

Application No. _____

In the Supreme Court of the United States

JOSEPH NJUGUNA NJONGE,

Petitioner,

v.

MARGARET GILBERT, Superintendent,

Respondent.

On Application for Extension of Time to File a Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

**PETITIONER'S APPLICATION FOR EXTENSION OF 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 30.2, Petitioner Joseph Njonge respectfully requests a 60-day extension of time, up to and including January 31, 2020, to file a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review that court's unpublished memorandum decision in *Njonge v. Gilbert*, COA No. 18-35396 (attached as Exhibit A). On August 7, 2019, the court denied a petition for panel rehearing with suggestion for rehearing *en banc* (attached as Exhibit B). The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(a), and the time to file a petition for writ of certiorari will expire without an extension on December 2, 2019. This application is timely because it has been filed more than ten days prior to the date on which the time for filing the petition is to expire.

1. The undersigned is the Federal Public Defender for the Western District of Washington.
2. This case presents a substantial and important question of federal law: Whether the trial court's intentional three-hour closure of voir dire for no other reason beyond shortage of space in the courtroom, and during which a prospective juror brought up his racial and religious prejudices, can be so "trivial" that the Sixth Amendment right to public trial did not attach.

3. Assistant Federal Public Defender Vicki Lai is the lead counsel. She presented the oral argument to the Ninth Circuit on May 15, 2019, and has authored all of the briefing in this case. On April 10, 2019, Ms. Lai was appointed as appellate counsel by the Ninth Circuit in *United States v. Boyajian*, COA No. 16-50327, a criminal appeal involving hundreds of counseled and pro-se pre-trial and post-trial motions, a 178-page public docket, and a transcript of over 8,000 pages. The Ninth Circuit specifically requested that appointed counsel devote significant time to preparing the opening brief. Appellant was convicted of violating 18 U.S.C. §§ 2423(b) and 2423(c) based on conduct alleged to have occurred in Cambodia and 18 U.S.C. § 2260A and was sentenced by the district court to 70 years' imprisonment on August 15, 2016. The case presents, in part, complicated issues about the reach of the Foreign Commerce Clause and federal jurisdiction, and Ms. Lai has devoted much of the past few months combing through the voluminous record and regularly communicating with the appellant to meet the March 6, 2020, opening brief deadline. In addition, Ms. Lai has other appellate and habeas cases, which has limited her availability to work on this matter.

4. While the attached Memorandum Opinion is unpublished, there is a strong dissent from Ninth Circuit Senior Circuit Judge Andrew Kleinfeld. *See* Exhibit A. Further, the panel majority affirmed the denial of habeas relief by *sua*

sponte resolving the appeal on triviality grounds, without the benefit of briefing, since the State had defended the denial of habeas relief based solely on procedural and 28 U.S.C. § 2254(d) gatekeeping defenses. Preparation of the petition for writ of certiorari requires significant additional analysis regarding the split of authority regarding the use of the “triviality exception,” which has never been endorsed by this Court. For example, the state courts in Alabama, Texas, Colorado, and Washington have rejected the triviality exception in most if not all contexts. *Ex Parte Easterwood*, 980 So.2d 367, 375–76 (Ala. 2006); *Harrison v. State*, No. 02-10-00432, 2012 WL 1034918, at *13 (Tex. App. Mar. 29, 2012); *People v. Lujan*, No. 15CA1176, 2018 WL 3384670 (Colo. July 12, 2018), *cert. granted*; *People v. Lujan*, 2019 WL 189366 (Colo. Jan. 14, 2019); *State v. Easterling*, 137 P.3d 825, 831 (Wash. 2006). *But see State v. Schierman*, 438 P.3d 1063, 1082 (Wash. 2018) (holding that ten-minute closure, which involved no juror questioning, de minimis violation of the right to public trial). Further, the First Circuit has rejected arguments that temporary, inadvertent closures are too trivial to warrant Sixth Amendment protection. *See United States v. Agosto-Vega*, 617 F.3d 541, 544–45, 548 (1st Cir. 2010).

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Accordingly, Petitioner Njonge respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari for 60 days, up to and including January 31, 2020.

Dated: November 20, 2019

Respectfully submitted,



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