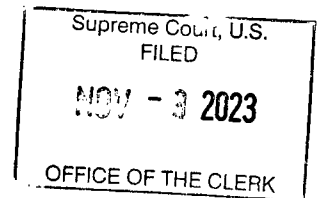


23-6014 **ORIGINAL**

In The  
**Supreme Court of the United States**



**Curtis Conway Bailey,**

*Petitioner,*

**v.**

**Bryan Morrison, Warden,**

*Respondent.*

**On Petition For Writ Of Certiorari  
To The Sixth Circuit Court Of Appeals**

**PETITION FOR WRIT OF CERTIORARI**

Curtis C. Bailey

*in propria persona*

Michigan Department of Corrections

Prisoner ID No. 868268

Lakeland Correctional Facility

141 First Street

Coldwater, Michigan 49036

## QUESTIONS PRESENTED

1. Whether a trial court can find the fact of a defendant's age as an element of the offense of first-degree criminal sexual conduct under Michigan law if the defendant's age is considered by the court to be an immutable fact not in dispute, and merely applied by the court to impose a mandatory minimum sentence of 25 years?
  - A. Under Michigan law, a court can take judicial notice of a party's age.
  - B. Because Bailey presents no challenge to the accuracy of his age calculation, the trial court's failure to instruct the jury on this question did not have a substantial and injurious effect in determining the outcome of this proceeding.
2. Whether Michigan's procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant would have a meaningful opportunity to raise an ineffective assistance of trial counsel (IATC) claim on direct appeal?
  - A. Under Michigan law, a defendant who wishes to advance a claim of IATC that depends on matters not of record can properly be required to seek at the trial court level an evidentiary hearing for the purpose of establishing his claim with evidence as a precondition to invoking the process of appellate courts.
  - B. Michigan's procedural framework makes it highly unlikely that a defendant will be able to raise an IATC claim on direct appeal.
  - C. Waiting to raise a claim of IATC until Michigan's postappeal proceedings adds an additional burden.
  - D. Waiting to raise a claim of IATC until Michigan's postappeal proceedings has serious practical problems.
  - E. Michigan's procedural framework to raise an ineffective assistance of trial counsel (IATC) claim on direct appeal is identical in operation as the procedure that existed in Texas.

## **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

## **RELATED CASES**

There are no cases directly related to this case in this Court.

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Whether a trial court can find the fact of a defendant's age as an element of the offense of first-degree criminal sexual conduct under Michigan law if the defendant's age is considered by the court to be an immutable fact not in dispute, and merely applied by the court to impose a mandatory minimum sentence of 25 years?

- Under Michigan law, a court can take judicial notice of a party's age.
- Because Bailey presents no challenge to the accuracy of his age calculation, the trial court's failure to instruct the jury on this question did not have a substantial and injurious effect in determining the outcome of this proceeding.

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Whether Michigan's procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant would have a meaningful opportunity to raise an ineffective assistance of trial counsel (IATC) claim on direct appeal?

- Under Michigan law, a defendant who wishes to advance a claim of IATC that depends on matters not of record can properly be required to seek at the trial court level an evidentiary hearing for the purpose of establishing his claim with evidence as a precondition to invoking the process of appellate courts.
- Michigan's procedural framework makes it highly unlikely that a defendant will be able to raise an IATC claim on direct appeal.
- Waiting to raise a claim of IATC until Michigan's postappeal proceedings adds an additional burden.
- Waiting to raise a claim of IATC until Michigan's postappeal proceedings has serious practical problems.
- Michigan's procedural framework to raise an ineffective assistance of trial counsel (IATC) claim on direct appeal is identical in operation as the procedure that existed in Texas.

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**IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

## JURISDICTION

The United States District Court for the Eastern District of Michigan had jurisdiction<sup>1</sup> under 28 U.S.C. § 2254 and entered judgment on February 10, 2023. [Appendix B]

The United States Court of Appeals for the Sixth Circuit had jurisdiction<sup>2</sup> under Rule 22(b)(1) of the Federal Rules of Appellate Procedure and entered judgment on August 11, 2023. [Appendix A]. No petition for rehearing was filed in this case.

A timely petition for certiorari was filed on or before November 9, 2023. This Court has jurisdiction<sup>3</sup> under 28 U.S.C. § 1254(1).

- 
1. Curtis Conway Bailey is “a person in custody under a state-court judgment who seeks determination that the custody violates the Constitution of the United States.” Rule 1(a)(1) of the Rules Governing Section 2254 Cases in the United States District Courts.
  2. “In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. 2253(c).” Fed. R. App. P. 22(b)(1)
  3. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.” 28 U.S.C. § 1254(1)

## CONSTITUTIONAL PROVISIONS INVOLVED

### **U.S. Const., Amend. VI:**

#### Rights of the accused.

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”

### **U.S. Const., Amend. XIV, § 1:**

#### Citizens of the United States:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

## STATEMENT OF THE CASE

### Introduction

The Genesee County Prosecutor first brought charges of first-degree criminal sexual conduct against Bailey on the theory that, as a 20-year old,<sup>4</sup> he had sexually assaulted the 10-year old stepdaughter of his brother when she visited her paternal grandmother. Bailey lived with his mother at this residence during the alleged assaults. After being accused in July of 2010, Bailey—with the help of his family—retained former Genesee County Prosecutor Arthur Bush to defend him. When 12 months passed with no charges being brought, the contract with Mr. Bush expired.<sup>5</sup>

Charges were brought, however, 16 months after being accused, and Bailey was arrested on those charges during a traffic stop on November 3, 2011. Because Bailey's family had spent their financial reserve when they retained Attorney Bush, Bailey was compelled to seek court-appointed counsel. On November 9, 2011, Attorney Stephen Lazzio<sup>6</sup> was appointed by the court.

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4. Bailey's date of birth is July 23, 1990, making him 20 years old in July of 2010.

5. Mr. Bush informed Bailey's family that he did not believe the Prosecutor had sufficient evidence to bring charges, so a 12-month expiration date was included in the \$3,500 contract he made with Bailey's family. It must be noted that Bailey's mother sought to have Mr. Bush refund some of the fee in light of no charges being filed, but Mr. Bush refused.

6. Stephen M. Lazzio (P 30468) practiced law out of his Flint, Michigan office, and was under contract with the Genesee County Court to provide legal representation to indigent defendants. Mr. Lazzio passed away on January 17, 2016. See Appendix E.

Attached to this petition is a copy of Bailey's 20-page sworn affidavit.<sup>7</sup> In this affidavit, Bailey declares his actual innocence.<sup>8</sup> Bailey contends that the complainant in this case, Alexandria Conley,<sup>9</sup> made false accusations of sexual assault against him while hiding an ulterior motive to create a barrier to her being made by her parents to visit her paternal grandmother on a rotating basis.

Sexual assault accusations against Bailey would thereafter prevent her from visiting her paternal grandmother and restrict her to visits with her maternal grandmother, who always spent money on her in the form of gifts; something Bailey's mother was financially unable to do.

