

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

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IN THE SUPREME COURT OF THE UNITED STATES

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Marcus Jackson, Petitioner

v.

Vance Laughlin, Warden, Wheeler Correctional Facility,  
Timothy C. Ward, Commissioner, Georgia Department of Corrections, Respondents

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Application for Extension of Time to File Petition for Writ of Certiorari to the  
Superior Court of Wheeler County, Georgia

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PETITIONER'S APPLICATION FOR EXTENSION OF TIME TO FILE  
PETITION FOR WRIT OF CERTIORARI

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To the Honorable Clarence Thomas, Circuit Justice for the Eleventh  
Circuit:

Petitioner Marcus Jackson respectfully requests that the time for filing his Petition for a Writ of Certiorari be extended by thirty days, to and including August 28, 2019. On April 29, 2019, the Supreme Court of Georgia unanimously denied Petitioner's Application for a Certificate of Probable Cause to appeal the denial of his state habeas corpus petition (Denial, Appendix A; Lower Court Order, Appendix B). Accordingly, absent an extension of time, his Petition for a Writ of Certiorari is due on Monday, July 29. Petitioner is filing this Application ten days ahead of that date as required by S. Ct. R. 13.5. This Court would have jurisdiction under 28 U.S.C. § 1257.

### BACKGROUND

Georgia trial judges have discretion to reverse a conviction when a jury verdict "is found contrary to evidence and the principles of justice and equity," O.C.G.A. § 5-5-20, or is "decidedly and strongly against the weight of the evidence," § 5-5-21. The appellate courts of Georgia lack this power, but when a Defendant asks a trial judge to exercise it, there is a duty at least to consider granting relief. See *Gomillion v. State*, 769 S.E.2d 914, 916-917 (Ga. 2015). Settled law holds that this discretion is broad. *State v. Cash*, 779 S.E.2d 603, 607 (Ga. 2015) (citations omitted). The review to be conducted, in which the trial judge is said to be sitting as the "thirteenth juror," *id.*, differs from an inquiry into the sufficiency of the evidence, which courts perform under the more stringent standard of *Jackson v. Virginia*, 443 U.S. 307 (1979).

After Petitioner was sentenced to life imprisonment for murder, a preliminary Motion for New Trial was filed that expressly sought relief on the grounds set forth in sections 5-5-20 and 5-5-21. When the time came for a hearing on the motion, however, appellate counsel withdrew the request for a “justice and equity” or a “weight of the evidence” reversal. She proceeded solely on a claim that the evidence of guilt was legally insufficient.

Citing *Jackson v. Virginia*, the trial court granted the Motion for New Trial, but the Supreme Court of Georgia reversed that order and reinstated the conviction. *State v. Jackson*, 748 S.E.2d 902 (Ga. 2013). Counsel then filed a second motion in the trial court, which granted relief on the previously withdrawn ground. But on a second appeal by the State, the Georgia Supreme Court held that Petitioner's piecemeal presentation of claims for reversal had been improper, and it reinstated his conviction once more. *State v. Jackson*, 764 S.E.2d 395 (Ga. 2014).

Petitioner's appellate counsel was the only witness at his state habeas corpus hearing. She testified that she had stricken the “thirteenth juror” claim from Petitioner's Motion for New Trial, knowing that a favorable ruling would result in a new trial, because she believed that a reversal under *Jackson v. Virginia* could not be appealed by the State, and would therefore end the case in Petitioner's favor. Had she realized that a postverdict determination of evidentiary insufficiency, unlike for example the midtrial granting of a directed verdict, could indeed be overturned on a State's appeal, she would not have withdrawn the claim for relief that Petitioner's trial judge later endorsed, only to be reversed because the ruling

came too late.

Addressing Petitioner's claim that appellate counsel's withdrawal of the "thirteenth juror" claim had been constitutionally ineffective, the habeas court credited her testimony but ruled that there had been no showing of deficient performance as is required by *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny:

While she was mistaken in her belief that the issue was not directly appealable by the State, counsel affirmed that she strategically chose to advance Petitioner's strongest claim that would not subject Petitioner to retrial. Rather than pursue multiple grounds which, while potentially successful, would have subjected Petitioner to a retrial, appellate counsel chose to advance the sole issue which, if affirmed on appeal, would have been a final determination of the case. . . . The decision to go forward with the single sufficiency of the evidence claim was an objectively reasonable strategy.

Appendix B at 6. Seeking discretionary review of the order denying his Petition for Writ of Habeas Corpus, and relying on the Sixth Amendment right to the effective assistance of counsel, Petitioner argued to the Georgia Supreme Court that appellate counsel's strategy had rested on a mistake of law. She had not, as she believed, secured any protection against a further appeal by the prosecution. There had accordingly been no upside, but only a downside, to waiving affirmatively the appellate argument that would have triggered the most favorable standard of review, and that the trial judge would eventually, but fruitlessly, endorse. In accord with its usual practice, the Georgia Supreme Court's order denying review contained no analysis. See Appendix A.

## REASONS FOR GRANTING AN EXTENSION

1. The undersigned represented Petitioner in the habeas court below and on his Application for a Certificate of Probable Cause to appeal the denial of habeas relief. While counsel's obligations toward Petitioner have been satisfied, insofar as his representation agreement is concerned, the undersigned is continuing to represent Petitioner on a pro bono basis in this Court because a patent error by prior counsel left Petitioner with an undisturbed life sentence even though his trial judge plainly believed, on weighing the evidence, that he should have a new trial. Present counsel has left the private practice of law to work at a public defender's office, where he bears a substantial caseload, and he must prepare Petitioner's Petition for a Writ of Certiorari during off-hours. Simply stated, the press of this business requires some additional time to ensure that Petitioner's case for review on certiorari will be presented as compellingly as possible.
2. Extending Petitioner's time to file would not prejudice Respondents, who are represented in matters before this Court by the Office of the Attorney General. Petitioner is in any event now serving the sentence he seeks to attack through habeas corpus ; and the requested extension is short enough to allay concerns about impairing the State's ability to litigate Petitioner's case fully and fairly, should a Writ of Certiorari be granted and further proceedings ensue.

## CONCLUSION

For the reasons stated herein, and pursuant to Sup. Ct. R. 13.5, Petitioner requests that the time for filing his Petition for Writ of Certiorari be extended by 30 days, to and including August 28, 2019.

Respectfully submitted,

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