Nos. 19-6477/19A-482

In The

Supreme Court of the United States

OCTOBER TERM 2019

CHARLES RUSSELL RHINES,

Petitioner

v.

DARIN YOUNG, Warden, South Dakota State Penitentiary,

Respondent

On Petition For A Writ Of Certiorari
To The United States Court of Appeals For The 8th Circuit

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

JASON R. RAVNSBORG, South Dakota Attorney General
SHERRI M. WALD, Deputy Attorney General
PAUL S. SWEDLUND, Assistant Attorney General
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: 605-773-3215
Facsimile: 605-773-4106
paul.swedlund@state.sd.us

Attorneys for Respondent Young

CAPITAL CASE – EXECUTION SET FOR NOVEMBER 4, 2019, AT 1:30 P.M.

QUESTIONS PRESENTED

Did the district err in finding that it had no jurisdiction to order the state penitentiary to open its gates to allow Rhines' experts to examine him for clemency purposes?

While Rhines frames the question as whether the circuit court imposed an additional exhaustion requirement, this is a straw argument because Rhines cannot demonstrate that but for this "added requirement" he would have been entitled to relief under 18 U.S.C. § 3599.

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STATEMENT OF THE CASE

Charles Russell Rhines killed Donnivan Schaeffer in March of 1992 while burglarizing a Rapid City doughnut shop. *Charles Russell Rhines v. South Dakota Dep't. of Corrections*, 2019 SD 59, ¶ 2. A jury convicted Rhines of first-degree murder and recommended a sentence of death. The circuit court imposed the death sentence and issued a warrant of execution. The South Dakota Supreme Court affirmed the conviction and sentence. *Rhines,* 2019 SD 59, citing *State v. Rhines*, 1996 S.D. 55, 548 N.W.2d 415. This Court denied Rhines' request for a writ of *certiorari. Rhines*, 2019 SD 59 at ¶ 2, citing *Rhines v. South Dakota*, 519 U.S. 1013 (1996).

In the twenty-three years that have followed, Rhines has pursued collateral review of his conviction and sentence in state and federal courts. *Rhines*, 2019 SD 59 at ¶ 3. Rhines' *habeas corpus* litigation came to a conclusion on April 15, 2019, with this Court's denials of *certiorari* in 18-8029 and 18-8030. The state criminal trial court issued a new warrant setting Rhines' execution for the week of November 3-9, 2019. *Rhines*, 2019 SD 59 at ¶ 8.

In December of 2018, Rhines' petitioned for clemency on spurious claims that he is afflicted with autism, PTSD and/or a "cognitive processing deficit" brought on (allegedly) by exposure to neurotoxins in the air and/or water supply of his boyhood hometown of McLaughlin, South Dakota. The South Dakota Board of Pardons and Paroles denied the petition on December 12, 2018. CLEMENCY DENIAL, Appendix 001. Pursuant to state law, Rhines must wait

one year before he can refile for clemency. SDCL 24-15-10. Rhines is not currently eligible to apply for clemency under state law.

Prior to filing his clemency petition, Rhines had filed motions in the state *habeas corpus* and criminal courts and the federal *habeas corpus* court for an order compelling the South Dakota Department of Corrections to allow him to be examined by certain "experts" to develop his tin-foil hat autism/PTSD/CPD theories for his clemency petition. The state courts denied Rhines' motions and Rhines' appeal from the federal *habeas corpus* court's denial of the same motion is the subject of this petition. *Rhines v. Young,* 2019 WL 5485274 (8th Cir. 2019).

SUMMARY OF ARGUMENT

Neither the district or circuit courts had jurisdiction to entertain or rule on Rhines' motion for expert access. Rhines' demand for expert access was not in furtherance of his *habeas corpus* claims but rather was for clemency purposes. The district court's jurisdiction was limited to the *habeas corpus* claims in Rhines' petition. Rhines' motion for expert access was a *de facto* challenge to the conditions of his confinement, which is not a proper subject of *habeas corpus* proceedings. Thus, Rhines' reliance on *Ayestas v. Davis,* 138 S.Ct. 1080 (2018), is misplaced because due process affords a district court greater power to enjoin state agencies to comply with its orders in regards to experts.

Rhines had no due process right to expert access for clemency purposes. State clemency is a distinctly executive prerogative that historically has not been the province of federal courts. Since state-law provides no mechanism for

the type of access and evaluation demanded by Rhines, and there being no due process or pre-emptive basis for the type of access Rhines demanded, he could not invoke federal law to achieve what state law does not allow.

ARGUMENT

Rhines appeals from the district court's and circuit court's denials of his request for an order requiring the South Dakota State Penitentiary to allow Rhines to be neurologically evaluated for the ostensible purpose of preparing a petition for gubernatorial clemency. *Rhines,* 2019 WL 5485274. The district and circuit courts erred in exercising jurisdiction over the matter but not in denying Rhines' motion.

A. Rhines Has Not Made A Clear Showing Of A Legal Or Equitable Basis For A Stay Of His Execution

Recently, in *Bucklew v. Precythe,* 139 S.Ct. 1112, 1134 (2019), this Court condemned the practice of reflexively entering stays of execution. Stays of execution "should be the extreme exception, not the norm." *Bucklew,* 139 S.Ct. at 1134. Per *Bucklew,* no stay should be entered for lawsuits that attack settled precedent, which rest on speculative theories, which lack sufficient substance to survive summary judgment and which could have been brought sooner. *Bucklew,* 139 S.Ct. at 1134.

