No. ____

IN THE
Supreme Court of the United States

CHARLES RUSSELL RHINES,
Petitioner,
v.

SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, MIKE LEIDHOLT, SECRETARY, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, AND DARIN YOUNG AS WARDEN OF THE SOUTH DAKOTA STATE PENITENTIARY,
RESPONDENTS.

APPLICATION FOR STAY OF EXECUTION
CAPITAL CASE: IMMINENT EXECUTION
November 4, 2019 at 1:30 PM (Central)

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APPLICATION FOR STAY OF EXECUTION

INTRODUCTION

To the Honorable Justice Neil Gorsuch, Circuit Justice for the Eighth Circuit:

Petitioner Charles Russell Rhines respectfully requests a stay of his execution, presently scheduled for November 4, 2019 at 1:30 PM Central time.

On October 22, 2019, Petitioner filed a Complaint, seeking declaratory and injunctive relief, in the South Dakota Circuit Court for the Second Judicial Circuit, together with an Application for a Preliminary Injunction, Temporary Restraining Order and Stay of Execution ("Application"). Following a hearing on October 29, 2019, Petitioner filed a supplemental memorandum of law. On October 31, 2019, the circuit court issued a decision denying the Application. Petitioner filed a Notice of Appeal in the circuit court that same day. On November 1, 2019, Petitioner filed a Motion for Stay of Execution and Appellate Brief in the Supreme Court of the State of South Dakota.

On November 4, 2019, the South Dakota Supreme Court denied Petitioner's motion for stay pending disposition of his appeal. The court has not issued a decision on the appeal as of the filing of this application. This stay application is lodged in the event that the South Dakota Supreme Court's ultimate disposition is adverse and is requested so that the Court can protect its jurisdiction.[1]

[1] Immediately upon the issuance of a merits decision, Petitioner will file his certiorari petition in this Court.

If there is an adverse disposition, the decision will likely give rise to the following questions presented:

Under the law of South Dakota, Petitioner in this capital case has a statutory right to elect to be executed under the drug protocol in effect at the time of his conviction and sentence, rather than the current execution protocol. The State has refused to honor Petitioner's choice. The Questions Presented are:

Does Petitioner have a life and liberty interest in the choice given him such that the refusal to honor his choice violates due process?

Did South Dakota courts violate due process when it relied upon an extreme misapplication of res judicata law to refuse to adjudicate the merits of Petitioner's claims?

This Court should stay Rhines's execution to resolve those questions.

PROCEDURAL AND FACTUAL BACKGROUND

Rhines has been sentenced to death by the State of South Dakota, with an execution warrant setting his execution for Monday, November 4, at 1:30 Central time.

Section 23A-27A-32.1 South Dakota Codified Laws ("SDCL") provides that:

Any person convicted of a capital offense or sentenced to death prior to July 1, 2007 may choose to be executed in the manner provided in § 23A-27A-32 ***or in the manner provided by South Dakota law at the time of the person's conviction or sentence***. The person shall choose by indicating in writing to the warden not less than seven days prior to the sched-

uled week of execution the manner of execution chosen. If the person fails or refuses to choose in the time provided under this section, then the person shall be executed as provided in § 23A-27A-32.

SDCL § 23A-27A-32.1 (emphasis added).

Rhines was sentenced to death on January 29, 1993. At that time, South Dakota law provided, in pertinent part, that "[t]he punishment of death shall be inflicted by the intravenous administration of a lethal quantity of an ultra-short-acting acting barbiturate in combination with a chemical paralytic agent and continuing the application thereof until the convict is pronounced dead by a licensed physician according to accepted standards of medical practice. SL 1984, ch. 181, codified at SDCL 23A-27A-32.1 (1984).

In 2007, the South Dakota Legislature amended the law to change the drug protocol from the combination of "an ultra-short-acting acting barbiturate in combination with a chemical paralytic agent" to "a substance or substances in lethal quantity," as selected by the warden and subject to approval by the Secretary of the Department of Corrections. SDCL 23A-27A-32 (2007). However, Section 23A-27A-32.1 preserved the rights of a person convicted of a capital offense or sentenced to death prior to July 1, 2007, to select execution in the manner provided for at the time of the person's conviction or sentence.

