

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

AUSTIN KYLE LEE,
Applicant,

v.

UNITED STATES,
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

To the Honorable John Roberts, Chief Justice of the United States and Circuit Justice for the United States Court of Appeals for the Fourth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court, Austin Kyle Lee respectfully requests a 60-day extension of time, until Friday, September 27, 2024, within which to file a petition for a writ of certiorari. The Fourth Circuit entered its judgment on April 30, 2024. Unless extended, the time for filing a petition for a writ of certiorari will expire on July 29, 2024. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254.

1. This case concerns the standard of review for a violation of the Sixth Amendment right to a jury. The Sixth Amendment provides that, in all criminal prosecutions, a jury must decide any fact—other than the bare existence of a prior conviction—that increases the prescribed range of penalties to which the defendant is exposed. U.S. Const. amend. VI; *see Erlinger v. United States*, No. 23-370, slip op. at 9–10 (2024); *Alleyne v. United States*, 570 U.S. 99, 111 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998). It is undisputed that Applicant Austin Kyle Lee’s Sixth Amendment rights were violated in this case. The question is whether, having identified that error on direct review, he is entitled to any relief.

This Court has yet to resolve how to conduct a harmless-error analysis for an *Apprendi* error. *See, e.g., Erlinger*, slip op. at 26 (vacating judgment for *Apprendi* error without considering harmless). Some courts of appeals, including the court below, treat all *Alleyne* or *Apprendi* errors as trial errors that may be deemed harmless when it is “clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent

the error.” *Neder v. United States*, 527 U.S. 1, 18 (1999); see *United States v. Legins*, 34 F.4th 304, 323 (4th Cir. 2022) (collecting cases applying *Neder* to an *Alleyne* or *Apprendi* error). The Third Circuit, however, takes a more nuanced approach, treating some *Alleyne* or *Apprendi* errors as trial errors and others as sentencing errors. Under that approach, sentencing *Apprendi* errors are considered harmless only when the error “would have made no difference to the sentence.” *Parker v. Dugger*, 498 U.S. 308, 319 (1991); see *United States v. Lewis*, 802 F.3d 449, 458 (2015) (applying *Parker* to an *Alleyne* error). This case squarely presents the question whether an *Alleyne* or *Apprendi* error is always subject to harmless error review under *Neder* or should sometimes be subject to review under *Parker*.

2. Mr. Lee suffered an *Apprendi* error. A superseding indictment charged Mr. Lee with conspiracy to distribute and possess certain quantities of controlled substances under 21 U.S.C. §§ 841(a)(1) and 846 (Count One), and possession with intent to distribute under 21 U.S.C. § 841(a)(1) (Count Five). *Id.* In connection with these counts, the indictment alleged that Mr. Lee had a prior conviction for a “serious drug felony.” Op. 3. A “serious drug felony” is (1) an offense described in 18 U.S.C. § 924(e)(2) for which the defendant (2) served more than twelve months’ imprisonment and (3) was released within fifteen years of commencing the instant offense. 21 U.S.C. § 802(57). If proven, a prior serious drug felony conviction would enhance the prescribed penalties to which Mr. Lee was exposed, increasing the mandatory minimum sentence for Count One from ten years to fifteen years and the statutory sentencing range for Count Five from five-to-forty years to ten years-to-life. Op. 4.

Given this penalty-enhancing effect, both Mr. Lee and Respondent United States

agreed that under *Apprendi*, it was for the jury, not the judge, to decide whether the serious drug felony enhancement applied. Op. 5. The district court disagreed. For the district court, 21 U.S.C. § 851 directs the judge, not the jury, to find all three facts necessary to establish the enhancement for a prior serious drug felony conviction, even those facts about the duration and recency of the prior incarceration. *Id.* The district court further found that it was constitutional under *Almendarez-Torres* for it to decide whether the serious drug felony enhancement applied. Op. 5, 8. Thus, after the jury convicted Mr. Lee on all counts, the district court held a § 851 hearing and found that the United States had proved beyond a reasonable doubt that Mr. Lee had a prior conviction for a serious drug felony. Op. 6. The district court sentenced Mr. Lee to a total of 340 months' imprisonment, 280 months on Counts One and Five to be served concurrently. Op. 7.

3. The Fourth Circuit affirmed, holding that any *Apprendi* error was harmless under *Neder*. Op. 8-10. The court assumed without deciding that the district court violated Mr. Lee's Sixth Amendment right to a jury by deciding for itself the duration and recency of his prior imprisonment as necessary to impose the serious drug felony enhancement. Op. 9. The court found that error harmless because both elements were "uncontested and supported by overwhelming evidence." *Id.* (quoting *Neder*, 527 U.S. at 17).

4. The Fourth Circuit's decision is wrong, and had Mr. Lee's case arose in the Third Circuit, his conviction would have been reversed. Under the Third Circuit's approach, an *Apprendi* error that relates to a sentencing enhancement like the one for a prior serious drug felony conviction is pure a sentencing error, not a trial error. *See Lewis*, 802 F.3d at 455. As a result, the Third Circuit would have evaluated whether the error affected Mr.

Lee's sentence per *Parker*, rather than assess whether the jury would have found Mr. Lee guilty of a prior serious drug felony conviction absent the error per *Neder*. And under *Parker*, the *Apprendi* error Mr. Lee suffered was not harmless. See *Lewis*, 802 F.3d at 458. As in *Lewis*, the error increased the mandatory minimum for Count One and the statutory sentencing range for Count Five. *Id.* Unconstitutionally raising the penalty floor in this manner affected Mr. Lee's sentence because it is "impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Alleyne*, 570 U.S. at 112; see *Lewis*, 802 F.3d at 458.


5. Mr. Lee respectfully requests an extension of time to determine whether to file a petition for a writ of certiorari, and to prepare and file any such petition, seeking review of the Fourth Circuit's decision in this case. The case presents an important question of federal law with potentially far-reaching consequences. And Mr. Lee's undersigned counsel have been heavily engaged with other matters and have several other pending deadlines and commitments that would make the existing deadline difficult to meet, including, among other things, an oral argument in the First District Court of Appeals of Ohio; an answering brief in the United States Court of Appeals for the Eleventh Circuit; a motion to dismiss in the Northern District of California; a reply brief in the United States Court of Appeals for the Second Circuit; a petition for a writ of certiorari in this Court; an answering brief in the United States Court of Appeals for the Fourth Circuit; responding to two criminal grand jury subpoenas in the United States District Court for the Middle District of Florida; preparing for mediation this summer in litigation in the United States District Court for the Middle District of North Carolina; representing plaintiffs in active litigation in the

United States District Court for the Eastern District of Virginia and the United States District Court for the District of Delaware; representing defendants in active litigation in the United States District Court for the Northern District of Alabama, the United States District Court for the District of Colorado, and the United States District Court for the Northern District of Illinois; and responding to a request for additional information from the Antitrust Division of the U.S. Department of Justice under Section 7A(e)(1) of the Clayton Act, 15 U.S.C. § 18a, and Section 803.20 of the Premerger Notification Rules and Regulations, 16 C.F.R. § 803.20. The requested extension would allow counsel to continue to research the relevant legal issues and to prepare a petition that appropriately addresses the important issues raised by this case.

Accordingly, Mr. Lee respectfully requests an extension to file a petition for a writ of certiorari to and including September 27, 2024.

Date: July 15, 2024

Respectfully submitted,



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