

\*\*\*THIS IS A CAPITAL CASE\*\*\*

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

---

---

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

---

JUSTIN ANDERSON,

*Petitioner*

v.

WENDY KELLEY, Director,  
Arkansas Department of Correction,

*Respondent*

---

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Eighth Circuit

---

**UNOPPOSED APPLICATION FOR EXTENSION OF TIME  
TO FILE PETITION FOR A WRIT OF CERTIORARI**

---

To the Honorable Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit:

Under Rule 13.5, Petitioner Justin Anderson respectfully requests an extension of **sixty days**, up to and including **March 23, 2020**, in which to file a petition for a writ of certiorari.

Petitioner will seek review of an opinion of the United States Court of Appeals for the Eighth Circuit, attached as Appendix A. The Eighth Circuit denied a timely

petition for rehearing on October 25, 2019. *See* Appendix B. The time to file a petition for writ of certiorari in this Court currently expires on January 23, 2020. This application has been filed more than ten days before that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

This is a capital habeas corpus case. Over a dissent, the Eighth Circuit panel rejected Anderson’s claim that counsel was ineffective for failing to investigate evidence of *in utero* exposure to alcohol and resulting brain damage. The majority found that counsel reasonably failed to inquire into maternal drinking because, although they knew Anderson’s mother was an alcoholic who drank around the time of her pregnancy, no one specifically informed counsel that the mother drank during pregnancy. App’x A at 8–10. In concluding that counsel wasn’t required to ask Anderson’s mother about alcohol consumption during pregnancy, the opinion conflicts with this Court’s holding that capital defense counsel must pursue a mitigation investigation so long as the “known evidence would lead a reasonable attorney to investigate further.” *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). The majority also concluded that any deficient performance didn’t prejudice counsel because brain damage associated with fetal-alcohol exposure was just “one more mitigating circumstance” in a case where the jury found childhood abuse and neglect. App’x A at 12. This abbreviated prejudice analysis contradicts the Court’s requirement to reweigh the totality of the mitigation evidence against aggravation, “regardless of how much or how little mitigation evidence was presented during the initial penalty phase.” *Sears v. Upton*, 561 U.S. 945, 956 (2010). Other courts have

not so easily discounted the importance to capital mitigation of *in utero* alcohol exposure. *See Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 105 (2019); App’x A at 23–24 (dissenting opinion).

The petition will also address the Eighth Circuit’s treatment of claims under *Batson v. Kentucky*, 476 U.S. 79 (1986). This Court has held that “if a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful race discrimination.” *Purkett v. Elem*, 514 U.S. 765, 767 (1995). Courts “must determine whether the prosecutor’s stated reasons were the actual reasons or instead were a pretext for discrimination.” *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241 (2019). But in Anderson’s case, the Arkansas Supreme Court required only that the prosecutor state a race-neutral reason for striking African-American jurors without inquiring into whether those reasons were pretextual. *See Anderson v. State*, 163 S.W.3d 333, 348 (Ark. 2004). The Eighth Circuit denied a certificate of appealability on Anderson’s habeas claim challenging the state court’s resolution of the issue. Apparently that is because current Eighth Circuit law also allows a trial court to truncate the step-two analysis. *See Smulls v. Roper*, 535 F.3d 853, 861 (8th Cir. 2008) (“[B]y denying the *Batson* challenge, the trial court implicitly [finds] that the prosecution’s proffered nondiscriminatory reasons were credible.”). Other circuits disagree with this approach. *See Adkins v. Warden*, 710 F.3d 1241, 1250–52 (11th Cir. 2013); *Hardcastle v. Horn*, 368 F.3d 246, 257–59 (3d Cir. 2004). The petition will seek review to bring the Eighth Circuit into line with this Court’s precedents.

Counsel's duties in other death-penalty matters will prevent him from completing the petition in the time Rule 13.1 allows. Counsel's months of November and December were occupied with the preparation of a 146-page habeas reply in *Lacy v. Kelley*, No. 19-95, ECF No. 16 (E.D. Ark. Dec. 19, 2019), and a motion for relief from judgment in *Greene v. Payne*, No. 04-373, ECF No. 257 (E.D. Ark. Dec. 16, 2019). Since the filing of those documents, counsel's time has been consumed by preparation for oral argument on January 15, 2020, in *Thomas v. Payne*, Nos. 17-1833/17-2380 (8th Cir.). Counsel neither litigated this matter in the district court nor wrote the appellate briefs. He has required significant time to become familiar with the voluminous record arising from the trial and habeas proceedings. Counsel also has a deadline of January 31, 2020, in which to submit objections to a magistrate judge's report and recommendation in *Wertz v. Payne*, No. 17-333 (E.D. Ark.) another complex (albeit non-capital) habeas case. Additionally, counsel is one of three attorneys appointed for the defendant in *United States v. Strickland*, 19-cr-580 (E.D. Ark.), a federal death-penalty case. Counsel expects preparations in that case to occupy a good portion of his time in February and March.

An extension will not prejudice Respondent. Jacob Jones, counsel for Respondent, has authorized the undersigned to say that he does not oppose an extension to and including March 23, 2020.

WHEREFORE, Petitioner respectfully requests that the Court allow him until March 23, 2020, to file his petition for a writ of certiorari.

JANUARY 10, 2020

Respectfully submitted,

LISA G. PETERS  
FEDERAL PUBLIC DEFENDER



---

JOHN C. WILLIAMS  
Ass't Federal Public Defender  
1401 W. Capitol, Ste. 490  
Little Rock, AR 72201  
(501) 324-6114  
john\_c\_williams@fd.org

*Counsel for Justin Anderson*