

No. \_\_\_\_\_

IN THE  
Supreme Court of the United States

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STEPHEN DUANE BURGESS,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

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**Unopposed Application for Extension of Time  
to File a Petition for Writ of Certiorari**

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To the Honorable Elena Kagan  
Associate Justice of the United States Supreme Court  
and Circuit Justice for the Ninth Circuit

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**To the Honorable Elena Kagan, Associate Justice of the United States  
Supreme Court and Circuit Justice for the Ninth Circuit:**

Applicant-Defendant Stephen Duane Burgess (“Mr. Burgess”) respectfully requests an extension of time to file a petition for writ of certiorari under Supreme Court Rule 13.5. As explained below, the current deadline for Mr. Burgess to file his petition is November 24, 2022. Because that is a federal holiday and the Court is closed on November 25, 2022, his filing is actually due on November 28, 2022. For good cause set forth herein, Mr. Burgess is requesting an extension to December 26, 2022, to file his petition for a writ of certiorari. The United States does not oppose this request for an extension.

**Background and Procedural History**

Mr. Burgess pled guilty to and was convicted in 2015 of Discharge of a Firearm During the Commission of a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(A), and Second Degree Murder, in violation of 18 U.S.C. §§ 1111 and 1153. The latter offense was the predicate “crime of violence” for the former offense. He pled guilty after the Court denied a pretrial motion to suppress his confession for alleged *Miranda* violations. Additionally, he moved to dismiss the indictment pretrial based on a Sixth Amendment claim of underrepresentation of Latinos in the jury pool (affecting both his grand jury and a prospective trial jury) due to systemic practices by the district court; the district court denied this motion. The district court sentenced Mr. Burgess to a total

term of 384 months (32 years)—the 10-year mandatory minimum on the 924(c) count and 264 months consecutive on the murder count.

On direct appeal to the Ninth Circuit, Mr. Burgess presented four arguments: 1) the district court erred in denying his motion to suppress his statements to law enforcement; 2) the district court erred in denying his motion to dismiss based on the underrepresentation of Latinos in the jury pool; 3) his § 924(c) conviction must be vacated because second degree murder under 18 U.S.C. § 1111 is not a “crime of violence”; and 4) his 22-year sentence for second degree murder was substantively unreasonable. Mr. Burgess’ direct appeal involved extensive briefing, oral argument, and numerous stays to await and consider this Court’s rulings in *Lynch v. Dimaya*, 137 S. Ct. 31 (2016), *Voisine v. United States*, 136 S. Ct. 2272 (2016), *United States v. Davis*, 139 S. Ct. 2319 (2019), and *Borden v. United States*, 141 S. Ct. 1817 (2021), as well as a ruling from the *en banc* Ninth Circuit in *United States v. Begay*, 33 F. 4th 1081 (9th Cir. 2022).

Following all of that, the panel issued a memorandum opinion affirming his conviction and sentence on August 26, 2022.<sup>1</sup> The panel found that the district court did not err in denying either the motion to suppress or the motion to dismiss, that his conviction for second degree murder was a sufficient “crime of violence” § 924(c) predicate offense (relying on *Begay*), and that his sentence was not substantively unreasonable. In sum, the Ninth Circuit rejected all of Mr. Burgess’ arguments. The

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<sup>1</sup> See Attachment A.

Ninth Circuit further denied Mr. Burgess' motion to stay the mandate. Mr. Burgess did not file a petition for rehearing with the Ninth Circuit.

### **Opinion Below**

The Ninth Circuit's memorandum opinion is attached as Appendix A. As noted above, the Ninth Circuit has affirmed Mr. Burgess' convictions and sentence.

### **Jurisdiction**

This Court has jurisdiction under 28 U.S.C. § 1254.

