

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ERIC MINTER,

Petitioner/Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Andrew S. Pollis

Counsel of Record

CASE WESTERN RESERVE LAW SCHOOL

MILTON AND CHARLOTTE KRAMER

LAW CLINIC

11075 East Boulevard

Cleveland, Ohio 44106

Tel: (216) 368-2766

Fax: (216) 368-5137

Email: andrew.pollis@case.edu

TO: The Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit Court of Appeals:

In accordance with this Court’s Rules 13.5, 21, 22, 30, and 33.2, Applicant Eric Minter respectfully requests that the time to file his petition for a writ of certiorari be extended by 45 days, until February 9, 2024. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1). The Sixth Circuit Court of Appeals issued its opinion on August 31, 2023 (Exhibit A), and denied rehearing on September 26, 2023, (Exhibit B). Absent an extension of time, the petition is due on December 26, 2023.

Background

This case is a strong candidate for certiorari review because it presents an important question about the bounds of a trial court’s discretion in fact finding at sentencing in the aftermath of *Oregon v. Ice*, 555 U.S. 160, 129 S. Ct. 711, 172 L.Ed.2d 517 (2009) (5-4): Where a district court applies a federal sentencing enhancement based on findings of fact at sentencing—and neglects to explain how it selected among competing plausible inferences—does a generic abuse-of-discretion standard of review adequately protect the defendant’s Sixth Amendment right to a jury? The petition will also seek to resolve two circuit splits impacting thousands of individual defendants: (1) whether control over another by the defendant is a prerequisite to applying the managerial-role enhancement of United States Sentencing Commission, Guidelines Manual § 3B1.1 (2023) (“USSG § 3B1.1”); and (2) who bears the burden of

persuasion in assessing constructive possession of a firearm under United States Sentencing Guidelines Manual § 2D1.1(b)(1) (2023)¹ (“USSG § 2D1.1(b)(1)”).

In September 2018, Mr. Minter pled guilty to Conspiracy to Distribute a Mixture or Substance Containing a Detectable Amount of Heroin, in violation of 21 U.S.C. §§ 841(b)(1), 851, 846. At the original sentencing hearing, the district court applied two sentencing enhancements: a two-level enhancement for his alleged gun possession under U.S.S.G. § 2D1.1(b)(1) and a three-level enhancement for Mr. Minter’s alleged managerial role under U.S.S.G. § 3B1(b). After two successful appeals,² the district court again applied the same firearm enhancement and a two-point managerial-role enhancement under U.S.S.G. § 3B1(c):

- The firearm enhancement was based exclusively on vague statements Mr. Minter made in recorded jail conversations (in which he never mentioned a gun) and on the location of a gun under the stairs of a back porch that all residents of Mr. Minter’s multi-unit apartment building

¹ The 2023 Amendment to the United States Sentencing Guidelines became effective on November 1, 2023. The U.S. Sentencing Commission last amended the managerial-role enhancement in 1993 and last amended the firearm enhancement in 1991. So any amendments to the Sentencing Guidelines that occurred between Mr. Minter’s 2018 sentencing and the present appeal are not relevant.

² The previous appeals are not relevant here. In the first, the Sixth Circuit reversed the district court’s finding that Mr. Minter was a career offender under U.S.S.G. § 4B1.2(b), following the Sixth Circuit’s decision in *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc). In the second, the Sixth Circuit reversed the district court’s application of the three-level enhancement under U.S.S.G. § 3B1.1(b) because there were only four (not five) known participants in the conspiracy.

shared. The evidentiary support for the district court’s findings was thin, circumstantial, and easily susceptible to alternative explanations.

- To support the managerial-role enhancement, the district court also made two factual findings. First, it found that Mr. Minter handled administrative arrangements (time and place) with two West Virginia co-conspirators who transported money to the ringleader in Michigan and returned with drugs they then delivered to Mr. Minter. Second, it found that Mr. Minter paid the two co-conspirators and profited more than they did.

Circuit courts across the country are divided on how to review these particular enhancements—and how to allocate the burden of persuasion. For starters, a two-level enhancement for gun possession applies when the Government proves, by a preponderance of the evidence, that a defendant used a gun in committing a drug offense. *See* USSG § 2D1.1(b)(2). But in the Fifth Circuit, proximity of a gun to an accused’s residence triggers a presumption that the possession enhancement applies and shifts the burden to the defendant to evade it. *See United States v. Jacquinet*, 258 F.3d 423, 430–31, (5th Cir. 2001) (“The [firearm] adjustment should be applied if the weapon was present, unless the defendant establishes that it was *clearly improbable* that the weapon was connected with the offense.”) (emphasis added). The Eighth Circuit, by contrast, requires the Government to show “that it is *not clearly improbable* that the weapon was connected to the drug offense.” *United States v. Peroceski*, 520 F.3d 886, 889 (8th Cir. 2008) (emphasis added).

