No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS F. GEHRMANN AND ERIC W. CARLSON,

Applicants,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION TO THE HONORABLE JUSTICE SONIA SOTOMAYOR TO EXTEND TIME TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Thomas F. Gehrmann and Eric W Carlson (collectively "Applicants"), respectfully move this Court, pursuant to Supreme Court Rules 13(5) and 30 for additional time to file a petition for a writ of certiorari in this matter, and for the current deadline to be extended for 45 days, up to and including September 7, 2018. The Court of Appeals issued its judgment on April 24, 2018. (A1-A33). Unless extended, the time for filing a petition for writ of certiorari will expire on approximately July 24, 2018.

Based on the following circumstances specific to this unique case and pre-existing scheduling conflicts, Applicants respectfully request an extension of time so that the new deadline to file the petition for writ of certiorari is September 7, 2018.

INTRODUCTION

This Court has not had the chance to revisit the doctrine it established in *Franks v. Delaware,* 438 U.S. 154 (1978) since its original decision in that case forty years ago.[1] This case involves distinctive and first impression issues regarding the application of the *Franks* doctrine, such as the scope of suppression orders and remedies, and the proper standards courts should apply as a matter of law to facts specific to a *Franks* violation and the underlying government conduct that gives rise to

[1] Since its decision in *Franks,* this Court has only referred to the *Franks* doctrine by way of analogy or exception, but has never expanded on the rule or further defined concepts related to the rule. *See e.g. United States v. Leon,* 468 U.S. 897 (1984)(establishing a good faith exception that does not apply in a *Franks* case); *Herring v. United States,* 555 U.S. 135 (2009)(examining the exclusionary rule based on police record keeping error and analogizing that situation to misrepresentations and omissions under *Franks*).

such a violation. For instance, this case involves *inter alia* (1) the interplay between materiality for purposes of a *Franks* violation and probable cause, as opposed to how probable cause has traditionally been applied in other contexts, (2) the application of the severability doctrine to a multi-count indictment based on different types of criminal offenses where the good faith exception does not apply, (3) government waiver and the party presentation doctrine, and (4) the proper standard of review that applies to a *Franks* suppression order on appeal. No appellate court in any federal circuit has had occasion to review a *Franks* suppression order and/or the propriety of any remedy after a *Franks* violation, and the same is true for most, if not all, state appellate courts. This is most likely the situation because there is very little case law, anywhere, that involves a situation where the defense has actually prevailed in a *Franks* challenge and the government, in turn, appealed.

Therefore, Applicants respectfully request additional time to file their petition for a writ of certiorari because the novel questions at issue here are complex, and have been left unanswered since this Court first decided *Franks,* and because counsel's schedule over the next several weeks is dedicated to other, pre-existing matters.

SUMMARY OF RELEVANT FACTUAL BACKGROUND

This federal criminal matter arises out of Denver, Colorado, where the Applicants were indicted for tax offenses on July 22, 2015. At the time, they were both chiropractors who were partners in chiropractic businesses that were located in Colorado Springs, Colorado. The material omissions and misrepresentations that were the subject of the *Franks* litigation in the District Court are related to a state

administrative investigation into alleged improper billing practices which pre-dated the federal investigation that was subsequently conducted by the Department of Labor ("DOL") and the Internal Revenue Service ("IRS"). The conduct at issue was committed by the IRS Agent who authored the affidavit in support of a search warrant to search the Applicants' businesses in September of 2011.

The Applicants were initially targets for suspected health care fraud offenses, not tax offenses. A former patient of Applicant Carlson lodged a complaint against him in late 2007 for improper billing. This complaint was initially investigated by United Healthcare who then referred the matter to the Colorado Department of Regulatory Agencies ("DORA"). During the following year, DORA continued its investigation of the alleged improper billing practices and retained an expert who produced a report. Eventually, in reliance upon the state administrative investigation, the federal authorities began their investigation which focused on suspected federal health care fraud violations.

In March of 2011, DORA concluded its investigation and did not impose any adverse action against Applicant Carlson. Instead, DORA issued a letter of admonition ("LOA") that was a "full and final" resolution of the case. The LOA did not include any finding that Applicant Carlson engaged in misbilling or any type of fraud, and instead simply stated that he failed to make "essential entries on patient records."

The majority of the affidavit focused on the allegations of health care fraud, and the suspected tax offenses were a secondary aspect of the affidavit. The search warrant was issued for both health care fraud and tax offenses. In his affidavit, the

affiant IRS Agent omitted the existence of the LOA, omitted the resolution of the DORA matter which did not find that Applicant Carlson committed any type of fraud, and instead relied upon all of the uncorroborated, incriminating information that was produced by the expert who was paid by DORA, which included hearsay allegations from unidentified witnesses. Instead of providing a full, fair and accurate representation of the DORA case and its resolution, the IRS Agent submitted pages and pages of information from the expert report giving the Magistrate the inaccurate impression that Applicant Carlson had engaged in fraud and misbilled to the tune of hundreds and thousands of dollars, when indeed he had not. Neither Applicant was ever indicted for health care fraud in the end.

Based on this affidavit, the defense filed a motion to suppress pursuant to *Franks v. Delaware,* and the District Court held a *Franks* hearing where the IRS Agent testified. (*United States v. Gehrmann, et al.,* Case No. 15-cr-00303-RBJ). The District Court found the agent to be incredible on numerous points. (B7-B10) The Court found that the government violated *Franks* because the omissions and misrepresentations about the DORA matter were material, and reckless at the very least, which vitiated probable cause. On April 25, 2016, the Court entered a suppression order finding that complete suppression was appropriate. (B1-B14) The government filed an interlocutory appeal.

