

No. A-_____

In the Supreme Court of the United States

ALAN PETER TWARDOSKI,
PETITIONER

v.

STATE OF MONTANA,
RESPONDENT

*APPLICATION FOR AN EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT*

**APPLICATION OF PETITIONER TO THE
HONORABLE ELENA KAGAN AS CIRCUIT JUSTICE**

UNOPPOSED APPLICATION FOR EXTENSION OF TIME

To the Honorable Elena Kagan, as Circuit Justice for the Supreme Court of Montana:

In accordance with this Court's Rules 13.5, 22, 30.2, and 30.3, Applicant Alan Peter Twardoski respectfully requests that the time to file his petition for a writ of certiorari be extended for 60 days, up to and including December 4, 2026. The Supreme Court of the State of Montana issued its opinion on July 7, 2026 (attached). Absent an extension of time, the petition would be due on Monday, October 5, 2026. The jurisdiction of this Court is based on 28 U.S.C. § 1257. The State of Montana consents to this request.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is the opinion of the Montana Supreme Court in *State of Montana v. Alan Peter Twardoski*, Case No. DA 23-0452, 2026 MT 142 (“Op.”) (attached). That opinion, issued on July 7, 2026, affirmed the district court’s decision imposing an increased sentence on Twardoski after he first appealed and successfully overturned a prior unconstitutional verdict. In his appeal, Twardoski argued that the district court violated the Due Process Clause by considering an impermissible factor to increase his sentence, i.e., that he previously exercised his right to an appeal. The Montana Supreme Court agreed that the district court’s statements at sentencing that “[t]wenty-four individual people” found Twardoski guilty “were, at best, improvidently offered,” but held that there was nonetheless no need to remand because the district court “provided ample legitimate justification” for the increased sentence. Op. 14.

JURISDICTION

The judgment of the Montana Supreme Court was rendered on July 7, 2026. This Court has jurisdiction over any timely filed petition in this case pursuant to 28 U.S.C. §§ 1257(a) and 2101(d). Under Rule 13.1 of the Rules of this Court, a petition for certiorari is due to be filed in this case on or before October 5, 2026. As required by Rule 13.5, this application is being filed more than 10 days before the petition is due.

BACKGROUND

This case arises from an increased sentence imposed by the district court, on resentencing, after Twardoski successfully challenged his initial conviction on appeal. In June 2018, Twardoski was found guilty of various sexual crimes. Op. 2. He was initially sentenced “to the following concurrent prison terms: 50 years, with none suspended, for each count of sexual intercourse without consent and 50 years, with 25 years suspended, for the counts of sexual assault and sexual abuse of children.” The court also “designated Twardoski as a Tier II Sexual Offender and restricted Twardoski’s eligibility for parole until he completed Phases 1 and 2 of Sexual Offender Treatment.”

Twardoski appealed. The Montana Supreme Court “reversed and remanded for a new trial,” ruling that the district erred in interpreting Montana’s rape shield statute as barring certain evidence and so infringed “Twardoski’s constitutional right to confront his accuser and present a complete defense.” *See id.* at 2-3 (citing *State v. Twardoski*, 491 P.3d 711 (Mont. 2021)).

“In May 2022, Twardoski’s case was retried before a different judge.” *Id.* at 3. “The State dropped the sexual abuse of children charge on remand but otherwise prosecuted Twardoski using the same theory of the case and presenting evidence similar to the first trial.” *Id.* The jury found Twardoski guilty of all charges. *Id.* at 5.

Before sentencing, both the State and defense counsel recommended that Twardoski receive the same sentence as after his initial trial. At sentencing, however, the district court added a 25-year parole restriction that applied even if Twardoski

completed Sexual Offender Treatment. As the district court explained, it increased his sentence in that way with the express goal of ensuring that “you [Twardoski] will die in prison.” *Id.* at 7.

