IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

APPLICATION FOR CERTIFICATE OF APPEALABILITY

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

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

PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

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

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

LEGAL STANDARD

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

district court must obtain a COA for each issue he or she wishes to present to the court of appeals.

In *Slack v. McDaniel*, 529 U.S. 473, 483 (2000), the Supreme Court concluded that, "[e]xcept for substituting the word 'constitutional' for the word 'federal,'" AEDPA's COA requirement is merely "a codification of" the pre-AEDPA standard for granting a certificate of probable cause, as "announced in *Barefoot v. Estelle*," 463 U.S. 880, 894 (1983). The purpose of the COA requirement is "to prevent frivolous appeals." *Barefoot*, 463 U.S. at 892. A COA is necessary if an issue is "debatable among jurists of reason"; if "a court could resolve the issue[] [in a different manner]"; or "the question [is] adequate to deserve encouragement to proceed further." *Id.* at 893 n.4 (internal quotation and citation omitted); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (applying same standard under AEDPA).

Where the district court has ruled on a procedural ground, the petitioner must satisfy the *Slack*/*Barefoot* standard for both the procedural and the merits rulings. *See Buck v. Davis*, 137 S. Ct. 759, 777 (2017) (citing *Slack*, 529 U.S. at 484).

A court need not be convinced of the ultimate merits before granting a COA. *Miller-El*, 537 U.S. at 327 ("[W]e decide again that when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of

appeals should limit its examination to a threshold inquiry into the underlying merit of his claims."). A claim may be debatable, and thus deserving of a COA, "even though every jurist of reason might agree, after the certificate of appealability has been granted and the case received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 338.

I. REASONABLE JURISTS COULD DEBATE WHETHER *PEÑA-RODRIGUEZ V. COLORADO* REQUIRES NO-IMPEACHMENT RULES TO GIVE WAY FOR COURTS TO CONSIDER JUROR STATEMENTS REFLECTING ANTI-GAY BIAS IN SENTENCING, JUST AS IT REQUIRES FOR STATEMENTS REFLECTING RACIAL BIAS.

A. Introduction

Mr. Rhines has attempted to litigate claims relating to the anti-gay bias of his sentencing jury for over twenty-five years. Until 2017, however, the only available evidence was the trial transcript. It shows that the jurors sent a note to the trial court asking what would happen to Mr. Rhines if he were sentenced to life without the possibility of parole:

> Judge Kon[en]kamp,
>
> In order to award the proper punishment we need a clear p[er]spective on 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:
>
> Will Mr. Rhines <u>ever</u> be placed in a minimum security prison or be given work release.

> Will Mr. Rhines be allowed to mix with the general inmate population.
>
> [A]llowed to create a group of followers or admirers.
>
> 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.)
>
> Will Mr. Rhines be allowed to marry or have conjugal visits.
>
> Will he be allowed to attend college.
>
> 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).
>
> Will Mr. Rhines be jailed alone or will he have a cellmate.
>
> What sort of free time will Mr. Rhines have (what would his daily routine be).
>
> We are sorry, Your 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.

See Ex-12; *see also* Appellant's Appendix, App-575, Tr. Vol. 13 (1/26/1993) at 2697 (receiving note and marking as Court's Exhibit Number 5 at trial). The judge told the jurors only that "[a]ll the information I can give you is set forth in the jury instructions." App-576, Tr. Vol. 13 (1/26/1993) at 2698.

Mr. Rhines repeatedly raised constitutional claims based on this jury communication. On direct appeal, he challenged the trial court's refusal to give a curative instruction about the jury note and refusal to appoint a communications

expert to assist in discerning anti-gay bias during jury selection, and also argued that the note demonstrated that the death sentence had been imposed under the influence of "passion, prejudice, or any other arbitrary factor." *See* Appellant's Addendum at Add-250, Add-269, Add-271. In his first state habeas petition, he argued that his trial counsel had been ineffective for failing to appeal the refusal to answer the jury note. Add-294. In his federal habeas petition, he again challenged the trial court's refusal to take curative action after receiving the note. The petition also challenged the effectiveness of his trial counsel for failing to exclude evidence of his sexual orientation. Add-70, Add-186. Finally, in a motion to alter or amend judgment pursuant to Rule 59(e), he presented juror affidavits betraying anti-gay animus. The district court, writing before *Peña-Rodriguez*, ruled that the submission of the affidavits was procedurally improper, but also suggested that they might be inadmissible. Add-182–86.

Until the Supreme Court decided *Peña-Rodriguez*, any juror statements would indeed have been inadmissible in either a South Dakota court or a federal district court. South Dakota employs a rule similar to the corresponding federal rule, stating:

> During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the

> verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

S.D. Codified Laws § 19-19-606(b)(1); *see also* F.R.E. 606(b)(1). Both rules have several exceptions that do not apply in this case.

Recent juror interviews provide compelling evidentiary support for Mr. Rhines's long-held suspicions. One juror has declared under penalty of perjury that the jury "knew that [Mr. Rhines] was a homosexual and thought that he shouldn't be able to spend his life with men in prison." Ex-1. A second juror similarly has declared under penalty of perjury that "[o]ne juror made . . . a comment that if he's gay, we'd be sending him where he wants to go if we voted for [life imprisonment without the possibility of parole]." Ex-2. A third juror has said, "'There was lots of discussion of homosexuality. There was a lot of disgust. This is a farming community.' . . . 'There were lots of folks who were like[,] Ew, I can't believe that.'" Ex-3 (declaration of Katherine Ensler, Federal Community Defender Office, quoting the third juror) (some quotation marks omitted).

