhibits submitted by the State, the trial court granted the State's motion for summary judgment on the merits of the penalty phase IAC claims. Rhines v. Weber, No. Civ. 02-924, Memorandum Decision (S.D. 7th Jud. Cir. Sept. 17, 2012). Judge Trimble also ruled that one claim, that counsel presented only "tepid" mitigation evidence at the penalty phase, was raised in the first habeas proceeding, was decided by Judge Tice, and was therefore precluded by res judicata. The Supreme Court of South Dakota denied probable cause to appeal, and the Supreme Court of the United States denied Rhines's petition for certiorari review. Rhines v. Weber, 571 U.S. 1164 (2014). With all claims in Rhines's federal petition now exhausted, the district court lifted the stay. On February 16, 2016, in a 132-page

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Order, the district court granted the State's motion for summary judgment and denied Rhines's First Amended Petition for federal habeas corpus relief.

A. Penalty Phase IAC.

Rhines argues the district court erred in rejecting his claim that trial counsel were ineffective in investigating and presenting mitigating evidence during the penalty phase of trial, and that the state courts' contrary determination, made without an evidentiary hearing, was an unreasonable application of Supreme Court precedent based on unreasonable findings of fact. We review the district court's legal conclusions de novo and its factual findings for clear error. Taylor v. Bowersox, 329 F.3d 963, 968 (8th Cir. 2003). In rejecting this claim, both the state courts and the district court applied the familiar IAC standard of Strickland v. Washington, 466 U.S. 668 (1984). To establish a claim for ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. The defendant must also "show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

To warrant federal habeas relief, Rhines must establish that the state courts' decisions during the state habeas proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of" the Strickland standard; or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). These are deferential standards. In reviewing a state court's application of Strickland under § 2254, "[t]he question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Harrington v. Richter, 562 U.S. 86, 105 (2011). Our review is "limited to the record that was before

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the state court that adjudicated the claim on the merits." Cullen v. Pinholster, 563 U.S. 170, 180 (2011). "To determine whether the decision involved an unreasonable application of clearly established federal law, we review the decision reached in state court proceedings, but not the quality of the reasoning process." Dansby v. Hobbs, 766 F.3d 809, 830 (8th Cir. 2014), cert. denied, 136 S. Ct. 297 (2015).

When a habeas claim has been adjudicated on the merits by the state courts, we review "the last reasoned decision of the state courts." Worthington v. Roper, 631 F.3d 487, 497 (8th Cir.) (quotation omitted), cert. denied, 565 U.S. 1063 (2011). Here, the district court considered three distinct penalty phase IAC claims -- failure to perform an adequate mitigation investigation, presentation of a "tepid" mitigation case at trial, and failure to hire a mitigation expert. The first claim was raised in Rhines's first state habeas petition and exhausted when the Supreme Court of South Dakota summarily affirmed Judge Tice's denial. Rhines, 608 N.W.2d at 313. The second two claims were not exhausted until the Supreme Court of South Dakota denied leave to appeal Judge Trimble's Memorandum Decision granting summary judgment dismissing these claims.

In his September 2012 Decision, Judge Trimble expressly declined to reconsider the earlier rejection of the failure-to-investigate claim on the merits:

> As to the issues already addressed by the Supreme Court and the habeas court, the doctrine of res judicata disallows reconsidering an issue that was actually litigated or that could have been raised and decided in a prior action. Ramos v. Weber, 2000 S.D. 111, 616 N.W.2d 88; SDDS, Inc. v. State, 1997 S.D. 114, ¶ 16, 569 N.W.2d 289, 295 [citation omitted].

Thus, Judge Trimble considered new evidence submitted by Rhines in the successive state habeas proceeding -- principally, a June 2012 Affidavit of Dr. Dewey Ertz, a psychologist whose testing showed results consistent with Attention Deficit

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Hyperactivity Disorder (ADHD) and learning disorders -- only in connection with the unexhausted claims. This ruling significantly affects our consideration of these issues. First, it establishes that "the last reasoned decision of the state courts" on the failure to investigate claim was the Supreme Court of South Dakota's summary affirmance of Judge Tice's decision in October 1998 rejecting this claim on the merits *after a full evidentiary hearing at which all trial attorneys and a defense attorney expert testified live or by deposition*. Second, the Affidavit of Dr. Ertz submitted by Rhines in the successive state habeas proceeding, on which Rhines heavily relies on this appeal, may be considered in deciding the two then-unexhausted claims, but is *not* part of the record on the previously exhausted failure to investigate claim. See 28 U.S.C. § 2254(e)(2); Holland v. Jackson, 542 U.S. 649, 650-53 (2004). Third, Judge Trimble's additional ruling that the tepid-presentation unexhausted claim was barred by res judicata as a matter of South Dakota law is an independent and adequate state ground that bars federal habeas relief on this claim. Coleman v. Thompson, 501 U.S. 722, 729-30 (1991); Hanna v. Ishee, 694 F.3d 596, 613-14 (6th Cir. 2012), cert. denied, 577 U.S. 844 (2013); Franklin v. Luebbers, 494 F.3d 744, 750 (8th Cir. 2007), cert. denied, 553 U.S. 1067 (2008); cf., Foster v. Chatman, 136 S. Ct. 1737, 1746-47 (2016).

1. The Failure To Investigate Claim. Rhines argues that trial counsel were ineffective because they failed to conduct an adequate mental health investigation, failed to provide adequate background information to a retained psychiatrist, failed to follow up on the results of psychological testing, and inadequately investigated Rhines's family background and school and military records. Prior to trial, Rhines was evaluated by Dr. D.J. Kennelly, a psychiatrist, for competency, mental illness, and sanity, and Dr. Bill H. Arbes, a psychologist. Dr. Kennelly found no signs of mental illness, but saw signs of personality deficits. Dr. Arbes's report found that Rhines suffered from general anxiety disorder and schizotypal personality disorder with paranoid, schizoid, or avoidant traits.