Bucklew reaffirmed the longstanding principle that the mere fact that an inmate has filed a 42 U.S.C. § 1983 claim – even a potentially meritorious one – "does not warrant the entry of a stay as a matter of right." *Nelson v. Campbell,* 541 U.S. 637, 649 (2004); *McFarland v. Scott,* 512 U.S. 849, 858 (filing for post-

conviction relief "by no means grants capital defendants a right to an automatic stay of execution"). "[I]f a dilatory capital defendant inexcusably ignores [the] opportunity [to bring a claim earlier] and flouts the available processes, a . . . court presumably would not abuse its discretion in denying a stay of execution." *McFarland,* 512 U.S. at 858. Per *Bucklew* and *Nelson,* no stay is warranted in this matter:

a. Rhines' appeal attacks settled precedent of *Ohio Adult Parole Auth. v. Woodard,* 523 U.S. 272 (1998).

b. The subject petition rests on the erroneous factual premise that Rhines suffers from a neurological deficit of significant magnitude to mitigate his death sentence, but which was overlooked by all the other doctors who have been involved in Rhines' case (Kennelly, Arbes, Ertz, Franks, Schacht). This is sheer speculation that was effectively rejected by the circuit court's denial of Rhines' *Martinez* and ineffective mitigation investigation claims. *Rhines v. Young,* 899 F.3d 482, 492, 495 (2018)("[t]here is no evidence . . . to support a belief that any further [mental health mitigation investigation] efforts would have been fruitful;" Rhines' *Martinez* claims were "no more than variations on the penalty phase" ineffective mitigation investigation claims).

c. The erroneous legal premise of the subject petition and request for stay is that the district court's powers under 18 U.S.C. § 3599 are co-extensive in the *habeas corpus* and clemency contexts. They are not, so the analogy he draws to *Ayestas v. Davis,* 138 S.Ct. 1080 (2018), is inapposite. The further flaw

underlying the subject petition is the straw argument that but for the "added" exhaustion requirement, 18 U.S.C. § 3599 would have afforded Rhines relief. Since Rhines cannot prove any right to the 18 U.S.C. § 3599 relief he demands, the "added" exhaustion requirement is a straw argument.

d. Rhines' arguments for expert access were not sufficient to withstand summary disposition in the district court.

e. Rhines was dilatory in seeking expert access. He could have sought expert access to develop his *Martinez* claim as early as 2012 when this Court decided the case. He did not. He could have appealed the district court's denial of his *first* motion for expert access in 2016. *Rhines v. Young,* 5:00-CV-05020-KES (D.Ct.S.D.) (Docket 334, 357). He did not. Instead, Rhines waited until 2018 to take a separate appeal from the district court's denial of his *second* motion for expert access. Rhines' failure to appeal the 2016 denial of his *first* motion for expert access at the same time that he appealed the denial of his *habeas corpus* petition demonstrates how this appeal is a calculated "tool to interpose unjustified delay." *Bucklew,* 139 S.Ct. at 1134.

There is no legal or equitable basis for a stay in this case.

B. Reasons To Deny The Petition

A petition for writ of *certiorari* will be granted only for compelling reasons. S.Ct.Rule 10. Rhines fails to demonstrate that his petition meets the considerations governing *certiorari* review. He does not identify a split among the circuit courts on the same important matter, nor does it appear that any

such split exists. He argues that the circuit court impermissibly added an exhaustion prerequisite for 18 U.S.C. § 3599 applicants that does not exist in the statute. No other circuit court has reached this question let alone arrived at a contrary conclusion. This Court should not depart from its "ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals. See this Court's Rule 10." *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 139 S.Ct. 1780, 1782 (denying certiorari on question addressed by only one circuit court.)

Nor has Rhines identified an important question of federal law that this Court needs to settle. A circuit court's "interpretation of § 3599," and the statute's operation in the clemency context, are not burning questions of federal law when, as here, Rhines was allocated funds to, and did hire, experts to investigate Rhines' alleged neurological deficits.

C. Jurisdiction

Rhines forfeited his right to see doctors of his choosing when he killed Donnivan Schaeffer. Rhines is now a ward of the South Dakota Department of Corrections (DOC) and the rules of that agency do not allow inmates access to elective medical care or evaluation.

State administrative rules allow inmates access only to medically necessary care administered by DOC medical personnel or outside personnel under contract to the DOC, *i.e.* an oncologist at Avera for an inmate with cancer. DOC RULE 1.4.E.2, Appendix at 001. Even if Rhines has a neurological deficit,

it is too subtle for its treatment to qualify as medically necessary. And even if it were not too subtle, evaluation and treatment could only be rendered by a neurologist under contract to the DOC, not some PFCDO gun for hire. DOC RULE 1.4.E.2.III, Appendix at 001.

Under state law, access to death row inmates is governed by SDCL 23A-27A-31.1. By statute, the only persons who may access a death row inmate are penitentiary and Department of Corrections staff, defendant's counsel, clergy and certain members of the inmate's family.

The only statutory provision for psychiatric examination of a death row inmate under state law is SDCL 23A-27A-22.1. Such examination is only allowed if a defendant makes "a substantial threshold showing of incompetence to be executed." Where, as here, a defendant has previously been determined to be competent, SDCL 23A-27A-22.1 further requires "a *prima facie* showing of a substantial change in circumstances raising a significant question of the defendant's competence to be executed."

There is no statutory counterpart to SDCL 23A-27A-22.1 permitting psychiatric examination of a death row inmate for purposes of preparing a clemency petition.

Absent a pre-emptive or due process basis for expert access at this stage of Rhines' case, no federal court has jurisdiction or discretion to order a state executive agency to violate its rules or state statutes. As pointed out in *Ohio Adult Parole Auth. v. Woodard,* 523 U.S. 272, 284 (1998), "clemency has not

traditionally 'been the business of courts.'" In the absence of a federal statute vesting a *habeas corpus* court with jurisdiction over state clemency process, the PFCDO argues that 18 U.S.C. § 3599's authorization for appointed federal *habeas corpus* counsel to represent a defendant for state clemency purposes intrinsically vested the district court with jurisdiction to enter orders to facilitate this representation. The district court properly rejected this argument.

