

App. No. \_\_\_\_

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In The

Supreme Court of the United States

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Tony Von Carruthers,

*Petitioner,*

v.

Tony Mays, Warden

*Respondent.*

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PETITIONER'S APPLICATION TO EXTEND TIME TO  
FILE PETITION FOR A WRIT OF CERTIORARI

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To the Honorable Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Petitioner Tony Von Carruthers respectfully requests that the time to file a Petition for a Writ of Certiorari be extended sixty days from September 24, 2018, to and including November 23, 2018. The U.S. Court of Appeals for the Sixth Circuit denied a petition for rehearing en banc on June 26, 2018, App. A, *infra*, after issuing its opinion and judgment on May 3, 2018, App. B, *infra*. Absent an extension, the Petition therefore would be due on September 24, 2018. This Application is being filed at least 10 days before that date. *See* S. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254 to review this case.

## Background

1. Petitioner Carruthers and an accomplice were arrested and charged with first degree murder, kidnapping, and robbery after the death of three individuals in February 1994. *See generally Carruthers v. Mays*, 889 F.3d 273, 277-86 (6th Cir. 2018). The trial court appointed counsel to represent Petitioner for the trial and potential capital sentencing proceedings. After disputes with his first two sets of appointed counsel led to their withdrawal from the representation, the court granted a second request for new counsel, appointing William Massey and Harry Sayle as Petitioner's third set of counsel. Similar to prior appointed counsel, Massey failed to adequately prepare for trial—declining to perform a full investigation into the charges and waiting until just weeks before the scheduled trial date to seek a mitigation specialist for sentencing. Petitioner reacted to Massey's lack of preparation by making threatening calls and sending letters to Massey's office. Massey responded by informing the court that he could no longer represent Petitioner and moved to withdraw as counsel.

The court subsequently conducted a hearing on Massey's motion to withdraw. The court initially denied the motion, telling Petitioner that he needed to assist Massey and Sayle in their preparations for trial, and that his failure to assist his counsel could result in Petitioner representing himself at trial. An attorney representing Petitioner's interest was not present at this or subsequent representation hearings. Petitioner protested that he was not competent to represent himself and that Massey had not adequately prepared for trial.

The next week, Massey informed the court that he had received additional threatening letters from Petitioner and again sought to withdraw. Petitioner argued that Massey had

refused to communicate with him since the last hearing and that he could not possibly represent himself in these proceedings. The court nonetheless ultimately granted Massey's motion to withdraw, forcing Petitioner to represent himself in a capital trial because Petitioner had "involuntarily waived [his] right to counsel." W.D. Tenn. Dkt. No. 55-5 at 352. After the prosecution received a continuance, Massey informed the court that he could represent Petitioner at trial. The court denied Massey's request and Petitioner's subsequent motions invoking his right to counsel, forcing Petitioner to proceed through the full trial and sentencing pro se. The jury convicted Petitioner of three counts of first-degree murder, three counts of aggravated kidnapping, and one count of aggravated robbery, and sentenced him to death.

2. On direct appeal, Petitioner argued that he was denied his Sixth Amendment right to counsel and that he never waived that right. The Tennessee Supreme Court disagreed. *State v. Carruthers*, 35 S.W.3d 516 (Tenn. 2000). Although the court recognized that "this appears to be the only capital case in the country in which a defendant has been held to have implicitly waived or forfeited the right to counsel and has been required to represent himself at trial and sentencing," the court found that Petitioner's actions were "extreme and egregious," "the record in this case supports a finding of both implicit waiver and forfeiture," and that a "sanction" denying Petitioner his constitutional right to counsel "is appropriate under the circumstances." *Id.* at 546-49 & n.28.