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In denying this claim after a full evidentiary hearing, Judge Tice noted: "there were substantial initial efforts made to develop mitigation evidence. Trial counsel used reasonable efforts to do so. There is no evidence to support a belief that any further efforts would have been fruitful." The Supreme Court of South Dakota cryptically affirmed this ruling. But Judge Trimble, laying foundation for considering the unexhausted tepid-presentation claim on an expanded summary judgment record, described trial counsel's investigative efforts in greater detail:

> A review of the record reveals that Rhines' counsel did investigate possible mitigation evidence. They investigated by talking to Rhines, his family and friends, reviewing his military service records, his schooling, employment history, psychiatric and psychological examinations and found that there was very little mitigating evidence to be found or presented. Counsel also looked to Rhines for information. Gilbert asked him to write an autobiography from which he hoped to obtain mitigating information. The information revealed in this autobiography was at best disturbing. Rhines autobiography described his poor performance in school The attached affidavits from his teachers reveal that he was disruptive, defiant and rebellious. The affidavit from Rhines' childhood friend, Kerry Larson, indicates that Larson's testimony would not be favorable to Rhines. He describes Rhines as "intimidating and scary" and knew of Rhines' attempt to blow up the grain elevator. He also said Rhines had a reputation for being a fire starter, and for abusing small animals. He also stated that he witnessed Rhines pouring gasoline on an anthill and setting it on fire in the 6th grade. Furthermore, the other friends that Rhines named in his answers to interrogatories as being helpful in the mitigation case, were interviewed and they did not provide any favorable testimony to support Rhines' allegations.
>
> His military records show that he was jailed and disciplined and Article 15'd on numerous occasions for insubordination, drug use, theft of plastic explosives, and assault with a deadly weapon on a fellow service member. In 1976, Rhines was discharged on less than honorable conditions 4 months before the completion of his enlistment.

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> After leaving the military, Rhines briefly attended college until he burgled a dorm room in 1977. He then obtained employment with an excavating contractor where he was taught to use dynamite. His employment ended when he stole his employer's dynamite and wired a grain elevator to explode. One of his employers became aware of his plan and rushed to the elevator and unwired the dynamite before Rhines could explode it.
>
> Between his release from the penitentiary in 1987 and the 1992 murder, Rhines worked various jobs. He worked at a doughnut shop in Seattle, Washington, until he embezzled approximately $40,000 from the company by forging payroll checks made payable to himself.
>
> * * * * *
>
> [Trial counsel] Gilbert further explained in his affidavit that Rhines' sisters were emphatic that their elderly mother could not take the stand or assist in his defense. Gilbert stated that the defense team met with Dr. D.J. Kennelly, a psychiatrist and that he did not recognize anything in his report as being useful as mitigation evidence. Dr. Kennelly consulted with Dr. Bill H. Arbes, a psychologist, and no useful evidence was gleaned from his report, either. Gilbert stated that he discussed having Rhines giv[e] his own allocution but it was determined that Rhines' allocution would not be convincing. He further stated that Rhines agreed that his allocution would not be effective.

Based largely on Dr. Ertz's report, which we may not consider on this issue, Rhines argues that trial counsel "bungled" the mental health investigation and "never conducted a thorough investigation of Mr. Rhines's background and history." But "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. Here, as in Burger v. Kemp, 483 U.S. 776 (1987), we agree with the state courts and the district court "that there was a reasonable basis for [counsel's] strategic decision that an explanation of petitioner's

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history would not have minimized the risk of the death penalty. Having made this judgment, he reasonably determined that he need not undertake further investigation [of Rhines's past]." Id. at 795. As Judge Tice noted in denying this claim, "There is no evidence [in the initial state habeas record] to support a belief that any further efforts would have been fruitful." "[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." Rompilla v. Beard, 545 U.S. 374, 383 (2005).

2. The Tepid Presentation Claim. At sentencing, defense counsel called only two mitigation witnesses, Rhines's sisters, who testified that Rhines suffered from social, emotional, and learning difficulties as a child and teen. Rhines argues counsel provided ineffective assistance by failing to present testimony by Dr. Arbes to show Rhines suffered from a serious psychological disorder. As discussed, this issue is procedurally barred by the state court's res judicata decision. We also agree with the district court that the claim fails on the merits. To illustrate, we quote only a small portion of Judge Trimble's thorough discussion of this issue:

> Rhines' trial counsels' mitigation strategy was predicated on two monumental defense victories: 1) a pretrial order in limine excluding Rhines' two prior felony convictions for burglary and armed robbery with a sawed off shotgun; and 2) a pretrial order in limine prohibiting the state from presenting evidence concerning non-statutory aggravating factors.
>
> * * * * *
>
> [Quoting from trial counsel's testimony at the initial habeas hearing] So . . . who we ended up presenting as mitigation witnesses were his two sisters who were both adults, and they talked about him, what they remembered from his childhood and the contacts . . . they had with him more recently. . . . I saw us as being really boxed in . . . to how much about his life we could present without opening up the fact that . . . he had spent a good part of . . . his adult life in prison.

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> [D]ue to strategic reasons such as the fear of opening the door to allow evidence of Rhines past criminal history and other aggravating evidence which counsel has successfully moved *in limine* to exclude, a delicate line had to be walked in the presentation of any evidence at this phase of the trial.

* * * * *

> The record is replete with evidence supporting the theory that the presentation of the evidence at the penalty phase was due to strategic planning and an effort to minimize the potential "bad" evidence that the State could have introduced to rebut Rhines' efforts to put in mitigating evidence.