As in *Baze v. Parker,* 632 F.3d 338, 343 (6th Cir. 2011), the district court found that "access to federally-funded counsel [is] not federal oversight of the discovery process in a state proceeding." Statutory authorization for a federal court "to fund [an] investigator's efforts does not allow for any judicial oversight to ensure the investigator's success." *Baze,* 632 F.3d at 344. Federal law "allows a federal court to approve the expenditures of federal funds, not usurp oversight of the discovery process in a state proceeding." *Baze,* 632 F.3d at 344. The district court correctly found that she did "not sit as [a] super appeals court over state commutation proceedings." *Baze,* 632 F.3d at 342.

But even if 18 U.S.C. § 3599 expanded the district court's limited *habeas corpus* jurisdiction to aid the PFCDO's state clemency representation (beyond compensating the PFCDO and its experts for services rendered in connection therewith), any such authority would be qualified and limited to circumstances not applicable here; 18 U.S.C. § 3599 permits the PFCDO only to participate in processes for "clemency as may be available to the defendant." Since state law does not provide for psychological or psychiatric evaluation of a death row

inmate for clemency purposes, 18 U.S.C. § 3599 would not extend to such process because it is not "available" under state law. 18 U.S.C. § 3599 is not, as the PFCDO suggests, a federal truncheon for greater clemency process than is "available" by state law. Even if applicable, 18 U.S.C. § 3599 does not pre-empt state law and administrative rules regarding inmate medical care or access to death row inmates. Thus, it does not follow from the PFCDO's appointment as Rhines' federal *habeas corpus* counsel that the district court acquired plenary supervision over South Dakota's clemency process.

"Clemency proceedings . . . are conducted by the executive branch, *independent of* . . . collateral relief proceedings." *Woodard,* 523 U.S. at 284. "[T]he fact that *Harbison* gives [death row inmates] the right to federally funded counsel in state clemency proceedings does not imply that [a] court has authority to intervene in the clemency process itself." *Spisak v. Tibbals,* 2011 WL 9614 (N.D.Ohio). Rhines' requested expert evaluation was collateral to, not in furtherance of, the adjudication of the *habeas corpus* petition pending before the district court. *Spisak,* 2011 WL 9614 at *2 (issuance of writ requiring tape recorded interview of a death row inmate for clemency purposes inappropriate as it would not aid the district court's *habeas corpus* jurisdiction). In substance, Rhines' motion for expert access sought to alter the conditions of his confinement. Such matters are not a proper subject of a *habeas corpus* action and "18 U.S.C. § 3599 cannot be read as an independent basis of jurisdiction."

Spencer v. Haynes, 774 F.3d 467, 470-71 (8th Cir. 2014); *Spisak,* 2011 WL 9614 at *2.

18 U.S.C. § 3599 "provides for 'nothing beyond . . . funding power' and doesn't 'empower the court to order third-party compliance' with" the PFCDO's investigations. *Leavitt v. Arave,* 682 F.3d 1138, 1141 (9th Cir. 2012). Consequently, because *habeas corpus* relief was the sole basis for the district court's jurisdiction, the district court had no jurisdiction over the collateral matter of Rhines' demand for elective neurological evaluation for clemency purposes. *Leavitt,* 682 F.3d at 1141. The district court properly found that 18 U.S.C. § 3599 did not pre-empt DOC rules and restrictions on inmate access.

The district court did not reach the jurisdictional question but simply denied Rhines' petition on its merits. When Rhines appealed, the state filed a notice of review of the jurisdictional question and argued in the circuit court that neither the district court nor circuit court had jurisdiction. Like the district court, the circuit court did not reach the jurisdictional question. *Rhines v. Young,* 2019 WL 5485274. Since neither had jurisdiction to enter the rulings that are the subject of this petition, the petition can be denied on jurisdiction alone.

D. Due Process

To entertain Rhines' petition for writ of *certiorari* on its merits is to submit to his erroneous premise that but for the "added" exhaustion requirement, he was entitled to relief. Rhines is incorrect because the circuit

court stated that it had been prepared to deny his claim on the merits. *Rhines v. Young,* 2019 WL 5485274 at *1. The circuit court did not "add" exhaustion to its analysis of Rhines' 18 U.S.C. § 3599 pre-emption/due process claim, it simply did not reach the merits because it believed Rhines had not yet exhausted his state remedies.

Per *Woodard,* Rhines' hypothesized minimal due process "right," if it exists, is limited to enjoining states from thwarting an inmate's access to available state clemency processes by, for example, refusing to mail his petition. *Woodard,* 523 U.S. at 284. *Woodard* imposed no obligation on states to facilitate an inmate's clemency petition. There is no due process basis to order the DOC to bend its rules to meet the latest of Rhines' endless demands.

