

IN THE SUPREME COURT OF THE UNITED STATES

No. 22A406

MUSTAFA KAMEL MUSTAFA, APPLICANT

v.

UNITED STATES OF AMERICA

APPLICATION FOR AN EXTENTION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECORD CIRCUIT

Pursuant to Rules 13.5 and 30.2 of this Court, counsel for Mustafa Kamel Mustafa a/k/a Abu Hamza, respectfully requests a 14-day extension of time, to and including January 23, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. The Court of Appeals entered its judgment on October 13, 2021, App., *infra*, 1a-6a, and denied Applicant’s petition for rehearing and/or rehearing *en banc* on August 26, 2022, *id.* at 7a. On November 9, 2022, the Honorable Sonya Sotomayor granted an initial 46-day extension of Applicant’s deadline, and as such, unless extended again, the time for filing a petition for a writ of certiorari will expire on Monday, January 9, 2022. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. Applicant was indicted in the Southern District of New York on numerous counts of terrorism-related activity, specifically: (1) conspiracy to take hostages (18 U.S.C. § 1203); (2) hostage taking (18 U.S.C. § 1203); (3) conspiracy to provide and conceal material

support and resources to terrorists (18 U.S.C. §§ 371, 956, 2339A); (4) providing and concealing material support and resources to terrorists (18 U.S.C. §§ 956, 2339A, and 2); (5) conspiracy to provide material support and resources to a foreign terrorist organization (18 U.S.C. § 2339B); (6) providing material support and resources to a foreign terrorist organization (18 U.S.C. §§ 2339B and 2); (7) conspiracy to provide and conceal material support and resources to terrorists (18 U.S.C. §§ 956, 2339A); (8) providing and concealing material support and resources to terrorists (18 U.S.C. §§ 956, 2339A, and 2); (9) conspiracy to provide material support and resources to a foreign terrorist organization (18 U.S.C. § 2339B); (10) providing material support and resources to a foreign terrorist organization (18 U.S.C. §§ 2339B and 2); and (11) conspiracy to supply goods and services to the Taliban (18 U.S.C. § 371; 50 U.S.C. § 1705 [1996 ed.]; 31 C.F.R. §§ 545.204, 545.206 [1999 ed.]).

2. Following a jury verdict, Applicant was sentenced to a term of life imprisonment by the Honorable Kathleen B. Forrest, United States District Court Judge for the Southern District of New York., which he is serving at ADX Florence in arguable violation of the extradition order than resulted in his transfer to the United States for trial. Applicant's trial followed a lengthy extradition battle that lasted over eight years and was ultimately resolved by the European Court of Human Rights, and only upon the assurance that Applicant would not serve an extended sentence at ADX Florence, which is now the case.

3. Applicant direct appeal of his conviction and sentence was granted in part and denied in part by the Second Circuit Court of Appeals on October 23, 2018, and the portions of the appeal that thereafter formed the basis for a petition for certiorari to this Court were thereafter denied certiorari on October 7, 2019.

4. While Applicant's direct appeal of his conviction and sentence was still pending, Applicant filed a pro se motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. On July 12, 2019, the Honorable Analisa Torres, United States District Judge for the Southern District of New York, denied Applicant's pro se post-conviction motion for a new trial, and on August 2, 2019, denied Applicant's pro se motion for reconsideration of the same. Applicant thereafter filed a timely pro se Notice of Appeal.

5. The Second Circuit Court of Appeals appointed the undersigned counsel to represent Applicant in relation to the denial of Applicant's pro se post-conviction motions (hereafter referred to as the "Rule 33 appeal") as the undersigned had previously represented Applicant in relation to Applicant's prior direct appeal.

6. As stated, on October 13, 2021, the Court of Appeals entered its Judgment denying Applicant's Rule 33 appeal, App., infra, 1a-6a, and on August 26, 2022, denied Applicant's petition for rehearing and/or rehearing en banc, id. at 7a. It is that appeal, the Rule 33 appeal, that will form the subject of Applicant's forthcoming petition for certiorari.

7. Applicant is a Muslim imam who had been based in London, England, and who, without question, is the highest profile alleged terrorist ever extradited from Europe to the United States for criminal prosecution. His offenses, prosecuted in the Southern District of New York, spanned the globe and were alleged to include a hostage taking in Yemen, support for the Taliban in Afghanistan, militant fundamentalist propaganda in England, and the creation of terrorist training camps within the United States.

8. The prosecution of Applicant's offenses was extensive, including *unclassified* discovery so voluminous that it filled an entire conference room with banker's boxes stacked to the ceiling. Applicant's trial (and both appeals) also involved and referenced substantial

classified material subject and controlled by the strict requirements of the Classified Information Procedures Act (“CIPA”), 18 U.S.C. App. 3, which requires the storage of such material only in a separate, secure, facility authorized to maintain “SECRET” level national security documents.

9. Because Applicant’s counsel possessed the requisite national security clearance, but Applicant himself did not, Applicant’s counsel was provided access to the classified material relevant to Applicant’s defense but Applicant himself was prohibited from being given access to that information.

10. The questions anticipated to be presented in the forthcoming petition for certiorari are: (1) Whether a claim of ineffective assistance of counsel may be raised under Rule 33(b)(1) of the Federal Rules of Criminal Procedure if the newly discovered evidence is newly discovered *to the defendant*? And (2), whether production of evidence to *defense counsel* as compared to *access to* that evidence by *the defendant* should be distinguished in the context of a claim of ineffective assistance of counsel? An answer to both of these questions will raise Fifth and Sixth Amendment concerns.

11. A second extension of time is necessary to complete the forthcoming petition for certiorari due to the impact on attorney-client communications caused by Applicant’s conditions of confinement. Applicant is being detained in the Special House Unit (“SHU”) at ADX Florence in Florence, Colorado, under highly restrictive Special Administrative Measures (“SAMs”), which greatly limit and severely delay even communications with counsel. It is, for example, common place for it to take up to four weeks for letters from Applicant to be received by counsel due to the extensive security review process that all mail – even legal mail – is required to be undertaken in relation to this case. Similarly, it often

takes a lengthy period of time to schedule legal telephone calls with Applicant, and such communication is necessary prior to filing the forthcoming petition for certiorari.

12. Accordingly, counsel for Applicant respectfully requests a 14-day extension of time, to and including January 23, 2023, within which to file a petition for writ of certiorari.

Dated: December 14, 2022

Respectfully submitted,

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