

No. A-_____

IN THE
Supreme Court of the United States

STEVEN LAWAYNE NELSON,

Applicant,

v.

BOBBY LUMPKIN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

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

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

To: The Honorable Samuel A. Alito, Jr., Circuit Justice for the United States
Court of Appeals for the Fifth Circuit:

Pursuant to this Court's Rules 13.5 and 22, Applicant Steven Lawayne Nelson respectfully requests an extension of thirty (30) days to file a petition for a writ of certiorari in this case. His forthcoming petition will seek review of the Fifth Circuit's decision in *Nelson v. Lumpkin*, 72 F.4th 649 (5th Cir. 2023), in which the court of appeals, after granting a certificate of appealability, affirmed the district court's denial of Applicant's petition for a writ of habeas corpus. This application is supported by the following reasons:

1. The Fifth Circuit issued its decision in this case on June 30, 2023 and denied Applicant's petition for rehearing *en banc* on August 11, 2023. Without an extension, the petition for a writ of certiorari would be due on November 9, 2023. With the requested extension, the petition would be due on December 11, 2023. This Court's jurisdiction will be invoked under 28 U.S.C. § 1254(1).

2. This case involves the interpretation of 28 U.S.C. § 2254(d), which limits the habeas claims a federal court may consider when a petitioner is in custody pursuant to a state court judgment. Under § 2254(d), a federal court may not consider "any claim that was adjudicated on the merits in State court proceedings" unless such adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" as determined by this Court, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The question here is whether § 2254(d) precludes litigation of an ineffective assistance of counsel claim based entirely on allegations and evidence not presented to a state court. Holding that § 2254(d) can preclude relitigation of even fundamentally altered claims, the Fifth Circuit declined to consider a federal-court claim that no state court has adjudicated, contrary to the text of the statute and the law of the other federal circuits. In doing so, the Fifth Circuit dramatically and incorrectly expanded the preclusive scope of § 2254(d).

The Fifth Circuit's novel fundamental alteration test is in conflict with the rules in the Fourth, Sixth, and Ninth Circuits. The Fourth Circuit uses a "heart of

the claim” test under which § 2254(d) precludes relitigation only of federal-court claims having the same legal “substance” as a state court claim. *See, e.g., Mahdi v. Stirling*, 20 F.4th 846, 898 (4th Cir. 2021). The Sixth Circuit uses a “gravamen of the claim” test that works the same way as the Fourth Circuit’s test does, notwithstanding the difference in terminology. *See, e.g., Sears v. Warden GDCP*, 73 F.4th 1269, 1286 n.10 (11th Cir. 2023). And the Ninth Circuit uses a more traditionally phrased version of the fundamental alteration test under which a federal-court claim was not “adjudicated on the merits” in state court if it presents a distinct theory of ineffectiveness. *See, e.g., Poyson v. Ryan*, 879 F.3d 875, 896 (9th Cir. 2018). In none of those other circuits will a federal claim be precluded if it depends on a theory—and evidence and allegations—the state court did not consider. Only the Fifth Circuit has embraced a different rule. This Court’s intervention is required to resolve this division of authority over the interpretation of § 2254(d).

3. Good cause exists for the requested thirty (30) day extension. Applicant’s Counsel of Record has recently been scheduled to begin a trial on November 6, 2023, which will be immediately followed by an arbitration beginning on November 13, 2023. The demands of preparing for both proceedings, along with the press of other business, have interfered with the time needed to prepare the petition for a writ of certiorari.

4. Co-counsel Lee Kovarsky, a full-time, tenured law professor at the University of Texas, likewise has unavoidable commitments over the next several weeks. Among other things, he has multiple publication obligations between October

31 and November 21, 2023, and as a member of his faculty's Appointments Committee, he is hosting a number of candidates for 1.5 day visits over the course of the next several weeks.

5. For these reasons, Applicant requests that the due date for his petition for a writ of certiorari be extended to December 11, 2023.

Respectfully submitted,

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