

IN THE SUPREME COURT OF THE UNITED STATES

Case No. 19-

Sec., CA DOC, et al.
USAP9 Case no. 15-56615

CHRISTOPHER DIEP,

Petitioner,

-v-

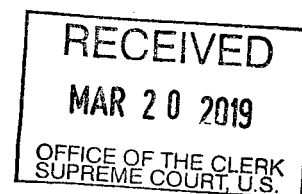
MATTHEW CATE, et al.

Respondent.

**MOTION TO DIRECT THE CLERK TO FILE
THE PETITION FOR WRIT OF CERTIORARI
OUT OF TIME**

Petitioner, Christopher Diep, through CJA appointed counsel, Correen Ferrentino, hereby files this motion to direct the clerk to file the attached petition for a writ of certiorari out of time.

On December 7, 2018, the Ninth Circuit Court of Appeals denied the petition for rehearing in this case. Therefore, a petition for writ of certiorari in this court was due by March 7, 2019.



On March 7, 2019, counsel was finalizing the petition and preparing it for filing. Counsel had applied for e-filing access the day before and did not believe it had been approved and was intending to file the petition by U.S. mail with a postmark of March 7, 2019. Counsel intended to file the petition this way both from prior practice in this court several years ago and from the confirmation counsel's paralegal received from the clerk of this court that the petition must be post-marked on or before the due date. However, that afternoon, counsel learned e-filing access to this court had been approved and mistakenly assumed that a petition for writ of certiorari e-filed on the date due would be timely. Counsel failed to consult the rules of this court prior to making this assumption.

On March 7, 2019, counsel e-filed the petition with this court. The following day, March 8, 2019, counsel's paralegal shipped the paper copies of the petition through a third-party commercial carrier, Fed-Ex, for next day delivery to the US Supreme Court at 1 First St NE, Washington, DC 20543. Because of the frequency with which counsel e-files briefs in state and federal court, counsel assumed the paper copies acted as a courtesy or chambers copy and it did not occur to counsel that the petition was untimely until receiving the clerk's letter today so stating.

Counsel acknowledges that this error is un-excusable but asks this court to consider this request to direct the clerk to file the petition out of time so that the client, Christopher Diep, who is serving a life sentence in California, is not prejudiced by counsel's error. By way of explanation, but in no way to avoid responsibility, counsel provides to the court additional information as to why counsel attempted to file the petition on the date due instead of earlier to avoid this type of situation.

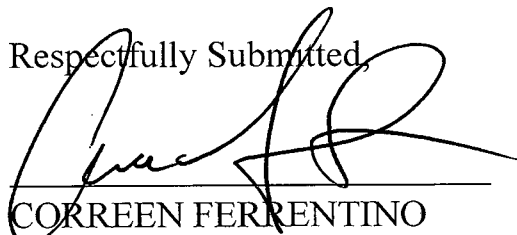
Counsel's practice is solely criminal law but includes trial and appellate work in both state and federal court. Counsel also handles habeas cases and post-conviction litigation related to immigration cases. Because of this, a number of

individual's seeking relief in the criminal courts hired counsel to assist them to avoid devastating immigration consequences. Then, new legislation and amendments to existing legislation in California were passed and became effective both at the end of 2018 and beginning of 2019, requiring counsel to file numerous additional briefs, petitions, and motions, mostly for existing clients, that required extensions in existing cases which then became due during the time in which this petition needed to be prepared and filed. On average, over the last two months, counsel has filed approximately three briefs per week, some in complex cases, while handling other matters in the trial courts. This unexpected increase in counsel's case load impacted her ability to prepare and file the petition in this case earlier.

Therefore, Diep, through counsel, respectfully asks this court to find good cause to grant this request and direct the clerk to file the petition for writ of certiorari out of time.

Dated: March 15, 2019

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Correen Ferrentino', written over a horizontal line.

CORREEN FERRENTINO
Ferrentino & Associates, Inc.
949 South Coast Dr., Ste 250
Costa Mesa, CA 92626
Telephone: (949) 973-2024

DECLARATION OF CORREEN FERRENTINO

I, Correen Ferrentino, declare as follows:

I am an attorney at law, licensed to practice law in the State of California, United States District Courts for the Central, Southern, Northern, and Eastern Districts, the Ninth Circuit Court of Appeals, and this court.

I was appointed to represent Petitioner, Christopher Diep in U.S. District Court, Central District of California and then in the Ninth Circuit Court of Appeals, case no. 15-56615. The petition for rehearing was denied on December 7, 2018 and the petition for writ of certiorari was due in this court on March 7, 2019.

On March 7, 2019 I was finalizing the writ petition and preparing it for filing. I had applied for e-filing access the day before and did not believe it had been approved and was intending to file the petition by sending by U.S. mail, both from prior practice in this court several years ago and from the confirmation my paralegal received from the clerk of this court that the petition must be post-marked on or before the due date. However, that afternoon, I learned e-filing access to this court had been approved and mistakenly assumed that a petition for writ of certiorari e-filed on the date due would be timely. I failed to consult the rules of this court prior to making this assumption.

On March 7, 2019, I e-filed the petition with this court. The following day, my office shipped the paper copies of the petition through a third-party commercial carrier, Fed-Ex, for next day delivery to the US Supreme Court at 1 First St NE, Washington, DC 20543. Because of the frequency with which I e-file briefs in state and federal court, I assumed the paper copies acted as a courtesy or chambers copy and it did not occur to me that the petition was untimely until receiving the clerk's letter today which so stated.

