

IN THE UNITED STATES SUPREME COURT

DALE w. EATON,)	
)	
Petitioner,)	
)	
vs.)	A - _____
)	
MIKE PACHECO,)	CAPITAL CASE
)	
Respondent.)	

**PETITIONER’S APPLICATION FOR
EXTENSION OF TIME IN WHICH TO FILE HIS
PETITION FOR A WRIT OF CERTIORARI**

**TO: THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE
OF THE SUPREME COURT OF THE UNITED STATES AND
CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT**

COMES NOW petitioner, Dale W. Eaton, by and through counsel, and submits to this Court, pursuant to Rule 13, his application for extension of time requesting an additional sixty (60) days up to and including February 24, 2020, in which to file his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. In support of this application, petitioner states as follows:

1. In this capital habeas corpus case brought pursuant to 28 U.S.C. § 2254, Mr. Eaton’s petition for a writ of certiorari to the Tenth Circuit is currently

due on or before December 26. Undersigned counsel were appointed to represent petitioner in this litigation pursuant to the Criminal Justice Act.

2. Petitioner will seek this Court's discretionary review of the July 23, 2019, opinion of a panel of the Tenth Circuit Court of Appeals affirming a Wyoming district court's order and judgment denying in part petitioner's habeas corpus petition. *See Eaton v. Pacheco*, 931 F.3d 1009 (10th Cir. 2019). A copy of the opinion is attached hereto.

3. Petitioner filed a timely motion for Rehearing and Suggestions in Support of Rehearing *En Banc* of the lower court's opinion. On September 27, 2019, the Tenth Circuit denied these motions. A copy of the order denying rehearing and rehearing *en banc* is attached hereto. Petitioner, pursuant to 28 U.S.C. § 1254(1) and Rule 13, intends to petition this Court for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals.

4. Pursuant to Rule 13, Mr. Eaton's petition for a writ of certiorari would be due on or before December 26, 2018. For the following reasons, petitioner believes that in the interest of justice and for good cause shown, his request for an extension of time should be granted.

5. The issues that will be raised in Mr. Eaton's petition for a writ of certiorari are complex. The Honorable Alan B. Johnson found that Mr. Eaton's

public defender at his capital trial was ineffective for failing to investigate his background and mental health, relying in large part on the testimony of a pretrial examiner, Dr. Kenneth Ash, recanting his finding that Mr. Eaton was competent to proceed and explaining that a competent life history investigation would have changed his diagnosis and findings regarding Mr. Eaton. Judge Johnson also found that Mr. Eaton's appellate public defenders were constitutionally ineffective for failing to conduct this investigation themselves during Wyoming's appellate procedure for investigating and raising claims of ineffective assistance of trial counsel. Judge Johnson granted Mr. Eaton a conditional writ, setting aside his death sentence. The State of Wyoming did not appeal this ruling. However, relying on 28 U.S.C. § 2254(d), Judge Johnson denied Mr. Eaton's claim that trial counsel was ineffective for failing to investigate and raise Mr. Eaton's incompetence to proceed, even though it rests on the same evidence and performance deficiencies as Mr. Eaton's successful ineffective assistance of counsel claim. Judge Johnson granted the State of Wyoming's motion for summary judgment on that claim, prior to the evidentiary hearing that resulted in the granting of the conditional writ. Although Mr. Eaton's Wyoming appellate defenders did allege that Mr. Eaton was incompetent to proceed, and that trial counsel was ineffective for failing to allege his incompetence, appellate counsel did not allege that trial counsel's investigation

into competence was deficient, nor did appellate counsel conduct that investigation themselves—the same investigation deficiency for which Judge Johnson found them ineffective. The record in this case presents questions left open by this Court’s decision in *Cullen v. Pinholster*, 563 U.S. 170 (2010), including whether Mr. Eaton’s federal “failure to investigate” ineffectiveness claim, supported by new evidence which persuaded the pretrial examiner to repudiate his competency finding, is a different claim than his state court “failure to allege” ineffectiveness claim, 563 U.S. at 213, n. 5, and whether, in applying § 2254(d), *Cullen v. Pinholster* bars the consideration of new evidence as to which a petitioner can satisfy the cause-and-prejudice standard of *Keeney v. Tamayo Reyes*, 504 U.S. 1 (1992). Further, this case squarely presents the circumstance discussed by Justice Alito noted in his concurrence in *Pinholster*, “that, when an evidentiary hearing is properly held in federal court, review under 28 U.S.C. § 2254(d)(1) must take into account the evidence admitted at that hearing.” 563 U.S. at 203 (Alito, J., concurring). This is a factually complex case, and additional time will allow counsel to winnow and hone the issues in a manner conducive to this Court’s informed exercise of its discretion in determining whether to grant certiorari.

6. Undersigned counsel, Sean D. O’Brien, is a full time professor at UMKC School of Law, and carries an active caseload of pro bono trial and postconviction

representation. Prof. O'Brien is lead counsel in this matter. In addition to his duties as a full-time professor, since the filing of the Tenth Circuit Court of Appeals' opinion herein, Prof. O'Brien has been engaged in the litigation of *Kidd v. Korneman*, DeKalb County, Missouri No. 18DK-CC00017 (Order filed Aug. 14, 2019) (habeas petition challenging two first degree murder convictions and two counts of armed criminal action, habeas relief granted, remanded for new trial); *State v. Kidd*, Jackson County, Missouri No. 16CR9602137A (charging two counts, first degree murder, and two counts of armed criminal action) (charges dismissed September 13, 2019); *Harris v. McBee*, Livingston County, Missouri No. 9LV-CC00013 (Order entered October 16, 2019) (habeas corpus petition challenging juvenile offender's mandatory sentence of life without parole for first degree murder; relief denied October 16, 2019, preparing proceedings for appellate review); In addition, Prof. O'Brien is actively assisting and advising counsel in habeas corpus litigation in capital cases in Missouri, Texas, Nebraska, Tennessee and Oregon, including cases under warrant for execution.