State law only allows for psychiatric examination of death row inmates for *competency* purposes . . . and Rhines cannot come close to making a "substantial" showing of a "significant question" regarding his competence to be executed to qualify for an SDCL 23A-27A-22.1 examination. Rhines has been examined by a psychiatrist, two psychologists and a clinical social worker and has been found competent by each:

a. Rhines' criminal defense counsel had him examined by Dr. D.J. Kennelly and a team of consulting mental health professionals who prepared a complete psychiatric, psychosocial and psychological workup on Rhines. As reflected in defense counsel's letter, Dr. Kennelly was asked to examine Rhines not simply for competency and sanity, but also to perform "whatever testing or

evaluations" he felt were appropriate to determine whether Rhines was afflicted with a "mental illness." STONEFIELD LETTER, Appendix at 004. Likewise, the trial court ordered Dr. Kennelly to examine Rhines for whether he "was suffering from a substantial psychiatric disorder of thought, mood, or behavior" that impaired his judgment. ORDER APPOINTING PSYCHIATRIC EXPERTS, Appendix at 006. Dr. Kennelly was thus tasked to perform a comprehensive evaluation, which he did in consultation with a clinical social worker and a psychologist.

b. Dr. Kennelly found that Rhines had no psychotic symptoms, no chronic depression, no thought disorder, no distress related to his homosexuality, no major mental disorder, no inability to use judgment or comprehend his behavior, no impairment of executive power over his behavior, no impairment of judgment, and no inability to rationally and factually understand his legal situation and charges. KENNELLY REPORT, Appendix at 008.

c. Dr. Kennelly's clinical social worker prepared a psychosocial background report on Rhines. Rhines reported that he did poorly in school because he "didn't apply himself." Rhines did not report any difficulties focusing his attention or thinking things through. Rhines dropped out of high school but eventually obtained a high school diploma while serving in the military. Rhines was mustered out of the army in 1976. He underwent a brief period of counseling in 1978 "to facilitate his working through sexual identity problems." PSYCHOSOCIAL REPORT, Appendix at 013. He was convicted

of his first felony in 1977 (burglary) and his second in 1979 (armed robbery). Rhines spent most of his years between 1977 and 1987 in prison. He shuffled between different employers and uncharged crimes between 1987 and 1992 until he was arrested for murder. Rhines did not report having been the victim of sexual assault or experiencing PTSD from anything related to his military "service."

d. Dr. Kennelly also consulted with Dr. Bill H. Arbes for purposes of psychological examination and testing on Rhines. Rhines did not fully cooperate with Dr. Arbes. First, Dr. Arbes found Rhines to be an individual of average intellectual ability, not mentally disabled in any way. Second, Dr. Arbes found "no signs of psychotic affiliation or thinking." Dr. Arbes determined that Rhines did not exhibit "signs of disturbance of thought process or thought content." Instead, Dr. Arbes detected "clear signs of a marked underlying personality disorder." Third, Rhines "tended to falsify his responses to the [MMPI] test data," invalidating the test. Based on Rhines' pattern of "random responding" to test questions, Dr. Arbes concluded that Rhines was "falsifying his responses to appear in a more negative light than in fact is the case." Rhines also threw his MCMI testing, but not quite enough to invalidate the test. The MCMI revealed moderate psychopathology. Dr. Arbes diagnosed Rhines' principle problems as apathy, insecurity and introversion. Rhines compensated for his "pervasive

inadequacy in most areas" by following "a meaningless, ineffectual, and idle life pattern." ARBES REPORT, Appendix at 016.

e. Most significantly, for purposes of Rhines' motion, the testing performed by Drs. Kennelly and Arbes revealed no manifestations of organic brain injury and "[s]creening for neurological evaluation [wa]s negative." KENNELLY REPORT, Appendix at 008.

f. In 2012, Rhines was again examined and tested by Dr. Dewey Ertz. Dr. Ertz administered an IQ test which resulted in Rhines scoring a 132 (superior) on the verbal subtest, 100 (average) on perceptual reasoning, 100 on working memory, and 79 (below average) on processing speed. ERTZ REPORT, Appendix at 020. Dr. Ertz reported that Rhines exhibited ADHD "symptoms," without rendering a formal diagnosis. ERTZ REPORT, Appendix at 020. Dr. Ertz also hypothesized that Rhines labored under a "cognitive processing deficit" because of the discrepancy between Rhines' superior score of 132 on the verbal component and below average score of 79 on the non-verbal component but, again, rendered no formal diagnosis. Given Rhines' history of malingering in testing administered by Dr. Arbes, the disparity between Rhines' verbal and non-verbal score likely is explained by malingering.

g. Pre-incarceration testing on Rhines did not document any significant discrepancy between Rhines' verbal and non-verbal capabilities. A Lorge-Thorndike IQ test administered in 1971, before Rhines had incentives to

malinger, revealed only a four-point discrepancy between his verbal (92) and non-verbal (88) scores. SCHACHT REPORT, Appendix at 032.

h. Dr. Ronald Franks reviewed the same testing and psychosocial history available to Dr. Ertz and observed that Dr. Ertz did "not formally make th[e] diagnosis [of ADHD]." FRANKS REPORT, Appendix at 029. Dr. Franks reported that ADHD does not cause uncontrollable, violent behavior or impair one's ability to comprehend and choose between right and wrong. FRANKS REPORT, Appendix at 030. Even if Rhines has ADHD, the famously death penalty-adverse 9th Circuit Court of Appeals has observed that ADHD is "somewhat common" and not "quality" mitigation evidence. *Brown v. Ornoski,* 503 F.3d 1006, 1016 (9th Cir. 2007). The same can be said of mild autism or average or even sub-average cognitive processing.

i. According to Dr. Franks, Rhines' only consistent and concrete psychiatric diagnosis has been one of antisocial personality disorder. FRANKS REPORT, Appendix at 029. Dr. Franks found "no evidence that Mr. Rhines suffers from a major mental illness." According to Dr. Franks, Rhines "clearly . . . knew right from wrong at the time of the killing" as evidenced by "his attempts at covering his crime and his escape from South Dakota after the crime." Dr. Franks found that "all evidence supports [Rhines'] competency to stand trial." FRANKS REPORT, Appendix at 029, 030. Dr. Franks listened to Rhines' taped confession and found "no indication that . . . Mr. Rhines had difficulty understanding the questions asked of him or in

answering them coherently using logical thought processes." FRANKS REPORT, Appendix at 030. Dr. Franks found "no evidence of slow cognitive processing during his confession."

