No. 23A411

In The
SUPREME COURT OF THE UNITED STATES
October Term 2023

Irvin Harris Johnson,
Appellant/Petitioner,

v.

United States,
Appellee/Respondent.

Additional Application for an Extension of Time in Which to File a Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

APPLICATION TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE, AS CIRCUIT JUSTICE

JEFFREY T. GREEN*
JOSHUA FOUGERE
TOBIAS LOSS-EATON
MORGAN BENNETT LINDSAY
MORGAN BRANCH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

December 1, 2023

Attorneys for Applicant/Petitioner

*Counsel of Record

APPLICATION FOR EXTENSION OF TIME

Under this Court's Rule 13.5, Applicant Irvin Harris Johnson requests an additional 28-day extension of time within which to file a petition for a writ of certiorari, up to and including Friday, January 12, 2024.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *Irvin Harris Johnson* v. *United States*, No. 13-CF-0493 (D.C. Apr. 7, 2023). The District of Columbia Court of Appeals denied Applicant's motion for rehearing or rehearing en banc on August 17, 2023.

JURISDICTION

This Court will have jurisdiction over a timely filed petition under 28 U.S.C. § 1254(1). Under this Court's Rules 13.1, 13.3, and 30.1, the petition was initially due by November 15, 2023. On November 8, 2023, the Chief Justice granted Mr. Johnson's first application to extend this deadline, to December 15, 2023. In accordance with Rule 13.5, Mr. Johnson has filed this application more than 10 days in advance of that due date.

REASONS JUSTIFYING AN EXTENSION OF TIME

Applicant respectfully requests an additional 28-day extension of time within which to file a petition for a writ of certiorari in this case, up to and including January 12, 2024.

1. An extension is warranted because of the importance of the issues presented and the seriousness of the errors made by the District of Columbia Court of Appeals. The Court of Appeals held that neither attorney-client privilege nor work-product doctrine applied to—meaning the Sixth Amendment did not protect—

handwritten notes that Mr. Johnson wrote to himself, while he was in jail, in preparation for his next meeting with his trial attorney. That erroneous holding threatens the right to counsel and conflicts with precedent from other courts.

Like many people who are jailed while awaiting trial, Mr. Johnson did not know when he would next get to speak with his public defender. Thus, as he reviewed the affidavit attached to his arrest warrant and reactions and strategy points occurred to him, he jotted them down so he could refer to them when meeting with counsel. He thus produced "a recitation of [his] impressions and his reactions to the information he learned at his preliminary hearing and from the affidavit supporting his arrest warrant," Ex. A at 12, which he discussed "with counsel both before and after he wrote [it]," C.A. App'x 893. Yet the government seized this note from his jail cell and used it at trial as a purported "confession." The note was so powerful—especially compared to the other, purely circumstantial evidence against Mr. Johnson—that the jury asked to see it during deliberations.

Even so, the court below held that no privilege attached to this note because it did "not, *on its face*, mention counsel or otherwise indicate that it was intended for their eyes." Ex. A at 13 (emphasis added). And the court said that, even if the note was protected by the work-product doctrine, no prejudice resulted from its use at trial—even though the government portrayed it as a confession and the jury asked to see it. *Id.* at 14. On these grounds, the court found no Sixth Amendment violation. *See id.* at 13. The court then denied Mr. Johnson's petition for rehearing en banc.

Thus, under the decision below, the prosecution is free to seize a client's notes, blow them up as evidence for the jury, and repeatedly tell the jury that the defendant's written thoughts about legal strategy—prepared for discussions with his lawyer—are akin to a confession. As Judge Howard observed at oral argument, such a rule produces profound and unfair consequences. And it threatens the basic purpose of the privilege and work-product doctrines, and thus the Sixth Amendment right to counsel.

This Court has long recognized "the centrality of open client and attorney communication to the proper functioning of our adversary system of justice." *United States* v. *Zolin*, 491 U.S. 554, 562 (1989). "By assuring confidentiality, the privilege encourages clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 108 (2009). If jailed clients cannot take the initiative to prepare notes for attorney meetings without losing the privilege, their counsel cannot effectively advise them, and they cannot properly defend themselves. "Certainly, an outline of what a client wishes to discuss with counsel—and which is subsequently discussed with one's counsel—would seem to fit squarely within our understanding of the scope of the privilege." *See United States v. Defonte*, 441 F.3d 92, 96 (2d Cir. 2006) (per curiam).

