No. 22A-___

In the Supreme Court of the United States

WOLFGANG VON VADER,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

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 SEVENTH CIRCUIT

TO THE HONORABLE AMY CONEY BARRETT, ASSOCIATE JUSTICE AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicant Wolfgang Von Vader respectfully requests a 59-day extension of time, to and including September 29, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

The Seventh Circuit denied a timely request for rehearing on May 3, 2023. Unless extended, the time to file a petition for a writ of certiorari will expire on August 1, 2023. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). Copies of the lower court's opinion and its order denying rehearing are attached.

1. Section 3582(c)(1)(A) of Title 18 of the U.S. Code gives district courts discretion to grant sentence reductions to prisoners that can show "extraordinary and compelling reasons" warrant such a reduction. In crafting this safety valve, Congress placed only one limit on that standard—"[r]ehabilitation of the defendant alone" is not an "extraordinary and compelling reason." 28 U.S.C. § 994(t). Aside from that limit, Congress left it to the United

States Sentencing Commission to set "applicable policy statements" (18 U.S.C. § 3582(c)(1)(A)) defining "what should be considered extraordinary and compelling reasons" (28 U.S.C. § 994(t)).

2. Applicant Wolfgang Von Vader is serving a sentence that the district court agrees (and the court of appeals assumed) was unlawfully enhanced and for which he has already served five years longer than he should. *See* C.A. App. 20-23; *accord* C.A. App. 3. Von Vader, however, was the victim of a massive institutional failure of a multi-agency task force. Unbeknownst to him, in the wake of this Court's decisions in *Johnson* v. *United States* and *Mathis* v. *United States*, the United States Sentencing Commission, the United States Probation Office, and the Federal Defender—in conjunction with the district courts and the U.S. Attorney's Offices—all collaborated to ensure that every person serving an unlawful sentence received appointed counsel to file a petition for § 2255 relief, typically unopposed. Although the multi-agency effort helped everyone else, Von Vader was overlooked and, thus, he alone remains inequitably imprisoned.

In mid-2021, after exhausting administrative remedies, Von Vader moved for a § 3582(c)(1)(A) sentence reduction, citing his unlawfully enhanced sentence and health concerns in view of the COVID-19 pandemic. C.A. App. 2. The district court denied the motion, holding that under circuit precedent, Von Vader had not presented "extraordinary and compelling reasons" warranting a sentence reduction because a "sentencing error" formed part of the factual basis for his release (C.A. App. 4-6; *see United States* v. *Thacker*, 4 F.4th 569 (7th Cir. 2021); *United States* v. *Martin*, 21 F.4th 944 (7th Cir. 2021)) and notwithstanding the stunning institutional failure that left him alone imprisoned unlawfully.

In affirming the district court, the Seventh Circuit held that "extraordinary and compelling reasons" under Section 3582(c)(1)(A) embraces only "new fact[s] about an inmate's health or family status, or an equivalent post-conviction development, not a purely legal contention for which statutes specify other avenues of relief." Ex. A at 4. And the court of appeals deemed Von Vader's circumstance—being overlooked by institutional actors and therefore inequitably serving an unlawfully enhanced sentence—to be "a legal contest to a sentence [that] must be resolved by direct appeal or motion under §2255." Ex. A at 4-5. The Seventh Circuit denied Von Vader's request for rehearing. Ex. B.

3. This case presents a pressing issue worthy of the Court's review because it deepens a circuit split and further contributes to rampant circuit confusion. The first approach to section 3582(c)(1)(A), embraced by at least the First and Ninth Circuits, holds that changes in sentencing law can be considered in a court's holistic determination of whether there are "extraordinary and compelling" reasons warranting a sentence reduction. *See United States* v. *Ruvalcaba*, 26 F.4th 14, 28 (1st Cir. 2022); *United States* v. *Chen*, 48 F.4th 1092, 1098-1099 (9th Cir. 2022).

