IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANTHONY C. BARRETT,

Petitioner,

CASE NO. 2:15-cv-2876
CRIM. NO. 2:11-cr-173

v.

JUDGE ALGENON L. MARBLEY
Magistrate Judge Kemp

UNITED STATES OF AMERICA,

Respondent.

REPORT AND RECOMMENDATION

Petitioner, a federal prisoner, has filed a motion to vacate his sentence pursuant to 28 U.S.C. §2255. The case is before the Court on the motion (Doc. 136), the United States' response (Doc. 155), and Petitioner's reply and supplemental memorandum supporting reply (Docs 159 and 160). For the following reasons, it will be recommended that the motion to vacate be **DENIED**.

I. Facts and Procedural History

On July 7, 2011, the grand jury indicted Anthony C. Barrett, Henry B. Moore, Jr., and Nathaniel Crews, Jr. Count 1 charged the three defendants with conspiring to commit armed bank robbery. Petitioner and one or more of the other two defendants were also charged with committing the robbery (which took place at a Huntington National Bank Branch located on East Main Street in Bexley, Ohio) and with carrying and brandishing one or more firearms during the robbery (Counts 2 and 3). Finally, the grand jury charged Petitioner with possessing both firearms and ammunition after having been convicted of three prior violent felonies (Counts 4 and 5). (Doc. 16).

Because Petitioner was financially unable to retain counsel, the Court appointed attorney J. Kristin Burkett to represent him. (Doc. 23).

Petitioner was arraigned on July 20, 2011 and pleaded not guilty. The case was set for trial on August 29, 2011. Twelve days before trial, Petitioner signed a plea agreement which obligated him to plead guilty to Counts 2 and 4 of the indictment. He acknowledged that he could be sentenced to up to 25 years in prison for the armed bank robbery and that Count 4 carried a term of imprisonment of between 15 years and life, but he and the United States stipulated to a sentence of 19 years, which would bind the Court if the plea agreement were accepted. Petitioner also waived his right to appeal his sentence or to challenge it collaterally through a §2255 proceeding, but retained the right to challenge his sentence on grounds of ineffective assistance of counsel or prosecutorial misconduct. (Doc. 48, ¶s 1, 2, 11 & 13). Two days later he appeared before Judge Marbley and entered his guilty plea. His plea was accepted and on December 7, 2011, Judge Marbley sentenced Petitioner to a total of 228 months of imprisonment - the agreed sentence of nineteen years - on each of the two counts, to be served concurrently. That sentence is reflected in the judgment and commitment order filed on December 14, 2011. (Doc. 76).

Petitioner did not appeal. However, he filed a motion to vacate sentence on December 7, 2012. He raised nine separate grounds for relief. For the most part, despite the fact that the plea agreement contained a waiver of the right to file a motion under §2255, the United States addressed those claims on their merits. The Court, however, dismissed all claims not based on an allegation of ineffective assistance of counsel

because of the guilty plea or the waiver contained in the plea agreement, and denied the remaining grounds for relief as lacking in merit. (Doc. 123). Petitioner unsuccessfully appealed that decision, with both this Court and the Court of Appeals denying his request for a certificate of appealability. (Docs. 131 and 133).

Petitioner's second motion to vacate - the one being addressed by this Report and Recommendation - was filed on September 4, 2015. Because it was a second or successive motion, this Court transferred it to the Court of Appeals on November 13, 2015. In an order filed on August 24, 2016, the Court of Appeals granted Petitioner leave to file this motion, reasoning that because Petitioner's current petition raised an issue about the proper application of *Johnson v. United States*, 135 S.Ct. 2551 (2015) to his sentence on Count Four, and because the holding in *Johnson* had, in *Welch v. United States*, 136 S.Ct. 1257 (2016), been made retroactive to cases on collateral review, good cause existed to allow Petitioner to proceed on his second motion. This Court then issued the show cause order which led to the filing of the response, reply, and supplemental memorandum described above.

II. Petitioner's Claims and the United States' Response

Petitioner received concurrent 19-year sentences on Count Two, the armed bank robbery charge, and Count Four, on which he was sentenced under the Armed Career Criminal Act, or ACCA. As more fully discussed below, *Johnson* applies only to sentences imposed under the ACCA. Petitioner's motion asserts that at least one of the three prior offenses used to qualify him for a 15-year minimum sentence under theACCA was based on the residual clause of the statute, which *Johnson* held to be void

for vagueness. According to Petitioner, this error renders the entire plea agreement void.

