

CAPITAL CASE

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**In The
SUPREME COURT OF THE UNITED STATES**

October Term 2022

**Theodore Washington,
*Applicant/Petitioner,***

v.

**David Shinn, Director,
*Respondent.***

**Application for an Extension of Time Within
Which to File for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

**APPLICATION TO THE HONORABLE JUSTICE
ELENA KAGAN AS CIRCUIT JUSTICE**

ROBERT N. HOCHMAN
NATHANIEL C. LOVE
ANDREW F. RODHEIM
MEREDITH MCBRIDE
SIDLEY AUSTIN LLP
ONE SOUTH DEARBORN
Chicago, IL 60603
(312) 853-7000

JEFFREY T. GREEN*
SIDLEY AUSTIN LLP
1501 K STREET N.W.
WASHINGTON, D.C. 20005
(202) 736-9291
jgreen@sidley.com

XIAO WANG*
NORTHWESTERN SUPREME
COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-1486

October 17, 2022

Attorneys for Applicant/Petitioner

*Counsel of Record

APPLICATION FOR AN EXTENSION OF TIME

Pursuant to Rule 13.5 of the Rules of this Court, Applicant Theodore Washington hereby requests a 60-day extension of time within which to file a petition for a writ of certiorari up to and including Friday, January 27, 2023.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

On April 17, 2019, in *Theodore Washington v. David Shinn*, No. 05-99009, the Ninth Circuit entered a memorandum disposition affirming the district court's denial of a subset of the claims presented in Applicant's habeas petition (Exhibit 1), and issued a separate opinion reversing the district court's ruling as to the remaining claim concerning ineffective assistance of counsel (Exhibit 2). Both Applicant and Respondent filed timely petitions for rehearing en banc. On January 15, 2021, the Ninth Circuit withdrew its previous opinion, denied Respondent's petition for rehearing en banc as moot, and denied Applicant's petition for rehearing en banc with respect to the claims addressed in the memorandum disposition (Exhibit 3). The Ninth Circuit did not re-enter judgment, but instead directed further briefing and set oral argument. On December 20, 2021, the Ninth Circuit issued a new opinion affirming the ineffective assistance of counsel claim (Exhibit 4), and Applicant timely filed a petition for rehearing en banc. On August 29, 2022, The Ninth Circuit issued a third, amended opinion and denied Applicant's petition for rehearing en banc (Exhibit 5). The District Court of Arizona denied Mr. Washington's Amended Petition for habeas relief on April 22, 2005 (Exhibit 6).

JURISDICTION

This Court will have jurisdiction over any timely filed petition for certiorari in this case pursuant to 28 U.S.C. § 1254(1). Under Rules 13.1, 13.3, and 30.1 of the Rules of this Court, a petition for a writ of certiorari was due to be filed on or before November 28, 2022. In accordance with Rule 13.5, this application is being filed more than 10 days in advance of the filing date for the petition for a writ of certiorari.

REASONS JUSTIFYING AN EXTENSION OF TIME

Applicant respectfully requests a 60-day extension of time within which to file a petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in this case, up to and including January 27, 2023.

1. This is a felony murder case arising out of events that occurred in 1987. Three individuals—Fred Robinson, James Mathers, and Petitioner Theodore Washington—were originally convicted and sentenced to death in a joint trial. While Robinson knew the victim and was apprehended fleeing the scene, the State explicitly argued to jurors to find Mathers and Petitioner Washington guilty “by association.” The Arizona Supreme Court vacated Mathers’ conviction for insufficient evidence, and directed his acquittal. *State v. Mathers*, 796 P.2d 866, 869–70 (Ariz. 1990). But Washington’s counsel failed to raise that issue on direct review. At Washington’s post-conviction review hearing, the same trial judge that presided over the joint trial and sentenced Washington found that “no greater

evidence seems to place [Washington] at the scene” as compared to Mathers, who had been acquitted for exactly that reason. The trial judge believed himself powerless to correct the problem, but suggested instead that another court could do so in subsequent proceedings.

On habeas review, both the United States District Court for the District of Arizona and the Ninth Circuit ignored and failed to defer to these state court factual findings. Even in pre-AEDPA cases, a state court’s factual findings are entitled to a presumption of correctness. See *Miller-El v. Cockrell*, 537 U.S. 322, 356 & n.1 (2003) (Thomas, J., dissenting); 28 U.S.C. § 2254(d) (1994 ed.). This case presents the question of whether a federal court, on habeas review, must give deference to a state court’s findings in such circumstances as these.

Given the complexity and importance of the question presented, as well as the lengthy record spanning more than three decades, an extension of time will allow counsel to properly present a thorough and coherent petition.

2. Applicant has requested that the Northwestern University School of Law Supreme Court Practicum assist in preparing his petition. In light of the Practicum’s other responsibilities, an extension of time will permit the participants the time necessary to complete a cogent and well-researched petition. For example, in the coming months, the Northwestern Practicum has several overlapping commitments representing other clients in this Court, including petition for writs of certiorari in *Alvarez v. United States* (No. 22-), *Brown v. United States* (No. 22-), and *Rodriguez v. United States* (22-) and reply briefs in *Miclaus v. United States*

(No. 21-8129), *McGill v. United States* (No. 22-5073), and *Barrieta-Barrera v. United States* (No. 21-2289). Mr. Green is also appointed counsel in several D.C. Court of Appeals cases currently briefing and/or preparing for oral argument—*Johnson v. United States* (No. 13-CF-493), *Parker v. United States*, (No. 19-CF-1168), *Proctor v. United States* (22-CF-349), *Minor v. United States* (18-CF-0686), and *Neal v. United States* (17-CF-1346)—and has ongoing, active litigation in the United States District Court for the District of Columbia, the District of Columbia Superior Court, the United States District Court for the District of Delaware, the United States District Court for the District of Utah, the United States District Court for the Eastern District of Pennsylvania, and the Superior Court of the U.S. Virgin Islands. A 60-day extension for the Applicant would allow Mr. Green the necessary amount of time to effectively contribute to all open matters including Applicant’s petition as well as his other client business abroad, and would also allow the Northwestern Practicum students sufficient time for research and drafting efforts per Applicant’s request.

4. In addition, Mr. Love is currently preparing for a trial beginning December 6, 2022 in the United States District Court for the Western District of Michigan in *Magna Mirrors of America, Inc. v. Samvardhana Motherson Reflectec Group Holdings Limited*, No. 17-cv-00077-JMP-PJG, and is primarily responsible for active litigation matters in United States District Courts for the Northern District of Illinois, the Northern District of Georgia, the District of Delaware, and the District of New Jersey. Mr. Rodheim is preparing a brief in opposition to a

petition for a writ of certiorari for Appellees-Respondents in this Court in *Texas v. Cook County*, No. 21-2561, and has active litigation in the United States District Courts for the District of Arizona, the Northern District of Illinois, and the District of New Jersey.

5. Applicant requests a full 60-day extension because a 30-day extension would make the deadline December 28, 2022, and a full 60-day extension would move the deadline beyond both Mr. Love's trial beginning December 6, 2022 in the Western District of Michigan and the holiday season.

CONCLUSION

For the foregoing reasons, Applicant respectfully request that this Court grant an extension of 60 days, up to and including January 27, 2023, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,

/s/ Jeffrey T. Green

ROBERT N. HOCHMAN
NATHANIEL C. LOVE
ANDREW F. RODHEIM
MEREDITH MCBRIDE
SIDLEY AUSTIN LLP
ONE SOUTH DEARBORN
Chicago, IL 60603
(312) 853-7000

JEFFREY T. GREEN*
SIDLEY AUSTIN LLP
1501 K STREET N.W.
WASHINGTON, D.C. 20005
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jgreen@sidley.com

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