j. Forensic psychologist Thomas E. Schacht also reviewed Rhines' testing and complete psychosocial history. Dr. Schacht reported that Dr. Ertz's testing was "insufficient to support retrospective diagnoses of ADHD or learning disability." SCHACHT REPORT, Appendix at 034. Dr. Schacht noted that Rhines was never placed in special education while in school and that Rhines himself had stated he was "not . . . developmentally disabled." Dr. Schacht attributed Rhines' poor scholastic performance in his final year of high school to being absent or tardy from school 77 out of a total of 162 days, and to Rhines' admission that he "didn't apply [him]self" to his studies. SCHACHT REPORT, Appendix at 035. IQ testing from when Rhines was in the military reflected scores of between 103 (above average) to 134 (superior). Thus, as with the Lorge-Thorndike test from 1971, Rhines' military IQ testing did not reveal a marked discrepancy between Rhines' verbal and non-verbal abilities. Rhines' military "General Technical" testing yielded a score of 123, three points above what the military "required for a soldier to participate in full-time study at a civilian college and statistically correspond[ing] roughly to the ability level demonstrated by college graduates on standard IQ tests." SCHACHT REPORT, Appendix at 036. Dr. Schacht also viewed a video recording of Rhines during a civil deposition in 1994 and found that it did

"not show the delays or dysfluencies that would presumably accompany expenditure of mental effort on pathological 'oral reprocessing.' There was no need to interrupt the deposition or to turn off the tape to accommodate Mr. Rhines' alleged need for oral reprocessing." SCHACHT REPORT, Appendix at 043. Consequently, Dr. Schacht found that Dr. Ertz's hypothesis of a cognitive processing deficit was "undefined and not demonstrated."

Other than Dr. Ertz's "undefined" hypothesis of some unspecified cognitive processing deficit that was "not demonstrated" outside of any setting in which Rhines had a powerful incentive to malinger – *i.e.* in pre-murder IQ testing, in a videotaped civil deposition – there is no substantial evidence that Rhines is afflicted with any type of neurological disorder. Nor is there any evidence whatsoever that this alleged neurological disorder, even if it exists, would warrant expert access per SDCL 23A-27A-22.1. If it was significant enough to adversely impact Rhines' competency or functioning, it would have manifested in pre-incarceration IQ testing and Dr. Kennelly's neurological screening. Rhines is wide of the mark of demonstrating that further neurological examination is reasonably necessary to his clemency petition.

For example, in *Foley v. White,* 835 F.3d 561, 564 (6th Cir. 2016), the court affirmed the district court's denial of funding for neuropsychological examination for clemency purposes as not reasonably necessary in light of the fact that Foley did not have "a history of childhood developmental issues" and was "not of extremely low intelligence." Foley, like Rhines, "was quite intelligent and had

been fully involved in assisting his own defense." *Foley,* 835 F.3d at 564. Like Rhines, "Foley's competence and mental health ha[d] been discussed, analyzed and adjudged numerous times . . . and his arguments ha[d] consistently been found to be without merit." *Foley,* 835 F.3d at 564. And, as in *Foley,* here there is a "lack of medical documentation to support" Rhines' late assertions of PTSD, autism or neurological deficits and an "absence of any indicators of brain damage or mental illness in the record." *Foley,* 835 F.3d at 564.

Given the absence of any pre-murder documentation of any neurological or intelligence deficits, there is every reason to believe that the PFCDO wants expert access to Rhines not for the purpose of clemency or exploring a "substantial" question of Rhines' mental functioning, but rather to attempt to open new fronts of frivolous, obstructive litigation.

As noted in *Commonwealth v. Spotz,* 99 A.3d 866 (Pa. 2014), the PFCDO has exploited its appointment privileges "to impede the death penalty to indulge its private political viewpoint," often by unethical means. *Spotz,* 99 A.3d at 904. That the PFCDO has burdened both the state and federal courts with the specious due process arguments it proffers here is of a piece with its noted "contempt" for the courts, "scurrilous" tactics, "contemptuous" conduct, "dubious" and "ethically questionable" behavior, "pervasive conduct in causing delay," "obstructionist agenda," "argument unencumbered by concerns for accuracy, honest, and candor," "abuses in briefing," "war on its ethical duty of candor to the court," "extreme conduct and/or misconduct," and overall "strategy to subvert

the proper role of state courts" that is "simply unethical and improper." *Spotz,* 99 A.3d at 867, 876, 881, 891, 897, 900, 901, 902, 903, 904, 906, 907, 911, 912, 915, 916, 917, 918, 919, 920, 921.

Access to a death row inmate by PFCDO "experts" is "invariably followed by years or decades of delay" occasioned by efforts to open new fronts of "trivial and frivolous" litigation and inundate courts at every level with "prolix pleadings" and "reams of paper, pleadings, amendments, *etc.*" marshalled by its "teams of investigators, paralegals, lawyers and experts." *Spotz,* 99 A.3d at 881, 897, 898, 899, 901, 903, 917.

This extremist agenda is evident in the exaggerated maladies the PFCDO would have their "experts" develop, as though autism explains or excuses robbing a small business and killing an employee for a few hundred dollars. The suggestion that autism begets criminal behavior is an insult to the autistic. The suggestion that Rhines has PTSD from his "service" in Korea (which his autobiography describes as "PARTY CENTRAL!") is an insult to the two soldiers who died in the Bonifas Incident. And we learn for the first time in the 26-year history of this case that Rhines supposedly was "brutally" raped by four fellow soldiers while in the army, which, even if true, hardly explains why Donnivan Schaeffer deserved to have a hunting knife pounded into his brain stem 15 years later. Rhines has said he killed Schaeffer because he "got in the way" of his robbing the store, not because of symptoms of a mental condition. FRANKS REPORT, Appendix at 29.

