App. No. 07A51

In the Supreme Court of the United States

DISTRICT OF COLUMBIA AND MAYOR ADRIAN M. FENTY, PETITIONERS,

v.

DICK ANTHONY HELLER, ET AL., RESPONDENTS.

ON APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' OPPOSITION TO PETITIONERS' APPLICATION TO EXTEND TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

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To the Hon. John G. Roberts, Jr., as Circuit Justice for the United States Court of Appeals for the District of Columbia Circuit:

Introduction

Respondents look forward to supporting the forthcoming petition for certiorari. However, that petition should be filed no later than August 6, 2007.

Petitioner's application for an extension of time lacks merit. The application fails to set forth the requisite "good cause" for issuance of an extension. Indeed, Petitioners in this case have had an exceptionally long time to prepare their petition and substantial resources with which to do so.

This case was filed on February 10, 2003. Petitioners have had nearly five years to consider the single question of law presented by this case – whether the Second Amendment, in securing a "right of the people," secures the rights of individuals.

On March 9, 2007, that question was answered in the affirmative by the United States Court of Appeals for the District of Columbia Circuit. On May 8, 2007, the D.C. Circuit denied Petitioners' application for rehearing *en banc*. The mandate would have been issued seven days later per D.C. Cir. R. 41(a) and Fed.

R. App. P. 41(a), but Respondents consented to Petitioners' request for a stay of the mandate through the entire ninety-day period for filing a certiorari petition.

In issuing the stay, Judge Silberman observed, "I assume it is understood that the District intends to petition for review in the Supreme Court. If it did not so intend, in my view, it would be inappropriate for it to have sought the stay." App. B to Application (citing *Boim* v. *Quranic Literacy Inst.*, 297 F.3d 542, 543-44 (7th Cir. 2002) (opinion in chambers)).

Respondents consented to the motion for a stay because they favor the granting of certiorari. However, Respondents were quite clear in sharing the D.C. Circuit's position that its mandate would only be withheld "until August 7, 2007." App. B. to Application. The question of extending this Court's ninety-day deadline never arose among counsel, and Respondents would never have agreed to such a request.

For the government of our nation's capital, five months to ponder an unopposed certiorari petition on a single question of law should suffice.

Argument

Petitioners' burden in making this application is heavy. "An application to extend the time to file a petition for a writ of certiorari is not favored," and may only be granted for "good cause." S. Ct. R. 13.5.

Over the past four years, the Petitioners were aggressively represented by the District of Columbia's Office of the Attorney General and supported by a host of *amici* in both the District Court and the Court of Appeals. Several of the attorneys listed on the Application to Extend Time have been working on this case for years. Petitioner's Counsel of Record argued the matter in the D.C. Circuit.

Petitioners now claim that additional time is required for their new, additional counsel "to become familiar with the record below, relevant legal precedents and historical materials, and the issues involved in this matter." Application, p. 5, ¶ 4; but see Application, p. 4, ¶ 3 (Petitioners' counsel are confident that there is "a substantial prospect of reversal").

Petitioners are certainly free to involve any number of new attorneys in their case, but the bare desire simply does not constitute "good cause" for extending the time period for filing a Petition for Certiorari. Parties routinely consult new or additional counsel in seeking further appellate review, particularly in this Court. If simply adding new counsel were sufficient cause to extend the deadline for petitioning this Court then many if not most parties would likely have grounds for such a motion. "Counsel who urged the point below is counsel here; the addition of another counsel hardly affords grounds for the desired extension." *Carter* v. *United States*, 75 S. Ct. 911 (1955) (opinion in chambers).

To the extent this is an argument that additional legal research must be conducted, that argument fails as well:

> In this case, counsel has given no reason for his request other than his desire for additional time to research constitutional issues. The same reason could be adduced in virtually all cases. It does not meet the standard of "good cause shown" for the granting of a disfavored extension.

Kleem v. *INS*, 479 U.S. 1308 (1986) (opinion in chambers); see also *Madden* v. *Texas*, 498 U.S. 1301 (1991) (opinion in chambers) (rejecting application to extend time to petition in capital case on grounds that counsel "has never before prepared a certiorari petition on a capital case" and requires others "to assist him and provide him with sufficient guidance to ensure that the important constitutional issues in [the] case are properly researched and presented to this Court").