The United States opposes granting relief on numerous grounds. It argues that the three violent felony convictions used to sentence Petitioner under the ACCA - two Florida robbery convictions and one Ohio robbery conviction - count as prior violent felonies under other sections of the ACCA which were not impacted by the *Johnson* decision. It also asserts that this claim was waived by the plea agreement, that it was procedurally defaulted because Petitioner did not appeal his sentence, and that, under the "concurrent sentence" doctrine, the Court should decline to review the ACCA sentence because, even if it were vacated or reduced, Petitioner would still have to serve the same 19-year sentence which was imposed on the armed bank robbery count. Anticipating that Petitioner might attempt to excuse any procedural default of this claim by arguing that it would have been futile to raise the vagueness challenge to the ACCA before *Johnson* was decided, the United States asserts that this argument was not so novel that counsel could not reasonably have believed in its merits even before the Supreme Court adopted it (and, in the process, effectively overruled contrary decisions from the Sixth Circuit Court of Appeals).

Petitioner responds to these arguments as follows. First, he asserts that robbery can never qualify as a crime of violence under the ACCA. Second, he contends that his current claim is actually a claim that his trial counsel was constitutionally ineffective because she permitted him to plead guilty to an ACCA charge when the statute was void for vagueness. He also argues that his counsel was ineffective for not filing an

appeal which raised the vagueness issue. Lastly, he responds to the argument that the Court should apply the concurrent sentence doctrine by contending that the *Johnson* error voids his entire plea agreement. In his supplemental reply, he appears to clarify his claim concerning whether the robbery offenses for which he was convicted qualify as crimes of violence, stating that they do not due to the vagueness of the residual clause of the ACCA.

III. Discussion

A. *Johnson v. United States*

Before beginning a discussion of Petitioner's specific arguments, it is helpful to explain exactly what the Supreme Court held in *Johnson v. United States.* There, the United States Supreme Court held that the "residual clause" of 18 U.S.C. § 924(e)(2)(B)(ii) of the Armed Career Criminal Act ("ACCA") was unconstitutionally vague. Under the ACCA, a criminal defendant who is found guilty of possessing a firearm after having been convicted on three or more convictions of a "serious drug offense" or a "violent felony" is subject to a mandatory minimum sentence of 15 years and a maximum term of life in prison. 18 U.S.C. § 924(e)(1). The ACCA defines the term "violent felony" as follows:

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

> (ii) is burglary, arson, or extortion, involves use of explosives, *or* otherwise involves conduct that presents a serious potential risk of *physical injury to another[.]*

18 U.S.C. § 924(e)(2) (Emphasis added). The italicized portion of subsection (ii) is known as the "residual clause," and it is the section of the statute that *Johnson* found to be unconstitutionally vague. The Supreme Court's decision left the first portion of the definition of "crime of violence" intact.

B. Application of *Johnson* to Petitioner's Case

Petitioner has made three filings in this case which characterize his claim. The first, his motion, asserts, with little supporting argument, that his ACCA sentence was invalidated by *Johnson.* In his response, however, Petitioner argues that his robbery convictions do not constitute crimes of violence within the meaning of 18 U.S.C. § 924(c), arguing that these convictions do not qualify as "crimes of violence" under 18 U.S.C. § 924(c) by application of the "categorical approach" required by *Descamps v. United States*, -- U.S. –, 133 S.Ct. 2276 (2013), and *Taylor v. United States*, 495 U.S. 575 (1990), and as defined in *Johnson v. United States*, 559 U.S. 133, 140 (2010). Clearly, this claim has been waived for numerous reasons. It was not raised on direct appeal; it was not raised in Petitioner's first motion to vacate; it is not a *Johnson* claim, which is the only claim on which the Court of Appeals has granted Petitioner leave to pursue through what would otherwise be a prohibited second motion to vacate; and it was waived in the plea agreement. The Court sees no need to address this claim in any detail, other than to say it also appears to fail on its merits, *see United States v. Patterson*, -F.3d-, 2017 WL 1208425 (6th Cir. April 3, 2017).