"Our federal habeas cases have treated claims of 'actual innocence,' not as an independent constitutional claim, but as a basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits..."<sup>10</sup> Because Bailey's claim of actual innocence is linked to his claim of ineffective assistance of counsel, Bailey respectfully moves this Honorable Court to consider his claim of ineffective assistance of trial counsel Stephen Lazzio on the merits.

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7. Appendix F: Affidavit of Curtis Conway Bailey

8. Appendix F: Affidavit of Curtis Conway Bailey, Items #4 and #5, p 2 of 20

9. At the time of the alleged sexual assaults in 2009-2010, Alexandria Conley was 10 years old. She is now over 18 and no longer a minor. Her full name is used here instead of her initials.

10. *Herrera v Collins*, 506 U.S. 390, 416; 113 S. Ct. 853; 122 L. Ed. 2d 203 (1993)

## Factual Background

**Eight days** after last staying at her paternal grandmother's house, Conley put the first of two handwritten notes in the locked message box provided by her sex education teacher at Randel Elementary School on Monday, May 17, 2010. This message box was provided by teacher Lorrice Miles so her students could privately ask sensitive or embarrassing questions. That day Ms. Miles checked the box, found the note, and asked Conley to stay after class. The note said:

My uncle touches me when I am asleep, I wake up in the middle of the night but keep my eyes closed, acting asleep. I am scared of him hurting me. I don't tell my parents cause, I am scared of my Uncle."<sup>11</sup>

Ms. Miles then interviewed Conley before contacting the Department of Human Services (DHS). Ms. Miles "said she also asked Conley if her uncle had put anything inside of her," to which "Conley responded he hadn't."<sup>12</sup> After being contacted, DHS caseworker Amber Ragland came to the school, and conducted a second interview with Conley. During this interview, Conley "reports that he [Bailey] has not put anything inside her."<sup>13</sup>

Twelve days after last staying at her paternal grandmother's house, and four days after she put the first note in the locked message box, Conley put a second note into the message box. This note said:

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11. Children's Protective Services Investigation Report, Allegations; Comments, p 1

12. Flint Township Police Department Case Report; Detective James Santa (Case No. 2010-15238), p 1

13. Children's Protective Services Investigation Report, Allegations; Comments, p 1

“I have to stay at Uncle Curtis’s [Bailey’s] house for a week starting May 25th.”<sup>14</sup>

When questioned by Detective Santa on May 27, 2010, Ms. Miles said that “she spoke with Conley who told her she was staying with her uncle and grandmother because her parents didn’t know what had been happening.”<sup>15</sup> This was the second time Conley had been interviewed by Ms. Miles—one for each note—and the third time she was interviewed so far.

**30 days** after last staying at her paternal grandmother’s house and 22 days after she delivered the first note, a formal forensic interview was conducted with Conley on June 8, 2010 at the Weiss Advocacy Center by employee Gail Hartwell. The interview was both audio and video recorded, and observed by Detective Santa and DHS caseworker Ragland. This will be the fourth time Conley was interviewed about the alleged sexual assaults, and the first of two forensic interviews that were recorded.

On that same day, Conley was given her first physical examination by her pediatrician Dr. Rajalakshmi Sankaran “at Sankaran’s office.”<sup>16</sup> Dr. Sankaran published a report of the physical examination where she found that “Conley’s vulva was open as was the vaginal opening.”<sup>17</sup>

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14. Flint Township Police Department Case Report; Detective James Santa (Case No. 2010-15238), Property Receipt (Note attached to Case Report) (alteration added)

15. *Id.* at p 2

16. *Id.* at p 4

17. *Id.*



At the conclusion of the physical examination, Dr. Sankaran “referred Conley to Hurley Hospital for a CSC kit.”<sup>18</sup> The CSC kit was taken on June 8, 2010 at Hurley Hospital during a second physical examination performed by Hurley Hospital Sexual Assault Nurse Examiner (SANE) Sheri Clair as the “attending medical forensic examiner.”<sup>19</sup> During the “History of Assault” part of the exam, Conley was asked to state the date of the assault, to which she said: “Approx 1 month ago.”<sup>20</sup>

Of crucial importance is Sheri Clair’s finding—30 days after the last time that Conley was in the same house as Bailey—that Conley’s labia majora to be “red and tender to the touch” and that her hymen was “missing.”<sup>21</sup>

**51 days** after last staying at her paternal grandmother’s house, Conley is given a third physical examination<sup>22</sup> at McLaren Regional Medical Center which was performed by Dr. Edwin Gullekson. During this examination, Dr. Gullekson found Conley’s:

“hymen with lateral traction showed a clear area of injury, which was approximately at 11 o’clock. The laceration would have been about 6 to 7 mm at length and appeared to go

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18. *Id.*

19. Michigan Medical Forensic Examination Record, p 2 of 8

20. *Id.* (This statement agrees with what Conley’s mother told DHS caseworker Amber Ragland that it was Mother’s Day weekend—Sunday, May 9, 2010—the last time Conley stayed at her paternal grandmother’s house.)

21. *Id.*

22. On Bailey’s direct appeal, the Michigan Court of Appeals incorrectly found that the complainant “underwent two physical examinations at Hurley Medical Center and McLaren Regional Hospital,” omitting the physical examination that was performed by her pediatrician. See Appendix C: *People v Bailey*, unpublished opinion per curiam of the Court of Appeals, issued October 21, 2014 (Docket No. 315992); 2014 Mich. App. LEXIS 1948, at \*2

down 3 to 4 mm. It was more hyperemic in the cut or lacerated area. The rest of the hymen appeared normal.<sup>23</sup>

Bailey contends that the physical injury findings of Dr. Gullekson made 51 days after Conley last stayed at her paternal grandmother's house are compelling evidence that the injuries were self-inflicted prior to the scheduled physical examination.

Bailey was arrested on November 3, 2011. Each of the events described above were part of the record available to defense counsel Stephen Lazzio after his appointment on November 9, 2011. It is important to note that it was nearly 15 months before Bailey's trial began on February 7, 2013, giving Attorney Lazzio plenty of time to investigate Bailey's case.

### **Forensic Interviews**

Six months before trial started, the Prosecutor ordered yet another forensic interview of Conley on July 30, 2012. This second forensic interview was also conducted by employee Gail Hartwell at the Weiss Advocacy Center. This interview generated additional charges of criminal sexual conduct in the second-degree (touching). Notably, as the DVD of the June 8, 2010 forensic interview of Conley by Gayle Hartwell was being played for the jury on the third day of trial, the player was stopped for reasons not apparent in the record. Shortly after being stopped, the DVD player was restarted and the recording continued.

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23. McLaren Regional Medical Center, Medical Record of Alexandria Conley, June 29, 2010, p 1 of 1

Bailey notes for this Court that the trial transcripts show the June 8, 2010 recording was started at 10:05 am and ended at 10:36 am.<sup>24</sup> During this time period, the recording was stopped for a brief 5 minute intermission. Bailey contends that, during the intermission, the DVD for the June 8, 2010 recorded interview was removed and replaced with the DVD of the July 30, 2012 to make it appear to the jury that only one interview was conducted which yielded allegations of both penetration and touching.