Nothing has prevented Rhines himself from providing a "complete" psychosocial history to his many lawyers or the myriad experts who examined him prior to the PFCDO's intervention. *Foley,* 835 F.3d at 564. Rhines wrote his "autobiography" in 1992 to inform his lawyers of the possible mitigating circumstances of his life and it makes no mention of a sexual assault. There is no record of this alleged assault in Rhines' counseling, military, penological or other records of the last 40 years. *Foley,* 835 F.3d at 564. But with the appearance of the PFCDO in this case comes a new allegation of a sexual assault on Rhines while he was in the military.

Dr. Richard G. Dudley is a frequent flyer in cases brought by PFCDO attorneys Michael Wiseman (whose ethical practices and frivolous claims were roundly denounced in the *Spotz* opinion) and Stuart Lev (who currently represents Rhines in federal court). PFCDO DUDLEY CASES, Appendix at 050. As noted in *Spotz,* the PFCDO "deploys" so-called experts like Dr. Dudley in furtherance of "abusive litigation" and "abjectly frivolous claims." *Spotz,* 99 A.3d at 881, 892, 897, 899, 900, 902, 905, 906, 912. Given the dearth of evidence of any "substantial" or "significant question" regarding Rhines' mental competency in his pre-murder psychosocial history, it is safe to assume that Dr. Dudley has not really been retained for the purpose of exploring any genuine issue regarding Rhines' mental status but simply to assist the PFCDO to engage in its well-documented *modus operandi* of bringing "trivial" claims for obstructive purposes. *Spotz,* 99 A.3d at 897, 898, 915, 917.

"Clemency proceedings are not part of the trial – or even the adjudicatory process. They do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process." *Woodard,* 523 U.S. at 284.

The PFCDO's core assertion that some form of "due process" – constitutional or statutory – necessitates expert access in the clemency context is simply erroneous. *Spotz,* 99 A.3d at 899, 902. The PFCDO's petition is another one of its famous "boilerplate declaration[s]" whose objective is just to concoct obstructive, frivolous process. *Spotz,* 99 A.3d at 904, 906, *passim*. Indeed, the PFCDO's claim of some "due process" or statutory right to have Rhines examined for clemency purposes is flatly contradicted by the very authorities it cites:

a. Despite the PFCDO's insistence that due process protections apply in state clemency proceedings, this Court's decision in *Woodard* was actually split on whether due process attaches to clemency proceedings and, if so, to what extent. The "principal opinion" written by Justice Rehnquist ruled that "the executive's authority [to grant clemency] would cease to be a matter of grace . . . if it were constrained by" due process. *Woodard,* 523 U.S. at 285. In Justice O'Connor's concurring opinion she suggested that "some *minimal* procedural safeguards" should inure to clemency proceedings to prevent arbitrary denials as, for example, if "a state official flipped a coin to determine whether to grant clemency" or arbitrarily denied a prisoner any access to its clemency process. *Woodard,* 523 U.S. at 289 (italic emphasis in

original). The "majority" for this proposition is only achieved if one adds Justice Stevens' dissent to the three justices who joined Justice O'Connor's concurrence. But since, as Justice O'Connor herself points out, the process afforded Woodard "observe[d] whatever limitations the Due Process Clause may impose on clemency proceedings," her suggestion of "some *minimal* " due process was not integral to the court's holding and, thus, was mere *dicta.*[1] Concurring opinion *dicta* plus dissenting *dicta* does not a majority holding make. Thus, it cannot be said that this Court has ever affirmatively *ruled* that even minimal due process attends clemency proceedings. Hence, circuit court recognition of "minimal" due process rights in the clemency context has been tentative, observed mainly in terms of the same assumption *arguendo* as Justice O'Connor's concurrence without actually affirmatively adopting the predicate assumption.

b. For example, in *Winfield v. Steele,* 755 F.3d 629, 631 (8th Cir. 2014), when the court was asked to decide if a Department of Corrections employee had been pressured to rescind his support for a death row inmate's clemency petition, the court, like Justice O'Connor, held that "[w]hatever *minimal* procedural safeguards" might hypothetically exist in the clemency context were not violated in that case. *Winfield* describes the *Young* case – cited by Rhines for

[1] *Bd. of Trustees v. Fox,* 492 U.S. 469, 489 (1989)(describing *dicta* as discussion in a decision not integral to the holding of the case); *Connecticut v. Doehr,* 501 U.S. 1, 30 (1991)(describing *dicta* as discussion of "abstract and hypothetical situations not before" the court).

the proposition that *Woodard* affirmatively established minimal due process in the clemency context – as "an outlier" that "runs counter to the weight of authority from . . . the narrower approaches adopted by our sister circuits."[2] *Winfield's* concurrence suggested that the court should overrule its *Young* decision to bring circuit jurisprudence more in line with the actual notional quality of a "rule" cobbled out of a pocket majority of concurring and dissenting *dicta.*

c. But even if one accepts that *Woodard* affirmatively established some right to *minimal* due process in clemency proceedings, Justice O'Connor stated that it would *not* be implicated by a rule that simply "precluded [an inmate] from testifying *or submitting documentary evidence." Woodard,* 523 U.S. at 289 (emphasis added). Thus, for example, in *Noel v. Norris,* 336 F.3d 648, 649 (8th Cir. 2003), another post-*Young* case which is indistinguishable from this

