

App. No. ____

In The

Supreme Court of the United States

Oscar Franklin Smith,

Petitioner,

v.

Tony Mays, Warden

Respondent.

PETITIONER'S APPLICATION TO EXTEND TIME TO
FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Sonia Sotomayor, as Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Petitioner Oscar Franklin Smith respectfully requests that the time to file a Petition for a Writ of Certiorari be extended thirty days from January 29, 2019, to and including February 28, 2019. The U.S. Court of Appeals for the Sixth Circuit denied a petition for rehearing en banc on October 31, 2018, App. A, *infra*, after issuing its opinion and judgment on August 22, 2018, App. B, *infra*. Absent an extension, the Petition therefore would be due on January 29, 2019. This Application is being filed at least 10 days before that date. *See* Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254 to review this case.

Background

1. Petitioner Smith was arrested and charged with three counts of first-degree murder in October 1989. *See Smith v. Bell*, No. 3:99-0731, 2005 WL 2416504, at *1-2 (M.D. Tenn. Sept. 30, 2005). The trial court appointed Karl Dean as pro bono counsel to represent Smith, assisted by Paul Newman, Mary Parson, and Joan Zeigler. Dean had never before served as lead counsel on a capital case. He subsequently failed to adequately prepare for trial—declining to perform a full investigation into the trustworthiness of the prosecution’s fingerprint expert, apparent contradictions in the police’s proffered timeline, and plausible leads concerning a different suspect, among other shortcomings. The prosecution therefore was able to successfully wage a case based exclusively on circumstantial evidence. The jury convicted Petitioner of three counts of first-degree murder in less than three days.

2. The penalty phase of Petitioner Smith’s trial lasted one day. His trial counsel failed to adequately prepare for this stage of proceedings as well—forgoing any investigation into Petitioner’s frontal lobe damage, his potential adverse reaction to certain prescription medication, and his father’s severe intellectual disability and psychiatric disorders (all of which have been revealed over subsequent proceedings). The jury, unaware of any of these mitigating factors, sentenced Petitioner to death. The trial court denied Petitioner’s subsequent motions for a judgment of acquittal as to both the guilt and penalty phases of the trial, as well as a motion for a new trial. Petitioner then filed a notice of appeal to the Tennessee Supreme Court. That Court

affirmed the trial court's judgment in November 1993 and rejected Petitioner's request for rehearing in January 1994.

3. Petitioner Smith commenced his state habeas proceedings in February 1995. The trial court appointed Petitioner new counsel and Petitioner filed an amended petition for post-conviction relief in May 1996. He raised a range of claims alleging the ineffective assistance of trial counsel with respect to both the guilt-phase and penalty-phase of his trial. The state court denied Smith's petition on all counts, in large part due to the failure of state habeas counsel to investigate or offer supporting evidence for his claims. The Tennessee Court of Criminal Appeals denied Smith's appeal on June 30, 1998, *Smith v. State*, No. 01C01-9802-CR-00048, 1998 WL 345353 (Tenn. Crim. App. June 30, 1998), and the Tennessee Supreme Court denied Smith's application for further review, *Smith*, 2005 WL 2416504, at *10.

4. Petitioner then filed his petition for writ of habeas corpus in federal court, raising his ineffective assistance of trial counsel claims. The district court denied Smith's petition on September 30, 2005, in large part on the ground that his claims had been procedurally defaulted. *Smith*, 2005 WL 2416504. The Sixth Circuit affirmed. *Smith v. Bell*, 381 F. App'x 547 (6th Cir. 2010). This Court then vacated and remanded Petitioner Smith's claims twice, in light of *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), respectively.

5. On remand to the district court, Smith made a motion for additional discovery concerning the conduct of his state habeas counsel and original trial attorneys to supplement his otherwise inadequately investigated ineffective assistance claims.

Smith v. Carpenter, No. 3:99-CV-0731, 2015 WL 4545736 (M.D. Tenn. July 28, 2015).

The district court ultimately dismissed Smith's habeas petition, reasoning that Sixth Circuit precedent had foreclosed consideration of any evidence supporting claims already raised in state court, which the district court held included both Smith's guilt-phase and sentencing-phase ineffective assistance claims. The Sixth Circuit then denied Petitioner's request for a certificate of appealability and petition for an *en banc* rehearing.

Reasons for Granting an Extension of Time

The time to file a Petition for a Writ of Certiorari should be extended for thirty days for at least two reasons:

1. Undersigned counsel just recently agreed to assist in preparing and filing a petition for writ of certiorari to this Court. Additional time is necessary for counsel to study the facts and the law and prepare a thorough petition for this Court's review. The press of other matters before this and other courts, including a brief in the Fifth Circuit due on January 24, 2019, and a brief in opposition in this Court due January 25, 2019, make the existing deadline on January 29, 2019, difficult to meet. The additional time will assist counsel in preparing a concise and well-researched petition that will be of maximum benefit to this Court.

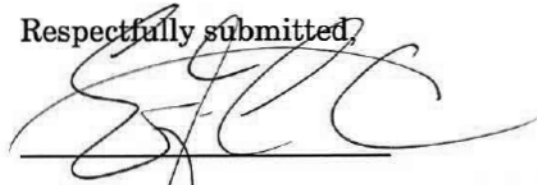
2. The Court is likely to grant the petition. This petition raises significant concerns about a criminal defendant's ability to challenge the ineffectiveness of his trial counsel under *Martinez* and *Trevino*. The petition will demonstrate the extreme nature of the Sixth Circuit's approach to Petitioner and those similarly situated in

light of an existing split among the courts of appeals. This case involves the exceptionally important question of whether an ineffective assistance of trial counsel claim that state habeas counsel ineffectively fails to support with any evidence is procedurally defaulted under *Martinez* and *Trevino*. See *Gallow v. Cooper*, 570 U.S. 933 (2013) (Breyer, J., respecting the denial of the petition for writ of certiorari) (“[W]here state habeas counsel deficiently neglects to bring forward ‘any admissible evidence’ to support a substantial claim of ineffective assistance of trial counsel [or where there is no counsel at all], there seems to me to be a strong argument that the state habeas counsel’s ineffective assistance results in a procedural default of that claim.”).

Conclusion

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended for thirty days to and including February 28, 2019.

Respectfully submitted,



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