IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

EXHIBITS TO APPLICATION FOR CERTIFICATE OF APPEALABILITY

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

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Dated: July 26, 2018

EXHIBITS

Exhibit 1

DECLARATION OF Harry Keeney
PURSUANT TO 28 U.S.C. § 1746

I am postive Charles Rhines is guilty. We sentenced him to what he should get a long time ago. We deliberated and all thought he deserved death. I still think he does. we thought that the crime was intentional We also knew that he was a homosexual and thought that he shouldn't be able to spend his life with men in prison. I still believe he deserves the death penalty.

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Harry Keeney

Exhibit 2

DECLARATION OF Frances Cersosimo
PURSUANT TO 28 U.S.C. § 1746

I was a juror on Charles Rhines's case. I think we came to the right decision. I think his shot at redemption is waiving his appeals and being executed. We deliberated at both the guilt and penalty phases. We followed the judge's instructions. I remember we sent a note about life and death. We talked about that for a while. Our responsibility was profound and we took it seriously. One juror said it would be a deterrent to other criminals if Charles received a death sentence. After discussing this, we agreed the death penalty served no deterrent purpose. One juror made ~~an~~ a comment that if he's gay, we'd be sending him where he wants to go if we voted for LWOP. Rhine's confession jumped out, with his jarring laughter — a huge contrast to his otherwise soft voice. We had Donovan's picture in front of us - the one of his body as it was found. Rhines destroyed his freedom and that was a big thing. I think we made the right decision. Rhines had a fair trial, and deserves his sentence. I stand by my decision today. Rhines had a fair and compassionate jury - very fair. Nobody said he was evil. We judged his deeds, not his character. FC 12-11-16

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Frances Cersosimo 12-11-16

Exhibit 3

DECLARATION OF KATHERINE ENSLER
PURSUANT TO 28 U.S.C. § 1746 & 18 P.A. CONS. STAT. § 4904

I, Katherine Ensler, do hereby declare and verify as follows:

1. I spoke with Mr. Bennett Blake on December 10, 2010, over the phone with my colleague Alex Kursman.

2. Mr. Blake began the conversation stating that an investigator had called him recently, that his wife was a producer for KOTA, that he knows several defense attorneys, and that he has family in law enforcement.

3. Mr. Blake then stated that he had no remorse for the verdict or sentence.

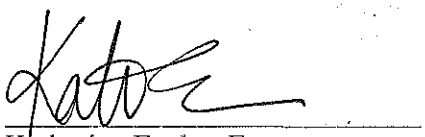
4. He stated that the jury had deliberated, and when asked to speak more about the deliberations, he immediately said, "There was lots of discussion of homosexuality. There was a lot of disgust. This is a farming community."

5. He stated that it was very clear that Mr. Rhines was a homosexual given the testimony at trial. He then said, "There were lots of folks who were like 'Ew, I can't believe that.'"

6. I let Mr. Blake know I was going to write down what he said to us about the case, which he said was fine.

7. Later the same day he sent my colleague a text message telling him he did not want to be contacted again.

8. I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information and belief, subject to 28 U.S.C. § 1746 and 18 Pa. Cons. Stat. § 4904.



Katherine Ensler, Esq.
Research and Writing Specialist
Federal Community Defender Office for the Eastern District of Pennsylvania

Date: December 12, 2016

Exhibit 4

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

STATE OF SOUTH DAKOTA, **Plaintiff and Appellee,** **vs.** **CHARLES RUSSELL RHINES,** **Defendant and Appellant.**	**ORDER** **#28444**

Appellant having served and filed a motion for relief from the circuit court's judgment in the above-entitled matter, and appellee having served and filed a response thereto along with a motion to file exhibits under seal, and appellant having served and filed a reply thereto, and Lambda Legal Defense and Education Fund having served and filed a motion for leave to file a brief of amicus curiae, and the Court having considered said motions, responses, and replies, and being fully advised in the premises, now, therefore, it is

ORDERED that Appellee's motion to file exhibits under seal is granted;

ORDERED that Appellant's motion for relief from the circuit court's judgement is denied. Appellant cites *Pena-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017), arguing that the jury improperly considered his sexual orientation in the penalty phase of his trial. Assuming, but not deciding, that this appellate Court has original jurisdiction to grant relief from a circuit court's final judgment under SDCL 15-6-60(b)(6) based on an

alleged change in conditions, and assuming but not deciding that the constitutional rule articulated in *Pena-Rodriguez* is to be retroactively applied, this Court declines to apply *Pena-Rodriguez*. It is this Court's view that neither Appellant's legal theory (stereotypes or animus relating to sexual orientation) nor Appellant's threshold factual showing is sufficient to trigger the protections of *Pena-Rodriguez*; and it is

ORDERED that Lambda Legal Defense and Education Fund's motion for leave to file a brief of amicus curiae is denied as moot.

DATED at Pierre, South Dakota, this 2nd day of January, 2018.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

(Justice Janine M. Kern disqualified.)

PARTICIPATING: Chief Justice David Gilbertson, Justices Steven L. Zinter, Glen A. Severson and Steven R. Jensen.

STATE OF SOUTH DAKOTA
In the Supreme Court
I, Shirley A. Jameson-Fergel, Clerk of the Supreme Court of South Dakota, hereby certify that the within instrument is a true and correct copy of the original thereof as the same appears on record in my office. In witness whereof, I have hereunto set my hand and affixed the seal of said court at Pierre, S.D. this 2nd day of Jan, 20 18.
Clerk of Supreme Court
Deputy

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

Exhibit 5

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

CHARLES RUSSELL RHINES,	)	
	)	**CIV. 5:00-5020-KES**
Petitioner,	)	
	)	
v.	)	**CAPITAL CASE**
	)	
DARIN YOUNG, Warden,	)	
South Dakota State Penitentiary,	)	
	)	
Respondent.	)	

MOTION FOR LEAVE TO AMEND PETITION FOR HABEAS CORPUS AND CONSOLIDATED BRIEF IN SUPPORT OF MOTION

Petitioner, Charles Rhines, by and through undersigned counsel, hereby seeks leave of this Court to amend his Petition for Habeas Corpus pursuant to Fed. R. Civ. P. 15(a)(2). In the alternative, Mr. Rhines requests that this Court construe this Motion as a Motion for Relief from Judgment Pursuant to Rule 60(b)(6). His proposed amendment is submitted as Exhibit 1 to this pleading.

Jurors from Mr. Rhines's trial have recently come forward to explain that a bias against Mr. Rhines because of his homosexual identity played a significant role in the decision to sentence him to death. Jurors rejected a sentence of life imprisonment because of an explicitly voiced concern that such a sentence would

effectively reward him with the opportunity to mingle with, and have sexual relations with, young male inmates.

Until recently, juror statements about their internal discussions and decision processes were always inadmissible and could never give rise to claims of juror misconduct. In *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017), however, the United States Supreme Court recently changed course, holding that such evidence is admissible when offered to prove a claim of juror bias. As described below, the new juror statements, combined with the change of law in *Pena-Rodriguez*, should provide Mr. Rhines the opportunity to show that there was juror bias that was not revealed in *voir dire*, and that he was sentenced to death, in part, because he is a homosexual.

BRIEF IN SUPPORT OF MOTION

I. THIS COURT HAS THE AUTHORITY TO GRANT LEAVE TO AMEND, AND AN AMENDMENT WOULD BE PROPER.

This Court has the authority to grant this motion to amend although the case is pending on appeal – both because it retains jurisdiction to amend until the conviction is final and because it may in any case grant relief pursuant to Rule 60(b) of the Rules of Civil Procedure. The circumstances support allowing the amendment.

A. New Evidence of Juror Bias

Newly discovered information has disclosed that Mr. Rhines's homosexuality was definitely a focal point of the deliberations.

Juror Frances Cersosimo recalled hearing an unidentified juror comment of Mr. Rhines "that if he's gay we'd be sending him where he wants to go if we voted for LWOP." Ex. B, Decl. of Frances Cersosimo.

Juror Harry Keeney stated that the jury "knew that [Mr. Rhines] was a homosexual and thought he shouldn't be able to spend his life with men in prison." Ex. C, Decl. of Harry Keeney.

Juror Bennett Blake confirmed that "[t]here 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. D, Decl. of Katherine Ensler.

All of the jurors who were asked, including Mr. Keeney and Mr. Blake, had told the Court in *voir dire* that they did not harbor anti-gay bias. *See, e.g.*, Trial Tr. at 327-28 (1/5/1993) (Keeney); 932 (1/8/1993) (Blake). The newly discovered information establishes that these assertions were false.

B. The Court Has Jurisdiction Because The Judgment Is Not Yet Final.

Because the judgment is not yet final, this motion does not qualify as a successive petition. 28 U.S.C. § 2244(b)(3)(A) requires that an applicant obtain

authorization from the Court of Appeals before filing a second or successive petition in the district court. An amendment filed in the district court during the pendency of an appeal of the habeas petition, however, is not considered a second or successive petition. *See Nims v. Ault*, 251 F.3d 698, 703 (8th Cir. 2001) (suggesting that the addition of a juror misconduct claim after a district court's denial of a habeas petition, but before that petition is resolved on appeal, was not successive, by considering that claim on its merits notwithstanding the jurisdictional prerequisites for filing second or successive petitions); *id.* at 705 (Bye, J., dissenting) ("The majority permits a prisoner to file a petition in district court, receive a complete adjudication on the merits, appeal, dismiss the appeal to add a new claim, and start all over *without penalty*.") (emphasis in original); *see also Whab v. United States*, 408 F.3d 116, 118-19 (2d Cir. 2005) (explaining that when a habeas petitioner raises a new claim, it is not successive so long as the habeas petition remains on appeal, and that the court should consider whether to permit the amendment under the flexible standards of Fed. R. Civ. P. 15(a), rather than the AEDPA standards governing second or successive petitions).

