

**CAPITAL CASE**

No. 18-A-\_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL SAMPLE,

Petitioner-Applicant

vs.

TONY MAYS, Warden

Respondent

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UNOPPOSED APPLICATION FOR EXTENSION OF TIME

TO FILE PETITION FOR WRIT OF CERTIORARI

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To The Honorable Sonia Sotomayor, Associate Justice, and Circuit Justice

For The United States Court Of Appeals For The Sixth Circuit: Pursuant to

U.S.S.Ct.R. 13.5, in this capital case, Applicant, Michael Sample, respectfully

applies for a sixty (60) day extension of time, to and including February 14, 2019,

within which to file a petition for writ of certiorari. In support of this application,

Michael Sample states:

1. This is a capital proceeding. On September 17, 2018, the Tennessee Supreme Court denied Mr. Sample's application to appeal from the Court of Criminal Appeals opinion affirming the lower court's denial of Mr. Sample's motion to reopen his post-conviction proceeding pursuant to *Moore v. Texas*. *Sample v. State*, No. W2017-02370-SC-R11-PD (Tenn. September 17, 2018) (Exhibit 1).

2. Michael Sample presently has until December 16, 2018 to file a petition for writ of certiorari. *See U.S.S.Ct.R. 13.1.*

3. Under Rule 13.5, this Court may extend the time for seeking certiorari for up to sixty (60) additional days. Your Honor should do so under the circumstances.

4. Since the first of the year, six lawyers of the eight person capital habeas unit at the Office of the Federal Defender for the Middle District of Tennessee have resigned. Four of the positions have been filled, with the most recent hire starting October 1, 2018, but two positions remain open. Additionally, the newly hired attorneys are all inexperienced in capital work and require training and supervision. Because of this mass exodus, undersigned counsel has had her individual caseload double, while having to continue with her supervisory and training duties. Much of counsel's time has been consumed attempting to learn those new cases sufficiently to manage those cases' critical deadlines. Ultimately, the office will be stronger than ever, but for the time being we face some challenges.

5. Among the lawyers who left this office were Mr. Sample's former lead counsel, who left as of October 11, 2018, and Mr. Sample's second chair counsel,

who formally withdrew on April 9, 2018. A new attorney, Richard Tennent, who is experienced in criminal defense, but not in capital habeas litigation, has been assigned to take over as lead counsel in Mr. Sample's case (and has already filed appearance as lead counsel in the related *habeas* matter in the Western District of Tennessee). Mr. Tennent's application for membership in the bar of the United States Supreme Court is presently pending.

6. Additionally, since the time the Tennessee Supreme Court denied review of this case, counsel participated as the lead litigator in *Abdur'Rahman, et. al. v. Parker, et. al.*, 18-183-II (Chancery Court of Davidson County February 20, 2018) and *Abdur'Rahman et al. v. Parker et al.*, No. M2018-01385-SC-RDO-CV, 2018 WL 4858002 (Tenn. 2018). That litigation, including a two week trial and subsequent oral argument as well as attendant litigation preceding Mr. Irick's execution has consumed much of counsel's time. See *Irick v. Tennessee*, 139 S. Ct. 1 (2018) (Sotomayor, J., dissenting). That was shortly followed with litigation related to the execution of counsel's client, Edmund Zagorski, on November 1, 2018. See *Zagorski v. Parker*, 130 S. Ct. 11 (2018) (Sotomayor, J., dissenting).

7. Given counsel's current and ongoing responsibilities, counsel will require additional time to prepare and present to this Court Mr. Sample's petition for writ of certiorari.

8. The issues to be presented in Mr. Sample's petition are significant. A petition for writ of certiorari would include viable constitutional challenges to his death sentence establishing that the opinion of the Tennessee courts is in conflict

with *Moore v. Texas*, 137 S.Ct. 1039 (2017), and *Montgomery v. Louisiana*, 577 U.S.\_\_\_\_, 138 S.Ct. 718 (2016), where the Tennessee courts have failed to provide Mr. Sample with a forum for the vindication of his *Atkins* claim.

9. Opposing counsel, Assistant Attorney General, James Gaylord, has authorized undersigned counsel to state that he has no objection to this application.

10. In this capital case, therefore, Your Honor should grant Michael Sample a sixty (60) day extension of time, to and including Thursday, February 14, 2019, within which to file a petition for writ of certiorari. *See e.g., Dupree v. Laster*, U.S. No. 10A444 (Nov. 1, 2010) (Kagan, J.) (granting sixty day extension of time to file petition for writ of certiorari); *Wynne v. Renico*, U.S. No. 10A372 (Oct. 14, 2010) (same); *Marshall v. Huber*, U.S. No. 10A335 (Oct. 1, 2010) (same); *Smith v. Bell*, U.S. No. 10A493 (Nov. 16, 2010) (same).

#### CONCLUSION

The application for extension of time should be granted.

Respectfully Submitted,

*/s/ Kelley J. Henry*  
Kelley J. Henry  
Chief, Capital Habeas Unit  
Amy D. Harwell  
Assistant Chief, Capital Habeas Unit  
Office of the Federal Public Defender  
Middle District of Tennessee  
810 Broadway, Suite 200  
Nashville, Tennessee 37203  
(615) 736-5047

CERTIFICATE OF SERVICE

I certify that a copy of this application was served upon counsel for Respondent, James Gaylord, 425 Fifth Avenue North, Nashville, Tennessee 37243 this the 3rd day of December, 2018.

*/s/ Kelley J. Henry*  
Kelley J. Henry  
Counsel for Michael Sample