CASE NO. 19-6477/19A-482 (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

REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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Dated: November 2, 2019

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REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

This case presents a straightforward question regarding the system Congress created for death-sentenced state prisoners to access counsel and "to obtain [investigative, expert, or other] services." *See* 18 U.S.C. § 3599(f). Although Congress created requirements for the federal courts and § 3599 applicants to follow, it did not create a rigid requirement that such applicants exhaust potentially available state remedies for expert or other services before filing § 3599 motions. The Eighth Circuit created precisely this sort of requirement. The Brief in Opposition (BIO) argues that the question presented does not warrant a grant of certiorari and makes numerous arguments that sidestep both the question and its important implications for § 3599 applicants. As set forth in Mr. Rhines's Petition and below, a writ of certiorari is warranted.

I. This Court should grant certiorari to review the Eighth Circuit's creation of a threshold exhaustion requirement for death-sentenced state prisoners proceeding under § 3599.

The BIO's two primary arguments regarding *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), demonstrate this case's worthiness for certiorari review.

First, the BIO argues that *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), does not apply by attempting to distinguish § 3599's application in connection with executive-clemency proceedings from the statute's application in connection with habeas-corpus proceedings. *See* BIO at 4. Yet the text of § 3599 and this Court's precedents preclude any such distinction. Federal courts "may authorize" appointed counsel "to obtain . . . services"—such as "investigative" or "expert" services—after deciding whether those "services are reasonably necessary for the representation of

the defendant, whether in connection with issues relating to guilt or the sentence." § 3599(f). Congress drew no line between habeas or clemency proceedings. The power to authorize a defendant's attorney to obtain expert services for clemency proceedings arises from the same source and operates in the same manner as the power to authorize a defendant's attorney to obtain expert services for habeas proceedings. Through § 3599, "Congress ensured that no prisoner would be put to death without meaningful access to the 'fail-safe' of our justice system." *Harbison v. Bell*, 556 U.S. 180, 194 (2009) (quoting *Herrera v. Collins*, 506 U.S. 390, 415 (1993)). Thus, the Eighth Circuit was bound by this Court's interpretation of § 3599 and its "reasonably necessary" requirement in *Ayestas*, and the Eighth Circuit's novel exhaustion requirement lacks any meaningful limiting principle. *See* Petition at 12–13.

The BIO also asserts that the Eighth Circuit "did not 'add' exhaustion to its analysis of [a § 3599 request]." *See* BIO at 11. Yet, in the same breath, the BIO concedes that the Circuit treated the issue of whether Mr. Rhines "had not yet exhausted his state rememdies" as dispositive of the appeal below. *See* BIO at 11 (noting that the Eighth Circuit "simply did not reach the merits because it believed Rhines had not yet exhausted his state remedies"). Thus, there appears to be no meaningful dispute about the rule the Eighth Circuit created and applied to this case: A death-sentenced prisoner must exhaust state remedies before federal courts in the Eighth Circuit will reach the merits of a motion under § 3599.

Because of this new requirement, no court in this case has applied the framework § 3599 established or the *Ayestas* Court's interpretation of it. The BIO

does not respond to this critical point, nor does it address the extent to which this new requirement is "more demanding" than what § 3599 itself requires. *See* Petition at 11–13 (applying *Ayestas*, 138 S. Ct. at 1092–94).

Ayestas itself also demonstrates the compelling nature of § 3599 issues. There, this Court granted certiorari to review a single Circuit's "arguably more demanding" test for § 3599 applicants. *See Ayestas*, 138 S. Ct. at 1093. This case, and its implications for state prisoners facing execution in the Eighth Circuit, call for similar attention and this Court's review.

II. Clemency remains available to Mr. Rhines, as confirmed by South Dakota law.

The State incorrectly asserts that, because the South Dakota Board of Pardons and Paroles recommended denying Mr. Rhines's clemency petition, he must wait one year before "refil[ing]." BIO at 1 (citing S.D. Codified Laws § 24-15-10). That assertion rests on a mistaken premise: that a statute governing when an inmate may present an application to the Board also limits the power of the Governor to consider new information, an amended application, or file a new application. *See* S.D. Codified Laws § 24-15-10 (governing inmate's applications to the Board).

