

No. 23A-____

IN THE
Supreme Court of the United States

MICHAEL SHANE MCCORMICK, SR.,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

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

To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court and Circuit Justice for the Sixth Circuit:

1. Pursuant to Supreme Court Rules 13.5, 22, and 30, Applicant Michael Shane McCormick, Sr., respectfully requests a 60-day extension of time, up to and including February 23, 2024, to file a petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, seeking review of that court's decision in *McCormick v. United States*, 72 F.4th 130 (6th Cir. 2023). The Sixth Circuit issued its decision on June 27, 2023, and denied a timely rehearing petition on September 26, 2023. *See Order, McCormick v. United States*, No. 22-5587 (6th Cir. Sept. 26, 2023). These decisions are attached as Appendix A and Appendix B, respectively. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1), and the time to file a petition for a writ of certiorari will otherwise expire on December 25, 2023. This

Application for Extension of Time is timely because it has been filed on December 12, 2023, more than ten days prior to the date on which the time for filing the petition is to expire.

2. The decision of the Sixth Circuit presents important and recurring questions about defense counsel's duty to consult with clients after trial proceedings about whether to file an appeal. Applicant McCormick entered an open guilty plea to drug and firearm offenses. He chose an open plea because he wanted to preserve his opportunity to appeal lest he receive a higher sentence than his codefendants, and he explained this plan to his counsel before sentencing. McCormick did in fact receive a disproportionately higher sentence than his codefendants and expressed his displeasure to counsel after sentencing. But McCormick's counsel never filed a notice of appeal and did not consult with him about appealing his conviction or his sentence, making McCormick's later attempts to appeal untimely. During McCormick's § 2255 proceedings, his counsel even stated that he *never* discusses an appeal with his clients after sentencing. Failing to consult about an appeal in these circumstances was not an objectively reasonable choice as required by *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). Despite all this, the Sixth Circuit found that McCormick's counsel had no duty to consult. To reach that result, the panel acknowledged that it was deepening a preexisting circuit split. Multiple other circuits and state supreme courts have found that defense counsel has a duty to make objectively reasonable choices both during and *after* trial proceedings by consulting about whether an appeal should be filed. Those courts have applied *Flores-Ortega* correctly, and the Sixth Circuit's approach

(which is shared by the Seventh Circuit and at least one state supreme court) should be corrected.

3. Applicant has good cause for an extension of time. Applicant is represented by Lawrence D. Rosenberg, who serves as a professor at West Virginia University College of Law and co-director of the school's Supreme Court Clinic. Students in the Clinic will be heavily involved in the drafting of Applicant's petition for a writ of certiorari. The time to file Applicant's petition for a writ of certiorari will expire on Christmas Day, December 25, 2023. Mr. Rosenberg and the Clinic have a petition for a writ of certiorari due in this Court on December 29, 2023, in *Mays v. Smith et al.*, No. 23A367, which has occupied a great deal of their time over the last few months. The Clinic students have also had extensive academic commitments during the past several weeks, including final examinations and final papers. The Clinic students also have extensive personal commitments during this time, including traveling for the holidays.

4. Additionally, Mr. Rosenberg has had recently, and will have in the coming weeks, significant professional commitments that would also make completing the petition extremely difficult without the requested extension. For example, in October and November 2023, he engaged in extensive briefing and presented oral argument before the Central District of California in *In the Matter of the Application of Lufthansa Technik AG, Petitioner, for an Order Pursuant to 28 U.S.C. § 1782 to Take Discovery Pursuant to the Federal Rules of Civil Procedure, of Respondent Thales Avionics, Inc. For Use in Foreign Proceedings* (No. 8:22-mc-00034-JVS-KES). In October

and November 2023, he also engaged in extensive briefing and motion practice in the Western District of Washington in *In the Matter of the Application of Lufthansa Technik AG, Petitioner, for an Order Pursuant to 28 U.S.C. § 1782 to Take Discovery, Pursuant to the Federal Rules of Civil Procedure, of Respondent Panasonic Avionics Corporation for Use in Foreign Proceedings* (No. 2:17-cv-1453-JCC). In both of those matters, he expects to engage in further extensive briefing over the next several weeks as well as take depositions in California and Washington state. In October and November, Mr. Rosenberg also prepared substantial post-hearing briefing in an arbitration proceeding before the American Arbitration Association in *Citigroup v. Villar* (No. 01-21-0004-5256), has prepared further substantial briefing and motions in December in related proceedings in the U.S. District Court for the Central District of California, and will have an in-person hearing in the matter in Los Angeles on January 18, 2023. In November and December, Mr. Rosenberg and other members of the legal team have filed extensive briefing in preparation for an in-person merits hearing that will likely take place in late January 2024 in Immigration Court in Maryland. Other members of the legal team have additional conflicting professional and personal commitments over the holidays.

5. The issues in this case warrant careful briefing and consideration, which counsels in favor of the requested extension. The quality of the petition would greatly benefit from an extension of time to allow counsel and Mr. Rosenberg's students to complete the requisite research and writing.

WHEREFORE, Applicant respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari for 60 days, up to and including February 23, 2024.

Dated: December 12, 2023

Respectfully submitted,

/s/ Lawrence D. Rosenberg

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