No. A._____

In the Supreme Court of the United States

MICHAEL FERGUSON,

***Applicant*,**

v.

UNITED STATES of AMERICA,

***Respondent*.**

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicant Michael Ferguson respectfully requests a 60-day extension of time, to and including July 13, 2018, to file a petition for a writ of certiorari in this case.

The Sixth Circuit Court of Appeals issued its order denying Mr. Ferguson's petition for rehearing en banc on February 13, 2018. Unless extended, the time to file a petition for a writ of certiorari will expire on April 14, 2018. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). The order denying the petition for panel rehearing is not published, but it is attached to this motion. The Sixth Circuit opinion is available at 2018 WL 316261 (6th Cir. Jan. 8, 2018). A copy of the opinion and order is attached.

1. Michael Ferguson is serving a 105-month federal sentence that runs consecutively to a 24-month state felony firearm offense. He appealed his federal sentence on procedural and substantive grounds. *United States v. Ferguson*, No. 17-1176, 2018 WL 316261, at *1 (6th Cir. Jan. 8, 2018). The Sixth Circuit concluded that his total sentence of nearly eleven years was both procedurally and substantively reasonable. *Id.*

2. The questions that are likely to be presented in the petition are:

> (A) The district court opted to incarcerate Ferguson for nearly eleven years based on double hearsay and bare arrest records. Did the district court abuse its discretion and violate Due Process by relying on such unreliable and inaccurate information?
>
> (B) Mr. Ferguson received an aggregate sentence of 127 months for being a felon in possession of a firearm—a sentence that is 22 months higher than the guidelines range and 55 months longer than the national average sentence for his crime. Was the sentence substantively unreasonable?

2. The first question concerns the reliability of evidence district courts may use when imposing a sentence. The Sixth Circuit believed a witness's statement included in a police report, which the witness later retracted under oath, was sufficiently reliable. *Ferguson*, 2018 WL 316261, at *4. The Sixth Circuit also approved the use of dismissed charges and bare arrest records at sentencing hearings. *See id.* at *5.

This question is one of exceptional importance. Today, plea bargaining "*is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (internal quotation marks omitted). Once a defendant decides to plead guilty, the sentencing hearing is the most important part of the criminal proceeding. As the importance of sentencing hearings has increased, the factfinding role of sentencing judges has also expanded. Due process demands that sentencing decisions not be based on materially false or unreliable information. *See United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke,* 334 U.S. 736, 741 (1948)). This case presents an opportunity for the full Court to address the extent to which sentencing courts may rely on hearsay statements and bare arrest records to impose sentences.

The **Sixth Circuit**'s resolution of this question also conflicts with the approach of other federal courts of appeals. Consider, for example, the **Ninth Circuit**'s recent observation that "'a codefendant's confession inculpating the accused is inherently unreliable." *United States v. Pimentel-Lopez*, 859 F.3d 1134, 1144 (9th Cir. 2017), *amending and superseding,* 828 F.3d 1173 (9th Cir. 2016) (quoting *Lee v. Illinois*, 476

U.S. 530, 546 (1986)). This "time-honored teaching" applies with equal force at sentencing and should also be considered and honored when the absent declarant is a suspect. *See id.* The **Third Circuit** requires district courts "rigorously" to consider whether the hearsay offered is sufficiently reliable—particularly when the statements could significantly impact the defendant's sentence. *United States v. Brothers*, 75 F.3d 845, 848–49 (3d Cir. 1996). In the **District of Columbia**, the rule is the same. *United States v. Edwards*, 994 F. Supp. 2d 11, 15–21 (D.D.C. 2014), *aff'd sub nom.*, *United States v. Williams*, 827 F.3d 1134 (D.C. Cir. 2016) (when considering whether the defendant participated in a murder when the only evidence proffered was hearsay statements contained "layers of hearsay"). The **Tenth Circuit** also admonished a district judge for relying on uncorroborated hearsay to conclude that the defendant engaged in felonious conduct even though he was convicted for only a misdemeanor. *See United States v. Fennell*, 65 F.3d 812, 813 (10th Cir. 1995).

The Sixth Circuit's decision to sanction use of bare arrest records and dismissed charges creates a circuit split, as well. The **Third** and **Fifth Circuits** have taken an appropriately strong stance against the use of arrest records for any purpose because an "arrest happens to the innocent as well as the guilty." *United States v. Berry*, 553 F.3d 273, 282 (3d Cir. 2009) (internal quotation marks omitted); *Johnson*, 648 F.3d at 277–78. As the **Fifth Circuit** observed, "an arrest, without more, is quite consistent with innocence," and therefore insufficient to establish any facts by a preponderance of the evidence. *United States v. Johnson*, 648 F.3d 273, 277–78 (5th Cir. 2011) (internal quotation marks omitted). The **Third Circuit** offered an

additional compelling reason to eschew any consideration of a person's arrest record: the need to avoid unwarranted sentencing disparities. In particular, numerous studies, research, and commentary have noted that police are more likely to arrest people of color and those who live in impoverished neighborhoods than white people and those who live in affluent ones. *See generally United States v. Mateo-Medina*, 845 F.3d 546, 552–53 (3d Cir. 2017); *Berry*, 553 F.3d at 285. Thus, "[a] record of a prior arrest may . . . be as suggestive of a defendant's demographics as his/her potential for recidivism or his/her past criminality." *Mateo-Medina*, 845 F.3d at 552–53.

3. Concerning the second question, since 2007, this Court has offered little guidance about how courts of appeals should review the substantive reasonableness of a sentence. The Sixth Circuit's feeble discussion of the sentence imposed here illustrates how impoverished appellate review has become. *See Ferguson*, 2018 WL 316261, at *7. Some courts, like the **Second Circuit**, have scrutinized more carefully within-guidelines sentences for certain criminal offenses. *See generally United States v. Jenkins*, 854 F.3d 181 (2d Cir. 2017) (exploring why within-guidelines sentences for child-pornography offenses may be unreasonable). But what considerations are relevant when appellate courts review the reasonableness of a person's sentence?

This case provides a vehicle to answer that question. Mr. Ferguson's sentence was at the very top of the Guidelines range. He had few criminal convictions and none for violent offenses. His conduct during the commission of the offense was not unusual. Yet the district court imposed a sentence well above the national average for similar offenses. And the district court's decision to make his federal sentence

consecutive to a state sentence pushed the total time Mr. Ferguson must spend in prison above the statutory maximum. This Court can use this case to guide the lower courts of appeals as they review numerous sentences for substantive reasonableness.

4. Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. Undersigned counsel have been working diligently to prepare a petition for certiorari, but significant professional and personal obligations have interfered with their ability to draft the petition. Within the last month counsel has had numerous case deadlines that have interfered with their ability to prepare this petition. For example, Ms. Fitzharris had to reply to six responses to discovery motions, which were heard on April 18, 2018. She must file a petition for certiorari with this court on May 7, 2018 in *Raybon v. United States*, No. 17A914. She also filed two appellate briefs in the Sixth Circuit Court of Appeals. *See United States v. Jones*, No. 18-1108; *United States v. Nakhleh*, No. 18-1107. For the foregoing reasons, the application for a 60-day extension of time, to and including Monday, July 13, 2018, within which to file a petition for a writ of certiorari should be granted.

May 2, 2018

Respectfully submitted,

s/Colleen P. Fitzharris

s/Brandy Yolanda Robinson

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