

No. 17A-_____

IN THE
SUPREME COURT OF THE UNITED STATES

No. 17-

KURT ROBERT SMITH

Petitioner,

v.

**JOSEPH MEKO, WARDEN,
LITTLE SANDY CORRECTIONAL COMPLEX**

Respondent

**APPLICATION TO THE HONORABLE JUSTICE ELENA KAGAN FOR A
THIRTY (30) 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 pursuant to Supreme Court Rules 13.5 and 30.3 to grant him a thirty (30) day extension, to and including January 11, 2017, in which to file a Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. The Petition for Certiorari is presently due to be filed on December 12, 2017, 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 inmate who was charged

with participation in a prison riot while serving a life sentence on an unrelated offense. He was offered an *Alford* plea to the maximum sentence for each offense, with the inducement that the offenses would run concurrently with each other and concurrently with his life sentence, for a total of five years. He was advised by counsel that this meant that if he agreed to this offer, his new sentence would not only not change his total time to serve, it would also not change his parole eligibility on his life sentence. Believing that he was being offered the opportunity to end the case without an admission of guilt, and without altering his existing life sentence, Mr. Smith agreed. The trial court accepted his plea and sentenced him to the agreed term.

In Kentucky, parole eligibility was not calculated by the trial court, but by the Kentucky Department of Corrections (KDOC). Significantly, when Mr. Smith returned from sentencing the KDOC recalculated his sentence based on the new judgment, and his eligibility was not changed. It was not until more than a year later, during a routine reclassification, that Mr. Smith first learned that his eligibility had been changed by the KDOC to reflect an additional two years before he would be parole eligible. Mr. Smith promptly requested an administrative review, and was told on or after October 10, 2011, that his parole eligibility had been recalculated based on a Kentucky regulation which required the KDOC to add the parole eligibility for new offenses to the eligibility for any existing offense – i.e., to treat the new offenses as though they ran consecutively rather than concurrently for the purposes of parole eligibility. Notably, the explanation provided by KDOC omitted a critical portion of the regulation it was quoting.

Mr. Smith sent an appeal letter to the KDOC on October 18, 2011, noting that

his judgment had required the sentences to run concurrently and that was a condition of his plea agreement.. On November 14, 2011, he received a response denying his appeal. For the first time, KDOC provided Mr. Smith with a correct and complete recapitulation on of the regulation on which they were relying.

On October 23, 2012, Mr. Smith filed a state post-conviction action alleging that his attorney had rendered deficient performance by mistakenly advising him that his plea would not change his parole eligibility, and that he would not have accepted the plea except for counsel's deficient advice. The Kentucky state court denied relief, and Mr. Smith filed a petition for writ of habeas corpus in the Eastern District of Kentucky.

As relevant here, the litigation in the lower courts primarily concerned whether Mr. Smith's petition was timely filed. Mr. Smith argued he was entitled to statutory tolling to November 14, 2011 – the date that the questions of his parole eligibility were finally settled. The Warden argued that he was entitled to statutory tolling to no later than October 16, 2011 – the date of Mr. Smith's letter to KDOC initiating his final appeal, because on that date he was or ought to have been aware of the fact that his attorney had misadvised him about parole eligibility. The Eastern District of Kentucky agreed with the Warden, and dismissed the case. On appeal, the Sixth Circuit affirmed in an unpublished ruling issued September 13, 2017 (see attachment 1). Mr. Smith plans to file a petition for certiorari challenging that ruling.

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

Issues to be Presented: This case presents the following issue:
Whether an inmate who follows state requirements and exhausts administrative remedies on an issue is entitled to statutory tolling under 28 U.S.C. § 2244(d)(1)(D),

where the fact established by the administrative process was relevant to his ineffective assistance of counsel claim.

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. The undersigned is the Post-Trial Division Director at the Kentucky Department of Public Advocacy (DPA), Kentucky's statewide public defender agency. In this capacity, the undersigned 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. During a three-week period during late October into early November, two of the DPA's four full time capital post-conviction lawyers left the agency's employment for other opportunities. As a result, the undersigned has had to spend considerable time arranging replacement counsel, and hiring new attorneys to fill the vacant positions. These tasks have been complicated by budget shortfalls within the DPA, which have substantially limited the resources available to the undersigned.

In addition, the undersigned represents more than two dozen clients in various contexts. Since the opinion was issued, the undersigned has had a number of case related duties, including filing a motion for class certification in a multiparty case in Franklin County (Ky.) Circuit Court; filing a motion for discretionary review, a cross motion for discretionary review, responses to two motions to transfer, and a reply brief in the Kentucky Supreme Court, as well as reviewing over 3000 pages of discovery in a civil action, and drafting a complaint for a new action which is expected to be filed within the next week.

The undersigned believes that a thirty day (30) 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 thirty (30) day extension, to and including January 11, 2018, in which to file the Petition for Certiorari.

Respectfully submitted,

TIMOTHY G. ARNOLD, Director
Post-Trial Division
Department of Public Advocacy
5 Mill Creek Park
Frankfort, KY 40601
(502) 564-8006
(502) 695-6769 (fax)
tim.arnold@ky.gov

Counsel for Petitioner

December 1, 2017

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CERTIFICATE OF SERVICE

I, Timothy G. Arnold, a member of the Bar of this Court, hereby certify that on December 1, 2017, a copy of this Application for Extension of Time to File a Petition for a Writ of Certiorari in the above entitled case was mailed, first class postage prepaid, to the Hon. Paul Varo, Assistant Attorney General, Commonwealth of Kentucky, 1024 Capital Center Drive, Frankfort, Kentucky 40601, counsel for respondent herein. I further certify that all parties required to be served have been served.

TIMOTHY G. ARNOLD, Director
Post-Trial Division
Department of Public Advocacy
5 Mill Creek Park
Frankfort, KY 40601
(502) 564-8006
(502) 695-6769 (fax)
tim.arnold@ky.gov

Counsel for Petitioner

December 1, 2017