IN THE SUPREME COURT OF THE UNITED STATES

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No. 19A-_____

UNITED STATES, APPLICANT

v.

JEFFERY HAVIS

_____

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Pursuant to Rules 13.5 and 30.3 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully requests a 30-day extension of time, to and including October 4, 2019, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. The en banc court of appeals entered its judgment on June 6, 2019. Unless extended, the time within which to file a petition for a writ of certiorari will expire on September 4, 2019. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). Copies of the en banc and panel opinions are attached.

1. Following a guilty plea in the United States District Court for Eastern District of Tennessee, respondent was convicted on one count of possessing a firearm after a felony conviction, in

violation of 18 U.S.C. 922(g)(1). The district court calculated his advisory Sentencing Guidelines range as 46 to 57 months, based in part on the court's determination that respondent's prior felony conviction under Tennessee law for selling and/or delivering cocaine, in violation of Tenn. Code Ann. § 39-17-417(a) (1997), qualified as a "controlled substance offense" for Guidelines purposes. See App., infra, 2a; Gov't C.A. Br. 2-3. The court sentenced respondent to 46 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

2. A divided panel of the court of appeals affirmed. App., infra, 7a-17a. The panel rejected respondent's argument that his Tennessee conviction did not qualify as a "controlled substance offense" for Guidelines purposes because the Tennessee statute could be violated by "attempting to transfer drugs." Id. at 9a; see Tenn. Code Ann. §§ 39-17-402(6), 39-17-417(a) (1997).

The Guidelines define a "controlled substance offense" to mean "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance * * * or the possession of a controlled substance * * * with intent to manufacture, import, export, distribute, or dispense." Sentencing Guidelines § 4B1.2(b) (2016). An application note in the accompanying commentary states that the term "'controlled substance offense' include[s] the

offenses of aiding and abetting, conspiring, and attempting to commit such offenses." Id. § 4B1.2, comment. (n.1) (emphasis omitted). The court of appeals had relied on that commentary in a prior case, which the panel found to be controlling here, to interpret "the Guidelines's definition of 'controlled substance offense' to include attempts." App., infra, 9a (citing United States v. Evans, 699 F.3d 858, 866-867 (6th Cir. 2012)). Judges Stranch and Thapar each filed separate concurring opinions questioning circuit precedent, and Judge Daughtrey dissented. Id. at 18a-26a.

3. The court of appeals granted respondent's subsequent petition for rehearing en banc and -- without the benefit of additional briefing or argument -- vacated the panel decision. App., infra, 34a. In a six-page per curiam decision, the court overruled Evans, concluded that "the attempted delivery of a controlled substance" is not a "'controlled substance offense'" as defined by Section 4B1.2(b) of the Guidelines, and remanded for resentencing. Id. at 3a; see id. at 1a-6a. In the court's view, the commentary interpreting that definition to include attempts was an improper effort "to add an offense not listed in the guideline," without complying with the "congressional review and notice and comment" requirements for amending the Guidelines. Id. at 6a; see 28 U.S.C. 994(p) and (x).

The government sought reconsideration, explaining that the commentary had in fact been subject, on numerous occasions, to notice-and-comment and congressional-review procedures. Gov't C.A. Mot. for Recons. 3-8. The government also maintained that the commentary's inclusion of attempt offenses is a reasonable interpretation of the definition of "controlled substance offense" in Section 4B1.2(b), because the guideline definition includes "distribution" offenses and was adopted against a background understanding -- reflected in the Controlled Substances Act, 21 U.S.C. 801 et seq. -- that distribution offenses include attempts. See Gov't C.A. Mot. for Recons. 9 (discussing 21 U.S.C. 802(8) and (11), which define "'distribut[ion]'" to include "deliver[y]," and "'delivery'" to include "actual, constructive, or attempted transfer"). Finally, the government observed that the court of appeals' decision "widened an inter-circuit split about whether attempt offenses are controlled substance offenses under [Section] 4B1.2(b)." Id. at 2 (footnote omitted); see id. at 2 n.2 (collecting cases).

The en banc court of appeals denied the government's motion for reconsideration. App., infra, 27a-28a. Judge Sutton concurred in the denial. Id. at 29a-33a. Although he disagreed with the government's argument that the term "distribution" generally includes attempts in this context, he acknowledged that both the Controlled Substances Act and Tennessee law define the "'attempted

transfer' of drugs" as a form of drug distribution. Id. at 30a; see id. at 32a.

4. The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. Additional time is needed for further consultation with other components of the Department of Justice and, if a petition is authorized, to permit its preparation and printing.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

AUGUST 2019