
In The
SUPREME COURT OF THE UNITED STATES
October Term 2022

Joshua Seekins,
Applicant/Petitioner,

v.

United States of America,
Respondent.

Application for Extension of Time Within
Which to File for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPLICATION TO THE HONORABLE JUSTICE
SAMUEL ALITO AS CIRCUIT JUSTICE

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APPLICATION FOR AN EXTENSION OF TIME

Pursuant to Rule 13.5 of the Rules of this Court, Applicant Joshua Seekins hereby requests a 30-day extension of time within which to file a petition for a writ of certiorari, up to and including Monday, March 13, 2023.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *United States v. Seekins*, 21-10556 (5th Cir. Aug. 24, 2022) (attached as Exhibit 1), affirming the decision and the sentence in *United States v. Seekins*, 3:19-CR-563 (N.D. Tex. May 25, 2021) (attached as Exhibit 2).

JURISDICTION

This Court will have jurisdiction over any timely filed petition for certiorari in this case under 28 U.S.C. § 1257(a). Under Rules 13.1, 13.3, and 30.1 of the Rules of this Court, a petition for a writ of certiorari is currently due to be filed on or before February 9, 2023. In accordance with Rule 13.5, this application is being filed more than 10 days in advance of that date.

REASONS JUSTIFYING AN EXTENSION OF TIME

1. Applicant respectfully requests a 30-day extension of time within which to file a petition for a writ of certiorari seeking review of the decision of the Fifth Circuit in this case, up to and including Monday, March 13, 2023.

This case presents substantial issues going to the federal government's constitutional power and the validity of sentencing procedures that affect many people. *First*, this Court has warned that Congress' power under the Commerce

Clause “must be read carefully to avoid creating a general federal authority akin to the police power.” *Nat’l Fed’n Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012). However, Fifth Circuit precedent currently imposes no such limit. Applicant Joshua Seekins, a homeless man with a prior felony conviction, was sentenced to 70 months in prison for possessing two shotgun shells, which he found in a dumpster. Because the shotgun shells had moved across state lines at some time in the past, the Fifth Circuit found that Mr. Seekins had committed a federal felony.

This result is not supported by the case law or the Constitution’s original public meaning, as Judges Ho, Smith, and Engelhardt explained in dissenting from the denial of rehearing en banc below. (See Exhibit 3.) In *United States v. Lopez*, 514 U.S. 549 (1995), this Court found that the Gun Free School Act exceeded Congressional power under the Commerce Clause. The opinion cautions against “convert[ing] congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *Lopez*, 514 U.S. at 567. In the wake of *Lopez*, some circuits nonetheless have held that if a weapon had previously traveled in interstate commerce in any way, including in association with a manufacturer, that was sufficient to establish a nexus. See, e.g., *United States v. Rawls*, 85 F.3d 240 (5th Cir. 1996). These Circuits have pointed to *Scarborough v. United States* in which the Court determined that Congress’ intended nexus was met as long as the weapon had passed through interstate commerce at some point, not at any particular time. 431 U.S. 563, 577 (1977).

Judges in circuits around the country, and Justices of this Court, have questioned the inconsistency of *Lopez* and *Scarborough*. See, e.g., *Alderman v. United States*, 562 U.S. 1163 (2011) (Thomas, J., dissenting from the denial of the petition for writ of certiorari) (joined in relevant part by Scalia, J.) (“If the *Lopez* framework is to have any ongoing vitality, it is up to this Court to prevent it from being undermined by a 1977 precedent that does not squarely address the constitutional issue.”); *United States v. Patton*, 451 F.3d 615, 636 (10th Cir. 2006) (“Like our sister circuits, we see considerable tension between *Scarborough* and the three-category approach adopted by the Supreme Court in its recent Commerce Clause cases”). Multiple courts, including the dissent from the denial of rehearing in this case, have called for this Court to resolve this inconsistency. And this case presents a particularly good vehicle: There is no other conceivable nexus to interstate commerce, and the issue has been preserved throughout.