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[2] *Gissendaner v. Commissioner,* 794 F.3d 1327 (11th Cir. 2015), flatly contradicts *Young.* The *Gissendaner* court found that no due process interference with a clemency petition resulted when the warden instructed prison staff to not answer a death row inmate's attorney's questions but rather to direct any such questions to the department of corrections public affairs office. In *Fauldner v. Texas Bd. of Pardons,* 178 F.3d 343 (5th Cir. 1999), the court ruled that the "minimal" due process contemplated by *Woodard* was limited to "extreme situations" wherein state action denies an inmate any access to clemency proceedings. In *Duvall v. Keating,* 162 F.3d 1058 (10th Cir. 1998), the court ruled that, since minimal due process could only reach process "explicitly set forth by set law," a death row inmate's due process claim was without merit because he had "fail[ed] to show that he was deprived of any procedure set forth in the Oklahoma constitution." Finally, in *Lee v. Hutchinson,* 854 F.3d 978 (8th Cir. 2017), the court observed that a parole board's alleged failure to comply with state law, regulations and policy in the processing of clemency petitions of eight death row inmates did not violate due process when the alleged violations did not prevent the board from giving due and serious consideration to each of the inmates' applications.

one, the court ruled that a death row inmate had no due process right to compel the state to allow him to obtain a brain scan to bolster the "brain damage" basis for his clemency petition. As in *Noel,* Rhines will be able to present "some evidence, though not the particular evidence" of an evaluation by Drs. Dudley and Martell, of his alleged neurological deficits through Dr. Ertz. *Noel,* 336 F.3d at 649. Thus, "[w]hatever *minimal* procedural safeguards" might apply in the clemency context are not, according to *Woodard* and *Noel,* abridged by any rule or ruling that would preclude Rhines from developing and submitting medical evidence in support of his petition.

d. Likewise, in *Baze v. Thompson,* 302 S.W.3d 57, 58 (Ky. 2010), an inmate was denied "permission to interview guards, the death row unit administrator, and death-sentenced inmates" at the penitentiary "to develop information pertaining to Baze's mental health that could potentially be used in a clemency petition." Even accepting that some *minimal* due process attends to clemency applications, *Baze* stated that this process required "only that a death row prisoner receive the clemency procedures explicitly set forth by state law." *Baze,* 302 S.W.2d at 60; *Winfield,* 755 F.3d at 632 (clemency due process limited to procedure explicitly set forth in state law). But because "no Kentucky statute or constitutional provision create[d] a right to present a certain type of information in a clemency petition," the *Baze* court ruled that "the minimal protections afforded by the due process clause in this context

simply do not encompass the type of relief Baze request[ed]." *Baze,* 302 S.W.2d at 60.

e. Again, in *Lewis v. Dept. of Corrections,* 139 P.3d 1266, 1269 (Alaska 2006), an inmate claimed a denial of due process when corrections officials refused her request for an "examination by a medical professional of [her] own choosing" in order to develop a claim of "exceptional circumstances" warranting clemency. Citing *Noel,* the *Lewis* court noted that the inmate "was not precluded from presenting evidence of her [alleged] mental condition, but was not allowed to investigate her health situation with an outside medical examination." *Lewis,* 139 P.3d at 1270. The court observed that Lewis' claim of a mitigating mental condition was undermined by, among other things, the absence of "pre-incarceration medical records" suggesting the existence of the claimed condition. Thus, refusal of the inmate's request alone was not a due process issue as it did not involve "any state official intentionally trying to derail [her] efforts to apply for executive clemency." *Lewis,* 139 P.3d at 1271. Rhines' claimed neurological deficit (and autism and PTSD) likewise suffers from any pre-incarceration medical records documenting its existence, including the facts that Dr. Kenelly's screening for neurological conditions was negative and Rhines' scholastic and military IQ testing did not reveal any significant discrepancies in Rhines' verbal and non-verbal abilities.

Even assuming that Rhines' non-verbal abilities lag behind his verbal skills, at least one court has observed that the verbal IQ score rather than the

non-verbal score is most pertinent to the determination of moral culpability. *People v. Vidal,* 155 P.3d 259 (Cal. 2007). In *Vidal,* the defendant had non-verbal scoring as high as 126, but verbal scoring as low as 59. The *Vidal* court affirmed the trial court's finding of mental retardation on the grounds that the verbal IQ score is the best measure of mental capabilities relevant to culpability because it is most probative of "issues of premeditation, deliberation, appreciation of concepts of wrongful conduct, ability to think and weigh reasons for and not for doing things and logic, foresight, and all of those are related to verbal IQ." Rhines' superior verbal IQ scores of 132 and 134 effectively foreclose any "significant question" about Rhines' mental capabilities.

Yet, the fact that Rhines' due process argument "runs counter to the weight of authority" does not deter the PFCDO. *Winfield,* 755 F.3d at 632. Even if *Woodard* had affirmatively adopted a minimal due process rule in the clemency context, it simply forbids a state from thwarting an inmate's *access* to the clemency process (*i.e.* by refusing to place his petition in the mail), it does not enjoin a state to *facilitate* an inmate's claim in any way. Thus, minimal due process is not violated here if Rhines is simply "precluded from . . . submitting documentary evidence." *Woodard,* 523 U.S. at 289.

Ultimately, the obstacle between Rhines and clemency is not an inability to develop more frivolous excuses for himself, it is his open and enduring lack of remorse. In 1992, after murdering Schaeffer, Rhines "laughed it off like it was no real biggee." FRANKS REPORT, Appendix at 29. In a 2015 letter to then-

Mayor Sam Kooiker in Rapid City, Rhines mocked Donnivan Schaeffer's parents' ongoing grief as so much "yada, yada, yada," and disparaged them with a false claim that they collected "$$$ courtesy of their deceased son" from a lawsuit against Dig'Em Donuts. RHINES LETTER, Appendix at 065, 067. Rhines is not on death row because of autism, neurotoxins, PTSD, neurological deficits, his sexual orientation or any other lame and cowardly excuse he makes for himself. He is there because of the utter lack of remorse captured on the 1992 recordings of his confessions and exhibited again in the 2015 Kooiker letter.

