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**In The**  
**SUPREME COURT OF THE UNITED STATES**  
**October Term 2023**

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*Taberon Dave Honie,*  
**Applicant,**

v.

*Robert Powell, Warden of the Utah State Prison,*  
**Respondent.**

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

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**APPLICATION TO THE HONORABLE JUSTICE**  
**NEIL M. GORSUCH AS CIRCUIT JUSTICE**

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ARIZONA

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July 10, 2023

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## **APPLICATION FOR AN EXTENSION OF TIME**

Pursuant to Rule 13.5 of the Rules of this Court, Applicant Taberon Dave Honie hereby requests a 60-day extension of time within which to file a petition for a writ of certiorari up to and including September 22, 2023.

## **JUDGMENT FOR WHICH REVIEW IS SOUGHT**

The judgment for which review is sought is *Taberon Dave Honie v. Robert Powell*, No. 19-4158 (10th Cir. Jan. 26, 2023) (attached as Exhibit 1). The Tenth Circuit Court of Appeals denied Applicant's petition for panel rehearing and/or rehearing en banc on April 26, 2023 (order attached as Exhibit 2).

## **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 is due to be filed on or before July 25, 2023. 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**

An extension is warranted because of the importance of the issue presented in this capital case and undersigned counsel's need for additional time to prepare a petition that will assist the Court in deciding whether to grant certiorari.

The petition will present an important question that is the subject of a sharp circuit split—whether the standard for assessing *Strickland* prejudice in the context of counsel's deficient advice to waive a right to a sentencing jury turns on a process-

based standard or an outcome-based standard (*i.e.*, whether the defendant would have selected a different process but for the ineffective assistance of counsel, versus whether the defendant would have received the same sentence under a different process). After misadvising Mr. Honie to waive his state statutory right to a capital sentencing jury, Mr. Honie's counsel later erroneously told his client that it was too late to withdraw the waiver and, on that basis, refused his client's request to move the court to withdraw the waiver. Then a judge sentenced Mr. Honie to death. Under Supreme Court precedent and the law of at least two other circuits, the proper way to assess prejudice from that undisputed deficient performance is to evaluate whether Mr. Honie would have chosen a jury for his sentencing—*i.e.*, whether, but for his counsel's deficient performance, Mr. Honie would have exercised his process-based right to be a sentenced by a jury.

Departing from those precedents and widening a circuit split, the Tenth Circuit upheld a state court's application of a substantive, outcome-based prejudice standard. The Tenth Circuit's rule thus requires a capital habeas petitioner like Mr. Honie to overcome a nearly insurmountable hurdle: proving that the outcome of his sentencing would have been different had he been afforded a jury of his peers.

Whether a lawyer's error can deprive an individual of a sentencing jury when faced with the gravest of punishments is a vitally important issue that calls for Supreme Court review. When state law gives defendants the right to decide whether to put their lives in the hands of a judge or a jury of their peers, as Utah's does, defense counsel may not usurp that choice. This Court's intervention is

necessary to safeguard defendants' rights and to resolve the circuit split on this issue.

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 Tenth Circuit in this case, up to and including September 22, 2023.

1. The extension of time is necessary because of the press of other client business. For example, Mr. Green, who is counsel of record in this case, must file an opening merits brief in this Court on July 12, 2023 in *Brown v. United States*, No. 22-6389, and he is responsible for ongoing federal litigation regarding execution protocols in Alabama, *Barber v. Ivey et al.*, No. 2:23-cv-00342-ECM (M.D. Ala.). The execution date for the *Barber* matter is set for July 20, 2023.

2. Co-counsel Therese Michelle Day is currently assigned to seven capital habeas cases and is also the head of the Capital Habeas Unit for the District of Arizona. Ms. Day has a reply brief due in Arizona district court on July 18, 2023 in the case of *Fitzgerald v. Shinn*, No. CV-19-05219-PHX\_MTL. Moreover, as head of the unit, Ms. Day has a number of administrative duties that require time and attention.

3. Co-counsel Eric Zuckerman needs additional time in which to prepare merits filings in three cases in July and August and a pre-hearing expert report disclosure for five experts due on July 10, 2023. The filings include: (1) an amended habeas corpus petition due in the U.S. District Court for the Northern District of

California (*Pollock v. Ayers*, No. 05-cv-01870-SI); (2) an answering brief due in the Utah Supreme Court (*Carter v. Utah*, No. 20221116-SC); and (3) a motion for a new sentencing in the Contra Costa Superior Court (*People v. Ramos*, No. 913003-0). The July pre-hearing expert report disclosure is for *Utah v. Archuleta* in the Fourth District Court of Utah, No. 881701140.

### CONCLUSION

For the foregoing reasons, Applicant respectfully requests that this Court grant an extension of 60 days, up to and including September 22, 2023, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,

/s/ Jeffrey T. Green

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