

No. A-____

**IN THE
SUPREME COURT OF THE UNITED STATES**

DOMINICK BAILEY,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

On Application for Extension of Time

**APPLICATION FOR AN EXTENSION OF TIME
TO FILE A PETITION FOR A WRIT OF
CERTIORARI**

To the Honorable Ketanji Brown Jackson, Associate Justice of the
United States Supreme Court and Circuit Justice for the First Circuit:

Pursuant to Supreme Court Rule 13.5, applicant Dominick Bailey
respectfully requests a 60-day extension of time, until July 11, 2025,
within which to file a petition for a writ of certiorari. The United States

Court of Appeals for the First Circuit issued its opinion in this case (Appendix, *infra*) on November 20, 2024. The applicant timely moved on December 2, 2024, for an extension of time to file a petition for rehearing to January 3, 2025. The First Circuit (Aframe, J.) allowed the motion. The applicant's petition for rehearing and rehearing en banc was timely filed in the First Circuit on January 3, 2025. On February 11, 2025, the petition for rehearing and the petition for rehearing en banc was denied. Unless extended, the time for filing a petition for a writ of certiorari will expire on May 12, 2025. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

This case implicates two important and recurring constitutional issues: first, Bailey's conviction as a felon in possession violates the Second Amendment both facially and as applied to him, and he was deprived of appellate due process in violation of the Fourteenth Amendment and Second Amendment by the appellate court's different handling of his case and a procedurally similar case. Along with those important constitutional matters, several sentencing issues also require review. The additional time is warranted to allow Mr. Bailey to prepare and file his petition on these topics.

As further reasons, the petitioner states:

1. Mr. Bailey was convicted of being a felon in possession of a firearm. Op. 2. His plea was after *McDonald v. City of Chicago*, 561 U.S. 742 (2010) and *District of Columbia v. Heller*, 554 U.S. 570 (2008), but before *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022). Following his conviction, he brought a Second Amendment challenge to 18 U.S.C. § 922(g)(1). He argued that the statute violated the Second Amendment on its face because he was part of “the people” protected by the Constitution and the Government could not demonstrate a historical tradition of permanently disarming people for conduct that is today classified as a felony. He further argued that the statute was unconstitutional as applied to him, as he had never been convicted of seriously harming anyone, his criminal offenses were mostly minor, and had taken place long ago. Though Mr. Bailey had not filed a motion to dismiss below, he argued that his claims should be subject to plain error review.

2. On August 2, 2024, the First Circuit decided *United States v. Langston*, 110 F.4th 408 (1st Cir. 2024), which reviewed similar arguments for plain error.

3. Just three months later, on November 20, 2024, the First Circuit determined that Bailey had waived his constitutional claims and refused to grant even plain error review, Op. at 5–6, despite his being in the same procedural posture as Langston. This disparate treatment was arbitrary and denied Bailey his Fifth Amendment right to due process. Bailey explicitly raised and preserved this due process issue.

4. In addition, the sentencing judge erroneously upwardly departed Bailey’s sentence pursuant to USSG §4A1.3 and based the departure on outdated convictions for minor, dissimilar misconduct that should not have been considered; Bailey’s record does not demonstrate the severity that warrants a departure, and the judge ignored Bailey’s counsel’s arguments in mitigation of his criminal record; the judge based the sentence on arrests, an error found to be plain in *United States v. Marrero-Pérez*, 914 F.3d 20, 24 (1st Cir. 2019) and the increase of two to three criminal history categories was unexplained in violation of the departure guideline.

5. The constitutionality of the felon in possession statute is a question that has created substantial questions within the circuits. See

United States v. Duarte, 108 F.4th 657 (9th Cir.), reh’g en banc granted, opinion vacated, 108 F.4th 786 (9th Cir. 2024). The treatment of these challenges has created a split within the First Circuit. Compare *United States v. Langston*, 110 F.4th 408 (1st Cir. 2024) (plain error) with *United States v. Turner*, 124 F.4th 69, 75 (1st Cir. 2024) (waiver) and *United States v. Bailey*, 121 F.4th 954, 959–60 (1st Cir. 2024) (same). Mr. Bailey will address both of these questions, as well as his sentencing argument, in his petition.

6. Mr. Bailey respectfully requests a 60-day extension of time to file his petition for a writ of certiorari from the First Circuit’s decision. An extension of time is warranted because of counsel’s commitments in the following matters:

- a. *Commonwealth v. Washington*, No. 0579CR00222 (first-degree murder). Counsel second-chaired a hearing on the defendant’s motion for new trial on April 12, 2025.
- b. *Commonwealth v. Lopez-Ortiz*, 2023-P-0295 (second-degree murder). A divided panel of the Massachusetts Appeals Court affirmed the defendant’s conviction on February 12, 2025. A petition for further appellate review is due by May 5, 2025.
- c. *Commonwealth v. Rooney*, No. SJC-12535 (first-degree murder). Rooney has filed an 87 page motion for new trial. The Commonwealth filed a 90 page opposition. Rooney’s reply to their opposition is due June 9, 2025.

