

No. 18A-_____

IN THE
SUPREME COURT OF THE UNITED STATES

No. 18-

KURT ROBERT SMITH

Petitioner

v.

**COOKIE CREWS, WARDEN,
KENTUCKY STATE REFORMATORY**

Respondent

**APPLICATION TO THE HONORABLE JUSTICE ELENA KAGAN FOR A
FORTY-FIVE (45) DAY EXTENSION OF TIME TO FILE A PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

To the Honorable Justice Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit, Greetings:

Petitioner, through counsel, respectfully requests that this Court grant him a forty-five (45) day extension, to and including November 22, 2018 in which to file a Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, pursuant to Supreme Court Rules 13.5 and 30.3. The Petition for Certiorari is presently due to be filed on October 8, 2018, and this application is being filed outside of the 10-day window required by Rules 13.5 and 30.3. As noted below, good cause exists for granting the extension.

Background: Petitioner, Kurt Smith, is a Kentucky prisoner who filed a

petition for habeas corpus under 28 U.S.C. § 2254, challenging his conviction and life sentence for wanton murder based on the death of his son. The district court denied the habeas petition, finding the state court had not unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1994) when it found that counsel's performance was constitutionally adequate. The Sixth Circuit Court of Appeals granted a Certificate of Appealability on two ineffective assistance of counsel claims: 1) counsel's failure to investigate a mental health defense; and 2) counsel's failure to investigate mitigating evidence.

On May 23, 2018, the Court of Appeals issued an opinion, noting its "reservations about the adequacy of Smith's representation at his criminal trial" but affirming under the "deferential standards of the Antiterrorism and Effective Death Penalty Act." *Kurt Smith v. Cookie Crews*, No. 14-5994, Dkt. 34-2, p. 2 (May 23, 2018). The Court expressed concern with trial counsel's decision to forego consulting with a mental health expert and proceed to trial with "no defense" based on her misunderstanding of the law. *Id.* at 12. The Court concluded that "counsel's purported strategic decisions on expert consultation were based on insufficient investigation because she failed to consult with a mental health expert before choosing among her options." *Id.* The Court, however, denied Petitioner relief due to the deference it believed it was required to give to the state court's decision. *Id.* Further, the Court held that, though "a close question, based on governing precedent, counsel's investigation into mitigation facts was not deficient." *Id.* at 15.

Thereafter, Petitioner filed a timely Petition for Rehearing and request for Rehearing *En Banc*. On July 10, 2018, the Sixth Circuit Court of Appeals denied that

petition.

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

Issues to be Presented: This case presents the following issue:

Whether trial counsel's strategic decisions are entitled to deference under *Strickland v. Washington* when the decision was based on a mistaken understanding of the controlling law.

Request for Extension: The undersigned certifies that he is not seeking this extension for hindrance or delay, but to ensure that the issues are properly presented to the Court. Undersigned counsel Timothy Arnold is the Post-Trial Division Director at the Kentucky Department of Public Advocacy (DPA), Kentucky's statewide public defender agency. In this capacity, he is responsible for supervising nearly 60 employees, who provide representation for more than 2000 post-trial clients, including nearly all of Kentucky's 33 death row inmates. Since the denial of rehearing in this case, Arnold has had substantial additional duties due to the resignations of a manager and unit leader. In addition, Arnold has filed multiple major pleadings, including an original habeas corpus, two original state post-conviction actions, a motion for summary judgment in a substantial civil action, two replies to motion for summary judgment in other civil actions, and a reply brief in the Kentucky Supreme Court.

Undersigned counsel Staples is an attorney with Loevy & Loevy, a civil rights firm in Chicago, Illinois and with The Exoneration Project, a legal clinic at the University of Chicago Law School dedicated to the representation of the wrongfully convicted. She currently represents approximately twenty clients whose cases are in various stages of litigation. Since the opinion was issued, Staples has conducted or

participated in over twenty depositions for a case in the United States District Court, Eastern District of Kentucky, involving over 40,000 pages of discovery. In addition to drafting and filing various motions within the state and federal courts, Staples has drafted and filed an extensive state court pleading in Jefferson Circuit Court and has drafted a complaint for a case in the Western District of Kentucky. She has also made various court appearances and conducted numerous witness and client interviews.

The undersigned believes that a forty-five (45) day extension of time is the minimum needed to ensure that the issues are properly framed and presented for this Court's review. Accordingly, for the reasons expressed above, Petitioner respectfully requests that this Court grant him a forty-five (45) day extension, to and including November 22, 2018 in which to file the Petition for Certiorari.

Respectfully submitted,

/s/Timothy G. Arnold
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