

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

**Case No. 18-2376**

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**CHARLES RUSSELL RHINES,**

**Appellant,**

**v.**

**DARIN YOUNG,**

**Appellee.**

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**On Appeal from the United States District Court  
for the District of South Dakota, Western Division  
The Honorable Karen E. Schreier, District Judge**

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**PETITION FOR PANEL REHEARING**

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Date: September 12, 2018

## **PRELIMINARY STATEMENT**

This is a Petition for Panel Rehearing. It seeks review of the September 7, 2018, Order denying Appellant's request for a Certificate of Appealability.

The Order is not reported and is attached as Exhibit 1.

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## REASONS TO GRANT REHEARING

Petitioner Charles Russell Rhines, through counsel, hereby moves for panel rehearing from this Court's Order denying a certificate of appealability ("COA") on the district court's denial of his motion to amend. The September 7, 2018, Order notes that Judge Kelly would grant the certificate.<sup>1</sup>

Judge Kelly's vote in favor of granting a certificate should have been sufficient to authorize its issuance. First, this Court's denial is in conflict with the text of the controlling statute, which provides that appeals in habeas corpus actions may not be taken "[u]nless *a* circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1) (emphasis added); *accord* Fed. R. App. P. 22(b)(1) (in a habeas corpus proceeding, "the applicant cannot take an appeal unless *a* circuit justice or *a* circuit or district judge issues a certificate of appealability under 18 U.S.C. § 2253(c)." (emphasis added)). Under both the statute and the rule, a single circuit judge is sufficient to grant a COA.

This conclusion is also supported by the low bar for a grant of certificate of appealability and considerations unique to capital cases. COA should be granted when the question presented is debatable among jurists of reason. *See Miller-El v.*

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<sup>1</sup> Although the Order does not identify the other judges on the panel, Appellant assumes that Judges Loken and Gruender were the other members, as they sat with Judge Kelly in ruling on Mr. Rhines's appeal from the denial of his petition for a writ of habeas corpus. *Rhines v. Young*, Nos. 16-3360, 17-1060, 899 F.3d 482 (8th Cir. Aug. 3, 2018).

*Cockrell*, 537 U.S. 322, 336 (2003) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). The Supreme Court reiterated in *Buck v. Davis* that the COA determination is a “threshold” inquiry and “is not coextensive with a merits analysis.” 137 S. Ct. 759, 773 (2017). Courts undertaking a COA inquiry should “ask only if the District Court’s decision was debatable.” *Id.* at 774 (quoting *Miller-El*, 537 U.S. at 348) (internal quotation marks omitted). The bar is a low one: “[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Id.* (alteration in original) (quoting *Miller-El*, 537 U.S. at 338) (internal quotation marks omitted). “[M]eritorious appeals are a subset of those in which a certificate should issue, . . . not the full universe of such cases.” *Jordan*, 135 S. Ct. at 2651 (Sotomayor, J., dissenting from the denial of certiorari) (alteration in original) (quoting *Thomas v. United States*, 328 F.3d 305, 308 (7th Cir. 2003)) (internal quotation marks omitted). A division of opinion among the judges deciding whether to grant COA provides a strong indication that a question is “debatable among jurists of reason,” and should be enough to require a COA, especially in a capital case. Three members of the Supreme Court have indicated that a disagreement among judges as to a habeas claim, in the case under review and an analogous case, “alone might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution” of the claim. *See Jordan v. Fisher*,

135 S. Ct. 2647, 2651 (2015) (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting from the denial of certiorari) (emphasis in original).

Here, Judge Kelly's vote to grant COA in this capital case is an indication in itself that reasonable jurists could debate the correctness of the district court's ruling. Panel rehearing of the order denying COA, which overlooked or misapprehended these points of law, is therefore appropriate pursuant to Federal Rule of Appellate Procedure 40(a)(2).

Panel rehearing is also appropriate because the courts of appeals have applied differing standards as to whether a COA on a claim may properly be denied, as not debatable among jurists of reason, over the dissent of a federal appellate judge. In the Second, Fifth, and Eleventh Circuit Courts of Appeals, the answer is yes—COA would be denied. In the Third, Fourth, Sixth, Seventh, and Ninth Circuit Courts of Appeals, the answer is no—COA would be granted.

This Circuit appears to have no formal rule or procedure concerning this question. But, as the current order illustrates, this Court appears to require the votes of a majority of a panel before COA may be granted.

A majority of the federal courts of appeals to have offered guidance on the issue, either by local rule or in reported decisions, permit a single circuit judge to issue a COA, even where the application is being considered by a panel. In the Third Circuit, COA applications are referred to a panel of three judges, and "if any

judge on the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253, the certificate will issue.” 3d Cir. L.A.R. 22.3; *see also Harper v. Vaughn*, 272 F. Supp. 2d 527, 529 n.4 (E.D. Pa. 2003). Likewise, in the Fourth Circuit, an application for COA “shall be referred to a panel of three judges. If any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253(c), the certificate will issue.” 4th Cir. R. 22(a)(3); *see also Johnson v. Moore*, 164 F.3d 624, 1998 WL 708691, at \*1 (4th Cir. 1998) (unpublished). In the Ninth Circuit, an application for COA is “presented to 2 judges rather than the full panel if only 2 are participating. Any judge participating may vote to grant relief and so order.” 9th Cir. General Order 6.3(g)(1).