7. Undersigned counsel, Lindsay J. Runnels, associate counsel in this matter, is a CJA panel attorney in the District of Kansas and carries an active caseload of postconviction innocence cases and federal trial litigation. Since the filing of the Tenth Circuit Court of Appeals' opinion herein, Ms. Runnels has been

engaged in the postconviction litigation of *State v. Lamar Johnson*, Missouri Court of Appeals Eastern District No. 108193 (appeal of the dismissal of the prosecuting attorney's motion for new trial based on newly discovered evidence of innocence of first-degree murder and armed criminal action convictions, oral argument scheduled December 11, 2019); *United States v. Ramon Najjar*, USDC Kansas No. 19-mj-08235-TJJ (federal gun charges under 18 U.S.C. § 924(c)); *United States v. Julio Rodriguez et al.*, USDC Kansas No. 19-20070-CM-JPO (a thirty-five count indictment charging conspiracy to distribute methamphetamine, fentanyl, and heroin and unlawful possession of firearms under 21 U.S.C §§ 841(a); 841(b); 18 U.S.C § 21 and 18 U.S.C. § 924(c)); *United States v. Tayler Parsons*, USDC No. 19-CR-10124-EFM (acquisition of fentanyl by deception under 21 U.S.C. § 843)a)(3); *United States v. Robert Williams*, USDC Kansas No. 18-40069-DDC (unlawful possession of a firearm under 18 U.S.C. § 924(c), notice of appeal to the Tenth Circuit Court of Appeals filed December 4, 2019); *Callanan v. Griffith*, Missouri Supreme Court No. 95443, (habeas corpus petition challenging conviction of murder in the first degree, Special Master appointed); *State v. Alumbaugh*, Cherokee County, Kansas No. 2013-CR-2 (guilty plea set aside, trial scheduled May 2020 indecent liberties with a child); and *McIntyre v. Wyandotte County Unified Government et al.*, USDC Kansas No. 18-CV-02545 (a 42 U.S.C. §

1983 action alleging civil rights violations resulting from a wrongful conviction).

8. Undersigned counsel, Terry J. Harris, local counsel in this matter, is a CJA Panel attorney in the District of Wyoming. Since October 4, 2019, Mr. Harris has been representing federal defendant Pablo Luis Ibarra against a federal drug conspiracy charge, 21 U.S.C. §§ 846 and 841(b)(1)(A), in *United States v. Jonathan Cartajena-Galaviz and Pablo Luis Ibarra*, USDC Wyoming 19CR143-ABJ, a matter that had been set for jury trial to begin December 9, 2019. Mr. Ibarra successfully changed his plea to “guilty” December 2, 2019, and his sentencing hearing is scheduled to take place February 10, 2020. Discovery review and other pretrial litigation leading up to that change of plea has been extensive and time consuming. On September 26, 2019, another of Mr. Harris’ clients, Matthew Ty Barrus, was formally indicted in an alleged \$8.6 million dollar conspiracy to defraud Medicaid. *United States v. Matthew Ty Barrus, et al.*, USDC Wyoming 19CR171-ABJ. Upon motion of the United States, the District Court declared that litigation “complex” November 13, 2019 (19CR171-ABJ, ECF No. 64), due both to the excessive volume of discovery and a finding that “understanding the charged scheme requires an understanding of (among other things) services provided to individuals with diagnosed substance-abuse disorders, substance-abuse and mental health service provider taxonomies and licensure, substance-abuse treatment

services—and how Wyoming Medicaid rules and regulations apply to all of the above . . . find[ing] that the interactions of these different specialized areas of expertise make this case unusual and significantly increase the complexity of trial preparations.” *Id.* Additionally, Mr. Harris has throughout this fall been engaged in ongoing pretrial litigation efforts on behalf of Mr. Eaton, in anticipation of resumed state court capital sentencing proceedings. Finally, Mr. Harris does not have the expertise or experience needed to adequately prepare Mr. Eaton’s certiorari petition on behalf of Mr. Eaton.

8. Counsel assure this Court that the purpose of this motion is not to delay the resolution of this litigation, but, instead, to ensure that all of the constitutional issues in Mr. Eaton’s case are thoroughly and adequately presented to this Court for its discretionary review.

WHEREFORE, for good cause shown and for all the foregoing reasons, petitioner respectfully requests that Justice Sotomayor enter an order extending the deadline under which petitioner is required to file his petition for a writ of certiorari for a period of sixty (60) days, up to and including February 24, 2020.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court and that the original plus two true and correct copies of Petitioner's Application for Extension of Time in Which to File His Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were forwarded, postage prepaid, to:

Scott S. Harris, Clerk
United States Supreme Court
One First Street N.E.
Washington, DC 20543.

One copy was forwarded, postage prepaid, to:

Jenny L. Craig, Deputy Attorney General
Benjamin E. Fisher, Assistant Attorney General
123 State Capitol Building
Cheyenne, Wyoming 82002

this 10th day of December, 2019.



Sean D. O'Brien, # 30116
Counsel of Record for Petitioner