

No. A. _____

In the Supreme Court of the United States

NATHANIEL PEMBROOK,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO U.S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicant Nathaniel Pembroke respectfully requests a 60-day extension of time, to and including April 15, 2018, within which to file a petition for a writ of certiorari in this case.

The Sixth Circuit Court of Appeals issued an unpublished order affirming Pembroke's convictions on November 15, 2017. On the government's motion, the Sixth Circuit published the decision on November 29, 2017. A copy of the published opinion is attached. Unless extended, the time to file a petition for a writ of certiorari will expire on February 13, 2018. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1).

1. This case centers on two robberies that occurred in 2014. The government tried Pembroke for the robberies with three alleged co-conspirators. A jury convicted Pembroke of one count of Hobbs Act robbery, 18 U.S.C. § 1951(a), one count of conspiracy to interfere with commerce by robbery, 18 U.S.C. § 1951(a), one count of possession of a firearm by a felon, 18 U.S.C. § 922(g), and two separate counts of brandishing a firearm during and in relation to a crime of violence, 18 U.S.C. § 924(c). On May 3, 2016, the district court sentenced Pembroke to a total term of imprisonment of 33 years.

The government's case prominently featured the use of cell-site location information obtained without a warrant. Prosecutors used this location information as evidence that Pembroke and his co-defendants travelled together to the locations

of the two robberies. Pembroke challenged the warrantless collection of this information as a violation of the Fourth Amendment.

Pembroke also argued that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). If § 924(c)(3)(B) is stricken, Pembroke argued, then conspiracy to commit Hobbs Act robbery no longer constitutes a predicate crime of violence for purposes applying the mandatory minimum sentences under § 924(c).

The questions that are likely to be presented in the petition are (1) whether the Sixth Circuit erred by rejecting Mr. Pembroke's Fourth Amendment challenge to the use of cell-site information against him at trial; and (2) whether § 924(c)(3)(B) is unconstitutionally vague in light of *Johnson*.

2. Concerning the first question, the district court refused to suppress the cell-site location evidence on the grounds that, at the time officers collected the information, no Supreme Court precedent established that obtaining cell-site data was a search within the meaning of the Fourth Amendment. The Sixth Circuit affirmed this decision but acknowledged that this Court granted certiorari in *Carpenter v. United States*, No. 16-402, 137 S. Ct. 2211 (2017). In *Carpenter*, this Court is examining the Sixth Circuit's conclusion that warrantless collection of cell-site information is not a violation of the Fourth Amendment. If *Carpenter* recognizes Fourth Amendment protection for cell-site information, Pembroke may ask this Court to grant certiorari, vacate the Sixth Circuit decision in his case, and remand with instructions to re-evaluate its decision in light of the anticipated ruling in *Carpenter*.

3. Concerning the second question, the Sixth Circuit rejected Pembroke's vagueness challenge to § 924(c)(3)(B) as foreclosed by current Sixth Circuit precedent: *United States v. Taylor*, 814 F.3d 340, 376–79 (6th Cir. 2016). The Sixth Circuit recognized, however, that Pembroke preserved this claim “on the possibility that the case of *Sessions v. Dimaya*, No. 15-1498, 137 S. Ct. 31 (2016), pending in the Supreme Court on the question of whether 18 U.S.C. § 16(b) is unconstitutionally vague per *Johnson*, will result in [his] favor.” As raised at oral argument in *Dimaya* on January 17, 2017, § 16(b) and § 924(c)(3)(B) are materially identical, so if one is vague then the other must be also. This case presents the opportunity to clarify whether § 924(c)(3)(B) is unconstitutionally vague. As with the *Carpenter* case, Pembroke anticipates that he also may ask this Court to grant certiorari, vacate the Sixth Circuit decision in his case, and remand with instructions to re-evaluate its decision in light of the anticipated ruling in *Dimaya*.

4. Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. Undersigned counsel has been working diligently to prepare a petition for certiorari, but significant professional and personal obligations have interfered with his ability to develop a strategy and to draft the petition. Counsel maintains a caseload with frequent deadlines in district court litigation, as well as various deadlines for substantive appellate and habeas briefs. In addition, it is anticipated that the forthcoming decisions in *Dimaya* and *Carpenter* may provide grounds for Pembroke to seek relief.

For the foregoing reasons, the application for a 60-day extension of time, to and including Monday, April 15, 2018, within which to file a petition for a writ of certiorari should be granted.

Respectfully submitted,

s/Benton C. Martin

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