No. 18A-

IN THE

Supreme Court of the United States

FATU-KAMARA HARRIS, RN,
Applicant,

v.

PICHARDO DE VELOZ,
Respondent.

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

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

In accordance with Supreme Court Rules 13.5, 22, and 30, Applicant, Fatu-Kamara Harris, R.N., hereby respectfully requests a 45-day extension of time, up to and including May 31, 2019, in which to file her petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, seeking review of that court's judgment in this case.

The Eleventh Circuit entered judgment on November 21, 2018. *See Pichardo de Veloz v. Miami-Dade County*, No. 17-13059 (App. la-27a). Applicant filed a timely petition for rehearing en banc, which was denied on January 16, 2019. *See* App. 28a-29a. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1).

The time to file a petition for a writ of certiorari will expire without an extension on April 16, 2019. This application is timely because it is filed more than ten days prior to the date on which the time for filing the petition is set to expire. Sup. Ct. R. 13.5, 30.

1. This case presents an important question of federal law because it involves the wrongful deprivation of qualified immunity to a jail nurse on an Eighth Amendment deliberate indifference claim for actions that can, at worst, be described as negligent. This Court has, in the last eight years, issued at least seventeen decisions reversing lower court decisions that have denied qualified immunity to individual officers. In so doing, this Court has extolled the "importance of qualified immunity "to society as a whole,'" and has remarked that it "often corrects lower courts when they wrongly subject individual officers to liability." *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).[1]

This case presents a strong candidate for certiorari. The court of appeals erred in finding the law clearly established and in making that finding on the basis that the plaintiff did not raise until her reply brief on appeal. In doing so, the court

[1] *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (per curiam); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam); *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018); *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017); *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017); *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam); *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (per curiam); *Sheehan, supra*; *Carroll v. Carman*, 135 S. Ct. 348 (2014) (per curiam); *Plumhoff v. Rickard*, 572 U.S. 765 (2014); *Wood v. Moss*, 572 U.S. 744 (2014); *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam); *Reichle v. Howards*, 566 U.S. 658 (2012); *Messerschmidt v. Millender*, 565 U.S. 535 (2012); *Ryburn v. Huff*, 565 U.S. 469 (2012) (per curiam); *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011).

created a circuit split, without justification, with the First through Tenth Circuits and the D.C. Circuit, all of which have refused to allow a § 1983 appellant to assert an argument she did not raise in her initial appellate brief.[2]

In addition to ignoring the clear waiver issue, the court of appeals also stripped the applicant of the qualified immunity that had been granted to her by the district court, based on a new rule created and applied retroactively. The court held that, in November 2013, it was clearly established by "obvious clarity" that the applicant's conduct (mistakenly assuming that a biological female inmate taking hormone replacement therapy was a biological male in the midst of transitioning to female and noting that mistaken assumption in her medical file) violated the Eighth Amendment right of a female inmate not to be "wrongfully misclassif[ied] . . . as a male inmate and plac[ed] . . . in the male population of a detention facility." App. 27a. The court cited no precedent in creating this rule, contrary to this Court's unambiguous instruction that "[t]o be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

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[2] *See Buchanan v. Maine*, 469 F.3d 158, 170 n.7 (1st Cir. 2006); *Lore v. City of Syracuse*, 670 F.3d 127, 149 (2d Cir. 2012); *Harvey v. Plains Twp. Police Dep't*, 421 F.3d 185, 192 (3d Cir. 2005); *Hensley ex rel. North Carolina v. Price*, 876 F.3d 573, 580 & n.5 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 1595 (2018); *Lincoln v. Turner*, 874 F.3d 833, 850-51 (5th Cir. 2017); *Puckett v. Lexington-Fayette Urban Cty. Gov't*, 833 F.3d 590, 610-11 (6th Cir. 2016); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 597 (7th Cir. 1997); *Brewington v. Keener*, 902 F.3d 796, 802-03 & n.4 (8th Cir. 2018); *George v. Morris*, 736 F.3d 829, 837 (9th Cir. 2013); *Zia Shadows, L.L.C. v. City of Las Cruces*, 829 F.3d 1232, 1239 n.3 (10th Cir. 2016); *Fox v. District of Columbia*, 794 F.3d 25, 29 (D.C. Cir. 2015).

The court alternatively defined the right as a female detainee's right under the Eighth Amendment not to be "plac[ed]" within the male population, see App. 27a, a formulation that runs afoul of this Court's repeated admonition that lower courts not "define clearly establish law at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *Sheehan, supra*, at 1775-76). The court "made no effort to explain how that" right (which the court similarly announced without a stated basis in case law) "prohibited [the applicant]'s actions in this case." *City of Escondido v. Emmons*, 139 S. Ct. 500, 503-04 (2019) (per curiam).

2. Counsel for applicant have had several professional obligations and pending deadlines in other matters in the time since the Eleventh Circuit's denial of rehearing en banc. Additionally, counsel have obligations and deadlines in other matters that will intensify in the time between this filing and the present deadline for filing a petition for a writ of certiorari.

Specifically, applicant's counsel are attorneys to the defendant in the matter of *Wyndham Vacation Ownership, Inc., et al. v. Totten Franqui Davis & Burk, LLC, et al.*, Case No. 9:18-cv-81055-DMM, a complex timeshare litigation case currently set for trial in July 2019, in the U.S. District Court for the Southern District of Florida. In the time period since rehearing en banc was denied until the time that the petition for writ of certiorari would be due, counsel will have taken and defended a total of 16 depositions in that case, with full day depositions scheduled on the day before (corporate representative of co-defendants) and the two

separate depositions set on the day that the petition for writ of certiorari would be due, (one of the defendant to take place in Nevada, and another of the Plaintiffs' expert witness to take place on the same day in Florida). In that time, counsel has also argued a substantive motion to dismiss and two discovery hearings.

Applicant's counsel also represent Defendants in a related case pending in the U.S. District Court for the Middle District of Florida, *Bluegreen Vacations Unlimited, Inc., et al. v. Totten Franqui Davis & Burk, LLC, et al.*, Case No. 6:18-cv-2188-RDB, wherein a substantive Motion to Dismiss is currently set for hearing on April 9, 2019 in Orlando, Florida before the Honorable Roy Dalton, Jr.

The duties of applicant's counsel to other client needs have conflicted and will conflict with their ability to prepare and file a petition for a writ of certiorari by the current deadline. Because it is impossible to competently and fully meet all client obligations, and because the requested modest extension of time to file the petition for a writ of certiorari would neither prejudice the respondent in this case nor result in any meaningful delay in the Court's consideration of the petition, good cause exists to grant the requested extension. In addition, this Court has already granted the Application for Extension of Time to file a petition for writ of certiorari, of this applicant's co-defendant, Dr. Fredesvindo Rodriguez-Garcia (No. 18A-951). Allowing the applicant this extension would make the similarly situated co-defendants' petitions for writ of certiorari due at the same time.

Wherefore, Applicant respectfully requests that an order be entered extending the Applicant's time to file a petition for writ of certiorari for 45 days, to and including May 31, 2019.

Dated: April 5, 2019

MCINTOSH SAWRAN & CARTAYA, P.A.

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CERTIFICATE OF SERVICE

I, Carmen Y. Cartaya, hereby certify that on April 5, 2019, a copy of this Application for Extension of Time to File a Petition for Writ of Certiorari in the above-entitled case was emailed to counsel for Respondent herein, listed below, with a copy by mail, first-class postage pre-paid, to follow, in compliance with Supreme Court Rule 29.3:

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