Perhaps recognizing that this argument would not succeed, in his supplemental memorandum, Petitioner changed tactics, alleging again that the robbery convictions were swept into the ACCA through the residual clause and that his sentence is therefore void. That argument, however, does not fit the facts. Although the United States concedes that there is some conflicting authority (for example, *United States v. Moore*, 203 F.Supp.3d 854 (N.D. Ohio 2016), a case which is currently on appeal) about whether aggravated robbery, as defined by Ohio law, qualifies as a violent felony under 18 U.S.C. §924(e)(2(B)(i) - which, again, is not the section of the statute affected by *Johnson* - that does not matter here. This Court treated all three robbery convictions as crimes of violence under that subsection because they involved "the use, attempted use, or threatened use of physical force against the person of another...." Robbery is such a crime, and it was intended to be included in the ACCA, which represented an expansion of the prior law which specifically referred to burglary and robbery. *See, e.g., Begay v. United States,* 553 U.S. 137 (2008); *see also Patterson, supra.* This Court has treated other robbery convictions, such as those under the Hobbes Act, 18 U.S.C. §951, as crimes of violence under §924(e)(2(B)(i) and not under the residual clause invalidated by *Johnson*. *See, e.g., Velazquez v. United States*, 2016 WL 8193687 (S.D. Ohio Dec. 15, 2016), *adopted and affirmed* 2017 WL 447243 (S.D. Ohio Feb. 2, 2017). Consequently, even if it could be argued, based on the reasoning in *Moore* (which the United States contends was wrongly decided), that Petitioner's Ohio conviction is not actually a crime of violence as defined in §924(e)(2(B)(i) , this is not the place to make that argument. *Moore*, it should be noted, made its holding in the context of sentencing, and not on a

motion for collateral review which relies on *Johnson*, and it did not address the residual clause of the ACCA. The assertion that the three robbery convictions do not qualify as crimes of violence under §924(e)(2(B)(i), is not a *Johnson*-based claim, and it was waived in multiple ways, including by the plea agreement.

Attempting to avoid this result, Petitioner argues that he is not actually attacking the Court's decision to treat the robbery convictions as crimes of violence under the ACCA, but is raising a claim of ineffective assistance of counsel for not making a *Johnson* claim at the time the plea agreement was being negotiated. That argument, too, fails for numerous reasons. That is not the claim on which Petitioner was authorized to proceed by the Court of Appeals. Further, since the residual clause of the ACCA was not used in sentencing Petitioner, counsel could not have been ineffective for failing to challenge that clause as void, because such a challenge would have had no effect on the outcome of the case. Finally, to the extent that Petitioner's various filings might be construed to be raising a claim that counsel should have raised the same issue which was decided in *Moore*, that is even further afield from the *Johnson* claim which the Court of Appeals authorized.

There is likely merit in the United States' alternative argument which relies on the concurrent sentence doctrine. The guideline range for the armed bank robbery conviction was actually higher than the sentence which Petitioner received, and had the Court accepted an argument, at the time of sentencing, that Petitioner could not be sentenced under the ACCA, it would still have imposed the same sentence - which is the one to which both Petitioner and the United States had agreed. However, the short

answer to all of Petitioner's arguments is that he has no claim under *Johnson* or even tangentially related to *Johnson*, and because that is the only type of claim he can pursue in this successive motion, he is not entitled to any relief.

IV. Recommended Disposition

For the reasons set forth above, the Magistrate Judge **RECOMMENDS** that the motion to vacate sentence (Doc.36) be **DENIED** and that this action be **DISMISSED**.

V. Procedure on Objections

If any party objects to this *Report and Recommendation*, that party may, within fourteen (14) days of the date of this report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. 28 U.S.C. § 636(b)(1).

The parties are specifically advised that failure to object to the *Report and Recommendati*on will result in a waiver of the right to have the district judge review the *Report and Recommendation de novo*, and also operates as a waiver of the right to appeal the decision of the District Court adopting the *Report and Recommendation. See Thomas v. Arn,* 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir.1981).

The parties are further advised that, if they intend to file an appeal of any adverse decision, they may submit arguments in any objections filed, regarding whether a certificate of appealability should issue.

