

No.

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS DAVID CARO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

To the Honorable John G. Roberts, Jr., Chief Justice of the United States
and Circuit Justice for the Fourth Circuit:

Petitioner Carlos David Caro (“Caro”), a federal death row inmate, prays for a 46-day extension of time to file his petition for writ of certiorari, to and including Monday, November 18, 2018. The Fourth Circuit affirmed the denial of relief under 28 U.S.C. § 2255 on May 8, 2018. *See Caro v. United States*, 733 Fed. Appx. 651 (4th Cir. 2018) (unpublished). Caro filed a Petition for Rehearing and Petition for Rehearing *En Banc* on June 22, 2018, *see United States v. Caro*, Fourth Cir. No. 16-1, Doc. 82, which was denied in an Order of July 6, 2018. Fourth Cir. Doc. 84. Thus, the original due date for the petition for writ of certiorari is October 4, 2018. On September 24, 2018, undersigned counsel spoke with the United States Solicitor General’s Office, the office that will represent the Government on certiorari. A case manager

indicated that the Solicitor General does not object to the extension requested. This Application is timely filed pursuant to Supreme Court Rule 29.2.

Caro brought Defendant's Motion for Collateral Relief Pursuant to 28 U.S.C. § 2255 in the United States District Court for the Western District of Virginia on May 22, 2013. *United States v. Caro*, U.S.D.C. No. 1:06CR00001-JPJ, Doc. 790. The district court denied relief on May 4, 2015, Dist. Ct. Doc. 808, but issued an order in which it certified for appeal the claim that Caro was denied his right to Due Process under the Fifth Amendment and *Brady v. Maryland*, 373 U.S. 83 (1963). *See* Dist. Ct. Doc. 810. On May 8, 2018, the Fourth Circuit affirmed the denial of § 2255 relief. *Caro*, 733 Fed. Appx. 651. On July 6, 2018, the Fourth Circuit denied Caro's Petition for Rehearing and Petition for Rehearing *En Banc*. *See Caro*, Fourth Cir. No. 16-1, Doc. 84. A copy of the Fourth Circuit's Opinion is attached hereto as Appendix A. The jurisdiction of the court is invoked under 28 U.S.C. § 1254(1).

Carlos Caro was convicted by a federal jury in the Western District of Virginia of first degree murder and sentenced to death. His conviction and death sentence were affirmed on direct appeal. *See United States v. Caro*, 597 F.3d 608 (4th Cir. 2010). At issue at capital sentencing was Caro's future dangerousness. Caro sought Bureau of Prison ("BOP") records that would show *inter alia* the average length of time an inmate had been held in the federal supermax prison known as ADX Florence, Colorado, in order to show the jury that Caro could be held securely by the BOP if he were not sentenced to death. Caro brought discovery motions pursuant to Federal Rules of Criminal Procedure 16 and 17, and suggested that the suppressed BOP data may contain evidence favorable to the accused that was required to be disclosed pursuant to *Brady*. While a magistrate judge ordered the data disclosed, the Government objected and the district court reversed the magistrate judge's order. Expert witnesses for the parties then gave conflicting opinions as to average length of time an inmate could be held at ADX Florence, with the Government's witness opining that the average stay was three years before the inmate was stepped down to less secure facilities, and the defense risk management expert testifying that the average was considerably longer. The prosecution argued that Caro would be a threat to commit violent acts in the future because he could be

housed at ADX Florence for only three years before being transferred to a less secure facility. The jury sentenced Caro to death.

On direct appeal, the Fourth Circuit denied relief on claims that Caro was entitled to discovery of the BOP data under Federal Rules of Criminal Procedure 16(a)(1)(e) and 17(C), and that he could not prove the requisite materiality on a *Brady* claim. *See Caro*, 597 F.3d at 616-22. In the § 2255 motion, Caro, armed with some newly-discovered data as to how long inmates had been held at ADX Florence, presented a formal *Brady* claim and further requested the disclosure of the relevant data in the BOP's possession to show that inmates could be held at ADX Florence much longer than three years and, in one case, an inmate had been held continuously for 27 years. A panel majority of the Fourth Circuit affirmed on the basis that Caro brought and lost the *Brady* claim on direct appeal and was procedurally barred from re-litigating the claim in § 2255 proceedings. *See Caro*, 733 Fed. Appx. at 659. The chief judge dissented on the basis that the Government's suppression of the BOP data at trial necessarily meant that Caro could not adequately bring a *Brady* claim on direct appeal because he did not possess the relevant data to show *Brady* materiality. *See id.* at 664 *et seq.* (Gregory, C.J., dissenting).