Peña-Rodriguez held that rules similar to South Dakota's must yield to allow courts to consider juror statements regarding racial bias in deliberations over a guilty verdict. The underlying logic applies to anti-gay bias that motivates a choice of death instead of life imprisonment without parole. Whether the exception recognized in *Peña-Rodriguez* should apply to compelling evidence of

anti-gay stereotyping and animus, at least in a capital case, is debatable among jurists of reason. Entrusting jurors with the decision whether to sentence an individual to death and then precluding evidence that they relied on anti-gay animus and stereotypes violates the right to impartial jury sentencing. *See, e.g.*, *Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976) (explaining that both the Sixth Amendment and "principles of due process" guarantee an impartial jury). The federal and South Dakota no-impeachment rules must not preclude consideration of this evidence in support of Mr. Rhines's proposed juror bias and misconduct claims.

B. Anti-Gay Bias, Like Racial Bias, Poses A Threat To Impartial Jury Sentencing.

Peña-Rodriguez arose "at the intersection of the Court's decisions endorsing the no-impeachment rule and its decisions seeking to eliminate racial bias in the jury system." *Peña-Rodriguez*, 137 S. Ct. at 868.[3] There, two jurors stated that a third juror, during deliberations on guilt in a noncapital case, "had expressed anti-Hispanic bias toward [a] petitioner and [the] petitioner's alibi witness." *Id.* at 861.

[3] The Court earlier had established that "the Constitution . . . prohibits the exclusion of defense evidence under rules of evidence . . . that are disproportionate to the ends that they are asserted to promote," *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006). *See Rock v. Arkansas*, 483 U.S. 44, 62 (1987); *Davis v. Alaska*, 415 U.S. 308, 320 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Washington v. Texas*, 388 U.S. 14, 15, 23 (1967); Brief for Pet'r at 15–16, *Peña-Rodriguez*, 137 S. Ct. 855 (No. 15-606), 2016 WL 3453451.

The statements were "egregious and unmistakable in their reliance on racial bias." *Id*. at 870. The Court distinguished its previous rulings involving instances of juror "drug and alcohol abuse" and "pro-defendant bias," which it characterized as "anomalous behavior from a single jury—or juror—gone off course." *Id.* at 861, 868. The juror conduct in *Peña-Rodriguez* threatened broader "systemic injury to the administration of justice" that would result if juror-based racial discrimination were left unaddressed. *Id.* at 868.[4] Whereas "attempt[ing] to rid the jury of every irregularity of [the former] sort would be to expose it to unrelenting scrutiny," *id.*, attempting "to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy," *id.*

Like race-based bias, unchecked anti-gay bias causes systemic harm to the justice system and, in particular, capital jury sentencing.

Prejudice based on sexual orientation is just as long-standing and deeply rooted. "Until the mid-20th century, same-sex intimacy long had been condemned

[4] *Cf. McDonald v. Pless*, 238 U.S. 264, 268–69 (1915) (recognizing that "there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.' This might occur in the gravest and most important cases; . . . ." (quoting *United States v. Reid*, 53 U.S. 361, 366 (1851)); *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014) ("There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged."); *Peña-Rodriguez*, 137 S. Ct. at 864 (same).

as immoral by the state itself in most Western nations, a belief often embodied in the criminal law." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015). "Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate." *Id.*; *see also Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."); *id.* at 597 (Scalia, J., dissenting) ("There are 203 prosecutions for consensual, adult homosexual sodomy reported in the West Reporting system and official state reporters from the years 1880–1995. There are also records of 20 sodomy prosecutions and 4 executions during the colonial period." (citations omitted)); Gregory M. Herek, *The Psychology of Sexual Prejudice*, 9 American Psychological Society No. 1, 19 (2000) (reporting polling data showing that more than half of respondents in a 1992 national survey expressed "disgust" for lesbians and gay men).

Historically, "[g]ays and lesbians did not identify themselves as such because . . . being openly gay resulted in significant discrimination. The machineries of discrimination . . . were such that explicit exclusion of gay individuals was unnecessary—homosexuality was 'unspeakable.'" *SmithKline*

Beecham Corp. v. Abbott Labs., 740 F.3d 471, 485 (9th Cir. 2014) (citing and quoting Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 814–36 (2002)).

Among the "[s]tereotypes of gays and lesbians" that courts have recognized as having "pernicious effects," are that they are "promiscuous, . . . 'disease vectors' or child molesters." *Abbott Labs.*, 740 F.3d at 486 (citation omitted). "Empirical research has begun to show that discriminatory attitudes toward gays and lesbians persist and play a significant role in courtroom dynamics." *Id.* (citing Jennifer M. Hill, *The Effects of Sexual Orientation in the Courtroom: A Double Standard*, 39:2 J. of Homosexuality 93 (2000)); *see* Sarah E. Malik et al., *Moral Outrage Drives Biases Against Gay and Lesbian Individuals in Legal Judgments*, 26 Jury Expert 14 (2014) (finding, through mock jury experiments, jury bias against gay defendants in jury sentencing).

In an analogous context, the Supreme Court has recognized that classifications other than those on the basis of race require court intervention during jury selection. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994) (applying *Batson v. Kentucky*, 476 U.S. 79 (1986), to peremptory strikes on the basis of gender, and distinguishing strikes "to remove from the venire any group or class of individuals normally subject to 'rational basis' review"). And Justice Kennedy's concurrence noted concerns about gender bias in jury deliberations: "We do not prohibit racial and gender bias in jury selection only to encourage it in

jury deliberations. Once seated, a juror should not give free rein to some racial or gender bias of his or her own." *Id.* at 153 (Kennedy, J., concurring). Moreover, "[t]he wise limitation on the authority of courts to inquire into the reasons underlying a jury's verdict does not mean that a jury ought to disregard the court's instructions. A juror who allows racial or gender bias to influence assessment of the case breaches the compact and renounces his or her oath." *Id.* (Kennedy, J., concurring).

