

IN THE UNITED STATES SUPREME COURT

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| DALE w. EATON, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | 19-A-678 |
| |) | |
| MIKE PACHECO, |) | CAPITAL CASE |
| |) | |
| Respondent. |) | |

**PETITIONER’S REPLY TO RESPONDENT’S OPPOSITION TO
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 in reply to Respondent’s Opposition to Petitioner’s Application for Additional Time Within which to File his Petition for Writ of Certiorari, states as follows:

1. Mr. Eaton explained in his Application the need for additional time, arising from a combination of the press of counsel’s extensive pro bono work, the volume of the record and the complexity of the legal and factual issues involved.
2. Respondent opposes Petitioner’s application for additional time, suggesting that a Petition for Writ of Habeas Corpus would be frivolous and

offered solely to delay Mr. Eaton's retrial. Neither suggestion is correct.

3. Respondent is correct that Petitioner moved in the district court to bar the State of Wyoming from retrying the penalty phase of Mr. Eaton's trial because dozens of mitigation witnesses whom Mr. Eaton's ineffective trial counsel should have called had passed away in the years that the State of Wyoming resisted Mr. Eaton's efforts to obtain a fair sentencing trial. Mr. Eaton argued that Wyoming's violation of his Sixth Amendment right to effective counsel cannot be cured in these circumstances. These circumstances put Mr. Eaton at a significant disadvantage at retrial of the sentencing stage of his capital trial. The courts below declined to rule on Mr. Eaton's motion on principles of comity and federalism. *Eaton v. Pacheco*, 931 F.3d 1009, 1027 (10th Cir. 2019).

4. Although Mr. Eaton is entitled to a new sentencing hearing, he seeks retrial of the guilt and innocence portion of his trial because the evidence of his severe mental impairments supports defenses to the charge under Wyo. Stat. § 7-11-304 and 305. Such a defense is far from frivolous on the facts of this case, and could mean the difference between Mr. Eaton being returned to death row, sentenced to life in the Wyoming State penitentiary, or committed to the Wyoming State Hospital for care, custody and treatment. Mr. Eaton has a right, and counsel have a duty, to pursue the most effective remedies afforded to him under the law.

5. The district court's refusal to consider the pretrial examiner's recantation of his competency finding rests entirely on this Court's decision in *Cullen v. Pinholster*, 563 U.S. 170 (2010). Mr. Eaton provided the Court with a brief overview of that issue in his Application.

6. The record herein will refute Respondent's suggestion that the issues Mr. Eaton seeks to present are "straightforward" or meritless. Respondent's Objections, p. 3. The unchallenged decision of the district court granting penalty phase relief includes findings that no member of Mr. Eaton's trial team was qualified to properly interpret signs of mental illness. *Eaton v. Wilson*, No. 09-CV-0261-J, *Order Granting Conditional Writ of Habeas Corpus*, pp. 74-75; (D. Wyo. Filed Nov. 20, 2014) (unpublished). Mr. Eaton did not participate in his defense because trial counsel mistakenly interpreted his symptoms of psychiatric impairment as recalcitrance. *Id.*, p. 108. Trial counsel not only failed to investigate Mr. Eaton's mental health history, but also failed to inform the pretrial examiner, Dr. Kenneth Ash, that Mr. Eaton was not participating in his defense and that he acted out impulsively during his trial. *Id.*, pp. 272-273. At a hearing today, Dr. Ash would testify that Mr. Eaton was not competent to proceed. Further, the district court found appellate counsel were also ineffective for failing to pursue the investigation that trial counsel should have conducted. *Id.*, pp. 369-371. However, appellate

counsel were diligent; their failure flows from the arbitrary and unreasonable refusal to allow adequate time to investigate. *Eaton v. Wilson*, No. 09-CV-0261-J, *Order Granting, in Part, and Denying, in Part, Respondent's Motion for Summary Judgment, and Granting Petitioner's Motion for Evidentiary Hearing*, p. 35 (D. Wyo., filed May 3, 2012) (unpublished). The district court found that the state court's failure rendered the state court ruling unreasonable under 28 U.S.C. § 2254(d)(2) with respect to Mr. Eaton's penalty phase ineffective assistance of counsel claim, *id.*, but not with respect to Mr. Eaton's guilt-innocence phase competency to proceed claim. The case law at the intersection of *Cullen v. Pinholster*, *supra*, and § 2254(d)(2) is complicated.

6. Counsel assure this Court that the purpose of this motion is not to delay the resolution of this litigation, and that allowing additional time needed for a cogent presentation of the issues would be important to Mr. Eaton and helpful to the Court.

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, or to grant such other relief as the Court deems appropriate.

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 Reply to Respondent's Objection to 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 for overnight delivery, 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, and by e-mail, to:

Jenny L. Craig, Deputy Attorney General
123 State Capitol Building
Cheyenne, Wyoming 82002

this 21st day of December, 2019.



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