CONCLUSION

The time for expert evaluation of Rhines has passed. He has exhausted the processes for which due process requires expert assistance. The process due him is not limitless. Per *Woodard,* federal *habeas corpus* jurisdiction is "independent of" state clemency processes. Since 18 U.S.C. § 3599 does not vest a federal court with jurisdiction over a state clemency proceeding, no federal court has authority to order a mental examination of a state death row inmate in aid of a state clemency petition. Since the district court's powers under 18 U.S.C. § 3599 in the clemency context are not coextensive with its powers under 18 U.S.C. § 3599 in the *habeas corpus* context, *Ayestas* is not apropos of Rhines' case.

There is no state law making expert evaluation "available" to clemency petitioners. Rhines if free under state law to present any evidence he can procure, but state law does not vest clemency petitioners with any form of compulsory process to procure that evidence. If state law permitted Rhines to

compel access by experts in the clemency context (as there is in the *habeas corpus* context), Rhines would have been examined. But absent a pre-emptive or due process basis for federal intervention, the DOC cannot be ordered to afford process beyond that afforded by state law or violate its duly-enacted administrative rules regarding the medical care available to inmates or the persons who may access the denizens of death row.

Rhines' pre-incarceration IQ testing does not validate the hypothesis of a neurological deficit advanced by Drs. Ertz, Dudley and Martell. Rhines exhibited none of the outward manifestations of a neurological deficit during his 1994 videotaped deposition. Even if the discrepancy between Rhines' verbal and non-verbal scoring on Dr. Ertz's IQ testing represents some kind of processing deficit relative to his verbal skills, it is Rhines' superior verbal IQ scores of 132 and 134 that are most probative of issues pertaining to clemency. Rhines is, thus, miles away from a substantial or significant question concerning his mental capacity.

Nor does Rhines proffer a cognizable due process claim of right to the requested expert access. In South Dakota, "[e]xecutive clemency is lodged in the governor, not for the benefit of the convict only, but for the welfare of the people, who may properly insist upon the performance of that duty by him, if a pardon is to be granted." *Doe v. Nelson,* 2004 SD 62, ¶ 31, 680 N.W.2d 302, 313. Because "commutation [of a sentence] is a privilege and not a right," Rhines has no constitutional right to clemency. *State v. King,* 149 N.W.2d 509,

518 (S.D. 1967); *Ponder v. Brownlee,* 2007 WL 3231804 (E.D.Ark.)(inmate had no protected constitutional right to clemency).

Rhines, thus, does not have any right to any particular process or type of evidence to assist him in developing the basis for his clemency petition. Neither Article IV, § 3 of the South Dakota Constitution nor SDCL 24-14 *et seq*. and its implementing rules at ARSD 17:60:05 *et seq*. explicitly provide for the presentation of *any* evidence by a petitioner in clemency proceedings let alone specialized medical expertise of the inmate's own choosing. As in *Noel, Lewis* and *Baze,* Rhines thus has no right to brain scans, private neurological consultations or compulsory process to develop his mental status theories. *Noel,* 336 F.3d at 649; *Lewis,* 139 P.3d at 1270; *Baze,* 302 S.W.2d at 60. Whatever *de minimis* due process might attach to such proceedings will be met here so long as Rhines is permitted to proffer "some evidence" of his alleged cognitive processing deficit to the clemency board through Drs. Ertz, Martell and Dudley's retrospective analyses. *Winfield,* 755 F.3d at 632; *Noel,* 336 F.3d at 649. Even so, it is hard to see how the PFCDO's proffered diagnoses improve Rhines' plea for clemency when viewed in light of his complete psychosocial history and high pre-murder IQ.

Rhines has eluded justice for 25 years. Disappointed that Drs. Kennelly, Arbes and Ertz could not come up with legitimate diagnoses of significant mental illness or impairment in this case, the PFCDO now wants to send in some sock puppet experts to concoct trifling new maladies. Here, as in *Spotz,*

the PFCDO is "at bottom gaming a system and erecting roadblocks in aid of a singular goal – keeping [Rhines] from being put to death." *Spotz,* 99 A.3d at 868.

But since the PFCDO's only openly-stated purpose for testing in its motion is for preparation of a clemency petition, and since state law makes no provision for medical examination of a clemency petitioner, the district court certainly did not err in denying Rhines' motion for *more* mental status examination.

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Respectfully submitted,

JASON R. RAVNSBORG
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA

Paul S. Swedlund

Paul S. Swedlund
Assistant Attorney General
State of South Dakota
1302 East Highway 14, Suite 1
Pierre, SD 57501
605-773-3215
paul.swedlund@state.sd.us

CERTIFICATE OF SERVICE

Appellee Darin Young, by and through his counsel, Paul S. Swedlund, hereby certifies that a copy of respondent's brief and appendix was served on appellant's counsel, Claudia Van Wyk and Stuart B. Lev, via e-mail and first-class U.S. Mail to claudia_vanwyk@fd.org and 601 Walnut Street, Suite 545 West, Philadelphia, PA 19106, and Jason J. Tupman, Acting Federal Public Defender, 200 West 10th Street, Suite 200, Sioux Falls, SD 57104 via e-mail to jason_tupman@fd.org respectively and U.S. Mail first class prepaid.

Dated this 2nd day of November 2019.

Paul S. Swedlund
Paul S. Swedlund
Assistant Attorney General