

UNITED STATES COURT OF APPEALS  
*for the* EIGHTH CIRCUIT

**CHARLES RUSSELL RHINES,**

*Petitioner/Appellant,*

v.

**DARIN YOUNG,** Warden, South  
Dakota State Penitentiary,

*Respondent/Appellee.*

No. 18-2376

**STATUS REPORT AND NOTICE OF INTENT TO OBTAIN  
WARRANT OF EXECUTION**

Appellee Darin Young, by and through his counsel, Paul S. Swedlund, hereby files this status report and notice of intent to obtain a warrant of execution.

1. Charles Russell Rhines killed Donnivan Schaeffer in 1992 and was sentenced to death in 1993. JUDGMENT AND SENTENCE, copy attached. Donnivan's parents have awaited justice for their son for 27 years.
2. The South Dakota Supreme Court affirmed Rhines' conviction in 1996. *State v. Rhines*, 548 N.W.2d 415 (1996).

3. The United States Supreme Court denied Rhines' petition for a writ of *certiorari* to review the South Dakota Supreme Court's affirmance. *Rhines v. South Dakota*, 117 S.Ct. 522 (1996).
4. Rhines filed his first state *habeas corpus* petition in 1996. The state court denied the petition in 1998. The South Dakota Supreme Court affirmed the trial court's denial in 2000. *Rhines v. Weber*, 2000 SD 19, 608 N.W.2d 303.
5. Rhines filed a federal *habeas corpus* petition in 2000. As a result of that proceeding, the United States Supreme Court ruled that federal review of Rhines' first state *habeas corpus* claims would be "stayed and abeyed" while he exhausted a new set of claims in a second state *habeas corpus* proceeding. *Rhines v. Weber*, 544 U.S. 269 (2005).
6. Rhines filed an amended second state *habeas corpus* petition in 2005. The state court entered summary judgment denying the petition in 2012.
7. In concert with his second state *habeas corpus* petition, Rhines also challenged the constitutionality of the state's execution protocol. After a trial in which the court took

testimony and evidence from both parties, the state court entered judgment in favor of the state.

8. The South Dakota Supreme Court affirmed the denial of Rhines' second state *habeas corpus* petition and the judgment rejecting his method of execution challenge. *Rhines v. Weber*, #26673 (S.D. 2013).
9. The United States Supreme Court denied Rhines' petition for a writ of *certiorari* to review the South Dakota Supreme Court's decision. *Rhines v. Weber*, 134 S.Ct. 1002 (2014).
10. Rhines reactivated his pending federal *habeas corpus* petition for review of the first and second state *habeas corpus* decisions. Rhines also moved to amend his federal petition to bring new claims of alleged neurological deficits per *Martinez v. Ryan*, 566 U.S. 1 (2012). The district court denied the petition and the *Martinez* motion in 2016. *Rhines v. Young*, 2016 WL 615421 (D.Ct.S.D.)
11. Rhines filed an original action in the South Dakota Supreme Court to set aside his sentence on the grounds of alleged jury bias per *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017).

The South Dakota Supreme Court rejected the application.

*Rhines v. South Dakota*, #28444 (S.D. 2018).

12. The United States Supreme Court denied Rhines' petition for a writ of *certiorari* to review the South Dakota Supreme Court's rejection of his *Pena-Rodriguez* application. *Rhines v. South Dakota*, 138 S.Ct. 2660 (2018).
13. Rhines appealed the district court's denials of his *habeas corpus* petition and *Martinez* motion. Rhines also asked this court for a certificate to appeal the district court's denial of a motion to amend his petition to bring the same *Pena-Rodriguez* claim rejected by the South Dakota Supreme Court. This court affirmed the district court's judgment in the *habeas corpus* case and denied Rhines' application for a certificate to appeal the *Pena-Rodriguez* issue. *Rhines v. Young*, 899 F.3d 482 (8<sup>th</sup> Cir. 2018). Rhines petitioned the United States Supreme Court for review of these rulings.
14. While Rhines' petitions for *certiorari* were pending, he filed a petition for clemency with the South Dakota Board of Pardons and Paroles. The board rejected Rhines' petition.