Similar confusion exists over whether “control over another” is required to apply the managerial-role enhancement of U.S.S.G. § 3B1.1. The list of seven factors in Application Note 4 of U.S.S.G. § 3B1.1 have deepened that confusion.³ Some circuits correctly identify “control over another” as the key issue, recognizing that the seven factors are useful only to distinguish between a four-point “leadership and organizational” role enhancement and a three-point “management or supervision” role enhancement. Consequently, those circuits apply the enhancement only after making a threshold finding that the defendant exercised “control over others.” *See, e.g., United States v. Flores*, 995 F.3d 214, 221–22 (D.C. Cir. 2021) (concluding, without discussion of the Application note 4 factors, that the enhancement applied because the defendant exercised supervisory control over others). But the Sixth Circuit sometimes (as here) weighs those factors (without a predicate control finding) to determine whether the enhancement applies. *United States v. Castilla-Lugo*, 699

³ The Application Note reads:

In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as “kingpin” or “boss” are not controlling. Factors the court should consider include [1] the exercise of decision making authority, [2] the nature of participation in the commission of the offense, [3] the recruitment of accomplices, [4] the claimed right to a larger share of the fruits of the crime, [5] the degree of participation in planning or organizing the offense, [6] the nature and scope of the illegal activity, and [7] the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

USSG § 3B1.1, Application Note 4.

F.3d 454, 459–61 (6th Cir. 2012) (“Courts consider the [Application Note 4] factors to determine whether to apply an enhancement under § 3B1.1, and if so, whether the leader/organizer enhancement or the lesser manager/supervisor enhancement is appropriate.”). *But see United States v. Vandenberg*, 109 F.3d 318, 321 (6th Cir. 2012) (“[A] defendant must have exerted control over at least one individual within a criminal organization for the enhancement of § 3B1.1 to be warranted.”). And at least one circuit, under a line of cases flowing from *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), applies the “common ordinary meaning” of “leader,” “organizer,” “supervisor,” and “manager,” without reliance on the Application Note 4 factors. *See United States v. Adair*, 38 F.4th 341, 354 (3d Cir. 2022).

In short, Mr. Minter’s petition is a serious candidate for certiorari review because it will seek to resolve two circuit splits and to ensure that appellate courts meaningfully scrutinize judicial fact-finding that enhances a criminal defendant’s sentence of incarceration.

Reasons for Granting an Extension of Time

For two reasons, Mr. Minter respectfully requests this Court grant his application.

First, Mr. Minter’s undersigned counsel practices at Case Western Reserve University School of Law’s Milton and Charlotte Kramer Law Clinic (the “Clinic”), where third-year law students work under faculty supervision as certified legal interns under Ohio R. Gov. Bar II. The law students who represent Mr. Minter began working on his case only in the last few months, and they are also preparing for their fall-semester final examinations and their other case responsibilities, including:

- A petition to the Supreme Court of Ohio in *State of Ohio v. Brandon Alexander*, 2023-Ohio-2708 (Ct. App. Aug. 4, 2023), due on December 11, 2023;
- An opening brief in the Eighth District Court of Appeals for Ohio in *State of Ohio v. Jerone Terry*, CA-23-113241, due on December 26, 2023;
- A reply brief in the Eighth District Court of Appeals for Ohio in *State of Ohio v. Albert Fontanez*, CA-23-113105, currently anticipated to be due on December 28, 2023;
- A reply brief in the Eight District Court of Appeals for Ohio in *State of Ohio v. William Woods*, CA-23-113100, currently anticipated to be due on December 28, 2023; and
- A reply brief in the First District Court of Appeals for Ohio in *State of Ohio v. Andrea Nelson*, C-2300422, currently anticipated to be due on January 16, 2024.


Second, the extension accommodates the law students' holiday plans as they return to their respective homes for winter break and travel for the season.

Mr. Minter files this application not to delay, but to provide Mr. Minter's counsel enough time to develop the arguments for the Court's review. The requested extension would provide them with the time necessary to familiarize themselves with the record, the decisions below, and the relevant case law, and to prepare a concise and thorough petition.

Conclusion

Applicant Mr. Minter respectfully requests that the Court extend the due date 45 days for its petition for a writ of certiorari to and including Friday, February 9, 2024.

Respectfully submitted this 11th day of December, 2023.

By: 

Andrew S. Pollis
Counsel of Record
CASE WESTERN RESERVE LAW SCHOOL
MILTON AND CHARLOTTE KRAMER
LAW CLINIC
11075 East Boulevard
Cleveland, Ohio 44106
Tel: (216) 368-2766
Fax: (216) 368-5137
Email: andrew.pollis@case.edu

DATED: December 11, 2023

AP-4547-PLDG-231211-Motion for Extension of Time to File Minter Cert. Petition