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IN THE SUPREME COURT OF THE UNITED STATES

ISRAEL WEINGARTEN,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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

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PARTIES

Petitioner Israel Weingarten was the Petitioner-Appellant in the proceedings in the United States Court of Appeals for the Second Circuit.

The United States of America was the Respondent-Appellee in the Second Circuit proceedings.

APPLICATION FOR EXTENSION OF TIME

To the Honorable Ruth Bader Ginsburg, as Circuit Justice for the United States Court of Appeals for the Second Circuit:

Under Supreme Court Rule 13.5, Petitioner Israel Weingarten respectfully requests that the time to file his Petition for a Writ of Certiorari in this matter be extended for thirty days, to and including February 9, 2018. In support of this application, Mr. Weingarten states:

1. In the underlying case, Mr. Weingarten sought relief under 28 U.S.C. §2255 based on his counsel in the original district court proceedings providing ineffective assistance of counsel under the Sixth Amendment. Relevant to the anticipated petition for writ of certiorari, Mr. Weingarten asserted that his counsel in the original district court proceedings were ineffective because they failed to raise two statute of limitations claims that would have been outcome determinative in Mr. Weingarten's favor. The district court denied Mr. Weingarten's §2255 claims with little discussion.

2. On appeal, the United States Court of Appeals for the Second Circuit acknowledged that the limitations issues raised in Mr. Weingarten's §2255 petition are strong, though the court stopped short of deciding that the issues would have been outcome determinative. Instead the Second Circuit denied relief because it concluded that Mr. Weingarten's counsel's failure to raise those claims in the original district court proceedings cannot be considered constitutionally deficient

performance because, at the time that counsel failed to raise those claims, the claims were not clear winners under then-existing case law. The Second Circuit's published opinion in this regard was filed on July 27, 2017. *See Weingarten v. United States*, 865 F.3d 48 (2d Cir. 2017) (attached as Exhibit A).

3. On September 8, 2017, Mr. Weingarten filed a timely petition for panel rehearing and rehearing en banc.

4. On October 12, 2017, the Second Circuit denied Mr. Weingarten's petition for panel rehearing and rehearing en banc. A copy of that order is attached as Exhibit B.

5. Accordingly, absent an extension of time Mr. Weingarten's Petition for a Writ of Certiorari is due on January 10, 2017. *See* S. Ct. Rule 13.3.

6. Mr. Weingarten is filing this application more than ten days before that date. *See* S. Ct. Rule 13.5.

7. This Court has jurisdiction under 28 U.S.C. §1254(1).

8. Mr. Weingarten is seeking a thirty-day extension because other commitments have made it impossible for Todd W. Burns – the attorney who was primarily responsible for prosecuting the appeal in the Second Circuit, and who is also responsible for preparing the Petition for a Writ of Certiorari on Mr. Weingarten's behalf – to complete an adequate Petition by January 10, 2017. An overview of Mr. Burns's recent and pending professional obligations is set out below.

9. On October 30, 2017, Mr. Burns filed an opening brief in the Ninth Circuit in *United States v. Vescuso*, Case No. 16-50441, and on November 17, 2018, Mr. Burns filed an opening brief in the Ninth Circuit in *Hays v. Tews*, Case No. 15-56593. Following that, Mr. Burns has devoted most of the past several weeks to reviewing the voluminous record materials related to *Bell v. Davis*,

S.D. Cal. Case No. 17-cv-1051, a 28 U.S.C. §2254 capital proceeding for which the petition is due on July 25, 2018. This recent focus was necessary to identify and coordinate things that need to be addressed well in advance of the July 2018 filing deadline. Mr. Burns has simultaneously been completing trial preparations relating to *Godinez v. Maleno Huerta*, S.D. Cal. Case No. 16-cv-0236, for which the final pretrial conference was held on December 18, 2017. In the near future Mr. Burns will turn his attention to preparing a Petition for a Writ of Certiorari related to *United States v. Robles*, Ninth Cir. Case No. 15-50133, which is due on January 9, 2018. After that, Mr. Burns will be able to devote sufficient time to preparing Mr. Weingarten's Petition for a Writ of Certiorari.

10. Mr. Weingarten and his Counsel believe this case presents an important issue warranting a carefully-prepared Petition, as the Second Circuit's resolution of the ineffective assistance issue is contrary to this Court's opinion in *Strickland v. Washington*, 466 U.S. 668 (1984), and is contrary to holdings in cases from several other circuit courts.

11. Counsel for Mr. Weingarten believes that a thirty-day extension will be sufficient to allow him to prepare and finalize a Petition for filing in this Court.

12. Counsel for Mr. Weingarten has not sought the position of counsel for Respondent with respect to this application because the matter will be handled for Respondent by the Solicitor General's Office, but the matter has not yet been referred to that Office and thus Counsel for Mr. Weingarten does not have a point of contact with respect to seeking Respondent's position on this application.

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13. For the foregoing reasons, Mr. Weingarten respectfully requests that the time to file a Petition for a Writ of Certiorari in this matter be extended thirty days, to and including February 9, 2018.

Respectfully submitted,

/s/ Todd W. Burns

Date: December 23, 2017

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