The Eighth Circuit itself recognized that "South Dakota law grants the Governor broad constitutional and statutory clemency authority." *Rhines v. Young*, No. 18-2376, 2019 WL 5485274, at *1 (8th Cir. Oct. 25, 2019) (per curiam) (citing *Doe v. Nelson*, 680 N.W.2d 302, 313 (S.D. 2004)). The concurrence added that "the state's statutory scheme permits the Governor to delegate to the Board of Pardons

and Paroles the authority to hear such applications." *Id.* (Kelly, J., concurring) (citing *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 . . . .'" *Id.* (Kelly, J., concurring) (quoting *Doe*, 680 N.W.2d at 313). As a result, "whether Mr. Rhines is deserving of clemency is now properly in the hands of the Governor." *Id.* (Kelly, J. concurring). Mr. Rhines can submit, and the Governor can consider, evidence from his experts.

Moreover, the BIO argues that, because state law does not provide for expert evaluation for clemency purposes, expert evaluations are not "available" for purposes of § 3599. *See* BIO at 8–9. This argument is beside the point, however, and arises out of a misreading of § 3599's plain language. The statute refers to the availability of *clemency itself*, not particular processes that relate to clemency. *See* §§ 3599(e)–(f) (authorizing attorneys to obtain expert services "for executive or other clemency as may be available to the defendant"). Clemency is available to Mr. Rhines under state law, thus, a federal court has jurisdiction to consider whether to authorize his attorneys to obtain legal and expert services and, necessarily, what it entails "to obtain" those services. In any event, the BIO does not cite any statute or regulation that forbids the presentation of psychiatric or neuropsychological evidence to the Governor. Thus, such evidence is "available" in clemency.

III. Mr. Rhines has been pursuing access to his experts for clemency since February 2018.

None of the delay concerns and last-minute tactics this Court addressed in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), are applicable here. Mr. Rhines sought

the relief at issue here well within the time "to allow consideration of the merits without requiring entry of a stay." *See Hill v. McDonough*, 547 U.S. 573, 584 (2006).

In 2017, even while his initial habeas appeal was still pending in the Eighth Circuit, Mr. Rhines began preparing for clemency proceedings. During those preparations, his counsel recognized that Mr. Rhines had never been evaluated by a neuropsychologist or a forensic psychiatrist with the benefit of a thorough social history. Because prior counsel's experts had been barred by the State Department of Corrections from accessing Mr. Rhines, Mr. Rhines sought an order to allow his experts access. On June 9, 2017, Mr. Rhines moved in the South Dakota state court for an order to access his experts to prepare for clemency proceedings. That request was denied on October 24, 2017. Mr. Rhines appealed to the South Dakota Supreme Court, but that appeal was dismissed on January 2, 2018.

On February 7, 2018, Mr. Rhines moved in the district court, pursuant to § 3599 and the All Writs Act, for an order to access his experts, arguing that their services were reasonably necessary to support clemency proceedings. The district court denied the motion on May 25, 2018. Mr. Rhines timely appealed on June 21, 2018. Briefing was completed on November 15, 2018.

In January 2019 the Eighth Circuit notified the parties that oral argument would be held in September 2019. On February 1, 2019, the State requested that oral argument be scheduled in April 2019, which the Eighth Circuit denied. Oral argument proceeded on September 26, 2019, and the Eighth Circuit issued its opinion on October 25, 2019. Mr. Rhines filed his petition for writ of certiorari a week later, on November 1, 2019.

Mr. Rhines has been diligent and relentless in seeking access to his experts. He anticipated over two years before his scheduled execution—and before his habeas review was even complete—that these experts would assist in his clemency proceedings and has been timely pursuing access through the federal courts since February 7, 2018.

In fact, the State manufactured the emergency posture of the current litigation. By February 2019, the State was aware that oral argument in the Eighth Circuit would not be held until September 2019. Nonetheless, on June 25, 2019, the State scheduled Mr. Rhines's execution for the week of November 3, 2019, just weeks after the anticipated September oral argument. Thus, Mr. Rhines has not been dilatory, but has been denied in-person access to expert services necessary to present his case for relief in the "'fail-safe' of our justice system." *See Harbison*, 556 U.S. at 194 (quoting *Herrera*, 506 U.S. at 415).

CONCLUSION

For these reasons and those in Mr. Rhines's petition, this Court should grant a writ of certiorari to resolve the question presented.

Respectfully submitted,

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