

CAPITAL CASE

No. ____

IN THE
Supreme Court of the United States

HAROLD LEE HARVEY, JR.,

Applicant,

v.

STATE OF FLORIDA,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH
TO FILE A PETITION FOR A WRIT OF CERTIORARI

ROSS B. BRICKER
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March 6, 2019

To the Honorable Clarence Thomas, Associate Justice of the United States Supreme Court and Circuit Justice for the Eleventh Circuit:

Pursuant to this Court's Rules 13.5, 22, and 30.3, Harold Lee Harvey, Jr. ("Applicant") respectfully requests, through his pro bono counsel, a sixty-day extension of time, to and including May 20, 2019, in which to file a petition for a writ of certiorari to review the decision of the Florida Supreme Court denying Applicant relief on his successive post-conviction motion to vacate his conviction and death sentence. *Harvey v. State*, 260 So. 3d 906 (Fla. Nov. 15, 2018).

Applicant has not previously sought an extension of time from this Court. Pursuant to Rule 13.5, this application is being filed at least ten days before the current due date of March 20, 2019.

In support of his application, Applicant states as follows:

1. On November 15, 2018, the Florida Supreme Court affirmed the Florida Circuit Court of the Nineteenth Judicial Circuit's denial of Applicant's successive post-conviction motion to vacate his conviction and death sentence under Florida Rule of Criminal Procedure 3.851. The Florida Supreme Court held that Applicant's request for an evidentiary hearing to evaluate his intellectual disability claim was untimely and affirmed denial of relief. The Florida Supreme Court also held that Applicant was not entitled to relief under this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), because his conviction was final before 2002. Seven of the justices concurred or concurred in result, with Justice Pariente writing to explain her disagreement with the Florida Supreme Court's position on the retroactive application of *Hurst*. A copy of the Florida

Supreme Court's per curiam opinion denying relief to Mr. Harvey is attached here as Exhibit A.

2. Applicant timely moved for rehearing or reconsideration of the Florida Supreme Court's decision on December 10, 2018, arguing that the Court's conclusion that Applicant was procedurally barred from bringing his intellectual disability claim was erroneous and had been based on a distinguishable case. The Florida Supreme Court cited *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), to conclude that Applicant's claim was untimely, but *Rodriguez* is inapplicable. Unlike the intellectual disability claim in *Rodriguez*, Applicant's claim was not viable until the Florida Supreme Court's 2016 decision in *Walls v. State*, 213 So. 3d. 340 (Fla. 2016), which applied *Hall v. Florida*, 572 U.S. 701 (2014), retroactively to expand the class of people entitled to relief to include Applicant for the first time. Applicant could not raise a viable intellectual disability claim before then, making his request for an evidentiary hearing timely.

3. Applicant also argued that the Florida Supreme Court misconstrued his Eighth Amendment claim. Applicant explained that his Eighth Amendment claim, based on the jury unanimity requirement announced in *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016), was distinct from the Sixth Amendment right to have a jury, rather than a judge, decide his sentence. The Florida Supreme Court has never considered the retroactive applicability of that distinct right, and Applicant sought rehearing to invite the Florida Supreme Court to do so. Finally, Applicant argued that the Florida Supreme Court had overlooked procedural deficiencies that Applicant pointed out in the proceedings below, failing even to address them. On December 20, 2018, the Florida Supreme Court denied

Applicant's motion for rehearing or reconsideration in a perfunctory one-sentence order. The Florida Supreme Court's order is attached here as Exhibit B.

4. This Court has jurisdiction to review, by writ of certiorari, the decision of the Florida Supreme Court under 28 U.S.C. § 1257(a).

5. As Applicant will demonstrate in his petition for a writ of certiorari, this case raises important questions of constitutional law. First, the Florida Supreme Court created an arbitrary cut-off for the retroactive application of this Court's holding in *Hurst v. Florida*, drawing the line for those entitled to relief at the moment of this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). See *Asay v. State*, 210 So. 3d 1 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). The Florida Supreme Court thereby denied relief to those whose death sentences were final before 2002, in violation of their constitutional rights under the Sixth, Eighth, and Fourteenth Amendments. Furthermore, in Applicant's case, the Florida Supreme Court ordered that Applicant was entitled to a new trial in 2003, *after* the *Ring* decision. *Harvey v. State*, No. SC95075, 2003 Fla. LEXIS 1140 (Fla. Jul. 3, 2003); *but see Harvey v. State*, 946 So. 2d 937, 940 (Fla. 2006) (withdrawing prior opinion in light of intervening Supreme Court precedent).

6. Second, on remand from this Court, the Florida Supreme Court again reviewed the *Hurst* case, and recognized for the first time a constitutional right to jury unanimity under the Eighth Amendment. *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). No Florida Supreme Court decision has yet analyzed the retroactive application of that right. *Hitchcock v. State*, 226 So. 3d 216, 220 (Fla. 2017) (Pariente, J., dissenting). But the Florida Supreme Court has now repeatedly held, without analysis, that the same

arbitrary cut-off applies to both the Sixth Amendment right to a jury decision and the Eighth Amendment right to have that decision be unanimous. *See, e.g., Hitchcock*, 226 So. 3d at 217, *Asay*, 210 So. 3d at 22; *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017). Drawing this line, which in the unanimity context is even more arbitrary as it does not relate to *Ring*, violates the Eighth and Fourteenth Amendments.

7. Applicant and his pro bono counsel respectfully submit that the requested extension of time is justified for the following reasons.

8. Applicant is currently incarcerated at the Union Correctional Institution in Raiford, Florida, and Applicant's pro bono counsel, Ross B. Bricker, will need time to review the petition with him before filing it.