Numerous cases confirm that the state court's analysis was not an unreasonable application of Strickland under the governing deferential standard -- "whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Harrington, 562 U.S. at 105; see Darden v. Wainwright, 477 U.S. 168, 185-87 (1986); Strickland, 466 U.S. at 699; Fretwell v. Norris, 133 F.3d 621, 627-28 (8th Cir.), cert. denied, 525 U.S. 846 (1998); Sidebottom v. Delo, 46 F.3d 744, 754 (8th Cir.), cert. denied, 516 U.S. 849 (1995). Rhines cites no contrary, factually indistinguishable Supreme Court or Eighth Circuit precedent.

3. Failure To Hire a Mitigation Expert. Judge Trimble rejected this initially unexhausted claim because the investigative function of a mitigation expert was performed by Rhines's trial counsel, and a retained expert "would have interviewed the same friends, family, teachers, employers and reviewed the same records including the autobiography of Rhines, as his attorneys did." The district court concluded that a reasonable argument supports this analysis "given the extensive investigation that had already taken place." We agree.

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As we agree with the district court that the state courts did not unreasonably apply Strickland in concluding that trial counsels' penalty phase efforts were not constitutionally deficient, we need not address whether the state courts unreasonably concluded there was no Strickland prejudice.

B. Denial of Rhines's Motion to Amend.

Fifteen months after the district court lifted its stay in February 2014, Rhines filed a motion for an additional "minimum" 180-day stay to investigate new, unexhausted claims of penalty phase IAC and for permission to file a second amended federal habeas petition. The district court denied Rhines this untimely "opportunity for his current counsel to comb through the record and look for additional ineffective assistance of trial counsel claims overlooked not only by [his state post-conviction attorney] but also by each of [his prior] federal habeas attorneys." Rhines v. Young, Order Denying Motion for Abeyance at 14 (Aug. 5, 2015). Rhines moved to reconsider and for leave to amend his First Amended Petition, submitting findings and conclusions by three new experts. Specifically, he sought to amend his petition to include claims that his "trial counsel were ineffective for failing to investigate, develop, and present: (1) evidence of his childhood exposure to environmental toxins; (2) evidence of his brain damage; and (3) evidence of his military service and resulting trauma." On appeal, he argues this evidence "fundamentally alters" his penalty phase IAC claims and renders them unexhausted.

The district court denied this motion because the contention was contrary to the holding in Pinholster that federal habeas review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. 563 U.S. at 180-82. On appeal, Rhines argues the district court erred in denying his motion to amend and preventing him from investigating and presenting new and unexhausted claims of penalty phase trial counsel IAC. We review the denial of a

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motion to amend for abuse of discretion. Moore-El v. Luebbers, 446 F.3d 890, 901 (8th Cir. 2006) (standard of review).

Rhines argues these new, unexhausted claims of trial counsel IAC are not procedurally barred because his first state habeas counsel was ineffective in failing to conduct an independent review of trial counsel's performance under Martinez v. Ryan, 566 U.S. 1, 13-14 (2012). But this case is governed by the "mixed petition" stay-and-abeyance principles established by the Supreme Court in Rhines:

> A mixed petition should not be stayed indefinitely. . . . [N]ot all petitioners have an incentive to obtain federal relief as quickly as possible. In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death. . . . Thus, district courts should place reasonable time limits on a petitioner's trip to state court and back. . . . And if a petitioner engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay at all.

544 U.S. at 277-78. In response to this mandate, the district court identified unexhausted claims that were "potentially meritorious" and granted a stay "pending exhaustion of [those claims]." Rhines then returned to state court and submitted new evidence supporting the unexhausted claims -- principally the report of Dr. Ertz.

Now, *years* later, based on alleged ineffectiveness of prior federal habeas counsel, new attorneys request a new, unlimited stay to pursue new, unexhausted claims of trial counsel penalty phase IAC supported by new experts. This request is squarely at odds with the Supreme Court's definition in Rhines of the "limited circumstances" in which stay and abeyance of a mixed petition promotes exhaustion of state remedies without frustrating AEDPA's goal of finality. A habeas petitioner granted a limited stay to exhaust state post-conviction remedies who returns to federal court and requests another stay to exhaust additional claims is deliberately engaging in dilatory tactics and intentional delay that are completely at odds with AEDPA's

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purpose to "reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." Rhines, 544 U.S. at 276. Moreover, in this case, Judge Trimble's opinion confirms that the new claims would be procedurally barred under South Dakota law; therefore, further exhaustion would be futile. See Ashker v. Leapley, 5 F.3d 1178, 1180 (8th Cir. 1993).

We also conclude that the district court properly determined that the "new" claims Rhines seeks to raise in a second amended petition would be precluded by Pinholster. Rhines raised now-exhausted penalty phase IAC claims that were rejected by the South Dakota courts on the merits. The "new" claims Rhines identifies are no more than variations on the penalty phase IAC claims already presented in state court. They "merely provide[] additional evidentiary support for his claim that was already presented and adjudicated in the state court proceedings. Thus, Martinez is inapplicable." Escamilla v. Stephens, 749 F.3d 380, 395 (5th Cir. 2014).

For these reasons, the district court did not abuse its discretion in denying Rhines's motion to stay the habeas proceedings and file a second amended petition.

C. Victim Impact Testimony.

In 1991, the Supreme Court overruled contrary prior decisions and held that the Eighth Amendment does not bar a State from concluding that "evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." Payne v. Tennessee, 501 U.S. 808, 827 (1991). Rhines murdered Schaeffer in March 1992. Effective July 1, 1992, the South Dakota Death Penalty statute was amended to include as an aggravating or mitigating circumstance, "Testimony regarding the impact of the crime on the victim's family." S.D.C.L. § 23A-27A-1 (1992).

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Relying on Payne, the trial court overruled Rhines's objection and permitted the victim's mother to read a statement concerning the loss of her son during the penalty phase. On direct appeal, Rhines challenged this ruling on many grounds, including a claim that admission of this victim impact evidence violated the Ex Post Facto Clause of the federal Constitution. The Supreme Court of South Dakota rejected this contention because Payne was decided before Rhines's crime, Payne observed that "there is no reason to treat victim impact evidence differently than other relevant evidence is treated," 501 U.S. at 827, and under South Dakota law evidence is admissible if it is relevant and not unfairly prejudicial. Rhines, 548 N.W.2d at 446. The district court concluded that this was not an unreasonable application of clearly established federal law. Rhines argues the district court erred. We disagree.

A criminal or penal law has a prohibited *ex post facto* effect if it is "retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. 24, 29 (1981). Acknowledging that Payne was decided before he murdered Schaeffer, Rhines argues that S.D.C.L. § 23A-27A-1, enacted after his crime, violated the *ex post facto* prohibition because it made "victim impact . . . a new aggravating factor on which the jury could rely as the basis for a death sentence."

This contention is not supported by the record. After admitting the mother's victim impact statement, the trial court instructed the jury:

> You received information on the effect of Donnivan Schaeffer's loss to his family. This is sometimes called victim impact evidence. This information was admitted for your consideration for a limited purpose: so that you may fully appreciate and comprehend the extent of the loss his death caused to his family and loved ones. You may consider it for this purpose only.

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> *You may not consider this victim impact evidence as an aggravating circumstance. Nor may you consider it as detracting in any way from mitigation evidence offered by the Defendant.*

(Emphasis added.) This instruction makes clear that the victim impact evidence was admitted, as the Supreme Court of South Dakota explained, under longstanding, general principles of South Dakota law, not as evidence authorized by a newly-enacted statute and admitted as an aggravating basis for a death sentence. The Court's ruling plainly was not an unreasonable application of clearly established federal law applying the Ex Post Facto Clause.[2]

Rhines further argues the admission of victim impact testimony violated his right to due process. This claim was waived in the district court:

> Mr. Rhines does not argue that the admission of victim impact testimony during the penalty phase violated his rights under the Eighth Amendment. That was no longer the law on the day the murder was committed. Payne. Nor does he argue here that its admission violated South Dakota law. . . .
>
> What Mr. Rhines asserts here is that the admission of aggravation evidence during the penalty phase which would have been inadmissible on the day the murder was committed violates the *Ex Post Facto* Clause of the Constitution . . . .

---

[2]In Nooner v. Norris, 402 F.3d 801, 807 (8th Cir. 2005), we held that an Arkansas victim impact evidence statute did not violate the Ex Post Facto Clause because "victim impact evidence 'does not violate the ex post facto prohibition . . . because it neither changes the quantum of proof nor otherwise subverts the presumption of innocence,'" citing Neill v. Gibson, 278 F.3d 1044, 1053 (10th Cir. 2001). Rhines argues Nooner is distinguishable because it did not involve an aggravating factor statute. As the victim impact evidence in this case was not admitted under S.D.C.L. § 23A-27A-1, we need not consider this issue.

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Petitioner's Response to State's Motion for Summary Judgment at 30, Rhines v. Young, No. Civ-5020-KES (D.S.D. 2014). Moreover, this claim was never raised to the state courts and is therefore procedurally barred. See, e.g., Hall v. Luebbers, 341 F.3d 706, 719-720 (8th Cir. 2003).

D. Life Without Parole Jury Instruction.

During deliberations, the jury sent the trial judge a note:

> In order to award the proper punishment we need a clear p[er]spective of 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 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, 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, You 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.
>
> [Signed by each juror].

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The court proposed a response: "Dear Jurors: I acknowledge your note asking questions about life imprisonment. All the information I can give you is set forth in the jury instructions." Rhines proposed that, in addition to the court's proposal, the response also state: "You are further instructed, however, that you may not base your decision on speculation or guesswork." The court rejected Rhines's proposal and submitted the response it initially proposed. On direct appeal, the Supreme Court of South Dakota rejected Rhines's contention that the trial court abused its discretion in refusing to give the proposed additional instruction. Rhines, 548 N.W.2d at 454.

In the state habeas proceeding, Rhines argued that failure "to raise in the direct appeal, the failure of the trial court to specifically answer the jury's question on prison life" was ineffective assistance of appellate counsel, basing this contention on Simmons v. South Carolina, 512 U.S. 154 (1994). In rejecting this contention, the Supreme Court of South Dakota explained that appellate counsel was not ineffective in failing to make a due process argument because Simmons is distinguishable. In Simmons, after the prosecution put the defendant's future dangerousness in issue, the Supreme Court held that "due process requires that the sentencing jury be informed that the defendant is parole ineligible." Rhines, 608 N.W.2d at 310, quoting Simmons, 512 U.S. at 156. By contrast, at Rhines's trial, future dangerousness was not expressly put in issue, and "the jury . . . was repeatedly told that life imprisonment meant life without parole, which is exactly what is required by Simmons." Id. at 311. Moreover, because day-to-day correctional decisions are within the discretion of the South Dakota Department of Corrections, if the trial judge had attempted to answer the jury's questions, "he could have said little more than, 'It depends.'" Id. The district court considered this issue at length and concluded that "the South Dakota Supreme Court's decision that Simmons did not apply was not contrary to or an unreasonable application of clearly established federal law."

On appeal, Rhines argues that the Supreme Court of South Dakota's decision was an unreasonable application of clearly established federal law because it ignored

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"the key holding" of Simmons -- that it violates due process to impose the death penalty "on the basis of information which [defendant] had no opportunity to deny or explain." Simmons, 512 U.S. at 161, quoting Gardner v. Florida, 430 U.S. 349, 362 (1977). Though it addresses the Supreme Court of South Dakota's decision to distinguish Simmons, this argument was not made in the state habeas proceedings and may well be procedurally barred. But in any event, it is without merit. The jury's question did not implicate the Simmons/Gardner principle because the jury was told that life imprisonment meant life without parole; thus, the jury did not receive information favorable to the prosecution that Rhines could not deny or explain.