In addition, the same pragmatic concerns that apply to race-based stereotyping and animus apply to sexual-orientation-based stereotyping and animus. *Compare Peña-Rodriguez*, 137 S. Ct. at 869 (explaining the difficulty in relying on voir dire or juror reports during deliberations to address racial bias) *with, e.g.*, *United States v. Bates*, 590 F. App'x 882, 886–87 (11th Cir. 2014) (unpublished) (citing cases and 2013 survey data regarding the potential for unfair prejudice when admitting evidence of one's homosexuality before jurors), *and State v. Jonas*, 904 N.W.2d 566, 571–74 (Iowa 2017) (discussing cases and secondary literature that show difficulty in questioning veniremembers who actually express bias, particularly anti-gay bias, during voir dire). Jurors often are hesitant to reveal anti-gay bias, making it difficult to address through pretrial questioning. *Cf. People v. Peña-Rodriguez*, 412 P.3d 461, 474 (Col. App. 2012) (explaining that "while some prospective jurors may be hesitant to admit racial

bias, prospective jurors may be hesitant to admit gender bias, . . . [and] bias based on sexual orientation, . . ."), *aff'd*, 350 P.3d 287, *rev'd and remanded sub nom. Peña-Rodriguez*, 137 S. Ct. 855.

The *Peña-Rodriguez* Court noted the challenges that arise when questioning potential jurors about racial bias: "Generic questions" might not result in revelations of bias, and "more pointed questions 'could well exacerbate whatever prejudice might exist without substantially aiding in exposing it.'" *Peña-Rodriguez*, 137 S. Ct. at 869 (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 195 (1981) (Rehnquist, J., concurring in result)). The same goes for anti-gay bias. Here, in fact, Mr. Rhines's lawyers asked nearly all of the jurors if they could treat him fairly after learning that he is gay. Despite the jurors' assurances of fairness, evidence now shows that the fact of Mr. Rhines's homosexuality and their perception of it played a significant role in their deliberations on a death sentence.

In addition, "[t]he stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations." *Peña-Rodriguez*, 137 S. Ct. at 869. That remains true for anti-gay bias, and the trial courts' usual safeguards doubly failed in this case. The jurors wrote a note to the trial court that suggested their improper consideration of sexual orientation, but did not report the inappropriate use of stereotypes and animus that had occurred. And the trial court told the jury to keep deliberating without addressing, let alone

disapproving, the suggestion in the note that jurors inappropriately were discussing sexual orientation.

Lower courts have recognized the need for similar protections against discrimination and stereotyping on the basis of sexual orientation.

For example, the Ninth Circuit has held that *United States v. Windsor*, 570 U.S. 744 (2013), compelled the conclusion that *Batson* applies when an attorney exercises peremptory strikes on the basis of a potential juror's sexual orientation, stressing that "in its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review." *Abbott Labs.*, 740 F.3d at 481, 486.[5]

Other courts, considering the facts of each case, have reached conflicting results regarding whether a party must be permitted to question veniremembers

[5] The U.S. Attorney's Manual stated in February 2018: "The attorney for the government should oppose attempts by the court to impose any sentence that is: . . . (5) based on a prohibited factor, such as race, religion, gender, ethnicity, national origin, *sexual orientation*, or political association, activities, or beliefs." U.S. Dep't of Just., U.S. Atty's Manual No. 9-27.745, Unreasonable or Illegal Sentences (last updated February 2018) (emphasis added). And, in 2012, the U.S. Department of Justice adopted a policy that "[*Batson*] should be interpreted to extend to juror strikes based on sexual orientation." C.J. Williams, *To Tell You the Truth, Federal Rule of Criminal Procedure 24(a) Should Be Amended to Permit Attorneys to Conduct Voir Dire of Prospective Jurors*, 67 S.C. L. Rev. 35, 69 n.35 (2015) (quoting Memorandum to All Department Employees from Eric H. Holder, Jr., Attorney General, on Department Policy on Ensuring Equal Treatment for Same-Sex Married Couples (Feb. 10, 2014)).

about their potential anti-gay bias.[6] For example, in *United States v. Bates*, 590 F. App'x 882, 887 (11th Cir. 2014) (unpublished), the Eleventh Circuit held that a federal district court in a noncapital case had been constitutionally required to permit voir dire on bias when a defendant's "sexual activity and gender non-conforming conduct" were "'inextricably bound up' with the issues to be resolved at trial." *Id.* at 887 (quoting *Ross*, 424 U.S. at 597). Later, in *Berthiaume v. Smith*, 875 F.3d 1354 (11th Cir. 2017), the Eleventh Circuit reversed a federal district court for a similar failure when "the sexual orientation of [a plaintiff in a civil case] and his witnesses [were] central facts at trial and were 'inextricably bound up' with the issues to be resolved at trial," *id.* at 1358 (quoting *Rosales-Lopez*, 451 U.S. at

[6] The Supreme Judicial Court of Maine stated in 1982: "It is axiomatic that a juror who admittedly harbors anti-homosexual prejudice should be subject to inquiry at the trial of an individual who is or may be perceived to be a homosexual." *State v. Lovely*, 451 A.2d 900, 902 (Me. 1982). *Cf. State v. Rulon*, 935 S.W.2d 723, 726 (Mo. Ct. App. 1996) (noting that the "inextricably bound up" test applies to "[r]acial issues, and presumably other issues of potential prejudice by analogy," applying that test after stating, "[i]f we assume that the *Ham*[*v. South Carolina*, 409 U.S. 524 (1973),] requirements apply to prejudice against homosexuals," but concluding that the defendant could not satisfy the test). *But see United States v. Click*, 807 F.2d 847, 849–50 (9th Cir. 1987) (affirming trial court's denial of a homosexual defendant's request for questioning in a noncapital case regarding "bias against homosexuals," reasoning that "the effect of asking such a question is sufficiently problematic to justify its avoidance by the trial court"); *Kemp v. Ryan*, 638 F.3d 1245, 1262 (9th Cir. 2011) (concluding, in an AEDPA case in which a state court judge, not a jury, had sentenced the defendant to death: "[the petitioner] has not offered any case law holding that homophobia should be elevated to the same level as racial prejudice").

