

No. _____

In the Supreme Court of the United States

ELROY WILKERSON, *APPLICANT*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*.

**APPLICATION FOR EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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

1. Petitioner Elroy Wilkerson requests a 30-day extension of time to file his petition for certiorari in this Court to and including April 30, 2025. *See* 28 U.S.C. § 2101(c); Sup. Ct. R. 13.5, 22, 30. The final judgment of the Fifth Circuit was entered on December 30, 2024, and Petitioner’s time to petition for certiorari in this Court expires March 31, 2025. This application is being filed more than 10 days before that date.

A copy of the opinion below, which is reported at 124 F.4th 361, is attached. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1).

2. As shown by the opinion below, this case involves the statutory interpretation of “sexually explicit conduct” under 18 U.S.C. § 2256(2)(A), and more

specifically, “lascivious exhibition” under 18 U.S.C. § 2256(2)(A)(v), which was an element of the offenses for which Petitioner was convicted. The court of appeals held that “lascivious exhibition” means a “depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexually stimulation in the viewer,” and that “lasciviousness” can be determined by applying six factors first identified in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff’d*, 813 F.2d 1231 (9th Cir. 1987). *Wilkerson*, 124 F.4th at 366–67, 369. This definition raises an important question about the meaning of a federal statute that is at odds with this Court’s decision in *United States v. Williams*, 553 U.S. 285 (2008), and in direct conflict with *United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2022).

3. Petitioner was represented in the district court and court of appeals by the Federal Public Defender for the Western District of Texas and is represented in this Court by Assistant Federal Public Defender Kristin L. Davidson, a member of the Bar of this Court. Since the Fifth Circuit handed down its decision on December 30, counsel has been engaged in many matters in this Court and the Fifth Circuit, limiting the amount of time she has been able to devote to preparing the petition in this case. Counsel has filed nine briefs in the Fifth Circuit, as well as one petition for certiorari and a reply to a brief in opposition in this Court. Counsel also had an oral argument before the en banc Fifth Circuit. Between now and the current March 31, 2025, deadline, counsel

has seven opening briefs and two anticipated reply briefs due in the Fifth Circuit, and an oral argument before the Fifth Circuit on March 31, 2025. And between March 31 and April 30, 2025, counsel has three opening briefs due in the Fifth Circuit and one petition for certiorari in this Court, with more briefing notices likely to issue during that time.

For these reasons, Petitioner respectfully requests that an order be entered extending his time to petition for certiorari in the above-captioned case to and including April 30, 2025.

Respectfully submitted,

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KRISTIN L. DAVIDSON
Assistant Federal Public Defender
Counsel of Record
OFFICE OF THE FEDERAL
PUBLIC DEFENDER
WESTERN DISTRICT OF TEXAS

Counsel for Petitioner

February 27, 2025

CERTIFICATE OF SERVICE

I, a member of the Bar of this Court, certify that on February 27, 2025, I served a copy of this Application on Counsel for the United States on all parties required to be served by enclosing a copy of each in an envelope and delivering it to FedEx, a third party commercial carrier, for delivery within three calendar days to:

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