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In The

SUPREME COURT OF THE UNITED STATES

October Term 2022

Shamar Cortez Womack,

Applicant/Petitioner,

v.

United States,
Respondent.

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

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APPLICATION TO THE HONORABLE JUSTICE SAMUEL A. ALITO, JR. AS CIRCUIT JUSTICE

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August 10, 2022

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APPLICATION FOR AN EXTENSION OF TIME

Pursuant to Rule 13.5 of the Rules of this Court, Applicant Shamar Cortez Womack hereby requests a 30-day extension of time within which to file a petition for a writ of certiorari up to and including Wednesday, September 21, 2022.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *United States* v. *Shamar Cortez Womack*, No. 21-10942 (5th Cir. Apr. 11, 2022) (attached as Exhibit 1). The Fifth Circuit denied Applicant's motion for rehearing en banc on May 23, 2022 (attached as Exhibit 2).

JURISDICTION

This Court will have jurisdiction over any timely filed petition for certiorari in this case pursuant to 28 U.S.C. § 1254(1). Under Rules 13.1, 13.3, and 30.1 of the Rules of this Court, a petition for a writ of certiorari was due to be filed on or before August 22, 2022. In accordance with Rule 13.5, this application is being filed more than 10 days in advance of the filing date for the petition for a writ of certiorari.

REASONS JUSTIFYING AN EXTENSION OF TIME

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 United States Court of Appeals for the Fifth Circuit in this case, up to and including September 21, 2022.

1. The Armed Criminal Career Act requires the imposition of a 15-year mandatory minimum consecutive sentence if a defendant who has been found guilty

of violating 18 U.S.C. § 922(g)(1) (prohibiting felons from possessing firearms) has three or more prior and separate convictions of "violent felonies" or "serious drug offenses." The ACCA enhancement was applied in this case on the basis of three predicate felonies—an Arkansas robbery, an Arkansas conviction for murder, and possession of a controlled substance with purpose to deliver. However, "[a] state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense." *Mathis* v. *United States*, 579 U.S. 500, 501 (2016). The Arkansas list of substances currently controlled is broader than the substances controlled by federal statute. For example, the Arkansas schedule of prohibited substances includes "Magic Mint" (*Salvia divinorum* and *Salvinorin A*). Ark. Code Ann. § 5-64-215(a)(4). Neither substance is a controlled substance under federal law. The Arkansas schedule of prohibited substances also defines marijuana more broadly than the federal schedule. Mr. Womack's Arkansas conviction for possession of a controlled substance (marijuana) with intent to deliver does not qualify as a "serious drug offense" under 18 U.S.C. § 924(e) because there is a "realistic probability" that prosecutors could obtain convictions under the Arkansas statute that could not be obtained under the analogous federal statutes. See *Gonzales* v. *Duanas-Alvarez*, 549 U.S. 183, 193 (2007) (defendant must show "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime").

The circuits are divided over how to apply *Duenas-Alvarez*'s "realistic probability" test. In the Eighth Circuit, for example, a defendant can satisfy the test

when, as here, it is "evident from the language of the statute itself" that the state statute could be applied more broadly than the federal analog and, thus, "there [is] no need to provide evidence regarding how [the state] in fact applied it." *Gonzalez* v. *Wilkinson*, 990 F.3d 654, 659–60 (8th Cir. 2021). Another seven circuits have also so held and confine the "reasonable probability" test to the circumstances that spawned it: only where the defendant proposes a novel and non-obvious construction for generic-looking statutory language, must he point to a specific example proving that the state statute reaches further than its text alone would suggest. See *Swaby* v. *Yates*, 847 F.3d 62, 66 (1st Cir. 2017); *Hylton* v. *Sessions*, 897 F.3d 57, 63 (2d Cir. 2018); *Singh* v. *Att'y Gen.*, 839 F.3d 273, 286 n.10 (3d Cir. 2016); *Van Cannon* v. *United States*, 890 F.3d 656 (7th Cir. 2018); *United States* v. *Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc), *abrogated on other grounds by United States* v. *Stitt*, 139 S. Ct. 399 (2018); *United States* v. *Titties*, 852 F.3d 1257, 1274 (10th Cir. 2017); *Ramos* v. *Att'y Gen.*, 709 F.3d 1066, 1072 (11th Cir. 2013).

In an 8-7 en banc opinion, however, the Fifth Circuit held that the "reasonable probability" test requires, in all cases, that a "defendant must point to an actual state case applying a state statute in a nongeneric manner, even where the state statute may be plausibly interpreted as broader on its face." *United States* v. *Castillo-Rivera*, 853 F.3d 218, 224 (5th Cir. 2017) (en banc). Other circuits have acknowledged the split and criticized *Castillo-Rivera*. See *Hylton*, 897 F.3d at 64; *Salmoran* v. *Att'y Gen.*, 909 F.3d 73, 81 (3d Cir. 2018). In Mr. Womack's case, the

Fifth Circuit reiterated its holding in *Castillo-Rivera* and thus further entrenched the split.

Given the complexity and importance of the question presented, an extension of time will allow counsel to properly explicate the reasoning in the various circuits and thereby present a thorough and coherent petition.

2. Applicant has requested that the Northwestern University School of Law Supreme Court Practicum assist in preparing his petition. The Practicum begins its work for the upcoming Term in mid-August. An extension of time will permit the participants the time necessary to complete a cogent and well-researched petition after the beginning of the academic calendar for Fall 2022, which commences August 29, 2022.

3. The extension of time is also necessary because of the press of other client business. For example, in the coming months, the Northwestern Practicum has several overlapping commitments representing other clients in this Court, including petition for writs of certiorari in *Vargas-Soto* v. *United States* (No. 22-), and reply briefs in *McGill* v. *United States* (No. 22-5073) and *Wortham* v. *New York* (No. 21-7703). Mr. Green is also appointed counsel in two D.C. Court of Appeals cases currently briefing and/or preparing for oral argument, *Johnson* v. *United States* (No. 13-CF-493) and *Parker* v. *United States*, (No. 19-CF-1168), [add Proctor, Minor, Neal] and has ongoing, active litigation in the United States District Court for the District of Columbia, 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. A 30-day extension for the Applicant would allow Mr. Green the necessary amount of time to effectively contribute to all open matters including Applicant's petition as well as his other client business abroad, and would also allow the Northwestern Practicum students sufficient time for research and drafting efforts per Applicant's request.

4. In addition, Mr. Loss-Eaton is currently preparing the merits brief for Respondent in this Court in *Mallory* v. *Norfolk Southern Railway*, No. 21-1168. That brief is due on August 26, 2022.

CONCLUSION

For the foregoing reasons, Applicant respectfully request that this Court grant an extension of 30 days, up to and including September 21, 2022, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,

/s/ Jeffrey T. Green

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