In their answer in opposition to Bailey's application for leave to appeal in the Michigan Supreme Court on his claim that Attorney Lazzio performed deficiently when he failed to object to the admission of the forensic interview recording—an issue that was raised in Bailey's postappeal motion for relief from judgment—the Genesee County Prosecutor stated:

“There is no indication in the record that counsel was surprised or otherwise prejudiced by the fact that he had not watched the video recording until the second day of trial, prior to opening statements.

...

Even if the evidence would have been inadmissible if objected to, Defendant has failed to show that counsel provided ineffective assistance by allowing admission of the video recording.”<sup>25</sup>

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24. *People v Bailey*, Jury Trial held February 8, 2013 in the 7th Judicial Circuit for Genesee County (Case No. 2011-30007-FC), Transcript pp 12-13

25. *People v Curtis Conway Bailey*, Plaintiff-Appellee's Answer in Opposition to Defendant-Appellant's Application for Leave to Appeal, filed in the Michigan Supreme Court on January 4, 2018 (Docket No. 156928), pp 25 and 26

### **Expert Witnesses**

The Genesee County Prosecutor called four expert witnesses during Bailey's trial. On day two of the trial, the Prosecutor called DHS caseworker Amber Ragland to testify in regards to the second interview with Conley.<sup>26</sup> Ms. Ragland testified, without objection by Attorney Lazzio, about things that Conley told her during an investigative interview. This testimony included statements from Conley that the person who committed the unlawful touching was her uncle Curtis Bailey and that Conley had informed her that her Uncle had not put anything inside her.<sup>27</sup>

On day three of the trial, the Prosecutor called Gayle Hartwell to testify about the formal forensic interview that was conducted and recorded with Conley on June 8, 2010 at the Weiss Advocacy Center. Ms. Hartwell testified that she conducted a forensic (investigative) interview of Conley and testified, without objection, that Conley had disclosed to her that her Uncle had touched her vaginal area with his fingers.<sup>28</sup> The Prosecutor then stated they would play a recording of the interview, and Attorney Lazzio stated that he had no objections. The recording was played.<sup>29</sup>

The third expert called by the Prosecutor was Dr. Edwin Gullekson, who conducted the third physical examination of Conley at McLaren Regional

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26. *People v Bailey*, Jury Trial held February 7, 2013 in the 7th Judicial Circuit for Genesee County (Case No. 2011-030007-FC), Jury Trial Transcripts (JTT), Vol. 2, p 94

27. *Id.*, at pp 98-107

28. *Id.*, Vol. 3, at pp 10-11

29. *Id.*, pp 12-13

Medical Center.<sup>30</sup> Attorney Lazzio voiced no objection. Following Dr. Gullekson's testimony, the Prosecutor called SANE Sheri Clair, who testified, without objection by Attorney Lazzio, about the first physical examination that was performed on Conley by her pediatrician Dr. Sankaran. SANE Clair, despite having no pediatric training at the time, testified that Dr. Sankaran's findings "were consistent with some type of penetration."<sup>31</sup>

### **State Appellate Court Proceedings**

On direct review, and with the assistance of retained appellate counsel Neil Szabo (P 33792), Bailey filed an appeal in the Michigan Court of Appeals and raised five claims of error:

- (1) the evidence was insufficient to prove penetration;
- (2) confrontation right was violated when the pediatrician's report was admitted, but she did not testify; and
- (3) **trial counsel was ineffective for failing to object to the admission of the pediatrician's report;**
- (4) complainant's prior consistent statements were admitted;
- (5) prosecutorial misconduct during rebuttal arguments.

The Michigan Court of Appeals affirmed Bailey's convictions in an unpublished opinion.<sup>32</sup> Bailey then filed an application for leave to appeal in the Michigan Supreme Court raising the same claims as in the Michigan Court of Appeals. The Michigan Supreme Court denied his application.<sup>33</sup>

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30. *Id.*, pp 50-63

31. *Id.*, pp 80-81

32. Appendix C: *People v Bailey*, unpublished opinion per curiam of the Court of Appeals, issued October 21, 2014 (Docket No. 315992); 2014 WL 5364048; 2014 Mich. App. LEXIS 1948

33. *People v Bailey*, 866 NW2d 428 (July 28, 2015) (unpublished table decision)

## State Postappeal Proceedings

In October 2015, Bailey returned to the trial court and, with the assistance of retained counsel, filed a postappeal motion for relief from judgment raising these claims of error:

- (1) judicial fact-finding in violation of Alleyne;
- (2) inaccuracies in the presentence investigation report;
- (3) ineffective assistance of counsel;
  - (A) failure to object to improper evidence;
    - 1. medical diagram and improper conduct of prosecutor;
    - 2. medical records in violation of Confrontation Clause;
    - 3. video recording of forensic interview of complainant;
  - (B) failure to obtain expert medical testimony;
  - (C) failure to call essential witnesses;
  - (D) failure to move for a directed verdict;
  - (E) failure to discuss possible plea negotiations;
  - (F) failure to properly cross-examine witnesses.

On October 6, 2016, without ever holding a *Ginther* hearing<sup>34</sup> as requested, the trial court denied the motion for relief from judgment.<sup>35</sup> After the trial court's decision, Bailey filed a delayed, but timely, application for leave to appeal in the Michigan Court of Appeals. Bailey then sought leave to appeal in the Michigan Supreme Court. That court denied his application,<sup>36</sup>

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34. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973)

35. Appendix D: *People v Bailey*, No. 11-30007-FC (Genesee County Cir. Ct., October 6, 2016) (unpublished)

36. *People v Bailey*, 503 Mich 857; 917 NW2d 387 (September 12, 2018); 2018 Mich LEXIS 1735 (unpublished table decision)

## Federal District Court Proceedings

With the assistance of retained counsel James Sterling Lawrence (P 33664), Bailey sought habeas relief in the United States District Court for the Eastern District of Michigan. Attorney Lawrence raised six claims of error in the habeas petition he filed on September 10, 2019:

1. insufficient evidence to prove penetration;
2. right to confrontation was violated when a nurse and a records keeper presented conclusions from a report of a doctor who did not testify;
3. ineffective assistance of counsel for failing to object to the admission of the report of the doctor who did not testify;
4. prosecutorial misconduct by appealing to jury sympathy and civic duty;
5. judicial fact-finding in violation of Alleyne;
6. other instances of ineffective assistance of counsel, and cumulative effect of all errors:
  - a. failure to object to the admission of the forensic interview recording and transcripts;
  - b. failure to consult with an expert and use that expert at trial.

Bailey's case was originally assigned to United States District Court Judge Arthur J. Tarnow. On June 10, 2020, Lawrence moved to withdraw from Bailey's case after being suspended from the practice of law for 100 days.<sup>37</sup> District Judge Tarnow granted his motion and appointed the Federal Community Defender to represent Bailey. On July 23, 2020, Attorney Martin J. Beres (P 26407) accepted the appointment and filed an appearance of counsel.

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37. James Lawrence was suspended from practicing law for 100 days beginning June 11, 2020. See State of Michigan Attorney Discipline Board, Case No. 18-130-GA.

