

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

Capital Case

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IN THE  
SUPREME COURT OF THE UNITED STATES

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DAVID SHINN,

PETITIONER,

vs.

GEORGE RUSSELL KAYER,

RESPONDENT.

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APPLICATION FOR EXTENSION OF TIME TO FILE  
PETITION FOR WRIT OF CERTIORARI

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Attorneys for Petitioner

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

Petitioner David Shinn<sup>1</sup> intends to file a Petition for Writ of Certiorari in this case, seeking review of the Ninth Circuit’s opinion in *Kayer v. Ryan*, 923 F.3d 692 (9th Cir. 2019), which granted habeas relief as to Kayser’s death sentence. Exhibit A. The Ninth Circuit issued the opinion on May 13, 2019, *see id.*, and the court denied rehearing on December 18, 2019. Exhibit B. The petition’s current due date is March 17, 2020. Pursuant to Rules 13.5, 30.2, and 30.3 of the Rules of the Supreme Court of the United States, Petitioner requests a 30-day extension of time to file the Petition, with a new due date of April 16, 2020. Petitioner has filed this application more than 10 days before the current due date. Kayser’s attorney, Jennifer Garcia, does not oppose this request.

#### Basis of Jurisdiction

Petitioner will invoke this Court’s jurisdiction under 28 U.S.C. § 1254(1) and Rule 13 of the Rules of the Supreme Court of the United States.

#### Background

This case presents important issues concerning the application of the Anti-terrorism and Effective Death Penalty Act (AEDPA), as well as the degree to which a state supreme court’s independent review of the death penalty factors into the prejudice assessment for an ineffective-assistance-at-sentencing claim. *See Strickland v. Washington*, 466 U.S. 668, 695 (1984) (“When a defendant challenges

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<sup>1</sup> David Shinn, Director of the Arizona Department of Corrections, Rehabilitation, and Reentry, is substituted for his predecessor, Charles L. Ryan, who has retired. *See* Rule 35.3, Rules of the United States Supreme Court.

a death sentence ... the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.”).

In this AEDPA case, a divided panel of the Ninth Circuit granted habeas relief as to Kayser’s death sentence based on counsel’s perceived ineffectiveness at sentencing. *See* Exhibit A. Despite the state court having adjudicated the ineffective-assistance claim on the merits, *see* 28 U.S.C. § 2254, the panel majority, having found deficient performance, effectively conducted a de novo review on the question of prejudice and granted relief. *Id.* at 20–70. Absent from the opinion is any meaningful consideration of “the only question that matters” under AEDPA: whether the state court’s merits adjudication was objectively unreasonable. *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (quotations omitted); *see also* Exhibit B, at 28–29.

Instead, the majority conducted its own qualitative assessment of the aggravation and mitigation, and compared Kayser’s case to an unrelated Arizona Supreme Court opinion in which that court reduced a death sentence on independent review. Exhibit A, at 20–70. In the majority’s view, the unrelated state-court decision presented similar facts and Kayser’s mitigation was compelling, warranting a finding of prejudice. *Id.* Judge Owens dissented, criticizing the majority for failing to apply AEDPA deference in reviewing the claim. *Id.* at 72–76.

Petitioner unsuccessfully sought panel and en banc rehearing. *See* Exhibit B. However, Judge Bea authored a dissent, which 11 judges joined, effectively urging this Court to reverse the panel majority’s opinion. *See id.* at 25 & n.1 (“Like clockwork, practically on a yearly basis since the Millennium, we have forced the Supreme Court to correct our inability to apply the proper legal standards under [AEDPA].”). These judges correctly recognized that the majority had repeated the analysis that led to reversal in *Richter* and other cases by conducting *de novo* review disguised as AEDPA deference. *Id.* at 25–56.

#### Reasons for the Extension Request

For several reasons, counsel of record will be unable to complete Petitioner’s petition by the current due date of March 17, 2020. Counsel assumed responsibility for this case when the prior attorney—who had handled it since the 1999 direct appeal—retired from the Office. While counsel has some familiarity with the case, she requires additional time to develop the detailed understanding of the complicated record necessary to present a complete, accurate, and persuasive petition to the Court.

In addition, counsel of record supervises the Capital Litigation Section of the Office of the Arizona Attorney General, and also carries a full capital caseload. Until the last few weeks, 3 positions in the Section have been vacant, requiring undersigned counsel to cover certain cases on a temporary basis. In addition, another attorney from the Section is on medical leave and counsel of record must satisfy two imminent deadlines in that attorney’s cases, the most significant of

which is a large direct-appeal answering brief due in the Arizona Supreme Court on February 20, 2020. *See State v. Smith*, No. 18–0295.

Finally, counsel of record’s own capital caseload has been heavy in recent weeks. Counsel has recently completed and filed a supplemental brief in Pima County Superior Court, *State v. Martinez*, No. CR20031993 (filed January 30, 2020), and a response to a motion to recall the mandate in the Ninth Circuit, *Apelt v. Ryan*, No. 15–99013 (filed January 23, 2020). Counsel also must complete and file a reply to a response to a petition for review in the Arizona Supreme Court, *State v. Miller*, No. 19–0061–PC, by February 24, 2020, and a response to a petition for state post-conviction relief in Pima County Superior Court, *State v. Atwood*, Nos. CR–14065 & CR–15397, by February 27, 2020. Further, counsel must file a brief in opposition in this Court in *In re Gulbrandson*, No. 19–7393; that brief is currently due on February 24, 2020, but counsel is seeking a 30-day extension of that deadline, until March 25, 2020. For these reasons, Petitioner respectfully requests an extension of time for filing a petition for writ of certiorari, to and including April 16, 2020.

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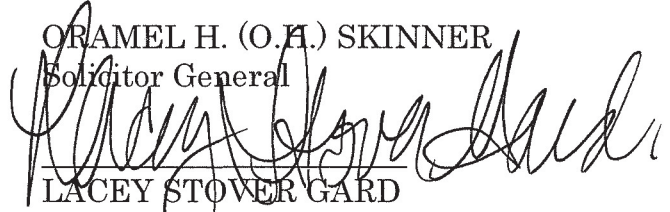
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Respectfully submitted,

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Solicitor General

A handwritten signature in black ink, appearing to read "Lacey Stover Gard", is written over the printed name of the Assistant Attorney General.

LACEY STOVER GARD  
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(Counsel of Record)

Attorneys for RESPONDENT