

IN THE
SUPREME COURT OF THE UNITED STATES

No. ____

MITCHELL J. STEIN,

Applicant,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,

Respondent.

**APPLICATION TO THE HON. CLARENCE THOMAS
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

Pursuant to Supreme Court Rule 13(5), Mitchell J. Stein hereby moves for an extension of time of 60 days, to and including Monday, July 22, 2019, for the filing of a petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit dated October 11, 2018 (Exhibit A). A petition for rehearing was denied on February 21, 2019 (Exhibit B). The jurisdiction of this Court is based on 28 U.S.C. §1254(1).

1. Unless an extension is granted, the deadline for filing the petition for certiorari will be Wednesday, May 22, 2019. For the reasons set forth at ¶ 5, *infra*, Applicant respectfully requests leave of Court to serve and file this Application one day after the deadline to apply for an extension of time.

2. This case involves the exceptionally important question of whether collateral estoppel may be used offensively to enter summary judgment on an alternative theory that was never presented to the trier of fact in the antecedent action. Stein was outside counsel for Signalife, nka Heart Tronics, a publicly-traded

medical device company. The Securities and Exchange Commission and Department of Justice prosecuted Stein in parallel civil and criminal proceedings, which arose out of an investigation initiated by the SEC in 2009. After Stein's criminal conviction, the SEC moved for summary judgment under the doctrine of collateral estoppel, though it made entirely different factual allegations as to a purchase order at the center of both cases. Specifically, at the criminal trial, the DOJ alleged that three purchase orders were "all made up" by Stein, "never happened" and were "fake good news." The government's witnesses testified that the purchase orders were "phantom," that they "never received any backup or anything on them," and that all information on the orders was supplied by Stein. The SEC alleged in its civil complaint against Stein and others, however, that a customer existed under one of the three purchase orders, made a down-payment under it, and that the ruse began "[w]hen it became clear that [Signalife] could not deliver the product and the Customer was canceling his order." After Stein's conviction, the SEC argued that Stein was collaterally estopped from litigating the issues raised in its complaint as to the three purchase orders and was awarded an \$11 million summary judgment. The Ninth Circuit affirmed the judgment though the SEC's theory was never presented to the jury in the criminal action.

3. Stein argued that the use of offensive estoppel is fundamentally unfair where the different theory alleged in the second action was never presented to the trier of fact in the antecedent action, and that the summary judgment here deepens the entrenched split among federal and state courts on whether alternate theories and grounds to a judgment have a preclusive effect. Though the American Law Institute instructed in the Restatement (Second) of Judgments § 27 (1980) that alternate grounds to a judgment have no preclusive effect, thereby clarifying that its polar opposite approach in the First Restatement of Judgments was not the proper approach, several circuits continue to abide by the rationale that collateral estoppel applies to each ground to a judgment, even if it does "not fulfill the necessity requirement for collateral estoppel in a strict sense." *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 251 (3d Cir. 2006).

4. Stein further argued that, based on the principles of fundamental fairness set forth in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), offensive estoppel is inequitable where the judgment in the antecedent action rests on material false testimony. At the criminal trial, the prosecution failed to correct the false testimony of two of its witnesses who testified that they received “no backup or anything” on the purchase orders and received all information from Stein, when in truth they had received the down-payment check from an actual customer on one of the purchase orders. The district court at the criminal trial refused to admit the check into evidence. The Eleventh Circuit affirmed the conviction in *Stein I* based on the reasoning that “... in the absence of government suppression of the evidence[,] ... there can be no *Giglio* violation.” *United States v. Stein*, 846 F.3d 1135, 1150 (11th Cir. 2017); *see also, Stein v. United States of America*, 2017 WL 3575743 (2017) (Stein’s first petition for writ of certiorari in the criminal action). The Eleventh Circuit vacated Stein’s sentence and remanded for resentencing. Stein, by and through his lead counsel in the criminal appeal, Jeffrey L. Fisher, is currently appealing Stein’s conviction based on newly discovered evidence which confirms that both the DOJ’s and the SEC’s theories about the purchase order at issue are false. Under these circumstances, Stein could not have had a fair opportunity to litigate the DOJ’s theory, let alone the SEC’s different allegations. *See, Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 329 (1971) (holding that “the most significant safeguard” is that “the party against whom an estoppel is asserted had a full and fair opportunity to litigate” the issue).

5. Counsel of Record, Richard C. Klugh, who has only recently been added to the Applicant’s legal team in this case, is facing extensive deadlines between now and the current due date of the petition. On May 13, 2019, the undersigned is required to file the petition for writ of certiorari in *United States v. Portocarrero*, 11th Cir. No. 17-13535. The undersigned is also required to file a petition for rehearing in *United States v. Pavlenko*, 11th Cir. No. 17-15047 on May 13, 2019. On or before May 17, 2019, Mr. Klugh is required to file the initial brief in *United States v. Grayson Enterprises, Inc.*, 7th Cir. No. 19-1367. The undersigned must also prepare for

extensive evidentiary hearings scheduled for May 20, 2019, in *United States v. Makarenko*, S.D. Fla. No. 17-20407-Cr-MGC (a prosecution alleging munitions list conspiracy and substantive violations by foreign nationals), and faces multiple additional jurisdictional and briefing deadlines in federal criminal cases over the next three weeks, in addition to oral argument in the Eleventh Circuit on June 11 and 14, 2019.

7. Applicant requests an extension for counsel to complete researching the extensive factual record and complex legal issues presented in this case and to finalize a petition that fully addresses the important and far-reaching issues in a manner that will be most helpful to the Court.

For the foregoing reasons, Applicant respectfully requests that an extension of time to and including Monday, July 22, 2019, be granted within which Applicant may file a petition for a writ of certiorari.

Respectfully submitted,

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May 13, 2019