

NO:
IN THE
SUPREME COURT OF THE UNITED STATES

GREGORY NESBITT,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

APPLICATION FOR EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE
OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT

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INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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GREGORY NESBITT,

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STATE OF FLORIDA DEPARTMENT OF CORRECTIONS,

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PETITIONER'S APPLICATION FOR EXTENSION OF TIME
TO FILE PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Pursuant to Rules 13.5, 22, and 30.3 of the Rules of the Supreme Court of the United States, Gregory Nesbitt respectfully requests a sixty-day extension of time, to and including March 25, 2022, within which to file a petition for a writ of certiorari from the judgment of the United States Court of Appeals for the Eleventh Circuit. Mr. Nesbitt has not previously sought an extension of time and is currently incarcerated.

Basis for Jurisdiction

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 because Mr. Nesbitt was charged in the United States District Court for the Southern District of Florida with an offense against the laws of the United States,

and he filed a motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). On December 29, 2020, the district court denied the compassionate release, disposing of all the claims between the parties to this cause.

Mr. Nesbitt timely appealed to the United States Court of Appeals for the Eleventh Circuit on January 11, 2021. On October 25, 2021, the Court of Appeals affirmed the district court's decision.

Mr. Nesbitt is filing this Application at least ten days before the filing date for a petition for writ of certiorari, which is January 24, 2022. The jurisdiction of the Court will be invoked under 28 U.S.C. § 1254(1).

Judgment to be Reviewed and Opinions Below

The Eleventh Circuit's opinion affirming the district court's denial of Mr. Nesbitt's compassionate release motion is unpublished but reported at 2021 WL 4947105. The slip opinion of that decision is attached as Appendix A.

Reasons for Granting an Extension

In 2002, a jury convicted Mr. Nesbitt of seven counts involving various robbery and drug offenses, and two counts of using and carrying a firearm during and in relation to a crime of violence or drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i). In February 2003, the district court imposed a sentence that totaled 660 months of imprisonment – 55 years – comprised of 360 months concurrent on the non-924(c) counts, and consecutive sentences of 60 and 240 months on the § 924(c) counts, respectively. At the time, not only was the district court

required to sentence Mr. Nesbitt within the mandatory range established by the United States Sentencing Guidelines, *see United States v. Booker*, 543 U.S. 220 (2005), but was also required to “stack” – impose the consecutive sentence totaling 300 months – on the two § 924(c) convictions.

Immediately before imposing sentence, the district court stated, “I do agree that the sentence is harsh. I think it is driven by the guidelines and mandatory sentences. And, frankly, I regret the length of this sentence.” Although the district court added it didn’t disagree with the verdict, it continued, “But I regret the length of the sentence. As [defense counsel] says, there are people in state court that have been convicted of murder and have been sentenced to less than this one.”

At the time Mr. Nesbitt committed his crimes, § 924(c) imposed minimum mandatory consecutive sentences of 5 years for a first violation of § 924(c) and 20 years for a “second or subsequent” offense. The lengthy consecutive sentence applied to every violation of § 924(c) after the first, even if the defendant – like Mr. Nesbitt – (1) had not previously been convicted of a § 924(c) violation, and (2) was charged with multiple § 924(c) violations in the same indictment. That is no longer true. In the First Step Act of 2018, Congress amended § 924(c) to provide that the minimum consecutive penalty of a second or subsequent offense applies only after the first § 924(c) conviction has become final. Pub. L. 115-391, § 403(b), 132 Stat. 5194, 5221-22. Thus, if Mr. Nesbitt were sentenced today, he would face a minimum mandatory sentence of five years for each § 924(c) offense, or a total of 10 years,

rather than the 30 years actually imposed. Unfortunately, Congress did not make the First Step Act's amendments to § 924(c) retroactive, so it offered Mr. Nesbitt no relief. *See id.*, 132 Stat. at 5222.

On December 2, 2020, Mr. Nesbitt filed in the district court a motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). The First Step Act also amended that provision. Previously, only the Director of the Bureau of Prisons could file a compassionate release motion and any reduction was required to be consistent with the Sentencing Commission's applicable policy statements, which are found in United States Sentencing Guideline § 1B1.13. After the First Step Act, amended § 3582(c)(1)(A) allowed defendants to seek compassionate release for "extraordinary and compelling reasons," and four circuits have held that district courts considering § 3582(c)(1)(A) motions filed by defendants are not bound by the criteria listed in § 1B1.13. *See United States v. McCoy*, 981 F.3d 271, 281-83 (4th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *United States v. Jones*, 980 F.3d 1098, 1108-11 (6th Cir. 2020); *United States v. Brooker*, 976 F.3d 228, 234 (2d Cir. 2020).

Mr. Nesbitt's compassionate release motion presented several "extraordinary and compelling reasons," including: (1) his chronic hypertension and asthma, which render him more susceptible to serious infection from the COVID-19 virus, and (2) the length of his stacked § 924(c) sentences and the disparity between the sentence imposed and the sentence Congress deemed appropriate in the First Step Act. The

court of appeals, however, affirmed the district court's denial of the motion, relying on its precedent in *United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021). *See App. At 6-7.* In *Bryant*, the Eleventh Circuit split from its sister circuits to conclude that "1B1.13 is an applicable policy statement that governs all motions under Section 3582(c)(1)(A)," even those filed by defendants instead of the Director of the BOP. *Bryant*, 996 F.3d at 1252-62. In light of this split in the circuits, Mr. Nesbitt has a compelling issue to raise in a petition for writ of certiorari in this Court.

Mr. Nesbitt respectfully requests an additional 60 days in which to file his petition for writ of certiorari in light of the press of undersigned counsel's other cases. Most relevant here, undersigned counsel has been asked to co-counsel her colleague, Assistant Federal Public Defender Andrew Adler, and assist with preparation of the briefs in *Dexter Earl Kemp v. United States*, No. 21-5726. This Court granted the petition for writ of certiorari in *Kemp* on January 10, 2022. *See Kemp v. United States*, ___ S. Ct. ___, 2022 WL 89273 (U.S. Jan. 10, 2022) (Mem.). *Kemp's* brief is due on February 24, 2022. Between now and that due date, *Kemp* will place great demands on undersigned counsel's time.

In addition, undersigned counsel is drafting a petition for writ of certiorari seeking this Court's review of the Eleventh Circuit's decision *Lewis Taylor, Jr. v. Fla. Dep't of Corr.*, No. 21-12587. That certiorari petition is due on February 2, 2022. In 1976, the State of Florida imposed a 129-year sentence on Mr. Taylor for a non-homicide offense he committed when he was 16 years old. Mr. Taylor has

challenged that sentence in a 28 U.S.C. § 2254 habeas corpus petition as a violation of the Eighth Amendment's prohibition against cruel and unusual punishments.

Mr. Nesbitt's certiorari petition is currently due on January 24, 2021. A sixty-day continuance would make the petition fall due on Friday, March 25, 2022. S. Ct. R. 30.1. This request is not for purposes of delay. Rather, undersigned counsel believes that additional time is needed for the careful preparation of the petition for writ of certiorari in this matter. No party will be prejudiced by the grant of a sixty-day extension of time.

WHEREFORE, Petitioner respectfully asks this Honorable Court to grant a sixty-day extension of time within which to file a Petition for Writ of Certiorari, to and including March 25, 2022.

Respectfully submitted,

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