

NO:
IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN DIEZ,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

APPLICATION FOR EXTENTION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE
OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT

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INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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TO FILE PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Pursuant to Rules 13.5, 22, and 30.3 of the Rules of the Supreme Court of the United States, Martin Diez respectfully requests a sixty-day extension of time, to and including June 11, 2018, within which to file a petition for a writ of certiorari from the judgment of the United States Court of Appeals for the Eleventh Circuit in Case No. 16-16755. Mr. Diez has not previously sought an extension of time.

Basis for Jurisdiction

The district court had jurisdiction of this case pursuant to 28 U.S.C. § 2254(a) because Mr. Diez, a person in custody pursuant to the judgment of a court of the State of Florida, filed a 28 U.S.C. § 2254 petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida claiming that he

was being held in custody in violation of the Constitution of the United States. On August 26, 2016, the district court denied Mr. Diez's habeas petition, disposing of all the claims between the parties to this cause. On September 26, 2016, the district court denied Mr. Diez's timely motion to alter or amend judgment.

On October 24, 2016, Mr. Diez timely appealed the dismissal of his habeas corpus petition to the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. §§ 1291 and 2253. On November 29, 2017, the Eleventh Circuit affirmed the district court's decision, App. A-2, and on January 10, 2018, it denied Mr. Diez's petition for rehearing, App. A-1.

Mr. Diez is filing this Application at least ten days before the filing date for a petition for writ of certiorari, which is April 10, 2018. The jurisdiction of the Court will be invoked under 28 U.S.C. § 1254(1).

Judgment to be Reviewed and Opinions Below

The Eleventh Circuit's opinion affirming the district court's denial of Mr. Diez's habeas corpus petition will be reported in the Federal Appendix, can be found at 2017 WL 5899916, and is reproduced in Appendix A-2. The Eleventh Circuit's order denying Mr. Diez's petition for panel rehearing is unreported and is reproduced in Appendix A-1.

The unexplained *per curiam* decision of the Florida Third District Court of Appeal affirming the denial of Mr. Diez's state postconviction motion is reported at 107 So.3d 422 and is reproduced in Appendix A-3. The state trial court's decision

denying Mr. Diez's state postconviction motion is unreported and is reproduced in Appendix A-4.

Reasons for Granting an Extension

Mr. Diez respectfully requests an additional 60 days to file his petition for writ of certiorari for two reasons. First, this Court's impending decision in *Wilson v. Sellers*, No. 16-6855, will affect the Court's consideration of Mr. Diez's petition for writ of certiorari. In *Wilson*, the Court will determine whether the Eleventh Circuit correctly held that the standard articulated in *Harrington v. Richter*, 562 U.S. 86 (2011), applies to all unexplained state appellate court decisions or whether instead a federal habeas court must "look through" a summary appellate decision to review the last reasoned state court decision pursuant to the presumption of *Ylst v. Nunnemaker*, 501 U.S. 797 (1991).

Here, Mr. Diez filed in the Florida trial court a postconviction motion raising, *inter alia*, two claims: (1) trial counsel provided ineffective assistance by failing to obtain and present to the jury certain Venezuelan custody documents that would have supported Mr. Diez's defense that he was acting in good faith when he committed the offenses for which he was ultimately convicted; and, (2) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), because it obtained these Venezuelan custody documents pretrial and failed to provide them to the defense. The Florida trial court denied Mr. Diez's postconviction motion in a reasoned decision that addressed only the ineffective assistance of counsel claim. See App. A-4. The

Florida Third District Court of Appeal affirmed in an unexplained *per curiam* opinion. See App. A-3.

Mr. Diez thereafter filed a 28 U.S.C. § 2254 habeas corpus petition in the United States District Court for the Southern District of Florida. The petition raised, *inter alia*, the same ineffective assistance of counsel and *Brady* claims that Mr. Diez exhausted in his state postconviction motion. The Eleventh Circuit affirmed the district court's denial of habeas corpus relief. App. A-2. Relevant here, it determined that the summary nature of the state appellate court's opinion triggered the applicability of *Harrington v. Richter*. Specifically, the Eleventh Circuit concluded, based on circuit precedent, that because "[t]he Florida appellate court denied Diez's claims without explanation," that decision was "a denial on the merits . . . entitled to deference under § 2254(d)(1)." App. A-2 at 5. The Eleventh Circuit therefore held that Mr. Diez had to meet the *Harrington* standard and "show that there was no reasonable basis for the state [appellate] court's denial of relief." *Id.* (citing *Harrington*, 562 U.S. at 102).

Should this Court hold in *Wilson* that the *Harrington* standard does not apply to a summary appellate court decision affirming a reasoned lower court ruling, the Eleventh Circuit's error in requiring Mr. Diez to meet the *Harrington* standard would be manifest. The Court heard arguments in *Wilson* last October and a decision is likely soon. A sixty-day extension of time in this case will allow time for the *Wilson* decision to issue. It will also allow undersigned counsel time to craft Mr.

Diez's certiorari petition, and the relief he requests therein, in light of *Wilson's* holding.

Mr. Diez also respectfully requests additional time to file his certiorari petition due to the workload of undersigned counsel. During the week of April 9, 2018, undersigned counsel has two motions for certificate of appealability due in the Eleventh Circuit in two separate 28 U.S.C. § 2254 cases: *Andre K. Clarke v. Florida Department of Corrections*, S.D. Fla. No. 15-800561-Civ-Marra, in which the petitioner serving a life sentence; and *Eric Christopher Barrass v. Secretary, Florida Department of Corrections*, S.D. Fla. No. 14-24885-Civ-Lenard. Undersigned counsel is at present also preparing for two oral arguments before the Eleventh Circuit. The argument in *Ponton v. Florida Dept. of Corr.*, 11th Cir. No. 16-10683, is to be held on April 13, 2018; that in *Dewey Hylor v. United States*, 11th Cir. No. 17-10856 is scheduled for the week of May 14, 2018. In addition, undersigned counsel has to prepare for an evidentiary hearing on a claim of ineffective assistance of counsel in a 28 U.S.C. § 2255 proceeding set for July 12, 2018, before the United States District Court for the Southern District of Florida, in *Ramon Acosta v. United States*, S.D. Fla. No. 18-20053-Cv-Moore/White.

Mr. Diez's certiorari petition is due on April 10, 2018. A sixty-day continuance would make the petition fall due on Monday, June 11, 2018. S. Ct. R. 30.1. This request is not for purposes of delay. Rather, undersigned counsel believes that additional time is needed to allow for the careful preparation of

the petition for writ of certiorari in this matter. No party will be prejudiced by the grant of a sixty-day extension of time.

WHEREFORE, Mr. Diez respectfully asks this Honorable Court to grant him a sixty-day extension of time within which to file a Petition for Writ of Certiorari, to and including June 11, 2018.

Respectfully submitted,

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