Almost two years later to the date, on April 24, 2018, the Tenth Circuit issued an order and judgment that reversed the District Court's suppression order and remanded the matter to the District Court. *United States v. Gehrmann, et al.,* No. 16-

1208 (10th Cir. April 24, 2018) ("Opinion"). Although most of the briefing and argument on appeal focused on the severability doctrine, namely whether partial versus complete suppression was appropriate, the Tenth Circuit's Opinion focused solely on materiality and probable cause.

The Court focused on these issues, despite the fact that the government essentially admitted in the District Court that the IRS agent's omissions were material and on appeal barely addressed the question of materiality. Indeed, the Applicants claimed that the government had confessed the issue of materiality down below, and had waived its right to readdress the issue on appeal. Notwithstanding the facts in the record which supported this argument, the Tenth Circuit reversed the District Court. In doing so, is the first federal circuit that has considered a *Franks* suppression order on appeal, and that has issued an order related to the standards of materiality, probable cause and the an applicable standard of review under *Franks* when the defense prevailed on that issue down below.

ARGUMENT

Due to the novel facts and legal issues this case presents, good cause exists to support the Applicants' request to extend the time in which to file their petition for writ of certiorari. First, counsel needs adequate time to research the factual record, review the numerous cases relied on by the Tenth Circuit, and update its research regarding any new applicable law, particularly any potential new decisions during the last few years from any court that may have addressed a *Franks* case. It will take

time to revisit and research the numerous issues at play here because the Opinion addresses many first impression issues.

For instance, the Tenth Circuit found that the letter of admonition was "indisputably relevant and should have been included in Agent Rutkowski's affidavit," but then applied *de novo* review, interpreted the meaning of the admonition letter and held that its relevance does not equate to materiality for purposes of suppression under *Frank*s. (A18-A23). The Court held that a civil standard of proof, despite the exculpatory nature of the omitted evidence, was a factor relevant to a determination of the materiality of the omitted materials. *Id.* at 31-33. The Court also created potential precedent regarding materiality and the fair-probability standard for probable cause in the context of a *Franks* situation, but yet failed to address the bad faith that is always at issue in a *Franks* fact pattern in doing so. *Id.* at 25-31.

Counsel's schedule over the next several weeks will not allow them to accomplish all of the work that needs to be done to file the type of well-researched petition that should be filed in this case. Counsel for Applicant Gehrmann will begin a jury trial in a complicated federal securities and wire fraud case on July 9, 2018, in Denver. (*United States v. Coddington,* 15-cr-00383-RBJ-01) This trial is scheduled to last for three weeks and will consume all of July for both of Applicant Gehrmann's attorneys, Ms. Frost and Mr. Ridley. Likewise, due to the complex nature of the case, trial preparation has consumed all of June and this will continue to be the case until the trial commences on July 9th. The case involves terabytes of discovery, complicated fraud allegations, witnesses who are located all over the United States and in foreign

countries and defending the matter has been, and will continue to be, a time-consuming and serious task. The petition for writ of certiorari is currently due while council is scheduled to be in this jury trial.

Counsel for Applicant Carlson, is also busy with the press of other matters over the next several weeks, such as trials, motions hearings and other court appearances. Counsel for Applicant Gehrmann, however, will take the lead in this case and due to the trial preparation and jury trial described above will simply be unable to devote the time they need to on this matter during the upcoming weeks. Therefore, good cause exists to extend the time in which to file the petition for writ of certiorari based on the work that needs to be done in this case and the pre-existing scheduling conflicts on counsel's calendar.

Good cause also exists because counsel needs additional time to reach out to third party organizations who may be willing to lend *amicus* support due to the unprecedented nature of this case. This is a case that has much significance for the defense bar, and overall how courts will handle *Franks* challenges to warrants in the future. Undersigned counsel has communicated with the National Association of Criminal Defense Attorneys ("NACDL") who are presently reviewing the pleadings, orders and the Opinion in this matter to determine whether it will participate in an *amicus* capacity. Counsel also intends on reaching out to other organizations who may also be interested in this case, such as the defense bar association here in Colorado. Due to the scheduling matters outlined above, and because it will take time for any

third party to review the significant documents in the record, an extension of time is supported by good cause.

Finally, good cause also exists because no party will be prejudiced if this Court grants the requested extension. It took the Tenth Circuit more than a year to issue the Opinion here, and that delay is not attributable to the Applicants. The Applicants will not be prejudiced by a brief extension of time and will agree to any continuance in the District Court so that their attorneys have adequate time to research, write and do the work that needs to be done. Similarly, the Respondent will not be prejudiced in any way because the Respondent is the party who chose to bring the interlocutory appeal, and it took years for the government to bring the indictment it eventually did in the first place. The Applicants were indicted years after the alleged tax offenses, not long before the statute of limitations ran. Therefore, good cause also exists because no party will experience any prejudice based a short continuance.

WHEREFORE, the Applicants respectfully move this Court to grant this motion and extend the time to file the petition for writ of certiorari by an additional 45 days, so that the new deadline is September 7, 2018.

Dated: June 13, 2018

Denver, Colorado

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing motion:

(1) all required privacy redactions have been made;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program (WebRoot, updated June 13, 2018) and according to the program, it is free of viruses.

s/ Kristen M. Frost
Kristen M. Frost

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2018, I electronically filed the foregoing motion using the CM/ECF system which will send notification of such filing, to all counsel of record and mailed via Federal Express two day delivery as required by Rule 22 and Rule 33.2:

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