189). *See also id.* (explaining that the "facts and circumstances" of the case had created "a 'reasonable possibility that [sexual orientation bias] might have influenced the jury'" (quoting *Rosales-Lopez*, 451 U.S. 192)); *id.* (citing *Obergefell*, 135 S. Ct. at 2596–97, and the "the long history of cultural disapprobation and prior legal condemnation of same-sex relationships"). *Cf. State v. Jonas*, 904 N.W.2d 566, 571–75 (Iowa 2017) (discussing "cases in which potential jurors expressed bias related to gay people in cases with sexual context," and concluding that a trial court abused its discretion in denying a for-cause challenge when a veniremember had expressed "actual bias against gay people in the original questionnaire and during voir dire"); Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 Harv. J. L. & Gender 407, 427–34 (2014) (discussing cases involving veniremembers' expressions of potential bias against homosexuality during voir dire).[7]

[7] Further, when jurors perceive a male defendant's relationship with another man with bias, stereotypes, or disgust and consider that perception in sentencing him to death, but they would not have that same perception for a female defendant's relationship with a man, then they are biased because of sex and applying gender stereotypes. *Cf. Peña-Rodriguez*, 137 S. Ct. at 869 (indicating that its decision involved "racial stereotypes" in addition to "animus"); *J.E.B.*, 511 U.S. at 146 ("When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized."). Two circuits sitting en banc now have concluded in Title VII cases that discrimination on the basis of sexual orientation is a form of sex discrimination, following reasoning from *Loving v. Virginia*, 388 U.S. 1 (1967), and *Price Waterhouse v. Hopkins*, 490 U.S. 228

C. Providing Sentencing Discretion To Capital Jurors Creates A Special Risk That They Will Invoke Intolerable Bias During Their Deliberations.

The Supreme Court long has recognized the "special context of capital sentencing[.]" *Lockhart v. McCree*, 476 U.S. 162, 182 (1986) (citing *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Adams v. Texas*, 448 U.S. 38 (1980)). An inherent part of this "special context" is that states have given juries "broad discretion to decide whether or not death *is* 'the proper penalty' in a given case, ..." *Id.* (quoting *Witherspoon*, 391 U.S. at 519). "'Guided by neither rule nor standard, . . . a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.'" *Id.* (quoting *Witherspoon*, 391 U.S. at 519) (some quotation marks omitted).

The Court, in turn, has been "convinced that such discretion gives greater opportunity for racial prejudice to operate than is present when the jury is restricted to factfinding," *Turner v. Murray*, 476 U.S. 28, 36 n.8 (1986) (plurality opinion).

(1989), among other cases. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 113–15, 124–28 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 342, 345–49 (7th Cir. 2017) (en banc); *see also Hively*, 853 F.3d at 341–42, 350 (collecting cases regarding this issue). *Cf. Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018) (panel decision concluding that "[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex").

See also Caldwell v. Mississippi, 472 U.S. 320, 340–41 n.7 (1985) (noting the "highly subjective" nature of the jury's sentencing decision (going on to quote *Zant v. Stephens*, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring in judgment)).

Given that recognition, to look away from evidence that jurors invoked deeply-rooted prejudice in exercising their discretion risks a "systemic loss of confidence" in capital jury sentencing. *See Peña-Rodriguez*, 137 S. Ct. at 869.

The Supreme Court's jurisprudence regarding constitutional requirements associated with voir dire reflects its particular concern that juror bias might operate more freely in capital cases. The Court has noted the difficulty in assessing voir dire on appeal, but "ha[s] not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections." *Morgan v. Illinois*, 504 U.S. 719, 730 (1992) (citing *Turner*, 476 U.S. at 36–37; *Ham v. South Carolina*, 409 U.S. 524, 526–27 (1973)). In *Ristaino v. Ross*, 424 U.S. 589 (1976), a noncapital case, it explained that "questioning about racial prejudice" must be allowed as a matter of constitutional law under particular circumstances. *See id.* at 596–97 (discussing *Ham*). Subsequently, in *Turner*, it held that a defendant is entitled to question potential jurors about racial prejudice in a capital trial involving an interracial crime. *See Turner*, 476 U.S. at 36–37.

As discussed in this application, the logic of *Peña-Rodriguez* cannot apply to racial bias in jury factfinding without applying to capital jury sentencing and comparably dangerous prejudice. Indeed, the Government of the United States conceded at oral argument for *Peña-Rodriguez* that "capital cases do present Eighth Amendment considerations . . . . The Court has often suggested under the Eighth Amendment different sets of rules apply, and there may be different considerations in that context," *Peña-Rodriguez*, No. 15-606, Tr. of Oral Arg. 51 (Oct. 11, 2016). Just as the Court considered Fourteenth Amendment principles in *Peña-Rodriguez*, *see* 137 S. Ct. at 867–68, this Court should consider the "'recogni[tion] that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination,'" *Turner*, 476 U.S. at 35 (plurality opinion) (quoting *California v. Ramos*, 463 U.S. 992, 998–99 (1983)).

D. The Evidence Mr. Rhines Has Presented Would Satisfy *Peña-Rodriguez*.

Three factors demonstrate that "a court could resolve the issues [in a different manner]," *see Barefoot*, 463 U.S. at 893 n.4, and that accordingly a COA should issue.

