

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

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**In the Supreme Court of the United States**

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MARK STEVEN UNGER,  
Petitioner,

v.

DAVID BERGH,  
Respondent.

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**APPLICATION FOR AN EXTENSION OF TIME IN WHICH  
TO FILE A PETITION FOR WRIT OF CERTIORARI**

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit:

Under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.2, Petitioner Mark Unger respectfully requests a 60-day extension of time in which to file a petition for writ of certiorari in this Court, up to and including December 7, 2018. The Sixth Circuit affirmed the denial of Mr. Unger's petition for a writ of habeas corpus on July 10, 2018. (Attachment A.) Petitioner's time to petition for certiorari in this Court expires on October 8, 2018. This application is being filed more than ten days before that date. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## **Background**

1. Petitioner was convicted in 2006 of the first-degree murder of his wife. The prosecution's theory at trial was that Mrs. Unger fell or was pushed from an elevated deck onto a concrete ledge adjacent to a lake, that she lost consciousness and came to rest on the ledge, and that Mr. Unger later moved her body from the platform into the water, where she died. The defense countered that Mrs. Unger accidentally fell from the deck, hit the ledge, and the momentum from the fall carried her into the water, where she drowned. The key dispute at trial therefore was whether Mrs. Unger lay alive on the concrete ledge for any extended period of time before going into the water.

2. The prosecution's theory rested squarely upon testimony from an expert witness that a brain-tissue staining test showed that Mrs. Unger survived for at least 90 minutes on the concrete ledge. The expert based that testimony on his review of certain medical articles, which he claimed supported that theory.

3. It turns out that the medical articles on which the prosecution's expert relied do not remotely support his testimony. There is no medical literature anywhere in the world that establishes that a positive stain correlates to any minimum survival time.

4. Mr. Unger's trial counsel could not remember ever reading the articles, never sought to exclude the prosecution expert's testimony, failed to cross-examine

the expert regarding the lack of support in the articles for the prosecution's theory, and failed to prepare his own defense expert to counter the testimony.

5. Despite trial counsel's errors, the state courts rejected Mr. Unger's claims for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The U.S. District Court for the Eastern District of Michigan denied Mr. Unger's habeas petition, and the Sixth Circuit affirmed, on July 10, 2018. (Attachment A.)

### **Good Cause Exists for the Requested Extension**

6. Good cause exists for a 60-day extension to file a petition for writ of certiorari. Mr. Unger was represented in the Sixth Circuit by undersigned counsel, who is based in Kalamazoo, Michigan. Since the Sixth Circuit decision in July, Mr. Unger and his family have consulted with D.C.-based Supreme Court specialists regarding potential representation in this Court. That effort has delayed preparation of a cert petition by undersigned counsel. Counsel also has pressing deadlines in other matters, including several appellate briefs due in the Michigan Court of Appeals and dispositive motions and motions in limine due in a Tennessee product-liability action set for trial in early November.

8. Counsel for Respondent has indicated that Respondent does not object to the requested extension. Moreover, the extension, if granted, would not prejudice Respondent because Petitioner is presently in custody serving a life sentence.

For all of these reasons, Petitioner respectfully requests a 60-day extension of time in which to file a Petition for a Writ of Certiorari, up to and including December 7, 2018.

Respectfully submitted,

By:           /s/ Paul D. Hudson            
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Counsel for Petitioner Mark Unger

Dated: September 25, 2018

## CERTIFICATE OF SERVICE

Pursuant to Rules 29.3, 29.4(a) and 29.5 of the Rules of this Court, I hereby certify that on September 25, 2018, I have mailed by United States Postal Service the foregoing Application for an Extension of Time in Which to File a Petition for Writ of Certiorari to the Supreme Court to the following:

Andrea M. Christensen-Brown  
Assistant Attorney General  
Attorney for Respondent  
Criminal Appellate Division  
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Lansing, MI 48909  
(517) 373-4875

Respectfully submitted,

By:           /s/ Paul D. Hudson            
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Counsel for Petitioner Mark Unger

## ATTACHMENT A

*Unger v. Bergh*, \_F. App'x\_; 2018 WL 3359556; No. 17-2045 (6th Cir. July 10, 2018)

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