

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,) COA No. 13-30000
Plaintiff-Appellee,) USDC No. CR11-00022-RJB
v.) District of Alaska
FRANCIS SCHAEFFER COX,) UNOPPOSED MOTION FOR
Defendant-Appellant.) EXTENSION OF TIME TO FILE
) PETITION FOR REHEARING OR
) PETITION FOR REHEARING
) WITH SUGGESTION FOR
) REHEARING EN BANC

Comes now the Appellant, Francis Schaeffer Cox, and respectfully moves this Court, pursuant to Federal Rules of Appellate Procedures 27 and 40 and the Ninth Circuit Rule of Practice 27-1, for an order extending the date on which Appellant's Petition for Rehearing or Petition for Rehearing with Suggestion for Rehearing *En Banc* is due, for 28 days until October 10, 2017. This motion is based upon the files and records of this case, and the attached declaration of counsel.

As set forth in the declaration, counsel for the government, Steven E. Skrocki, has no objection to this request for an extension of time to October 10, 2017.

DATED this 1st day of September, 2017.

Respectfully submitted,

s/ *Michael Filipovic*
Federal Public Defender
Attorney for Francis Schaeffer Cox

CERTIFICATE OF SERVICE

I certify that on September 1, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of filing to all registered parties. I further certify I mailed a copy of the document to Francis Schaeffer Cox.

s/ *Charlotte Ponikvar*
Paralegal
Office of the Federal Public Defender

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UNITED STATES OF AMERICA,) COA No. 13-30000
Plaintiff-Appellee,) USDC No. CR11-00022-RJB
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FRANCIS SCHAEFFER COX,) DECLARATION OF
Defendant-Appellant.) MICHAEL FILIPOVIC

I, Michael Filipovic, declare the following under penalty of perjury:

1. I represent Francis Schaeffer Cox on appeal.
2. On August 29, 2017, this Court filed an unpublished Opinion affirming Mr. Cox' convictions with the exception of his conviction for solicitation to murder federal agents, vacated all his sentences, and remanded to the district court for resentencing. A petition for rehearing is due by September 12, 2017.
3. Counsel is requesting a continuance until October 10, 2017, for filing the petition for rehearing and rehearing *en banc*.
4. Mr. Cox is in custody at USP Marion with a release date of October 26, 2033.
5. Steven E. Skrocki, the attorney for the government has been contacted and he does not oppose this request for a 28 day extension.

6. I have a pre-planned overseas trip and will be out of the country from September 8, 2017, until September 24, 2017, returning to my office on Monday September 25, 2017.

7. Based on my unavailability for these 17 days in September, my responsibilities as Federal Defender, the complexity of the issues which will be presented for rehearing and the suggestion for rehearing *en banc*, and my workload on other cases I am requesting a continuance to October 10, 2017, which would provide for 16 days to prepare the petition upon my return to my office.

8. The record in this case is voluminous, with 13 separate volumes of excerpts of record, and the oversized briefs alone total over 300 pages. The legal issues are both novel and extremely complex. Neither undersigned counsel nor the government was able to locate any other case with facts even remotely similar to the facts presented by this case.

The Petition for Rehearing or Petition for Rehearing with Suggestion for Rehearing *En Banc* will seek rehearing on at least the conspiracy conviction and the jury instructions issues. The petition will be based in part on the announcement of a new principle of law in the unpublished memorandum opinion, in which the Circuit for the first time joins a preexisting circuit split over whether a conspiracy conviction can be based on a contingency that is not objectively likely to occur, but which the conspirators subjectively believed was likely to occur. *See Memorandum Opinion*, Dkt. 159 at 3; Substitute Opening Brief, Dkt. 112 at 67–68 (citing *United States v. Palmer*, 203 F.3d 55, 64 (1st Cir. 2000)); Substitute Answering Brief, Dkt. 126 at 112 (citing *United States v. Podolsky*, 798 F.2d 177, 179 (7th Cir. 1986)). It will also address the panel opinion's inconsistent application of the federal jurisdictional principles of *United States v. Feola*, 420 U.S. 671 (1975), by simultaneously vacating the solicitation conviction and upholding a conspiracy

conviction based on identical facts and additional facts to which the same *Feola* principle applies. *See Memorandum Opinion*, Dkt. 159 at 3–4; *Feola*, 420 U.S. at 695–96 (“Where the object of the intended attack is *not identified with sufficient specificity so as to give rise to the conclusion that had the attack been carried out the victim would have been a federal officer*, it is impossible to assert that the mere act of agreement to [murder] poses a sufficient threat to federal personnel and functions so as to give rise to federal jurisdiction.”) (emphasis added).

Given the complexity of the issues, briefs, and record in this case, additional time is necessary to present to this Court a clear and concise statements of reasons for rehearing.

9. Therefore, in order to effectively prepare a petition for rehearing with a suggestion for rehearing *en banc* for Mr. Cox, I respectfully request that this Court extend the time for filing until October 10, 2017.

DATED this 1st day of September, 2017.

s/ *Michael Filipovic*
Federal Public Defender