No. _____

In the Supreme Court of the United States

DYLAN GREGORY KERSTETTER,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), Dylan Gregory Kerstetter seeks leave to file the accompanying Application to Extend the Deadline to File a Petition for Certiorari without prepayment of costs and to proceed *in forma pauperis*. Mr. Kerstetter was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), both in the United States District Court for the Northern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit. I have included a copy of the district court's appointment order on page 9a of the Appendix to the Application.

Respectfully submitted on March 29, 2024.

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APPLICATION TO EXTEND THE DEADLINE TO FILE A PETITION FOR WRIT OF CERTIORARI

To: The Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court and Circuit Justice for the Fifth Circuit.

Applicant Dylan Gregory Kerstetter respectfully requests that the Court extend the deadline to file a Petition for a Writ of Certiorari in this case to June 7, 2024. *See* 28 U.S.C. § 2101(c); S. Ct. R. 13.5.

Basis for Jurisdiction

This Court will have jurisdiction to review the Fifth Circuit's judgment under 28 U.S.C. § 1254(1). The Fifth Circuit issued its judgment on September 25, 2023. *See* Appendix, *infra*, 2a. The court considered and denied Mr. Kerstetter's petition for rehearing on January 11, 2024. App. 1a. Absent extension, the petition for certiorari would be due April 10, 2024.

Judgment to be Reviewed and Opinion Below

The Fifth Circuit's opinion is published at 82 F.4th 437 and is reprinted on pages 3a–8a of the Appendix. The judgment is reprinted on page 2a, and the order denying rehearing is reprinted at page 1a.

Reasons for Granting an Extension

The Fifth Circuit affirmed the district court's decision to sentence Dylan Gregory Kerstetter under the Armed Career Criminal Act, 18 U.S.C. § 924(e). The court then denied Mr. Kerstetter's petition for rehearing. The Fifth Circuit's opinion passed on numerous issues that have divided the circuits. I need additional time to research and write an adequate petition for certiorari.

A. This case presents several plausible grounds for certiorari.

1. Mr. Kerstetter argued below that he could not be sentenced under the Armed Career Criminal Act, 18 U.S.C. § 924(e), because his indictment did not allege, his guilty plea did not admit, and no jury found that three predicate convictions were for crimes committed on different occasions. Relying on its decision in *United States v. Valencia*, 66 F.4th 1032, 1033 (5th Cir. 2023), the Fifth Circuit rejected that argument. App. 5a–6a. This Court granted certiorari to decide that question in *Erlinger v. United States*, 144 S. Ct. 419 (2023). The case was argued earlier this week.

2. Two additional cases, consolidated by order of the Court, will also affect the Court's resolution of this petition. In *Brown v. United States*, 143 S. Ct. 2458 (2023), and *Jackson v. United States*, 143 S. Ct. 2457 (2023), the Court will decide whether the ACCA's "serious drug offense" definition, 18 U.S.C. § 924(e)(2)(A), incorporates the federal controlled substances schedules as of the date of the prior offense, the date of the federal firearm possession offense, or the date of the federal sentencing. *Jackson* is especially salient; the defendant there argues that his 1998 and 2004 "cocaine" convictions from Florida were not ACCA predicates because, at

that time, Florida controlled ioflupane. Before 2015, ioflupane was federally controlled as a derivative of cocaine. The Government de-scheduled ioflupane in 2015, and many states followed its lead. *See Schedules of Controlled Substances: Removal of [^{123}I] Ioflupane from Schedule II of the Controlled Substances Act*, 80 Fed. Reg. 54,715 (Sept. 11, 2015); *see also*, e.g., *Amendment to the Tex. Controlled Substances Schedule*, 40 Tex. Reg. 8050 (Nov. 13, 2015).

3. In this case, Mr. Kerstetter argued that his two Texas drug-delivery convictions were for offenses broader than the ACCA's "serious drug offense" definition. App. 5a, 7a–8a. One of the convictions was specifically identified as a 1993 delivery of "cocaine." App. 5a. The other was charged as a "methamphetamine" delivery in 2013. *Ibid.* At sentencing, the district court ruled that Texas's "Penalty Group 1," which includes both "cocaine" and "methamphetamine," is indivisible. 5th Cir. R. 264–267. The Fifth Circuit did not disturb that ruling on appeal. App. 3a–9a. If this Court decides that the "serious drug offense" definition incorporates the federal schedules as of the date of the federal offense (or as of the date of the federal sentencing), then Mr. Kerstetter's Texas "cocaine" conviction would surely be overbroad. Both of the Texas drug convictions preceded the Texas and federal decisions to de-schedule ioflupane in 2015.

