No. 23-

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TIMOTHY SUMPTER,
Petitioner,

v.

STATE OF KANSAS,
Respondent.

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

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

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APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI

TO: Justice Neil Gorsuch, Circuit Justice for the United States Court of Appeals for the Tenth Circuit

Under this Court's Rules 13.5 and 22, Applicant Timothy Sumpter requests an extension of thirty (30) days in which to file a petition for a writ of certiorari in this case. The U.S. Court of Appeals for the Tenth Circuit issued its opinion on December 29, 2022. A petition for panel rehearing was granted in part on March 3, 2023. A petition for rehearing *en banc* was denied on March 3, 2023. Unless extended, the time to file a petition for certiorari will expire on June 1, 2023. With the requested extension, the petition would be due on July 3, 2023.

This application is being filed 10 days before the petition is due. *See* S. Ct. R. 13.5. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254. In support of this application, Applicant states:

1. This case is a serious candidate for review. The decision below created a circuit split on an important and recurring questions about the Antiterrorism and Effective Death Penalty Act of 1996. Under Section 2254(d), a state court prisoner is entitled to an application for a writ of habeas corpus if the state court proceeding "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

2. Mr. Sumpter timely filed a post-conviction relief petition in Kansas state court. His state court petition included an ineffective

assistance of trial counsel claim for trial counsel's "[f]ailure to [u]nderstand and [a]rgue the [e]lements of [a]ggravated kidnapping" "at all stages of the case." Sumpter not only noted her failure to attack sufficiency through motions at the preliminary hearing, trial, and post-trial, he also contended counsel's failure to investigate meant "she missed crucial opportunities to challenge the State's claims and testimonial evidence," and enumerated examples from trial argument and evidentiary presentation including failure to correct misstatements of law, cross-examination, and incorrectly relaying the elements to the jury.

3. The Kansas Court of Appeals (KCOA) rejected Mr. Sumpter's request for post-conviction relief on this claim because it concluded that "the trial evidence was sufficient for the jury's verdict." *Sumpter*, 2019 WL 257974 at *5. As the KCOA explained:

> [T]he quality of the lawyers' representation becomes irrelevant if Sumpter cannot also show prejudice. If the trial evidence legally supports the jury's verdict and, thus, the conviction, his argument founders on that part of the *Strickland* test. We engage that analysis and conclude the State presented sufficient evidence to prove the aggravated kidnapping charge. To assess sufficiency we review the evidence in a light most favorable to the State as the prevailing party and ask whether reasonable jurors could return a guilty verdict based on that evidence.

Sumpter, 2019 WL 257974, at *3.

4. In the United States District Court for the District of Kansas, Judge Lungstrum granted habeas relief on this claim and concluded the federal court could review this ineffective assistance claim *de novo*

because the KCOA "applied the wrong standard" when it used sufficiency to decide prejudice. *Sumpter v. Kansas* (*Sumpter II*), 485 F. Supp. 3d 1286, 1296 (D. Kan. 2020). He determined that "the records reveals [] that trial counsel failed to assert that defense at any stage, including at the preliminary hearing, in examining the witnesses, in arguing for a directed verdict, in proposing and arguing jury instructions, and in closing argument." *Sumpter II*, 485 F. Supp. 3d at 1293-94. Judge Lungstrum concluded that this failure "was objectively unreasonable" and "especially inexcusable considering that this conviction proved to be the most serious for purposes of petitioner's sentencing." *Id.* at 1299. The State of Kansas did not appeal this deficiency finding to the Tenth Circuit.

5. Under clearly established law, in most ineffective assistance cases, a petitioner shows prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The court "must consider the totality of the evidence before the judge or jury." *Id.* In certain circumstances, the Supreme Court has recognized that a failure to investigate the legal underpinnings of a count and potential defenses is *per se* prejudicial because such a failure affects every strategic choice on evidence and argument. *U.S. v. Cronic*, 466 U.S. 648, 659 (1984); *Kimmelman*, 477 U.S. at 385.

Based on this framework, the Supreme Court has held that a state

court decision would be "contrary" to *Strickland* if it required a prisoner to meet a higher evidentiary burden than "reasonable probability." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). In *Williams*, Justice O'Connor gave the example of how requiring a "preponderance of the evidence" would be one such "contrary requirement." *Id.*

6. The Tenth Circuit determined that it was "an entirely reasonable application of *Strickland*—in particular, its prejudice standard," for the KCOA to determine that "because the trial evidence was sufficient for the jury's verdict, Sumpter could have suffered no prejudice from his lawyers' handling of the charge and conviction either in the district court leading up to and during the trial." (quoting *Sumpter I*, 2019 WL 257974, at *5).

7. On facts similar to Mr. Sumpter's, the Third and Ninth Circuits have held that it is an unreasonable application of clearly established law to assess whether there is prejudice from counsel's deficient performance by determining whether there was enough evidence to legally support a conviction. *Crace v. Herzog*, 798 F.3d 840, 849 (9th Cir. 2015); *Saranchak v. Sec'y, Pa. Dep't of Corr.*, 802 F.3d 579, 599 (3d Cir. 2015). Similar to the holding of the Kansas Court of Appeals here, the State of Washington in *Crace* had set out the correct *Strickland* prejudice standard. But as the Ninth Circuit noted, "recitation of the legal standard" on its own is not enough, the state court's application of the law must also be reasonable. *Crace*, 798 F.3d at 850 n.5.

The Tenth Circuit's approach is not only wrong, but it would result in virtually eliminating any entitlement to a fair trial for all but those

who could prove factual innocence. This rule would essentially only allow ineffective assistance of trial counsel claims to proceed if a petitioner can show factual innocence. Such a standard is not only impermissibly "heightened" and "outcome determinative" as recognized by the Third Circuit. *Saranchak*, 802 F.3d at 598. It would also make ineffective assistance claims duplicative of *Jackson* claims as the Ninth Circuit explained:

> If a defendant can only show *Strickland* prejudice when the evidence is insufficient to support the jury's verdict—a circumstance in which the defendant does not need to rely on *Strickland* at all because *Jackson* already provides a basis for habeas relief. . . . By reducing the question to sufficiency of the evidence, the [state court] has focused on the wrong question here—one that has nothing to do with *Strickland*.

Crace, 798 F.3d at 849.

8. Due to the circuit split on these important issues, there is a reasonable prospect that this Court will grant the petition such that it warrants this additional time to fully evaluate, frame, and present these important questions in the most effective manner.

9. This application for a thirty-day extension seeks to accommodate Applicant's legitimate needs. Applicant's counsel, Ruth Anne French-Hodson, has served as pro bono counsel for Applicant through both state and federal habeas proceedings. Ms. French-Hodson is not presently a member of the bar of this Court but her application has been submitted, and she will be serving as Counsel of Record, also on a pro bono basis. Ms. French-Hodson is an appointed co-lead in multi-

district litigation currently involved in multiple discovery, briefing, and mediation obligations in the United States District Court for the Western District of Pennsylvania. *In re SoClean Inc. Sales Practices and Products Liability Litigation*, 2:22-mc-00152-JFC. Ms. French-Hodson also leads ongoing, active litigation in the United States District Court for the Northern District of Oklahoma, United States District Court for the Eastern District of Missouri, and the United States District Court for the District of Kansas. An extension would allow Ms. French-Hodson to effectively contribute to her pending matters, including this one.

For these reasons, Applicant requests that the due date for his petition for a writ of certiorari be extended to July 3, 2023.

Respectfully submitted,

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