Later authority from this Circuit erroneously relied on the wrong panel opinion as precedent. In *Williams v. Norris*, 461 F.3d 999 (8th Cir. 2006), the panel held that an amendment to a habeas petition is a successive habeas petition if it occurs after the petition is denied by the district court but before the denial is affirmed on appeal. *Id.*

at 1004. The *Williams* Court declined to rely on *Nims*, and instead relied on *Davis v. Norris*, 423 F.3d 868 (8th Cir. 2005), a later panel opinion which conflicted with *Nims*. *Williams*, 461 F.3d at 1004. The Eighth Circuit has since ruled that "when faced with conflicting opinions, the earliest opinion must be followed as it should have controlled the subsequent panels that created the conflict." *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc). Here, the earliest opinion is *Nims*. Thus, the instant motion should be governed by *Nims* rather than *Williams*.

Because *Nims* stands for the proposition that a new claim cannot be deemed successive until the denial of the underlying petition has been affirmed on appeal, a district court retains discretion to permit an amendment under Fed. R. Civ. P. 15(a) while that petition is pending on appeal.

C. The Court Has Jurisdiction Under Rule 60(b) To Consider Whether An Obstacle To Merits Review Has Been Removed.

If this Court finds that it does not have jurisdiction to entertain this motion under the authority of *Nims* – although it should – it should nevertheless entertain this motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure. Rule 60(b)(6) provides that "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). The statute requires the litigant to file a motion under Rule 60(b) within a "reasonable time[.]" Fed. R. Civ. P. 60(c).

"[A] Rule 60(b)(6) motion in a § 2254 case is not to be treated as a successive habeas petition if it does not assert, or reassert, claims of error in the movant's state conviction." *Gonzalez v. Crosby*, 545 U.S. 524, 538 (2005). Rather, upon a showing of extraordinary circumstances, Rule 60(b) is the proper vehicle where the "motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Id.* at 532, 535.

> If neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction, allowing the motion to proceed as denominated creates no inconsistency with the habeas statute or rules. Petitioner's motion in the present case, which alleges that the federal courts misapplied the federal statute of limitations set out in § 2244(d), fits this description.

Gonzalez , 545 U.S. at 533.

This Court has recognized that a change in the law that had previously prevented a litigant from even bringing a claim can, in some circumstances, warrant a grant of Rule 60(b) relief. *See Cornell v. Nix*, 119 F.3d 1329, 1332-33 (8th Cir. 1997) (analyzing whether newly decided *Schlup v. Delo*, 513 U.S. 298 (1995), which recognized innocence exception to procedural rule that would otherwise bar review of Cornell's claim, was "extraordinary circumstance" entitling him to 60(b) relief); *Cox v. Wyrick*, 873 F.2d 200, 201-02 (8th Cir. 1989) ("A change in the law having retroactive application may, in appropriate circumstances, provide the basis for granting relief under Rule 60(b)[,]" but in this case new law "inapposite.").

In a case similar to this one, *Cox v. Horn*, 757 F.3d 113, 120-26 (3d Cir. 2014), the petitioner sought to raise an otherwise defaulted trial ineffective assistance claim, arguing that the Supreme Court's then-recent decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), now provided a means to establish cause and prejudice to overcome the default and allow habeas review of the merits. The Court of Appeals rejected an argument that a new decision, categorically, could never be sufficient to support a Rule 60(b) motion. It held that a district court has discretion to consider the change in the law, along with other factors, in making the equitable determination whether to grant relief. *Id.* at 124; *accord Ramirez v. United States*, 799 F.3d 845, 850-6 (7th Cir. 2015) (district court abused discretion in ruling petitioner categorically ineligible for 60(b) relief in light of *Martinez*, and in failing to consider multiple factors before making equitable decision).

Here, Mr. Rhines attacks a defect in the integrity of the federal habeas proceeding. Just as the statute of limitations in *Gonzalez* precluded the habeas court from reviewing any of the claims in the habeas petition, in this case a rule of evidence, now declared unconstitutional, precluded review of this claim.[1] Indeed, it was not even raised in Mr. Rhines's habeas petition. Mr. Rhines could not introduce

[1] Mr. Rhines attempted to raise a similar claim in his motion for relief from judgment pursuant to Rule 59 of the Rules of Criminal Procedure. Although this Court rejected the claim because it was inappropriate matter for a Rule 59 motion, it also suggested that juror affidavits were not even admissible. Order, July 5, 2016, Doc. 348, at 8.

the evidence he now proffers in either state or federal court to establish that he was prejudiced, because federal law and South Dakota law forbade jurors from offering testimony or affidavits concerning what occurred during the jurors' deliberations. *See* Fed. R. Evid. 606(b)(1); SDCL § 19-19-606. Additionally, *Tanner v. United States*, 483 U.S. 107 (1987), barred Mr. Rhines from introducing the evidence he now proffers as support for a claim that jurors were untruthful during *voir dire*, and as a result his right to an impartial jury was violated.[2]

The Supreme Court has now set aside these obstacles to merits review on constitutional grounds. In *Pena-Rodriguez*, 137 S. Ct. at 860, the Court held that due process requires the states to allow petitioners in certain circumstances to offer jurors' affidavits to obtain relief from judgment. As explained below, this case presents one of those circumstances. Therefore, as in *Gonzalez*, Mr. Rhines seeks a ruling that would remove an obstacle to merits review. The motion therefore does not constitute a second or successive petition.

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[2] Mr. Rhines's stand-alone claim that his right to an impartial jury was violated is unexhausted in state court but not necessarily defaulted. In *Hughbanks v. Dooley*, 887 N.W.2d 319, 326 (S.D. 2016), the South Dakota Supreme Court construed the two-year statute of limitations provision in S.D.C.L. § 21-27-3.3 to allow an additional two-year period beginning on the statute's effective date July 1, 2012 for petitioners whose time to file had already lapsed. It did not determine whether the statute made any exception for capital cases, was subject to equitable tolling, or attempt to reconcile its well-settled case law. Thus, it remains unclear whether exhaustion of the new claims in state court would be futile.

The motion otherwise satisfies the criteria for Rule 60(b)(6) relief. Rule 60(b)(6) "confers broad discretion on the trial court to grant relief when appropriate to accomplish justice; it constitutes a grand reservoir of equitable power to do justice in a particular case and should be liberally construed when substantial justice will thus be served." *MIF Realty v. Rochester Assocs.*, 92 F.3d 752, 755 (8th Cir. 1996) ("Rule 60(b) is to be given a liberal construction so as to do substantial justice and to prevent the judgment from becoming a vehicle of injustice." (citations and quotation marks omitted)); *see also City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147, 1154 (8th Cir. 2013) (Rule 60(b)(6) "broadly permits relief" for any reason justifying it); *Thompson*, 580 F.3d at 444 (citations omitted) (granting Rule 60(b)(6) motion in capital habeas case); *Lasky v. Cont'l Prods. Corp.*, 804 F.2d 250, 256 (3d Cir. 1986) ("the Rule should be liberally construed for the purpose of doing substantial justice").

In *Buck v. Davis*, 137 S. Ct. 759 (2017), the Supreme Court reaffirmed a court's broad discretion to entertain Rule 60(b) motions and emphasized the range of factors that may properly be considered:

> In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863–864, 108 S. Ct. 2194, 100 L.Ed.2d 855 (1988).

137 S. Ct. at 777-78.

In *Buck*, the Court found extraordinary circumstances present because the petitioner had been sentenced to death in part because of his race. *Id.* at 778. "Our 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." *Id.* The *Buck* Court further noted that, as to the second factor, "[r]elying on race to impose a criminal sanction 'poisons public confidence' in the judicial process." *Id.* (citation and quotations omitted). "It thus injures not just the defendant, but 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the process of our courts.'" *Id.*

Mr. Rhines's case presents an extraordinary circumstance – he was sentenced to death, in part, due to his homosexuality, an immutable characteristic congruent to the one condemned in *Buck*. Furthermore, just as relying on race in capital sentencing undermines public confidence in the judicial process, so too does relying on a defendant's sexuality in deciding whether he lives or dies.

State and federal evidentiary rules barred Mr. Rhines from presenting evidence to support his claim that he was sentenced to death based on his sexuality. These barriers have now been removed. Rule 60(b) relief from the judgment should accordingly be granted.

D. The Criteria for Amendment Are Satisfied.

Rule 15(a)(2) provides that a district court "should freely give leave [to amend] when justice so requires." "Under the liberal amendment policy of Federal Rule of Civil Procedure 15(a), a district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving partly, futility of the amendment, or unfair prejudice to the non-moving party can be demonstrated." *Roberson v. Hayti Police Department*, 241 F.3d 992, 995-96 (8th Cir. 2001) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962); *cf. Griffin v. Delo*, 961 F.2d 793, 793–94 (8th Cir. 1992) ("In light of the death sentence under which appellant labors and our granting of permission for his second attorney to withdraw, we believe that a remand with directions to allow the petitioner to raise additional issues for consideration by the district court is the most prudent course.").

Justice requires this Court to grant Petitioner leave to file an amendment to his petition. The proposed claim was never presented or ruled upon during Mr. Rhines's state or federal habeas corpus proceedings because evidentiary rules made it unavailable to Mr. Rhines. If this Court denies Mr. Rhines's motion for leave to amend his petition, these meritorious claims of constitutional magnitude may never be heard in any courtroom, state or federal, and no court will be able to correct this substantial injustice. Leave to amend should accordingly be granted.

