No. A._____

In the Supreme Court of the United States

CARL WELLBORN,

***Applicant*,**

v.

MARY BURGHUIS, Warden,

***Respondent*.**

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicant Carl Wellborn respectfully requests a 60-day extension of time, to and including January 13, 2019, within which to file a petition for a writ of certiorari in this case.

The Sixth Circuit Court of Appeals issued its order denying Mr. Wellborn's motion for panel rehearing on August 16, 2018. Unless extended, the time to file a petition for a writ of certiorari will expire on November 14, 2018. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). The order denying the petition for panel rehearing is not published, but it is attached to this motion. The one-judge order denying Mr. Wellborn's request for a certificate of appealability is available in the Westlaw database at 2018 WL 4372196. A copy of the order is also attached.

1. This case involves the systematic exclusion of black and Latino citizens from the jury pool in Kent County, Michigan, and the reliability of cross-racial identification. In 2001, the system of sending jury summonses to citizens of Kent County systemically excluded black and Latino citizens. In November 2001, during the period of systematic exclusion, a Kent County jury convicted Mr. Wellborn of three counts of criminal sexual conduct. A jury in Montcalm County had previously acquitted Mr. Wellborn of one of the same offenses involving one of the same victims.

The Sixth Circuit has already held that the system of juror selection in Kent County violated the Sixth Amendment's guarantee of an impartial jury drawn from a fair cross-section of the community. See *Garcia-Dorantes* v. *Warren*, 801 F.3d 584, 600–04 (6th Cir. 2015). Mr. Wellborn did not object to the composition of his venire

or argue on direct appeal that his venire violated the Sixth Amendment's guarantee of an impartial jury drawn from a fair cross-section of the community. See *Duren* v. *Missouri*, 439 U.S. 357 (1979). When Mr. Wellborn raised the claim in a post-conviction motion for relief from the judgment, Michigan courts did not adjudicate the claim because it had been procedurally defaulted.

The Sixth Circuit Court of Appeals found that Mr. Wellborn and other similarly situated petitioners had shown cause to excuse the procedural default. Despite the structural nature of the fair cross-section claim, the Sixth Circuit held that the petitioners had to show "actual prejudice" to obtain federal review of the claim. *See Ambrose* v. *Booker (Ambrose I)*, 684 F.3d 638, 649–52 (6th Cir. 2012). The court adopted the standard of prejudice used to assess claims of ineffective assistance that this Court outlined in *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984). *Ambrose* v. *Booker (Ambrose II)*, 801 F.3d 567, 578–79 (6th Cir. 2015).

On remand, Mr. Wellborn argued that he could show a reasonable probability that a properly constituted jury would have reached a different verdict. The magistrate judge recommended rejecting that contention and denying a certificate of appealability ("COA"). The district court rejected Mr. Wellborn's objections and adopted the magistrate judge's recommendation. After this Court granted certiorari in *Weaver* v. *Massachusetts*, 137 S. Ct. 1899 (2017), Mr. Wellborn moved to amend the judgment to grant the certificate of appealability. After this Court decided *Weaver*, the district court denied the motion. Mr. Wellborn appealed to the Sixth Circuit Court of Appeals, requesting a COA to address the question of actual

prejudice and whether a fair cross-section violation always renders a trial fundamentally unfair, and therefore warrants a presumption of prejudice. See *Weaver*, 137 S. Ct. at 1911. One judge denied Mr. Wellborn's request. Mr. Wellborn petitioned for panel rehearing, and a three-judge panel denied his petition. Believing reasonable jurists could debate this question, Judge Donald dissented.

The questions that are likely to be presented in the petition are (1) whether the Sixth Circuit erred by denying Mr. Wellborn's application for a certificate of appealability; and (2) whether a habeas petitioner asserting a meritorious procedurally defaulted fair cross-section claim must show "actual prejudice," *i.e.*, that there is a reasonable probability a properly constituted jury would reach a different result.

2. Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. Undersigned counsel have been working diligently to prepare a petition for certiorari, but significant professional and personal obligations have interfered with the ability to develop a strategy and to draft the petition. For example, Ms. Fitzharris has been preparing a brief in support of a petition for habeas corpus in *McGowan v. Christiansen*, No. 2:09-cv-14539. She must also file reply briefs in support of motions to suppress evidence and statements in *United States v. Evans*, No. 18-cr-20421. In addition, Ms. Fitzharris has been preparing for a jury trial that was scheduled to begin on October 23, 2018, in *United States v. Creech*, No. 17-cr-20544.

For the foregoing reasons, the application for a 60-day extension of time, to and including January 13, 2019, within which to file a petition for a writ of certiorari should be granted.

November 5, 2018

Respectfully submitted,

s/Colleen P. Fitzharris

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