

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TYLER GONZALES,
Applicant,

v.

CHERYL EPLETT,
Respondent.

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

Application to the Honorable Amy Coney Barrett,
as Circuit Justice for the Seventh Circuit

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APPLICATION FOR EXTENSION OF TIME

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30, Applicant Tyler Gonzales hereby requests a 60-day extension of time within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit. With that extension, the petition would be due on or before March 4, 2024.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *Gonzales v. Eplett*, No. 22-2393 (7th Cir. Aug. 9, 2023). The judgment and opinion of the Seventh Circuit (reported at 77 F.4th 585 (7th Cir. 2023)) are attached as Exhibit A. Also attached are the Seventh Circuit's order denying rehearing (unreported), the federal district court's order and judgment (unreported), and the Wisconsin Court of Appeals's decision (unreported).¹

JURISDICTION

The Seventh Circuit entered judgment on August 9, 2023, and denied rehearing on October 6, 2023. This Court's jurisdiction will be invoked under 28 U.S.C. § 1254. Under Rules 13.1, 13.3, and 30.1 of this Court, a petition for a writ of certiorari is due to be filed on or before January 4, 2024. In accordance with Rules 13.5 and 30.2, Gonzales has filed this request more than 10 days in advance of that deadline.

¹ Tyler Gonzales originally went by Tyler Montour. Mid-way through his federal habeas proceedings, he changed his last name to "Gonzales." Accordingly, although some case captions reference "Montour" while others reference "Gonzales," all pertain to the same petitioner.

REASONS JUSTIFYING AN EXTENSION OF TIME

Tyler Gonzales respectfully requests a 60-day extension of time, up to and including March 4, 2024, within which to file a petition for a writ of certiorari seeking review of the Seventh Circuit's decision in this case. An extension is warranted because of the importance of the issue presented and the need for additional time to prepare a petition that will assist this Court in deciding whether to grant certiorari.

1. This federal habeas case concerns the proper method for assessing attorney performance under the Sixth Amendment. A defendant's constitutional right to effective assistance of counsel is violated if his attorney performs deficiently and that deficient performance prejudices him. *Strickland v. Washington*, 466 U.S. 668 (1984). "Deficient performance" is "an objective standard"; it asks whether an attorney's performance was "reasonable[] *under prevailing professional norms.*" *Id.* at 688 (emphasis added). Even "strategic" choices must be reasonable. *Id.* at 690–91. Time and again, this Court has identified the "professional norms" of the time, then assessed counsel's performance against those objective criteria. *E.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 366–679 (2010); *Porter v. McCollum*, 558 U.S. 30, 39–40 (2009); *Bobby v. Van Hook*, 558 U.S. 4, 9–11 (2009) (per curiam); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Florida v. Nixon*, 543 U.S. 175, 191–92 (2004); *Wiggins v. Smith*, 539 U.S. 510, 522–27 (2003); *William v. Taylor*, 529 U.S. 362, 395–96 (2000); *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000). Thus, a reviewing court's assessment of "deficient performance" is a two-step shuffle: identify the professional norms in place at the time of representation, then compare counsel's actions to those norms.

No court reviewing Gonzales’s case has adhered to that standard. The Wisconsin Court of Appeals held that counsel cleared the Constitution’s performance bar because she made a “strategic” choice to pursue an all-or-nothing theory from start to finish; to the extent that strategy failed, Gonzales was to blame. See Ex. A at 42. The Wisconsin court never mentioned a professional norm with which counsel’s performance complied. For its part, the Seventh Circuit was “greatly troubled” by counsel’s performance—particularly that “adaptation to the state’s actual case ‘never even crossed her mind,’” given that “[a]n attorney’s choice rigidly to pursue a losing strategy certainly can support an ineffective assistance of counsel claim.” *Id.* at 14. And it recognized that the Wisconsin court had determined that counsel performed adequately because it “thought that there was little [counsel] could have done[] in the face of [the state’s] evidence.” *Id.* at 14. Yet, the Seventh Circuit held that the Wisconsin Court of Appeals’s decision was not an unreasonable application of *Strickland* and, therefore, deferred to its denial of relief. *Id.* at 15.

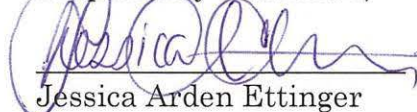
The ruling in this case contravenes numerous precedents from this Court and rents the fabric of the Sixth Amendment. This Court spoke clearly when it wrote that *Strickland*’s “deficient performance” test “is necessarily linked to the legal community’s practice and expectations.” *Padilla*, 559 U.S. at 366. But the Seventh Circuit now holds that a court reviewing a *Strickland* claim need not assess “deficient performance” in light of “prevailing professional norms.” On that view, *Strickland*’s objective, two-part test collapses into a subjective gut-check inquiry of whether the defense was doomed to fail.

2. An extension of time is needed to prepare and file a petition for a writ of certiorari because Gonzales's representation presently is in flux. Federal Defender Services of Wisconsin, Inc. (FDSW), through Attorney Jessica Arden Ettinger, represented Gonzales before the Seventh Circuit. Ms. Ettinger recently left FDSW and joined the Federal Community Defender Office for the Eastern District of Pennsylvania (FCDO). On December 18th, FCDO received approval from the Defender Services Office of the Administrative Office of the U.S. Courts to seek appointment under 18 U.S.C. § 3006A, and Ms. Ettinger filed a motion to appoint FCDO as Gonzales's counsel. As of this filing, that motion remains pending. If the motion is granted, then Ms. Ettinger will begin working on Gonzales's petition in earnest, but she will need more than the remaining two weeks to complete it. And if the motion is denied, then Gonzales will need additional time to obtain new counsel or prepare the petition himself. Accordingly, Gonzales respectfully asks for an extension of the present deadline.

CONCLUSION

For these reasons, Applicant Gonzales respectfully requests an extension of 60 days, to and including March 4, 2024, within which to file a petition for a writ of certiorari in this matter.

Respectfully submitted,



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