

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT J. RICE, Petitioner,

v.

UNITED STATES, Respondent.

**APPLICATION FOR EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

TO THE HONORABLE SAMUEL A. ALITO, ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE
FOR THE THIRD CIRCUIT:

Pursuant to this Court's Rules 13.5 and 30.2, applicant-petitioner Robert J. Rice prays for a 30-day extension of time to file his petition for a writ of certiorari in this Court to and including March 16, 2018.

1. Timeliness and Jurisdiction. On November 16, 2017, the United States Court of Appeals for the Third Circuit filed its opinion and judgment affirming the applicant's conviction. Appx. A. No petition for rehearing was filed by any party. As a result, pursuant to this Court's Rules 13.1 and 13.3, a petition for certiorari would be due on or before February 14, 2018. This application is being filed at least ten days before that date. See Rule 30.2. The jurisdiction of this Court is to be invoked under 28 U.S.C. § 1254(1).

2. Opinions Below. The Third Circuit's non-precedential opinion (per Fuentes, J., with Jordan & Chagares, JJ.), dated November 16, 2017, is attached as

Appendix A. It is not yet published in the Federal Appendix, but is available at 2017 WL 5495584. The United States District Court for the Middle District of Pennsylvania (Conner, Ch.J.) wrote a memorandum opinion (designated “Order”), filed November 19, 2015, addressing the applicant’s pretrial motion to suppress. That Order is not published in the Federal Supplement or otherwise available on electronic databases. A copy is attached as Appx. B. An unrelated, pre-sentence memorandum of the district court deciding a Double Jeopardy motion is available at 2016 WL 3654455 (July 8, 2016).

3. Reasons for Granting the Extension.

a. The applicant, a colonel in the U.S. Army assigned to the War College in Carlisle, Pennsylvania, was found guilty after a five-day jury trial in May 2016 on both counts of a two-count indictment. Count One charged possession of child pornography over a two-and-a-half-year period, in violation of 18 U.S.C. § 2252A(a)(5). Count Two charged receipt and distribution of child pornography, in violation of *id.*(a)(2), during certain days near the end of that same time period. The district court denied a pretrial motion, which invoked statutory (Wiretap Act) as well as constitutional grounds, to suppress evidence seized from the applicant’s computer. The warrant was derived from information gleaned by the use of illegal “spyware” installed by the applicant’s wife as their marriage deteriorated. Appx. B.

b. Prior to sentencing, the district court dismissed Count One on double jeopardy grounds, based on the applicant’s October 11, 2016, court martial conviction for related conduct. The applicant was sentenced on December 28, 2016, by the U.S.

District Court to serve 142 months' imprisonment (that is, 12 years adjusted for time served), with ten years' supervision to follow, and to pay a \$5000 fine.

c. Applicant Rice filed a timely, counseled appeal from his conviction. He argued that the key evidence used against him at trial was inadmissible under the federal Wiretap Act, 18 U.S.C. §§ 2510–2522 (“Title III”), and that a prejudicial comment by the prosecutor required a declaration of mistrial. In a non-precedential opinion, the court of appeals rejected those arguments and affirmed. Appx. A.

d. An appeal of Col. Rice's court martial conviction and sentence (which is running concurrently with his federal district court sentence) is pending before the United States Army Court of Criminal Appeals, at Docket No. ARMY 20160695. The appeal contends that all specifications of the military charges were barred by double jeopardy after the May 2016 civilian trial.

e. In undersigned counsel's professional opinion, this case presents an important question of federal law, concerning two seemingly conflicting sets of provisions of Title III, as amended in 1986 by the Electronic Communications Privacy Act (“ECPA”). Counsel anticipates that the petition will present the following question:

The 1968 federal Wiretap Act, 18 U.S.C. §§ 2510–2522, as amended by the 1986 Electronic Communications Privacy Act, provides for “suppression” of illegally seized “wire” and “oral” communications but not of illegally seized “electronic” communications. See *id.* §§ 2515, 2518(10)(a), 2518(10)(c). Yet the Act also provides that witnesses must not “disclose” illegally seized electronic communications through testimony during a trial. *Id.* §§ 2511(1)(c), 2517(3). Is the court required to bar admission at trial of testimony that discloses illegally seized electronic communications?

f. Following the Third Circuit's affirmance of the applicant's conviction, undersigned counsel promptly advised Mr. Rice of his right to petition this Court, and of the attendant deadline. On Monday, January 29, 2018, the applicant called the undersigned from the military prison in Leavenworth, Kansas, to advise that he had been able to make the arrangements to retain counsel for the filing of a petition for certiorari. As of this filing, however, counsel has not yet been formally retained.

g. Undersigned counsel, whose two-lawyer practice focuses on federal criminal appeals, would not be able to prepare a proper petition for certiorari in the two weeks remaining before the petition would be due, in light of other pre-existing obligations and deadlines, even if the retainer in this case had been consummated immediately. As a result of these circumstances, counsel cannot manage to file the petition in this case by the original February 14, 2018, due date and still satisfy his own or this Court's high standards.

h. Applicant Rice is currently incarcerated serving the sentence at issue in this case. He does not seek delay for any tactical reason. For the same reason, the government would not be prejudiced by the requested extension.

WHEREFORE, the Applicant-Petitioner prays that the Circuit Justice enter an Order extending the time within which he may petition this Court for certiorari by 30 days, to and including March 16, 2018.

Dated: February 1, 2018

Respectfully submitted,

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