### **Reasons Extension of Deadline is Justified**

Under Supreme Court Rule 13, Mr. Burgess' petition for a writ of certiorari to this Court is due by November 24, 2022, 90 days from when the memorandum was filed. Because that deadline falls on Thanksgiving, a federal holiday, and the Court is closed the following day, his actual filing deadline is November 28, 2022. Mr. Burgess seeks an extension until December 26, 2022, to file his petition for a writ of certiorari.

Mr. Burgess' appeal presents several distinct issues of significance that will be presented in his petition for certiorari. Likely the most prominent issue potentially justifying a grant of a writ of certiorari is whether second degree murder under 18 U.S.C. § 1911 qualifies as a "crime of violence" to support a conviction under 18 U.S.C.

§924(c). This Court has not yet addressed that question directly and conclusively, and there appears to be an active split amongst the circuit courts on this issue. Counsel seeks the requested extension of the deadline primarily because counsel needs additional time to research this issue and its current status across all circuits. As the Court will surely agree, identifying a potential circuit split on such a significant issue will provide this Court a much stronger basis to grant certiorari in Mr. Burgess' appeal.

Counsel is also requesting this extension because counsel is currently preparing and drafting a separate petition for a writ of certiorari in another appeal, *United States v. Bastide-Hernandez*, which is due on November 29, 2022. Due to his obligations on that appeal and other active cases, counsel does not feel he can adequately prepare, draft, and file Mr. Burgess' petition by the current deadline. Counsel anticipates the requested extension to December 26, 2022, would provide him adequate time to file Mr. Burgess' petition.<sup>2</sup>

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<sup>2</sup> Counsel is not seeking a longer extension, which is permissible up to an additional 60 days, because counsel anticipates being out of the office on paternity leave in January 2023. Counsel therefore is only seeking a partial extension within the 60 days that this Court's rules permit so that he may submit Mr. Burgess' petition before going on paternity leave.

Given the paramount importance of the issues presented in Mr. Burgess' appeal, particularly whether second degree murder is a "crime of violence" predicate offense for a charge under 18 U.S.C. § 924(c), counsel believes the requested extension is reasonable, necessary, and appropriate.

**Position of the United States**

Mr. Burgess' counsel has communicated with counsel for the United States, who has indicated they have no objection to the requested extension of the deadline for Mr. Burgess to file a petition for a writ of certiorari.

**CONCLUSION**

For the reasons set forth herein, Mr. Burgess respectfully requests an extension of time to file his petition for a writ of certiorari under Rule 13.5. Specifically, Mr. Burgess requests an extension until December 26, 2022, to file his petition for certiorari.

Dated: November 21, 2022.

s/ Paul Shelton  
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**Proof of Service**

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STATE OF WASHINGTON )

COUNTY OF YAKIMA )

Paul E. Shelton, being first duly sworn, deposes and says:

I am employed by the Federal Defenders of Eastern Washington and Idaho as counsel appointed to represent petitioner;

That this Application for Extension of Time to File a Petition for Writ of Certiorari is made pursuant to my obligations to represent indigent defendants in federal court and at the request of the petitioner;

On November 21, 2022, the Application for an Extension Petition for Writ of Certiorari in the above-entitled case was sent by United States mail to the Clerk of the

Supreme Court within the time allowed for filing, including one original and two copies in compliance with Supreme Court Rule 22.2;

An additional copy of the Application was served on counsel for Respondent by placing the same in the United States mail addressed to:

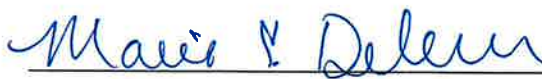
The Honorable Elizabeth Prelogar  
Solicitor General of the United States  
Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Mr. Thomas J. Hanlon  
Assistant United States Attorney  
402 E Yakima Avenue, Suite 210  
Yakima, WA 98901



Paul E. Shelton, Affiant

Subscribed and Sworn to before me this 21st day of November, 2022.



Notary Public in and for Yakima County, Yakima, Washington.

Commission Expires: 5-13-2024