First, Mr. Rhines presented statements from jurors reflecting animus and stereotypes aimed at an immutable characteristic, his homosexuality. *See*

Obergefell, 135 S. Ct. at 2596 (citing expert recognition "that sexual orientation is both a normal expression of human sexuality and immutable"). The statements in this case also confirm his suspected interpretation of the jury note that had asked—and offered an apology for—"inappropriate," irrelevant, and troubling questions about Mr. Rhines's future ability to "mix" with other inmates, "marry or have conjugal visits," and be able to "brag" to "new and[/]or young men . . . [,]" if they had not sentenced him to death. *See* Ex-12.

The jurors who provided evidence of anti-gay bias have not retracted their earlier statements. To the extent jurors now characterize the statements as poorly chosen jokes or deny their effect on the deliberations, the nature of the statements and the jurors' willingness to make them in deciding whether a man should live or die betrays any attempt now to limit their weight. As the Eleventh Circuit aptly explained in a similar context: "[A]nti-Semitic 'humor' is by its very nature an expression of prejudice on the part of the maker. . . ." *United States v. Heller*, 785 F.2d 1524, 1527–28 (11th Cir. 1986). Moreover, "[i]t is inconceivable that by merely denying that they would allow their earlier prejudiced comments to influence their verdict deliberations, the jurors could have thus expunged themselves of the pernicious taint of anti-Semitism." *Id.* (footnote omitted). *Cf.* Crandall & Esleman, A Justification-Suppression Model of the Expression and Experience of Prejudice, 129 Psychological Bulletin No. 3, 414–46 (2003)

(discussing manners in which individuals suppress and/or justify prejudice when expressing it). At least, there are material disputes of fact that require a remand for a hearing.[8]

Second, jurors' statements in this case evidence a clear and disturbing nexus during deliberations between their biases and their choice of a death sentence to, in one juror's words, keep Mr. Rhines from "life with men in prison" or, as another commented with regard to his homosexuality, from "where he wants to go." *Compare* Ex-1, Ex-2, Ex-3, *and* Ex-12 *with Tharpe v. Sellers*, 138 S. Ct. 545, 553 (2018) (Thomas, J., dissenting) (noting in dissent that jurors "testified that they did not consider race and that race was not discussed during their deliberations").

Third, Mr. Rhines can demonstrate actionable bias, *see Phillips*, 455 U.S. at 215–16, and juror misconduct in the form of providing material false information during voir dire, *see McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548,

[8] Courts assess whether improper bias arose even when jurors do not expressly recognize or admit that they harbor such bias. *See, e.g.*, *Murphy v. Florida*, 421 U.S. 794, 800–03 (1975); *Smith v. Phillips*, 455 U.S. 209, 221–23 (1982) (O'Connor, J., concurring). Rather, assessing the role of bias involves factual determinations. *See, e.g.*, *Phillips*, 455 U.S. at 215 ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has an opportunity to prove actual bias."); *see also Wellons v. Hall*, 558 U.S. 220, 221–26 (2010) (per curiam) (granting a petition for a writ of certiorari, vacating a judgment in light of an erroneous ruling on procedural default, and remanding to consider whether a petitioner would be entitled to discovery and a hearing regarding claims of juror and court bias and misconduct).

549 (1984).[9] Here, Mr. Rhines has evidence that at least two of the jurors whose statements he has proffered indicated during voir dire that Mr. Rhines's sexual orientation would not affect their decision. *See* Tr. Vol. 2 (1/5/1993) at 328 (first juror quoted in this application) ("I guess a man or lady has to live their own lives the way they see fit . . . I don't see where that would have any variance on this case as far as I'm concerned."); Tr. Vol. 5 (1/8/1993) at 932 (third juror quoted in this application) (answering "Not at all" when told about "evidence . . . that will show that Mr. Rhines is a homosexual, he's gay and one or two of the witnesses who might be called in this case are also gay and have had relationship[s] with Mr. Rhines," and asked whether "that cause[s] you to view Mr. Rhines differently at all?"). Yet Mr. Rhines has evidence that contradicts those voir dire statements and shows actionable bias: the jurors' later statements regarding Mr. Rhines's homosexuality. Had each answered the voir dire questions honestly, Mr. Rhines and his attorneys could have challenged each for cause.

The Supreme Court's recent decision in *Tharpe v. Sellers*, 138 S. Ct. 545 (2018) (per curiam), exemplifies the type of evidence that can require inquiry under *Peña-Rodriguez*. In *Tharpe*, a petitioner "moved to reopen his federal

[9] Under *McDonough Power*, a new trial is necessary if (1) "a juror failed to answer honestly a material question on voir dire," and (2) "a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556.

habeas corpus proceedings regarding his claim that the Georgia jury that convicted him of murder included a white juror . . . who was biased against [the petitioner] because he is black." *Id.* at 545. The juror had told the other jurors, among other things, that "[a]fter studying the Bible, I have wondered if black people even have souls." *Id.* at 546. The Supreme Court explained that "[the juror's] remarkable affidavit—which he never retracted—presents a strong factual basis for the argument that [the petitioner]'s race affected [the juror]'s vote for a death verdict." *Id.* at 546. It reversed a lower federal court's COA decision and explained that "jurists of reason could debate whether [the petitioner] ha[d] shown by clear and convincing evidence that [a] state court's factual determination [regarding whether race had affected the juror's vote for a death sentence] was wrong," *id.* at 545–46. Although the Court noted the "high bar" that the petitioner would face on remand, it granted the petition for certiorari, vacated the lower court's judgment, and remanded because of the "unusual facts of th[at] case" and the lower court's basis for its decision. *See id.* at 546–47.[10]

