

App. No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ALFORD D. EMBRY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE
PETITION FOR A WRIT OF CERTIORARI**

To the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Petitioner, Alford Embry, by his counsel, respectfully requests pursuant to Supreme Court Rule 13.5 and Rule 22 that the time for a petition for writ of certiorari in this matter be extended for 30 days to and including January 22, 2020. The United States Court of Appeals for the Sixth Circuit issued its judgment denying a certificate of appealability on September 24, 2019 (*see Appendix*). Mr. Embry's time to petition for writ of certiorari in this Court would therefore expire on December 23, 2019, absent an extension. Mr. Embry files this application at least ten days before that date, and supports his request as follows:

1. Mr. Embry was convicted in 1999 and 2000, in three separate federal cases, of three counts of armed bank robbery and several related offenses. Pursuant to the then-mandatory U.S. Sentencing Guidelines, he was deemed to be a career offender based on prior Kentucky convictions that qualified at the time as “crimes of violence”: a 1988 conviction for two counts of wanton endangerment and a 1991 conviction for fourteen counts of robbery. In a consolidated sentencing proceeding, the district court sentenced him to an aggregate term of 378 months’ imprisonment, at the middle of the career offender guideline range.

2. Mr. Embry did not appeal, and in 2001 he filed an initial § 2255 motion. The district court denied the motion, and the Sixth Circuit denied a certificate of appealability. *Embry v. United States*, No. 02-5808 (6th Cir. Feb. 19, 2003) (order).

3. In 2015, the Supreme Court held in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that the so-called residual clause in the Armed Career Criminal Act’s definition of the term “violent felony” was unconstitutionally vague. After certification and authorization by the Sixth Circuit pursuant to 28 U.S.C. § 2255(h)(2) and § 2244(b)(3), Mr. Embry filed a § 2255 motion challenging his career offender designation. He argued that because the ACCA’s residual clause is invalid, the identical provision in U.S.S.G. § 4B1.2 (1998) is also invalid; that his prior Kentucky conviction for wanton endangerment does not otherwise qualify as a crime of violence under § 4B1.2; and that, therefore, his designation as a career offender and resulting sentence are unconstitutional and he should be resentenced. The district court denied the motion as time-barred under § 2255(f)(3) in light of its decision in *Raybon v.*

United States, 867 F.3d 625 (6th Cir. 2017). The court also denied a certificate of appealability.

4. Mr. Embry filed a notice of appeal and applied for a certificate of appealability on the timeliness question, as well as the question whether the rule in *Johnson* voids the residual clause of the mandatory guidelines. He argued that *Raybon* could not be squared with this Court's later decisions in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *Davis v. United States*, 139 S. Ct. 2319 (2019). The Sixth Circuit denied the certificate of appealability by order, viewing itself bound by its reaffirmance of *Raybon* in a decision issued after *Dimaya*. See *Chambers v. United States*, 763 F. App'x 514, 518-19 (6th Cir. 2019), *pet. rh'g denied by Chambers v. United States*, 2019 U.S. App. LEXIS 19180 (6th Cir., June 26, 2019). (See Appendix.)

5. Good cause supports granting an extension of time. Between the time the Sixth Circuit denied the certificate of appealability and the current due date of December 23, 2019, counsel for Mr. Embry has been (and will be) responsible for a large number of briefs and filings and other appellate responsibilities, including four petitions for certiorari (and replies to the government's brief in opposition in two); a supplemental brief in a complex appeal now pending for over two years and for which oral argument is scheduled for December 18, 2019; a petition for rehearing in a case of first impression in the country; and oral argument in another case of first impression in the Sixth Circuit. In addition, counsel has served in numerous other capacities as part of her appellate duties, including as faculty for a district-wide

training for Federal defenders and attorneys appointed under the Criminal Justice Act; as the leader of a circuit-wide resource team of appellate Federal defenders related to a government appeal in a leading First Step Act case in the Sixth Circuit; and as a member of the Federal defender resource teams for two cases currently pending in this Court.

Meanwhile, numerous other pending petitions for certiorari raise the same questions Mr. Embry will raise here, to which the government has responded in several. An extension of 30 days would allow counsel adequate time to review those petitions and responses, and prepare the petition for certiorari in this case.

For the foregoing reasons, Mr. Embry asks this Court to extend the time to file a petition for a writ of certiorari in this appeal 30 days to and including January 22, 2020.

Respectfully submitted,

s/ Jennifer Niles Coffin
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Dated: December 11, 2019

APPENDIX

Decision of the Court of Appeals, *Embry v. United States*,
6th Cir. Case Nos. 18-6346, 19-5021/5022 (September 24, 2019). 1a

Nos. 18-6346, 19-5021/5022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALFORD D. EMBRY, JR.,)
Petitioner-Appellant,)
v.)
UNITED STATES OF AMERICA,)
Respondent-Appellee.)