The COVID-19 pandemic, however, delayed the timely adjudication of Bailey's habeas petition. During the delay, District Judge Tarnow passed away<sup>38</sup> on January 21, 2022, and the case was reassigned to United States District Court Judge Judith E. Levy. On February 10, 2023, District Judge Levy issued a Judgment denying Bailey's petition as to all his claims, and declining to issue a certificate of appealability on any claim.<sup>39</sup>

### **Federal Circuit Court's Decision**

Thereafter, in pro se, Bailey filed in the Sixth Circuit Court of Appeals a timely Motion for Certificate of Appealability (COA) and Brief in Support moving the Court to issue a COA on each of the six issues he raised in his habeas petition. On August 11, 2023, Circuit Judge Julia Smith Gibbons issued a Judgment denying a COA because "Bailey has failed to make a substantial showing of the denial of a constitutional right."<sup>40</sup>

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38. Michigan Lawyer's Weekly, January 31, 2022, Obituaries, p 3

39. Appendix B: *Curtis Bailey v Noah Nagy*, Opinion and Order Denying Petition for Writ of Habeas Corpus, Denying Certificate of Appealability, and Granting Permission to Proceed to Appeal *In Forma Pauperis*, decided February 10, 2023 (Case No. 19-cv-12656); 2023 U.S. Dist. LEXIS 23294, at \*27-28

40. Appendix A: *Curtis Conway Bailey v Bryan Morrison, Warden*, Judgment issued August 11, 2023 (Case No. 23-1254)



## REASONS FOR GRANTING THE PETITION

### Questions Meriting Review

This petition presents two questions meriting review. The first question is whether Circuit Judge Julia S. Gibbons of the United States Court of Appeals for the Sixth Circuit decided an important federal question in a way that conflicts with this Court's holding in *Alleyne v United States*.<sup>41</sup>

Circuit Judge Gibbons sanctioned the district court's finding<sup>42</sup> that it was harmless error for the trial court to fail to instruct the jury that Michigan Compiled Laws § 750.520(2)(b) required proof beyond a reasonable doubt that Bailey was 17 years or older at the time of the offense. Circuit Judge Gibbons declined to issue a certificate of appealability on this claim despite Bailey's substantial showing that his Sixth and Fourteenth Amendment rights were violated.

The second question is whether Circuit Judge Gibbons decided an important question of federal law that has not been, but should be, settled by this Court. Circuit Judge Gibbons evaluated one of Bailey's claims of ineffective assistance of counsel under the harmless error doctrine to find that trial "counsel did not perform deficiently by failing to raise a meritless objection" to the

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41. *Alleyne v United States*, 570 U.S. 99; 133 S. Ct. 2151; 186 L. Ed. 2d 314 (June 17, 2013)

42. Appendix B: *Bailey v Nagy*, 2023 U.S. Dist. Lexis 23294, at \*26-27 (E.D. Mich.)

admission of a video of the complainant's forensic interview because the complainant testified at trial and was subject to cross-examination.

Circuit Judge Gibbons found Bailey's other claim of ineffective assistance of counsel to be "wholly speculative" where he "presents no evidence of what his conjectured expert would have testified to or [evidence] supporting that counsel did not investigate the possibility," and therefore "does not show prejudice."

Circuit Judge Gibbons declined to issue a certificate of appealability on this claim despite Bailey's substantial showing that his Sixth Amendment right was violated.

While not a recognized concern of habeas corpus, Bailey nonetheless wants this Court to know that he is factually innocent of the crimes he was charged with and prosecuted for. Despite egregious violations of due process regarding evidence and testimony, the Genesee County criminal justice system was only able to partially<sup>43</sup> persuade a jury on February 14, 2013 to find Bailey guilty of crimes he did not commit. As briefly stated above, Bailey's constitutional right to have due process of law was violated multiple times by state procedure. On the facts of this case, Bailey's conviction has been obtained by methods that offend the Due Process Clause. The judgment below must be reversed

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43. Seven charges were put to the jury: five charges of first-degree criminal sexual conduct and two charges of second-degree criminal sexual conduct. The jury returned verdicts of guilty on three charges of first-degree criminal sexual conduct, and one charge of second-degree criminal sexual conduct. Jury Verdict. See Appendix A: Exhibit I of Bailey's Motion for a Certificate of Appealability to the United States Court of Appeals for the Sixth Circuit.

## Arguments

### Argument I:

**Whether a trial court can find the fact of a defendant's age as an element of the offense of first-degree criminal sexual conduct under Michigan law if the defendant's age is considered by the court to be an immutable fact not in dispute, and merely applied by the court to impose a mandatory minimum sentence of 25 years?**

This case involves the punishment provision of Michigan's first-degree criminal sexual conduct statute under Michigan Compiled Laws § 750.520b:

(2) Criminal sexual conduct in the first degree is a felony punishable as follows:

(a) Except as provided in subdivisions (b) and (c), by imprisonment for life or for any term of years.

(b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.”<sup>44</sup>

On February 14, 2013, the jury returned verdicts finding Bailey guilty of three counts of first-degree criminal sexual conduct. The jury was not instructed to make a finding of whether Bailey was 17 years of age or older when the offenses were committed. Bailey was sentenced on April 8, 2013 and, in accordance with Michigan Compiled Laws § 750.520b(2)(b), was given a mandatory minimum sentence of 25 years' imprisonment.

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44. Mich. Comp. Laws § 750.520b(2)(a) and (b)

Two months later, this Court issued its holding in *Alleyne v United States* on June 13, 2013. Retained appellate counsel Neil Szabo, however, did not raise an *Alleyne* error in the Appellant's Brief he prepared and filed on Bailey's behalf.<sup>45</sup>

After completing direct appeal in the Michigan appellate courts, Bailey filed a postappeal motion for relief from judgment in the Genesee County Circuit Court on October 26, 2015 raising this claim of error and a request for a *Ginther* hearing:

Were Defendant's Sixth and Fourteenth Amendment rights under the federal constitution violated by judicial fact finding which increased Defendant's minimum sentences in violation of *Alleyne v United States*, 133 S. Ct. 2151 (2013)?

Michigan's 7th Circuit Court Judge Archie L. Hayman denied relief without conducting an evidentiary hearing after finding that:

"a jury does not take Defendant's age into consideration, but rather it is only used at the time of sentencing. Since this Court would have had the Pre-Sentence Report at the time of sentencing, which listed the date of birth of the Defendant, the Defendant's age would have been established at the time of sentencing."<sup>46</sup>

On postappeal review, the Michigan Court of Appeals denied leave to appeal,<sup>47</sup> as did the Michigan Supreme Court.<sup>48</sup> Bailey, through retained counsel on September 10, 2019, filed a petition for writ of habeas corpus in the United

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45. Bailey refers this Court to the second argument he presents for review, *infra*.

46. Appendix D: Opinion and Order, *People v Bailey*, Case No. 2011-030007-FC) (Genesee County Cir. Ct. October 6, 2016)

47. *People v Bailey*, No. 337816 (Mich. Ct. App. September 27, 2017)

48. *People v Bailey*, 503 Mich. 857; 917 N.W.2d 387 (Mich. September 12, 2018)

States District Court for the Eastern District of Michigan raising the following claim of error:

Petitioner's due process rights were violated by judicial factfinding of an element never presented to the jury.<sup>49</sup>

Bailey's case was originally assigned to District Judge Arthur J. Tarnow but, as described above, circumstances required both the substitution of habeas counsel as well as the reassignment of the case to District Judge Levy.

