

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.

Respectfully submitted on November 14, 2025.

J. MATTHEW WRIGHT
Counsel of Record
Federal Public Defender's Office
Northern District of Texas
600 South Taylor Street, Suite 2300
Amarillo, Texas 79101
(806) 324-2370
matthew_wright@fd.org

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APPLICATION TO EXTEND THE DEADLINE
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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 December
19, 2025. *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 April 10, 2025. *See*
Appendix, *infra*, 2a–3a. The court considered and denied Mr. Kerstetter’s petition for
rehearing on August 25, 2025. App. 1a. Absent extension, the petition for certiorari
would be due November 24, 2025. This application is filed ten days before that date.

Judgment to be Reviewed and Opinion Below

The Fifth Circuit’s most recent opinion was not selected for publication. It is
reprinted on pages 4a–11a of the Appendix. The judgment is reprinted on pages 2a–
3a, 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. There is good cause to grant this request because the case involves an important issue that has divided the circuits, and because an unusual press of work has prevented Mr. Kerstetter’s counsel from completing an adequate petition.

A. This case involves a substantial and recurring issue that has divided the circuits.

This case involves an important issue that has divided the circuits. The question concerns the “categorical approach,” which governs the analysis of prior convictions under the ACCA and several other criminal and immigration statutes. “Under that by-now-familiar method, applicable in several statutory contexts, the facts of a given case are irrelevant. The focus is instead on whether the elements of the statute of conviction meet the federal standard.” *Borden v. United States*, 593 U.S. 420, 424 (2021). “If any—even the least culpable—of the acts criminalized do not” satisfy the federal definition, the conviction “cannot serve as an ACCA predicate.” *Id.* (citing *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

The question here is whether a defendant convicted under a state law that plainly criminalizes conduct outside the federal definition must point to actual state-court prosecutions that demonstrate a “realistic probability” that state prosecutors *would* apply the law to those facts. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

In most circuits, the answer is negative—where a statute plainly reaches conduct outside the federal definition, there is no need to look for actual prosecutions involving those facts. *See, e.g., 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); *Gordon v. Barr*, 965 F.3d 252, 261 (4th Cir. 2020); *United States v. Cervenak*, 135 F.4th 311, 327 (6th Cir. 2025); *Aguirre-Zuniga v. Garland*, 37 F.4th 446, 450 (7th Cir. 2022); *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147–48 (9th Cir. 2020); *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 the Fifth Circuit, however, a defendant cannot rely on statutory text alone: “It is incumbent on the defendant to point to ‘cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.’ This is so ‘even where the state statute may be plausibly interpreted as broader on its face.’” *United States v. Herrold*, 941 F.3d 173, 179 (5th Cir. 2019) (en banc) (quoting *United States v. Castillo-Rivera*, 853 F.3d 218, 222 & 224 n.4 (5th Cir. 2017) (en banc)); *see App., infra*, 10a.

Mr. Kerstetter urged the court below to join the majority. He also argued that this Court’s recent decisions had overruled *Castillo-Rivera* and *Herrold*. The court below rejected those arguments. *App., infra*, 10a–11a.

B. Due to a heavy press of work, Mr. Kerstetter’s counsel needs additional time to prepare the petition.

Mr. Kerstetter’s attorney will not be able to complete the petition by November 24. He maintains a heavy docket of direct criminal appeals at the Fifth Circuit, and

many deadlines happen to fall in November. In addition to Mr. Kerstetter's case, the attorney is currently working on seven appeals with November deadlines: five opening briefs, one reply brief, and one response to dispositive motion. Some of those deadlines will have to be extended into December. Two additional opening briefs and one petition for certiorari are due in December. By granting this application, the Court would allow undersigned counsel to complete an adequate petition without compromising the quality of representation in all those other pending appeals.

CONCLUSION

Mr. Kerstetter asks this Court to extend the deadline to file a petition for certiorari to December 19. That date falls 25 days after the current deadline.

Respectfully submitted on November 14, 2025,

J. MATTHEW WRIGHT
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