

IN THE SUPREME COURT OF THE UNITED STATES

HENRY P. ALFANO, WILLIAM HIRD, MICHAEL LOWRY,
ROBERT MULGREW and THOMASINE TYNES, Petitioners,

v.

UNITED STATES, Respondent.

**APPLICATION FOR EXTENSION OF TIME TO FILE
PETITION OR PETITIONS FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

TO THE HONORABLE SAMUEL A. ALITO, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

Pursuant to this Court's Rules 13.5 and 30.2, applicant-petitioners Henry P. Alfano, William Hird, Michael Lowry, Robert Mulgrew, and Thomasine Tynes jointly pray for a 45-day extension of time to file their petition or petitions for a writ of certiorari in this Court to and including June 3, 2019 (as the 45th day, June 2, will be a Sunday).

1. Timeliness and Jurisdiction. On January 18, 2019, the United States Court of Appeals for the Third Circuit filed its amended opinion and judgment affirming the applicants' convictions. Appx. A. This opinion superseded an earlier-filed opinion, *see* 901 F.3d 196 (August 21, 2018, since withdrawn), following the granting, in part, of petitions for rehearing by certain of the applicants. On February 7, 2019, the Court of Appeals denied motions for leave to file further rehearing petitions. As a

result, pursuant to this Court's Rules 13.1 and 13.3, a petition for certiorari by any of the applicants would be due on or before April 18, 2019. This application is being filed at least ten days before that date. See Rule 30.2. The jurisdiction of this Court is to be invoked under 28 U.S.C. § 1254(1).

2. Opinions Below. The Third Circuit's precedential opinion (per Nygaard, J., with Greenaway & Fisher, JJ.), filed January 18, 2019, is attached as Appendix A. It is published at 913 F.3d 332, *sub nom. United States v. Hird*. The United States District Court for the Eastern District of Pennsylvania (Kelly, J.) wrote a memorandum opinion, filed July 1, 2013, *sub nom. United States v. Sullivan*, addressing the applicants' pretrial motion to dismiss the mail and wire fraud counts. That opinion is not published in the Federal Supplement but is available at 2013 WL 3305217; a copy is attached as Appx. B. The orders granting in part applicant Mulgrew's and Tynes's petitions for rehearing of the Court of Appeals' initial (since withdrawn) opinion (901 F.3d 196), filed concurrently with the amended opinion, are available at 913 F.3d 392 and 913 F.3d 393, respectively.

3. Reasons for Granting the Extension.

a. Applicants Lowry, Mulgrew and Tynes were judges of the Philadelphia Traffic Court. Applicant Hird was the Administrator of that since-disbanded court. Applicant Alfano was a private citizen who owned a towing company and had a friendly relationship with another Traffic Court judge. All were accused (along with several others) of engaging in a scheme to "fix" tickets that were within the jurisdiction of the Traffic Court for adjudication. Hird and Alfano pleaded guilty,

reserving their right to challenge on appeal the denial of the defendants' joint motion to dismiss the fraud counts. The other defendants stood trial before Judge Stengel (E.D.Pa.) and a jury. After some eight weeks of trial, all defendants were acquitted of all charges alleging the existence or execution of a scheme to defraud, as well as the related conspiracy, *see* 18 U.S.C. §§ 1341, 1343, 1349, but the defendants who were charged with perjury or making false statements (including Lowry, Mulgrew and Tynes) were convicted on those counts. In particular, applicants Mulgrew and Lowry were each convicted on one count of false declarations (perjury) before the grand jury, 18 U.S.C. § 1623; applicant Tynes was convicted on two such counts.

b. Alfano was sentenced to probation; each of the other applicants received a sentence of imprisonment, which they have since fully served, although they remain on supervised release.

c. On appeal, applicants Hird and Alfano pursued their preserved challenges to the legal validity of the mail and wire fraud (and related conspiracy) counts under this Court's decisions in *McNally v. United States*, 483 U.S. 350 (1987), and its progeny, including *Cleveland v. United States*, 531 U.S. 12 (2000). In the same consolidated appeal, applicants Lowry, Tynes and Mulgrew challenged the sufficiency of the evidence to establish perjury based on any of their charged responses, relying on this Court's decision in *Bronston v. United States*, 409 U.S. 352 (1973). They also argued that they were gravely prejudiced at trial by the spillover effect of a two-month trial focused almost exclusively on the government's failed attempt to prove the charged fraud scheme, which should have been dismissed on legal grounds

before trial. In a precedential opinion, the Third Circuit rejected those arguments and affirmed. Appx. A.

d. In undersigned counsel's professional opinion, these cases present two important questions of federal statutory law, concerning the proper interpretation and application of this Court's cases. Counsel anticipates that the applicants' petition or petitions will present at least the following questions:

1. Does the potential for collection of fines and costs which may become due to the state from unadjudicated traffic tickets, on which there has yet been no finding of guilt, constitute "property" which may be the object of a scheme to defraud under the mail- and wire-fraud statutes, 18 U.S.C. §§ 1341, 1343, and 1349?

2. In *Bronston v. United States*, 409 U.S. 352 (1973), this Court declared that that "the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner – so long as the witness speaks the literal truth. The burden is on the questioner," emphasizing that "[p]recise questioning is imperative as a predicate for the offense of perjury." In this light:

Can responses to fundamentally ambiguous questions – or literally truthful answers to unambiguous questions – constitute "false declarations" under 18 U.S.C. § 1623, on the basis that (a) forbidden imprecision in questioning is limited to "glaring instances of vagueness or double-speak ... that ... would mislead or confuse a witness"; or that (b) the grand jury witnesses should have understood, from the "thrust" of the line of questions, that the prosecutors meant something other than what they actually asked.

f. Following the Third Circuit's affirmance on rehearing of the applicants' convictions, undersigned counsel promptly advised their clients of their right to petition this Court, and of the attendant deadline. By pooling resources and cooperating, the defendants eventually agreed they could manage – and wished – to pursue their appeals in this Court. Each of the undersigned counsel has been paid either no fee or a substantially reduced fee to file a joint petition for their clients.

g. Undersigned counsel for Mulgrew is acting as lead counsel for the applicants. His two-lawyer practice, which focuses on federal criminal appeals, has filed six opening briefs, two reply briefs, and two amicus briefs in the last two months. Counsel for the other applicants have similarly busy schedules of trials and appeals; for example, counsel for Alfano is commencing a jury trial out of town today, which is expected to last up to four weeks. Counsel would not be able to prepare a proper petition or petitions for certiorari in the two weeks remaining before the petition would be due, in light of other pre-existing obligations and deadlines. As a result of these circumstances, counsel cannot manage to file the petition or petitions in these cases by the original April 18, 2019, due date and still satisfy their own or this Court's high standards.

h. The applicants have fully served their terms of incarceration arising out of the convictions at issue here. They do not seek delay for any tactical reason. For the same reason, the government would not be prejudiced by the requested extension.

WHEREFORE, the Applicant-Petitioners pray that the Circuit Justice enter an Order extending the time within which they may petition this Court for certiorari by 45 days, to and including June 3, 2019.

Dated: April 8, 2019

Respectfully submitted,

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