- **Under Michigan law, a court can take judicial notice of a party's age.**

When District Judge Levy adjudicated Bailey's claim of error, she found that "Defense counsel did not object to Petitioner's birthdate as listed in the PSIR," and concluded that under Michigan law, "a court can take judicial notice of a party's age."<sup>50</sup> When Circuit Judge Gibbons adjudicated Bailey's certificate of appealability application, she adopted the State's oblique harmless error argument that Bailey was not prejudiced by the judge determining his age because it was an "immutable fact" and "easily ascertainable."<sup>51</sup>

Bailey concedes that when he was sentenced on April 8, 2013, it was not clearly established by this Court that before a Michigan trial court could impose a mandatory minimum sentence of 25 years, the court was required to instruct

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49. *Curtis Bailey v Noah Nagy*, Warden, Lakeland Correctional Facility, Petition for Habeas Corpus; Brief in Support: Issue V, pp 31-34

50. Appendix B: *Bailey v Nagy*, 2023 U.S. Dist. LEXIS 23294, \*27, citing *People v McReynolds*, No. 307453, 2014 Mich. App. LEXIS 401; 2014 WL 860332, at \*7 (Mich. Ct. App. Mar. 4, 2014)

51. Appendix A: *Curtis Conway Bailey v Bryan Morrison*, Warden, Judgment issued August 11, 2023 (Case No. 23-1254)

the jury that it had to make a finding beyond a reasonable doubt that the defendant was 17 years of age or older and the victim was less than 13 years of age. That changed, however, two months after Bailey was sentenced when this Court issued its holding in *Alleyne v United States* on June 13, 2013.

In *Alleyne*, this Court held that because the finding of brandishing increased the penalty to which defendant was subjected, that fact was an element of the offense which had to be found by a jury beyond a reasonable doubt. As the judge, rather than the jury, found brandishing, this Court held that the sentence violated defendant's Sixth Amendment rights. *Alleyne's* holding is crystal clear:

"The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense. In *Apprendi*, we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed.

While *Harris* declined to extend this principle to facts increasing mandatory minimum sentences, *Apprendi's* definition of 'elements' necessarily includes not only facts that increase the ceiling, but also that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt."<sup>52</sup>

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52. *Alleyne*, 570 U.S. at 107-108

Bailey contends that because his case was under direct review when *Alleyne* was decided, that holding applied retroactively to his case. Under *Alleyne's* holding, Bailey's age is by definition an element of the offense and must be submitted to the jury and found beyond a reasonable doubt because it increases the punishment above what is otherwise legally prescribed under Michigan Compiled Laws § 750.520b(2)(a). In that regard, Bailey asserts that the State courts and lower federal courts have decided an important federal question in a way that conflicts with this Court's holding in *Alleyne v United States*.

- **Because Bailey presents no challenge to the accuracy of his age calculation, the trial court's failure to instruct the jury on this question did not have a substantial and injurious effect in determining the outcome of this proceeding.**

In her opinion and order denying Bailey's petition for writ of habeas corpus, District Judge Levy did find that **"the trial court violated Petitioner's constitutional right** to have any fact which increases the mandatory minimum sentence submitted to the jury,"<sup>53</sup> but concluded that the *Alleyne* error was subject to harmless error analysis in accordance with *United States v Booker*,<sup>54</sup> and that, for purposes of federal habeas review, a constitutional error is considered harmless if it did not have a "substantial and injurious effect or influence" in determining the outcome of the proceeding.<sup>55</sup>

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53. Appendix B: *Bailey v Nagy*, 2023 U.S. Dist. LEXIS 23294, \*26

54. *Id.*, citing *United States v Booker*, 543 U.S. 220; 125 S. Ct. 738; 160 L. Ed. 2d 621 (2005)

55. *Id.*, citing *Brecht v Abrahamson*, 507 U.S. 619, 637; 113 S. Ct. 1710; 123 L. Ed. 2d 353 (2005)

District Judge Levy then determined that because Bailey's age is undisputed, "the Court holds that the trial court's failure to specifically instruct the jury on this question did not have a 'substantial and injurious effect' in determining the outcome of this proceeding."<sup>56</sup> Bailey contends that District Judge Levy misapprehends *Booker*, which actually only stated:

"It is also because, in cases **not involving** a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application of the harmless-error doctrine."<sup>57</sup>

Bailey contends that his *Alleyne* claim of error does involve a Sixth Amendment violation,<sup>58</sup> and that a post-trial analysis clearly shows that where the trial judge found the element of Bailey's age instead of the jury, that did have a substantial and injurious effect in determining the outcome of his sentencing proceeding.

Thereafter, Bailey sought a certificate of appealability (COA) from the Sixth Circuit Court of Appeals on two questions: (1) whether *Apprendi* and *Alleyne* were clearly established federal law that must be obeyed by the State of Michigan, and (2) whether Judge Levy can erect a harmless error defense for the State of Michigan that was not raised by the State.

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56. *Id.* at \*27

57. *United States v Booker*, 543 U.S. 220, 268; 125 S. Ct. 738; 160 L. Ed. 2d 621 (2005)

58. *Alleyne*, 570 U.S. at 111 ("As the judge, rather than the jury, found brandishing, the Court held that the sentence violated defendant's Sixth Amendment rights.")



Circuit Judge Julia Smith Gibbons found that the State did raise a harmless error defense, “albeit obliquely,” in its response to Bailey’s petition by asserting that his age was an immutable fact and easily ascertainable.<sup>59</sup> Judge Gibbons also found that, even though the State can waive a harmlessness defense, she had discretion to sua sponte conduct such a review.<sup>60</sup> Then, on harmless error review, Judge Gibbons found that Bailey presented “no challenge to the accuracy of his age calculation,” and thereafter concluded that “any *Alleyne* error was therefore harmless.”<sup>61</sup>

In that regard, Bailey asserts that, in accordance with circuit precedent and clearly established federal law, Judge Gibbons was precluded from sua sponte conducting a harmless error review:

“However, by not raising the issue of harmless error in either its appellate brief, or ‘in its response to the habeas petition in federal district court[,]’ the State has forfeited consideration of this issue on appeal.”<sup>62</sup>

Assuming, without arguing, that Judge Gibbons could legally raise a harmless error argument, the grounds for harmlessness run headlong into the holding of *Alleyne*—a State trial court judge cannot find the fact of Bailey’s age no matter how immutable and easily ascertainable. That is for a jury to find.

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59. *Id.* at p 5 (quotation omitted)

60. *Id.*

61. *Id.*

62. *Ayers v Hudson*, 623 F.3d 301, 317, n.12 (6th Cir. 2010); see also *Arizona v Fulminante*, 499 U.S. 279, 296; 111 S. Ct. 1246; 113 L. Ed. 2d 302 (1991) (noting that the State bears the burden of proof on harmless error).