[10] On remand, the Eleventh Circuit has distinguished a "pre-*Peña-Rodriguez* Claim" from a "*Peña-Rodriguez* Claim." *See* Order on Remand at 2–5, *Tharpe v. Sellers*, No. 17-14027 (11th Cir. April 3, 2018). It denied without prejudice the petitioner's application for a COA on the ground that the petitioner had not exhausted the latter claim in state court, noting that the denial "will enable [the petitioner] to pursue the [latter claim] in a successive petition in the [state court]." *Id.* at 9–10. A petition for reconsideration from that ruling is still pending. *See* Motion for Reconsideration, *Tharpe v. Sellers*, No. 17-14027 (11th Cir. April 20,

In sum, that jurors in Mr. Rhines's case denied biases against homosexuals during voir dire, made suspicious statements in a note to the trial court, and only revealed the role of anti-gay animus and stereotyping in their deliberations in later interviews raises material factual disputes that implicate important constitutional claims of jury bias and misconduct. This Court should consider whether no-impeachment rules must give way to allow the resolution of those claims before the state seeks to carry out this jury's death sentence.

E. Conclusion

For the reasons discussed above, this Court should grant the application for a COA. To allow a juror to vote for a man's death sentence on the basis of anti-gay stereotypes and animus unquestionably violates the Sixth and Fourteenth Amendments, along with the foundational principle that "[o]ur law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle," *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (applying the Sixth Amendment guarantee of effective assistance of counsel when an attorney injected race-based testimony into a jury's sentencing determination). Whether the exception the Supreme Court

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2018). In separate state court litigation, the Supreme Court denied a petition for certiorari from Tharpe in June 2018. *See Tharpe v. Sellers*, No. 17-344, 2018 WL 1627118 (2018).

recognized in *Peña-Rodriguez* should protect against anti-gay bias, at least when twelve jurors assemble to decide whether a man should live or die, is an important question that this Court should address.

II. JURISTS OF REASON COULD DEBATE WHETHER DISTRICT COURTS MAY ALLOW HABEAS PETITIONERS TO AMEND THEIR PLEADINGS DURING APPEAL, WHILE THE HABEAS PROCEEDINGS ARE INCOMPLETE.

When a district court denies relief on a procedural ground, a habeas petitioner seeking a COA must satisfy the *Barefoot*/*Slack* test on the procedural ground and on the underlying constitutional claims. *See Buck*, 137 S. Ct. at 777 (citing *Slack*, 529 U.S. at 484).

Mr. Rhines argued that the district court could allow him to amend his petition with the proposed juror bias and misconduct claims, pursuant to Rule 15 of the Federal Rules of Civil Procedure, because the judgment denying habeas relief would not be final unless and until this Court affirmed that order. The district court ruled that the judgment was final when it denied relief and that it lacked jurisdiction to entertain the motion to amend. *See* Ex-7 at 7, 13. Jurists of reason could differ—and have differed—over whether habeas courts have that power, and what principles should govern their discretion. This difference of opinion over the scope of the amendment power under Rule 15 warrants a COA. *See Moore-El v.*

Luebbers, 446 F.3d 890, 895–96 (8th Cir. 2006) (noting that district court granted COA on denial of motion for leave to amend).

First, authority in this Circuit and other circuits authorizes amendment of a habeas petition (or a § 2255 motion) during appeal. In *Nims v. Ault*, 251 F.3d 698 (2001), the majority reviewed the merits of a juror misconduct claim. Nims's counsel had become aware of the potential claim while his habeas appeal was pending, and had successfully moved for a remand to file an amended petition. *Id*. at 700. Following the amendment and exhaustion of state remedies, Nims appealed the denial of relief. *Id*. at 701. The majority reached the merits over the dissent of Judge Bye, who maintained that the amended claim was an impermissible second or successive petition governed by 28 U.S.C. § 2244(b)(2), and that Nims could not satisfy the statutory criteria. *Id*. at 701–03, 705–06.[11]

The Second Circuit relied in part on *Nims* in *Ching v. United States*, 298 F.3d 174 (2d Cir. 2002), in which the petitioner filed a second petition during his appeal of an adverse ruling on his initial § 2255 petition. *See Ching*, 298 F.3d at 175–76, 181. The court observed that AEDPA does not define what constitutes a "second or successive" § 2255 motion (which would require adherence to strict limitations and authorization from the circuit). At a minimum, it must be filed

[11] As discussed below, two subsequent panel rulings in this Circuit created a debatable question over *Nims*'s scope.

"subsequent to the conclusion of a proceeding that 'counts' as the first." *Id*. at 177 (quoting *Littlejohn v. Artuz*, 271 F.3d 360, 363 (2d Cir. 2001)). Every civil litigant has an opportunity to add or drop issues while the litigation proceeds; this concern is "particularly heightened in the AEDPA context, where the gatekeeping provisions of the statute stringently limit a petitioner's ability to raise further issues in a subsequent action." *Id*. The adjudication of a habeas petition is not necessarily final, the court concluded, simply because the judgment is "final" for purposes of filling a notice of appeal under 28 U.S.C. § 1291. Adjudication of the motion was "not yet complete" because the appeal was pending and "no final decision had been reached with respect to the merits." *Id*. at 178.

The court stressed that its ruling did not contradict AEDPA because the equitable principles of abuse-of-the-writ doctrine would allow courts to prevent piecemeal, vexatious, or dilatory litigation. Furthermore, a decision on a motion to amend is "committed to the sound discretion of the trial court," which may deny the motion to thwart dilatory, unfairly prejudicial, or abusive tactics. *Id*. at 179–80. The *Ching* court remanded for consideration of the motion as a motion to amend. *Id*. at 181–82; *see also Whab v. United States*, 408 F.3d 116, 118 (2d Cir. 2005) (because petition filed while application for COA on initial habeas appeal was pending was not a "second or successive" petition, authorization from court of appeals unnecessary).