On certiorari, Caro will seek to have the Court determine whether a procedural bar prohibits the prosecution of a *Brady* claim in § 2255 proceedings where the Government's suppression of the relevant BOP data has precluded the movant from properly bringing a *Brady* claim and establishing the materiality of the alleged *Brady* claim on direct appeal. The petition will discuss court of appeals decisions both within and outside the Fourth Circuit that illustrate the worthiness of Caro's petition for a grant of certiorari and the fact that a district court in another district actually ordered disclosed to the defense the BOP data suppressed here.

In addition to the complicated nature of the questions to be presented, Mr. Caro's appointed counsel are engaged in other federal court matters that impede their ability to timely file the petition for writ of certiorari.

Undersigned counsel from the Capital Habeas Unit of the Federal Public Defender's Office for the District of Arizona, who has functioned as lead counsel below and on the petition for writ of certiorari, is engaged in the federal courts in numerous active § 2254 challenges to death sentences, including six capital habeas cases in which he serves as lead counsel. Since the Fourth Circuit denied relief in *Caro* in May 2018, counsel, along with co-counsel Beck and Spence from the Federal Public Defender's Office for the Western District of Virginia, litigated the Petition for Rehearing and Petition for Rehearing *En Banc* in Mr. Caro's case.

On May 31, 2018, Assistant Federal Public Defender Gabrielsen and co-counsel at the Arizona FPD filed a reply brief in a capital habeas appeal in *Ramirez v. Ryan*, Ninth Cir. No. 10-99023, Dkt. 46. Mr. Gabrielsen also moved in the Ninth Circuit on June 12, 2018, for a certificate of appealability ("COA") so as to be permitted to appeal the denial of relief on a § 2254 petition in *Gulbrandson v. Ryan*, Ninth Cir. No. 8-15829, Dkt. 7. The Ninth Circuit denied the COA on the basis that the petition was second or successive ("SOS") and had not been authorized by the circuit pursuant to 28 U.S.C. § 2244(b)(3), *id.*, and counsel is thus preparing an application for authorization to file an SOS petition in that matter. Counsel continues to litigate two matters pursuant to the Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), which allows the federal courts to excuse the procedural default of an ineffective assistance of trial counsel ("IAC") claim upon a showing that the petitioner's state post-conviction relief counsel rendered IAC under *Strickland v. Washington*, 466 U.S. 668 (1984), in not raising the trial IAC claim in the state post-conviction proceedings. Counsel seeks remand of one capital appeal for application of *Martinez* in *Spreitz v. Ryan*, Ninth Cir. 09-99006, and is engaged in *Martinez* litigation in the district court in another Arizona capital matter, *Lee v. Ryan*, U.S.D.C. No. CV-04-0039-PHX-JJT. On August 2, 2018, the United States District Court for the Northern District of California appointed the Arizona FPD pursuant to the appropriate protocol and *Harbison v. Bell*, 556 U.S. 180 (2009), as additional counsel in the clemency case of a California death row inmate, and undersigned counsel has been assigned that matter. *See Mickey v. Davis*, No. 93-CV-00243-EJD, Dkt. 243.

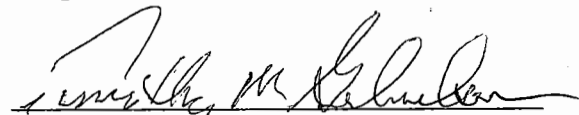
Assistant Federal Public Defender Spence is the Senior Litigator in the Office of the Federal Public Defender for the Western District of Virginia, Roanoke. Her supervisory and case load duties have been increased due to the retirement of the Federal Public Defender in the district and the delay in clearing the new defender to begin work as the FPD. In addition, the cases of 75 defendants have recently been assigned to her office for habeas review and possible requests for relief because one of the main case officers in each of those cases was fired when the United States Attorney learned of officer misconduct over a ten-year period, casting sufficient doubt on the officer's credibility to bring concerns about these convictions. Ms. Spence is personally handling 19 of those cases, and is responsible for supervising the remaining 56 cases that three other assistant federal public defenders in her office are handling.

Assistant Defender Beck carries a case load that includes some 20 cases that are in pretrial or appellate postures. In addition, his practice has been consumed with preparation of a case scheduled to go to trial in November 2018.

Counsel for Mr. Caro have no dilatory purpose in extending the due date to file the petition for writ of certiorari. The time is necessary to adequately represent Mr. Caro before the Court.

Wherefore, Mr. Caro respectfully requests that an order be entered extending his time to petition for certiorari 46 days to and including November 18, 2018.

Respectfully submitted,



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