Petitioners' claim that they need time to draft "a carefully prepared Petition" because "[t]his case presents extraordinarily important issues," Application, p. 4 ¶ 2, confuses the distinction between petitions for certiorari and briefs on the merits. As explained by Justice Frankfurter,

> Too frequent is the suggestion of counsel asking for extension that more time is required for "research" on the questions to be presented by the petition for certiorari. I cannot emphasize too strongly that petitions for certiorari all too frequently misconceive the true nature of such petitions – the considerations governing review on certiorari – and the manner of presenting them. It does not require heavy research to charge the

> understanding of this Court adequately on the gravity of the issue on which review is sought and to prove to the Court the appropriateness of granting a petition for a writ of certiorari.

Brody v. *United States*, 77 S. Ct. 910 (1957). When the issue upon which review is sought has received extensive consideration in the courts below, the difficulty of properly preparing a certiorari petition is lower still. *Id.*

"[C]ounsel may be appropriately reminded that the requirements of the Rules of this Court regarding the contents of a petition for certiorari seldom call for the kind of research which may be demanded for a brief on the merits." *Carter*, 75 S. Ct. 911. Under some circumstances, an adequate petition for certiorari "ought not to take more than a day or two on the part of competent counsel, particularly one previously responsible for the cause." *Id.*

Respondents agree that "[s]eeking this Court's review in any case is a serious decision, and governments in particular should think carefully before filing a Petition for Certiorari." Application, p. 4, ¶ 1. However, the Court's deadlines for governments – including the government of the District of Columbia – are no different than its deadlines for other litigants: ninety days, extended by the time in which a petition for rehearing *en banc* was pending. S. Ct. R. 13.3; 28 U.S.C. § 2101(c).

The notion that state governments might be entitled to additional deference under Rule 13 has been squarely rejected. *Mississippi* v. *Turner*, 498 U.S. 1306 (1991) (opinion in chambers). In *Turner*, Mississippi sought an additional thirty days to petition for certiorari because budget cuts had reduced its appellate staff. "Like any other litigant, the State of Mississippi must choose between hiring more attorneys and taking fewer appeals. Its budget allocations cannot, and I am sure were not expected to, alter this Court's filing requirements." *Turner*, 498 U.S. at 1306-07. Likewise, Petitioners should conform their litigation plans to the Court's rules, and not the other way around.

If this Court wished to treat government attorneys differently in this regard, it could fashion an appropriate rule. See, e.g. Fed. R. Civ. P. 12(a) (United States defendants have 60 days to respond to a complaint, other litigants, 20 days). But "our rules envision only one good cause standard." *Penry* v. *Texas*, 515 U.S. 1304, 1306 (1995). In *Penry*, Justice Scalia rejected the notion that death row inmates enjoy relaxed "good cause" standards to extend the time to petition for certiorari. And the fact that a motion for rehearing in the court below extended to six months the time to consider a certiorari petition vitiated the need for additional time. *Penry*, 515 U.S. at 1306. The instant case, where Petitioners' motion for rehearing extended the deadline to five months, is not much different in that

regard. Cf. *United States ex rel. Cerullo* v. *Follette*, 396 U.S. 1232 (1969) (opinion in chambers) (two and a half months are sufficient time to file petition for certiorari).

Finally, Respondents cannot agree that "no meaningful prejudice would arise from the extension." Application, p. 5, ¶ 5. The record in this case is replete with lengthy delays occasioned by Petitioners. Those delays have already caused significant prejudice to Respondents, often in ways that were unforeseeable at the time. Deadlines exist in part for the protection of the parties. As evidenced by Respondents' consent to Petitioner's extraordinary motion for a stay of the appellate court's mandate, Respondents have not been inflexible regarding deadlines. However, this Court's rules plainly require "good cause" to extend the time for filing a petition for certiorari and none has been shown.

Conclusion

The factors rendering this case a worthy candidate for certiorari are well-known. The case presents an issue of exceptional importance – whether an enumerated constitutional "right of the people" secures an individual right. This Court has issued no direct guidance on the topic save for one sixty-eight year-old precedent, the meaning of which is frequently claimed to be ambiguous. The federal courts of appeal, as well as state courts of last resort, are profoundly split.

Within the District of Columbia, the federal appellate court and the "state" high court, see S. Ct. R. 47, are split on the subject as well.

Petitioners are certainly capable of filing an adequate, successful petition for certiorari well within the time allotted. The application is devoid of merit and should be denied.

Dated: July 18, 2007

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