

No. 23A_____

IN THE
Supreme Court of the United States

KHAN MOHAMMED,

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 D.C. CIRCUIT**

NATHANIEL H. NESBITT
HOGAN LOVELLS US LLP
1601 Wewatta Street, Suite 900
Denver, CO 80202
Tel.: (303) 899-7300

PETER S. SPIVACK
REEDY C. SWANSON
Counsel of Record
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Tel.: (202) 637-5600
reedy.swanson@hoganlovells.com

Counsel for Applicant Khan Mohammed

February 27, 2024

APPLICATION

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the District of Columbia Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicant Khan Mohammed respectfully requests a 32-day extension of time, to and including April 22, 2024, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

1. The D.C. Circuit entered judgment on December 22, 2023. *See Mohammed v. United States*, 89 F.4th 158 (D.C. Cir. 2023), App. 1a-13a. Unless extended, the time to file a petition for a writ of certiorari will expire on March 21, 2024. 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. This case raises an important question about the standard of proof for the Sentencing Guidelines in criminal cases that has long divided the circuits. Court-appointed counsel for Applicant Khan Mohammed seek this extension to ensure that the forthcoming certiorari petition fully presents that issue for this Court's review.

3. Applicant Khan Mohammed was initially convicted of drug trafficking under 21 U.S.C. § 959(a)(1)-(2) and narcoterrorism under 21 U.S.C. § 960a. *See* App. 2a-3a. The convictions stemmed from an undercover Drug Enforcement Agency

operation in Afghanistan in 2006. Mohammed was sentenced to life in prison. Pet. App. 4a.

4. The D.C. Circuit subsequently held that the narcoterrorism count was infirm because Mohammed's trial counsel was "constitutionally deficient." *United States v. Mohammed*, 863 F.3d 885, 890 (D.C. Cir. 2017). Specifically, trial counsel "complete[ly] fail[ed] to investigate potential impeachment" evidence against the Government's star witness. *Id.*

5. The District Court then concluded that Mohammed was prejudiced by his counsel's failure, and vacated the narcoterrorism conviction. App. 3a. The Government elected not to retry Mohammed on that count. *Id.*

6 At resentencing, the Government nevertheless sought to reimpose the life sentence by applying the terrorism enhancement. The Government relied on the factual basis for the now-vacated narcoterrorism conviction. *See* App. 26a. The enhancement had an extraordinary effect on Mohammed's Sentencing Guidelines range because it raised the offense level by 12 points and required the court to treat Mohammed as having the highest criminal history category, even though he had no criminal record apart from this case. *See* U.S.S.G. § 3A1.4(b). All told, the terrorism enhancement raised the floor of Mohammed's Guidelines range from 97 months to 360 months, and raised the ceiling from 121 months to life.

7. Mohammed argued that, given the terrorism enhancement's draconian impact compared to his offense of conviction and his trial counsel's ineffectiveness,

the District Court could apply the enhancement only if it found the factual basis to exist by clear and convincing evidence. *See* App. 22a.

8. In the Ninth Circuit, Mohammed’s argument would likely have prevailed. The Ninth Circuit has long recognized that where “the facts found” at sentencing “*actually* are determinative of the sentence given”—imposing “an extremely disproportionate effect on the sentence relative to the offense of conviction”—the Due Process Clause requires courts to make factual findings at sentencing by clear and convincing evidence. *United States v. Staten*, 466 F.3d 708, 719 (9th Cir. 2006) (citation omitted). Indeed, in another terrorism enhancement case, the Government recently conceded that the Ninth Circuit’s law required applying the clear-and-convincing standard. *See United States v. Alhaggagi*, 978 F.3d 693, 700-701 (9th Cir. 2020).

9. In the decision below, however, the D.C. Circuit refused to follow the Ninth Circuit’s lead, instead siding with a number of other circuits that have rejected the Ninth Circuit’s use of the clear-and-convincing standard in circumstances like those presented here. *See* App. 9a-10a (citing cases from the Second, Third, Fourth, and Fifth Circuits).

10. This case presents an excellent vehicle for this Court to resolve this longstanding and acknowledged circuit split.¹ The factual basis for the terrorism

¹ The Ninth Circuit recently held an *en banc* argument to decide whether to adhere to its longstanding rule. *See* App. 38a-39a. A decision has not yet issued in that case. The Ninth Circuit’s pending *en banc* opinion is another reason to grant this application, as the additional time may help clarify the state of the law in the lower courts by the time Mohammed’s petition reaches this Court’s conference.

enhancement here is highly tenuous. The Government's argument is that Mohammed intended to use the proceeds of drug sales to buy a car that he would then use to move weapons for an alleged terrorist attack. App. 11a-12a. But transcribed audio recordings in the record establish that these were two separate conversations, weeks apart, involving two entirely different vehicles. *See id.*; Reply Br. 17-19, *United States v. Mohammed*, No. 22-3072 (D.C. Cir. July 28, 2023) (including a complete timeline of events). Had the District Court been required to analyze these facts using the clear-and-convincing standard, it is highly unlikely it would have agreed with the Government.

11. Identifying the correct standard of proof at sentencing is a critical question that has a substantial impact on criminal defendants around the country. The D.C. Circuit's approach allows the Government to seek supercharged sentences based on facts that were never found by a jury beyond a reasonable doubt, raising serious constitutional concerns under both the Sixth Amendment and the Due Process Clause.

14. Good cause exists for a 32-day extension of the time to file a certiorari petition. Counsel have a number upcoming briefing and argument deadlines, including: post-trial and remedies briefing in *Epic Games, Inc. v. Google LLC*, No. 3:20-cv-05671-JD (N.D. Cal.), throughout the month of March; a petition for certiorari in *NVIDIA Corp. v. E. Ohman J:or Fonder AB*, No. 23A578 (U.S.), due on March 4, 2024; preparation for oral argument in *National Rifle Association v. Vullo*, No. 22-842 (U.S.), scheduled for March 18, 2024; and a reply brief in *Roberts v. Progressive*

Preferred Ins. Co., No. 1:23-cv-1597-PAG (N.D. Ohio), due April 19, 2024. The requested extension will ensure that counsel have time to fully brief the important issues in this case.

15. For all these reasons, Applicant Khan Mohammed respectfully requests that the Court extend the time to file a certiorari petition to and including April 22, 2024.

Respectfully submitted,

NATHANIEL H. NESBITT
HOGAN LOVELLS US LLP
1601 Wewatta Street, Suite 900
Denver, CO 80202
Tel.: (303) 899-7300

PETER S. SPIVACK
REEDY C. SWANSON
Counsel of Record
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Tel.: (202) 637-5600
reedy.swanson@hoganlovells.com

Counsel for Applicant Khan Mohammed

February 27, 2024