CONCLUSION

For these reasons, the Court should grant Mr. Rhines leave to file the proposed amendment to his petition for a writ of habeas corpus, and all other appropriate relief.

Respectfully submitted,

NEIL FULTON, Federal Public Defender

By: /s/ Jason J. Tupman

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Counsel for Petitioner, Charles Russell Rhines

Dated: September 28, 2017

CERTIFICATE OF SERVICE

This will certify that, on September 28, 2017, a true and correct copy of the foregoing has been electronically filed with the Clerk of the Court via CM/ECF to be served on the following persons authorized to be noticed:

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

/s/ Jason J. Tupman
Jason J. Tupman

Exhibit 6

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

CHARLES RUSSELL RHINES,	)	
	)	**CIV. 5:00-5020-KES**
Petitioner,	)	
	)	
v.	)	**CAPITAL CASE**
	)	
DARIN YOUNG, Warden,	)	
South Dakota State Penitentiary,	)	
	)	
Respondent.	)	

PROPOSED AMENDMENT TO PETITION FOR HABEAS CORPUS

VII. MR. RHINES'S RIGHT TO AN IMPARTIAL JURY WAS VIOLATED BY THE ANTI-GAY BIAS OF MULTIPLE JURORS, WHICH THEY FAILED TO DISCLOSE DURING *VOIR DIRE*.

1. "The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on government power." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017).

2. But in some instances, a jury's "imperfections" strike at the heart of the justice system. In these cases—where a jury acts on the basis of discrimination rather than the evidence before it—the jury's behavior "is especially pernicious." *Id.* at 868 (citation omitted).

3. The jury at Mr. Rhines's trial knew he was gay. Almost all of the jurors were offered an opportunity to acknowledge their anti-gay biases during *voir dire*. They denied bias.[1]

4. But for at least some jurors, Mr. Rhines's sexual orientation made it impossible for them to provide him with the unbiased deliberations guaranteed by the Sixth and Fourteenth Amendments.

5. Instead, the decision between life and death became, at least in part, a referendum on whether a gay man should be afforded the purported benefit of living around other men in prison.

6. The jury's anti-gay bias and untruthful *voir dire* responses deprived Mr. Rhines of his right to a fair trial by an impartial jury. Relief is warranted.

A. The Jury's Knowledge of Mr. Rhines's Homosexuality

7. From before the beginning of Mr. Rhines's January 1993 trial, prospective jurors were informed that he was gay.

8. Mr. Rhines's own lawyers asked venirepersons if they harbored anti-gay bias. *See, e.g.*, Trial Tr. at 99 (1/5/1993) ("You are going to hear evidence that Mr. Rhines is gay, he's a homosexual, and you are going to hear that at least a couple of the people testifying in this case also are gay. Does that change your feelings about this case or sitting on this case in any way?").

[1] The one exception was juror Daryl Anderson, who was never asked how he felt about Mr. Rhines's sexual orientation. *See* Trial Tr. at 1326-50 (1/11/1993).

9. During the trial, the jury also heard evidence regarding Mr. Rhines's homosexuality.

10. For example, witness Heather Harter testified that she walked in on Mr. Rhines "cuddling" with her husband, Sam Harter, when she and Mr. Harter visited Mr. Rhines in Seattle. Trial Tr. at 2362 (1/19/1993).

11. Ms. Harter further testified that Mr. Rhines told her that he hated her because Mr. Harter loved her instead of him. Trial Tr. at 2364 (1/19/1993).

12. Mr. Rhines's ex-boyfriend Arnold Hernandez also testified that he had a "sexual" relationship with Mr. Rhines before Mr. Rhines lived with Mr. Harter. Trial Tr. at 2292 (1/19/1993).

B. "We'd Be Sending Him Where He Wants to Go."

13. Some of the jurors proved incapable of separating out their knowledge of Mr. Rhines's sexual orientation from their duty to serve impartially.

14. During penalty-phase deliberations, the jury debated the merits of a death sentence versus a sentence of life without parole ("LWOP").

15. On the second day of penalty deliberations, the jurors sent the trial judge a note that read as follows:

> 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:

1. Will Mr. Rhines ever be placed in a minimum security prison or be given work release.
2. Will Mr. Rhines be allowed to mix with the general inmate population.
3. [A]llowed to create a group of followers or admirers.
4. Will Mr. Rhines be allowed to discuss, describe or brag about his crime to other inmates, especially new and/or young men jailed for lesser crimes (ex: Drugs, DWI, assault, etc.)
5. Will Mr. Rhines be allowed to marry or have conjugal visits.
6. Will he be allowed to attend college.
7. Will Mr. Rhines be allowed to have or attain any of the common joys of life (ex[:] TV, Radio, Music, Telephone or hobbies and other activities allowing him distraction from his punishment).
8. Will Mr. Rhines be jailed alone or will he have a cellmate.
9. What sort of free time will Mr. Rhines have (what would his daily routine be).

We are sorry, 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.

Ex. A, Jury Note.

16. The jury note suggested that anti-gay bias played a role in the jury's decision-making process. The jurors' concerns mirrored themes elicited in the testimony of Heather Harter and Arnold Hernandez and reflected commonly held stereotypes of gay men: they were worried that he might taint other inmates by "mingling" with general population, that he might develop "followers" or

"admirers," and that he might "brag" to young inmates or have "conjugal visits" or marry.

17. As newly discovered information has disclosed, Mr. Rhines's homosexuality was definitely a focal point of the deliberations.

18. Juror Frances Cersosimo recalled hearing an unidentified juror comment of Mr. Rhines "that if he's gay we'd be sending him where he wants to go if we voted for LWOP." Ex. B, Decl. of Frances Cersosimo.

19. Juror Harry Keeney stated that the jury "knew that [Mr. Rhines] was a homosexual and thought he shouldn't be able to spend his life with men in prison." Ex. C, Decl. of Harry Keeney.

20. Juror Bennett Blake confirmed that "[t]here 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. D, Decl. of Katherine Ensler.

21. All of the jurors, including Mr. Keeney and Mr. Blake, told the court that they did not harbor anti-gay bias. *See, e.g.*, Trial Tr. at 327-28 (1/5/1993) (Keeney); 932 (1/8/1993) (Blake). The newly discovered information establishes that these assertions were false.

C. Mr. Rhines's Right to an Impartial Jury Was Violated.

22. The Sixth Amendment guarantees a defendant that each juror will be "indifferent as he stands unsworne." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (citation omitted).

23. When a juror gives material false information during *voir dire* regarding possible bias, a defendant must be granted a new trial if the nondisclosure denies the defendant his right to an impartial jury. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 549 (1984).

24. Under the *McDonough Power* standard, a defendant must be granted a new trial where (1) a juror provides false information during *voir dire* and (2) the truth, if known, would have provided the defense the basis for a successful cause challenge to that juror. *Id.* at 556.

25. Here, both Juror Keeney and Juror Blake satisfy the *McDonough Power* standard. First, they both provided false information during *voir dire*. Each testified that Mr. Rhines's sexual orientation would not affect his decision. *See* Trial Tr. at 328 (1/5/1993) ("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."); 932 (1/8/1993) ("Q: [T]here will be some evidence here 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. Knowing that, does that cause you to view Mr. Rhines differently at all? A: Not at all."). Based on their later statements regarding Mr. Rhines's homosexuality, each testified falsely.

26. Second, had each of the jurors answered the *voir dire* questions truthfully, Mr. Rhines and his attorneys would have known that each harbored anti-gay animus that he would not be able to put aside in judging Mr. Rhines's case. Thus, each could have been challenged for cause.

27. Separate from the *McDonough Power* standard, a defendant can show a violation of his Sixth Amendment rights where he can demonstrate actual bias on the part of a juror. *See Smith v. Phillips*, 455 U.S. 209, 215-16 (1982).

28. Here, Mr. Rhines can demonstrate actual bias against him on the part of Mr. Keeney, Mr. Blake, and the jury as a whole.

29. The jurors not only discussed Mr. Rhines's homosexuality during deliberations, they held it against him.

30. Eager to prevent him from receiving what they saw as the benefit of access to other men in prison, the jurors voted to impose a death sentence instead of LWOP.

31. Under *Smith*, the jurors who based their decision on anti-gay animus were biased against Mr. Rhines and thus deprived him of his right to fair trial under the Sixth and Fourteenth Amendments.

D. The "No-Impeachment Rule" Does Not Apply.

32. Like most jurisdictions, South Dakota employs a version of the "no-impeachment" rule. The rule, codified in South Dakota at SDCL § 19-19-606, provides that a juror may not testify or offer an affidavit "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 rule has several exceptions that are not relevant to this case.

33. However, under the Supreme Court's recent decision in *Pena-Rodriguez*, there are circumstances where the no-impeachment rule must give way to allow a court to consider evidence that purposeful discrimination has infected the deliberation process.

34. In *Pena-Rodriguez*, the defendant was charged with sexual assault. According to two jurors, a fellow juror commented during deliberations that he believed the defendant to be guilty of the sexual assault because "Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." 137 S. Ct. at 862. The Colorado courts ruled that they could not consider the evidence of racial bias because the no-impeachment rule barred the jurors from providing evidence regarding the internal process of deliberations. *Id.* at 862-63.

35. The Supreme Court reversed, holding that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule 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." 137 S. Ct. at 869.

36. The Court acknowledged other instances in which it had declined to find exceptions to the no-impeachment rule, including cases where jurors harbored generalized bias in favor of one side or abused drugs and alcohol. *Id.* at 868. The Court stressed that the no-impeachment rule remained generally applicable to help the jury system avoid "unrelenting scrutiny." *Id.*

37. But the Court concluded that racial bias was different because "if left unaddressed, [it] would risk systemic injury to the administration of justice." *Id.* The Court noted that its decisions "demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns" and added: "An effort 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.*

38. The logic of *Pena-Rodriguez* applies in this case. Like racial discrimination, discrimination on the basis of sexual orientation risks systemic, rather than case-specific, injury to the administration of justice.

