

Application No. _____

In the Supreme Court of the United States

FRANCIS SCHAEFFER COX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Application for Extension of Time to File a Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S APPLICATION FOR EXTENSION OF TIME
TO FILE PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

To the Honorable Anthony M. Kennedy, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Petitioner Francis Schaeffer Cox respectfully requests that the time to file a petition for writ of certiorari in this matter be extended for thirty days up to and including March 7, 2018. The Ninth Circuit Court of Appeals issued its opinion on August 29, 2017. *See* App. A. On November 7, 2017, the Court denied a petition for panel rehearing with suggestion for rehearing *en banc*. *See* App. B. This request is made pursuant to Rules 13.5 and 30.2 of this Court. Mr. Cox and the government were the only two parties in this direct appeal, and Mr. Cox is the only party requesting an extension of time. The petition is presently due February 5, 2018. In support of his motion, petitioner Cox states as follows:

1. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).
2. The memorandum opinion of the Ninth Circuit Court of Appeals in *United States v. Cox*, COA No. 13-30000, is attached as App. A to this application. The Ninth Circuit Court of Appeals' order denying Mr. Cox's Petition for Rehearing on November 7, 2017, is attached as App. B.
3. Mr. Cox seeks a 30-day extension of time in which to file his petition for writ of certiorari, from February 5, 2018, up to and including March 7, 2018.
4. As good cause for his application, Mr. Cox cites the following factors as support for his requested extension:

a. While the attached Memorandum Opinion is short, the underlying trial was lengthy, the appellate record and the briefing in the Ninth Circuit was voluminous, and the matter presents complicated issues concerning the reach of the criminal conspiracy statute and federal jurisdiction. Preparation of the petition for writ of certiorari requires significant additional analysis concerning the framing of the issues and construction of an effective presentation on why this Court should grant discretionary review. It is expected that the petition for certiorari will present the following issues: (1) whether a contingent conspiracy may be based on a condition that was highly unlikely to occur but which the conspirators subjectively believed was likely to occur; and (2) whether federal prosecution and conviction for conspiracy to murder a “completely fictitious” federal hit team and/or state or generic government employees conflicts with *Feola v. United States*, 420 U.S. 671 (1975).

Reasons offered to grant the writ will include that the panel’s conclusion that such a subjective belief was sufficient even when the contingencies—the coming of “Stalinesque martial law” and the participation by federal employees in “mass arrests and purges”—were objectively unreasonable, conflicts with the First Circuit, which requires an objective likelihood that such a condition would be fulfilled. *United States v. Palmer*, 203 F.3d 55, 64 (1st Cir. 2000) (applying the test announced by *United States v. Dworken*, 855 F.2d 12, 19 & n.6 (1st Cir. 1988)). It

also presents the unanswered question posed in *United States v. Podolsky*, 798 F.2d 177, 179 (7th Cir. 1986), where that court declined to require an objective standard, but offered the possibility of a middle ground between the later decisions of the First and Ninth Circuits: “[W]e need not decide in this case how to deal with the situation where an agreement is conditioned on an event that is highly unlikely ever to occur.” The petition will also argue that important policy considerations are presented by this circuit split concerning the reach of federal conspiracy liability and the federal jurisdiction for criminal offenses. As this Court has cautioned, “[T]he looseness and pliability of the [conspiracy] doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case.”

Krulewitch v. United States, 336 U.S. 440, 449 (1949) (Jackson, J., concurring).

This case is at the extreme edge of conspiracy liability; neither counsel nor the court below has identified any § 1117 conspiracy to murder (or § 111 conspiracy to assault) case with conditions even remotely similar to the unlikely events of historical proportion presented here.

b. The undersigned is the Federal Public Defender for the Western District of Washington. Mr. Cox was determined to be indigent and, pursuant to 18 U.S.C. § 3006A, I was appointed on January 27, 2016, by the Ninth Circuit Court of Appeals to represent Mr. Cox in the appeal from his convictions in the

District of Alaska. I personally prepared Mr. Cox's appeal with the assistance of Assistant Federal Public Defender Ann Wagner.

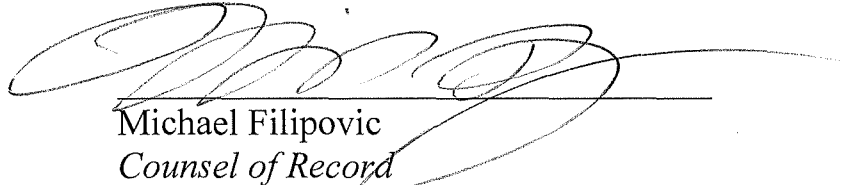
c. In addition to managing the Federal Public Defender Office for the Western District of Washington, which in this district includes managing the CJA panel, counsel presently has over 10 criminal, habeas, and appellate cases pending in the district or circuit court. Ms. Wagner's caseload consists of appellate and post-conviction cases. Her responsibilities include managing the large number of clients who may benefit from the retroactive application of this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), as well as being lead counsel in other direct appeal and habeas corpus cases to which the FPD has been assigned.

d. Undersigned counsel will be out of the country from January 25 to February 5, 2018, to attend the wedding of his daughter in Nairobi, Kenya, and Ms. Wagner will be on leave from January 18 to 23, 2018.

5. This Motion is made in the interests of justice and not for purposes of delay. The combination of the complexity of the issues in this case, the workload of counsel, and the travel schedules of counsel in the two and half weeks immediately prior to the due date for this petition establishes good cause for a 30-day extension of time.

WHEREFORE, petitioner Cox requests that this Court grant him an extension of time up to and including March 7, 2018, in which to file his petition for writ of certiorari.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Filipovic', is written over a horizontal line.

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January 5, 2018