

IN THE SUPREME COURT OF THE UNITED STATES

NO. 21A _____

JOHN N. KAPOOR, APPLICANT

v.

UNITED STATES

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable Stephen G. Breyer
Associate Justice of the United States Supreme Court
and Circuit Justice for the First Circuit

Pursuant to Rules 13.5 and 30.2 of this Court, counsel for John N. Kapoor respectfully requests a 48-day extension of time, to and including January 10, 2022, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case. The opinion of the court of appeals (App., infra, 1a-141a) is reported at 12 F.4th 1. The court of appeals entered its judgment on August 25, 2021. App., infra, 142a. Therefore, unless extended, the time for filing a petition for a writ of certiorari will expire on November 23, 2021. This application is being filed more than 10 days in advance of that date, and no prior application has been

made. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. This case concerns a novel attempt by the government to hold pharmaceutical executives criminally responsible for the medical judgments of doctors and other healthcare providers. Applicant was the founder of Insys Therapeutics, Inc., a pharmaceutical company that after a decade of research and development efforts launched a ground-breaking drug for treatment of the sudden, sharp, "breakthrough" pain that cancer patients experience. App., infra, 5a-6a.

The operative indictment charged applicant and six co-defendants with a single count of conspiracy under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(d), with five RICO predicates: violations of the Controlled Substances Act (CSA), 21 U.S.C. § 841(a)(1), honest services mail and wire fraud, 18 U. S. C. §§ 1341, 1343, 1346, and ordinary mail and wire fraud, id. §§ 1341, 1343. App., infra, 21a. The jury convicted all defendants after a highly publicized, 51-day trial and 15 days of jury deliberations. Id. In connection with its verdict, the jury found that applicant had conspired to all of the alleged RICO predicates, including illegal distribution of a controlled substance and honest services mail and wire fraud. Id.

Acting on misgivings that it had first voiced at applicant's pre-verdict motion for a judgment of acquittal, the district court

granted a post-trial judgment of acquittal on the CSA and both honest-services predicates. See United States v. Gurry, 427 F. Supp. 3d 166, 222 (D. Mass. 2019). As the district court explained, the government had failed to prove beyond a reasonable doubt that applicant had “an intent that healthcare practitioners prescribe [Subsys] to people that did not need it or in unnecessarily high doses.” Id. The district court reinforced its conclusion by reliance on the First Circuit’s equipoise rule, whereby an acquittal must be entered where the evidence “gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence.” Id. at 186 (quotation omitted).

The court of appeals reversed the judgment of acquittal. App., infra, 28a-42a. In the panel’s view, the record supported a finding that applicant intended doctors “to prescribe Subsys as much as possible, even when there was no medical necessity for the drug or the dosage prescribed.” Id. at 33a. The panel also rejected the district court’s application of the equipoise rule. Id. at 47a. Based on its reinstatement of the jury’s verdict on the CSA and honest-services predicates, the panel did not resolve applicant’s core arguments on appeal, which were premised on prejudicial spillover from those predicates.

2. This case presents issues closely related to the questions presented in Ruan v. United States, No. 20-1410 (cert. granted Nov. 5, 2021), and Kahn v. United States, No. 21-5261


(cert. granted Nov. 5, 2021). In those cases – the first of which concerns two Insys-linked doctors who were alleged to be co-conspirators of applicant – the Court will have occasion to clarify whether a physician alleged to have prescribed a drug outside the usual course of professional practice or without a legitimate medical purpose may be convicted under 21 U.S.C. § 841(a)(1) without regard to whether the physician believed, in good faith, that their prescriptions were legitimate. This Court’s resolution of that question is likely to impact applicant’s case, as the doctors’ perception of their own prescribing behavior, together with applicant’s knowledge of and agreement with that perception, were critical issues in applicant’s trial, the district court’s post-trial acquittal, and the court of appeals’ reinstatement of the jury’s verdict.

3. This case also presents an important question concerning the validity and application of the equipoise rule. The courts of appeal are deeply divided on the validity of the rule. Compare, e.g., app., infra, 47a with United States v. Vargas-Ocampo, 747 F.3d 299 (5th Cir. 2014) (en banc). Moreover, how an appellate court should apply the equipoise rule “is not entirely clear,” particularly when its review is limited to “a cold appellate record without the benefit of the dramatic insights gained from watching the trial.” Id. at 301. This case presents a striking illustration of that difficulty, given the sharply divergent views of the

evidence by the district court that witnessed the 51-day trial and the court of appeals panel that did not.

4. Counsel for applicant respectfully requests an extension of time, to and including January 10, 2022, within which to file a petition for a writ of certiorari. The requested extension would allow counsel sufficient time to further analyze the relationship between the issues in this case and those presented in Ruan and Kahn, where certiorari was granted just last week. In addition, undersigned counsel has other pending matters that will interfere with counsel's ability to file the petition on or before November 23, 2021. These include, among others, a criminal case pending in district court and a regulatory proceeding that is occurring on a compressed time schedule. Additional time is therefore needed to prepare the petition in this case.

Respectfully submitted.



KOSTA S. STOJILKOVIC
Counsel of Record
BETH A. WILKINSON
CHANAKYA A. SETHI
WILKINSON STEKLOFF LLP
2001 M St., N.W.
10th Floor
Washington, DC 20036
(202) 847-4045
kstoilkovic@
wilkinsonstekloff.com

NOVEMBER 10, 2021