We agree with the district court that the South Dakota Supreme Court's decision rejecting the claim of appellate counsel IAC because Simmons did not apply was not contrary to or an unreasonable application of clearly established federal law.[3]

E. Constitutionally Vague Aggravating Factor.

At the conclusion of the penalty phase, the jury was instructed that it must unanimously find at least one of the statutory aggravating circumstances in S.D.C.L. § 23A-27A-1 beyond a reasonable doubt; otherwise, "the only possible sentence for the Defendant is life imprisonment without parole." The jury found four aggravating circumstances -- the offense was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest; the offense was committed for the purpose of receiving money; the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture; and the offense was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind. § 23A-27A-1(3), (6), (9) (1992).

---

[3]Rhines further argues that the refusal to provide a curative instruction to prevent "rank speculation regarding life imprisonment without parole" violated the Eighth Amendment as construed in Boyde v. California, 494 U.S. 370, 380 (1990). This claim was never raised to the state courts and is therefore procedurally barred.

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On direct appeal, the Supreme Court of South Dakota agreed with Rhines that the depravity-of-mind statutory language is constitutionally overbroad and that the trial court's instructions did not "provide adequate guidance to the sentencer." Rhines, 548 N.W.2d at 449. However, applying the Supreme Court's analysis in Zant v. Stephens, 462 U.S. 862 (1983), the Court concluded that South Dakota's capital sentencing scheme includes all the procedural safeguards emphasized in Zant and therefore, as in Zant, the unconstitutionality of one statutory aggravating factor did not invalidate Rhines's death sentence. Id. 452-53. In denying federal habeas relief, the district court held that the South Dakota Supreme Court's conclusion was not an unreasonable application of clearly established federal law.

On appeal, Rhines argues that the Supreme Court of South Dakota unreasonably applied federal law, because this case is analogous to Stringer v. Black, 503 U.S. 222 (1992), in which the Supreme Court held that a death sentence under Mississippi law was invalid when the jury had been instructed on an unconstitutionally vague aggravating circumstance. Id. at 237. In distinguishing Zant, which reviewed a Georgia death sentence, the Court in Stringer explained:

> With respect to the function of a state reviewing court in determining whether the sentence can be upheld despite the use of an improper aggravating factor, the difference between a weighing State and a nonweighing State is . . . one . . . of critical importance. In a nonweighing State [like Georgia], so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty.

Id. at 231-32. By contrast, under the law of Mississippi, a weighing State, "after a jury has found a defendant guilty of capital murder and found the existence of at least one statutory aggravating factor, it must weigh the aggravating factor or factors against the mitigating evidence." Id. at 229.

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Though the Supreme Court of South Dakota did not cite Stringer, it expressly considered the weighing-nonweighing distinction in concluding that Zant was the controlling federal precedent: "our statutes do not require the jury to weigh aggravating circumstances against mitigating factors, and the jury was not instructed to consider the specific number of aggravating factors in deciding whether to render a death sentence." 548 N.W.2d at 453. The trial court's jury instructions were consistent with this interpretation of the South Dakota statute:

> In your deliberations on whether an aggravating circumstance has been proven beyond a reasonable doubt, do not consider which penalty should be imposed. . . . In the event you find beyond a reasonable doubt one or more aggravating circumstances to exist, then you must determine which of two penalties shall be imposed on the Defendant: Life imprisonment without parole or death.

Citing Brown v. Sanders, 546 U.S. 212 (2006), Rhines argues that the South Dakota statute makes South Dakota a weighing State "because it limited the universe of potential aggravating factors to those that made the defendant eligible for the death penalty." The Court in Brown modified its prior "weighing/nonweighing scheme." Id. at 219. The test in Stringer was the controlling federal law when the Supreme Court of South Dakota ruled on this issue in 1996; therefore, Stringer and Zant control review of the state Court's application of clearly established federal law. Stringer, 503 U.S. at 227. We agree with the district court that the state Court did not unreasonably apply this federal law when it decided that Zant was the controlling precedent for resolving this issue. Moreover, we conclude this is even more clear if the state Court's ultimate decision -- that the unconstitutionality of the depravity-of-mind aggravating circumstance did not invalidate Rhines's death sentence -- is measured against the revised rule adopted in Brown: "An invalidated sentencing factor . . . will render the sentence unconstitutional . . . *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." 546 U.S. at 220. Here, the jury found three valid aggravating

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circumstances that clearly encompassed the facts and circumstances supporting its additional depravity-of-mind finding.

III. Case No. 17-1060.

In Case No. 17-1060, Rhines applies for authorization to file a second or successive habeas petition arguing that "South Dakota's sentencing statute is likely unconstitutional" because, contrary to the U.S. Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016), the statute "does not require that the jury find each fact necessary to impose a death sentence unanimously and beyond a reasonable doubt." See 28 U.S.C. § 2244(b)(3). We deny the Application. Leave to file a second or successive habeas petition may be granted if "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." 28 U.S.C. § 2244(b)(2)(A). "[A] new rule is not 'made retroactive' unless the Supreme Court *holds* it to be retroactive." Goodwin v. Steele, 814 F.3d 901, 904 (8th Cir. 2014), citing Tyler v. Cain, 533 U.S. 656, 663 (2001). The opinion in Hurst made no mention of retroactivity, and no subsequent Supreme Court decision has made Hurst retroactive. Moreover, even if Hurst is retroactive, it does not apply. Hurst held that "a jury, not a judge, [must] find each fact necessary to impose a sentence of death." 136 S. Ct. at 619. Here, the jury instructions and verdict form demonstrate that the jury unanimously found beyond a reasonable doubt three aggravating circumstances, the facts necessary to render Rhines eligible to be sentenced to death, and sentenced Rhines to death. The trial judge was required to impose the sentence recommended by the jury. S.D.C.L. § 23A-27A-4 (1979).