/s Terence P. Kemp
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANTHONY C. BARRETT,

Petitioner,

v.

CASE NO. 2:15-CV-2876
CRIM. NO. 2:11-CR-173
JUDGE ALGENON L. MARBLEY
MAGISTRATE JUDGE KEMP

UNITED STATES OF AMERICA,

Respondent.

OPINION AND ORDER

On April 6, 2017, the Magistrate Judge issued a *Report and Recommendation* recommending that the *Motion to Vacate under 28 U.S.C. § 2255* (Doc. 136) be denied. (Doc. 166.) Petitioner has filed an *Objection* to the Magistrate Judge's *Report and Recommendation.* (Doc. 167.) Pursuant to 28 U.S.C. § 636(b), this Court has conducted a *de novo* review. For the reasons that follow, Petitioner's *Objection* (Doc. 167) is **OVERRULED.** The *Report and Recommendation* (Doc. 166) is **ADOPTED** and **AFFIRMED.** This action is hereby **DISMISSED.**

On August 19, 2011, Petitioner pleaded guilty charges of armed bank robbery and possessing firearms and ammunition after having been convicted of three prior violent felonies. (Docs. 48, 52.) On December 7, 2011, the District Court imposed 228 months incarceration on both charges, such sentences to be served concurrently to each other, pursuant to the terms of Petitioner's *Plea Agreement.* On August 24, 2016, the United States Court of Appeals for the Sixth Circuit granted Petitioner authorization for the filing of the instant successive § 2255 motion on Petitioner's claim that he should not be subject to an enhanced sentence under 18 U.S.C. § 924(e)(1) because his prior convictions no longer qualify as "violent felonies" in view

of the Supreme Court's decision in *Johnson v. United States*, -- U.S. --, 135 S.Ct. 2551 (2015)(declaring the "residual clause" of 18 U.S.C. 924(e)(2)(B)(ii) of the Armed Career Criminal Act ("ACCA") to be unconstitutionally vague). (Doc. 153.) The Magistrate Judge recommended dismissal of Petitioner's claim on the merits.

Petitioner objects to the Magistrate Judge's recommendation of dismissal. He argues that his prior Ohio robbery conviction does not qualify as a "violent felony" within the terms of the ACCA in view of the Supreme Court's decision in *Johnson*, 135 S.Ct. at 2551, and because it is "categorically overbroad" and does not involve "violent force capable of causing physical harm to a person" under *Johnson v. United States*, 559 U.S. 133 (2010). Petitioner also again asserts the denial of the effective assistance of trial and appellate counsel and claims that he was forced to enter a guilty plea. Petitioner contends that the error in his sentencing, based on his clam under *Johnson* voids his entire *Plea Agreement*. He maintains that this case involves a manifest miscarriage of justice and that he is actually innocent of his conviction under the ACCA.

For the reasons discussed by the Magistrate Judge, Petitioner's arguments are not persuasive. The sole claim authorized for consideration in these proceedings involves Petitioner's claim that he was improperly sentenced under *Johnson,* 135 S.Ct. at 2551. That claim fails, as Petitioner's prior robbery convictions qualify as crimes of violence under the provision of § 924(e)(2)(B)(i), which remains unaffected by *Johnson*. Petitioner's argument that his Ohio robbery conviction does not constitute a crime of violence under § 924(e)(2)(B)(i), that his guilty plea was not knowing, intelligent, and voluntary, and that he was denied the effective assistance of counsel are not properly before this Court.

For these reasons and for the reasons detailed in the Magistrate Judge's *Report and Recommendation,* Petitioner's *Objection* (Doc. 167) is **OVERRULED**. The *Report and*

Recommendation (Doc. 166) is **ADOPTED** and **AFFIRMED.** This action is hereby **DISMISSED.**

IT IS SO ORDERED.