4. Aside from the ioflupane/timing issue, the Fifth Circuit acknowledged that Texas's definition of "cocaine" sweeps broader than the federal CSA because Texas controls the *position* isomers of cocaine. App. 8a (citing *Alexis v. Barr*, 960 F.3d 722, 726–27 (5th Cir. 2020)).

a. In the Second, Seventh, and Eighth Circuits, that would be enough to avoid the ACCA. *See United States v. Minter*, 80 F.4th 406, 412 (2d Cir. 2023); *United States v. Myers*, 56 F.4th 595, 598–99 (8th Cir. 2022); *United States v. Turner*, 55 F.4th 1135, 1142–43 (7th Cir. 2022); *United States v. Oliver*, 987 F.3d 794, 807 (8th Cir. 2021); *United States v. Ruth*, 966 F.3d 642, 645–47 (7th Cir. 2020).

b. But the Fifth Circuit has held that a party claiming overbreadth must *always* point to an actual case where the state applied its overbroad statute to facts outside the federal definition—even where the statute's elements are plainly broader than the relevant definition. Relying on that circuit-specific precedent, the court rejected Mr. Kerstetter's argument because he did not "identify" an "actual case where Texas brought charges against someone under [Tex. Health & Safety Code] Section 481.112 for delivery of position isomers of cocaine." App. 8a. Fifth Circuit judges have acknowledged that its universal and "rigid" demand for an "actual case" gives rise to a "circuit split." *See Alexis*, 960 F.3d at 734 (Graves, J., concurring) ("[P]erhaps the Supreme Court can resolve the circuit split and add clarity in light of its decisions in [*Mellouli v. Lynch*, 575 U.S. 798 (2015)], and [*Mathis v. United States,* 579 U.S. 500 (2016)].").

c. Mr. Kerstetter *did* identify cases where defendants pleaded guilty to illegally possessing "cocaine position isomers," and Texas courts accepted the pleas and entered convictions for possession of a penalty-group-1 substance. 5th Cir. R. 110–111 (discussing *State v. Santos* in Harris County and *State v. Rueda Aguilar* in

Dallas County). Even that was insufficient for the Fifth Circuit—because the cases did not involve "delivery." App. 8a.

5. The Fifth Circuit also applied its "rigid" actual-case requirement to reject Mr. Kerstetter's challenge to counting his Texas burglary convictions. Pet. App. 6a (citing *United States v. Herrold*, 941 F.3d 173, 182 (5th Cir. 2019) (en banc)). Texas and a small handful of other states expanded the traditional definition of burglary to reach commission of a reckless, negligent, or even strict liability crime inside the premises while trespassing. *See* Tex. Pen. Code § 30.02(a)(3). This Court reserved judgment on whether that kind of crime is a generic burglary under the ACCA in *Quarles v. United States*, 139 S. Ct. 1872, 1880 n.2 (2019). The Seventh Circuit has held that the trespass-plus-crime theory is nongeneric because it reaches reckless, negligent, and strict-liability crimes for which the trespasser never formed specific intent. *See Van Cannon v. United States*, 890 F.3d 656, 664 (7th Cir. 2018); *see also Chazen v. Marske*, 938 F.3d 851, 860 (7th Cir. 2019) ("Our course of analysis is unaffected by the Supreme Court's most recent decision in *Quarles*."). The Eighth Circuit disagreed. *United States v. Hutchinson*, 27 F.4th 1323, 1327–28 (8th Cir. 2022); *but see id.* at 1330 (Kelly, J., dissenting). In *Herrold*, 641 F.3d at 182, the Fifth Circuit held that the defendant must point to an "actual case" in which the burglar did not, in fact, form specific intent to commit the predicate crime. If this Court resolves the realistic probability question in Mr. Kerstetter's favor, then the Fifth Circuit will need to decide whether a trespasser's commission of a reckless assault, negligent injury-to-child, or even a strict liability felony would be a generic burglary.

B. Mr. Kerstetter's counsel needs additional time to narrow the issues and prepare the petition.

I will not have an opportunity to prepare a focused and adequate petition under the current deadline. I was in another city participating in a trial on March 14 and March 17–22. I was fully engaged preparing for the trial and unable to work on any of my assigned appeals. In addition to this case, I have eight appeals with Opening Brief deadlines between now and the end of April.

I hope that the Court will resolve *Erlinger* and *Jackson*/*Brown* before the extended deadline requested in this application. That would narrow the potential issues for a certiorari petition. If those cases are still pending, I will need more time to decide between the potential issues and to address how the Court should resolve the petition depending on how those cases will be decided.

CONCLUSION

Mr. Kerstetter asks this Court to extend the deadline to file a petition for certiorari to June 7, 2024. That date falls 58 days after the current deadline of April 10.

Respectfully submitted on March 29, 2024,

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