In Case No. 16-3360, the judgment of the district court is affirmed. In Case No. 17-1060, we deny the Application To File Second or Successive Petition.

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Seventh Judicial Circuit Court

P.O. Box 230
Rapid City SD 57709-0230
(605) 394-2571

CIRCUIT JUDGES
Craig A. Pfeifle, Presiding Judge
Matthew M. Brown
Jeffrey R. Connolly
Jeff W. Davis
Robert Gusinsky
Heidi L. Linngren
Robert A. Mandel
Jane Wipf Pfeifle

MAGISTRATE JUDGES
Scott M. Bogue
Todd J. Hyronimus
Bernard Schuchmann
Marya Tellinghuisen

COURT ADMINISTRATOR
Kristi W. Erdman

STAFF ATTORNEY
Laura Hilt

October 24, 2017

Mr. Jason Tupman
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
200 W. 10th Street, Suite 200
Sioux Falls, SD 57104

Mr. Paul Swedlund
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501

Re: Case no. 51C93-000081A0

Dear Counsel:

The Court is in receipt of submissions from both parties regarding Defendant's Motion for Expert Access (filed 6/9/17) for the purposes of a clemency application. Defendant, Charles Rhines, requests permission to be evaluated by two mental health experts.[1] In support of the Motion, Defendant (1) sets forth a due process argument and (2) requests that the Court exercise discretionary authority under SDCL 23A-27A-31.1. The State opposes Defendant's request. For the reasons that follow, the Motion is denied.

[1] Counsel for Defendant states that "Mr. Rhines is not seeking funding from this Court. His federal counsel are representing him pursuant to appointments by the federal district court. This motion seeks only access for the experts already retained by his counsel." Petitioner's Reply Memorandum in Support of Motion for Expert Access, p. 1 n. 1 (filed 6/23/17).

1. Due Process

Defendant "maintains that he has a due process right to expert assistance to investigate his clemency petition." Petitioner's Reply Memorandum in Support of Motion for Expert Access, p. 3 (filed 6/23/17). In the case of *Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998), the United States Supreme Court discussed due process in the context of clemency proceedings. The Eighth Circuit Court of Appeals summarizes the opinion as follows:

> In *Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998), the Supreme Court addressed the application of the Due Process Clause to state clemency proceedings. A splintered Court rejected a claim that Ohio's clemency proceedings violated an inmate's constitutional right to due process. A plurality of four Justices emphasized that a request for clemency "is simply a unilateral hope," *id.* at 282, 118 S.Ct. 1244 (opinion of Rehnquist, C.J.) (internal quotation omitted), and suggested that the Due Process Clause has no application to the discretionary clemency process. A concurring opinion of four Justices concluded that "some *minimal* procedural safeguards apply to clemency proceedings," *id.* at 289, 118 S.Ct. 1244 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis in original), but rejected the inmate's challenge to Ohio's procedures. Justice O'Connor wrote that "[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* A separate opinion of Justice Stevens agreed with Justice O'Connor that some minimal procedural safeguards apply. *Id.* at 290–91, 118 S.Ct. 1244 (Stevens, J., concurring in part and dissenting in part).

Winfield v. Steele, 755 F.3d 629, 630–31 (8th Cir. 2014). After summarizing the *Woodward* opinion, the *Winfield* court went on to indicate that in the context of clemency proceedings there might exist some minimal procedural safeguards under the Due Process Clause. *Winfield,* 755 F.3d at 630 ("Whatever *minimal* procedural safeguards might be guaranteed by the Due Process Clause in a clemency proceeding are likely satisfied here.") In *Noel v. Norris,* 336 F.3d 648 (8th Cir. 2003), the Eighth Circuit addressed whether due process was violated when a request to undergo a particular kind of brain-scan procedure in connection with a clemency application was denied:

> Because clemency is extended mainly as a matter of grace, and the power to grant it is vested in the executive prerogative, it is a rare case that presents a successful due process challenge to clemency procedures themselves. *See Ohio Adult Parole Auth. v. Woodard,* 523 U.S. 272, 280–81, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998). On the other hand, 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. *See Young v. Hayes,* 218 F.3d 850, 853 (8th Cir.2000).

> Mr. Noel's claim seems to be a kind of amalgam. He asserts that state officials did not give him enough time to prepare for his clemency hearing and that the state would not allow him to undergo a particular kind of brain-scan procedure to prove his assertion that his brain damage ought to be considered on the question of whether he deserved clemency.
>
> We think that Mr. Noel's claim must be rejected. He presented a four-hundred page record to the state authority charged with making recommendations concerning clemency, and that authority denied his request. The materials that he presented included some evidence, though not the particular evidence that Mr. Noel sought to produce, of his brain damage. He does not claim that he was prevented from presenting any other kind of evidence. In the circumstances, we cannot say that the process was so arbitrary as to be unconstitutional or that the state prohibited Mr. Noel from using the procedure that it had established.

Noel, 336 F.3d at 649. Similar to the defendant in *Noel*, Mr. Rhines would like to undergo medical evaluation in connection with a clemency application and has access to some evidence regarding mental health, though not the particular evidence he is requesting.[2] Based on *Noel*, this Court concludes that access to the mental health professionals is not required under "[w]hatever *minimal* procedural safeguards might be guaranteed by the Due Process Clause in a clemency proceeding. . . ." *Winfield*, 755 F.3d at 631.

