

No. A-_____

IN THE
Supreme Court of the United States

BERNARD GADSON,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

On Application for Extension of Time

**APPLICATION FOR AN EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI**

To the Honorable Ketanji Brown Jackson, Associate Justice of the United States Supreme Court and Circuit Justice for the First Circuit:

Pursuant to Supreme Court Rule 13.5, applicant Bernard Gadson respectfully requests a 60-day extension of time, until January 6, 2024 (Saturday), within which to file a petition for a writ of certiorari. The United States Court of Appeals for the First Circuit issued its opinion in this case (Appendix, *infra*) on August 9, 2023. Unless extended, the time for filing a petition for a writ of certiorari will expire on November 7, 2023. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

This case implicates an important and recurring issue at the intersection of sentencing procedure and administrative law that has split the courts of appeals. The

additional time is warranted to allow Mr. Gadson to prepare and file his petition on that issue.

1. Mr. Gadson was convicted of bank fraud and other offenses. Op. 2. At sentencing, the district court was required to calculate his Sentencing Guidelines level using “the loss.” U.S.S.G. § 2B1.1(b). But the district court applied the Guidelines commentary, which says that “loss is the greater of actual loss or intended loss.” U.S.S.G. § 2B1.1, cmt. n.3(A). Here the district court determined that intended loss was greater than actual loss, “ultimately resulting in a twelve-level increase in [Mr.] Gadson’s total offense level.” Op. 7. Using actual loss would have resulted in a lower increase. *See id.* The district court sentenced Mr. Gadson to 110 months of imprisonment. That sentence was within his Guidelines range based on intended loss, although because two of the other counts of conviction required the imposition of mandatory consecutive terms of 24 months and 6 months, respectively, the sentence on the bank-fraud count was listed as 80 months.

2. The court of appeals affirmed the sentence. As relevant here, Mr. Gadson explained that the principles of administrative law set out in this Court’s decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), preclude deference to an administrative agency, such as the Sentencing Commission, when the agency’s interpretation conflicts with the plain text of the law in question. Op. 8-9. Because a potential loss *that did not occur* is not a “loss,” Mr. Gadson argued, the Commission’s attempt to write “intended loss” into the Guidelines is impermissible under *Kisor*. Op. 9. The court of appeals rejected that argument. The court

acknowledged that the Third Circuit had held that “loss” means actual loss and, “applying *Kisor*, placed ‘no weight’ on the commentary’s definition to the contrary.” Op. 9-10 (quoting *United States v. Banks*, 55 F.4th 246, 258 (3d Cir. 2022)). And it “assumed (without deciding) that the district court committed error” at Mr. Gadson’s sentencing. Op. 12 n.2. But because it was reviewing only for plain error, and because First Circuit precedent had previously applied the intended-loss Guideline without “express[ing] any doubt,” the court of appeals concluded that petitioner could not show a “clear or obvious” error. Op. 11-12 (citation omitted).

3. The application of *Kisor* to Guidelines commentary is a question that has already created substantial conflict among the circuits. The 6-6 split is detailed in the pending petition in *Ratzloff v. United States*, No. 23-310. The Court called for a response to that petition on October 6, and at present the government’s response is due November 6, 2023. The petition in this case will present the same question.

The court of appeals’ reliance on the “plain error” standard has no bearing on whether Mr. Gadson may obtain reversal or vacatur based on the same question as in *Ratzloff*. The court of appeals held only that the error could not be “plain,” *i.e.*, “clear or obvious,” because of *circuit* precedent failing to question the commentary’s redefinition of “loss.” If this Court holds, as the Third Circuit did, that that circuit precedent failed to correctly apply the Guidelines’ actual text, the First Circuit’s decision must be set aside: “it is enough that an error be ‘plain’ at the time of appellate consideration.” *Henderson v. United States*, 568 U.S. 266, 279 (2013) (citation omitted).

4. Mr. Gadson respectfully requests a 60-day extension of time to file his petition for a writ of certiorari from the First Circuit's decision. An extension of time is warranted because Mr. Gadson is in the process of retaining Supreme Court counsel from Goodwin Procter LLP to assist with preparing a petition for a writ of certiorari in this matter. An extension of time is therefore warranted to allow Mr. Gadson's new counsel to familiarize themselves with the record and to prepare and file the petition. Counsel have a number of other professional and personal commitments that further justify the extension, including four oral arguments (in the Ohio Court of Appeals, the Third Circuit, the Federal Circuit, and the Fourth Circuit) over the period from October 31 to December 7. In addition, if the Court grants the petition in *Ratzloff* at or near the extended due date, granting this extension would permit the parties to this case to file streamlined briefs at the certiorari stage.

For the foregoing reasons, applicant respectfully requests that the Court extend the time to file a petition for a writ of certiorari to January 6, 2024.

October 27, 2023

Respectfully submitted,

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