

App. No. \_\_\_\_\_

---

IN THE  
SUPREME COURT OF THE UNITED STATES

---

BRIAN SCOTT WITHAM,

*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 Brett M. Kavanaugh, 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, Brian Witham, 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 60 days to and including September 4, 2024. The United States Court of Appeals for the Sixth Circuit issued its judgment and published opinion affirming the dismissal of his motion for post-conviction relief on April 8, 2024 (*see* Appendix). Mr. Witham's time to petition for writ of certiorari in this Court would therefore expire on July 7, 2024, absent an extension. Mr. Witham files this application at least ten days before that date, and supports his request as

follows:

1. In 2016, Brian Witham pled guilty in the Eastern District of Tennessee to numerous federal charges in this case and others arising from a series of crimes he committed along with a co-defendant involving attempted armed extortion of bank employees and related carjackings. One of the counts to which he pled guilty was brandishing a firearm during and in relation to the attempted armed bank extortion, in violation of 18 U.S.C. § 924(c). In exchange for his guilty plea and after Mr. Witham assisted the government in the prosecution and conviction of his co-defendant, the government dismissed the remaining charges, including other § 924(c) counts. Mr. Witham was sentenced in 2017 to serve a total of 360 months in prison, which included a seven-year mandatory term for the single § 924(c) count to which he pled guilty.

2. On June 24, 2019, this Court decided *United States v. Davis*, 588 U.S. 445 (2019), striking down as unconstitutional the “residual clause” in the definition of “crime of violence” in 18 U.S.C. § 924(c)(3)(B). Within one year, Mr. Witham filed a motion based on *Davis* to vacate his conviction and sentence for the § 924(c) count predicated on attempted bank extortion, arguing that his actual innocence of that count excused his procedural default of the claim. The district court denied his motion on the ground that he had not also shown actual innocence of two other § 924(c) counts predicated on carjacking and dismissed in exchange for his guilty plea.

3. The Sixth Circuit granted a certificate of appealability on the question

whether a § 2255 movant asserting actual innocence to excuse procedural default must show actual innocence only of “more serious charges” the government “has forgone [] in the course of plea bargaining,” as this Court stated in *Bousley v. United States*, 523 U.S. 614, 624 (1998), or must *also* show actual innocence of equally serious dismissed charges. On April 8, 2024, the Sixth Circuit issued a published decision in this case (and another case with which it was consolidated) holding that a § 2255 movant must show actual innocence of both more serious and equally serious dismissed charges. The question in this appeal is whether the Sixth Circuit’s rule is correct.

4. Good cause supports granting an extension of time. In the time leading up to and following the current deadline, undersigned counsel has been and will be responsible for a large number of briefs and other filings, including the opening brief due June 24 in *United States v. Ramirez Gomez*, Sixth Cir. No. 24-5030; a motion for reduction in sentence filed June 11 in *United States v. Hymes*, Case No. 1:17-cr-43 (E.D. Tenn.); and the reply due June 21 in *Kinnear v. United States*, No. 3:25-cr-0096 (E.D. Tenn.). In addition, undersigned counsel has been responsible, pursuant to the Eastern District of Tennessee’s standing order, for review of over one hundred cases for potential motions for sentence reduction pursuant to a retroactive guideline amendment. And as a member of the national Federal Defender Guidelines Committee and the Federal Defender Sixth Circuit Appellate Group, she has provided substantial assistance with several out-of-district cases raising issues of ongoing importance to clients in those districts and elsewhere.

Despite due diligence on the part of counsel, the press of these and other responsibilities have left insufficient time in which to prepare the petition.

Mr. Witham therefore asks this Court to extend the time to file a petition for a writ of certiorari in this appeal 60 days to and including September 4, 2024.

Respectfully submitted,

*s/ Jennifer Niles Coffin*  
Jennifer Niles Coffin  
Assistant Federal Defender  
Federal Defender Services of  
Eastern Tennessee, Inc.  
800 South Gay St., Suite 2400  
Knoxville, Tennessee 37929  
(865) 637-7979  
jennifer\_coffin@fd.org

June 18, 2024