IN THE
SUPREME COURT OF THE UNITED STATES

No. ____

ANTHONY C. BARRETT,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION TO THE HON. SONIA SOTOMAYOR FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Pursuant to Supreme Court Rule 13(5), Anthony Barrett hereby moves for an extension of time of 30 days, to and including May 3, 2019, for the filing of a petition for a writ of certiorari. Unless an extension is granted, the deadline for filing the petition for certiorari will be April 3, 2019.

In support of this request, Applicant states as follows:

1. The United Stated Court of Appeals for the Sixth Circuit rendered its decision on November 15, 2018 (Exhibit 1) and its order denying rehearing *en banc* on January 3, 2019 (Exhibit 2). This Court has jurisdiction under 28 U.S.C. § 1254(1).

2. This case involves the exceptionally important question whether a successive habeas petitioner under 28 U.S.C. § 2255 bears the burden of showing

5. In reaching its decision, the Sixth Circuit further entrenched a clear split with other courts of appeals that have held that a successive § 2255 movant need not show that his conviction rested solely on the residual clause in order to obtain relief. *See, e.g.*, *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017) ("[I]mposing the burden on movants [to show their sentence relied on only the residual clause] would result in 'selective application' of the new rule of constitutional law announced in *Johnson II*, violating 'the principle of treating similarly situated defendants the same.'") (quoting *Teague v. Lane*, 489 U.S. 288, 304 (1989)); *United States v. Taylor*, 873 F.3d 476, 482 (5th Cir. 2017); *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017); *see also United States v. Booker*, 240 F. Supp. 3d 164, 168 (D.D.C. 2017). *But see Dimott v. United States*, 881 F.3d 232, 240 (1st Cir.), *cert. denied*, 138 S. Ct. 2678 (2018); *United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018), *cert. denied*, No. 18-5594, 2019 WL 113224 (U.S. Jan. 7, 2019); *Beeman v. United States*, 871 F.3d 1215, 1221-22 (11th Cir. 2017), *cert. denied*, No. 18-6385, 2019 WL 659904 (U.S. Feb. 19, 2019).

6. The Sixth Circuit's decision is also wrong because it conflicts with this Court's holding in *Welch v. United States*, 136 S. Ct. 1257 (2016), which held that *Johnson II* announced a new rule of constitutional law that is retroactively applicable on collateral review. 136 S. Ct. at 1265. *Welch* reached this conclusion even when the movant "did not show he was sentenced solely under the residual clause and was not challenging his ACCA enhancement solely under that clause."

Raines v. United States, 898 F.3d 680, 691-92 (6th Cir. 2018) (Cole, C.J., concurring).

7. Between now and the current due date of the petition, Counsel of Record, Barbara Smith, who represents Petitioner *pro bono*, has substantial briefing and pre-trial obligations, including, *inter alia*, an upcoming trial in *Quinn v. Quinn*, Case No. 3:19-cv-5010 (W.D. Mo.) and a hearing on a dispositive motion to remand in *Mahoney v. Emerson Electric Co., et al*, Case No. 1:18-cv-00405 (D. Idaho).

8. Applicant requests a modest extension of time for counsel to research the complex legal issues presented in this case in order to prepare a petition that fully addresses the significant issues raised by the decision below and to frame those issues—and the split of authority this decision exacerbates—in a manner that will be most helpful to the Court.

WHEREFORE, for the foregoing reasons, Applicant requests that an extension of time to and including May 3, 2019 be granted within which Applicant may file a petition for a writ of certiorari.

Respectfully submitted,

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March 18, 2019

EXHIBIT

1

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

No. 17-3491

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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.

EXHIBIT

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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.