Thus, pursuant to Section 23A-27A-32.1 SDCL, Rhines is entitled to elect to be executed by the manner set forth in South Dakota law at the time of his conviction or sentence. In two communications to Respondent Young (on October 1 and 4, 2019), Rhines elected to be executed under the drug protocol that

was in effect at the time that he was sentenced to death, to wit, "[t]he Two Drug Protocol of a Lethal Dose of An Ultra-Short Acting Barbiturate and a Chemical Paralytic."

On October 15, 2019, attorneys for Rhines delivered a letter to Respondent Young, South Dakota Attorney General Jason Ravnsborg, and Paul Swedlund, Assistant Attorney General, requesting, among other things, confirmation that Rhines's request to be executed by the intravenous administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent would be honored. In a letter dated October 17, 2019, Assistant Attorney General Swedlund advised counsel that he had received "Mr. Rhines' request for execution pursuant to the combination of drugs provided by statute at the time of his execution." Mr. Swedlund stated that "DOC will follow the law," and that that "[t]he ultra-short-acting barbiturate the state intends to use is pentobarbital."

Pentobarbital is not an ultra-short-acting barbiturate. (Stevens Aff. ¶¶ 7, 8, 11.) Barbiturates are a drug group that derive from barbituric acid. (*Id.* ¶ 5.) Barbiturates depress the central nervous system and have been used as sedatives and hypnotics for over a century. (*Id.*) Barbiturates are divided into the following classes: ultra-short-acting, short-acting, intermediate-acting, and long-acting. (*Id.*, ¶ 6; *see* Fritz Aff. Exh. 2 p.1.) The classifications refer to the time of onset and duration of the drug effects. (Stevens Aff. ¶ 6.) These classifications are widely accepted in the field of pharmacology. (*Id.*)

Ultra-short-acting barbiturates include sodium methohexital and sodium thiopental. (*Id.* ¶ 7; s*ee*

Fritz Aff. Exh. 2 p.2, Exh. 3 p. 13.) Pentobarbital is neither an ultra-short-acting barbiturate nor a chemical paralytic, but rather is classified as a short-acting barbiturate. (Stevens Aff. ¶¶ 8, 11.) Notably, the Food and Drug Administration approved branded manufacturer's package insert provided for Nembutal Sodium Solution, which is the manufacturer's name for pentobarbital, states "NEMBUTAL Sodium is a short-acting barbiturate." (Fritz Exh. 4.) The manufacturers for generic pentobarbital, Sagent and Leucadia, similarly state that pentobarbital is a short-acting barbiturate.[2] Pentobarbital is not an ultra-short-acting barbiturate and has never been classified as such. (Stevens Aff. ¶ 8.)

Sodium thiopental, the most frequently used ultra-short-acting barbiturate, is used for surgery of short duration. (*Id.* ¶ 9.) The onset of anesthesia is usually within 10 to 30 seconds, because sodium thiopental is so lipid soluble that it rapidly enters the brain. (*Id.*) Conversely, pentobarbital's effects take longer to begin onset and last longer than the effects of ultra-short-acting barbiturates. (*Id.* ¶ 8.)

In pharmacology, chemical paralytic agents are synonymous with neuromuscular blockers. (*Id.* ¶ 10.) Paralytics by themselves do not typically lessen a patient's awareness of pain. (*Id.*) Rather, they inhibit muscle action and thus prevent movement. (*Id.*) They are typically used during surgical procedures in combination with analgesics or anesthetics. (*Id.*) Common chemical paralytic agents include pancuronium

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[2]See https://www.sagentpharma.com/wpcontent/uploads /2017/11 /Pentobarbital_PI-Revised.pdf; http://leucadiapharma.com/wp-content /uploads/2018/02/Pentobarbital_PI_Art_Clean.pdf.

bromide and vecuronium. (*Id.*) Pentobarbital is not a chemical paralytic and has never been classified as such. (*Id.* ¶ 11.)

Despite Rhines's request for the 1993 drug protocol, which required the use of an ultra-short-acting barbiturate as part of the method of execution, Respondent, the State of South Dakota intends to use pentobarbital—which is *not* an ultra-short-acting barbiturate. If the state's grant of a choice to Rhines creates a life or liberty interest in the manner of his execution – and it does – then due process is violated by the state's refusal to honor that choice.