Notably, the district court did not identify any new evidence at trial justifying the increase in Twardoski’s sentence. Nor could it have, given that the State “prosecuted Twardoski using the same theory of the case and presenting evidence similar to the first trial.” *Id.* at 3. But the district court *did* focus on Twardoski’s prior trial, saying:

And I am concerned also. We have two sexual offender evaluations that say exactly the same thing. I understand, Mr. Twardoski, you’re standing here today saying you will engage in treatment, but both of the evaluators found you were not motivated for any programming. A specific quote, you expressed no insight, guilt, or shame into your part in the rape of your victim. **You continue to portray your victim as the sexual aggressor. Twenty-four individual people who knew nothing about you and nothing about her found you guilty.** And I’m not sentencing you on the first trial. I’m sentencing you on the second. **But we’ve got 24 people that heard those facts, and all of them agreed that it happened the way [I.A.] said it happened.**

Op.6 (emphasis added).

In a 4-3 Opinion, the Montana Supreme Court affirmed, rejecting Twardoski’s Due Process challenges under the United States and Montana Constitutions. Op. 17.¹ The majority acknowledged that “[p]unishing a defendant for exercising a statutory or constitutional right”—such as the right to appeal an unconstitutional verdict—is “a due process violation of the most basic sort.” Op. 11 (quotation marks

¹ Twardoski also raised an ineffective-assistance claim that is not the subject of this request, which the Court unanimously agreed it should not decide on direct appeal. Op. 11, 18.

and citation omitted). Because the district court’s statements directly focused on Twardoski’s successful appeal of his prior conviction, the majority agreed they “were, at best, improvidently offered,” as “[o]ut of context, they could at least suggest that the District Court resentenced Twardoski in part by relying on the first jury’s verdict, which resulted from erroneous rulings that violated Twardoski’s constitutional right to confront his accuser and present a complete defense.” *Id.* at 14. Nevertheless, analyzing the issue through the lens of judicial vindictiveness at resentencing, *see North Carolina v. Pearce*, 395 U.S. 711, 722-24 (1969), the majority held that there was no need to vacate and remand the sentence because the district court otherwise “provided ample legitimate justification for the 25-year parole restriction.” *Op.* at 14.

Justice Bidegaray dissented, in an opinion joined by Justices McKinnon and Gustafson. *Op.* 18-25 (Bidegaray, J., dissenting). As Justice Bidegaray explained, “[t]he District Court imposed a concededly more severe sentence after Twardoski successfully appealed a constitutionally infirm conviction, after both parties recommended the original sentence, after the State dismissed one charge, and after the court acknowledged that the relevant sentencing information had not materially changed.” *Id.* at 18. Because, in doing so, “the court expressly relied on the fact that ‘twenty-four individual people’ had found Twardoski guilty—including the first jury whose verdict followed a trial this Court held unconstitutional—[she] would vacate the 25-year parole restriction and remand for resentencing before a different judge.” *Id.*

To the dissenting justices, there was no way to isolate the increased sentence here from the court's improper reliance on "twenty-four" people finding Twardoski guilty. *Id.* at 21. "The court did not merely note that the second jury convicted Twardoski." *Id.* "It counted both juries." *Id.* "It invoked the combined force of 'twenty-four individual people.'" *Id.* "It did so even though this Court reversed the first conviction because the first trial violated Twardoski's constitutional right to confront his accuser and present a complete defense." *Id.*

Further, "[i]n context, the remark was part of the court's explanation for why Twardoski's denial of responsibility justified a parole restriction." *Id.* "The court first stated that both psychosexual evaluators found him unmotivated for treatment and that he expressed 'no insight, guilt, or shame.'" *Id.* "It then counted 'twenty-four individual people' who found him guilty." *Id.* "The sequence shows that the court used both verdicts as proof that Twardoski's continued denial was aggravating." *Id.* That was unlawful, as "[d]ue process does not permit a sentencing court to rely on a reversed, unconstitutional conviction to justify a harsher penalty; it protects the right to appeal only if a defendant can exercise that right without facing a sentencing penalty for having obtained reversal." *Id.* at 22.

The dissenting justices also rejected the majority's invocation of other considerations that might support the sentence, such as the "seriousness of the offenses" and Twardoski's "treatment needs." *Id.* As the dissent explained, "legitimate considerations do not cleanse an impermissible one." *Id.* at 22. "A sentence may be supported by many lawful considerations, but it cannot stand if the

sentencing court also relied on a constitutionally impermissible one that increased the punishment.” *Id.* The dissent would thus have held that “when a sentencing court adds a 25-year parole restriction after a successful appeal and expressly counts a constitutionally invalid first verdict as part of its explanation for doing so, due process requires resentencing.” *Id.* at 25.