## Argument II:

**Whether Michigan's procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant would have a meaningful opportunity to raise an ineffective assistance of trial counsel (IATC) claim on direct appeal.**

This case involves the procedural framework of Michigan's court rules that in theory grant permission to bring an ineffective assistance of trial counsel (IATC) claim on direct appeal but in practice deny a meaningful opportunity to do so. Bailey asserts that, by reason of the design and operation of Michigan's procedure, his claim of IATC was unable to receive judicial review in the state appellate courts, and was subsequently denied habeas relief for lack of prejudice.

- **Under Michigan law, a defendant who wishes to advance a claim of IATC that depends on matters not of record can properly be required to seek at the trial court level an evidentiary hearing for the purpose of establishing his claim with evidence as a precondition to invoking the process of appellate courts.**

The State of Michigan places the burden on the criminal defendant to establish the factual predicate for his claim of IATC.<sup>63</sup> "In addition, Michigan has a unified appeal system for criminal cases in which all claims must be raised in the first appeal, including claims of ineffective assistance of counsel that might not at first be apparent from the lower court record. To address this circumstance, the Michigan Supreme Court in *People v Ginther*, outlined a

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63. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) ("Finally, it is important to note that defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel.")

procedure in 1973 for developing a record when a defendant desires to assert claims that are outside the record. The Court stated:

A defendant who wishes to advance claims that depend on matters not of record can properly be required to seek at the trial court level an evidentiary hearing for the purpose of establishing his claims with evidence as a precondition to invoking the process of the appellate courts except in the rare case where the record manifestly shows that the judge would refuse a hearing; in such a case the defendant should seek on appeal, not a reversal of his conviction, but an order directing the trial court to conduct the needed hearing.”<sup>64</sup>

In 2018, the Michigan Supreme Court revisited the “burden” requirement and made it crystal clear what was expected of defendants:

“By contrast, the errors underlying ineffective-assistance claims often are not apparent from the trial record but instead require additional evidentiary development. This is because ineffective assistance claims center on deficiencies in the defense counsel’s decision making, which will not always reveal themselves in the official record.

As the United States Supreme Court has noted, the trial record is ‘devoted to issues of guilt or innocence’ and will often ‘not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it.’ Further, ‘[w]ithout additional factual development, ... an appellate court may not be able to ascertain whether the alleged error was prejudicial.’

For these reasons, in Michigan, a defendant can seek an evidentiary hearing in the trial court on defense counsel’s performance and then bring an ineffective-assistance claim

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64. *Bulger v Curtis*, 328 F. Supp. 2d 692, 701 (E.D. Mich. 2004), quoting *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973)

on direct appeal with the benefit of the augmented hearing record.”<sup>65</sup>

On its face, the procedure outlined above appears to delivery everything that is constitutionally required of a State to protect a defendant’s Sixth Amendment right to have the effective assistance of counsel for his defense. On closer examination, however, it is clear that Michigan’s procedure is the same procedure this Court addressed in *Trevino v Thaler* where Texas state law did not on its face require claims of ineffective assistance of counsel be raised in an initial-review collateral proceeding, but instead appeared to permit the defendant to raise a claim of ineffective assistance of trial counsel on direct appeal.<sup>66</sup> This Court found that the “structure and design of the Texas system in actual operation, however, made it ‘virtually impossible’ for an ineffective assistance claim to be presented on direct review.”<sup>67</sup>

- **Michigan’s procedural framework makes it highly unlikely that a defendant will be able to raise an IATC claim on direct appeal.**

Michigan also appears to permit IATC claims to be raised on direct appeal but, like Texas, the structure and design of the Michigan system in actual operation make it virtually impossible for an IATC claim to be presented on direct appeal. One reason is because of the abbreviated deadlines which deprive the appellate attorney of adequate time to investigate the IATC claim and file the required motion for a new trial pleading.

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65. *People v Randolph*, 502 Mich 1, 14-15; 917 NW2d 249 (2018) (citations omitted)

66. *Trevino v Thaler*, 569 U.S. 413; 133 S. Ct. 1911; 185 L. Ed. 2d 1044 (2013)

67. *Trevino*, 569 U.S. at 417

A second, and probably more important reason, is because a defendant who chooses to make an ineffective-assistance argument on direct appeal cannot present it again on collateral review.<sup>68</sup> “Except for the rare case in which ineffectiveness is readily apparent on the face of the trial court transcript, most appellate lawyers understandably opt not to raise ineffective assistance of trial counsel claims on appeal. They know that, if the claim is raised before there is record evidence to support it and the appellate court rejects it on the merits, the defendant will be barred from raising the claim in later proceedings, when outside information to support the claim would otherwise be admissible.”<sup>69</sup>

Through the avoidance of Mich. Ct. R. 6.508(D), Michigan surreptitiously channels initial review of a constitutional claim of IATC to collateral postappeal proceedings to the detriment of defendants. “This procedure place[s] defendants in a Catch-22 situation. If they raised the ineffectiveness issue on appeal, they would likely lose an otherwise meritorious claim, because the record was not sufficiently developed to support it. If, on the other hand, they waited until collateral review proceedings, they risked losing their ineffectiveness claim due to procedural default.”<sup>70</sup>

This is exactly what happened to Bailey. Retained appellate counsel Neil Szabo raised only one claim of IATC in the Court of Appeals. This claim of error,

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68. See Mich. Ct. R. 6.508(D) (“The court may not grant relief to the defendant if the motion ... (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision.”)

69. Appendix G: *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679, \*690-691 (citations omitted)

70. *Id.*, at \*691

as it turns out, had strong, indisputable support from medical records to show that SANE Sheri Clair was not present when Conley's pediatrician—Dr. Sankaran—performed the first physical examination of Conley. Because Dr. Sankaran did not testify at Bailey's trial, and because SANE Clair was not present during Dr. Sankaran's examination, Bailey's right to confrontation was violated when SANE Clair testified as to the contents of Dr. Sankaran's examination report.

Nonetheless, the Court of Appeals disposed of the claim by finding that trial counsel Stephen Lazzio "cannot be ineffective for failing to raise futile or meritless objections."<sup>71</sup> Following that denial, the claim was rejected by the trial court when Bailey attempted to raise it in the postappeal proceedings.<sup>72</sup> Bailey has now experienced the Catch-22 firsthand. He had a meritorious claim of IATC that had record support, but was nonetheless denied relief by the Court of Appeals, and by the trial court in Michigan's postappeal proceedings for the reason stated above.

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71. Appendix C: *People v Bailey*, 2014 Mich. App. LEXIS 1948, at \*12

72. Appendix D: *People v Bailey*, Order Denying Defendant's Motion for Relief from Judgment, issued October 6, 2016 (Case No. 2011-30007-FC), p 3 ("As to the medical records, since this issue was previously raised at the appellate level and decided against the defendant, this Court cannot grant relief.") (citing MCR 6.509 [sic: 6.508](D)(2))

- **Waiting to raise a claim of IATC until Michigan's postappeal proceedings adds an additional burden.**

Under Michigan's postappeal rules, a defendant has a second burden in addition to establishing the factual predicate for his claim of IATC. He or she must also establish entitlement to the relief requested by demonstrating "good cause" for not raising the IATC claim on direct review and by showing "actual prejudice" from the alleged irregularities that support the claim.<sup>73</sup>

Michigan law appears to recognize ineffective assistance of appellate counsel as "good cause" to excuse the procedural default of failing to raise the IATC claim on direct appeal,<sup>74</sup> but trial courts rarely schedule and conduct an evidentiary hearing during the postappeal proceedings. This is what happened to Bailey.

