

No. 19-

In the
United States Supreme Court

WILLIAM JOVIAN DAVIS,

Petitioner,

v.

CLARK E. DUCART, Warden,

Respondent.

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

To the Honorable Elena Kagan
Associate Justice of the United States Supreme Court
and Circuit Justice for the Ninth Circuit

HILARY L. POTASHNER
Federal Public Defender
MICHAEL T. DRAKE
Counsel of Record
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
(213) 894-5355
michael_drakei@fd.org

Counsel for Petitioner
WILLIAM JOVIAN DAVIS

Petitioner-appellant William Jovian Davis requests a 60-day extension of time, up to and including October 28, 2019, to petition the Court for certiorari. 28 U.S.C. § 2101(c); Sup. Ct. R. 13(5).

A. Basis for jurisdiction.

In *Davis v. Ducart*, No. 16-56662, a Ninth Circuit panel affirmed the district court's denial of habeas relief under 28 U.S.C. § 2254. The court denied rehearing on May 30, 2019. The opinion and order are attached as Exhibit A.

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

B. Judgment to be reviewed.

The panel denied his request to expand the certificate of appealability to include his claim that the district court abused its discretion when it denied him an evidentiary hearing to prove ineffective assistance of trial counsel. Davis seeks review of that judgment.

C. Justification for a 60-day extension.

Before this Court's decision in *Buck v. Davis*, 137 S. Ct. 759 (2017) (no relation to petitioner Davis here), the petitioner there presented to the Court statistical evidence comparing the rates of COA grants and denials in capital habeas cases in selected circuits. Brief for the Petitioner, *Buck, supra*, at App. 1, available at <https://www.scotusblog.com/wp-content/uploads/2016/08/15-8049-Merits-Brief-Petitioner.pdf>.

Discussion at oral argument in the case suggests that some Justices may have found the information edifying. See Oral Argument at

13:56, *Buck, supra* (Roberts, C.J.) (noting that petitioner’s brief mentions Fifth Circuit’s low grant rate), *available at* <https://www.oyez.org/cases/2016/15-8049>; *id.* at 41:33 (Kagan, J.) (noting that Fifth Circuit denies COAs in capital cases at rate ten times Eleventh Circuit’s, which “does suggest one of these two circuits is doing something wrong”). *See also generally McGee v. McFadden*, 139 S. Ct. 2608, 2611 (2019) (Sotomayor, J., dissenting from denial of certiorari) (noting overall rate of COA denials).

Here, Davis contemplates presenting similar information to the Court in his certiorari petition, limited to noncapital cases, and comparing the COA grant rates of individual judges on his panel to relevant base rates among judges in the circuit as a whole.

But because (unlike in *Buck*) the targeted information is not available on a centralized database like Westlaw, that means looking at the docket of each noncapital habeas case on the Ninth Circuit’s electronic case filing system and recording any COA dispositions and related data. Even with strategies in place to limit our sweep, this means reviewing the dockets of hundreds, maybe thousands of cases. The work is painstaking and, given our paralegals’ many other commitments, bound to take several more weeks to complete.

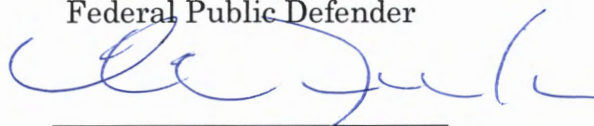
For these reasons, Davis respectfully requests a 60-day extension, to and including October 28, 2019, to petition the Court for certiorari. Because he was represented by counsel in the Ninth Circuit under the

Criminal Justice Act, 18 U.S.C. § 3006A(b), he brings this motion under Sup. Ct. R. 39(1).

CONCLUSION

Respectfully submitted,

HILARY L. POTASHNER
Federal Public Defender



MICHAEL T. DRAKE

Counsel of Record

Deputy Federal Public Defender

321 East 2nd Street

Los Angeles, California 90012

(213) 894-5355

michael_drakei@fd.org

Counsel for Petitioner

WILLIAM JOVIAN DAVIS

August 9, 2019

EXHIBIT A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 5 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

WILLIAM JOVIAN DAVIS, Petitioner-Appellant, v. CLARK E. DUCART, Warden, Respondent-Appellee.
--

No. 16-56662

D.C. No. 2:13-cv-08179-GW-LAL

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Submitted April 3, 2019**

Before: WALLACE, FARRIS, and TROTT, Circuit Judges.

California state prisoner William Jovian Davis appeals from the district court's judgment denying his habeas petition under 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C. § 2253. We review de novo the district court's denial of Davis's petition, *see Emery v. Clark*, 643 F.3d 1210, 1213 (9th Cir. 2011), and

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2)*.

we affirm.

Davis contends that the sentencing enhancement imposed under Cal. Penal Code § 186.22(b)(1) was not supported by sufficient evidence. On this record, the California Court of Appeal's determination that there was sufficient evidence to support all elements of the gang enhancement was neither contrary to nor an unreasonable application of clearly established federal law, nor based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d); *Jackson v. Virginia*, 443 U.S. 307, 324 (1979); *Johnson v. Montgomery*, 899 F.3d 1052, 1056-60 (9th Cir. 2018); *see also Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam) (“We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference.”).

We construe Davis's additional argument concerning the denial of an evidentiary hearing as a motion to expand the certificate of appealability. So construed, the motion is denied. *See* 9th Cir. R. 22-1(e); *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

COST TAXABLE	REQUESTED <i>(each column must be completed)</i>			
DOCUMENTS / FEE PAID	No. of Copies	Pages per Copy	Cost per Page	TOTAL COST
Excerpts of Record*	<input style="width: 100%; height: 25px;" type="text"/>	<input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>	\$ <input style="width: 100%; height: 25px;" type="text"/>
Principal Brief(s) (<i>Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief</i>)	<input style="width: 60px; height: 25px;" type="text"/>	<input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>
Reply Brief / Cross-Appeal Reply Brief	<input style="width: 60px; height: 25px;" type="text"/>	<input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>
Supplemental Brief(s)	<input style="width: 60px; height: 25px;" type="text"/>	<input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>	\$ <input style="width: 60px; height: 25px;" type="text"/>
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee				\$ <input style="width: 60px; height: 25px;" type="text"/>
TOTAL:				\$ <input style="width: 60px; height: 25px;" type="text"/>

***Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:

No. of Copies: 4; Pages per Copy: 500; Cost per Page: \$.10 (or actual cost IF less than \$.10);

TOTAL: 4 x 500 x \$.10 = \$200.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAY 30 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

WILLIAM JOVIAN DAVIS,

Petitioner-Appellant,

v.

CLARK E. DUCART, Warden,

Respondent-Appellee.

No. 16-56662

D.C. No.
2:13-cv-08179-GW-LAL
Central District of California,
Los Angeles

ORDER

Before: WALLACE, FARRIS, and TROTT, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and recommend denying the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.