Petitioner filed petitions for postconviction relief and habeas relief with the state courts, all of which were denied. *Carruthers v. State*, No. W2006-00376-CCA-R3-PD, 2007 WL 4355481 (Tenn. Crim. App. Dec. 12, 2007) (postconviction relief); *Carruthers v. Worthington*,

No. E2007-01478-CCA-R3-HC, 2008 WL 2242534 (Tenn. Crim. App. June 2, 2008) (state habeas). Petitioner then filed his petition for writ of habeas corpus in federal court, arguing, in part, that the trial court violated his Sixth Amendment right to counsel by forcing him to represent himself in a capital trial and sentencing hearing as a sanction for his conduct towards his attorneys. Applying the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the district court denied the petition. *Carruthers v. Worthington*, No. 2:08-cv-02425, at 26-28, 73-87 (W.D. Tenn. March 31, 2014) (ECF No. 195).

3. On appeal, the Sixth Circuit affirmed. *Carruthers v. Mays*, 889 F.3d 273 (6th Cir. 2018). The Sixth Circuit granted a certificate of appealability on three issues, one of which was whether “the trial court violated Carruthers’s right to counsel when it compelled him to proceed pro se at trial.” *Carruthers v. Mays*, No. 14-5457, at 3 (6th Cir. Dec. 28, 2015) (ECF No. 24). The court held that the Tennessee Supreme Court’s decision was not contrary to established Supreme Court precedent because the U.S. “Supreme Court has never addressed whether a criminal defendant may forfeit his right to counsel by effectively rejecting appointed counsel . . . and threatening multiple court-appointed attorneys.” *Carruthers*, 889 F.3d at 289-92. The court noted that “[n]othing in this opinion is intended to bless the state trial court’s actions or the merits of the Tennessee Supreme Court’s opinions,” and expressed that it was “troubling that the state trial court . . . required Carruthers to proceed pro se through his capital murder trial without giving him the warnings typically required in the distinct context of a defendant’s affirmatively waiving his right to counsel.” *Id.* Nonetheless, “given AEDPA deference,” it concluded that Petitioner “was not entitled to habeas relief.” *Id.* at 292. Judge Stranch concurred, “not[ing] [her] concern with a part of the Tennessee

Supreme Court’s analysis of implicit waiver or forfeiture of the right to counsel.” *Id.* at 293 (Stranch, J., concurring). Judge Stranch commented that the trial court and Tennessee Supreme Court’s erred in their analysis because she could not “agree that a criminal defendant may be denied his Sixth Amendment right to counsel as a form of punishment.” *Id.*

### **Reasons For Granting An Extension Of Time**

The time to file a Petition for a Writ of Certiorari should be extended for sixty days for three reasons:

1. Undersigned counsel just recently agreed to assist in preparing and filing a petition for writ of certiorari to this Court. Additional time is necessary for counsel to study the facts and the law and prepare a thorough petition for this Court’s review. The press of other matters before this and other courts, including an opening brief before the U.S. Court of Appeals for the D.C. Circuit, a response brief and petition for rehearing en banc before the U.S. Court of Appeals for the Ninth Circuit, and a petition for writ of certiorari, a reply to a brief in opposition, and an amicus brief in support of a petition for a writ of certiorari before this Court will make preparation of the Petition difficult absent an extension of time;

2. Undersigned counsel also recently suffered a major medical emergency, and the treatment and rehabilitation from that incident will require substantial time;

3. The Court is likely to grant the petition. While further research is required to fully elucidate the basis for that review, this petition raises significant concerns about a criminal defendant’s right to counsel and a trial court’s power to restrict that right as a sanction for the defendant’s conduct. The petition will demonstrate the extreme nature of the state

court's approach to Petitioner—his case presents a capital defendant whose disagreements with his appointed lawyers resulted in the trial court punishing him by imposing self-representation throughout his trial and sentencing. This case therefore involves the exceptionally important questions of: (1) what circumstances, if any, could justify a criminal defendant actively forfeiting his right to counsel through his conduct towards his attorneys, and (2) whether a criminal defendant can implicitly waive his right to counsel without being presented with formal warnings of the “dangers and disadvantages of self-representation.” *Faretta v. California*, 422 U.S. 806, 835 (1975) (internal quotation marks omitted); *see also Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (“[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial.”).

## Conclusion

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended for sixty days to and including November 23, 2018.

Respectfully submitted,

/s/ Eric F. Citron

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