2. SDCL 23A-27A-31.1

Defendant asks the Court to exercise discretionary authority under SDCL 23A-27A-31.1 to grant the requested access to mental health experts. Petitioner's Reply Memorandum in Support of Motion for Expert Access, p. 2 (filed 6/23/17). SDCL 23A-27A-31.1 states as follows:

> From the time of delivery to the penitentiary until the infliction of the punishment of death upon the defendant, unless lawfully discharged from such imprisonment, the defendant shall be segregated from other inmates at the penitentiary. No other person may be allowed access to the defendant without an order of the trial court except penitentiary staff, Department of Corrections staff, the defendant's counsel, members of the clergy if requested by the defendant, and members of the defendant's family. Members of the clergy and members of the defendant's family are subject to approval by the warden before being allowed access to the defendant.

In support of the request for expert access, Defendant's counsel indicates concern for Defendant's current mental health:

> His current counsel have serious and substantial questions related to Mr. Rhines's mental health and condition, and the review of prior records and reports has not

[2] Defendant has previously been evaluated by mental health professionals in connection with court proceedings in both state and federal court. Response to Motion for Expert Access, Exhibits 1-8 (filed 6/15/2017).

resolved these questions. Granting defense mental health experts access to visit and evaluate Mr. Rhines will allow counsel to look into, and possibly rule out, counsel's mental health concerns. This will enable counsel to prepare for and advise Mr. Rhines on a range of issues, including, but not limited to, a potential application for executive clemency, should such an application be warranted.

Motion for Expert Access p. 2 (filed 6/9/17). Ultimately, under South Dakota law a defendant must not to be put to death if found mentally incompetent to be executed, and the legislature has provided a statutory procedure to be used when counsel has concerns regarding a defendant's mental competency in this regard. SDCL 23A-27A-22 to 23A-27A-26. Consequently, since counsel for Defendant may utilize the procedure provided by statute to address concerns regarding Mr. Rhines' current mental health, the Court declines to grant the Motion under SDCL 23A-27A-31.1.

ORDER

Accordingly, the Motion for Expert Access is hereby DENIED.

Dated this 24 day of October, 2017

BY THE COURT:

Robert A. Mandel
Circuit Court Judge

ATTEST:

Ranae Truman
Clerk of Courts

By: Deputy

[SEAL]

Pennington County, SD
FILED
IN CIRCUIT COURT
OCT 24 2017
Ranae Truman, Clerk of Courts
By Deputy

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, 2018.
Clerk of Supreme Court
Deputy

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
JAN - 2 2018
Clerk

STATE OF SOUTH DAKOTA, **Plaintiff and Appellee,** **vs.** **CHARLES RUSSELL RHINES,** **Defendant and Appellant.**	**ORDER DISMISSING APPEAL** **#28460**

Appellee having served and filed a motion to dismiss the appeal taken in the above-entitled matter, and appellant having served and filed a response thereto, and appellee having served and filed a reply in support of motion to dismiss appeal, and the Court having considered the motion, response and reply, now, therefore, it is

ORDERED that the appeal be and it is hereby dismissed.

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.

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

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

CHARLES RUSSELL RHINES,	)	
	)	**CIV. 00-5020-KES**
Petitioner,	)	
v.	)	**PETITIONER'S NOTICE OF APPEAL**
	)	
DARIN YOUNG, Warden,	)	
South Dakota State Penitentiary,	)	
	)	
Respondent.	)	

Notice is hereby given that Charles Russell Rhines, petitioner in the above-captioned matter hereby appeals to the United States Court of Appeals for the Eighth Circuit from the District Court's Order Denying Motion for Leave to Amend, Denying Motion for Relief from Judgment, and Denying Motion for Expert Access (Doc. 399) entered on May 25, 2018, denying Mr. Rhines's motion for leave to amend his federal habeas corpus petition or, in the alternative, motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(6) (*see* Doc. 383) and motion for expert access (*see* Doc. 394), and any and all parts of the specifically listed order.

Dated this 21st day of June, 2018.

Respectfully submitted,

/s/ Claudia Van Wyk
CLAUDIA VAN WYK
PA Bar # 95130
Assistant Federal Defender
Federal Community Defender Office
Capital Habeas Unit
601 Walnut Street, Suite 545W
Philadelphia, PA 19106
Telephone (215) 928-0520
Facsimile (215) 928-0826
Claudia_Vanwyk@fd.org

NEIL FULTON, Federal Public Defender
Federal Public Defender
By:
Jason J. Tupman, Assistant Federal Defender
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
200 W. 10th Street, Suite 200
Sioux Falls SD 57104
Telephone: (605) 330-4489
Facsimile: (605) 330-4499
Filinguser_SDND@fd.org

Attorneys for Petitioner Charles Russell Rhines

CERTIFICATE OF SERVICE

This will certify that, on June 21, 2018, 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:

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

/s/ Claudia Van Wyk
Claudia Van Wyk

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: 16-3360

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

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 01, 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. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	))))))))))	Civ. 00-5020-KES ORDER APPOINTING COUNSEL

Roberto A. Lange has withdrawn as attorney of record from this case. It is hereby

ORDERED that the Federal Public Defender's Office for the District of South Dakota is appointed as co-counsel to represent petitioner together with lead counsel Charles M. Rogers.

Dated December 10, 2009.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
CHIEF 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 APPOINTING COUNSEL

The court previously granted the motion to withdraw by attorney Carol R. Camp. Assistant Federal Public Defender Jason J. Tupman moves the court to appoint additional counsel to represent petitioner. Respondent objects. It is

ORDERED that petitioner's motion (Docket 352) is granted. The Federal Community Defender for the Eastern District of Pennsylvania is appointed as co-counsel to represent petitioner together with lead counsel the Federal Public Defender's Office for the District of South Dakota.

Dated July 29, 2016.