39. Like racial discrimination, discrimination on the basis of sexual orientation implicates unique historical, constitutional and institutional concerns. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (recognizing right to same-sex marriage); *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (striking down as unconstitutional provision in Defense of Marriage Act that defined marriage as between man and woman); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding unconstitutional law criminalizing private homosexual sexual conduct); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (declaring unconstitutional state constitutional amendment that banned laws which themselves banned discrimination against gays and lesbians).

40. And, like the effort to eradicate racial discrimination, an effort to rid the justice system of discrimination on the basis of sexual orientation is not an exercise in perfecting the jury but rather an attempt to ensure that the legal system provides equal treatment under law.

41. Finally, as with attitudes about race, opinions about sexual orientation are not necessarily easy to unmask. *See Pena-Rodriguez*, 137 S. Ct. at 869. That was the case here, where the jurors deliberated regarding Mr. Rhines's sexual

orientation despite having pledged during *voir dire* that it would have no impact on their decision.

42. There is no principled reason to relax the no-impeachment rule to root out racial discrimination but enforce it where sexual-orientation-based animus is alleged. The no-impeachment rule should not apply here.

E. This Claim Is Timely.

43. Federal law provides that a claim is timely if it is filed within one year of the "date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Diligent counsel would not have questioned the jurors on their deliberations because at the time of state post-conviction and federal habeas corpus proceedings, no statements made during a jury's deliberations were admissible. *See Pena-Rodriguez*, *supra*.

44. The factual predicates for the claims were developed during conversations between counsel for Mr. Rhines and jurors on December 10 and 11, 2016. *See* Exs. B-D. This petition is being filed within one year of the date of those conversations; the claim is therefore timely.

F. Conclusion

45. Mr. Rhines was "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Parker v. Gladden*, 385 U.S. 363, 366 (1966).

46. The involvement of biased jurors in the deliberation and decision of Mr. Rhines's case violated his right to a fair trial by an impartial jury. Mr. Rhines respectfully requests that this Court grant the writ, conditioned on a new trial of Mr. Rhines's guilt or innocence and/or penalty.

CONCLUSION

For these reasons, the Court should grant Mr. Rhines's petition for a writ of habeas corpus and all other appropriate relief.

Respectfully submitted,

NEIL FULTON, Federal Public Defender

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Counsel for Petitioner, Charles Russell Rhines

Dated: September 28, 2017

CERTIFICATE OF SERVICE

This will certify that, on September 28, 2017, a true and correct copy of the foregoing has been electronically filed with the Clerk of the Court via CM/ECF to be served on the following persons authorized to be noticed:

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

/s/ Jason J. Tupman
Jason J. Tupman

Exhibit A

COURTIS EXHIBIT 765

about
10:45 A.M
1126/93

Judge Konnekamp,

In order to award the proper punishment We need a clear prospective of what "Life In Prison Without Parole" really means. We know what the Death Penality Means, but, We have no clue as to the reality of Life Without Parole.

The questions We have are as follows:

1. will Mr Rhines ever be placed in a minimum security prison or be given work release.

2. will Mr Rhines be allowed to mix with the general inmate population.

3. allowed to create a group of followers or admirers.

(4) will Mr Rhines be allowed to discuss, discribe or brag about his crime to other inmates, especially new and or young men jailed for lesser crimes (ex: Drugs, DwI, assault etc)

(5) Will Mr Rhines be allowed to Marry or have conjigal visits.

(6) will he be allowed to attend college

(7) will Mr Rhines be allowed to have or attain any of the common joys of life (ex TV, Radio, Music Telephone or hobbies and other activities allowing him distraction from his punishment).

(8) Will Mr Rhines be jailed alone or will he have a cellmate.

(9) What sort of free time will Mr Rhines have. (what would his daily routine be).

We are sorry, 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.

Bobby Walton
Foreperson
Dale Anderson
Barnett Blair
Judy Shafer
Delight McGriff
Wilma Woodson
Matthew Anderson
Robert W Corrin - Harry Keeney
Mark Owen
Fran Cesario

Exhibit B

DECLARATION OF Frances Cersosimo
PURSUANT TO 28 U.S.C. § 1746

I was a juror on Charles Rhines's case. I think we came to the right decision. I think his shot at redemption is waiving his appeals and being executed. We deliberated at both the guilt and penalty phases. We followed the judge's instructions. I remember we sent a note about life and death. We talked about that for a while. Our responsibility was profound and we took it seriously. One juror said it would be a deterrent to other criminals if Charles received a death sentence. After discussing this, we agreed the death penalty served no deterrent purpose. One juror made a comment that if he's gay, we'd be sending him where he wants to go if we voted for LWOP. Rhine's confession jumped out, with his jarring laughter — a huge contrast to his otherwise soft voice. We had Donovan's picture in front of us - the one of his body as it was found. Rhines destroyed his freedom and that was a big thing. I think we made the right decision. Rhines had a fair trial, and deserves his sentence. I stand by my decision today. Rhines had a fair and compassionate jury - very fair. Nobody said he was evil. We judged his deeds, not his character. FC 12-11-16

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Frances Cersosimo 12-11-16

Exhibit C

DECLARATION OF Harry Keeney
PURSUANT TO 28 U.S.C. § 1746

I am postive Charles Rhines is guilty. We sentenced him to what he should get a long time ago. We deliberated and all thought he deserved death. I still think he does. we thought that the crime was intentional We also knew that he was a homosexual and thought that he shouldn't be able to spend his life with men in prison. I still believe he deserves the death penalty.

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. § 1746.

Harry Keeney

Exhibit D

DECLARATION OF KATHERINE ENSLER
PURSUANT TO 28 U.S.C. § 1746 & 18 P.A. CONS. STAT. § 4904

I, Katherine Ensler, do hereby declare and verify as follows:

1. I spoke with Mr. Bennett Blake on December 10, 2010, over the phone with my colleague Alex Kursman.

2. Mr. Blake began the conversation stating that an investigator had called him recently, that his wife was a producer for KOTA, that he knows several defense attorneys, and that he has family in law enforcement.

3. Mr. Blake then stated that he had no remorse for the verdict or sentence.

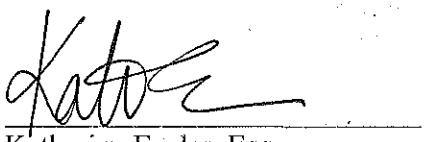
4. He stated that the jury had deliberated, and when asked to speak more about the deliberations, he immediately said, "There was lots of discussion of homosexuality. There was a lot of disgust. This is a farming community."

5. He stated that it was very clear that Mr. Rhines was a homosexual given the testimony at trial. He then said, "There were lots of folks who were like 'Ew, I can't believe that.'"

6. I let Mr. Blake know I was going to write down what he said to us about the case, which he said was fine.

7. Later the same day he sent my colleague a text message telling him he did not want to be contacted again.

8. I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information and belief, subject to 28 U.S.C. § 1746 and 18 Pa. Cons. Stat. § 4904.



Katherine Ensler, Esq.
Research and Writing Specialist
Federal Community Defender Office for the Eastern District of Pennsylvania

Date: December 12, 2016

Exhibit 7

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CHARLES RUSSELL RHINES, Petitioner, vs. DARIN YOUNG, WARDEN, SOUTH DAKOTA STATE PENITENTIARY; Respondent.	5:00-CV-05020-KES ORDER DENYING MOTION FOR LEAVE TO AMEND, DENYING MOTION FOR RELIEF FROM JUDGMENT, AND DENYING MOTION FOR EXPERT ACCESS

Petitioner, Charles Russell Rhines, moves the court for leave to amend his petition for habeas corpus under Fed. R. Civ. P. 15(a)(2), or in the alternative, moves the court for relief from judgment under Fed. R. Civ. P. 60(b)(6). Docket 383. Respondent, Darin Young, resists the motion on both grounds. Docket 389. In addition, Rhines moves the court for an order requiring Young to produce Rhines for two mental health expert evaluations in support of a potential clemency application to the South Dakota Governor. Docket 394. Respondent also opposes Rhines's motion for expert access. Docket 396.[1] For the following reasons, the court denies Rhines's motion to

[1] Contained in respondent's briefs in opposition to Rhines's motions are numerous ethical allegations against the Pennsylvania Federal Community Defender's Office. Such claims have no relevance to Rhines's case, the law pertinent to Rhines's motions, or the particular attorneys appointed to represent Rhines. Rhines's motions appear to the court to be no more than zealous representation of Rhines, which is what this court expects from court appointed counsel. Respondent's ethical allegations are stricken as scandalous.

amend under Rule 15(a)(2), denies Rhines's motion for relief from judgment under Rule 60(b)(6), and denies Rhines's motion for expert access.

BACKGROUND

The factual and procedural history of this case is more fully set forth in the court's February 16, 2016 order granting summary judgment in favor of respondent. *See* Docket 305. The court will briefly summarize the procedural history and then address any facts that are relevant to Rhines's pending motions throughout the analysis.

Rhines is an inmate at the South Dakota State Penitentiary in Sioux Falls, South Dakota. He was convicted of premeditated first-degree murder and third-degree burglary of a Dig'Em Donuts Shop in Rapid City, South Dakota. On January 26, 1993, a jury found that the death penalty should be imposed, and the trial judge sentenced Rhines to death by lethal injection. The South Dakota Supreme Court affirmed Rhines's conviction and sentence on direct appeal, and the United States Supreme Court denied further review in 1996. Rhines applied for a writ of habeas corpus in state court, raising numerous issues, which was denied in 1998 and affirmed by the South Dakota Supreme Court in 2000.

Rhines then filed a federal petition for a writ of habeas corpus in 2000. This court found several of Rhines's claims were unexhausted and granted a stay pending exhaustion in state court. Following respondent's appeal, the Eighth Circuit vacated the stay and remanded the case. Rhines filed a petition for a writ of certiorari in the United States Supreme Court, which granted

certiorari. After finding that a stay and abeyance is permissible under some circumstances, the Supreme Court remanded the case for further analysis not relevant to the pending motions. Ultimately, Rhines's petition in this court was stayed until he exhausted his state court claims. When this court lifted the stay, respondent moved for summary judgment. On February 16, 2016, this court granted respondent's motion for summary judgment, denied Rhines's amended habeas petition, and ruled on numerous other motions not relevant to the current motions. *See* Dockets 304, 305, 306. The court then denied Rhines's motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). Docket 348. On August 3, 2016, Rhines appealed this court's rulings to the Eighth Circuit Court of Appeals. Docket 357. Rhines has filed the two current motions during the pendency of his appeal.

DISCUSSION

I. Rhines's Motion for Leave to Amend Petition under Fed. R. Civ. P. 15(a)(2)

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), a petitioner must file his or her application for a writ of habeas corpus within one year of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

Because habeas proceedings are civil in nature, the Federal Rules of Civil Procedure apply. *See* 28 U.S.C. § 2242 ("[An application for a writ of habeas corpus] may be amended or supplemented as provided in the rules of procedure applicable to civil actions."). Federal Rule of Civil Procedure 15(a)(2) allows a party to amend its pleading with the opposing party's consent or the court's leave "when justice so requires." But a petitioner's amendment must meet the relation back requirements set forth in Federal Rule of Civil Procedure 15, which provides:

> (1) *When an Amendment Relates Back*. An amendment to a pleading relates back to the date of the original pleading when:
> (A) the law that provides the applicable statute of limitations allows relation back;
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading . . . .

Fed. R. Civ. P. 15(c); *see also McKay v. Purkett*, 255 F.3d 660, 660-61 (8th Cir. 2001) (applying Rule 15(c) to a petitioner's § 2254 amended petition and affirming the district court's dismissal of the amended claims because they did not relate back to petitioner's original claims). Thus, in the habeas context, any amendment to a timely filed habeas petition must be filed within AEDPA's one-year limitations period or the amendment must assert a claim that arose out of the conduct, transaction, or occurrence set out in the original petition.

The Supreme Court has addressed what the phrase "conduct, transaction, or occurrence" means under Fed. R. Civ. P. 15(c)(2) in the habeas framework. In *Mayle*, the Ninth Circuit, in agreement with the Seventh Circuit, had interpreted "conduct, transaction, or occurrence" to allow relation back to an original habeas petition when the petitioner's new claim stemmed from the petitioner's trial, conviction, or sentence. *Mayle v. Felix*, 545 U.S. 644, 656 (2005). The Supreme Court rejected that definition because it was too broad. *Id.* at 656-58. "An amended habeas petition, we hold, does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Id.* at 650.

The substance of Rhines's new claim is that some jurors from his trial have recently expressed the notion that a homosexual bias against Rhines "played a significant role in the decision to sentence him to death." Docket 383 at 1. And Rhines argues such juror bias is now admissible under the United States Supreme Court's recent decision in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). *Id.*

Because Rhines has appealed this court's denial of his habeas petition to the Eighth Circuit and that appeal is still pending, this court must first determine if it has jurisdiction over Rhines's current motion. Rhines maintains that this court still has jurisdiction to allow his amendment because "the judgment is not yet final." *Id.* at 3. Other than his reliance on *Nims v. Ault*, 251 F.3d 698 (8th Cir. 2001) and resistance to *Williams v. Norris*, 461 F.3d 999 (8th

Cir. 2006), which will be addressed below, *see infra* Section II.B., Rhines has not cited any Eighth Circuit precedent to establish that a judgment is not considered "final" until it is affirmed on appeal. In response, respondent contends that this court's judgment is final so the Eighth Circuit has exclusive jurisdiction over Rhines's case. Docket 389 at 7-9.

A. Judgment is Final

In general, a district court decision is final if "there is some clear and unequivocal manifestation by the trial court of its belief that the decision made, so far as [the court] is concerned, is the end of the case." *Waterson v. Hall*, 515 F.3d 852, 855 (8th Cir. 2008) (internal quotations omitted) (alteration in original). "A final decision is ordinarily one which disposes of all the rights of all the parties to an action." *Patterson v. City of Omaha*, 779 F.3d 795, 800 (8th Cir. 2015) (quotation omitted).

Here, judgment is final. In addition to the order granting respondent's motion for summary judgment and denying Rhines's petition for habeas corpus (Docket 305), this court entered a judgment denying Rhines's petition for habeas corpus relief on February 16, 2016. Docket 306. Entering a judgment clearly demonstrated the court's belief that Rhines's case was over. Rhines moved the court to alter or amend its judgment under Fed. R. Civ. P. 59(e) (Docket 323), which this court denied. Docket 348. Rhines then appealed several of this court's rulings, including this court's order granting summary judgment in favor of respondent (Docket 305) and judgment (Docket 306). Docket 357. *See Patterson*, 779 F.3d at 800 (noting that the Eighth Circuit's

jurisdiction is "limited to appeals taken from final decisions of the district courts."). If the Eighth Circuit affirms this court's order and judgment, nothing further will remain to be done. Thus, this court's judgment, which disposed of all claims in Rhines's petition for habeas corpus relief, was final.

B. Because this Court's Judgment was Final, Rhines's Motion to Amend is a Successive Petition.

AEDPA established a strict procedure that prisoners in custody under a state court judgment must follow in order to file a second or successive habeas corpus application challenging that custody. Under 28 U.S.C. § 2244(b)(2), a claim presented in a successive habeas petition under section 2254 that was not presented in the prior petition shall be dismissed unless:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

Before a district court can consider a successive petition, the petitioner "shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." *Id.* § 2244(b)(3)(A). There is no indication that Rhines has moved the Eighth Circuit Court of Appeals for an

order authorizing this court to consider Rhines's new claim of juror bias based on his homosexuality.[2]

Rhines argues that "[a]n amendment filed in the district court during the pendency of an appeal of the habeas petition, however, is not considered a second or successive petition." Docket 383 at 4. He relies on *Nims v. Ault*, 251 F.3d 698 (8th Cir. 2001) to support his position, arguing that *Nims* suggests "the addition of a juror misconduct claim after a district court's denial of a habeas petition, but before that petition is resolved on appeal, was not successive" because the *Nims* court considered the claim on its merits. *Id.*

Nims was convicted of kidnapping and sexually abusing an eight year old girl, which was affirmed by the Iowa Supreme Court on direct appeal. *Nims*, 251 F.3d at 700. After his post-conviction application for relief was denied,

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[2] On January 11, 2017, Rhines filed a protective petition for writ of habeas corpus while his application for authorization to file a successive petition was pending in the Eighth Circuit. Docket 377. The new claim raised in Docket 377, Rhines argues, is based on a new rule of constitutional law made retroactive to cases on collateral review that was announced in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Rhines contends that *Hurst* stands for the rule that a statute must require a jury to make death penalty findings beyond a reasonable doubt in order to comply with the Sixth Amendment, and South Dakota's death penalty statute violates this rule. Docket 377 at 4-6. The Eighth Circuit consolidated Rhines's petition for permission to file a successive habeas petition (*Rhines v. Young*, No. 17-1060 (8th Cir. application docketed Jan. 10, 2017)), with Rhines's appeal of this court's orders (*Rhines v. Young*, No. 16-3360 (8th Cir. appeal docketed Aug. 15, 2016)). *See* No. 17-1060; 16-3360, CLERK ORDER, docketed Feb. 16, 2017. "[T]he panel to which the consolidated cases are submitted for disposition on the merits shall determine whether to grant or deny the petition at the time it considers the appeal from the district court's order denying habeas relief in No. 16-3360." *Id.* This application for authorization, however, does not request authorization to file a successive petition on Rhines's new claim of sexual orientation bias by his state court jury.

Nims filed a federal habeas corpus petition, which was initially denied by the district court. *Id.* While that denial was on appeal to the Eighth Circuit, Nims requested the Eighth Circuit to remand the case to the district court so Nims could file an amended petition raising a newly-discovered claim of juror misconduct. *Id.* The Eighth Circuit dismissed the appeal without prejudice and remanded the case to the district court. *Id.*

The district court then dismissed Nims's amended petition without prejudice in order for Nims to fully exhaust his state remedies. *Id.* Following an unsuccessful attempt in front of the Iowa post-conviction court, Nims again filed a habeas petition in federal court, which was denied by the district court because the newly-discovered claim of juror misconduct was procedurally defaulted. *Id.* at 701. The district court issued a certificate of appealability, and the Eighth Circuit opinion, that Rhines currently relies on, followed.

After discussing Nims's failure to show cause for and prejudice from the default, the Eighth Circuit ultimately concluded that the district court did not err in finding that Nims's new claims were procedurally defaulted. *Id.* at 703. But because the Eighth Circuit considered Nims's new juror misconduct claim on its merits rather than on jurisdictional grounds for successive petitions, Rhines argues that *Nims* stands for the proposition that an amendment filed in the district court while an appeal is pending is not a successive petition. *See id.* at 703-06 (Bye, J., dissenting) (stating that Nims's petition should be considered successive and noting that "[t]he majority permits a prisoner to file a petition in district court, receive a complete adjudication on the merits,

appeal, dismiss the appeal to add a new claim, and start all over *without penalty*.") (emphasis in original). As an initial matter, the court does not read *Nims* to stand for the far-reaching proposition that Rhines suggests.