The Sixth and Seventh Circuits have not codified their COA procedures in local rules or general orders, but follow the same one-judge-suffices standard through their decisional law. *See Shields v. United States*, 698 F. App’x 807, 813 (6th Cir. 2017) (noting that court had granted COA on motion to vacate under 28 U.S.C. § 2255, where circuit judge on panel that heard direct appeal had dissented from opinion affirming conviction); *Shields v. United States*, No. 15-5609 at 2 (6th Cir. Nov. 4, 2015) (Order) (stating that “[b]ased on the dissenting opinion in the direct appeal, it appears that reasonable jurists could debate” the substantive claim, and granting COA); *Thomas*, 328 F.3d at 307–09 (summarizing Seventh Circuit

procedure whereby COA application is assigned to two-judge panel and then, if both vote to deny COA, the applicant may seek reconsideration by a three-judge panel, in which case COA will issue “if one of the judges to whom the application was referred under Operating Procedure 1(a)(1) concludes, on reconsideration, that the statutory criteria for a certificate have been met”); *cf. Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011) (“When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine.”).

In contrast, the Second, Fifth, and Eleventh Circuits permit a COA to be denied over a single judge’s dissent, notwithstanding the debatable-among-jurists-of-reason standard. In the Second Circuit, “[t]he clerk initially refers a request for a certificate of appealability to a single judge of the panel assigned to a death penalty case, who has authority to issue the certificate. If the single judge denies the certificate, the clerk refers the application to the full panel for disposition by majority vote.” 2d Cir. Internal Op. Proc. 47.1(c).<sup>2</sup> The Fifth and Eleventh Circuits do not have rules delineating that COA determinations are made by majority vote; instead, their decisional law reflects that these courts regularly deny COA by a vote of two-to-one. *See, e.g., Cromartie v. GDCP Warden*, No. 17-

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<sup>2</sup> The Second Circuit procedure allowing for non-unanimous COA denials applies at a minimum in capital cases. It is not clear from the Second Circuit’s rules whether a similar procedure applies in non-capital cases.

12627 (11th Cir. Mar. 26, 2018) (denying COA by vote of two-to-one); *Jordan v. Epps*, 756 F.3d 395, 413 (5th Cir. 2014), *cert. denied sub nom. Jordan v. Fisher*, 135 S. Ct. 2647 (same).

In this case, the panel majority denied COA despite Judge Kelly's view that COA should be granted. Appellant is aware of one other case from this Circuit where COA was denied over the views of a dissenting judge. *See Vang v. Hammer*, 673 F. App'x 596, 598 (8th Cir. 2016) (same).

Panel rehearing should be granted to consider whether the procedure in this case was inconsistent with the statutory requirements for COA, the Supreme Court's standard for granting COA, and the views of the majority of the Courts of Appeals.

## CONCLUSION

For these reasons, the petition for panel rehearing should be granted.

Respectfully submitted,

/s/ Claudia Van Wyk

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Dated: September 12, 2018

## CERTIFICATE OF COMPLIANCE

1. This document complies with Fed. R. App. P. 40(b)(1), which limits a petition for rehearing to no more than 3900 words, as it contains 1482 words.
2. It complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point type.
3. It has been scanned for viruses using Symantec Endpoint Protection and is free from viruses.

/s/ Claudia Van Wyk  
ClaudiaVanWyk

Dated: September 12, 2018  
Philadelphia, PA

**CERTIFICATE OF SERVICE**

I, CLAUDIA VAN WYK, hereby certify that on this date I served a copy of the foregoing on the following person in the manner indicated below:

BY ELECTRONIC SERVICE THROUGH ECF

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/s/ Claudia Van Wyk  
ClaudiaVan Wyk

Dated: September 12, 2018  
Philadelphia, PA

# **EXHIBIT**

# **1**

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No: 18-2376

Charles Russell Rhines

Appellant

v.

Darin Young, Warden, South Dakota State Penitentiary

Appellee

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Appeal from U.S. District Court for the District of South Dakota - Rapid City  
(5:00-cv-05020-KES)

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**ORDER**

With the district court's final order denying Charles Russell Rhines's federal petition for a writ of habeas corpus pending on appeal, Rhines filed in the district court a Rule 15(a)(2) motion for leave to amend the petition and a Rule 60(b) motion for relief from judgment. The district court denied relief on the ground that Rhines was seeking second or successive habeas relief that had not been authorized by the court of appeals, see 28 U.S.C. § 2244(b)(3)(A), and denied a certificate of appealability. We deny Rhines's application for a certificate of appealability from that ruling. Judge Kelly would grant the certificate.

Rhines also filed a motion in the district court for an order requiring respondent to produce Rhines for evaluation by mental health experts retained by the defense to support a potential request for executive clemency, relief that the South Dakota state courts have denied. The district court denied relief on the merits and denied a certificate of appealability. We conclude that no certificate of appealability is required to appeal this issue. A separate order establishing a briefing schedule will be issued.

The motion for leave to file an amicus brief is hereby granted.

September 07, 2018

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans