

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

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IN THE  
**Supreme Court of the United States**

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DAVID FREEMAN,

*Petitioner,*

v.

COMMISSIONER, ALABAMA DEPARTMENT OF  
CORRECTIONS,

*Respondent.*

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

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January 10, 2023

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Pursuant to Supreme Court Rules 13.5, 22, and 30, Petitioner David Freeman respectfully requests a 60-day extension of time, up to and including Friday, March 24, 2023, within which to file a Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. If not extended, the time for filing a Petition will expire on January 23, 2023. Consistent with Rules 13.5 and 30.2, this application is being filed at least ten days before that date.

This Court has jurisdiction in this case pursuant to 28 U.S.C. § 1254 and Supreme Court Rule 10.

**JUDGMENT FOR WHICH REVIEW  
IS BEING SOUGHT**

On August 24, 2022, the United States Court of Appeals for the Eleventh Circuit affirmed the United States District Court's denial of Mr. Freeman's petition for writ of habeas corpus. (Appendix A.) The court subsequently denied Mr. Freeman's timely filed petition for panel rehearing and/or petition for rehearing en banc on October 24, 2022. (Appendix B.)

**REASONS FOR THE REQUESTED  
EXTENSION OF TIME**

Counsel respectfully requests a sixty (60) day extension of time in which to file a petition for certiorari seeking review of the decision entered by the United States Court of Appeals for the Eleventh Circuit. In support of his request and demonstrating good cause, counsel states the following:

1. The state of Alabama convicted and sentenced to death David Freeman—a ward of the state nearly his entire life—for a crime that occurred when he was 18.

Mr. Freeman's conviction was vacated after the state violated this Court's rule in *Batson v. Kentucky*, 476 U.S. 79 (1986), because the prosecutor exercised peremptory challenges in a racially discriminatory manner. *Freeman v. State*, 651 So. 2d 576, 598 (Ala. Crim. App. 1994).

Mr. Freeman was retried. His attorney presented no mitigation case in the penalty phase, and the jury *non-unanimously* recommended a death sentence. A judge then sentenced Mr. Freeman to death, and the state appellate courts affirmed. *Freeman v. State*, 776 So. 2d 160 (Ala. Crim. App. 1999); *Ex parte Freeman*, 776 So. 2d 203 (Ala. 2000).

When Mr. Freeman entered state post-conviction proceedings, Alabama law did not require appointment of post-conviction counsel for indigent prisoners—even those facing a death sentence. *Barbour v. Haley*, 471 F.3d 1222, 1227 (11th Cir. 2006). Mr. Freeman was represented by *pro bono* out-of-state attorneys. Lacking the resources to fund the state litigation out of pocket, counsel sought funding from the state courts for reasonable costs associated with conducting investigation and retaining experts to support a claim of ineffective assistance of counsel (IAC). But the state refused to provide any funding to Mr. Freeman's counsel. Without access to resources, Mr. Freeman could not develop proof for his claims and was denied relief by the state courts in post-conviction. *Freeman v. State*, No. CR-02-1971 (Ala. Crim. App. June 17, 2005).

In 2006, Mr. Freeman filed his petition for writ of habeas corpus in federal court. He was appointed the Federal Defender office and now had resources to develop and present a factually robust and compelling IAC claim. His case was fully briefed by the end of 2007, and Mr. Freeman sat awaiting a decision for more than a decade.

When his case was briefed in the district court, the state argued that his IAC claim was procedurally defaulted because it was now factually developed and never

presented in state court. At the time the case was briefed, controlling law did not permit Mr. Freeman to argue post-conviction counsel's ineffectiveness as cause to overcome a procedural default. *Coleman v. Thompson*, 501 U.S. 722, 754 (1991). Yet by the time the district court denied Mr. Freeman relief in 2018, the law had changed. This Court had held in *Martinez v. Ryan* that post-conviction counsel's ineffectiveness could, in certain circumstances, constitute cause to overcome a procedural default. 566 U.S. 1 (2012). Despite this change in law, the district court denied Mr. Freeman a certificate of appealability (COA).

On appeal, the Eleventh Circuit granted Mr. Freeman a limited COA that rejected Mr. Freeman's request to brief the procedural issues in his case; instead, the COA was granted as to whether the IAC claim had merit. Mr. Freeman addressed only that specific issue in his opening brief.

While Mr. Freeman's case was pending before the Eleventh Circuit, this Court decided *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), which modified lower courts' interpretations of *Martinez*. Specifically, in *Ramirez*, this Court rejected the prisoner's argument: "where, per *Martinez*, a prisoner is not responsible for state postconviction counsel's failure to raise a claim, it makes little sense to hold the prisoner responsible for the failure to develop that claim." *Id.* at 1736. Instead, *Ramirez* held that federal courts could *not* consider new evidence where the prisoner blamed postconviction counsel for a claim that had not been developed and presented in state court. *Id.* at 1734. Considering this Court's decision, Mr. Freeman asked the Eleventh Circuit for a remand or supplemental briefing addressing *Ramirez*. Without addressing the motion, the Eleventh Circuit issued an opinion denying relief.

Seemingly inconsistent with the holding in *Ramirez*—and with the state’s argument that the factually developed IAC claim was never presented in state court and thus defaulted—the Eleventh Circuit found that Mr. Freeman’s claim presented in federal habeas *had* been adjudicated on the merits in state court and was *not* defaulted. The Eleventh Circuit recognized that Mr. Freeman failed to plead in his state post-conviction petition “any factual allegations in support of his claim,” Appendix A at 52. Nonetheless, it found that the federal IAC claim—which included “almost thirty pages of factual allegations of mitigation information, including explicit and lengthy allegations of physical abuse, sexual abuse, and PTSD,” slip. op. at 55—had been adjudicated on the merits. And as a result, the court applied 28 U.S.C. § 2254(d), a statutory provision that had never been briefed in the district court or on appeal, as the state consistently argued the claim was procedurally defaulted. Section 2254(d) only applies to claims adjudicated on the merits; not ones that are defaulted.

2. The Eleventh Circuit’s resolution of Mr. Freeman’s case presents critical questions related to both the proper interpretation of the Anti-Terrorism and Effective Death Penalty Act and this Court’s existing precedent. There appears to be a split among circuits on how to resolve issues like those presented in Mr. Freeman’s case. Although counsel for Mr. Freeman has been diligently researching the complex issues presented in this case and assessing how to effectively present them to this Court, given counsel’s previous and ongoing obligations, they are unable to meet the current filing deadline of January 23, 2023.

Undersigned counsel John Palombi is assigned 12 capital cases in various stages of litigation. Many of these cases are very active. He is preparing for an evidentiary hearing in one case, and he has been involved in reviewing discovery production and litigating discovery related

issues. He has a pleading due in mid-February and is assisting with the preparation of two appellate oral arguments in March. Finally, he has been involved in investigation, and consulting with experts in a case that is new to the office.

Mr. Freeman also is represented by Robin Konrad, who began working with the Federal Public Defender for the District of Arizona on August 29, 2022. In addition to Mr. Freeman's case, she has been assigned four cases in Arizona. One of her cases completed state review in November 2022, starting the time for filing the habeas petition. Since then, she's been reviewing the record, meeting with her client, conferring with prior counsel, and preparing the team for litigation. She has also been familiarizing herself with two other cases (both of which are more than 20 years old and have extensive records). In one of those cases, she has a brief due 30 days after this Court's decision in *Cruz v. Arizona*, No. 21-846. In the other case, she's had to assess the impact of *Shinn v. Ramirez* on the pending claims.

In addition to her case work, in November and December, Ms. Konrad was out of town for two weeks on client-related travel and to attend training in Arizona. She is also preparing for and presenting at a training sponsored by the Administrative Office of the U.S. Courts Defender Services on February 2-4, 2023, which will also require travel.

Finally, Ms. Konrad's elderly father had to undergo surgery on January 6. She traveled out-of-state to be with him for the procedure and to assist him and her visually impaired mother with his post-operation care. Given these circumstances, Ms. Konrad has been unable to dedicate the time necessary to properly prepare a petition for writ of certiorari on Mr. Freeman's behalf.

3. Based on counsel's previous and ongoing obligations as well as the complexity of the case, Mr. Freeman respectfully requests an extension of time of sixty (60)

days within which to file the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit on the above-styled case.

Respectfully submitted,

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