REASONS TO STAY THE EXECUTION

A stay of execution is warranted where there is a "presence of substantial grounds upon which relief might be granted." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). To decide whether a stay is warranted, the federal courts consider the petitioner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has delayed his or her claims. *See Hill v. McDonough*, 547 U.S. 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). This standard requires a petitioner in this Court to show a reasonable probability that four members of the Court would consider the underlying case worthy of the grant of certiorari, that there is a significant likelihood of reversal of the lower court's decision, and a likelihood of irreparable harm absent a grant of certiorari. *Barefoot*, 463 U.S. at 895.

I. RHINES WILL BE IRREPARABLY HARMED IF THE STATE OF SOUTH DAKOTA IS PERMITTED TO EXECUTE HIM IN VIOLATION OF HIS RIGHT TO SELECT THE METHOD OF EXECUTION THAT IS GUARANTEED BY SOUTH DAKOTA LAW.

There is no question that Rhines will suffer irreparable harm absent this Court entering a stay of execution. *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J. concurring) (irreparable harm "is necessarily present in capital cases"). "'Death is a punishment different from all other sanctions in kind rather than degree.'" *Bucklew v. Precythe*, 139 S. Ct. 1112, 1146, 203 L. Ed. 2d 521 (2019) (Sotomoyer, J., dissenting) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 303–304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)). "For that reason, the equities in a death penalty case will almost always favor the prisoner so long as he or she can show a reasonable probability of success on the merits." *Id.* (Sotomoyer, J., dissenting)(citing *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (noting that success on the merits and irreparable injury "are the most critical" factors)); *cf. Glossip v. Gross*, 135 S. Ct. 2726, 2737, 192 L. Ed. 2d 761 (2015) (observing, in a preliminary-injunction posture, that "[t]he parties agree that this case turns on whether petitioners are able to establish a likelihood of success on the merits" and analyzing the case accordingly); *accord, id.*, at 2792 (SOTOMAYOR, J., dissenting).

Petitioner is likely to prevail, both in obtain certiorari and a favorable resolution of the questions, be-

cause Respondents' decision to use pentobarbital, contrary to South Dakota law, deprives Rhines of his statutory rights and liberty interest to be executed in the manner of his choice without due process of law guaranteed under the Fourteenth Amendment to the United States Constitution.

II. SOUTH DAKOTA IS DENYING PETITIONER DUE PROCESS OF LAW IN REFUSING TO EXERCISE HIS STATE-LAW RIGHT TO CHOOSE THE MEANS OF HIS DEATH.

The manner of execution provided by South Dakota law at the time of Rhines's conviction and sentence was, in relevant part, "by the intravenous administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent and continuing the application thereof until the convict is pronounced dead by a licensed physician according to accepted standards of medical practice." SL 1984, ch 181, codified at SDCL § 23A-27A-32 (1984.) Rhines has exercised his right to choose the manner set forth in SL 1984, ch 181. (Compl. ¶ 44.) Rhines has done so in accordance with the provisions of SDCL § 23A-27A-32.1. (*Id.*) Respondents cannot deprive Rhines of his right to be executed in the manner of his choice. (*Id.* ¶ 45.) Respondents have a duty to ensure Rhines can exercise his right. (*Id.* ¶ 45.) In stating their intention to execute Rhines with pentobarbital, which is neither an ultra-short-acting barbiturate nor a chemical paralytic agent, Respondents deprive Rhines of his statutory rights. (*Id.* ¶¶ 47-49.)

In enacting SDCL § 23A-27A-32.1, in light of the statutory structure, Rhines has life and liberty interests that entitle him to be executed in the manner provided by South Dakota law at the time of the Rhines's conviction or sentence, to wit, by the intravenous administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent. (Compl. ¶¶ 51-54.) Rhines's life and liberty interests in being executed in this manner are protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. (*Id.* ¶¶ 55-56.) By refusing to guarantee that Rhines will be executed in the manner he has chosen, Respondents are depriving Rhines of his constitutionally protected life and liberty interests without due process of law. (*Id.* ¶ 57.)

The plain language of the statutes at issue is clear. In enacting SDCL § 23A-27A-32.1, the State of South Dakota created a right that entitles Rhines to be executed in the manner provided by South Dakota law at the time of the Rhines's conviction or sentence. *See* SDCL § 23A-27A-32.1. The South Dakota Legislature enacted this provision in February of 2007 and made no changes to it when the Legislature amended portions of § 23A-27A-32 in 2008.