Retained postappeal counsel Major White specifically moved the trial court to hold an evidentiary hearing pursuant to *People v Ginther* on each claim of IATC that he raised. When adjudicating the IATC claims, the trial court found that "since Defendant failed to raise the issues during the appellate process," he "would have to demonstrate good cause or a significant possibility of innocence, neither of which have been presented here."<sup>75</sup>

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73. Mich. Ct. R. 6.508(D)(3)(a) and (b); see Mich. Ct. R. 6.508(D)(3)(b)(i) (In a conviction following a trial, "actual prejudice" means that, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal.)

74. *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995) (" 'Cause' for excusing procedural default is established by proving ineffective assistance of appellate counsel, pursuant to the standard set forth in *Strickland v Washington*, or by showing that some external factor prevented counsel from previously raising the issue.") (citation omitted)

75. Appendix D: *People v Bailey*, Order Denying Defendant's Motion for Relief from Judgment, issued October 6, 2016 (Case No. 2011-30007-FC), p 3

When a Michigan defendant like Bailey has been unable to establish the factual predicate for his claim of IATC using the State's procedures in direct appeal and in postappeal, the end result is that the IATC claim also gets rejected by the federal habeas court because the defendant is unable to satisfy the highly deferential standards of *Strickland* and 28 U.S.C. § 2254(d).<sup>76</sup>

District Judge Levy denied relief on Bailey's claim that "counsel was ineffective for failing to object to the admission of medical records which contained the statements of a non-testifying physician" on the basis that Bailey "failed to show that admission of the records violated his right of confrontation;" accordingly, "he cannot show that counsel was ineffective for failing to object."<sup>77</sup>

Likewise, District Judge Levy denied relief on Bailey's claim that "counsel should have objected to the testimony of Amber Ragland, an investigator for the Department of Human Services, who testified about things [Conley] told her during an interview. Habeas relief was denied here on the grounds that Conley "testified and was subject to cross-examination at trial," and "counsel was not ineffective for failing to object."<sup>78</sup>

District Judge Levy also denied relief on Bailey's claim that "counsel should have objected to the admission of the videotape of Hartwell's forensic interview of [Conley]," on the basis that Bailey failed to assert an argument why the video

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76. In *Strickland v Washington*, 466 U.S. 668, 687; 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984), this Court set forth a two-prong standard of review: deficient performance and actual prejudice

77. Appendix B: *Bailey v Nagy*, 2023 U.S. Dist. LEXIS 23294, \*24

78. *Id.*, at \*24-25



was otherwise inadmissible under state law; Counsel, therefore, was not ineffective on this basis.”<sup>79</sup>

Finally, District Judge Levy denied relief on Bailey’s claim that “counsel was ineffective for failing to retain an expert witness” on the basis that Bailey “present[ed] no evidence that an expert witness would have presented evidence favorable to the defense.”<sup>80</sup>

- **Waiting to raise a claim of IATC until Michigan’s postappeal proceedings has serious practical problems.**

“Of those defendants who do fight on in collateral review proceedings, either pro se or with retained counsel, many will face serious problems asserting that their trial attorneys were ineffective due to the delay in presenting the claim. After four years, crucial witnesses may have died or disappeared. Even if a witnesses are available, their memory of relevant events may have deteriorated. Physical evidence may have disappeared, spoiled, or have been destroyed in the normal course of events. An ineffective assistance of trial counsel claim is ripe for consideration and review after the trial is over, and there is no reason to delay its presentation.”<sup>81</sup>

The ultimate question for retained criminal defense attorney Stephen M. Lazzio is to explain why he did not conduct a reasonable investigation in this case, and why he did not consult with and retain an expert witness.

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79. *Id.*

80. *Id.*, at \*25

81. Appendix G: *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679, \*695 (citations omitted)

Unfortunately, Attorney Lazzio passed away<sup>82</sup> on January 17, 2016, and cannot answer those questions.

Bailey asserts that, despite the unavailability of Attorney Lazzio, the State of Michigan should still be compelled to address the procedural framework it has in place to evaluate claims of IATC. As a matter of record fact, Attorney Lazzio was still alive when the Michigan Court of Appeals decided Bailey's direct appeal on October 21, 2014, and was still alive when the Michigan Supreme Court denied leave to appeal on July 28, 2015.

- **Michigan's procedural framework to raise an ineffective assistance of trial counsel (IATC) claim on direct appeal is identical in operation as the procedure that existed in Texas.**

The same unconstitutional procedure this Court found in Texas can be found in Michigan's procedure, specifically in the court rule that governs motions for a new trial, which is the pleading the Michigan Supreme Court in *Ginther* identified as the proper method to use to seek evidentiary development:

“(1) A motion for a new trial may be filed before the filing of a timely claim of appeal.

(2) If a claim of appeal has been filed, a motion for a new trial may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).

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82. Appendix E: Obituary: Stephen M. Lazzio

(4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.”<sup>83</sup>

To begin, the procedure outlined above under Mich. Ct. R. 6.431 requires trial counsel to raise their own ineffectiveness<sup>84</sup> in a motion for a new trial as the reason the trial or sentencing error was not objected to under Michigan’s contemporaneous objection rule.<sup>85</sup> This requirement is illogical, and contrary to common sense. In any regard, Bailey’s court-appointed trial counsel Stephen Lazzio did not file a motion for a new trial

Second, an indigent criminal defendant like Bailey who took his case to a jury trial—thus giving him an appeal of right under State law—must make a request for the appointment of appellate counsel within 42 days after entry of the judgment of sentence.<sup>86</sup> This particular procedural rule closes the door to trial counsel seeking an evidentiary hearing on the issue of ineffectiveness because the appointment order “must be entered on an approved form entitled ‘Claim of Appeal and Appointment of Counsel.’”<sup>87</sup> “The time limit for an appeal

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83. Mich. Ct. R. 6.431(A)(1), (2), and (4)

84. (“Counsel cannot be expected to raise their own ineffectiveness, their office’s ineffectiveness, or the ineffectiveness of other attorneys within that office. Yet, raising these claims would have required just that.”), *Lindsey v Jenkins*, 2022 U.S. App. LEXIS 37905, at \*20 (6th Cir.)

85. *People v Dombrowski*, 10 Mich App 445, 447; 159 NW2d 336 (1968) (“The lack of a contemporaneous objection to admission of these facts now precludes assignment of error thereon.”); see also *People v Jury*, 3 Mich App 427, 435; 142 NW2d 910 (1966) (“Our Supreme Court presumes evidence admitted was lawfully admitted where no proper objections were made at the trial.”) (citation omitted)

86. See Mich. Ct. R. 6.425(G)(1)(d) (“If the defendant is indigent, the court must enter an order appointing a lawyer if the request for a lawyer is filed within 42 days after entry of the judgment of sentence or, if applicable, within the time for filing an appeal of right.”) (Typically, a criminal defendant will complete the request for appointment of appellate counsel form before leaving the courtroom after he or she has been sentenced.)