15. On April 15, 2019, the United States Supreme Court denied Rhines' petitions to appeal this court's rulings affirming the district court's denial of *habeas corpus* relief and denying Rhines a certificate to appeal his *Pena-Rodriguez* claim.  
*Rhines v. Young*, 2019 WL 826425; *Rhines v. Young*, 2019 WL 826426.
16. With the United States Supreme Court's rejection of Rhines' latest petitions, Rhines' conviction and sentence became final. It is time for Rhines to serve his sentence.
17. The above-captioned appeal is currently pending before this court and is scheduled for oral argument on September 26, 2019. In this matter, Rhines is appealing the denial of a motion filed in the district court (two years after it denied his *habeas corpus* petition) seeking an order compelling the South Dakota Department of Corrections to allow new experts to examine Rhines in the penitentiary to develop evidence of a previously undetected neurological deficit to bolster a second clemency petition. These are the same experts and alleged neurological afflictions that Rhines proffered in support of the

*Martinez* claim that was rejected by the district court, this court, and the United States Supreme Court.

18. Rhines' appeal is meritless because:

- a. The district court exceeded its limited *habeas corpus* jurisdiction by entertaining and ruling on Rhines' motion. The requested expert access was not incidental to adjudicating Rhines' *habeas corpus* relief but was for clemency purposes. At best, the motion was a *de facto* 42 U.S.C. § 1983 conditions of confinement claim. But since Rhines had not filed a 42 U.S.C. § 1983 complaint, the *habeas corpus* court had no jurisdiction over the subject matter of the motion.
- b. Even if the district court had jurisdiction over the motion, it correctly ruled that Rhines had no due process or other substantive right to an order requiring the South Dakota Department of Corrections to provide the requested access.

19. Recently, in *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019), the United States Supreme Court condemned the practice of reflexively entering stays of execution. Stays of execution

“should be the extreme exception, not the norm.” *Bucklew*, 139 S.Ct. at 1134. Per *Bucklew*, no stay should be entered for lawsuits that attack settled precedent, which rest on speculative theories, which lack sufficient substance to survive summary judgment and which could have been brought sooner. *Bucklew*, 139 S.Ct. at 1134.

20. *Bucklew* reaffirmed the longstanding principle that the mere fact that an inmate has filed a 42 U.S.C. § 1983 claim – even a potentially meritorious one – “does not warrant the entry of a stay as a matter of right.” *Nelson v. Campbell*, 541 U.S. 637, 649 (2004).

21. It is the state’s considered opinion that, per *Bucklew* and *Nelson*, no stay is warranted by the above-captioned appeal:

- a. Rhines’ appeal attacks settled precedent of both the United States Supreme Court and this court. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998); *Noel v. Norris*, 336 F.3d 648, 649 (8<sup>th</sup> Cir. 2003)
- b. Rhines’ appeal rests on sheer speculation. Its erroneous premise is that Rhines suffers from a neurological deficit of significant magnitude to mitigate his death sentence, but

which was overlooked by all the other doctors who have been involved in Rhines' case (Kennelly, Arbes, Ertz, Franks, Schacht). This premise was effectively rejected by this court's denial of Rhines' *Martinez* and ineffective mitigation investigation claims. *Rhines*, 899 F.3d at 492, 495 (“[t]here is no evidence . . . to support a belief that any further [mental health mitigation investigation] efforts would have been fruitful;” Rhines' *Martinez* claims were “no more than variations on the penalty phase” ineffective mitigation investigation claims).

- c. Rhines' arguments for expert access were not sufficient to withstand summary disposition in the district court.
- d. Rhines was dilatory in seeking expert access. He could have sought expert access to develop his *Martinez* claim as early as 2012 when the United States Supreme Court decided the case. He did not. He could have appealed the district court's denial of his *first* motion for expert access in 2016. *Rhines v. Young*, 5:00-CV-05020-KES (D.Ct.S.D.) (Docket 334, 357). He did not. Instead, Rhines waited until 2018 to take a separate appeal from the district court's



denial of his *second* motion for expert access. Rhines' failure to appeal the 2016 denial of his *first* motion for expert access at the same time that he appealed the denial of his *habeas corpus* petition demonstrates how this appeal is a calculated "tool to interpose unjustified delay."