Second, Applicant suffers an excessively long sentence thanks to a split in the circuits about the scope of appellate review when a district court has applied an erroneous Sentencing Guidelines range but also asserted that, regardless of the correct range, it would impose the same sentence. Most circuits hold that such errors must be corrected and the sentence vacated and remanded for resentencing. But the Fifth Circuit, and two other outlier circuits, allows sentencing decisions to avoid appellate review altogether when the district judge has merely recited boilerplate language that Guidelines errors were immaterial to the analysis. In Applicant’s case, the record shows that the judge did not even reference the correct

Guidelines range in the explanation of the sentence, raising concern that the sentence was based entirely on the erroneous range. Leaving such error unreviewed nullifies the Guidelines as an effective anchor for uniform criminal sentencing.

Given the complexity and importance of these issues, an extension of time will allow counsel to properly analyze the reasoning for the divergent decisions and present a thorough and helpful petition.

2. Applicant has requested that the Northwestern University School of Law Supreme Court Practicum assist in preparing his petition. An extension of time will permit the Practicum's students the time necessary to complete a cogent and well-researched petition during the academic calendar for spring 2023.

3. The extension of time is also necessary because of the press of other client business. Joel Page, the counsel of record in this case, maintains an active practice in the Federal Public Defender's Office for the Northern District of Texas. The current deadline is among five that fall between today and the current due date, including: the instant case, petitions for certiorari in *Olivo-Duron v. United States* (22-10496) and *Wright v. United States*, (21-10548), and initial briefs in *United States v. Rodriguez* (22-10916) and *United States v. Pitz* (22-10313), all in the Fifth Circuit. These commitments are in addition to ongoing supervisory responsibilities toward appellate line attorneys and daily provision of assistance to trial attorneys, both within the Defender organization and among the attorneys appointed pursuant to the CJA.

Jeffrey Green, Co-Director of the Practicum, and the Practicum students have several overlapping commitments representing other clients in this Court, including a petition for writ of certiorari in *Washington v. Shinn* (No. 22-), a reply brief in *Brown v. United States* (No. 22-6389), and three Merits Amicus Briefs in *Smith v. United States* (21-1576), *Arizona v. Mayorkas* (22-592), and *United States v. Hansen* (22-179). Mr. Green also has ongoing, active litigation in the United States District Court for the District of Columbia, the District of Columbia Court of Appeals, the District of Columbia Superior Court, the United States District Court for the District of Delaware, the United States District Court for the District of Utah, the United States District Court for the Eastern District of Pennsylvania, and the Superior Court of the U.S. Virgin Islands.

Tobias Loss-Eaton, Partner at Sidley Austin LLP, will begin parental leave in mid-February; before his leave begins, he is working to complete work on active appeals in the Sixth Circuit, the New York Court of Appeals, and the Pennsylvania Superior Court.

Finally, Xiao Wang, Director of the Practicum, also has several pending matters in the federal courts of appeals. Over the next two months, Professor Wang has an answering brief due in *Dyer v. Fulgam* (22-5608) in the Sixth Circuit, reply briefs due in *Ford v. Reagle* (21-3061) in the Seventh Circuit and *U.S. v. Saffeels* (20-3524) in the Third Circuit, and oral argument in *Stanard v. Dy* (21-35582) in the Ninth Circuit. A 30-day extension would allow Professor Wang to effectively contribute to his pending matters, including this one.

A 30-day extension here would allow counsel the necessary amount of time to effectively contribute to all open matters, including Applicant's petition as well as other client business, and would also allow the Northwestern Practicum students sufficient time for research and drafting efforts per Applicant's request.

CONCLUSION

For the foregoing reasons, Applicant respectfully request that this Court grant an additional extension of 30 days, up to and including Monday, March 13, 2023, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,

/s/ Kevin Joel Page

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