

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MELVIN RUSSELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit

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

MARK H. DONATELLI
PAUL M. LINNENBURGER
ALICIA C. LOPEZ
ROTHSTEIN DONATELLI LLP
500 Fourth Street N.W., Suite 400
Albuquerque, New Mexico 87102
Phone: (505) 243-1443
Fax: (505)-242-7845
mhd@rothsteinlaw.com
plinnenburger@rothsteinlaw.com
alopez@rothsteinlaw.com

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TO: Justice Sonia Sotomayor, Circuit Justice for the United States
Court of Appeals for the Tenth Circuit:

Under this Court's Rules 13.5 and 22, Applicant Melvin Russell requests an extension of 60 days to file his petition for a writ of certiorari, in light of, *inter alia*, Applicant's very recent decision to pursue his appeal to the Supreme Court and the ongoing briefing demands on the undersigned counsel. Applicant's petition will challenge the decision of the U.S. Court of Appeals for the Tenth Circuit in *United States of America v. Russell*, No. 18-2174 (10th Cir. 2018), a copy of which is attached. In support of this application, Applicant provides the following information:

1. On December 20, 2019, the Tenth Circuit issued its order affirming Applicant's conviction of aggravated sexual abuse in Indian County under 18 U.S.C. §§ 1153, 2241(a)(1), and 2246(2)(A). Specifically, the Tenth Circuit's order affirmed the district court's denial of both (1) Applicant's motion to admit evidence of the complainant's close-in-time sexual encounter with another man, which could have provided an alternate source of the complainant's mild and minor vaginal injuries, brought under Federal Rule of Evidence 412, and (2) his request for a lesser-included offense jury instruction of "assault by striking, beating, or

wounding” under 18 U.S.C. § 113(a)(4), where DNA testing failed to show the presence of Applicant’s DNA inside the complainant’s body, and a jury could have reasonably found that he struck the complainant but did not forcibly cause the complainant to engage in a sexual act, consisting of vaginal penetration, with him.

2. Without an extension, the petition for a writ of certiorari would be due on March 19, 2020. With the requested extension, the petition would be due on May 18, 2020. This Court’s jurisdiction will be based on 28 U.S.C. § 1254(1).
3. This case is both important and a serious candidate for review, as it addresses the all-too-frequent misconstruction of Rule 412 of the Federal Rules of Evidence, which creates exceptions to the rape-shield rule designed to ensure that relevant evidence is admitted where it would aid in a trial court’s truth-seeking function – exceptions that lower courts plainly require this Court’s direction in order to apply. Here, Applicant contends that he was deprived of his Fifth Amendment Right to due process and his Sixth Amendment Right to confront adverse witnesses and to adequate assistance of counsel by the district court’s denial of his motion under Rules 412(b)(1)(A) & 412(b)(1)(C), notwithstanding evidence in the record that a consensual encounter could have caused the complainant’s injuries and a pointed lack of physical evidence that the complainant’s encounter with Applicant was sexual. Moreover, the Tenth Circuit appeared to read into the relevant Rule a requirement that, in order to pass muster under Rule

412(b)(1)(A), the defendant's proffered evidence of the complainant's alternate sexual encounter be supported by witness testimony as to whether the encounter could have left the complainant's injuries.

4. Applicant further submits that he was entitled to a lesser-included offense instruction for the crime of assault by striking, beating, or wounding, as a reasonable jury could have concluded that he did not forcibly cause the complainant to engage in a sexual act because his DNA was not found anywhere in the complainant's body, particularly because the testimony adduced at trial showed that the complainant was only "potentially" sexually assaulted, but was "clearly" struck in some fashion.
5. This application seeks to accommodate Applicant's legitimate needs. Applicant, who has been suffering from major medical issues in recent weeks, has only recently determined to pursue an appeal, and the current deadline is approximately three weeks away. Moreover, the undersigned counsel has dozens of active criminal and civil rights case, including appeals currently being briefed in the Tenth Circuit Court of Appeals and the New Mexico Court of Appeals, with pending deadlines that cannot be vacated. Because of these other obligations and the timing of Applicant's decision, Applicant will not be able adequately prepare a petition of this magnitude by March 19, 2020.

For these reasons, Applicant requests that the due date for his petition for a writ of certiorari be extended to May 18, 2020.

Respectfully submitted,

/s/ Paul M. Linnenburger

MARK H. DONATELLI
PAUL M. LINNENBURGER
ALICIA C. LOPEZ
ROTHSTEIN DONATELLI LLP
500 Fourth Street N.W., Suite 400
Albuquerque, New Mexico 87102
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