

No. _____

In the Supreme Court of the United States

PHILLIP CHARLES GIBBS,

Applicant,

v.

BECKY CARL,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO U.S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicant Phillip Gibbs respectfully requests a 60-day extension of time, to and including October 30, 2023, to file a petition for a writ of certiorari in this case.

On June 1, 2023, the Sixth Circuit Court of Appeals issued an opinion and order affirming the district court's second order denying habeas relief to Gibbs. Unless extended, the time to file a petition for a writ of certiorari will expire on August 30, 2023. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). A copy of the Sixth Circuit opinion is attached.

1. Phillip Gibbs is serving a 17½ to 30 year sentence for a robbery committed at age 16. During voir dire in his state trial, the state trial judge closed the courtroom to spectators, and Gibbs's mother, sister, and brother-in-law were denied entry. The state trial judge later explained that it was her standard practice to close the courtroom during voir dire.

2. The state courts denied Gibbs's argument on appeal that the courtroom closure violated his Sixth Amendment right to a public trial, applying plain error review because Gibbs's lawyer did not object at the time of trial. Gibbs then sought habeas relief in federal court, and the district court initially denied relief because it concluded that Gibbs defaulted his claim by not objecting during voir dire. Gibbs appealed to the Sixth Circuit, which reversed for further review by the district court of whether Gibbs knew about the courtroom closure at the time it occurred and whether, if Gibbs did default the claim, he had cause and prejudice to excuse the default.

3. On remand, the district court found that Gibbs's attorney knew about the practice of closing the courtroom and thus had defaulted the claim. The court also found that Gibbs's attorney did not render ineffective assistance in failing to object.

4. Gibbs again appealed to the Sixth Circuit, which affirmed the denial of habeas relief. Reviewing Gibbs's arguments de novo, the Sixth Circuit held that Gibbs failed to show that his trial attorney's failure to object, even if it represented deficient performance, prejudiced him. Gibbs pointed out that, if his lawyer had objected, then he would have prevailed on appeal because he would have been entitled to an automatic reversal under this Court's precedent regarding courtroom closures. But the Sixth Circuit held that the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 688 (1984), applies only when there is "a reasonable probability that the outcome of his *trial* would have been different." The court also refused Gibbs's request to find that the courtroom closure constituted structural error under *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017).

5. Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case, for two reasons:

a. Most importantly, undersigned counsel has not had an opportunity to discuss with Gibbs what issues to raise in the certiorari petition. Gibbs is currently incarcerated at Alger Correctional Facility, in Munising, Michigan, in the Upper Peninsula of Michigan, approximately six hours from undersigned counsel's office. Given counsel's trial schedule, he has not been able to travel to see Gibbs. Further, despite significant efforts, undersigned counsel

has not has an opportunity to speak with Gibbs via telephone to discuss the petition. State prison officials have assured counsel that an attorney/client phone call be scheduled within the next month.

b. Second, although undersigned counsel has been working diligently to prepare a petition for certiorari, other pressing deadlines and court hearings have interfered with his ability to draft the petition. Undersigned counsel has approximately 50 clients litigating federal criminal and habeas cases in the district court and court of appeals. This includes a healthcare fraud jury trial involving more than five million documents that concluded earlier this summer and is pending sentencing, and eight circuit-level appeals, one of which was argued recently after undersigned counsel took over the appeal for a colleague who left on maternity leave. Counsel also has a complex sentencing occurring the week after next, and an appellant reply brief due next week.

For the foregoing reasons, the application for a 60-day extension of time, to and including Monday, October 30, 2023, within which to file a petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Benton C. Martin

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