No. 21A_____

IN THE

Supreme Court of the United States

LENAIR MOSES, A/K/A BONES,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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APPLICATION

To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States and Circuit Justice for the Fourth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicant Lenair Moses respectfully requests a 60-day extension of time within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case. Because the 60th day after the current deadline for seeking certiorari falls on Saturday, August, 20, 2022, the 60-day extension would make the petition due on Monday, August 22, 2022.

1. The Fourth Circuit panel issued its decision on January 19, 2022. *See United States* v. *Moses*, 23 F.4th 347 (Appendix A). Applicant timely sought rehearing en banc. The United States opposed rehearing en banc, but agreed that panel rehearing was warranted. In a sharply divided vote, the Fourth Circuit denied panel rehearing and rehearing en banc on March 23, 2022 (Appendix B). Unless extended, the time to file a petition for certiorari will expire on June 21, 2022. This application is being filed more than ten days before a petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. Police in Raleigh enlisted a confidential informant to buy crack cocaine from Applicant Lenair Moses on two occasions in October 2018. The total cocaine at issue—less than half a gram—was sold for $40. App. 4a. Moses pled guilty to two counts of distributing a controlled substance in violation of 21 U.S.C. § 841(a)(1). The probation officer recommended that Moses be sentenced as a "career offender" under

Section 4B1.1 of the Sentencing Guidelines, which imposes a sentencing enhancement if, among other things, a defendant "has at least two prior felony convictions" for controlled substance offenses. U.S.S.G. § 4B1.1(a). One of the prior convictions relied on by the probation officer was a 2013 guilty plea for selling crack cocaine in Raleigh. The proposed career-offender enhancement increased Moses's Guidelines range six-fold—from 24–30 months to 151–188 months.

3. Moses objected to the career-offender recommendation. To qualify as a career-offender predicate, a prior conviction cannot involve "relevant conduct" to the current offense. *See* U.S.S.G. § 1B1.3(a)(2) (capitalization altered); *see also id.* §§ 4A1.2(a)(1); 4B1.2(c). The Guidelines define "relevant conduct" to include acts "that were part of the same course of conduct or common scheme or plan as the offense of conviction." *Id.* § 1B1.3(a)(2). Moses explained that his 2013 guilty plea involved relevant conduct because the act at issue—the sale of a small amount of crack cocaine in Raleigh—was part of the same course of conduct as the similar act underlying his current offense—the sale of a small amount of crack cocaine in Raleigh. The Government, by contrast, urged the trial court to impose a career-offender enhancement. It relied on the Sentencing Commission's statement in Application Note 5(C) to Section 1B1.3, which interprets the Sentencing Guideline to mean that "conduct associated with a sentence that was imposed prior to" the offense of conviction "is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction." *Id.* § 1B1.3(a)(2) cmt. n.5(C). The district court agreed with the government and sentenced Moses as a career offender.

4. A divided panel of the Fourth Circuit affirmed. As the panel majority explained, this case requires "determin[ing] the enforceability of and the weight to be given the official commentary of the Sentencing Guidelines." App. 2a. In *Stinson* v. *United States*, this Court held that the Guidelines commentary deserves the same deference that courts give agencies' interpretations of their own rules, typically known as *Auer* or *Seminole Rock* deference. 508 U.S. 36, 45 (1993) (citing *Bowles* v. *Seminole Rock & Sand Co*., 325 U.S. 410, 414 (1945)). More recently, however, this Court in *Kisor* v. *Wilkie* held that "a court should not afford *Auer* deference" unless the provision at issue is "genuinely ambiguous." 139 S. Ct. 2400, 2415 (2019). Thus, to determine the weight afforded to the Guideline's commentary, the panel had to first decide whether the Guidelines commentary is "subject[] * * * to the *Kisor* framework." App. 2a, 4a.

5. The panel answered no. The panel majority held that *Kisor* is categorically inapplicable in the Guidelines context and that "*Stinson* continues to apply unaltered by *Kisor*." App. 4a. The panel acknowledged *Kisor*'s command that deference to an agency's decision is warranted only when the regulation is "genuinely ambiguous." App. 10a, 17a, 20a (quoting *Kisor*, 139 S. Ct. 2415). Yet the panel concluded that, under *Stinson*, the Guidelines commentary remains "authoritative and binding, regardless of whether the relevant Guideline is ambiguous," except when the commentary violates the law or is " 'inconsistent with' " the Guideline itself. App. 21a (quoting *Stinson*, 508 U.S. at 38). The panel admitted that this "conclusion is not shared by at least two circuits." App. 3a-4a (citing *United States* v. *Nasir*, 17 F.4th

459, 469–472 (3d Cir. 2021) (en banc); *United States* v. *Riccardi*, 989 F.3d 476, 484–486 (6th Cir. 2021)). Based on its analysis, the panel majority held that "Application Note 5(C) must be afforded binding effect," and therefore concluded that the District Court correctly sentenced Moses as a career offender. App. 4a.