9. In 1989, the American Bar Association Death Penalty Project contacted Mr. Bricker to ask if he would be willing to represent pro bono a death penalty defendant in post-conviction proceedings. At that time, Mr. Bricker was opening a Florida office for Jenner & Block, LLP. Mr. Bricker agreed to do so and connected with the Volunteer Lawyers' Resource Center of Florida, Inc., which invited him to take on Applicant's case. Mr. Bricker did so and has diligently represented Applicant on a pro bono basis since his appointment. However, because Mr. Bricker's office is in Chicago, Illinois, he must communicate with Applicant primarily by mail and telephone.

10. Mr. Bricker, who serves as Chair of the Complex Commercial Litigation Practice at Jenner & Block, oversees a practice of more than 130 lawyers across five offices and serves in leadership roles in the firm's Policy and Management Committees.

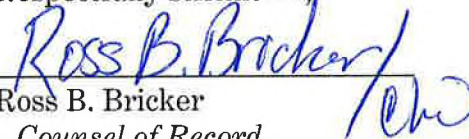
11. As described in his attached declaration, Mr. Bricker has a number of other professional commitments that interfere with his ability to complete the petition before the current due date.

12. Mr. Bricker and his colleagues have been working diligently to complete the petition, but Mr. Bricker will not have the opportunity to finalize the petition until after March 20, 2019.

WHEREFORE, for the foregoing reasons, Applicant respectfully asks that your Honor grant this Application and extend the time in which to petition for a writ of certiorari to and including May 20, 2019.

Dated March 6, 2019

Respectfully submitted,


Ross B. Bricker

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No. ____

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**DECLARATION OF ROSS B. BRICKER IN SUPPORT OF APPLICATION
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION
FOR A WRIT OF CERTIORARI**

I, Ross B. Bricker, declare as follows:

1. I am a partner in the Chicago, Illinois office of Jenner & Block LLP, where I serve as Chair of the Complex Commercial Litigation Practice. I am counsel of record for Applicant Harold Lee Harvey, Jr. in this matter.

2. In 1989, the American Bar Association Death Penalty Project contacted me to ask if I would be willing to represent pro bono a death penalty defendant in post-conviction proceedings. At that time, I was opening a small Florida office for Jenner & Block. I agreed to take a case and connected with the Volunteer Lawyers' Resource

Center of Florida, Inc., which asked me to work with them on Mr. Harvey's case. I have diligently represented Mr. Harvey on a pro bono basis since I was appointed.

3. I am submitting this Declaration in Support of Applicant's Application to Extend the Time in which to Petition for a Writ of Certiorari to and including May 20, 2019. I respectfully submit that the requested extension of time is justified for the following reasons.

4. I have had competing professional commitments that have interfered with my ability to complete the petition before the current due date. Among other matters, I serve as lead counsel on behalf of TEGNA Inc. ("TEGNA") in *In re: Local TV Advertising Antitrust Litigation* (N.D. Ill., No. 18-cv-6785); as co-lead counsel on behalf of Comcast Corp. ("Comcast") in *Viamedia v. Comcast* (7th Cir., No. 18-2852); as lead counsel on behalf of members of the Chinese government in *Capital Advisors LLC, et al. v. Parko LTD, et al.* (Dist. Ct., Clark Cty., Nev., No. A-16-741212-B); as lead counsel for Hertz Global Holdings, Inc. ("Hertz") in *In re Hertz Global Holdings, Inc. Securities Litigation* (D.N.J., No. 13-cv-07050), and *McIntosh v. Hertz Global Holdings, Inc.* (Del. Ch., No. 2018-0386-AGB); and as lead counsel for ADP, LLC ("ADP") in thirteen class action lawsuits currently pending in Illinois state court, *see, e.g., Henderson v. ADP, LLC* (Cir. Ct. Cook Cty., Ill., No. 2018-CH-07139), and one pending in New Jersey state court, *see Rihanna Porter v. ADP, LLC* (Sup. Ct. Essex Cty., N.J., No. ESXL00802618).

5. These matters have required a substantial commitment of my time, including briefing a number of significant motions and conducting or responding to discovery. The examples provided below illustrate the professional commitments that

have prevented or will prevent me from completing Mr. Harvey's petition by the current due date of March 20, 2019.

6. On February 21, 2019, I filed a brief in opposition to plaintiffs' motion to compel on behalf of TEGNA in *In re: Local TV Advertising Antitrust Litigation*. I am also engaged in supervising substantial ongoing fact investigation for this matter.

7. On February 26, 2019, I filed a brief in opposition to plaintiffs' motion for relief from judgment and leave to amend in *In re Hertz Global Holdings, Inc. Securities Litigation*.

8. I am currently preparing a motion to dismiss in *McIntosh v. Hertz Global Holdings, Inc.*, which is due on March 22, 2019.

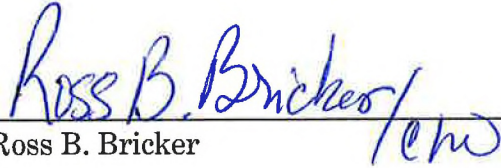
9. As counsel for Hertz, I am also presently engaged in providing significant ongoing support on a number of matters arising out of the investigation of Hertz by the Securities and Exchange Commission Enforcement Division, which concluded on December 31, 2018, and throughout which I served as Hertz's lead counsel.

10. As lead counsel for ADP in fourteen currently pending consumer class actions, I have six deadlines to file motions to dismiss between March 20, 2019, and April 5, 2019.

11. Although I have been working diligently to prepare a draft of the petition for a writ of certiorari, because of my commitments on the matters discussed above, I will not have an opportunity to complete the petition by the current due date of March 20, 2019.

12. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 6, 2019



Ross B. Bricker