

App No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KIELAN BRETT FRANKLIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Application for an Extension of Time
to File a Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**PETITIONER'S APPLICATION TO EXTEND TIME
TO FILE PETITION FOR WRIT OF CERTIORARI**

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To the Honorable Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

Pursuant to this Court's Rules 13.5, 21, 22, 30, and 33.2, Petitioner Kielan Brett Franklin respectfully requests the time to file his Petition for Writ of Certiorari be extended for 60 days, up to and including June 24, 2022. The United States Court of Appeals for the Ninth Circuit issued its opinion on November 23, 2021 (Appendix A). Rehearing en banc was denied on January 24, 2022 (Appendix B). Absent an extension of time, the Petition for Writ of Certiorari is due on April 25, 2022. This Application is filed more than ten days before the due date. S. Ct. R. 13.5.

Jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

The United States of America, by and through Timothy J. Racicot, Deputy Criminal Chief, United States Attorney's Office, District of Montana, does not oppose this Application.

BACKGROUND

On September 5, 2019, the government filed an indictment charging Mr. Franklin, Arielle Rose Cowser, Morgan Victor Pitsch, and Gerald Allen Hiler with Count I - Conspiracy to Commit Robbery Affecting Commerce, in violation of 18 U.S.C. § 1951(a); Count II - Robbery Affecting Commerce, in violation of 18 U.S.C. §§ 1951(a) and 2; and Count III - Possession of a Firearm in Furtherance of a Crime

of Violence, in violation of 18 U.S.C. §§924(c)(1)(A)(i) and (ii), and 2. Mr. Franklin was arraigned and detained on September 10, 2019.

On October 25, 2019, Mr. Franklin entered into a plea agreement intending to plead guilty to Counts II and III of the Indictment. A hearing on the Change of Plea was held on October 29, 2019. The hearing did not result in change of plea and no guilty pleas were maintained. A Superseding Indictment was filed on November 21, 2019, adding Counts IV and V which alleged violation of 18 U.S.C. § 1512(b)(1), Attempted Tampering with a Witness.

On January 21, 2020, Mr. Franklin filed a plea agreement and motion for leave to change plea. Mr. Franklin agreed to plead to Counts II and III of the Superseding Indictment charging Robbery Affecting Commerce in violation of 18 U.S.C. § 1951(a) and Possession of a Firearm in Furtherance of a Crime of Violence in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and (iii) and 2. In exchange, the government would move to dismiss Counts I, IV, and V of the Superseding Indictment. Mr. Franklin reserved his right to appeal the Court's denial of his pretrial motion to dismiss Count III which argued a conviction of 18 U.S.C. § 1951(a) is not a crime of violence under § 924(c)(3).

Mr. Franklin appeared for sentencing on June 17, 2020. The court imposed a sentence of 55 months imprisonment on Count II and 84 months imprisonment on Count III, to run consecutively, followed by 36 months supervised release on Count

II and 60 months supervised release on Count III, to run concurrently. CR 287. At sentencing, the district court relied upon unsworn, unconflicted, uncorroborated, and unreliable hearsay from incredible co-defendants to apply a guideline enhancement under U.S.S.G. § 3C1.1 obstruction.

Mr. Franklin appealed on June 19, 2020, presenting two issues. First, Mr. Franklin contended Hobbs Act robbery is not a crime of violence, and second, his right to due process was violated when the district court relied on unreliable hearsay of co-defendants to enhance his Guideline range. In affirming the district court, the Ninth Circuit announced a new a disjunctive test. A hearsay statement may form the basis of a defendant's sentence if it is either "procedurally reliable" or "substantively reliable." Appendix A; *United States v. Franklin*, 18 F.4th 1105.

Mr. Franklin will ask the Court to hold in abeyance the issue of whether Hobbs Act robbery is a crime of violence while this Court considers a Petition for Writ of Certiorari with a similar issue in *Dominguez v. United States*, No. 20-1000. Mr. Franklin will also ask the Court to review the Ninth Circuit's test related to reliance on out of court statements at sentencing. Mr. Franklin contends that substantive reliability, at minimum, is required and will argue a conjunctive test requiring both procedural reliability and substantive reliability is constitutionally required.

DISCUSSION

Counsel for Mr. Franklin has not had adequate time to research and prepare the Petition for Writ of Certiorari. After announcement of the new disjunctive test by the Ninth Circuit, extensive research is necessary into the status of the law in the regional circuit courts, as the issue is of national sentencing importance. Counsel is availing himself of the resources of the Federal Defenders and the Administrative Office of the U.S. Courts. A conference call is tentatively scheduled for the end of next week to begin evaluation of the status of circuit law.

In addition to extensive research, the undersigned has numerous litigation deadlines in April, including a motion to dismiss in *State of Montana v. Dalton Fish*, Montana Fifth Judicial District Court, Madison County, DC-29-2021-32, and significant discovery review pending potential federal charges in *State of Montana v. Steven Jeffrey Martin*, Montana Fourth Judicial Court, DC-32-22-88.

An extension will not cause prejudice to Respondent. Timothy J. Racicot, Deputy Criminal Chief, United States Attorney's Office, has indicated the United States does not oppose this application. Lastly, this is the undersigned's first opportunity to practice before this Court. An Application for Admission to Practice has been mailed to the Clerk Office, however the undersigned is not yet admitted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the time to file the Petition for Writ of Certiorari in this matter be extended 60 days, up to and including June 24, 2022.

Respectfully submitted this 6th day of April 2022.

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CERTIFICATE OF SERVICE

A copy of this application was served by email and U.S. mail on the 6th day of April 2022 to the counsel listed below in accordance with Supreme Court Rule 22.2 and 29.3.

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