In *Williams v. Norris*, 461 F.3d 999 (8th Cir. 2006), on the other hand, the Eighth Circuit affirmed the district court's denial of a motion for relief from judgment after finding that it was a successive petition. The federal district court denied Williams's original petition for a writ of habeas corpus. *Id.* at 1000. Williams then filed a motion to alter or amend the judgment, or alternatively, for relief from judgment, but the district court denied Williams's motion as successive. *Id.* Then a renewed motion for relief from judgment was filed on Williams's behalf, raising a new claim based on a recent United States Supreme Court ruling. The district court determined it was also a successive habeas petition and denied the motion. *Id.* at 1000-01.

On appeal, the Eighth Circuit reviewed whether Williams's motion for relief from judgment constituted a successive habeas petition de novo. *Id.* at 1001. The first argument raised by Williams, and noted as the "strongest argument" by the Eighth Circuit, "revolve[d] around the fact that the district court did not file a separate judgment, as required by Rule 58, when denying Williams's initial petition." *Id.*[3] Williams thus argued that the denial of his

[3] As discussed above, *see supra* Section II.A., this court filed a judgment as a separate document in Rhines's case (Docket 306), suggesting Rhines's argument here is weaker than the argument raised by Williams. *See Williams*, 461 F.3d at 1001 (noting the district court's inadvertent failure to file a judgment as a separate document was Williams's "strongest argument").

petition was not a final judgment so his Rule 59(e) motions to alter or amend the judgment and his Rule 60(b) motions for relief from judgment "should have been treated as motions to amend the initial habeas petition under Rule 15." *Id.* Despite the clerical error, the Eighth Circuit found that the district court properly dismissed Williams's Rule 59(e) and Rule 60(b) motions as successive petitions because it was clear that the district court intended its order to dispose of Williams's petition on the merits. *Id.* at 1002. The court cited to and discussed *Bonin v. Calderon*, 59 F.3d 815 (9th Cir. 1995), where the Ninth Circuit refused to construe the petitioner's motion to amend a habeas petition, after the district court had denied the petition, as a Rule 15 motion merely because the district court had failed to file a separate judgment. Agreeing with this analysis, the Eighth Circuit in *Williams* refused to accept Williams's argument that his motion should be construed as a Rule 15 motion just because a final judgment was inadvertently not filed.

Williams also argued that his motions were not successive because the denial of his original petition was not yet affirmed on appeal. *Williams*, 461 F.3d at 1003. Relying on *Davis v. Norris*, 423 F.3d 868 (8th Cir. 2005), the Eighth Circuit disagreed with Williams. *Id.*

Rhines argues that *Williams* erroneously relied on *Davis*, a 2005 decision, rather than the 2001 *Nims* decision, because Eighth Circuit precedent directs a court to follow the earliest opinion when there is a conflict between panel opinions. Docket 383 at 4-5 (quoting *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc)). Notably missing from Rhines's argument,

however, is the Eighth Circuit's discussion of the potential conflict between *Nims* and *Davis* in *Williams*. The *Williams* court found *Nims* and *Davis* reconcilable because the *Nims* court remanded the petition to the district court in 1992, pre-AEDPA and with the expectation that "petitioner [would] be able to later raise both his original and amended claims on appeal[,]" whereas *Davis* was different "in that the petitioner's request for a remand occurred after the passage of AEDPA." *Williams*, 461 F.3d at 1004. The *Williams* court's discussion of the distinctions between *Nims* and *Davis* leads this court to conclude that there are not two conflicting panel decisions that are implicated here. So Rhines's argument that *Nims*, the earlier decision, is controlling, rather than *Williams* and its reliance on *Davis*, is misplaced. Because Rhines's petition was filed post-AEDPA, *Williams*'s reliance on *Davis*, and the subsequent decision to "reject Williams's claim that an amendment to a petition is not a successive habeas if it occurs after the petition is denied, but before the denial is affirmed on appeal," controls. *Id.* at 1004.

The other issue with Rhines's argument is that *Nims* is distinguishable from this case. In *Nims*, the Eighth Circuit panel remanded the petition to the district court before Nims's petition was heard on appeal because Nims requested a remand. *Nims*, 251 F.3d at 700. And Nims requested the remand pre-AEDPA, but his subsequent appeal was heard and adjudicated by the Eighth Circuit post-AEDPA. Rhines's petition, on the other hand, was adjudicated by this court post-AEDPA, appealed to the Eighth Circuit post-AEDPA, and there is no indication that Rhines has asked the Eighth Circuit to

remand his petition to this court in order to amend the petition with his new claim of juror bias. So even if *Nims* did stand "for the proposition that a new claim cannot be deemed successive until the denial of the underlying petition has been affirmed on appeal" just because the *Nims* panel adjudicated Nims's claim on the merits, as Rhines argues (Docket 383 at 5), *Nims* is factually distinct from Rhines's motion. Thus, *Nims* does not support Rhines's position, and, based on *Williams*, the court rejects Rhines's argument that an amendment filed in the district court while the appeal of his habeas petition is pending is not a successive petition.

The court concludes that because it entered a final judgment in Rhines's case and the appeal of that final judgment is still pending, it does not retain jurisdiction to allow Rhines to amend his habeas petition to add a new claim under Fed. R. Civ. P. 15(a). Rather, based on Eighth Circuit case law, Rhines's motion to amend (Docket 383) is a successive petition. And because Rhines has not received authorization from the Eighth Circuit to file a successive petition, this court cannot adjudicate the merits of his motion under Rule 15.

II. Rhines's Rule 60(b) Motion

A. Jurisdiction

Rhines argues that if the court finds it does not have jurisdiction to grant his motion under Rule 15(a)(2), it should alternatively review the motion under Rule 60(b)(6). Docket 383 at 5. Federal Rule of Civil Procedure 60(b) allows a court to relieve a party from a final judgment, order, or proceeding for various reasons, such as mistake, newly discovered evidence, or fraud, among others.

Rule 60 includes a catchall provision, which allows the court to relieve a party for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). In order for a court to grant a 60(b)(6) motion, the movant must show "extraordinary circumstances" to justify relief, and "[s]uch circumstances will rarely occur in the habeas context." *Buck v. Davis*, 137 S. Ct. 759, 772 (2017) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)). "A district court has discretion under Rule 60(b) to grant postjudgment leave to file an amended complaint if the motion is 'made within a reasonable time,' and the moving party shows 'exceptional circumstances' warranting 'extraordinary relief.' " *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737, 743 (8th Cir. 2014) (quoting Fed. R. Civ. P. 60(c)(1); *United States v. Young*, 806 F.2d 805, 806 (8th Cir. 1986)).

What constitutes a reasonable time depends on the facts of the particular case. *Watkins v. Lundell*, 169 F.3d 540, 544 (8th Cir. 1999). *See Moses v. Joyner*, 815 F.3d 163, 166-67 (4th Cir. 2016) (concluding that the district court did not abuse its discretion in ruling that a habeas petitioner's Rule 60(b)(6) motion for relief from judgment, based on a change in habeas procedural law 15 months after the Supreme Court's decision, was untimely under Rule 60(c)). While leave to amend under Rule 15(a) should be "freely given," post-judgment leave to amend under Rule 60(b) is subject to stricter standards. *See Gonzalez*, 545 U.S. at 535 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 873 (1988) (Rehnquist, C.J., dissenting)) (noting a " 'very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved' ").

The Federal Rules of Civil Procedure also provide that if a court lacks authority to grant a motion for relief from judgment because an appeal is pending, "the court may: defer considering the motion; deny the motion; or state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed. R. Civ. P. 62.1(a). Thus, although an appeal is pending, this court may rule on Rhines's Rule 60(b) motion consistent with Rule 62.1(a).

B. Second or Successive Petition

The Supreme Court has acknowledged that Rule 60(b) motions in the habeas context, while playing "an unquestionably valid role," must not conflict with AEDPA's standards. *Gonzalez*, 545 U.S. at 533. "Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction-even claims couched in the language of a true Rule 60(b) motion-circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Id.* at 531 (citing 28 U.S.C. § 2244(b)(2)).

> A Rule 60(b) motion is a second or successive habeas corpus application if it contains a claim. For the purpose of determining whether the motion is a habeas corpus application, claim is defined as an 'asserted federal basis for relief from a state court's judgment of conviction' or as an attack on the 'federal court's previous resolution of the claim on the merits.' *Gonzalez*, 545 U.S. at 530, 532. 'On the merits' refers 'to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d).' *Id.* at 532 n.4. When a Rule 60(b) motion presents a claim, it must be treated as a second or successive habeas petition under AEDPA.

> No claim is presented if the motion attacks 'some defect in the integrity of the federal habeas proceedings.' *Id.* at 532. Likewise, a motion does not attack a federal court's determination on the merits if it 'merely asserts that a previous ruling which precluded a merits determination was in error-for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.' *Id.* at n.4.

Ward v. Norris, 577 F.3d 925, 933 (8th Cir. 2009). In *Gonzalez*, the Rule 60(b) motion, which sought to challenge a statute of limitations ruling that had prevented review of the petitioner's initial habeas petition, did not require authorization from the court of appeals. *Gonzalez*, 545 U.S. at 533, 538.

