

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CLARENCE WAYNE DIXON, Petitioner,

vs.

DAVID SHINN, ET AL., Respondents.

***** CAPITAL CASE *****

**APPLICATION TO EXTEND TIME
TO FILE PETITION FOR WRIT OF CERTIORARI**

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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:

Pursuant to Supreme Court Rules 13.5, 22, and 30, Petitioner Clarence Wayne Dixon respectfully requests a 60-day extension of time, up to and including Monday, March 16, 2020, within which to file a Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. If not extended, the time for filing a Petition will expire on January 16, 2020. Consistent with Rules 13.5 and 30.2, this application is being filed at least ten days before that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 and Supreme Court Rule 10.

On July 26, 2019, the United States Court of Appeals for the Ninth Circuit affirmed the United States District Court's denial of Mr. Dixon's application for capital habeas relief. (Appendix A.) Mr. Dixon timely filed a petition for panel rehearing and/or petition for rehearing en banc which was denied in an order issued on October 18, 2019. (Appendix B.)

BACKGROUND

Mr. Dixon is a severely mentally ill Arizona death row prisoner whose Sixth, Eighth, and Fourteenth Amendment rights were violated when, despite evidence of his incompetency known to but undisclosed by his trial counsel, he was permitted to represent himself at his 2007–2008 capital trial and sentencing and then ordered to be shackled with a stun belt and a full-legged metal brace in the absence of any trial

court finding that those restraints were warranted. Predictably, Mr. Dixon was sentenced to death.

Mr. Dixon challenged his erroneous and unconstitutional shackling on direct appeal to the Arizona Supreme Court in 2009. That court denied relief after finding that Mr. Dixon failed to carry his burden of proving that his shackles were visible to the jury and, in the alternative, that any shackling error was harmless. Later, during state postconviction proceedings, Mr. Dixon marshaled considerable and uncontroverted extra-record evidence demonstrating the denial of his Sixth Amendment right to the effective assistance of counsel; a consequence of his trial lawyers' failure to request a competency hearing before allowing Mr. Dixon to waive counsel, despite their knowledge of his history of mental illness, that he suffered from delusional thinking, and that he was unable to rationally communicate with them. The postconviction court rejected the ineffective-assistance claim and did so unreasonably by resolving substantial disputed issues of fact against Mr. Dixon without affording him a hearing.

On federal habeas review, Mr. Dixon again pressed both his shackling and ineffective-assistance claims in the United States District Court for the District of Arizona and in the Ninth Circuit Court of Appeals. There, he argued that the Arizona Supreme Court contravened this Court's precedents on direct appeal by allocating to Mr. Dixon the burden of proving that his shackles were visible to the jury when, in light of the trial court's unjustified unconstitutional decision to shackle him in the first instance, it should have placed the burden on the State to prove beyond a

reasonable doubt that the shackles were not visible to the jury. Mr. Dixon also argued that the postconviction court's rejection of his colorable ineffective-assistance claim without affording him the benefit of a hearing resulted in unreasonable fact finding under 28 U.S.C. § 2254(d)(2) and therefore required a federal hearing with *de novo* review. The Court of Appeals denied Mr. Dixon's request for relief on all of these issues. (Appendix A.) Mr. Dixon seeks this Court's review of that denial and the important federal questions that it implicates.

REASONS FOR THE REQUESTED EXTENSION OF TIME

Mr. Dixon's case presents complex issues related to: (1) the interplay between the ineffective assistance of counsel and a trial court's decision determining a capital defendant's competency to elect self-representation; (2) the application of 28 U.S.C. § 2254(d)(2) when a state court denies a claim after deciding substantial questions of disputed fact without granting a hearing; and (3) whether allocation to the defendant the burden of proving the visibility of shackles, when that defendant was unjustifiably shackled in the first instance, can be squared with this Court's precedents—a serious question on which the Circuit Courts of Appeal are divided.¹

¹ Compare, e.g., *United States v. Pina*, 844 F.2d 1 (1st Cir. 1988) (treating the visibility of shackles as part of inquiry into whether constitutional error obtained); *Adams v. Bradshaw*, 826 F.3d 306 (6th Cir. 2016) (same), with *United States v. Haynes*, 729 F.3d 178 (2d Cir. 2013) (finding constitutional error where defendant was unjustifiably shackled and treating the visibility of shackles as relevant to the question of whether defendant was prejudiced); *United States v. Tagliamonte*, 340 Fed. App'x 73, 80 (3d Cir. 2009) (treating visibility of shackles as relevant to the question of whether shackling error was harmless); *United States v. Cowan*, 528 Fed. App'x 278 (4th Cir. 2013) (same); *United States v. Banegas*, 600 F.3d 342 (5th Cir. 2010) (finding constitutional error where defendant was unjustifiably shackled and allocating the burden of proving that the shackles were not visible to the State as part of its burden of establishing harmlessness beyond a reasonable doubt); *Wrinkles v. Buss*, 537 F.3d 804 (7th Cir. 2008) (finding constitutional error where defendant was unjustifiably shackled and treating the visibility of shackles as relevant to the question of whether defendant was prejudiced); *United States v. Durham*, 287 F.3d 1297 (11th Cir. 2002) (same), and with *Dixon v. Ryan*, 932 F.3d 789 (9th Cir. 2019) (treating visibility of shackles as relevant both to the questions of whether constitutional

These important issues raised by Mr. Dixon's case require considerable research and analysis on the part of undersigned counsel, who assumed sole responsibility for Mr. Dixon's case following former lead-counsel's departure from the Office of the Federal Public Defender for the District of Arizona in late August 2019.

To date, undersigned counsel has not been able to afford Mr. Dixon's Petition for Writ of Certiorari the considerable attention that it requires. In addition to the routine obligations owed to her seven capital clients, including legal visits and clemency preparations involving out-of-state travel, Ms. Bass has spent considerable time preparing briefing supporting a Request for Evidentiary Development in *Tucker v. Shinn*, No. 2:17-CV-03383-DJH (D. Ariz.), presently due on January 9, 2020. Ms. Bass also has out-of-state travel planned from January 13–16, 2020 in connection with two of her Oklahoma capital clients' pursuit of clemency.

Ms. Bass will work diligently to file Mr. Dixon's Petition for Writ of Certiorari on or before March 16, 2020.

CONCLUSION

For the foregoing reasons, Mr. Dixon respectfully requests a 60-day extension of time in which to file his Petition for Writ of Certiorari, up to and including March 16, 2020.

error obtained from unjustifiable shackling and whether that error was harmless); *United States v. Wardell*, 591 F.3d 1279 (10th Cir. 2009) (treating visibility of unjustifiable shackles as relevant to the question of whether constitutional error obtained); *United States v. McGill*, 815 F.3d 846 (D.C. Cir. 2016) (same).

Respectfully submitted: December 19, 2019.

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