

CAPITAL CASE  
No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2022

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LARRY GAPEN,

Petitioner,

v.

STATE OF OHIO,

Respondent.

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UNOPPOSED APPLICATION TO EXTEND THE TIME TO FILE  
A PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT,  
MONTGOMERY COUNTY, OHIO

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**Deborah L. Williams,**  
Federal Public Defender  
by:

**Allen L. Bohnert (OH 0081544)**  
**(Supreme Court Bar No. 280600)**  
*\*Counsel of Record*  
Assistant Federal Public Defender  
**Adam M. Rusnak (OH 0086893)**  
Assistant Federal Public Defender  
Office of the Federal Public Defender  
for the Southern District of Ohio  
Capital Habeas Unit  
10 W. Broad Street, Suite 1020  
Columbus, Ohio 43215  
(614) 469-4116  
(614) 469-2999 (Fax)  
[allen\\_bohnert@fd.org](mailto:allen_bohnert@fd.org)  
[adam\\_rusnak@fd.org](mailto:adam_rusnak@fd.org)  
Counsel for Petitioner Larry Gapen

To the Honorable Brett Kavanaugh, Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

1. For the specific reasons set forth below, Petitioner Larry Gapen respectfully requests, under Supreme Court Rules 13.5, 22, and 30.3, a sixty-day extension of time to file his petition for a writ of certiorari regarding the denial, by the Court of Appeals for the Second District, Montgomery County, Ohio, of his request for leave to file a delayed motion for new trial after discovery of new evidence of egregious constitutional error that infected his capital trial and death sentence. Those newly discovered errors include matters such as seating of biased jurors, juror misconduct, court misconduct, inflammatory, excluded evidence nevertheless submitted for the jury's consideration in deliberations, and at least one juror's belief in, and application of, *lex talionis*, an extra-judicial source of law under which the death penalty was mandatory.

2. An Ohio jury convicted Larry Gapen of aggravated murder and recommended a death sentence as punishment. The trial court accepted that recommendation and the state courts affirmed Mr. Gapen's conviction and death sentence on direct appeal. The Ohio courts also denied Mr. Gapen's request for post-conviction relief.

3. Mr. Gapen filed an application for a writ of habeas corpus in the U.S. District Court for the Southern District of Ohio (Case No. 3:08-cv-00280), where he was represented by counsel from the Office of the Federal Public Defender for the Southern District of Ohio's Capital Habeas Unit. In the course of investigating the case, counsel uncovered information revealing that Mr. Gapen's trial was infected

with a broad range of constitutional error. The federal district court stayed Mr. Gapen's habeas corpus case for Mr. Gapen to return to state court with his newly uncovered claims. The state trial court eventually denied Mr. Gapen's motion for leave to file a delayed motion for new trial, further violating Mr. Gapen's federal constitutional rights in the process. Mr. Gapen appealed to the Ohio Second District Court of Appeals, but that court denied his appeal in an opinion issued on September 17, 2021. A copy of the Second District's opinion is attached. Mr. Gapen's timely appeal of that opinion to the Supreme Court of Ohio was a discretionary appeal seeking that court's acceptance of jurisdiction, not an appeal of right.

4. On February 15, 2022, the Supreme Court of Ohio issued an order granting jurisdiction and accepting Mr. Gapen's appeal in part. In the same order, the court *sua sponte* ordered the case held, pending a decision in *State of Ohio v. Bethel*, No. 2020-0648, which was already pending before the court. A copy of that order is also attached.

5. The Supreme Court of Ohio subsequently issued its decision in *Bethel*, with a holding that would support Mr. Gapen's case in part. Nevertheless, on April 26, 2022, the Supreme Court of Ohio issued an order dismissing Mr. Gapen's appeal as having been improvidently accepted. A copy of that order is attached as well.

6. Mr. Gapen seeks for this Court to review the Second District's September 17, 2021, opinion, following the Supreme Court of Ohio's April 26, 2022, decision to dismiss Mr. Gapen's appeal as improvidently accepted. Jurisdiction in this Court is

appropriate under 28 U.S.C. § 1254(1). Under this Court’s Rules, Mr. Gapen’s deadline to file a petition for writ of certiorari following the Supreme Court of Ohio’s dismissal of his appeal is July 25, 2022.

7. Mr. Gapen now seeks an extension of that deadline for an additional sixty (60) days. Good cause exists to justify Mr. Gapen’s requested extension. His counsel require additional time to draft a petition for a writ of certiorari due to their obligations to other capital clients in various stages of state and federal litigation, as well as personal reasons. In particular, counsel are reviewing all of their Ohio clients’ cases in light of the Supreme Court of Ohio’s recent holdings in *State v. Bethel*, 2022-Ohio-783 (Mar. 22, 2022), that is it not “within the trial court’s discretion to deny . . . a motion for leave” to file a new-trial motion under Ohio Rule of Criminal Procedure 33 based on a defendant’s failure to file the motion within a reasonable time after discovering new evidence, and that a defendant seeking to assert a claim under *Brady v. Maryland* in an untimely or successive petition for post-conviction relief “is not required to show that he could not have discovered suppressed evidence by exercising reasonable diligence.” In addition, lead counsel has a Reply Brief due in *State of Ohio v. Walter Raglin*, Case No. B-9600135 (Hamilton County, Ohio), in support of a motion for leave to file a delayed motion for new trial, while co-counsel has a Traverse/Reply due in *Lehr v. Shinn*, Case No. cv-19-01127 (D. Ariz.), a case in which the State’s Return of Writ/Answer was more than 500 pages long. Finally, both counsel have personal matters that require an extension: attorney Bohnert’s 7-year-old daughter is scheduled for surgery on June

16, 2022, which will require him to be out on leave for a period of time; Bohnert also faces a medical procedure of his own on July 14, 2022, which will require a preparation and recovery period; and attorney Rusnak is in the final stages of planning for his upcoming wedding which also entails a preparation and recovery period of its own.

8. Petitioner Gapen's counsel thus respectfully request an extension of time to adequately prepare his petition for a writ of certiorari.

9. Counsel for Respondent State of Ohio, Assistant County Prosecutor Andrew T. French, of the Office of the Montgomery County Prosecutor, has stated that he does not and will not oppose this 60-day extension.

Therefore, Petitioner Larry Gapen respectfully requests that an order be entered extending his time to file a petition for a writ of certiorari for sixty days, from July 25, 2022, until September 23, 2022.

Respectfully submitted this 1st day of June, 2022,

**Deborah L. Williams**  
Federal Public Defender,  
by:

*/s/ Allen L. Bohnert*  
**Allen L. Bohnert (OH 0081544)**  
**(Supreme Court Bar No. 280600)**  
*\*Counsel of Record*  
Assistant Federal Public Defender  
*/s/ Adam M. Rusnak*  
**Adam M. Rusnak (OH 0086893)**  
*Co-Counsel*  
Assistant Federal Public Defender  
Office of the Federal Public Defender  
for the Southern District of Ohio  
Capital Habeas Unit  
10 W. Broad Street, Suite 1020  
Columbus, Ohio 43215  
(614) 469-4116  
(614) 469-2999 (Fax)  
allen\_bohnert@fd.org  
adam\_rusnak@fd.org  
Counsel for Petitioner Larry Gapen