87. *Id.* at (G)(1)(e)

of right is jurisdictional, and when the claim of appeal is timely filed, jurisdiction moves from the circuit court to the Court of Appeals, which brings Mich. Ct. R. 7.208 into play.

Mich. Ct. R. 7.208(A) states that, after a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from, but in a criminal case, the filing of a claim of appeal does not preclude the trial court from granting a timely motion under subrule (B).

Now, under Mich. Ct. R. 7.208(B) Postjudgment Motions in Criminal Cases, appointed appellate counsel must file a motion for a new trial “[n]o later than 56 days after the commencement of the time for filing the defendant-appellant’s brief as provided by Mich. Ct. R. 7.212(A)(1)(a)(iii).”<sup>88</sup>

Bailey’s retained appellate counsel Neil Szabo raised a claim of error in the Michigan Court of Appeals that trial counsel Lazzio was ineffective for failing to object to the admission of the pediatrician’s report, but he did not file a motion for a new trial under the postjudgment procedure described above in Mich. Ct. R. 7.208(B). This puts Mich. Ct. R. 7.211(C) into play.

Mich. Ct. R. 7.212(A)(1)(a)(iii), in relevant part, sets the time limit to file the Appellant’s Brief at “56 days after the claim of appeal is filed, ..., the transcript is filed with the trial court or tribunal, ..., whichever is later...”<sup>89</sup> During this period of time, appellate counsel may move the Court of Appeals to

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88. Mich. Ct. R. 7.208(B) (in relevant part)

89. Mich. Ct. R. 7.212(A)(1)(a)(iii) (in relevant part)

remand to the trial court under Mich. Ct. R. 7.211(C) Special Motions; subrule (1) Motion to Remand.

Using this procedure, appellate counsel “must identify an issue sought to be reviewed on appeal and show:

“(i) that the issue is one that is of record and that must be initially decided by the trial court; or

(ii) that development of a factual record is required for appellate consideration of the issue.

A motion under this subrule must be supported by affidavit or offer of proof regarding the facts to be established at a hearing.”<sup>90</sup>

As mentioned above, Attorney Szabo raised a claim of error in the Michigan Court of Appeals that trial counsel was ineffective for failing to object to the admission of the pediatrician’s report, but again Attorney Szabo did not seek evidentiary development of the record by moving the Court of Appeals to remand the case to the trial court in accordance with Mich. Ct. R. 7.211(C). Thereafter, the Court of Appeals determined that there “was no *Ginther* hearing” on the issue of IATC, and “the Court’s review is limited to errors apparent on the record.” The Court of Appeals subsequently found no errors warranting reversal, and affirmed the judgment.<sup>91</sup>

Bailey contends that this approach is constitutionally inadequate to protect his right to have effective assistance of counsel since none of the Michigan

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90. Mich. Ct. R. 7.211(C)(1) (in relevant part)

91. Appendix C: *People v Bailey*, 2014 Mich. App. LEXIS 1948, at \*11, \*18

appellate courts would hold an evidentiary hearing on Bailey's claim of ineffective assistance of counsel. This inadequacy has been recognized by the federal court:

"In light of the elaborate procedure prescribed for exploring claims of ineffective assistance of counsel mandated by the [Michigan] Supreme Court's rules, it is quite inconsistent to suggest that such claims will be 'apparent on the record.' In reality, no trial court reasonably can be expected to grasp, much less make inquiry into, all of the meritorious defenses a defendant might be able to raise at trial, and it would be remarkable indeed to expect trial counsel to be their own best judge of her ineffectiveness.<sup>92</sup>

### **Summary**

To recap, after being accused in July of 2010, Bailey—with the help of his family—retained former Genesee County Prosecutor Arthur Bush to defend him. When 12 months passed with no charges being brought, the contract with Mr. Bush expired. Charges were brought, however, 16 months after being accused, and Bailey was arrested on those charges during a traffic stop on November 3, 2011. Because Bailey's family had spent their financial reserve when they retained Attorney Bush, Bailey was compelled to seek court-appointed counsel. On November 9, 2011, Attorney Stephen Lazzio was appointed by the court.

It is crucial to note that Bailey's trial began on February 6, 2013 and concluded on February 14, 2013. Bailey was sentenced on April 8, 2013, and filed a timely request for the appointment of appellate counsel on April 26, 2013.

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92. *Bulger v Curtis*, 328 F. Supp. 2d at 701

From the date of Attorney Lazzio's appointment until Bailey's trial began, 15 months passed. There is nothing in the record to indicate that Attorney Lazzio complied with the mandate of this Court in *Strickland*, that counsel has a duty to investigate:

"These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the court of appeals concluded, strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.

In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsels' judgment."<sup>93</sup>

Bailey contends that Attorney Lazzio did not conduct any investigation into the law and facts of his case before trial began. As discussed above, retained appellate counsel Neil Szabo raised only one claim of IATC in the Court of Appeals. This claim of error had strong, indisputable support from medical records to show that SANE Sheri Clair was not present when Conley's pediatrician—Dr. Sankaran—performed the first physical examination of

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93. *Strickland v Washington*, 466 U.S. at 690-691; see also *People v Trakhtenberg*, 493 Mich. 38, 52; 826 NW2d 136 (2012) ("a court cannot insulate the review of counsel's performance by calling it trial strategy.")

Conley. Because Dr. Sankaran did not testify at Bailey's trial, and because SANE Clair was not present during Dr. Sankaran's examination, Bailey's right to confrontation was violated when SANE Clair testified as to the contents of Dr. Sankaran's examination report. A reasonable investigation would have uncovered this fact, which would have precluded SANE Clair from testifying.

In addition, Attorney Lazzio's failure to consult with and retain an expert witness simply cannot be found to be trial strategy. The complainant in Bailey's case, Alexandra Conley, was interviewed two times by her sex education teacher, once by DHS employee Amber Ragland, twice by forensic interviewer Gayle Hartwell, and at least once by SANE Sheri Clair.

During the course of these interviews that spanned a thirty-day period, 11-year old<sup>94</sup> Conley's accusations went from sexual touching to sexual penetration. "Researchers have found that the younger the child, the more susceptible the child is to suggestion from adults, including well-meaning interviews, about bodily contact and bodily touching."<sup>95</sup> "Expert witness are able to educate the jury about these areas of concern, allowing the jury to better assess the credibility of the testimony of the complainants and the capability of interviewers who present hearsay renditions of the children's prior disclosures."<sup>96</sup>

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94. Alexandra Conley's birthdate is April 6, 1999 and she wrote the first note on May 17, 2010.

95. Appendix H: Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions* (American Criminal Law Review, 2005), Part C. Child Suggestibility; 42 Am. Crim. L. Rev. 1271, \*1285

96. *Id.*



## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Curtis C. Bailey", written over a horizontal line.

Curtis C. Bailey  
Prisoner ID No. 868268  
Michigan Department of Corrections  
Lakeland Correctional Facility  
141 First Street  
Coldwater, Michigan 49036

cc: Petitioner's File  
Respondent's Counsel of Record