This case presents important questions about what standard applies when a district court mentions an impermissible sentencing factor during sentencing. All seven justices agreed that it would violate Due Process for the district court to consider Twardoski’s successful exercise of his right to appeal as a factor supporting an increased sentence. And all seven justices agreed that the district court’s references to “twenty-four people” finding Twardoski guilty “could at least suggest” that the district court considered that factor here, making the sentence unlawful. *Id.* at 14 (majority), 18 (dissent).

The majority and dissent divided over what the government needed to show to support the sentence despite those improper comments. For the majority, it was enough that the sentencing judge provided alternative “legitimate justification[s] for the 25-year parole restriction.” Op. 14. The majority thus joined some other courts in applying a “weak” harmless error approach, in which the potential for other factors to adequately support the sentence meant that the sentence would not be vacated for considering an improper factor. *Cf. United States v. Fox*, 650 F. App’x 734, 740 (11th Cir. 2016) (“a district court’s consideration of an impermissible factor at sentencing

is harmless if the record as a whole shows the error did not substantially affect the district court's selection of the sentence imposed").

That approach breaks from that of other courts, such as the Sixth Circuit, which hold that "[w]hen the sentencing court considers an impermissible factor in calculating a defendant's sentence, a reviewing court will vacate and remand for resentencing." *United States v. Recla*, 560 F.3d 539, 545 (6th Cir. 2009); *see also United States v. Whitson*, 77 F.4th 452, 457 (6th Cir. 2023) (court "may not 'cloak[] an impermissible sentencing factor ... in a permissible one"). These decisions generally place a much greater burden on the government to prove that the impermissible factor did not affect the sentence.

The standard governing a sentencing court's invocation of an improper sentencing factor is a Due Process issue warranting further clarification. This case is potentially a good vehicle for providing guidance on the issue, not only because the majority itself admitted that the district court's comments were "improvident," Op. 14, but also because the opinions highlight the doctrinal disagreement over whether the presence of alternative sentencing justifications makes the sentence *per se* lawful, *id.* at 14-16, or whether the government must instead prove that the district court did not consider the impermissible sentencing factor it invoked, *id.* at 18-25.

REASONS FOR GRANTING AN EXTENSION

Petitioner just retained undersigned counsel as pro bono counsel for the purposes of evaluating whether to file and/or filing a petition for certiorari. Counsel were not involved in the proceedings below, and require additional time to familiarize

themselves with the record, research the complex issues presented in this case, and prepare a petition that will be most helpful to the Court. The legal issues in this case implicate the Court's substantial Due Process precedents concerning sentencing, re-sentencing, judicial vindictiveness, and harmless error. Evaluating this matter and preparing the petition will require a close study of these precedents.

In addition, the undersigned counsel have had substantial professional commitments over the past several weeks and will need to continue balancing commitments until the petition is filed. These commitments include:

- preparing and filing a Reply Brief in *Geigtech East Bay LLC v. Lutron Electronics Co., Inc.*, cross-appeals pending before the U.S. Court of Appeals for the Federal Circuit (Nos. 2025-2115, 2025-2116, 2025-2117, 2025-2118), due October 15;
- preparing and filing a Reply Brief in *Paula Sparkman v. Comerica Bank*, an appeal pending before the U.S. Court of Appeals for the Ninth Circuit (No. 25-7764), due November 2;
- preparing and filing a Reply Brief in *Investing Plaintiffs v. Equity Trust Company*, an appeal pending before the U.S. Court of Appeals for the Ninth Circuit (No. 25-7463), due November 9;

For these reasons, additional time is required to prepare the petition.

The State of Montana consents to the requested extension of time.

CONCLUSION

For the foregoing reasons, Applicant requests that the time to file a writ of certiorari in the above-captioned matter be extended 60 days to and including December 4, 2026.

Respectfully submitted,

/s/ Fred A. Rowley, Jr.

FRED A. ROWLEY, JR.
Counsel of Record
*Wilson Sonsini
Goodrich & Rosati, PC
633 W. 5th Street
Los Angeles, CA 90071
(323) 210-2900
Fred.rowley@wsgr.com*

Counsel for Petitioner

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