BY THE COURT:

/s/ *Karen E. Schreier*

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

April 15, 2019

Clerk
United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 S. 10th Street, Room 24.329
St. Louis, MO 63102-1125

Re: Charles Russell Rhines
v. Darin Young, Warden
No. 18-8029
(Your No. 18-2376)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The motion of Law Professors for leave to file a brief as *amici curiae* is granted. The motion of NAACP Legal Defense & Educational Fund, Inc. for leave to file a brief as *amicus curiae* is granted. The motion of American Civil Liberties Union, et al. for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

MEMORANDUM

TO: Mr. Matthew W. Thelen

FROM: Michael E. Gans, Clerk of Court

DATE: April 17, 2019

RE: 18-2376 Charles Rhines v. Darin Young

District Court/Agency Case Number(s): 5:00-cv-05020-KES

Enclosed is a letter received from the United States Supreme Court stating that an order has been filed denying certiorari in the above case.

JMM

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

April 15, 2019

Clerk
United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 S. 10th Street, Room 24.329
St. Louis, MO 63102-1125

Re: Charles Russell Rhines
v. Darin Young, Warden
No. 18-8030
(Your No. 16-3360, 17-1060)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

MEMORANDUM

TO: Mr. Matthew W. Thelen

FROM: Michael E. Gans, Clerk of Court

DATE: April 18, 2019

RE: 16-3360 Charles Rhines v. Darin Young
17-1060 Charles Rhines v. Darin Young

District Court/Agency Case Number(s): 5:00-cv-05020-KES

Enclosed is a letter received from the United States Supreme Court stating that an order has been filed denying certiorari in the above case.

MDS

STATE OF SOUTH DAKOTA
BOARD OF PARDONS AND PAROLES

NOTICE OF PAROLE HEARING RESULTS

Name: RHINES, CHARLES **ID:** 15036 **Location:** JPA [UNIT A-ADSEG4-58]

Board Member Present: KEVIN KRULL

PATRICIA WHITE HORSE CARDA

Hearing Date

12-DEC-18

Decision

Deny

Hearing Type

Commutation-Paper Review Hearing

Next Review Date

Details

Your request for commutation has been denied.

Reasons

For All Inmates: This document does not constitute the basis for an appeal.

*FOR Inmates Denied Discretionary Parole: When parole is denied under SDCL 24-15-8 or 24-15A-41, the denial is not a contested case and is therefore not subject to appeal. Based upon the precedent of Bergee v. SD Bd. of Pardons and Paroles, 2000 SD 35, denial or discretionary parole is not an appealable order. According to SDCL 24-15-8 and 24-15A-41, **"Neither this section or its application may be the basis for establishing a constitutionally protected liberty, property, or due process interest in any prisoner."***

Date Printed: December 13, 2018

FEDERAL COMMUNITY DEFENDER OFFICE
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Capital Habeas Unit

FEDERAL COURT DIVISION - DEFENDER ASSOCIATION OF PHILADELPHIA

SUITE 545 WEST -- THE CURTIS CENTER
601 WALNUT STREET
PHILADELPHIA, PA 19106

LEIGH M. SKIPPER
CHIEF FEDERAL DEFENDER

PHONE NUMBER (215) 928-0520
FAX NUMBER (215) 928-0826
FAX NUMBER (215) 928-3508

HELEN A. MARINO
FIRST ASSISTANT FEDERAL DEFENDER

November 9, 2018

Governor Dennis Daugaard
Office of the Governor
500 East Capitol Avenue
Pierre, S.D. 57501

VIA FEDEX

RE: Charles Rhines
Clemency Application
Capital Case

Dear Governor Daugaard,

Today, Mr. Rhines mailed his clemency application to the South Dakota Board of Pardons and Paroles. I have enclosed a courtesy copy of the application for your review.

The application includes: Mr. Rhines's application for executive commutation; a counseled petition for executive clemency; and supplemental materials in support of the petition.

Please contact me or my colleague, Claudia Van Wyk, at (215) 928-0520 if you have any questions or concerns. Thank you for your kind consideration in this matter.

Sincerely,

_____

Stuart B. Lev
Federal Community Defender for the
Eastern District of Pennsylvania
Suite 545 West, The Curtis Center
Philadelphia, PA 19106
215-928-0520
stuart_lev@fd.org

STATE OF SOUTH DAKOTA COUNTY OF PENNINGTON	ss.	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, *Plaintiff,* v. **CHARLES RUSSELL RHINES,** DOB 07/11/56 SD State Penitentiary Sioux Falls, SD 57117 *Defendant.*		51C93000081AO WARRANT OF EXECUTION

TO: DARIN YOUNG, WARDEN, SOUTH DAKOTA STATE PENITENTIARY

THIS COURT, on the 29th day of January 1993, having entered a Judgment of Conviction and Sentence ordering that Charles Russell Rhines be put to death by lethal injection for the crime of First-Degree Murder.

YOU, or your designee, are hereby commanded to impose said punishment of death on Charles Russell Rhines according to the form and in the manner prescribed by the laws of the State of South Dakota, namely SDCL 23A-27A *et seq.*, which sentence shall be imposed on Charles Russell Rhines between the hours of 12:01 a.m. and 11:59 p.m. during the week of Sunday, November 3, 2019, and Saturday, November 9, 2019, inclusive at a specific time and date to be selected at your discretion.

Upon the completion of said sentence of death, you shall cause to be filed with the Clerk of Courts of Pennington County your certificate and return setting forth the time, date, place and manner of execution, and that

defendant Charles Russell Rhines was then and there executed in conformity with the judgment of this Court and the requirements of law.

Dated this 25 day of June 2019.

BY THE COURT:

The Honorable Robert A. Mandel
Circuit Court Judge

ATTEST:
RANAE TRUMAN, CLERK

By: Jackie Moment
Deputy Clerk

SEAL

Pennington County, SD
FILED
IN CIRCUIT COURT
JUN 25 2019
Ranae Truman, Clerk of Courts
By _____ Deputy

State of South Dakota } Seventh Judicial
County of Pennington } Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this
JUN 25 2019
RANAE L. TRUMAN
Clerk of Courts, Pennington County
By _____ Deputy