I acknowledge that this error is un-excusable but ask this court to consider this request to direct the clerk to file the petition out of time so that my client,

Christopher Diep, who is serving a life sentence in California, is not prejudiced by my error. By way of explanation, but in no way to avoid responsibility, I provide to this court additional information as to why I attempted to file the petition on the date due and did not file it earlier to avoid such a situation as this.

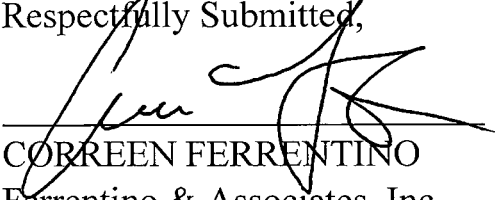
My practice is solely criminal law and it includes trial and appellate work in both state and federal court. I also handle habeas work and post-conviction litigation related to immigration cases. Because of this, the significant increase in the number of individual's seeking relief in the criminal courts due to potentially devastating immigration consequences and new legislation and amendments to existing criminal laws in California, effective at the end of 2018 and beginning of 2019, required I file numerous additional briefs, petitions, and motions, mostly for existing clients. In many of these cases, time was critical to avoid the potential negative consequences or take advantage of new legislation. This in turn required me to then extend the date to file numerous existing deadlines to the time period with which this petition needed to be prepared. On average, over the last two months, I have filed approximately three briefs per week, some in complex cases, while handling other matters in the trial courts. This unexpected increase in my case load impacted my ability to prepare and file the petition in this case earlier.

Therefore, based on the foregoing, I am requesting the clerk of this Court to file the petition for writ of certiorari out of time.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 15, 2019

Respectfully Submitted,



CORREEN FERRENTINO
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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 25 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CHRISTOPHER DIEP,

Petitioner-Appellant,

v.

MATTHEW CATE,

Respondent-Appellee,

and

DOMINGO URIBE, Jr., Warden,

Respondent.

No. 15-56615

D.C. No.

8:11-cv-01443-VBF-PLA

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Valerie Baker Fairbank, District Judge, Presiding

Argued and Submitted August 8, 2018
Pasadena, California

Before: GRABER, WARDLAW, and CHRISTEN, Circuit Judges.

Christopher Diep, a California state prisoner, appeals the district court's
denial of his 28 U.S.C. § 2254 habeas corpus petition challenging his conviction

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

for first-degree murder. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we review de novo. *Lopez v. Schriro*, 491 F.3d 1029, 1036 (9th Cir. 2007). Our review is governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. We affirm.

1. Diep claims that the prosecutor violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to provide the defense with exculpatory eyewitness testimony, and that the state courts unreasonably applied Supreme Court authority in holding otherwise. We turn to the last reasoned decision of the state courts; here, the Orange County Superior Court’s denial of Diep’s habeas petition. That court reasonably concluded that Diep did not meet his burden to demonstrate prejudice from the prosecution’s failure to provide defense counsel first with the testimony of two witnesses at Andrew Vu’s trial that another person, San, “was the shooter,” and, second, with information that one of those witnesses had previously identified photographs of two persons that he saw the night of the shooting – one identified as being at the café prior to the shooting, and the other identified as the driver of the black Acura. First, the public trial testimony of those witnesses was equally and readily available to defense counsel. *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) (“When . . . a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government.”) (citations omitted); *cf. Towery v. Schriro*, 641

F.3d 300, 309-10 (9th Cir. 2010) (finding prejudice under “the unique circumstances” where “the prosecutor knowingly put . . . testimony to inconsistent use in two separate trials for two separate crimes”). Second, that one of the witnesses had identified two other individuals in a yearbook was information revealed by a statement in a police report actually provided to defense counsel. Finally, the Orange County Superior Court reasonably concluded that Diep had not met his burden to demonstrate prejudice because Vu was convicted over the testimony that San was the shooter, and in any event, Diep was convicted of first-degree murder as an aider and abettor.

2. Nor was the state trial court’s determination that Diep did not meet his burden to demonstrate prejudice by the deficient performance of counsel, if any, objectively unreasonable. To obtain habeas relief, Diep must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The state court reasonably concluded that Diep failed to meet his burden to demonstrate prejudice because had counsel called the two eyewitnesses or introduced evidence of the photograph identification, there would not have been any difference in the outcome. Both pieces of evidence related to the identification of the shooter. The prosecutor acknowledged during Diep’s trial that the evidence did not establish the identity of the shooter, and instead prosecuted Diep under an

aiding and abetting theory, because there was evidence connecting Diep to the three cars that may have been at the scene in which the shooter was a passenger. Thus, whether the shooter was in a white car, a black car, or any car, did not discredit the prosecution's theory of aiding and abetting. Further, the evidence against Diep was compelling. Cell phone records showed that Diep's phone was near the scene of the murder at the time of the murder and at the location where the gun was thrown away; there was no evidence that he had loaned his phone to someone else; and there was evidence that Diep told someone where to find the gun beforehand. Any evidence about the identity of the shooter does not undermine this evidence as it applies to the prosecution's theory of aiding and abetting.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 7 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CHRISTOPHER DIEP,

Petitioner-Appellant,

v.

MATTHEW CATE,

Respondent-Appellee,

and

DOMINGO URIBE, Jr., Warden,

Respondent.

No. 15-56615

D.C. No.

8:11-cv-01443-VBF-PLA

Central District of California,
Santa Ana

ORDER

Before: GRABER, WARDLAW, and CHRISTEN, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

**Additional material
from this filing is
available in the
Clerk's Office.**