

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

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IN THE  
SUPREME COURT OF THE UNITED STATES

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DEVIN ALLEN BENNETT, *Applicant*,

*v.*

STATE OF MISSISSIPPI, *Respondent*

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APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE A  
PETITION FOR A WRIT OF CERTIORARI

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June 17, 2024

To the Honorable Samuel A. Alito, Jr., Associate Justice of the United States and Circuit Justice for the Fifth Circuit:

1. In accordance with this Court's Rules 13.5, 22, 30.2, and 30.3, Applicant Devin Allen Bennett respectfully requests that the time to file his petition for a writ of certiorari be extended for 60 days, up to and including Monday, September 16, 2024. The Mississippi Supreme Court issued its opinion on November 16, 2023 (Exhibit A) and denied rehearing on April 18, 2024 (Exhibit B). Absent an extension of time, the petition would be due on July 17, 2024. The jurisdiction of this Court is based on 28 U.S.C. 1257. This request is unopposed.

2. This case presents at least two important questions of federal constitutional law in the context of capital sentencing: 1) whether trial counsel's lack of mitigation investigation is excused by a court-manufactured theoretical strategy to argue residual doubt; and 2) whether the Mississippi Supreme Court's application of the "double-edged" sword approach to mitigating evidence conflicts with decisions of this Court and the Sixth, Eighth, and Fourteenth Amendments.

3. Bennett was convicted in 2003 of the capital murder of his two-month-old son, Brandon. The jury sentenced him to death after trial counsel's admittedly "woefully lacking" presentation of a mitigation case. The Mississippi Supreme Court affirmed Bennett's conviction and sentence on direct appeal.

4. In 2008, the Mississippi Supreme Court granted leave to file a post-conviction petition in the trial court after finding a substantial showing of ineffective assistance of counsel during the sentencing phase of trial. Following discovery and

briefing on the issue, the trial court conducted an evidentiary hearing at which Bennett's trial counsel acknowledged he had no prior capital case experience. He admitted that he conducted no mitigation investigation, hired no mental health experts to evaluate Bennett, and spent no time preparing for the sentencing phase of trial. Instead, he was focused solely on the guilt phase and was counting on a not guilty verdict.

5. Despite the significant mitigating evidence overlooked by trial counsel but discovered by post-conviction counsel, and disregarding counsel's concession to his poor sentencing performance, the circuit court found counsel constitutionally effective. The Mississippi Supreme Court affirmed, excusing trial counsel's lack of mitigation investigation because he "devoted his attention and resources to the sentencing phase strategy of 'residual doubt.'" *Bennett v. State*, 383 So.3d 1184, 1193 (Miss. 2023). The court acknowledged that trial counsel never articulated any such strategy. *Id.* This decision runs afoul of the precedent of this Court established in *Strickland v. Washington*, 466 U.S. 668 (1984), *Williams v. Taylor*, 529 U.S. 362 (2000), and *Wiggins v. Smith*, 539 U.S. 510 (2003).

6. The court further held that Bennett failed to prove *Strickland* prejudice because of the danger that his proposed mitigation evidence could have been a "double-edged sword." *Bennett*, 383 So.3d at 1194-1200. In other words, the court wrongly decided that the neglect and abuse Bennett suffered as a child due to his parents' drug and alcohol abuse, as well as his own substance abuse and failed treatments, were as likely to be (non-statutory) aggravators as they were mitigators.

The court's reasoning was based on the flawed legal conclusion that such evidence suggested future dangerousness – a theory originating in a pre-1991 Texas statute with no applicability to Mississippi's capital sentencing procedure. Unlike prior Texas law, the State of Mississippi may not even present evidence of alleged future dangerousness because it is not a statutory aggravating circumstance.

7. The Mississippi Supreme Court's reasoning is doubly problematic. First, nothing in Supreme Court decisions suggests that evidence of reduced moral culpability should be discounted in the prejudice calculus based on purported aggravating aspects. And the Supreme Court has never counted a defendant's impairments themselves as "aggravating." To the contrary, the Supreme Court has suggested that "due process of law would require that [a] jury's decision to impose death be set aside" if a state had "attached the 'aggravating' label to ... conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness." *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (citations omitted).

8. Second, the lower court decision conflicts with *Strickland*, because the death sentence requires a unanimous jury and the prejudice prong requires a reasonable probability that only one juror would have reached a different sentencing decision. Discarding the entirety of a mitigation case due to some negative aspects further defies *Strickland's* requirement that courts consider and reweigh the entirety of the evidence when determining prejudice.

9. Bennett's petition will thus satisfy the Court's criteria for certiorari because it will present two important questions of federal constitutional law in the context of capital sentencing.

10. Counsel respectfully requests additional time to file the petition for certiorari because counsel have numerous other substantial competing commitments in their other capital cases including:

- Pending motion by the State of Mississippi to set an execution date, and a pending successive state post-conviction petition in *Willie Jerome Manning v. State of Mississippi*, 95-DP-00066-SCT and 2023-DR-01076-SCT.
- Pending motion by the State of Mississippi to set an execution date, and a pending successive state post-conviction petition in *Robert Simon, Jr. v. State of Mississippi*, 91-DP-00353-SCT and 2016-DR-00092-SCT.
- Ongoing briefing in a successive state post-conviction petition following a *Rhines* stay in *Lisa Jo Chamberlin v. State of Mississippi*, 2022-DR-00546-SCT.
- Ongoing briefing and pending motions in an initial state post-conviction petition in *Tony Terrell Clark v. State of Mississippi*, 2022-DR-00829-SCT.
- Ongoing briefing in an appeal from denial of an initial state post-conviction petition in *Caleb Corrothers v. State of Mississippi*, 2023-CA-00401-SCT.
- Investigation and preparation of an initial state post-conviction petition in *Willie Cory Godbolt v. State of Mississippi*, 2020-DP-00440-SCT.
- Extensive travel, investigation, and preparation of successive state post-conviction petitions and related motions in other active capital cases.

For these reasons, Devin Allen Bennett respectfully requests that the time to file his petition for a writ of certiorari be extended for 60 days, up to and including Monday, September 16, 2024.

Respectfully submitted,

Handwritten signature of Krissy C. Mobile in blue ink.

KRISSY C. MOBILE  
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*Counsel for Applicant Devin Bennett*

June 17, 2024

CERTIFICATE OF SERVICE

I certify that I have served copies of this *Motion* via U.S. mail, postage pre-paid, to all parties of record using the below address:

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This the 17<sup>th</sup> day of June 2024.

  
COUNSEL FOR APPELLANT