FILED
Sep 24, 2019
DEBORAH S. HUNT, Clerk

O R D E R

In these consolidated appeals, Alford D. Embry Jr., a federal prisoner proceeding through counsel, appeals the district court's denial of his motion to vacate, set aside, or correct his sentence, filed pursuant to 28 U.S.C. § 2255. Embry has filed an application for a certificate of appealability (COA) and a motion to proceed in forma pauperis.

In 1999, Embry pleaded guilty in two separate cases to three counts of armed bank robbery, one count of using a firearm in relation to a crime of violence, and two counts of being a felon in possession of a firearm. *See United States v. Embry*, Nos. 1:99-cr-00067-TRM-CHS, 1:99-cr-00068-TRM-CHS (E.D. Tenn.). Later, in another case, a jury convicted Embry on one count of conspiracy to escape and one count of assault of a federal law enforcement officer. The three cases were consolidated for sentencing.

Embry's presentence report determined that, under the then-mandatory Sentencing Guidelines, he was a career offender based on two prior Kentucky convictions for a "crime of violence" within the meaning of USSG § 4B1.2(a)—one for four counts of wanton endangerment and one for fourteen counts of robbery. The district court sentenced Embry as a career offender to an aggregate term of 378 months of imprisonment and five years of supervised release. Embry

did not appeal, but he filed an initial § 2255 motion in 2001. The district court denied the motion. This court denied a COA. *Embry v. United States*, No. 02-5808 (6th Cir. Feb. 19, 2003) (order).

On April 18, 2016, within one year of the Supreme Court’s decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Embry filed a motion in this court for an order authorizing the district court to consider a second or successive § 2255 motion. Embry argued that, after *Johnson*, which invalidated the residual clause of the Armed Career Criminal Act (ACCA) as unconstitutionally vague, he was entitled to relief from his designation as a career offender. Although Embry was sentenced under the Guidelines, and not the ACCA, he argued that his 1988 Kentucky conviction for wanton endangerment was counted as a predicate offense under the identically worded residual clause of USSG § 4B1.2(a)(2) and thus was no longer valid for enhancement purposes. This court granted Embry’s motion and transferred the case to the district court with instructions to hold it in abeyance pending the Supreme Court’s decision in *Beckles v. United States*, 136 S. Ct. 2510 (2016) (mem.), which would resolve the circuit split over whether *Johnson*’s vagueness holding applied to the career-offender Guideline’s residual clause. *In re Embry*, 831 F.3d 377, 382 (6th Cir. 2016).

In *Beckles*, the Supreme Court ultimately held that the *advisory* Guidelines “are not subject to a vagueness challenge under the Due Process Clause” and that, as a result, the career offender Guideline’s residual clause “is not void for vagueness.” *Beckles v. United States*, 137 S. Ct. 886, 892 (2017). The Court did not address whether defendants, like Embry, who were sentenced before *United States v. Booker*, 543 U.S. 220 (2005)—when the Sentencing Guidelines were mandatory—could assert a vagueness challenge to their sentences under *Johnson*. *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring). Embry then filed a supplemental brief in the district court, raising that very issue. The district court rejected Embry’s argument, dismissed the motion as untimely, and declined to issue a COA. Embry now seeks a COA from this court to appeal the district court’s procedural ruling.

This court will issue a COA “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To satisfy that standard with respect to

a motion denied on procedural grounds, a petitioner must show “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The district court denied Embry’s motion as untimely because he did not file it until nearly thirteen years after his conviction became final, which was the date the limitations period began. *See* 28 U.S.C. § 2255(f)(1). Embry argued that the limitations period began running after the Supreme Court issued its decision in *Johnson*—that is, “the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” 28 U.S.C. § 2255(f)(3). But the district court rejected that contention. The court explained that, because *Johnson* did not recognize a new retroactively applicable right that also applies to defendants sentenced under the pre-*Booker* mandatory Sentencing Guidelines, it did not trigger a renewed one-year limitations period under § 2255(f)(3) that would render Embry’s motion timely. And as the district court recognized, this court has already held that *Johnson* did not establish the right asserted by Embry, i.e., “that individuals have a Constitutional right not to be sentenced as career offenders under the residual clause of the mandatory Sentencing Guidelines.” *Raybon v. United States*, 867 F.3d 625, 631 (6th Cir. 2017) (quoting *Mitchell v. United States*, No. 3:00-CR-00014, 2017 WL 2275092, at *3 (W.D. Va. May 24, 2017)). As a result, reasonable jurists would not debate the district court’s denial of Embry’s motion.

In his COA application, Embry argues that the Supreme Court’s decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), undermines *Raybon* and extends *Johnson*’s reach to the residual clause of the mandatory Guidelines. But this court has recently reaffirmed the binding effect of *Raybon* in the post-*Dimaya* landscape. *See Chambers v. United States*, 763 F. App’x 514, 518-19 (6th Cir. 2019).

Accordingly, Embry's COA application is **DENIED**, and as a result, his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk