

No. _____

In the
Supreme Court of the United States

DALIBOR KABOV AND BERRY KABOV,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

**APPLICATION TO JUSTICE ELENA KAGAN
FOR AN EXTENSION OF TIME TO FILE
A PETITION FOR WRIT OF CERTIORARI**

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February 2, 2024

TO: THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

Pursuant to Supreme Court Rule 13.5, Petitioners Dalibor Kabov and Berry Kabov respectfully request a 30-day extension of the time to file a petition for a writ of certiorari up to and including March 13, 2024. The United States Court of Appeals for the Ninth Circuit issued its decision on July 18, 2023, *see* Attachment A, and denied rehearing en banc on November 14, 2023, *see* Attachment B. Absent an extension, a petition for certiorari would be due on February 12, 2024. This application is timely because it has been filed more than ten days before the date on which the petition is otherwise due. S. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254(1).

1. Defendant-Petitioners Berry and Dalibor Kabov were convicted following a jury trial on charges including conspiracy to distribute and distributing oxycodone in January and May 2012, in violation of the Controlled Substances Act. 21 U.S.C. § 841(a)(1), (b)(1)(C), and the illegal importation of controlled substances. After their convictions, but while their case was on appeal, this Court decided *Ruan v. United States*, 142 S. Ct. 2370 (2022), holding that 21 U.S.C. § 841 requires a defendant to “knowingly or intentionally” act in a manner unauthorized by law. The Ninth Circuit, recognizing that this intervening precedent affected the sufficiency of the jury instructions in the Kabovs’ trial, vacated the Kabovs’ convictions for drug importation. The court refused, however, to vacate the Kabovs’ drug distribution convictions, even though the same error infected those convictions too. Despite false testimony by the government’s star witness, the Court also rejected their challenges

to the government's case under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959), concluding that the admission of the challenged evidence and testimony could not have changed the outcome of defendants' trial.

2. Petitioners intend to file a petition for certiorari. That petition will raise two issues: first, whether Petitioners' remaining drug convictions must also be vacated based on the *Ruan* error. The Ninth Circuit's decision to split the baby and grant relief on some but not all of Petitioners' convictions conflicts with how other Circuits have handled similar issues and cannot be squared with *Ruan* itself. Second, Petitioners also intend to raise the issue of the Ninth Circuit's denial of their *Brady* and *Napue* challenges, which included the false testimony of their star witness who was continuing to commit crimes while serving as a cooperator. Some of those issues potentially overlap with those raised in *Glossip v. Oklahoma*, Case No. 22-7466, in which this case recently granted certiorari.

3. Petitioners respectfully request an extension of 30 days, to and including March 13, 2024, to prepare a petition for certiorari. An extension is necessary because counsel for Dalibor Kabov, who is taking the lead on the joint petition, contracted a serious case of COVID in early January of this year and is continuing to deal with the after-effects. Counsel also has other matters with other pressing deadlines. The requested extension would not cause material delay, as this Court could still hear the case during the upcoming Term.

4. On February 2, 2024, Petitioners' counsel emailed Respondent's counsel requesting Respondent's position on the requested extension. Counsel for Respondent has stated that Respondent consents to the requested 30-day extension.

CONCLUSION

For the foregoing reasons, this Court should grant the requested extension of time for Petitioners' petition for certiorari.

Respectfully submitted,

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