The Tenth Circuit adopted a different approach in *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009), allowing the petitioner to "supplement" a prosecutorial misconduct claim in his original petition with a *Brady* claim added during his appeal. Douglas had argued in state court and in his initial habeas petition that the prosecutor had violated due process by vouching for the credibility of a cooperating witness. The new claim arose during Douglas's habeas appeal, when evidence emerged that the prosecutor had made a deal with the witness, failed to disclose it, and allowed the witness to lie on the stand. *Id.* at 1167, 1189–90. The Court of Appeals identified seven factors that justified allowing the supplement:[12]

> (a) Douglas's initial habeas petition was "open and still pending," and had never been "finally resolved," *id*. at 1190;
>
> (b) The pending prosecutorial misconduct claim was closely related to the newly asserted *Brady* claims, *id.* at 1190–91 ("Mr. Douglas just did not know how improper the prosecutor's vouching for Smith was" until he later discovered it, because the prosecutor covered it up);
>
> (c), (d) The prosecutor's misconduct was willful and intentional, and the prosecutor actively concealed it, *id*. at 1192;
>
> (e) The case was a death penalty case, *id*. at 1194 ("we apply a heightened concern for fairness in this case, where the state is prepared to take a man's life");

[12] The Tenth Circuit would ordinarily treat a request for amendment while an appeal is pending as a successive petition subject to the limitations of § 2244(b). *See Ochoa v. Sirmons*, 485 F.3d 538, 540–41 (10th Cir. 2007).

> (f) "[I]nequity of treatment" between Douglas and his co-defendant "[led] to the conclusion that the death penalty [was] capricious," *id*. at 1194–95;
>
> (g) Allowing the supplement would not thwart AEDPA's interest in finality because Douglas had acted diligently once he had uncovered the new *Brady* violations.

Id. at 1195.

Thus, jurists of reason have not only debated the question decided by the district court in Mr. Rhines's case—whether amendment is allowable during appeal—but have applied a variety of constraints to keep amendments within appropriate bounds: the sound discretion of the trial court under Rule 15, the multi-factored analysis used in *Douglas*, and the common law abuse-of-the-writ doctrine.

It is at least debatable that Mr. Rhines could satisfy any of those tests. As in *Douglas*, his initial habeas petition was on appeal, and thus "open and pending," when he moved to amend it. The amendment is closely related to a claim already before this Court: that the judge should have taken curative action when the jury asked questions reflecting anti-gay stereotypes and animus. As in *Douglas*, Mr. Rhines attempted in his state and earlier federal litigation to challenge the jurors' bias, but could not present the new evidence until it became available during his habeas appeal. Finally, just as the Tenth Circuit found the prosecutor's willful misconduct in an effort to take a prisoner's life especially insupportable and worthy of heightened scrutiny, this Court should find the jurors' statements

reflecting stereotyping and bias in Mr. Rhines's sentencing at least sufficiently shocking to require review.

The same factors could warrant the district court's exercise of sound discretion under Rule 15 and demonstrate that Mr. Rhines has not abused the writ. *See McCleskey v. Zant*, 499 U.S. 467, 490 (1991) (abuse-of-writ doctrine "derives from the court's equitable discretion," requiring consideration of a "suitor's conduct in relation to the matter at hand" (quotation marks omitted)).

Jurists of reason could also debate the district court's second ground for rejecting Mr. Rhines's claim. The court found *Nims* "factually distinct," because that petitioner, unlike Mr. Rhines, had requested a remand from the Court of Appeals before moving to amend. Ex-7 at 12–13. It is debatable whether this factual distinction matters. Federal Rule of Civil Procedure 62.1 enabled the court to issue an indicative ruling stating "either that it would grant the motion if the court of appeals remand[ed] for that purpose or that the motion raise[d] a substantial issue." *See also* Fed. R. App. P. 12.1 (providing for notice to court of appeals and remand corresponding to Fed. R. Civ. P. 62.1); *Idaho Bldg & Const. Trades Council, AFL-CIO v. Wasden*, No. 1:11-cv-00253-BLW, 2013 WL 1867067, at *2–3 (D. Idaho May 1, 2013) (entering indicative order stating willingness to consider motion to add party); *Fowler v. Johnson*, No. CV 17-11441, 2018 WL 1737122, at *6–9 (E.D. Mich. Apr. 11, 2018) (considering

whether to grant indicative ruling on Rule 15 motion to amend during appeal). In Mr. Rhines's case, whether the request for a remand preceded the amendment motion, as in *Nims*, or followed it should not make a difference.

Finally, jurists of reason could debate which authority from this Circuit controls Mr. Rhines's motion. As described above, in *Nims*, the majority reviewed the merits of a juror misconduct claim filed during direct appeal. The *Nims* opinion, as the first to address the question here—whether a habeas petitioner may amend the petition after the district court has ruled but before the appeal has been decided—should bind subsequent panels (and lower courts) under Circuit law settled in 2011. *See Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc). Before this first-in-time rule was settled, however, another panel of this Court concluded that a later decision, *Davis v. Norris*, 423 F.3d 868 (8th Cir. 2005), set forth the controlling rule. *See Williams v. Norris*, 461 F.3d 999, 1004 (8th Cir. 2006) (citing *Davis*). Davis sought a remand during his habeas appeal to litigate a claim that his death sentence was unconstitutional under *Atkins v. Virginia*, 536 U.S. 304 (2002), because of his intellectual disability. The Court of Appeals, in a departure from *Nims*, treated the remand motion as a successive petition and ruled that Davis could not satisfy the relevant standards. *Davis*, 423 F.3d at 878–79.

