

No. _____

IN THE
Supreme Court of the United States

RICHARD ASHBAUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari to
the United States Court of Appeals for the Fourth Circuit**

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

WEST VIRGINIA UNIVERSITY
COLLEGE OF LAW
U.S. SUPREME COURT
LITIGATION CLINIC
101 Law Center Drive
Morgantown, WV 26056

LAWRENCE D. ROSENBERG
Counsel of Record
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3939
ldrosenberg@jonesday.com

Counsel for Petitioner Richard Ashbaugh

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

1. Pursuant to Supreme Court Rules 13.5, 22, and 30, Petitioner Richard Ashbaugh, through counsel, respectfully requests a fifty-nine-day extension of time, up to and including Friday, April 12, 2019, to file a petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review *United States v. Ashbaugh*, No. 18-6105 (4th Cir.). The United States Court of Appeals for the Fourth Circuit denied Mr. Ashbaugh's petition for rehearing on November 14, 2018. App.B. This Court's jurisdiction will be invoked under 28 U.S.C. § 1254. The time to file a petition for a writ of certiorari will otherwise expire on February 12, 2019. The application is timely because it has been filed on or before ten days prior to the date on which the petition is otherwise due.

2. The United States Court of Appeals for the Fourth Circuit's decision presents an important question of federal law that warrants this Court's review.

a. Five years ago, this Court held that the resulting-in-death penalty enhancement of 21 U.S.C. § 841(b)(1)(C) applies only when use of the drug distributed by a defendant is a but-for cause of death, rather than merely a contributing cause. *See Burrage v. United States*, 571 U.S. 204 (2014). The question now is whether *Burrage* announced a substantive rule that courts must apply retroactively when collaterally reviewing a conviction or sentence.

b. The Courts of Appeals are currently split on this question. The Courts of Appeals for the Fifth, Sixth, Seventh, and Eighth Circuits have held that

the rule is retroactive. *See Harrington v. Ormond*, 900 F.3d 246, 249 (6th Cir. 2018) (“It is also clear that *Burrage* is retroactive, as the Government commendably concedes. Substantive decisions that ‘narrow the scope of a criminal statute by interpreting its terms’ apply retroactively to cases on collateral review.” (citations omitted)); *Santillana v. Upton*, 846 F.3d 779, 784 (5th Cir. 2017) (“In sum, as a substantive decision narrowing the scope of a federal criminal statute, *Burrage* applies retroactively to cases on collateral review.”); *Krieger v. United States*, 842 F.3d 490, 497–500 (7th Cir. 2016) (collecting cases in which the Government conceded that *Burrage* announces a substantive rule that must be applied retroactively on collateral review and holding that, even without the concession, the court would reach the same conclusion); *Ragland v. United States*, 784 F.3d 1213, 1214 (8th Cir. 2015) (per curiam) (accepting a similar concession by the Government).

c. In a series of opinions, however, the Court of Appeals for the Third Circuit has reached the opposite conclusion. *See Dixon v. White*, 647 F. App’x 62, 64 (3d Cir. 2016) (rejecting the argument that *Burrage* is retroactive and concluding that a prisoner cannot rely on that case to bring a petition under 28 U.S.C. § 2241); *Upshaw v. Lewisburg USP*, 634 F. App’x 357 (3d Cir. 2016) (same). In its decision in this case, the Court of Appeals for the Fourth Circuit has joined the Third Circuit in holding that *Burrage* is not retroactive for purposes of collateral review. This decision is consistent with previous holdings from the Fourth Circuit. *See Atkins v. O’Brien*, 148 F. Supp. 3d 547, 552 (N.D. W. Va. 2015) (holding that

Burrage “has not been applied retroactively to cases on collateral review”), *aff’d* 647 F. App’x 254 (4th Cir. 2016) (affirming “for the reasons stated by the district court”).

3. In addition to this circuit split, cases refusing to apply *Burrage* retroactively are in substantial tension with *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004), in which the Court explained that decisions that narrow the scope of criminal statutes by interpreting their terms—as *Burrage* did—create substantive rules that apply retroactively because they “necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him.”

