

No. 22A__

IN THE
Supreme Court of the United States

JERRY WAYNE WILKERSON,

Applicant,

v.

UNITED STATES,

Respondent.

MICHAEL CHATFIELD,

Applicant,

v.

UNITED STATES,

Respondent.

JASON MONTGOMERY,

Applicant,

v.

UNITED STATES,

Respondent.

BILLY HINDMON,

Applicant,

v.

UNITED STATES,

Respondent.

KASEY NICHOLSON,

Applicant,

v.

UNITED STATES,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME TO FILE
PETITION(S) FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States:

1. Under Supreme Court Rules 13.5, 22, and 30, applicants (the “Applicants”), all of the defendants-appellants in *United States v. Montgomery* (Nos. 20-5891, 20-5897, 20-5920, 20-5946, 20-6010), respectfully request a 58-day extension of time, up to and including January 20, 2023, to file one or more petitions for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit (the “Sixth Circuit”), to review *United States v. Montgomery*, 2022 WL 2284387 (6th Cir. June 23, 2022). The Sixth Circuit issued its decision on June 23, 2022. Appendix A. The Sixth Circuit denied the petition for panel rehearing and rehearing en banc on August 25, 2022. Appendix B. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254. The time to file petitions for writs of certiorari will otherwise expire on November 23, 2022. The application is timely because it has been filed more than ten days before the date on which a petition is otherwise due.

2. The decision of the Sixth Circuit presents important and recurring questions concerning the proper standard of intent to convict defendants for healthcare fraud, mail and wire fraud, violation of the anti-kickback statute, and money laundering: Specifically, whether such criminal convictions require the government to establish that a defendant subjectively knew or intended that their conduct was unlawful. Applicants were marketers who advertised certain compound drugs in accordance with industry standards pursuant to marketing contracts with pharmacies. The trial court devised a theory that Applicants had the requisite intent

because they failed to disclose the cost of the prescriptions to “someone.” Wilkerson Sentencing Tr., R.549, PageID#11602. Seeming to recognize that a failure to disclose is not sufficient to sustain Applicants’ criminal convictions, the Sixth Circuit instead inferred the requisite intent based on an objective analysis that considered a string of conduct that was not illegal. But the Sixth Circuit’s decision predates this Court’s decision in *Ruan v. United States*, 142 S. Ct. 2370 (2022), and cannot be squared with *Ruan*. It also conflicts with the decisions of several other circuits, which even before *Ruan*, required a more robust intent standard. *Ruan* establishes a rigorous intent standard that requires the government to prove that a defendant subjectively knew that his conduct was unlawful. Similarly, other circuits require that the government establish a subjective intent to act unlawfully in order to convict a defendant of healthcare fraud and related offenses. But the Sixth Circuit’s decision does not do that. The Sixth Circuit found that even if Applicants’ actions “could have a plausible innocent explanation,” when considered together, the court could infer the requisite intent.

3. Good cause exists for this requested extension. Counsel for these five cases have coordinated throughout trial in the district court and on appeal to ensure that there is no unnecessary duplication. Specifically, Applicants coordinated on briefing on appeal and, to various degrees, joined Wilkerson’s opening brief and reply brief. The Sixth Circuit then held a consolidated oral argument. This coordination has promoted judicial efficiency and conserved both the parties’ and the courts’ resources. Granting the requested extension will enable the Applicants to continue this

coordination in seeking certiorari, streamlining the issues for this Court to consider, and avoiding duplication.

4. Moreover, counsel for Applicant Wilkerson was appointed as counsel with the understanding that law students from the U.S. Supreme Court Litigation Clinic of the West Virginia University College of Law (the “Clinic”) would assist with the representation. Indeed, one of the Clinic students presented oral argument in the Sixth Circuit on one of the issues involved in this case. The Clinic students are preparing for upcoming exams and are also engaged in a number of other cases including *Lora v. United States* (Case No. 22-49), in which a reply in support of certiorari will be filed on or before November 15, 2022. An extension of time is necessary to ensure that the students are able to meaningfully engage in substantive work on the Petition in this matter.

5. Furthermore, undersigned counsel has had a number of recent and upcoming deadlines in other matters. Counsel for Applicant Wilkerson must draft a reply in response to an objection to a petition for certiorari filed on November 9, 2022, in *Owl Creek Asia I, L.P. et. al, v. United States* (Case No. 22-97) and draft a reply in support of a motion to approve bidding procedures in *In re The Roman Catholic Diocese of Rockville Centre, New York* (Case No. 10-12345) (Bankr. S.D.N.Y.). Additionally, counsel for Applicant Wilkerson has attended and prepared for hearings in an arbitration proceeding before the American Arbitration Association in *Citigroup v. Villar* (Case No. 01-21-0004-5256) on October 26, November 1, and November 8 and has also engaged in substantial witness preparation and a deposition for that

matter over the last few weeks. Counsel for Applicant Wilkerson is also litigating an appeal in a related matter in the Ninth Circuit (Case No. 22-56025). Counsel for Applicant Wilkerson is also lead counsel in *Lufthansa Technik v. Panasonic Avionics Corp.*, No. 2:17-cv-01453-JCC (W.D. Wash.), in which he is coordinating simultaneous document discovery from several parties, and in which he will be conducting one or more additional depositions in Seattle, Washington, in the next few weeks.

6. Undersigned counsel for Applicant Hindmon are engaged in an unusually high number of matters that are particularly problematic as a result of a staffing shortage and an unexpected death of an immediate family member. Counsel for Applicant Hindmon also must draft the opening brief in an appeal in the Sixth Circuit, in *Witham v. United States* (Case No. 21-6214), due November 29 and which raises an important issue for which a certificate of appealability was granted.

7. Undersigned counsel for Applicant Kasey Nicholson has an appellee brief due in *United States v. Jacobs* (Sixth Circuit 22-3488) on November 18, an appellant brief in *United States v. Goodwin* (22-5556) due November 21, and a reply brief in *United States v. Hubbard* (22-5390) due November 21.

WHEREFORE, Applicants respectfully request that an order be entered extending the time to file one or more petitions for a writ of certiorari for 58 days, up to and including January 20, 2023.

Dated: 11/10/2022

Respectfully submitted,

/s/ Lawrence D. Rosenberg

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