*Bucklew*, 139 S.Ct. at 1134.

22. Defendant has not chosen this course of action lightly or without concern for the perception that the state is curtailing Rhines' due process. However, Rhines is now beyond his *due* process. His objections to his conviction and sentence have been reviewed four times by the South Dakota Supreme Court, five by the United States Supreme Court and once by this court. In December of 2018, he petitioned for and was denied clemency by the South Dakota Board of Pardons and Paroles. Having exhausted his *due* process, Rhines has turned to extraneous processes "to interpose unjustified delay" in the imposition of his sentence. *Bucklew*, 139 S.Ct. at 1134.

23. Out of respect for this court's important role and authority, defendant carefully examined whether the above-captioned appeal should delay the imposition of Rhines' capital sentence.

Having concluded in good faith that it should not, defendant respectfully notifies this court of the state's intent to obtain a warrant for the execution of Charles Russell Rhines.

### **CONCLUSION**

Twenty-seven years ago Rhines walked young Donnivan Schaeffer to his death in a dingy storeroom of a strip-mall donut shop, where Rhines sat Donnivan on the floor, locked his head between his knees and pounded a hunting knife into Donnivan's brain stem with the flat of his palm. It is time for Rhines to take the same walk that he blithely took Donnivan on 27 years ago.

The above-captioned appeal is part of a PFCDO strategy to file "lawsuit after lawsuit" in order to thwart the state's and the victims' "important interest in the timely enforcement of a sentence." *Bucklew*, 139 S.Ct. at 1133. Even if Rhines could overcome the glaring jurisdictional defect in the above-captioned appeal, it is not sufficiently meritorious to warrant a stay. Per *Bucklew*, this court "can and should' protect settled state judgments from 'undue interference'" by denying a stay if Rhines

petitions for one. *Bucklew*, 139 S.Ct. at 1134. Absent a stay, the state intends to proceed with Rhines' execution in early November.

Dated this 14<sup>th</sup> day of May 2019.

Respectfully submitted,  
**JASON R. RAVNSBORG**  
**ATTORNEY GENERAL**  
**STATE OF SOUTH DAKOTA**

Paul S. Swedlund

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**CERTIFICATE OF COMPLIANCE**

Appellee Darin Young, by and through his counsel, Paul S. Swedlund, hereby certifies that this status report and notice of intent to obtain warrant of execution complies with the type limitations of Rule 27 as amended December 1, 2016. The document contains 1,681 words.

*Paul S. Swedlund*\_\_\_\_\_  
Paul S. Swedlund  
Assistant Attorney General

**CERTIFICATE OF SERVICE**

Appellee Darin Young, by and through his counsel, Paul S. Swedlund, hereby certifies that on May 14, 2019, a hard copy of the foregoing status report and notice of intent to obtain warrant of execution was served on appellant’s counsel, Claudia Van Wyk and Stuart B. Lev, via e-mail at [claudia\\_vanwyk@fd.org](mailto:claudia_vanwyk@fd.org) and [stuart\\_lev@fd.org](mailto:stuart_lev@fd.org) and via first-class U.S. Mail to 601 Walnut Street, Suite 545 West, Philadelphia, PA 19106.

*Paul S. Swedlund*\_\_\_\_\_  
Paul S. Swedlund  
Assistant Attorney General

STATE OF SOUTH DAKOTA, )  
 )  
 ) SS.  
COUNTY OF PENNINGTON, )

IN CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, )  
 )  
 )  
Plaintiff, )

File No. 93-81

vs.

