

No. 21-1008

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**In the Supreme Court of the United States**

ANDRES MENCIA, PETITIONER

*v.*

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 24-25) that the district court erred in instructing the jury on the elements of conspiring to distribute a controlled substance, in violation of 21 U.S.C. 846, by failing to correctly define the applicable mens rea requirement. The petition for a writ of certiorari should either be denied as untimely or held pending this Court's decision in *Ruan v. United States*, No. 20-1410, and *Kahn v. United States*, No. 21-5261 (argued Mar. 1, 2022).

As an initial matter, the petition for a writ of certiorari is substantially untimely and could be denied on that ground alone. The court of appeals entered its judgment on June 9, 2021, and the 150-day deadline for filing a petition for a writ of certiorari—extended by the Court's orders dated March 19, 2020, and July 19, 2021—began to run on that date. See Sup. Ct. R. 13.1, 13.3. Accordingly, petitioner's deadline for filing a petition for a writ of certiorari was Monday, November 8,

2021. Petitioner did not file his petition until January 12, 2022. This Court has discretion to consider an untimely petition for a writ of certiorari in a criminal case if “the ends of justice so require.” *Schacht v. United States*, 398 U.S. 58, 63-65 (1970); see *Bowles v. Russell*, 551 U.S. 205, 212 (2007). Petitioner offers no justification for the delay of more than two months between the 150-day time limit and the filing of the petition, and none is apparent from the record. This Court may therefore choose not to entertain the petition.

If the Court does not deny the petition as untimely, it should be held pending the decision in *Ruan* and *Kahn*. In those cases, the Court is considering the mens rea requirement that is applicable when a physician is prosecuted for distributing a controlled substance under 21 U.S.C. 841(a). See, Pet. at i, *Ruan, supra* (No. 20-1410); Pet. at 1, *Kahn, supra* (No. 21-5261). Because the Court’s decision in *Ruan* and *Kahn* may affect the proper disposition of the petition for a writ of certiorari, the petition could be held pending the decision in those cases and then disposed of as appropriate in light of that decision.\*

Respectfully submitted.

ELIZABETH B. PRELOGAR  
*Solicitor General*

MAY 2022

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\* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.