- d. *Rogers v. Lizotte*, No. 1:24-cv-12419-DJC (habeas corpus petition regarding first-degree murder). Rogers' memorandum in support of his petition is due on June 30, 2025.
- e. *Undisclosed client* (second-degree murder). This client is immediately eligible for parole, suffers from traumatic brain injuries and intellectual disabilities, and is entitled to counsel under *Crowell v. Massachusetts Parole Bd.*, 477 Mass. 106 (2017) and the Americans with Disabilities Act. This is requiring intensive release planning and close work with the client to prepare for his parole hearing. A parole hearing date has been set for November, requiring counsel to move with alacrity.
- f. *Undisclosed client* (first-degree murder). This client is immediately eligible for parole under the Supreme Judicial Court's decision in *Commonwealth v. Mattis*, 493 Mass. 216 (2024). This also requires quick action from counsel.
- g. The Committee for Public Counsel Services has assigned undersigned counsel as one of two resource attorneys statewide for federal habeas corpus petitions and murder appeals. As part of those responsibilities, counsel was responsible for preparing materials and co-leading a two-day seminar regarding federal habeas corpus petitions on March 19 and 26, 2025. In addition, this role involves significant time daily answering advice calls and editing memoranda.
- h. *Kozubal v. Register of Probate for Norfolk County*, No. NO24E0020QC (action to modify impoundment order related to criminal case). The Probate Court issued its decision dismissing this action on February 11, 2025. A notice of appeal must be filed by March 13, 2025. Assembly and substantial briefing will follow.

- i. *Commonwealth v. Scogland*, Lynn District Court No. 1913CR003118. This is a direct appeal. A motion to reconstruct the transcript was recently finalized. Substantial briefing is imminent either in the form of a motion for new trial or appellate brief.
- j. *Commonwealth v. Perry*, No. SJC-09616 (first-degree murder). The Commonwealth has moved to dismiss this appeal. The defendant has responded with a motion for discovery, a motion to remand, and a motion to extend time. No matter how the matter is handled, counsel will be responsible for drafting significant, substantive pleadings in the coming weeks.
- k. *Commonwealth v. Bufford*, Suffolk Superior Court No. 2084CR00367 (first-degree murder). This is a direct appeal. The transcripts have been partially produced and review has begun. A motion for funds and significant investigation are anticipated.
- l. *Commonwealth v. Gadson*, No. 1402CR000350 (breaking and entering). The motion for new trial was heard on January 31, 2025 and a motion to dismiss was heard on February 27, 2025. Related federal proceedings are pending and require counsel's attention.
- m. *Commonwealth v. Fisher*, No. 1581CR00353 (first-degree murder, 28 volumes of transcript). A motion to reduce verdict was filed on January 29, 2025. Investigation of a motion for new trial is ongoing.
- n. *Undisclosed client* (first-degree murder). This client is seriously disabled and has suffered repeated seizures, falls, and brain injuries. Counsel is preparing both a motion for new trial and a petition for commutation. The tasks involved in these undertakings are numerous and arduous.

- o. *Commonwealth v. Williams*, No. 8181CR01383 (first-degree murder, 15 volumes of transcripts, motion for new trial pending). Significant litigation related to the motion for new trial is anticipated.
- p. *Moore v. Zoldak*, No. 23-cv-11973 (D. Mass.) (first-degree murder, four counts, habeas corpus petition, 83 volumes of transcript). Counsel is assigned as a habeas corpus mentor to Attorney Jellison.
- q. *Don v. Alves*, No. No. 21-CV-10468-AK (first-degree murder, habeas corpus petition, 12 volumes of transcript). Counsel is assigned as a habeas corpus mentor to Attorney Jellison.
- r. *Additional Mentoring*: Counsel is formally mentoring five additional attorneys.

Finally, undersigned counsel's former law partner left the firm to assume the appellate bench in December, 2024. This required the remaining two partners (including the undersigned) to assume representation of the former partner's clients. In the case of the undersigned that meant assuming six active clients, including three first-degree murders. Combined with the administrative burden of transitioning the prior firm to a new firm, the impact of those events on undersigned counsel's practice is hard to overstate.

For the foregoing reasons, applicant respectfully requests that the Court extend the time to file a petition for a writ of certiorari to July 11, 2025.

Respectfully submitted,

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