6. Moses petitioned for rehearing en banc. The United States opposed rehearing en banc but supported panel rehearing and agreed that the panel's reasoning was erroneous. The United States "acknowledge[d] that *Kisor* applies in the guidelines context and governs how much deference the commentary receives." United States Response to Petition for Rehearing En Banc at 11.

7. The Fourth Circuit nonetheless refused to grant panel rehearing or rehearing en banc. In a statement supporting the denial of rehearing en banc, Judge Niemeyer—the author of the panel opinion—reiterated that the question "[a]t the root of this case" is "whether the Supreme Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), overruled its earlier decision in *Stinson v. United States*, 508 U.S. 36 (1993), for determining the enforceability of and weight to be given the official commentary of the Sentencing Guidelines." App. 28a. Judge Niemeyer rejected the view of *Kisor* pressed by both Moses and the United States. Instead, he maintained that, unless "the Supreme Court expresses its view" to the contrary, the Fourth Circuit will continue to accord binding deference to the Guidelines commentary even where the Guideline itself is unambiguous—*Kisor* and contrary precedent from other circuits notwithstanding. *Id.*

8. Five judges voted to grant rehearing en banc. App. 26a. In an opinion dissenting from the denial of rehearing en banc, Judges Wynn, Motz, King, and Thacker explained that the panel majority "frankly acknowledged that its holding departed from the law of the Third and Sixth Circuits." App. 38a-39a. "That alone makes it an exceptionally important case worthy of en banc review." App. 39a.

9. The Fourth Circuit's decision warrants this Court's review. As the panel acknowledged, its conclusion that *Kisor* does not apply to the commentary splits from the decisions of "at least" two other circuits: the Third and the Sixth. App. 3a-4a (citing *Nasir*, 17 F.4th at 469-472; *Riccardi*, 989 F.3d at 484-486). Other Circuits have also suggested that *Kisor* applies to the Guidelines commentary. *See United States* v. *Goodin*, 835 F. App'x 771, 782 n.1 (5th Cir. 2021); *United States* v. *Lewis*, 963 F.3d 16, 24 (1st Cir. 2020). That is not surprising, as the panel's conclusion flatly contradicts this Court's holdings in *Stinson* and *Kisor*. In *Stinson*, this Court held that the Guidelines commentary should receive the deference typically afforded to an agency's interpretation of its own rules—namely, *Seminole Rock*/*Auer* deference. *Stinson*, 508 U.S. at 45 (citing *Seminole Rock*, 325 U.S. at 414); *see also Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). But in *Kisor*, this Court identified "some of the limits inherent in the *Auer* doctrine" and "cabined * * * its scope." 139 S. Ct. at 2408, 2415. It follows, then, that the limits announced in *Kisor* apply to the Guidelines commentary. An extension of time will help ensure that the petition effectively presents this important issue.

10. Over the next several weeks, undersigned counsel are occupied with briefing deadlines for a variety of matters. Ms. Stetson, counsel of record, is drafting comments on a proposed major agency rule, due May 19; dispositive motions in a Lanham Act lawsuit, due May 20; a reply brief in support of certiorari in *Ingram* v. *United States*, No. 21-1274 (U.S.), due June 6; a response brief in *Novartis Pharmaceuticals Corporation* v. *Johnson*, No. 21-5299 (D.C. Cir.), due June 8; and a reply brief in *Capitol Records, LLC* v. *Vimeo, Inc.*, 21-2949 (2d Cir.) and *EMI Blackwood Music Inc.* v. *Vimeo, Inc.*, 21-02974 (2d Cir.), due August 2. In addition, Mr. Havemann is filing an opening brief on the merits in this Court in *Cruz* v. *Arizona*, No. 21-846 (U.S.), due June 13; preparing for a hearing in an NCAA infractions matter scheduled for June 17; and drafting a response brief in the Third Circuit in *Takeda Pharmaceutical Co. Ltd.* v. *Zydus Pharmaceuticals (USA) Inc.*, No. 21-2608 (3d Cir.), due June 30. Applicant requests this extension of time to permit counsel to research the relevant issues and to prepare a petition that fully addresses the important questions raised by the proceedings below.

11. For these reasons, Applicant respectfully requests that an order be entered extending the time to file a petition for certiorari to and including August 22, 2022.

Respectfully submitted,

/s/ Catherine E. Stetson

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