Here, Rhines argues his Rule 60(b)(6) motion is not a claim, and thus not a successive petition, because he attacks a defect in the integrity of the federal habeas proceeding. Docket 383 at 7. Specifically, he argues, "a rule of evidence, now declared unconstitutional [by *Pena-Rodriguez*], precluded review" of his claim of juror bias based on Rhines's homosexuality, and thus, the Supreme Court has removed an obstacle to a merits review of his claim. *Id.*

After considering Rhines's Rule 60(b)(6) motion, the court concludes Rhines's is attempting to present a new claim, which means his motion is a successive petition. Rhines is attempting to assert a claim of sexual orientation bias by the jury based on the Supreme Court's decision in *Pena-Rodriguez*. In other words, Rhines is attempting to use a Supreme Court case, and extend the holding of that case to the facts of his case, as a basis for relief from his death penalty sentence in state court. Thus, Rhines's new claim meets the very definition of "claim" that was established in *Gonzalez*: "an asserted federal basis for relief from a state court's judgment of conviction[.]" *Gonzalez*, 545

U.S. at 530; *see also id.* at 538 ("We hold that a Rule 60(b)(6) motion in a § 2254 case is not to be treated as a successive habeas petition if it does not assert, or reassert, claims of error in the movant's state conviction."). Rhines is doing exactly that—asserting a claim of error in his state conviction. Because Rhines's Rule 60(b)(6) motion is a successive petition and he did not seek or obtain the Eighth Circuit's authorization to file it, this court does not have jurisdiction to consider it on the merits. *See Burton v. Stewart*, 549 U.S. 147, 152 (2007) (concluding that because petitioner filed a successive petition without appellate authorization, "the [d]istrict [c]ourt never had jurisdiction to consider it in the first place.").

III. Rhines's Motion for Expert Access

Rhines also moves the court for an order requiring respondent to produce Rhines for expert evaluations by Richard Dudley, Jr., M.D., a forensic psychiatrist, and Dan Martell, Ph.D., a neuropsychologist. Docket 394. He plans to use the advice of Dr. Dudley and Dr. Martell for a possible clemency application, should one become necessary. *Id.* The Department of Corrections, acting under SDCL § 23A-27A-31.1, will not allow the two experts to access Rhines in prison without a court order. *Id.*

Rhines previously moved this court for a different doctor's expert access as part of his habeas proceeding. Docket 313. The court denied Rhines's motion because Rhines is in a state penitentiary, not a federal penitentiary, and SDCL § 23A-27A-31.1 authorizes a state trial court—here, the Circuit Court for the Seventh Judicial Circuit of South Dakota—to order the

Department of Corrections staff to allow other persons not specified in the statute access to capital inmates. Docket 334 at 6. Based on the principles of comity and federalism, the court concluded SDCL § 23A-27A-31.1 did not authorize the court to grant Rhines's request. *Id.* at 7.

Rhines contends that he has now addressed the federalism concerns because he has sought relief in the South Dakota courts, which have denied his motion for expert access. Docket 394 at 4; *see also* Docket 394-1 (Circuit Court for the Seventh Judicial Circuit of South Dakota denial of Rhines's motion, dated Oct. 24, 2017); Docket 394-2 (South Dakota Supreme Court order dismissing Rhines's appeal, dated Jan. 2, 2018). As a legal basis for his motion, Rhines argues that this court's appointment of counsel under 28 U.S.C. § 3599 extends representation to clemency proceedings, which may also include expert services in support of such clemency proceedings. Docket 394 at 6. Rhines also argues he has a due process right to these expert services for his possible clemency request. *Id.* at 12.

A. Authorization for Representation under 18 U.S.C. § 3599

On Rhines's first argument, 28 U.S.C. § 3599 provides in relevant part:

> (a)(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).
>
> . . . .
>
> (e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so

> appointed shall represent the defendant throughout every subsequent stage of . . . all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

18 U.S.C. § 3599.

The Supreme Court has interpreted the phrase, "shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant" found in 18 U.S.C. § 3599. *Harbison v. Bell*, 556 U.S. 180, 185 (2009). The Court concluded that the plain language of the statute provides that federally appointed counsel's authorized representation for a habeas petitioner includes state clemency proceedings that are available to state petitioners. *Id.* at 185-86. In rejecting the government's argument that § 3599(e) refers only to federal clemency, the Court reasoned:

> To the contrary, the reference to "proceedings for executive or *other* clemency, § 3599(e) (emphasis added), reveals that Congress intended to include state clemency proceedings within the statute's reach. Federal clemency is exclusively executive: Only the President has the power to grant clemency for offenses under federal law. U.S. Const., Art. II, § 2, cl. 1. By contrast, the States administer clemency in a variety of ways. . . . Congress' reference to "other clemency" thus does not refer to federal clemency but instead encompasses the various forms of state clemency.

Id. at 186-87 (internal citations omitted).

The Supreme Court's holding in *Harbison* does not mandate federally funded counsel for a capital habeas petitioner to represent the petitioner in his state clemency proceedings, it merely authorizes such representation. *See*

Harbison, 556 U.S. at 194 ("We further hold that § 3599 authorizes federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation."). And authorizing a federally appointed and funded counsel's representation under § 3599 does not give this court the authority to supervise or control a state's clemency process. Thus, 18 U.S.C. § 3599's authorization for representation alone does not require this court to order respondent to produce Rhines for an evaluation by the two mental health experts in support of a clemency request.

B. Due Process Right to Expert Services for Clemency

Rhines states that he has never received neuropsychological testing to determine if he suffers from any brain disease or injury, and he has never been evaluated by a psychiatrist who engaged in an independent background investigation. Docket 394 at 13. Thus, he argues, it is his due process right to be evaluated by Dr. Dudley and Dr. Martell in support of his "potential clemency application." *Id.* at 2, 12.

The Supreme Court has recognized that "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Harbison*, 556 U.S. at 192 (quoting *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993)). And as the Eighth Circuit has explained, "clemency is extended mainly as a matter of grace, and the power to grant it is vested in the executive prerogative, [so] it is a rare case that presents a successful due process challenge to clemency procedures themselves." *Noel v. Norris*, 336 F.3d 648, 649 (8th Cir. 2003) (per

curiam). But in *Ohio Adult Parole Authority v. Woodard*, a divided Supreme Court acknowledged that "some *minimal* procedural safeguards apply to clemency proceedings." 523 U.S. 272, 289 (1998) (O'Connor, J., concurring) (plurality opinion) (emphasis in original).

Rhines has not presented the court with a case holding that a capital habeas petitioner has a due process right to expert evaluations in support of a potential clemency application. In *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), which Rhines relies on, the Supreme Court held that a capital defendant has a due process right to access a competent psychiatrist when the "defendant demonstrates . . . his sanity at the time of the offense is to be a significant factor at trial" so the psychiatrist can help the defendant prepare his defense. Rhines, on the other hand, is potentially seeking clemency relief. He is not preparing for trial, and his motion for expert access does not raise the issue of insanity at the time of the offense.

The other cases Rhines cites, and the cases this court has reviewed, all discuss the "minimal" due process rights afforded to petitioners in the act of applying for clemency to the respective executive branch—not the preparation leading to a possible application. *See Lee v. Hutchinson*, 854 F.3d 978, 981-82 (8th Cir. 2017) (per curiam) (denying capital inmates' motion to stay executions because the Arkansas Parole Board's clemency process, "despite the procedural shortcomings," afforded the inmates the "minimal due process guaranteed by the Fourteenth Amendment."); *Winfield v. Steele*, 755 F.3d 629, 631 (8th Cir. 2014) (per curiam) (concluding that inmate failed to demonstrate "a significant

possibility of success on his claim that the Missouri clemency process violated his rights under the Due Process Clause" when he claimed correctional employees threatened and pressured someone to not make statements in support of the inmate's clemency application); *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (holding that a city attorney's interference, in the form of witness tampering, with the petitioner's efforts to present evidence to the Missouri Governor in his clemency application was "fundamentally unfair" and required a stay of execution). *But see Winfield*, 755 F.3d at 631-32 (Gruender, J., concurring) (maintaining that *Young* "lacks support in relevant Supreme Court authority" and is an "outlier" compared to narrower approaches adopted by other circuits). *See also Turner v. Epps*, 460 F. App'x 322, 330-31 (5th Cir. 2012) (concluding that capital prisoner's motion for expert access to assist in "laying a foundation for a request for clemency" did not violate his due process right).

In fact, the Eighth Circuit has rejected a due process argument for alleged interference with the ability to prepare for a clemency application. In *Noel v. Norris*, 336 F.3d 648, 649 (8th Cir. 2003) (per curiam), a capital prisoner in Arkansas claimed the State of Arkansas violated his due process right by interfering "with his ability to prepare and present his case for executive clemency." The Eighth Circuit noted that "if the state actively interferes with a prisoner's access to the very system that it has itself established for considering clemency petitions, due process is violated." *Id.* One argument Noel presented was that the state did not allow him to undergo a

particular brain-scan procedure to prove his brain damage should be considered in his clemency application. *Id.* But the Eighth Circuit rejected this argument, stating "we cannot say . . . that the state prohibited Mr. Noel from using the procedure that it had established." *Id.*

Rhines presents a similar claim to *Noel* in that he wants to undergo medical evaluations in order to prepare and present a clemency application. But the prisoner in *Noel* had already applied for, and been denied, clemency. Rhines, on the other hand, has construed his motion for expert access in his habeas case as a due process requirement for his "potential" clemency application. Unlike the cases discussed above where due process may be implicated by clemency procedures, Rhines has not initiated his clemency application. And he has not provided evidence that South Dakota has "arbitrarily denied [him] access to its clemency process." *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring) (plurality opinion). No Eighth Circuit case, South Dakota statute, or state or federal constitutional provision creates a due process right to accumulate all information that may lead to a clemency application, or to present a certain type of information in a clemency application. *See Turner*, 460 F. App'x at 331 (noting the lack of "a due process right to a more effective or compelling clemency application."). Because Rhines has not established a due process right to an expert evaluation in preparation for a possible clemency application, his request for this court to order respondent to produce Rhines for evaluations by Dr. Dudley and Dr. Martell is denied.

