

THIS IS A CAPITAL CASE

No. _____

In the
Supreme Court of the United States

TIMOTHY WAYNE KEMP,
Petitioner

v.

WENDY KELLEY, Secretary,
Arkansas Department of Correction,
Respondent

On Petition for a Writ of Certiorari to the
Eighth Circuit Court of Appeals

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

To the Honorable Justice Neil M. Gorsuch, Associate Justice of the Supreme
Court of the United States and Circuit Justice for the Eighth Circuit:

Pursuant to Rule 13.5, Petitioner Timothy Wayne Kemp respectfully requests a
60-day extension of time in which to file his petition for writ of certiorari in this
Court, up to and including **January 25, 2020**.

Petitioner will seek review of an opinion of the Eighth Circuit Court of Appeals,
attached as Exhibit A. The Eighth Circuit denied a petition for rehearing on August

28, 2019. *See* Exhibit B. The time to file a petition for writ of certiorari in this Court currently expires on November 26, 2019, and this application has been filed more than ten days before that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

This case arises from the denial of a habeas petition in a capital case. Kemp argued that his counsel failed to discover and present persuasive evidence that Kemp had an abusive childhood and suffered from fetal alcohol spectrum disorder and posttraumatic stress disorder. After a lengthy hearing, the district court found that Kemp presented evidence “significantly more compelling than what was presented at either the first trial or the resentencing trial.” *Kemp v. Kelley*, 2015 WL 5842538, *10 (E.D. Ark. October 6, 2015). According to the district court, the expanded evidence “told a horrible story” of “a deep family history of poverty and mental illness; a routine of trauma during childhood; and Kemp’s mother, Lillie, drank alcohol heavily when she was pregnant with him.” *Id.* at *9–*10. The district court found that had this information been presented to the jury, they probably would have spared Kemp’s life. *Id.* at *2. However, the district court found that counsel was not unreasonable in failing to discover and present this compelling evidence.

The Eighth Circuit, like the district court, decided the matter by finding that counsel’s performance was adequate. Exhibit A at 14–16. The prejudice ruling was not disturbed on appeal. Exhibit A at 14. The appellate court acknowledged that prevailing professional norms required a fully staffed defense team, but

nevertheless found that Kemp’s lawyer (a solo practitioner with a heavy caseload that included six capital cases) reasonably opted to do the investigation himself. *Id.* at 15. As a result of the investigation, the jury heard from three witnesses: Kemp’s mother, his boss, and a psychologist who thought Kemp was antisocial. Exhibit A at 6–7. When three of Kemp’s death sentences were overturned by the Arkansas Supreme Court, counsel viewed the resentencing as a “rerun,” did not seek out additional witnesses, and instead put on the same evidence.

This Court has repeatedly held that the foundation of effective representation is a thorough investigation. *Strickland v. Washington*, 466 U.S. 668, 691 (1984). In a death-penalty case, a thorough investigation includes a full examination of the client’s life history. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 524–25 (2003). The Court has held that an attorney may reasonably cease their investigation when further investigation is likely to be “fruitless” (*id.* at 525) or turn up only “cumulative” evidence (*Bobby v. Van Hook*, 558 U.S. 4, 11 (2009)). The Eighth Circuit found that counsel’s investigation was reasonable even though he had interviewed a small number of witnesses and mostly neglected to search for biographical records on Kemp and his family. In doing so, the appellate court disregarded prevailing professional norms *and* counsel’s own statements that more needed to be done in the case. Kemp intends to file a petition for writ of certiorari addressing whether the Eighth Circuit contravened the precedent of this Court by finding that counsel in a death penalty case may cease a life-history investigation

once he discovers some mitigation evidence regardless of whether there are indications that further investigation will be fruitless.

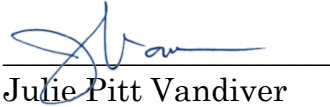
Counsel requires additional time to prepare a petition presenting this important issue to the Court. Counsel's duties in other death-penalty cases will prevent her from completing the petition in the time allowed by the rule. Counsel has been unable to devote sufficient time to preparation of the petition because of a lengthy hearing in the death-penalty case *Springs v. Kelley*, No. 5:13-cv-5 (E.D. Ark.). Counsel's month of September was dominated by preparation for and participation in a two-week hearing in that case. The case is set to reconvene on November 18th for up to a week more of testimony. In addition, counsel is engaged in discovery in the death-penalty case of *Sales v. Kelley*, No. 15-cv-248 (E.D. Ark) and a deposition scheduled for December 18, 2019, will require significant record review and preparation. Counsel requests an additional 60 days because a 30-day extension would make the petition due on December 26, 2019. Counsel has pre-existing plans to spend the week of Christmas with her family. Because of these and additional obligations in other death-penalty cases, counsel requires more time to prepare the petition in this matter.

Counsel for the Respondent, Kent Holt, has indicated he has no objection to the requested time.

WHEREFORE, Petitioner respectfully requests that this application be granted and that the Court allow him until January 25, 2020, to file his petition for a writ of certiorari.

November 4, 2019

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Julie", is written over a horizontal line.

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