JUDGMENT

CHARLES RUSSELL RHINES, )  
 )  
 )  
DOB: 7/11/56 )  
 )  
 )  
PCN #: 1674495 )  
 )  
 )  
Defendant. )

On the 29th day of January, 1993, at the hour of 9:00 o'clock a.m., the Defendant, CHARLES RUSSELL RHINES, being present personally and being represented by and through his attorneys, Joseph Butler, Wayne Gilbert, and Mike Stonefield, each of Rapid City; the State being represented by State's Attorney, Dennis A. Groff, and Deputy State's Attorney, Mark A. Vargo; the Defendant having previously been arraigned on an Indictment alleging the offense of COUNT I: FIRST DEGREE MURDER (FELONY), committed on or about March 8, 1992, in violation of SDCL 22-16-4; the Defendant having previously entered a plea of Not Guilty to COUNT I of the Indictment as charged; a jury trial having been held before this Court commencing the 4th day of January, 1993, with respect to said offense; the jury having returned its verdict of Guilty of the offense of COUNT I: FIRST DEGREE MURDER (FELONY) on January 22, 1993; a pre-sentence hearing having been held before the jury commencing on the 25th day of January, 1993; the jury having returned its verdict with a finding of three aggravating circumstances and a

recommendation that the the death sentence be imposed, and the Defendant having been fully advised of his rights, and the Court having affixed this day as the date for pronouncing sentence; the Defendant having been asked whether there was any legal cause to show why a judgment should not be pronounced against him in accordance with the law and no cause being shown; it is hereby

ORDERED AND ADJUDGED, and the judgment and sentence of this Court is that you, CHARLES RUSSELL RHINES, upon your conviction for the crime of FIRST DEGREE MURDER (FELONY), shall suffer the death penalty, said penalty to be inflicted within the walls of the South Dakota State Penitentiary in the manner prescribed by the statutes of the State of South Dakota, and it is further

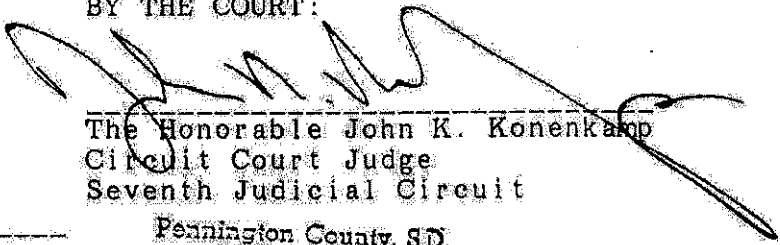
ORDERED, that the week of August 22, 1993, be and the same is hereby appointed as the week within which this death sentence shall be executed, and it is further

ORDERED, that the Defendant, CHARLES RUSSELL RHINES, is hereby remanded to the custody and control of the Sheriff of Pennington County, South Dakota, to be by him delivered to the Warden of the South Dakota State Penitentiary at Sioux Falls, South Dakota, within ten (10) days from the date hereof for the execution of the sentence for the offense of MURDER IN THE FIRST DEGREE, to be held by him pending the final determination of the appeals in this matter, which are automatic, and said sentence to be executed upon final determination of said appeals.

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Dated this 29th day of January, 1993.

BY THE COURT:



The Honorable John K. Konenka  
Circuit Court Judge  
Seventh Judicial Circuit

Pennington County, S.D.

FILED  
IN THE CIRCUIT COURT

JAN 29 1993

ATTEST:

/s/Bonnie Fitzgerald  
Clerk of Courts

By Bock  
Deputy

(SEAL)

Bonnie Fitzgerald, Clerk

By B Deputy  
NOTICE OF RIGHT TO APPEAL

You, CHARLES RUSSELL RHINES, are hereby notified that pursuant to SDCL 23A-27A-9, that the Clerk of Courts of the Seventh Judicial Circuit, within ten (10) days after receiving the transcript of this trial, shall transmit the entire record and transcript of the Supreme Court together with a Notice prepared by the Clerk and a report prepared by the trial judge. The Notice shall set forth the title and docket number of this case, your name and the names and addresses of your attorneys, a narrative statement of the Judgment, the offense, and the punishment prescribed.

You are further notified that you have a right to appeal as provided for by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of the State of South Dakota and the State's Attorney of Pennington County and by filing a copy of the same, together with proof of such service with the Clerk of this Court within Thirty (30) days from the date that this Judgment is filed with said Clerk.

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