4. Good cause exists for this motion. Undersigned counsel, Lawrence D. Rosenberg of Jones Day, directs the West Virginia University College of Law’s United States Supreme Court Litigation Clinic, which is co-counsel in this case. The Clinic strives to have its students fully participate in its cases. Undersigned counsel and the Clinic were only recently retained to prepare a petition for a writ of certiorari in this matter. Neither participated in the case before the United States Court of Appeals for the Fourth Circuit. The Clinic students have only recently returned to the College of Law from their winter break. The Clinic has been active with several cases before this Court and the lower courts. For example, with assistance from Clinic students, Mr. Rosenberg argued *Dawson v. Steager*, No. 17-419 (U.S.), in this Court on December 3, 2018, filed a petition for a writ of certiorari in *Banks v. Gore*, No. 18-840 (U.S.), on December 21, 2018, in which a reply is expected to be due on February 20, 2019, filed a petition for a writ of certiorari in *Jeffrey v. West Virginia*, No. 18-884 (U.S.) on January 7, 2019, and is currently

working on *Moss v. Atkinson*, No. 18-6096 (4th Cir.), in the U.S. Court of Appeals for the Fourth Circuit, where a Clinic brief is due on March 5, 2019, and where oral argument has been scheduled for March 19, 2019. The Clinic has also been appointed by the U.S. District Court for the Northern District of West Virginia in *Wilkerson v. Warden, Williamsburg Federal Correctional Institution*, No. 1:18CV211, to brief and argue a habeas jurisdictional issue; Clinic briefs are due in that matter on February 13, 2019, and March 20, 2019, and oral argument is scheduled for March 29, 2019. In light of the academic calendar and the Clinic's other obligations, the requested extension is necessary to allow the students sufficient time to participate fully in this case.

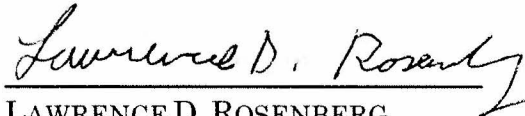
5. Mr. Rosenberg himself also has had recently, and will have in the coming weeks, significant professional and personal commitments that would make it extremely difficult to complete the petition without an extension. In addition to the work in *Dawson, Banks, Jeffrey, Moss*, and *Wilkerson*, discussed above, Mr. Rosenberg has a number of other preexisting professional responsibilities: He argued *Cleveland Clinic Foundation v. True Health Diagnostics, LLC*, No. 18-1218 (Fed. Cir.), on January 10, 2019; he is preparing briefing regarding cross-summary judgment motions in *Stagg P.C. v. U.S. Dep't of State*, No. 1:15-cv-08468-KPF (S.D.N.Y.); he is lead counsel in *Lufthansa Technik v. Panasonic Avionics Corp.*, No. 2:17-cv-01453-JCC (W.D. Wash.), in which he has recently worked on several filings and is now coordinating simultaneous document discovery and depositions from two separate parties; and he is lead counsel in numerous actions before the

United States Court of Federal Claims, including *Owl Creek Asia I, L.P. v. United States, et al.*, No. 18-281C; *Appaloosa Investment Limited Partnership I, et al., v. United States*, No. 18-370C; *Akanthos Opportunity Master Fund, L.P., v. United States*, No. 18-369C; *CSS, LLC, v. United States*, No. 18-371C; *Mason Capital L.P., et al., v. United States*, No. 18-529C; and *CRS Master Fund, L.P., et al. v. United States*, No. 18-1155C, in which oral argument is expected to be scheduled soon. In addition, Mr. Rosenberg will be out of town, attending American Bar Association meetings, from February 14-16 and March 8-9, 2019, and was out of town traveling for professional and personal commitments from January 17-21 and January 24-28, 2019.

WHEREFORE, Petitioner respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari for fifty-nine days, up to and including April 12, 2019.

January 31, 2019

Respectfully submitted,



LAWRENCE D. ROSENBERG

Counsel of Record

JONES DAY

51 Louisiana Avenue, N.W.

Washington, DC 20001-2113

(202) 879-7622

ldrosenberg@jonesday.com

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