Williams sought to reconcile *Nims* with *Davis* on the ground that the former was a pre-AEDPA case and the court expected that Nims would later be able to raise both the original and amended claims on appeal. *Williams*, 461 F.3d at 1004.[13] Jurists of reason might disagree with this conclusion. The presence (under AEDPA) or absence (pre-AEDPA) of potential bars to relief should not determine the question whether an amendment may be allowed until the judgment becomes final with the conclusion of the appeal process. AEDPA imposed certain procedural requirements on habeas petitioners that did not previously exist. It did not, however, fundamentally change courts' understanding of what constitutes a successive petition for purposes of avoiding abuses of the writ. *See Crouch v. Norris*, 251 F.3d 720, 723 (8th Cir. 2001) ("AEDPA fails to define what constitutes a 'second or successive' application. . . . [I]t is generally acknowledged that the interpretation of 'second or successive' involves the application of pre-AEDPA abuse-of-the-writ principles.") (cited in *Ching*, 298 F.3d at 179). That AEDPA could apply to a given habeas petition should not categorically foreclose

[13] The *Williams* court also chose to rely on *Davis* rather than *Nims* because it was more recent, offered a more detailed analysis, and was more similar to Williams's case. *Williams*, 461 F.3d at 1004. Under Circuit law decided in 2011, after *Williams*, none of these reasons can overcome the rule that the first panel opinion to decide a question binds subsequent panels and "must be followed." *See Mader*, 654 F.3d at 800; *Taylor v. United States*, 223 F. Supp. 3d 912, 920 (E.D. Mo. 2016) (citing *Mader* and declining to follow later panel opinion that conflicted with earlier precedent).

an otherwise appropriate amendment. The district court elected to follow *Williams*'s attempted reconciliation of *Davis* with *Nims*, *see* Ex-7 at 12, but jurists of reason could debate whether *Nims* is the controlling opinion under the first-in-time rule, and whether *Williams* correctly reconciled *Davis* with *Nims*.

Finally, in the current posture of Mr. Rhines's case, this Court should order a remand. As in *Ching*, his initial appeal presents other grounds requiring further proceedings in the district court. Because his amendment motion raises a substantial issue that the district court should decide, this Court should grant a COA, remand, and order the district court to consider the grounds for amendment along with the other grounds for remand raised in Mr. Rhines's appeal.

III. NO COA IS REQUIRED TO APPEAL THE DISTRICT COURT'S DENIAL OF MR. RHINES'S MOTION TO ALLOW MENTAL HEALTH EXPERTS TO EVALUATE HIM FOR PURPOSES OF CLEMENCY OR OTHER PROCEEDINGS.

Mr. Rhines petitioned the South Dakota state courts to allow his defense-retained mental health experts to meet with and evaluate him at the state prison. After the state courts denied that request, Mr. Rhines petitioned the District Court for an order requiring the Warden to produce him for expert evaluations in support of a potential request for executive clemency and, if relevant, other matters. The District Court denied that request in its May 25, 2018, Order at pages 17–22. Mr. Rhines has appealed that ruling.

No COA is needed for this part of the appeal. In *Harbison v. Bell*, the Supreme Court held that a COA is only required under 28 U.S.C. §2253(c)(1)(a) if the district court's order disposed of a habeas corpus proceeding's merits, i.e., "a proceeding challenging the lawfulness of a prisoner's detention." *Harbison v. Bell*, 556 U.S. 180, 183 (2009). The Court in *Harbison* allowed the defendant to appeal the district court's denial of his request for federally appointed counsel during clemency proceedings without a COA, because the order "merely denie[d] a motion to enlarge the authority of appointed counsel[,]" instead of disposing of the merits. *Id.*

The Eighth Circuit has followed suit in similar circumstances. *See Edwards v. Roper*, 688 F.3d 449, 462 (8th Cir. 2012) (citing *Harbison*, 556 U.S. at 183) (COA not required where defendant appealed the district court's denial of his motion for funds to conduct a mental examination). Courts of Appeals in other circuits have held similarly. *See Woodward v. Epps*, 580 F.3d 318, 333 n.8 (5th Cir. 2009) (COA not necessary to appeal the denial of funds for expert assistance in a habeas proceeding); *United States v. Pickard*, 733 F.3d 1297, 1301 n.2 (10th Cir. 2013) (COA not necessary to appeal district court's denial of motion to unseal DEA records); *Lambright v. Ryan*, 698 F.3d 808, 817 n.2 (9th Cir. 2012) (COA not necessary to appeal denial of motion to modify protective order).

Mr. Rhines similarly may appeal the district court's denial of his motion for expert access without a COA. As in *Harbison*, the district court's order did not dispose of the merits of Mr. Rhines's habeas corpus proceedings and did not address the lawfulness of his detention. Instead, the order merely denied Mr. Rhines access to expert services, which he requested in order to prepare his clemency application. No COA is required for the appeal to move forward. *See Harbison*, 556 U.S. at 183. This Court should set a briefing schedule to resolve the merits of the appeal.

CONCLUSION

For the reasons above, the Court should grant a COA and set a briefing schedule.

Respectfully submitted,

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Dated: July 26, 2018

CERTIFICATE OF SERVICE

I certify that this application was served on the Court and opposing counsel named below via the ECF system on July 26, 2018:

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CERTIFICATE OF COMPLIANCE

Appellant, Charles Russell Rhines, through undersigned counsel, respectfully certifies that this application contains 9010 words, excluding items noted in Rule 32(f). He has contemporaneously filed a motion to exceed the type-volume limitations of Rule 27, as amended December 1, 2016.

It complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27(d)(1)(E), because the document has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in 14-point Times New Roman font.

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/s/ STUART B. LEV
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Dated: July 26, 2018