On the other hand, the Third, Sixth, and Eighth Circuits have held that district courts "cannot consider nonretroactive changes in sentencing law either alone or in combination with other factors" to find "extraordinary and compelling" reasons that warrant a reduction. *United States* v. *McCall*, 56 F.4th 1048, 1055-1056 (6th Cir. 2022) (en banc); *see also United States* v. *Crandall*, 25 F.4th 582, 586 (8th Cir. 2022); *United States* v. *Andrew*s, 12 F.4th 255, 261-262 (3d Cir. 2021). And the Seventh Circuit in the decision below joined a divided panel of the D.C. Circuit in holding that district courts may not consider *any* changes in law—whether nonretroactive or retroactive. *See United States* v. *Jenkins*, 50 F.4th 1185, 1200 (D.C. Cir. 2022).

Not only is there a circuit split, there is even deep confusion over how to apply the limits of the extratextual rule that changes in the law cannot be considered as part of an "extraordinary and compelling reasons" analysis under section 3582(c)(1)(A). The Fourth Circuit, for example, recently held that "quintessential collateral attacks on[] convictions and sentence[s]" are not cognizable under section 3582(c)(1)(A) in view of § 2255, while at the same time reaffirming circuit precedent holding that a "change in the sentencing law that occurred after their sentencings (but did not apply retroactively)" *can* be considered. *See United States* v. *Ferguson*, 55 F.4th 262, 271 (4th Cir. 2022); *United States* v. *McCoy*, 981 F.3d 271 (4th Cir. 2020).

As a panel of the Seventh Circuit observed just after the decision below, "[t]he Supreme Court has not weighed in on this disagreement. There are serious arguments to be considered on both sides. * * * All we can say is that the issue is teed up, and either the Commission or the Court (we hope) will address it soon." *United States* v. *Williams*, 65 F.4th 343, 349 (7th Cir. 2023).

Since the decision below, the U.S. Sentencing Commission formally adopted the view that section 3582(c)(1)(A)'s "extraordinary and compelling reasons" does allow sentence reductions in certain unusual circumstances involving changes in the law, an interpretation set to take effect November 1, 2023. But the Sentencing Commission's formally adopted views have yet to stem the tide of circuit disarray and confusion over whether and how changes in the law can factor in section 3582(c)(1)(A)'s analysis or are overridden by extratextual considerations or other statutes like 28 U.S.C. § 2255.

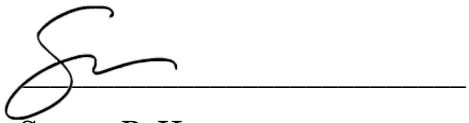
4. Additional time is needed for preparing and printing a petition in this important case. Undersigned counsel has prescheduled vacation and several other matters with prior and proximate due dates, including a petition for rehearing in *Vanda Pharmaceuticals Inc.*

v. *Teva Pharmaceuticals USA, Inc.*, 23-1247 (Fed. Cir.), filed June 9, 2023; a motion to dismiss counterclaims in *FedEx Trade Networks Transport & Brokerage, Inc.* v. *AirBoss Defense Group, LLC* v. *McWilliams Collective, LLC*, No. 22-cv-1313 (D. Md.), filed June 16, 2023; a hearing from June 12 to June 23, 2023 in a confidential arbitration; a reply on certiorari in *Gonzalez-Rivas* v. *Garland* (U.S.), filed June 28, 2023; a motion to dismiss in a confidential arbitration filed June 28, 2023; an opposition to a motion to dismiss in *AirBoss Defense Group, LLC* v. *Mc Williams Collective, LLC*, No. 23-cv-1253 (D. Md.), due July 7, 2023; an opposition to a motion for judgment on the pleadings in *Vanda Pharmaceuticals Inc.* v. *Teva Pharmaceuticals USA, Inc.*, No. 23-cv-152 (D. Del.), due July 12, 2023; a post-hearing brief in a confidential arbitration due July 20, 2023; a reply on a motion in a confidential arbitration due July 28, 2023; oral argument on a motion to dismiss in a confidential arbitration on August 3, 2023; a reply in a confidential arbitration due August 3, 2023; and a response to a proposed order in *Proposal To Refuse To Approve a New Drug Application Supplement for Hetlioz (Tasimelteon); Opportunity for a Hearing*, No. FDA-2022-N-2390, due August 11, 2023.

For the foregoing reasons, the application for a 59-day extension of time, to and including September 29, 2023, within which to file a petition for a writ of certiorari in this case should be granted.

June 30, 2023

Respectfully submitted.



Sarah P. Hogarth
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
shogarth@mwe.com