ALGENON L. MARBLEY
United States District Judge

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 18a0574n.06

No. 17-3491

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 15, 2018
DEBORAH S. HUNT, Clerk

ANTHONY C. BARRETT,	)	
	)	
Petitioner-Appellant,	)	
	)	ON APPEAL FROM THE
v.	)	UNITED STATES DISTRICT
	)	COURT FOR THE
UNITED STATES OF AMERICA,	)	SOUTHERN DISTRICT OF
	)	OHIO
Respondent-Appellee.	)	

Before: SILER and KETHLEDGE, Circuit Judges; OLIVER, District Judge*

KETHLEDGE, Circuit Judge. Anthony Barrett appeals the district court's denial of his motion under 28 U.S.C. § 2255, arguing that his sentence for bank robbery and being a felon in possession of a firearm was unconstitutional. Specifically, he argues that his sentence was based on the Armed Career Criminal Act's residual clause, which the Supreme Court declared unconstitutional in *Johnson v. United States*, 135 S. Ct. 2551 (2015). But Barrett has not shown that the sentencing court, in fact, used the residual clause to sentence him; and § 2255 itself bars him from raising his other arguments.

In 2011, Barrett pleaded guilty to armed bank robbery and to being a felon in possession of a firearm. By that time, Barrett already had two robbery convictions in Florida and one in Ohio. At sentencing, the district court determined that these convictions qualified as "violent felonies" under the ACCA, meaning that Barrett faced a 15-year mandatory minimum. The district court

* The Honorable Solomon Oliver, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

sentenced him to concurrent 19-year terms. Barrett did not appeal. The next year, Barrett filed his first motion under § 2255, which the district court denied. This court affirmed.

Three years later, the Supreme Court held that the ACCA's residual clause was unconstitutionally vague. *See Johnson v. United States*, 135 S. Ct. 2551 (2015). Later that year, Barrett asked this court for permission to file his second motion under § 2255, arguing that *Johnson* invalidated his sentence because, Barrett said, the district court had relied on the residual clause to sentence him. This court granted Barrett permission to file his motion.

After Barrett did so, the district court found that when sentencing Barrett it had used the elements clause rather than the residual clause. Hence the court denied him relief. This appeal followed.

We review the district court's findings of fact for clear error and its legal conclusions de novo. *Valentine v. United States*, 488 F.3d 325, 331 (6th Cir. 2007). This court's decision in *Potter v. United States*, 887 F.3d 785 (6th Cir. 2018), governs the analysis here. Under *Potter*, Barrett must demonstrate (at a minimum) that the district court in fact relied only upon the residual clause when it sentenced him in 2011. *See id.* at 787-88.

Barrett has not made that showing. The district judge who denied Barrett's motion was the same judge who sentenced him. And the judge found that he had relied on the elements clause. Under *Potter*, that finding is nearly conclusive. *See id.* at 788. Moreover, as Barrett largely admits, under the caselaw at the time his three prior convictions qualified as violent felonies under both the elements clause and the residual clause. Thus there would have been no legal reason for the district court to rely only on the residual clause. And Barrett points to nothing in his plea agreement, his sentencing transcript, or otherwise in the record that could support a finding that the sentencing court relied only upon the residual clause. His claim therefore fails.

That leaves Barrett's argument that his prior convictions would no longer qualify as violent felonies under the law today. *See United States v. Stokeling*, 684 F. App'x 870 (11th Cir. 2017), *cert. granted*, 138 S. Ct. 1438 (2018); *United States v. Yates*, 866 F.3d 723 (6th Cir. 2017). But that argument is based on grounds other than the Supreme Court's decision in *Johnson*—which is to say, it does not rest on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court[.]" *See* 28 U.S.C. § 2255(h). Instead, the argument is an attempt to relitigate issues that the district court decided at Barrett's sentencing in 2011. Section 2255 by its terms bars that attempt.

In response, Barrett says this court's order—which authorized his second § 2255 motion—was "broad enough" to allow him to challenge anew the status of his prior convictions as violent felonies. But that order does not amend the requirements of § 2255(h). *See Paulino v. United States*, 352 F.3d 1056, 1059-61 (6th Cir. 2003). We therefore affirm the district court's denial of Barrett's motion to vacate his sentence.

No. 17-3491

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 03, 2019
DEBORAH S. HUNT, Clerk

ANTHONY C. BARRETT,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

BEFORE: SILER and KETHLEDGE, Circuit Judges; and OLIVER, District Judge.*

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.** No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*The Honorable Solomon Oliver, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

**Chief Judge Cole recused himself from participation in this ruling.