

No.

In the Supreme Court of the United States

MARK DAVID BAILEY,

Applicant,

v.

BLAINE C. LaFLER,

Respondent.

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

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Applicant Mark David Bailey, by undersigned counsel and pursuant to 28 U.S.C. § 2010(c) and Supreme Court Rule 13.5, respectfully requests a sixty-day extension of time, to and including August 21, 2018, within which to file a petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this matter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The United States Court of Appeals for the Sixth Circuit reversed the district court's grant of habeas corpus to Mr. Bailey, in an unpublished opinion on January 19, 2018. *Bailey v. Lafler*, 722 F. App'x 425 (6th Cir. 2018). Mr. Bailey's timely petition for rehearing or rehearing *en banc* was denied by Order filed on March 26, 2018. Unless the time for filing the petition a writ of certiorari is extended, the time for filing the petition will expire on June 22, 2018.

This habeas corpus case arises out of Mark Bailey's conviction for a cold-case murder. In 1989, 79-year-old Mary Pine was murdered in a rural town in West Michigan. Early on, investigators connected the case to another murder of an elderly woman that had occurred in the same town nine years earlier. In a report, state police noted several similarities between the murders and suggested that the same person committed both. *Id.*

Due to the similarity in the murders, the investigators enlisted the Federal Bureau of Investigation's help. The FBI's National Center for the Analysis of Violent Crimes produced a detailed report, analyzing the two murders. Noting the many similarities—including the fact that an electrical cord was wrapped around each victim's neck and face for no apparent purpose—the FBI concluded that the same person was “most likely responsible for both crimes.”

Although Mr. Bailey was around 10 years old at the time of the first murder, the State investigated him for both murders. It conducted a fingerprint analysis comparing his fingerprints to those found at the scene of the earlier murder. This fingerprint analysis excluded Mr. Bailey as a suspect for the first murder.

16 years later, the State charged Mr. Bailey with the murder of Mary Pine, the second murder. In limine, the trial court excluded all evidence of the earlier murder, failing to provide any reasoning or legal explanation for this decision. Mr. Bailey was ultimately convicted of the murder and sentenced to life in prison. The State never disclosed the fingerprint analysis that excluded Bailey as a suspect from the first murder.

Mr. Bailey appealed to the Michigan Court of Appeals. *People v. Bailey*, No. 265803, 2007 WL 2141362 (Mich. Ct. App. July 26, 2007). Mr. Bailey argued that the trial court violated his right to present a defense when it excluded all references to the earlier murder. Specifically, he argued that the similarities between the murders demonstrated that the same person was responsible for both crimes—and that person could not be Mr. Bailey, as he was 10 years old at the time of the first murder.

Despite the fact that the State—unbeknownst to the defense—had fingerprint analysis excluding Mr. Bailey from the first murder, the State chose to argue that Mr. Bailey could have been responsible for both murders. The court of appeals rejected Mr. Bailey's argument, and the Michigan Supreme Court denied his petition for review.

After exhausting his state remedies, Mr. Bailey filed a habeas corpus petition in the United States District Court for the Western District of Michigan. Among other claims, Mr. Bailey argued that the trial court violated his right to present a defense by excluding evidence of third-party guilt. During this proceeding, Mr. Bailey first received the State's 1989 fingerprint analysis that excluded him as a suspect in

the first murder. Based on this withheld evidence, Mr. Bailey amended his petition to add a claim under *Brady v. Maryland*, 373 U.S. 83 (1963).

The district court granted Mr. Bailey's habeas petition, vacating his conviction. The district court held that Mr. Bailey's third-party guilt and *Brady* claims "together reveal the ultimate constitutional error: Bailey was not allowed to introduce the probative evidence that strongly suggested a person other than Bailey was 'most likely responsible for both crimes,'" including the crime of which Mr. Bailey was convicted.

On appeal, the Sixth Circuit reversed the district court's grant of habeas corpus. The Sixth Circuit agreed that the State violated *Brady* by withholding "evidence that could have altered the Michigan courts' and jury's views of the case." *Bailey v. Lafler*, 722 F. App'x 425, 426 (6th Cir. 2018). However, the court ruled that the Michigan courts had not "unreasonably" applied *Brady*, and therefore denied Mr. Bailey's claim. The court also determined that fairminded jurists could disagree about whether Mr. Bailey's right to present a defense had been denied, thus habeas relief was not warranted on that claim.

The question that is likely to be presented in the petition is whether the Sixth Circuit is correctly applying AEDPA's "unreasonable application" standard in cases where there is a violation of defendant's constitutional rights.

This issue is one on which this Court should give direction. The question is important to every criminal whose constitutional rights have been violated by erroneous state court decisions. The federal courts are the last avenue for a

defendant to challenge flawed state court convictions, yet AEDPA's standard is being interpreted as becoming impossible to meet, even when the record shows the standard has been met. The opinion in this case demonstrates how meaningful federal review has almost become a nullity.

The Sixth Circuit incorrectly concluded that, although the state courts violated Bailey's constitutional rights, these determinations were not unreasonable. Yet, Mr. Bailey's constitutional rights were flagrantly violated in a manner on which reasonable jurists cannot disagree.

Good cause exists for an extension of time to prepare and file a petition for a writ of certiorari. During the period since the denial of rehearing in this matter undersigned counsel has had many responsibilities before the district court in which she has been heavily engaged. In particular, counsel has been, or is, working on: a case involving contested competency, a complex *Daubert* issue, a contested extradition hearing, several motions to suppress evidence, and a myriad of sentencings and pretrial hearings. Additionally, two attorneys from Office of the Federal Public Defender for the Western District of Michigan are currently on extended medical leave. As a result, undersigned counsel's responsibilities have increased as she has been assigned some of the duties that these attorneys usually preform. Counsel has been working diligently to prepare the petition for writ of certiorari in this matter, but additional time is necessary.

For the foregoing reasons, undersigned counsel respectfully requests that this application for a sixty-day extension within which to file a petition for a writ of certiorari in this matter be granted.

Respectfully submitted,

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Dated: June 20, 2018

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