

No. 24A1015

In the Supreme Court of the United States

BRANDON PHILLIPS,
Applicant,

v.

UNITED STATES,
Respondent.

**APPLICATION FOR A FURTHER EXTENSION OF TIME IN WHICH
TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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To: The Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Eighth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, Applicant Brandon Phillips respectfully requests that the time to file a petition for writ of certiorari in this matter be extended by an additional 21 days, to and including June 18, 2025.

The Eighth Circuit entered its judgment and issued an opinion in support of the judgment on December 23, 2024. Mr. Phillips timely petitioned for rehearing or rehearing en banc on January 6, 2025. The Eighth Circuit denied the petition on January 28, 2025. On April 21, Justice Kavanaugh extended the time for filing a petition to May 28, 2025. This Application is filed more than ten days prior to that date.

The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). Attached are copies of the Eighth Circuit's panel opinion (Exhibit 1) and its Order denying Mr. Phillips's petition for rehearing or rehearing en banc (Exhibit 2).

BACKGROUND

Mr. Phillips pleaded guilty to a charge of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court sentenced him to ten years of imprisonment, three years of supervised release, and a lifetime ban on federal benefits based on five prior convictions, four of which involved possession of

marijuana, including one conviction that belonged to a different individual also named Brandon Phillips.

An amendment to the Missouri Constitution, which was in effect at the time of sentencing, legalized the use of limited amounts of marijuana and mandated the retroactive expungement of most prior marijuana-related convictions in Missouri. The district court failed to consider the effects of the Missouri Constitution on Mr. Phillips's sentence. The primary issue presented is whether Mr. Phillips's prior state marijuana-related convictions, which have been expunged pursuant to the Missouri Constitution, constitute predicate offenses under §§ 2K2.1 and 4A1.1 of the federal Sentencing Guidelines.

On appeal, the US Court of Appeals for the Eighth Circuit vacated the ban on federal benefits and affirmed the prison sentence without ruling on the issue of the Missouri Constitution's provision mandating the expungement of Mr. Phillips's marijuana-related convictions. Taking Mr. Phillips's expunged convictions into account would lower his Criminal-History Category by four levels to Category II, which corresponds to a Guidelines range of 41–51 months, rather than the 120 months he received.

REASONS FOR GRANTING AN EXTENSION OF TIME

An additional 21-day extension of time is needed for the undersigned counsel to consult with Mr. Phillips and to prepare and file a petition for writ of certiorari.

1. Counsel for Mr. Phillips anticipates that the petition for certiorari will present important questions concerning the interplay between the federal Sentencing

Guidelines and the legalization of marijuana under a State Constitution, namely, whether a marijuana conviction that has been set aside and vacated pursuant to a State Constitutional Amendment is an “expunged” conviction under USSG § 4A1.2(j)—which expressly states that “[s]entences for expunged convictions are not counted”—and, therefore, should not be included in determining a defendant’s criminal history. The circuit courts are split on the issue of whether expunged convictions should count under the Sentencing Guidelines. The First, Eighth, and Tenth circuits’ expungement analysis focuses on whether the conviction was set aside because of innocence or errors of law. *See United States v. Townsend*, 408 F.3d 1020, 1025 (8th Cir. 2005); *United States v. Dobovsky*, 279 F.3d 5, 10 (1st Cir. 2002); *United States v. Hines*, 133 F.3d 1360, 1366 (10th Cir. 1998). In contrast, the Second, Third, and Ninth Circuits focus on the statutory purpose and whether the legislature intended to eliminate any trace of the past proceeding such that the vacated conviction is treated as if it never occurred. *See United States v. Beaulieu*, 959 F.2d 375, 380 (2d Cir. 1992); *United States v. Doe*, 980 F.2d 876, 882 (3d Cir. 1992); *United States v. Hidalgo*, 932 F.2d 805, 807 (9th Cir. 1991). The circuit split is clear and has become entrenched in the case law. The issue is of particular importance because a majority of States have decriminalized the use of marijuana and multiple States have enacted laws mandating expungement of marijuana-related convictions.

2. The additional time is needed because Mr. Phillips’s counsel have had and continue to have other significant obligations in the time period leading up to and following the current deadline, including upcoming early June deadlines related

to the close of fact discovery in a case pending in the District of Delaware, and the close of expert discovery in a case pending in the Eastern District of New York. This case presents weighty and complex issues, and the undersigned counsel requires additional time to prepare the petition in this case.

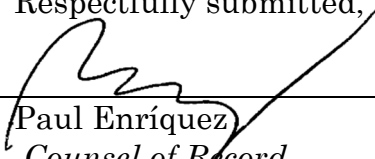
3. In addition, Mr. Phillips currently resides at a Federal Correctional Institution in Manchester, Kentucky (FCI Manchester). The undersigned counsel were only recently able to communicate with Mr. Phillips after a period of no communication from January to April, despite multiple requests for legal calls. The requested final extension is necessary to afford sufficient time for counsel to communicate with Mr. Phillips and to prepare and file the petition.

3. The requested 21-day extension would impose no additional burden or prejudice on the parties.

CONCLUSION

Accordingly, Mr. Phillips respectfully requests that the time within which he may file a petition for a writ of certiorari be extended by 21 days to, and including, June 18, 2025.

Respectfully submitted,



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