At the time that Rhines was convicted and sentenced, in 1993, South Dakota law provided, in pertinent part, and unequivocally, that "[t]he punishment of death ***shall*** be inflicted by the intravenous administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent and continuing the application thereof until the convict is pronounced dead by a licensed physician according to accepted standards of medical practice." SL

1984, ch 181, codified at SDCL § 23A-27A-32 (1984) (emphasis added). The statute allows no discretion in the manner of execution, but rather gives specific directives as to the manner of execution. Accordingly, SDCL § 23A-27A-32.1 and SL 1984, ch 181 create a protected right to an execution "by the intravenous administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent and continuing the application thereof until the convict is pronounced dead by a licensed physician according to accepted standards of medical practice." SL 1984, ch 181.

Pursuant to the SDCL § 23A-27A-32.1, Rhines shall be executed in this manner if he "choose[s] by indicating in writing to the warden not less than seven days prior to the scheduled week of execution the manner of execution chosen." SDCL § 23A-27A-32.1. Rhines did chose to be executed in this manner—more than 4 weeks prior to his week of execution—in a written Kite-Request Slip dated October 1, 2019, addressed to Respondent Young, and in amended written Kite-Request Slip dated October 4, 2019, addressed to Respondent Young. (Compl. ¶¶ 30, 31, Exhibits B, C to the Compl.) Based upon the foregoing, Rhines has demonstrated that he has a right to be executed in the manner he has chosen arising from South Dakota Codified Law.

Respondents cannot deprive Rhines of his right to be executed in the manner of his choice. Respondents have a duty to ensure Rhines can exercise his right. Respondents, however, have taken the position that pentobarbital is an ultra-short-acting barbiturate. (Compl ¶ 34, Exh. E to the Compl.) Respondents' assertion is erroneous. Pentobarbital is not an ultra-

short-acting barbiturate. (Compl ¶ 36; Stevens Aff ¶¶ 7, 8.)

This case is analogous to *Smith v. State of Montana, Department of Corrections*, No. BDV-2008-303, 2015 WL 5827252 (Mont. Dist. Oct. 6, 2015) (Exh. A to the Compl.). In *Smith*, the Court addressed a similar Montana law that provided "[t]he punishment of death must be inflicted by administration of a continuous, intravenous injection of a lethal quantity of an ultra-fast-acting barbiturate in combination with a chemical paralytic agent until a coroner or deputy coroner pronounces that the defendant is dead." *Id.* at *1. However, the State of Montana intended to execute Smith using pentobarbital, which, Smith argued, is not an ultra-short-acting barbiturate. *Id.* After a trial, the court concluded, among other things, that pentobarbital is not an ultra-fast-acting barbiturate and enjoined the State of Montana from executing Smith using pentobarbital. *Id.* at *6.

The Montana statute at issue in *Smith* and SL 1984, ch 181 are nearly verbatim. The evidence presented by Rhines demonstrates, as was demonstrated in *Smith*, that pentobarbital is not an ultra-short-acting barbiturate.

South Dakota's refusal to honor this state-created right constitutes a denial of due process of law. Procedural due process constrains governmental acts that "deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment" *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). When a state regulatory provisions sets forth "specific directives to the decisionmaker that if the regulations' substantive predicates are present, a

particular outcome must follow," a liberty interest is created. *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 463 (1989); *see also Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (Oklahoma statute providing jury could impose a sentence of no fewer than 10 years in prison created liberty interest). Procedural due process also constrains the government when it ends a person's life. *See, e.g.*, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J.) ("A prisoner under a death sentence remains a living person and consequently has an interest in his life.")

Here, after the State enacted SDCL § 23A-27A-32.1, Mr. Rhines had life and liberty interests that entitle him to be executed in the manner provided by South Dakota law at the time of the Rhines's conviction or sentence. *See* SDCL § 23A-27A-32.1. The South Dakota Legislature enacted this provision in February of 2007 and made no changes to it when the Legislature amended portions of § 23A-27A-32 in 2008.

The statute allows no discretion in the manner of execution, but rather gives specific directives as to the manner of execution. *See Bagley*, 5 F.3d at 328. Accordingly, SDCL § 23A-27A-32.1 and SL 1984, ch.181 create protected life and liberty interests in execution.

