

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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BRANDON MICHAEL COUNCIL,  
*Applicant,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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**UNOPPOSED APPLICATION FOR AN EXTENSION OF TIME TO FILE A  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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December 13, 2023

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## APPLICATION

To the Honorable John Roberts, Chief Justice of the Supreme Court of the United States and Circuit Justice for the Fourth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicant Brandon M. Council respectfully requests a 60-day extension of time, to and including February 26, 2024, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

1. The Fourth Circuit entered judgment on August 9, 2023. *See United States v. Council*, 77 F.4th 240 (4th Cir. 2023). App. 1a. The Fourth Circuit denied Council's petition for rehearing en banc on September 26, 2023. *See* App. 42a. Unless extended, the time to file a petition for a writ of certiorari will expire on December 26, 2023. This application is being filed more than 10 days before a petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. This is a capital case in which preparing the petition for certiorari demands particularly extensive work. The Fourth Circuit's opinion in Council's appeal addressed 10 different claims involving a plethora of constitutional and statutory issues. The stakes could not be higher for Council. For these reasons, deciding exactly which issues to present to this Court, how to present them, and drafting and producing the petition, requires extra time and effort.

3. Council’s trial was plagued by numerous cert-worthy errors. Among others, the District Court abdicated its independent duty to determine Council’s competency. *See Pate v. Robinson*, 383 U.S. 375, 384 (1966). Where there is reason to believe a defendant may be incompetent, a court must hold a hearing and make a formal determination on competency. *See id.* at 384-385; 18 U.S.C. § 4241(a, d). There were plenty such reasons here. Council’s lawyer’s CJA vouchers candidly observed that Council was “crazy.” When speaking with investigators, Council repeatedly blamed “demons” who “control people’s minds.” Council had a family history of mental illness. And after the Government rested its case at trial, defense counsel explained that Council had, in multiple meetings, been “delusional,” “unhinged,” and suffered “a break with reality.” Council “adopted views that are irrational,” believed “God is somehow responsible” for the victims’ deaths and that Council was “being persecuted” because the court could “not subpoena God.” The judge tried to speak directly with Council, who just sat mute, crying, and after several minutes muttering how God killed the victims.

4. Courts determine competency—not defense counsel, and not experts. *See Pate*, 383 U.S. at 384. But at the eventual competency “hearing,” the district court found Council competent—despite extremely serious signs he was not—because defense counsel claimed he was and because of a two-paragraph expert statement that said, without any substantive explanation, that Council was competent. These bare-bones remarks with *no* support separately meant the district court had no “sufficient[]” record to support finding competency. *Dusky v. United States*, 362

U.S. 402, 402 (1960). And the “hearing” was a single transcript page—where defense counsel merely handed over the expert statement and said they now thought Council competent—making it unclear if it even qualified as the “hearing” required to be held. 18 U.S.C. § 4241(a, c). The Fourth Circuit’s affirmance raised additional troubling implications, writing that a trial court must “balanc[e]” a defendant’s “right to be tried only if competent” *against* his “right[] to \* \* \* effective assistance of counsel.” App. 9a. In so affirming, the Fourth Circuit created a split against those other circuits which have made clear that a defense attorney’s claim that his client is competent does not relieve the court of its duty to determine competency. *See, e.g., Maxwell v. Roe*, 606 F.3d 561, 574, 576 (9th Cir. 2010); *United States v. White*, 887 F.2d 705, 709 (6th Cir. 1989).

5. Competence is the foundational trial right, for “upon it depends” all of a defendant’s other rights, including effective assistance of counsel. *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (citation omitted). Sixty thousand competency hearings are conducted every year. Supreme Court review is needed to ensure courts independently ensure the competency of defendants and resolve underlying circuit splits in the process. The stakes will never be higher than for Council, who was tried and sentenced to death despite manifest signs of incompetence, including a complete break from reality.

6. Catherine E. Stetson of Hogan Lovells U.S. LLP, Washington, D.C., was recently retained as pro bono counsel because of her experience before this Court, and will bear primary responsibility for preparing the petition for certiorari. Over the

next several weeks, she is occupied with briefing deadlines and argument in a variety of matters, including a reply brief in support of certiorari in the United States Supreme Court due on December 20, 2023 in *Ingram v. United States* (No. 23-341); a response brief in the Federal Circuit due on January 16, 2024 in *Shell USA, Inc. v. Scientific Design Co., Inc.* (No. 23-01937); a reply brief in the D.C. Circuit due on January 17, 2024 in *Ipsen Biopharmaceuticals, Inc. v. Becerra* (No. 23-5142); and an oral argument on January 31, 2024 in Delaware federal district court in *AstraZeneca v. Becerra* (No. 23-931). Applicant requests this extension of time to permit counsel to research the relevant legal and factual issues and to prepare a petition that fully addresses the important questions raised by the proceedings below.

7. Council's counsel has communicated with the government's counsel, Ann O'Connell Adams, of the Appellate Section, Criminal Division, United States Department of Justice. Ms. Adams states that the government does not oppose the requested extension.

8. For these reasons, Applicant respectfully requests that an order be entered extending the time to file a petition for certiorari to and including February 26, 2023.

Respectfully Submitted,

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