CONCLUSION

Rhines has appealed this court's final judgment to the Eighth Circuit, and that appeal is still pending. Thus, Rhines's Rule 15(a)(2) motion to amend is a successive petition, and Rhines has not received authorization to submit the successive petition to the district court. If construed to be a Rule 60(b)(6) motion, Rhine's motion is also a successive petition. But again, because he has not received authorization from the Eighth Circuit to file a successive petition raising the new claim of juror bias based on his homosexuality, this court does not have jurisdiction to rule on the merits of his motion. Finally, Rhines has failed to show he has a due process right under the Constitution to an expert evaluation in order to prepare for a potential clemency application to the South Dakota Governor. Thus, it is

ORDERED that Rhines's motion to amend, or in the alternative, motion for relief from judgment (Docket 383) is denied.

IT IS FURTHER ORDERED that Rhines's motion for expert access (Docket 394) is denied.

DATED this 25th day of May, 2018.

BY THE COURT:

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

Exhibit 8

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

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

MOTION FOR EXPERT ACCESS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BRIEF IN SUPPORT OF MOTION

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

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

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

> **(a)(1)** Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation *or investigative, expert, or other reasonably necessary services* at any time either--
>
> **(A)** before judgment; or
>
> **(B)** after the entry of a judgment imposing a sentence of death but before the execution of that judgment;
>
> shall be entitled to the appointment of one or more attorneys *and the furnishing of such other services* in accordance with subsections (b) through (f).
>
> * * *
>
> **(e)** Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and *shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.*
>
> **(f)** *Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on*

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

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

(emphases added).

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

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

Id. at 5 (emphasis added).

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

> § 620.70 Continuity of Representation
>
> * * *

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

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

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

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

> § 680.20.20 Processing of Clemency Vouchers

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

Id. (emphasis added).

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

STUART B. LEV
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Assistant Federal Defenders
BY: /s/ Claudia Van Wyk
Federal Community
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Counsel for Petitioner, Charles Russell Rhines

Dated: February 7, 2018

CERTIFICATE OF SERVICE

This will certify that, on February 7, 2018, a true and correct copy of the foregoing has been electronically filed with the Clerk of the Court via CM/ECF to be served on the following persons authorized to be noticed:

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

/s/ Claudia Van Wyk
Claudia Van Wyk

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

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

EXHIBIT A
MOTION FOR EXPERT ACCESS

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

October 24, 2017

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

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

Re: Case no. 51C93-000081A0

Dear Counsel:

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

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

1. Due Process

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

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

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

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

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

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

2. SDCL 23A-27A-31.1

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

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

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

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

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

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

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

ORDER

Accordingly, the Motion for Expert Access is hereby DENIED.

Dated this 24 day of October, 2017

BY THE COURT:

Robert A. Mandel
Circuit Court Judge

ATTEST:

Ranae Truman
Clerk of Courts

By: Deputy

[SEAL]

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

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

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

EXHIBIT B
MOTION FOR EXPERT ACCESS

STATE OF SOUTH DAKOTA
In the Supreme Court
I, Shirley A. Jameson-Fergel, Clerk of the Supreme Court of South Dakota, hereby certify that the within instrument is a true and correct copy of the original thereof as the same appears on record in my office. In witness whereof, I have hereunto set my hand and affixed the seal of said court at Pierre, S.D. this 2nd day of Jan, 2018.
Clerk of Supreme Court
Deputy

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

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

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

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

ORDERED that the appeal be and it is hereby dismissed.

DATED at Pierre, South Dakota, this 2nd day of January, 2018.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

(Justice Janine M. Kern disqualified.)

PARTICIPATING: Chief Justice David Gilbertson, Justices Steven L. Zinter, Glen A. Severson and Steven R. Jensen.

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

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

EXHIBIT C

MOTION FOR EXPERT ACCESS

27 January 2018

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

RE: **Charles Rhines**

Dear Mr. Lev:

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

Records and Documents Reviewed

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

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

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

In Summary

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

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

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

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

Childhood Difficulties

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

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

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

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

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

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

Late Adolescent/Early Adult Years

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

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

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

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

Recommendations

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

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

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

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

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

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

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

Sincerely,

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

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

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

ORDER

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

BY THE COURT:

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

Exhibit 9

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CHARLES RUSSELL RHINES, Plaintiff, vs. DARIN YOUNG, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, Defendant.	5:00-CV-05020-KES ORDER DENYING CERTIFICATE OF APPEALABILITY

Rhines moves for a certificate of appeability (COA) in order to appeal this court's order denying Rhines's motion for leave to amend, denying Rhines's motion for relief from judgment, and denying Rhines's motion for expert access. Docket 400 (referring to this court's order found at Docket 399). Under 28 U.S.C. § 2253, a habeas petitioner seeking to appeal from a final order of the district court must first obtain a COA before an appeal of that denial may be entertained. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). This certificate may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(2). A "substantial showing" is one that demonstrates "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Stated differently, "[a] substantial showing is a

showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997).

Rhines raised similar claims in related state court litigation, but the South Dakota Supreme Court dismissed his appeal. *See* Dockets 392-1, 392-2, 394-1. Rhines then petitioned the United States Supreme Court for a writ of certiorari to review the judgment of the South Dakota Supreme Court. On June 18, 2018, the United States Supreme Court denied Rhines's petition. *Rhines v. South Dakota*, --- S. Ct. ----, 2018 WL 2102800, at *1 (June 18, 2018). The court finds that Rhines has not made a substantial showing that his claims here are debatable among reasonable jurists, that another court could resolve the issues raised in his claims differently, or that a question raised by his claims deserves further proceedings. Thus, a certificate of appealability is not issued.

Dated June 21, 2018.

BY THE COURT:

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

Exhibit 10

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

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

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

Dated this 21st day of June, 2018.

Respectfully submitted,

/s/ Claudia Van Wyk
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Attorneys for Petitioner Charles Russell Rhines

CERTIFICATE OF SERVICE

This will certify that, on June 21, 2018, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court via CM/ECF to be served on the following persons authorized to be noticed:

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

/s/ Claudia Van Wyk
Claudia Van Wyk

Exhibit 11

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

Michael E. Gans
Clerk of Court

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

June 26, 2018

Mr. Jason J. Tupman
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RE: 18-2376 Charles Rhines v. Darin Young

Dear Counsel:

The district court has transmitted a notice of appeal in this matter, and we have docketed it under the caption and case number shown above. Please include the caption and the case number on all correspondence or pleadings submitted to the court. Counsel in the case must supply the clerk with an Appearance Form. Counsel may download or fill out an Appearance Form on the "Forms" page on our web site at www.ca8.uscourts.gov.

The notice of appeal has been treated as an application for certificate of appealability in accordance with Rule 22(b) of the Federal Rules of Appellate Procedure. It is our understanding that within thirty days of the date of this letter, counsel for the appellant will be filing an additional application for certificate of appealability. At that time, the case will be forwarded to a panel of judges for consideration. You will be advised of any action taken in this case.

An order appointing your offices to represent appellant will be sent under separate Notices of Docket Activity. Your duties as counsel are defined by Eighth Circuit Rule 27B and Eighth Circuit's Plan to Expedite Criminal Appeals. Please review these materials which are on the "Rules and Procedures" page of our website.

On June 1, 2007, the Eighth Circuit implemented the appellate version of CM/ECF. Electronic filing is now mandatory for attorneys and voluntary for pro se litigants proceeding without an attorney. Information about electronic filing can be found at the court's web site www.ca8.uscourts.gov. In order to become an authorized Eighth Circuit filer, you must register with the PACER Service Center at https://www.pacer.gov/psco/cgi-bin/cmecf/ea-regform.pl. Questions about CM/ECF may be addressed to the Clerk's office.

If you have any questions, please contact our office.

Michael E. Gans
Clerk of Court

CYZ

Enclosures

cc: Mr. Craig Martin Eichstadt
Mr. Stuart Lev
Mr. Charles Russell Rhines
Mr. Paul Sanford Swedlund
Mr. Matthew W. Thelen
Ms. Sherri Sundem Wald

District Court Case Number: 5:00-cv-05020-KES

Caption For Case Number: 18-2376

Charles Russell Rhines

Petitioner - Appellant

v.

Darin Young, Warden, South Dakota State Penitentiary

Respondent - Appellee

Addresses For Case Participants: 18-2376

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Exhibit 12

COURTIS EXHIBIT #5

about
10:45 A.M
11/26/93

Judge Konnekamp,

In order to award the proper punishment We need a clear prospective of what "Life In Prison Without Parole" really means. We Know what the Death Penality Means, but, We have no clue as to the reality of Life Without Parole.

The questions We have are as follows:

1. will Mr Rhines ever be placed in a minimum security prison or be given work release.
2. will Mr Rhines be allowed to mix with the general inmate population.
3. allowed to create a group of followers or admirers.

(4) will Mr Rhines be allowed to discuss, discribe or brag about his crime to other inmates, especially new and or young men jailed for lesser crimes (ex: Drugs, DwI, assault etc)

(5) Will Mr Rhines be allowed to Marry or have conjigal visits.

(6) will he be allowed to attend college

(7) will Mr Rhines be allowed to have or attain any of the common joys of life (ex TV, Radio, Music Telephone or hobbies and other activities allowing him distraction from his punishment).

(8) Will Mr Rhines be jailed alone or will he have a cellmate.

(9) What sort of free time will Mr Rhines have. (what would his daily routine be).

We are sorry, 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.

Bobby Walton
Foreperson

[signatures]