

No.

In the Supreme Court of the United States

ROBERT HOMRICH,

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 Robert Homrich respectfully requests a 60-day extension of time, to and including May 7, 2018, to file a petition for a writ of certiorari. On March 1, 2018, this Court extended the time to file a Petition for Certiorari in *Raybon v United States* (Case No. 17A914); the case relied on by the Sixth Circuit Court of Appeals in denying Mr. Homrich's motion to vacate under 28 U.S.C. § 2255. Counsel for Mr. Homrich has been discussing the case similarities with counsel for Mr. Raybon and with granting the *Raybon* extension, extraordinary circumstances exist to further grant an extension in Mr. Homrich's case to allow counsel to continue to develop the issue in his case.

The Sixth Circuit Court of Appeals issued its order affirming the district court's judgment dismissing Mr. Homrich's motion to vacate on December 8, 2017. Unless extended, the time to file a petition for a writ of certiorari will expire on March 8, 2018. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). A copy of the order is attached.

1. Robert Homrich is one of many federal prisoners who sentence was fixed by the residual clause of mandatory career-offender guideline. Mr. Homrich filed a Motion Under 28 U.S.C. § 2244 for Order Authorizing District Court to Consider Second or Successive Application for Relief Under 28 U.S.C. § 2255 on September 16, 2015. (Case 15-1999; Doc. 4). The government filed a response (Case 15-1999; Doc. 5) and Mr. Homrich filed a pro se reply on October 27, 2015. (Case 15-1999; Doc. 6). Mr. Homrich also moved for Reduction of Sentence under the Guideline Amendment

782. (R. 603; PageID.354). Mr. Homrich was denied a reduction as he was sentenced as a career offender. (R. 611; PageID.363). Upon denial of the motion for reduction, on July 23, 2015, Mr. Homrich filed a motion (letter) to the court asking if he was eligible for relief under *Johnson*. (R. 618; PageID.409). The Honorable Judge Paul L. Maloney appointed counsel to assist with this request. Unknown to counsel, Mr. Homrich also had filed his § 2244 motion in the Sixth Circuit Court of Appeals.

On March 28, 2016, the Sixth Circuit granted Mr. Homrich's motion to file a second or successive motion to vacate. (Case 15-1999; Doc. 7). Mr. Homrich filed a supplemental brief (R. 626; PageID.442-472) in accordance with the Court's April 11, 2016, Order (R. 625; PageID.441) directing both parties to file supplemental briefs. Mr. Homrich asserted that his sentence was unconstitutional because it was enhanced under the residual clause, which violates due process of law.

On July 19, 2016, the government filed a Motion to Stay Litigation Pending Supreme Court's Decision in *Beckles v. United States* (R. 633; PageID.542) which was granted by the Court on July 28, 2016 (R. 639; PageID.561-566), following a hearing conducted on July 25, 2016. On March 8, 2017, the Court lifted the stay and ordered the parties to file new briefs, given *Beckles*. Following briefing, the Court denied Mr. Homrich's motion for relief under 28 U.S.C. § 2255 but granted a certificate of appealability. (R. 645; PageID.602-609).

Mr. Homrich timely appealed. (Notice of Appeal, R. 64; PageID.611). A panel of the Sixth Circuit rejected his second or successive 28 U.S.C. § 2255 petition to vacate and correct his sentence, which he filed within one year of *United States v.*

Johnson, 135 S. Ct. 2551 (2015).¹ *Homrich v. United States*, (6th Cir. 2017). The panel held:

“The district court properly dismissed Homrich’s motion to vacate because *Johnson* did not announce a new, retroactive rule of constitutional law that invalidated the residual clause in § 4B1.2 of the mandatory sentencing guidelines. See *Raybon v. United States*, 867 F.3d 625, 629–30 (6th Cir. 2017).

Accordingly, we **AFFIRM** the district court’s judgment.”

The question likely to be presented in the petition is whether petitioners sentenced as career offenders under mandatory guidelines filed timely second or subsequent 28 U.S.C. § 2255 motions if the circuit court granted their petitions and they filed their motions within one year of *Johnson*.

2. The Sixth Circuit held that Mr. Homrich’s petition was untimely under 28 U.S.C. § 2255(f)(3) because “*Johnson* did not announce a new, retroactive rule of constitutional law that invalidated the residual clause in section 4B1.2 of the mandatory sentencing guideline.” The court did not use this Court’s “new rule” jurisprudence of *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, to determine whether the rule Mr. Homrich asserts is “new.” Mr. Homrich contends the right he asserts is not new; it is a mere application of *Johnson*, *Chaidez v. United States*, 568 U.S. 342, 347—48 (2013), which this Court recognized is retroactive in *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016).

¹ A § 2255 motion is timely filed within one year of “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).

The First Circuit has criticized the Sixth Circuit's resolution of this question, see *Moore v. United States*, 871 F. 3d 72, 82-83 (1st Cir. 2017), as have district courts in other circuits, see, e.g., *United States v. Roy*, --- F. Supp. 3d ---, No. CR 00-40013-NMG, 2017 WL 4581792, at *5 (D. Mass. Oct. 13, 2017), *reconsideration denied*, 2017 WL 5309619 (D. Mass. Nov. 13, 2017); *Long v. United States*, No. CV 16-4464 CBM, at 1-7 (C.D. Cal. Sept. 15, 2017) (holding *Johnson* invalidates the mandatory Guidelines' residual clause and petition was timely); *United States v. Parks*, No. 03-CR-00490-WYD, 2017 WL 3732078, at *1-7 (D. Colo. Aug. 1, 2018)(same); *Sarracino v. United States*, No. 95-CR-210-MCA, 2017 WL 3098262, at *2-5 & n.3 (D.N.M. June 26, 2017), *report and recommendation, adopted*, No. 95-CR-210-MCA, 2017 WL 3822741 (D.N.M. Aug. 30, 2017).

Resolution of this question has significant practical importance to numerous federal prisoners whose sentences increased because the residual clause of the mandatory career-offender guideline fixed their sentencing ranges.

3. 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 her ability to draft the petition. Within the last month counsel had prearranged vacation plans, a jury trial, a bench trial, four sentencings including one with significant legal issues under 18 U.S.C. § 3559, and various other deadlines for motions in other cases in the Northern Division of the Western District of Michigan. (*United States v. Jessica Lynn Tobias*, 2:17-cr-22; *United States v. Kevin Edward*

McGivern, 2:16-cr-28; *United States v. Evan Gabriel Smith*, 2:17-cr-19; *United States v. Jeremy Lee Heinkel*, 2:17-cr-33; *United States v. Michael Scott Sanders*, 2:17-cr-26; and *United States v. Eric Scott Ruska*, 2:17-cr-25). For the foregoing reasons, the application for a 60-day extension of time, to and including, Monday, May 7, 2018, within which to file a petition for a writ of certiorari should be granted.

March 6, 2018

Respectfully submitted,

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