

---

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

---

**BRANDON SCOTT DONALDSON,**

*Petitioner-Applicant*

vs.

**STATE OF TENNESSEE,**

*Respondent.*

---

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

---

To The Honorable Brett Kavanaugh, Associate Justice, and Circuit Justice for the United States Court of Appeals for the Sixth Circuit: Pursuant to Supreme Court Rules 13.5 and 22, Applicant Brandon Scott Donaldson respectfully applies for a forty-five (45) day extension of time, to and including March 31, 2023, within which to file a petition for writ of certiorari. In support of this application, Mr. Donaldson states:

1. This is an appeal from a conviction on two counts of second-degree murder. Without an extension, the petition for writ of certiorari would be due on February 14, 2023. With the requested extension, the petition

will be due on March 31, 2023. This application is being filed more than ten days prior to the due date of the petition.

2. Undersigned counsel has contacted opposing counsel, Assistant Attorney General Courtney Orr, who has indicated that the State of Tennessee does not oppose the requested extension.
3. The court's jurisdiction will be based on 28 U.S.C. § 1257.
4. The Tennessee Court of Criminal Appeals issued an opinion in this case on April 21, 2022, affirming Mr. Donaldson's conviction. A copy of that opinion is attached hereto as *Appendix A*. Following a timely petition for rehearing, that Court issued an Order on May 10, 2022, denying rehearing. That order is attached hereto as *Appendix B*. Following an application for discretionary review, including review of the claims discussed herein, the Tennessee Supreme Court issued an order denying the application on November 16, 2022. A copy of that order is attached hereto as *Appendix C*.
5. The case raises two separate issues relating to the application of principles of racial fairness to our criminal justice system.
6. First, it raises an issue, under *Batson v. Kentucky*, 476 U.S. 79 (1986), relating to a peremptory challenge exercised by the State. In this case, the prosecutor offered a number of reasons for striking the first African-American in the jury box. On appeal, the Tennessee Court of Criminal Appeals agreed that one of the proffered reasons (that the juror had

trouble hearing and seeing) was pretextual, given the absence of any evidence to support that contention and the fact the prosecutor did not ask him any questions about the issue. The court nonetheless found no *Batson* error because it deemed the other reasons given by the prosecutor to justify his strike to be plausible.

7. In doing so, it rejected Mr. Donaldson's argument, renewed in his petition for rehearing, that the presence of even one improper justification reflecting improper motivation constituted a *Batson* violation, regardless of the veracity of the other justifications. In doing so, that opinion raises issues left open after *Synder v. Louisiana*, 552 U.S. 472 (2008), and *Foster v. Chatman*, 578 U.S. 488 (2016), as to how to address a situation where the prosecutor had both permissible and impermissible motivations for exercising a strike. The lower courts have reached significantly different conclusions as to how to analyze this situation, with some adopting a mixed-motivation analysis; others adopting a *per se* approach; and others a sole-motivation approach. *See, e.g., Akins v. Easterling*, 648 F.3d 380, 389 (6th Cir. 2011) (discussing different approaches). The instant case provides an appropriate vehicle for resolving that question.
8. Second, it raises an issue relating to the constitutional requirement of a jury drawn from a fair cross-section of the community. In this case, Mr. Donaldson presented detailed statistics and affidavits establishing that

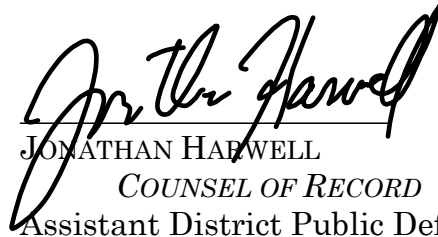
there was underrepresentation of Blacks on the specific jury venire on the day of the case and the general pool of potential jurors from which the venire was drawn. The Tennessee Court of Criminal Appeals found that the first two prongs for a fair cross-section claim laid out in *Duren v. Missouri*, 439 U.S. 357, 364 (1979) (distinctive group and underrepresentation in venire) had arguably been met, but that Mr. Donaldson failed in his claim as to the third prong (underrepresentation due to the systematic exclusion of the group) because he could not show the specific cause of the underrepresentation. It rejected the claim made by Mr. Donaldson that, where the evidence showed underrepresentation over the course of many months if not years, and statistical analysis ruled out the possibility of it being the result of random chance, then the underrepresentation was by definition “systematic,” i.e., inherent in the system, even if the exact cause could not be pinpointed or could result from a variety of contributing social and economic factors.

9. This Court discussed related issues in *Berghuis v. Smith*, 559 U.S. 314 (2010), but did not need to resolve the precise question because it was reviewing the case under the deferential standard of AEDPA, rather than on direct appeal. It specifically observed further that it had “never ‘clearly’ decided, and [had] no need to consider here, whether the impact of social and economic factors can support a fair-cross-section claim.” 559 U.S. at 333 n.6. This case therefore provides an ideal vehicle to

resolve the question of burdens of production and persuasion, as well as the practical meaning, of “systematic exclusion” under *Duren*.

10. This application is not filed for purposes of delay.
11. Undersigned counsel is an Assistant Public Defender in the Sixth Judicial District. Counsel is the head of the appellate division at the Public Defender’s Community Law Office. Counsel is responsible for monitoring the court’s appellate caseload and drafting and filing briefs in many of the office’s cases. In addition, counsel is involved in a number of serious cases pending in the trial courts.
12. Counsel has had numerous pending deadlines and has filed numerous briefs in the appellate courts of Tennessee over the last three months. Further, counsel has litigated several substantial motions in the criminal courts of Knox County. Finally, counsel took a scheduled family break over the winter holidays.
13. For these reasons, counsel has been unable to draft and finalize a petition for writ of certiorari within the ninety-day limit provided by law. A forty-five day extension will be adequate for that purpose.

Wherefore, the Applicant respectfully requests that an order be entered extending the time for filing a petition for writ of certiorari to and including March 31, 2023. A *Certificate of Service* is enclosed herewith.



JONATHAN HARWELL  
*COUNSEL OF RECORD*  
Assistant District Public Defender  
Knox County Public Defender's  
Community Law Office  
1101 Liberty Street  
Knoxville, TN 37919  
Phone: (865) 594-6120

February 3, 2023