

In The
SUPREME COURT OF THE UNITED STATES
October Term 2024

Azibo Aquart,
Applicant,
v.
United States of America,
Respondent.

Application for Second Extension of Time Within
Which to File a Petition for a Writ of Certiorari to
the U.S. Court of Appeals for the Second Circuit

APPLICATION TO THE HONORABLE JUSTICE
SONIA SOTOMAYOR AS CIRCUIT JUSTICE

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August 29, 2024

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APPLICATION FOR A SECOND EXTENSION OF TIME

Under this Court's Rule 13.5, Applicant Azibo Aquart respectfully requests a second 30-day extension of time within which to file a petition for a writ of certiorari, to and including October 11, 2024.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *United States v. Aquart*, 92 F.4th 77 (2d Cir. 2024) (attached as Exhibit 1), *reh'g denied*, No. 21-2763 (2d Cir. May 14, 2024) (attached as Exhibit 2).

JURISDICTION

This Court will have jurisdiction over any timely petition under 28 U.S.C. § 1254(1). The Second Circuit issued its judgment on January 29, 2024, and denied Mr. Aquart's timely rehearing petition on May 14, 2024. On August 5, 2024, Justice Sotomayor granted a 30-day extension of time within which to file a petition for a writ of certiorari, to and including September 11, 2024. In accordance with Rule 13.5, this application is being filed more than 10 days before that date.

REASONS JUSTIFYING AN EXTENSION OF TIME

1. The court below resolved an important question in a way that exacerbated a growing circuit split. In 2011, Mr. Aquart was found guilty of multiple counts of violent crimes in aid of racketeering ("VICAR") and drug-related murder and sentenced to death. The Second Circuit affirmed the conviction but vacated the sentence. On remand, the prosecution declined to pursue the death

penalty, and Mr. Aquart received life sentences for the VICAR counts and 40-year sentences for the drug-related murder counts.

After receiving new counsel, Mr. Aquart attempted to raise several new challenges to his conviction, including the sufficiency of the indictments for his VICAR and drug-related murder convictions. On the VICAR counts, Mr. Aquart argued that the Connecticut statutes underlying his convictions cannot, as a matter of law, constitute murder predicates under VICAR. And as to the drug-related murder counts, Mr. Aquart argued that, by the time of his trial, Congress had raised the minimum drug quantity above the amount stated in his indictment. Accordingly, Mr. Aquart's indictment did not allege a viable crime for either VICAR or drug-related murder.

The district court, however, refused to consider these new challenges, concluding that the mandate rule prevented it from reconsidering the guilt component of Mr. Aquart's judgment. On his second appeal, Mr. Aquart argued that the mandate rule does not bar consideration of his arguments because these defects in the indictment are jurisdictional. He contended that his indictment alleged specific conduct that was beyond the reach of the charging statutes; accordingly, the court lacked jurisdiction over both the VICAR offenses and the drug-related murder offenses.

The Second Circuit rejected Mr. Aquart's argument, holding that "his challenges do not implicate jurisdiction." Ex. 1. at 11. The court relied on this Court's opinion in *United States v. Cotton*, which held that "defects in an indictment

do not deprive a court of its power to adjudicate a case.” 535 U.S. 625, 630 (2002). Accordingly, the Second Circuit concluded that “whether alleged conduct constitutes the charged offense is a non-jurisdictional question.” Ex. 1 at 13. In so holding, the Second Circuit joined the Fifth and Tenth Circuits, which have similarly construed *Cotton* to reach the same result. See *United States v. Scruggs*, 714 F.3d 258, 264 (5th Cir. 2013); *United States v. De Vaughn*, 694 F.3d 1141, 1149 (10th Cir. 2012).

The Eleventh Circuit has arrived at the opposite conclusion. In *United States v. Peter*, the Eleventh Circuit reaffirmed that “a district court is without jurisdiction to accept a guilty plea to a ‘non-offense.’” 310 F.3d 709, 713 (11th Cir. 2002). The court distinguished the non-jurisdictional defect in *Cotton*, where the indictment failed “to allege a fact requisite to the imposition of defendants’ sentences.” *Id.* at 714. By contrast, the indictment in *Peter* “consisted only of specific conduct that, as a matter of law, was outside the sweep of the charging statute,” which deprived the court of jurisdiction. *Id.*

This case is a good candidate for the Court to resolve this acknowledged circuit split over whether the failure of an indictment to allege an “offense[] against the laws of the United States,” 18 U.S.C. § 3231—by alleging conduct that is outside the sweep of the charging statute—presents a jurisdictional error.

2. A second 30-day extension is warranted because the facility where Mr. Aquart is incarcerated, USP Florence, has been in near-constant lockdown since late 2023. As a result, communication between Mr. Aquart and his counsel is infrequent and difficult. Mr. Aquart is not currently scheduled to meet with his

counsel again until September 19, 2024. A second 30-day extension will allow Mr. Aquart to review and discuss his petition at least once more before filing.

An extension is also warranted because Mr. Aquart has asked the Northwestern Supreme Court Practicum to help prepare his petition. Over the summer, the Practicum has no students because its academic calendar year begins on August 30. A second 30-day extension will allow the students to make a more significant contribution to a complete and cogent petition before it is filed.

Finally, an extension is also warranted because of the press of counsel's other client business. The Practicum and undersigned counsel are also responsible for a reply brief in support of the petition in *Martinez v. Garland*, No. 23-7678, and a forthcoming petition in *Colorado v. Fields*, No. 24A84. Undersigned counsel is also responsible for ongoing merits briefing in several court of appeals cases. See *Ass'n of Am. R.R. v. Hudson*, No. 24-1399 (4th Cir.); *Morgan v. Bureau of Prisons*, No. 22-2731 (7th Cir.); *Wisc. Cent. Ltd. v. Surface Transp. Bd.*, No. 24-1484 (7th Cir.); *Grand Trunk Corp. v. Surface Transp. Bd.*, No. 24-1811 (7th Cir.).

CONCLUSION

For these reasons, Applicant respectfully requests a second extension of 30 days, to and including October 11, 2024, within which to petition for review in this case.

Respectfully submitted,

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