In turn, the decision below violates the Sixth Amendment and conflicts with other appellate courts' rulings. "The essence of the Sixth Amendment right to effective assistance of counsel is, indeed, privacy of communication with

counsel." *E.g.*, *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 174 (4th Cir. 2019) (collecting cases) (citing *United States v. Brugman*, 655 F.2d 540, 546 (4th Cir. 1981)). By failing to apply the privilege to client materials intended for use in confidential attorney-client communications, the decision below eviscerates this principle and conflicts with other appellate decisions. *E.g.*, *Defonte*, 441 F.3d at 96 (district court erred by rejecting privilege claims over jailed person's diary, including notes for discussions with counsel); *Bishop* v. *Rose*, 701 F.2d 1150, 1151, 1155 (6th Cir. 1983) (finding Sixth Amendment violated where defendant's handwritten statement was discovered by prison guards, sent to the prosecutor, and used to impeach him at trial). "Similarly, the work-product doctrine fulfills an essential and important role in ensuring the Sixth Amendment right to effective assistance of counsel." *In re Search Warrant*, 942 F.3d at 174. By finding no prejudice from the work-product violation even though the note was *used at trial as a "confession,"* the decision below conflicts with other courts' recognition that "a prosecutor's intentional intrusion into the attorney-client relationship" almost always "constitute[s] a *per se* violation of the Sixth Amendment." *United States v. Orduno-Ramirez*, 61 F.4th 1263, 1269 (10th Cir. 2023).

2. An extension of time is also warranted because counsel, who are representing Mr. Johnson on a *pro bono* basis, have multiple other obligations that coincide with the current deadline.

Mr. Green presented oral argument to this Court in *Brown* v. *United States*, No. 22-6389, on November 27. His preparations occupied much of his time in the

preceding weeks. Mr. Green and Mr. Loss-Eaton are also responsible for preparing multiple petitions for writs of certiorari currently due in December.

Mr. Loss-Eaton is additionally responsible for briefing issues remanded by this Court to the Pennsylvania state courts in *Mallory* v. *Norfolk Southern Railway*, 600 U.S. 122, 127 n.3 (2023), and is preparing to present oral argument before the Sixth Circuit in *Norfolk Southern Railway* v. *Dille Road Recycling*, LLC, No. 22-4037, on December 6.

Ms. Lindsay is preparing reply comments due in December for multiple clients in a rulemaking proceeding before the U.S. Surface Transportation Board ("STB") in *Reciprocal Switching for Inadequate Service*, Docket No. EP 711 (Sub-No. 2), as well as briefing due in January before the STB in *Sanimax USA LLC v. Union Pacific Railroad Co.*, Docket No. NOR 42171.

Ms. Branch is preparing a lengthy response brief in *Krynica Vitamin SA v. Heineken Brouwerijen B.V.*, ICDR No. 1-22-0000-8374 that is due on December 11. She also has obligations in matters pending before the U.S. District Court for the Northern District of California in two different cases, *Lyons v. Gilead Sciences, Inc.*, No. 19-cv-02538, and *Calkin v. Gilead Sciences, Inc.*, No. 20-cv-01884, as well as several related actions pending in New York, *State of New York ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co., et al.*, Index No 10559/2014, California, *State of California ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co., et al.*, Case No. CGC-14-540777 and New Jersey, *State of New Jersey ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co., et al.*, Docket No. MER-L-00885-15.

Finally, students from the Northwestern Supreme Court Practicum will assist with the preparation of this petition, and an extension is warranted to allow their assistance without interfering with their fall semester exams.

CONCLUSION

For these reasons, Applicant respectfully requests an additional extension of 28 days, to and including January 12, 2024, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,

JEFFREY T. GREEN*
JOSHUA FOUGERE
TOBIAS LOSS-EATON
MORGAN BENNETT LINDSAY
MORGAN BRANCH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

Attorneys for Applicant/Petitioner

December 1, 2023

*Counsel of Record