Respondents, as State actors, cannot deprive Rhines of his life and liberty interests without due process of law to which he is entitled under the due process clauses of the Fourteenth Amendment of the United States Constitution *See* U.S. Const. amend. XIV, § 1; Pentobarbital is neither an ultra-short-acting barbiturate nor a chemical paralytic. (Compl ¶ 36; Stevens Aff. ¶¶ 7, 8, 11.) Ultra-short-acting

barbiturates include sodium methohexital and sodium thiopental. (Compl ¶ 35; Stevens Aff. ¶ 7.) By stating that Rhines will be executed using pentobarbital, which is not an ultra-short-acting barbiturate, Respondents are deliberately and intentionally depriving Rhines of his constitutionally protected life and liberty interests without due process of law. Petitioner has accordingly established the requisite likelihood that this Court will grant certiorari and that he will prevail on the merits of his claim.

III. SOUTH DAKOTA'S INVOCATION OF *RES JUDICATA* TO BAR RHINES'S CLAIM IS AN UNCONSTITUTIONAL APPLICATION OF A STATE-LAW DOCTRINE.

The South Dakota trial court did not reach the merits of Rhines's claim that he is entitled to invoke the earlier protocol for his execution, resting its denial of relief solely on its application of *res judicata* to bar the action—because Rhines purportedly could have raised this claim in his prior habeas corpus challenge to death by injection as violative of the Eighth Amendment. (Order at 21-22). The heart of the trial court's analysis, however, is an erroneous conclusion it repeats throughout its order: that "Rhines challenged the exact protocol in 2011 [that] he is challenging now." Order at 21.

At its core, the Due Process Clause of the Fourteenth Amendment guarantees a party not only "the opportunity to present his case," but also the right "to have its merits fairly judged." *Logan v. Zimmerman*

Brush Co., 455 U.S. 422, 433 (1982). A court may not prevent a party from litigating an issue unless that issue was "actually litigated and resolved in a valid court determination essential to the prior judgment." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (citation and internal quotation marks omitted). Because deciding a claim without a determination of the merits is such an obvious due-process denial, courts demand a clear indication that an issue was actually determined in the prior litigation. *See Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904).

Although "[s]tate courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes," states may not engage in "extreme applications" of preclusion doctrines that are "inconsistent with a federal right that is 'fundamental in character.'" *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 797 (1996). The "actually decided" requirement is indeed "fundamental in character."

As this Court observed only eight years after the Fourteenth Amendment was adopted, "the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined." *Cromwell v. Cnty. of Sacramento*, 94 U.S. 351, 353 (1876). Courts could not preclude the adjudication of an issue where "several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated." *Russell v. Place*, 94 U.S. 606, 608 (1877). Federal and state appellate courts today uniformly follow this venerable preclusion rule.

See, e.g., 18 Charles Alan Wright et al., Federal Practice and Procedure § 4420 (2d ed. 2002); Restatement (Second) of Judgments § 27, reporter's note, cmt. e (1982).

In *Fayerweather*, this Court held that, as a matter of due process, no court may preclude a party from litigating an issue that had not been actually decided in a prior adjudication. In that case, several plaintiffs sued in federal court to recover their shares of an estate. Although they had signed releases waiving their rights to recover, the plaintiffs insisted the releases were invalid. Addressing its jurisdiction to review the trial court's order as presenting a constitutional question, this Court agreed that, if the state court (as plaintiffs contended) had "rendered its judgment without any determination" of the "fundamental question" in the case, *i.e.*, the validity of their releases, the state court had "depriv[ed] them of their property without any judicial determination of the fact upon which alone such deprivation could be justified," which would be a denial of due process. *Id*. at 299.

On the merits, the Court upheld the use of issue preclusion, but only because "[n]othing can be clearer from this record than that the question of the validity of the releases was not only before the state courts, but was considered and determined by them." *Id*. at 308. The Court also confirmed that when evidence has been "offered at [a] prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment, then the conclusion must be that the prior decision is not an adjudication upon any particular issue or issues, and the plea of *res judicata* must fail." *Id*. at 307.

Here the state trial court denied Rhines due process of law by misconstruing Rhines's claims to rule that *res judicata* barred those claims. The court repeatedly described his present claims as a "challenge [to] the [execution]s protocol's compliance with the statutes," and comparing those claims to his prior habeas corpus claims. Order at 16-17 ("Rhines could have and should have brought a specific challenge to the use of pentobarbital as part of his then-pending complaint . . . ."); *id.* at 21 ("Rhines challenged the exact protocol in 2011 as he is challenging it now."). The actual nature of Rhines's prior litigation and this litigation belie the state court's analysis.

In 2008, Rhines brought constitutional challenges to the State's manner of execution. He sought a ruling that the Eighth Amendment barred "an execution carried out by means of [a] two drug cocktail provided in SDCL 23A-27A-32 in effect at the time of his conviction" and "a declaration that SDCL 23A-27 A-32, as presently codified, and as applied to Rhines, constitute[d] an unconstitutional bill of attainder[,] an unconstitutional ex post facto law[,] and deprive[d] him of his right to due process of the law." Order at 13. The State adopted a new protocol in 2011, during that litigation, and the state court thereafter denied relief. *Id.* at 13–14. In 2018, Rhines unsuccessfully challenged the current protocol's promulgation as in violation of the Administrative Procedures Act.

Rhines had no reason to believe that the State would not use an ultra-short-acting barbiturate if he exercised his statutory right to demand that protocol.

that he seeks to enforce through this litigation. The 2011 protocol contemplates the use sodium thiopental. As recently as August of 2019, Respondents provided documents to Mr. Rhines's attorneys regarding sodium thiopental, with which Respondents could execute Mr. Rhines in compliance with its law. As of October 2019, by statute, Rhines had the right to elect his method of execution, either by the law currently in place, or by the law in place at the time of his conviction or sentence. The Legislature mandated that he make his election at least seven days prior to his scheduled execution. SDCL § 23A-27A-32.1. There is no dispute that Rhines complied with the statute governing his election on October 1, 2019, more than a month before his scheduled execution dates. Before October 17, 2019, there was no reason to believe that the State would do anything other than abide by the statutory requirement; on that date, the State indicated it would not use sodium thiopental and, instead, advised counsel that "[t]he ultra-short-acting barbiturate the state intends to use is pentobarbital."

Rhines promptly initiated a new action to enforce his statutory rights. The claims in this case arise out of the State's refusal to comply with Rhines's proper statutory election and events. At no earlier point in time did Rhines have any opportunity to litigation those claims—and the prior litigation did not in any manner actually decide the question whether the State may ignore Rhines's election. The state court's invocation of *res judicata* to bar consideration of Rhines's claims accordingly denies him due process of law.

CONCLUSION

The Court should stay Rhines's execution.

Respectfully,

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November 4, 2019

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

CHARLES RUSSELL RHINES, **Plaintiff and Appellant,** **vs.** **SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, MIKE LEIDHOLT, SECRETARY, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, and DARIN YOUNG IN HIS CAPACITY AS WARDEN OF THE SOUTH DAKOTA STATE PENITENTIARY,** **Defendants and Appellees.**	**ORDER DENYING STAY OF EXECUTION** **#29166**

On October 31, 2019, appellant served and filed a notice of appeal from an order denying application for a temporary restraining order, preliminary injunction, and stay of his execution set for the week of November 3, 2019. Appellant has filed a motion for stay of execution pending the appeal to this Court and appellee filed a response. The Court considered appellant's motion and supporting documents, the State's response and the whole of the circuit court's memorandum opinion and order of October 31, 2019, denying appellant's motion for a preliminary injunction and stay of execution. The Court also considered and weighed the factors for issuance of a preliminary injunction or stay of execution including the likelihood of success on the merits, the likelihood of irreparable injury absent

preliminary relief, the balance of equities, and the public interests. Now, therefore, being fully advised in the premises, it is

ORDERED that appellant's motion for a stay pending appeal is hereby DENIED.

DATED at Pierre, South Dakota, this 4th day of November, 2019.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

(Justices Janine M. Kern and Patricia J. DeVaney disqualified.)

PARTICIPATING: Chief Justice David Gilbertson and Justices Steven R. Jensen and Mark E. Salter and Circuit Court Judges Michelle K. Comer and Kent Shelton.

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 4th day of Nov., 2019.
Clerk of Supreme Court
Deputy

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
NOV - 4 2019
Clerk