

No. 19A-__

IN THE
Supreme Court of the United States

JOHNNY LEE OLDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI**

Anton Metlitsky
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036
(212) 326-2000

Megan Saillant
FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF
FLORIDA
Sun Center
101 SE 2nd Place, Ste. 112
Gainesville, FL 32601
(352) 373-5823

Jeffrey L. Fisher
Counsel of Record
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025
(650) 473-2600
jlfisher@omm.com

Kendall Turner
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

**APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION
FOR A WRIT OF CERTIORARI**

To: Justice Clarence Thomas, Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

1. Under this Court's Rules 13.5 and 22, Applicant Johnny Lee Olds requests an extension of thirty (30) days to file a petition for a writ of certiorari in his case. His petition will challenge the decision of the Eleventh Circuit in *Olds v. United States*, No. 19-13195-E, 2019 WL 7989938 (11th Cir. Dec. 20, 2019), a copy of which is attached. App. 1a–3a. The Eleventh Circuit issued its opinion on December 20, 2019, and Mr. Olds did not seek rehearing en banc. Without an extension, the petition for a writ of certiorari would be due on March 19, 2020. With the requested extension, the petition would be due on April 20, 2020. This Court's jurisdiction will be based on 28 U.S.C. § 1254(1) and 28 U.S.C. § 2253.

2. In 2009, Mr. Olds pleaded guilty to unlawfully possessing a firearm as a convicted felon. App. 1a. His sentence for that offense was enhanced under the Armed Career Criminal Act (ACCA) because he had prior convictions for burglary, attempted robbery, sale of cocaine, and aggravated battery on a pregnant woman. App. 1a–2a. The sentencing transcript is silent as to the ACCA provision on which the district court relied on enhancing Mr. Olds's sentence. App. 2a–3a.

After this Court invalidated ACCA's residual clause in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Olds filed a petition under 28 U.S.C. § 2255 to

vacate, set aside, or correct his sentence. He did not dispute that his prior drug offense was a valid predicate for enhancing his sentence under ACCA, but he challenged his enhanced sentence on the grounds that (1) his prior convictions for burglary, attempted robbery, and aggravated battery on a pregnant woman no longer qualified as ACCA predicate offenses under ACCA's elements clause or ACCA's force clause, and thus (2) the sentence could be enhanced only under ACCA's residual clause, which this Court invalidated in *Johnson*. App. 2a–3a.

The Eleventh Circuit did not dispute that precedent post-dating Mr. Olds's sentencing held that burglary and battery offenses no longer qualified as predicate offenses under ACCA's elements or force clauses. But it held that “[s]uch precedent is not relevant to the *historical fact* of whether the sentencing court actually relied solely upon the residual clause to enhance his sentence.” App. 3a (emphasis added). And because the “the record is otherwise silent as to whether the sentencing court relied on the residual clause to enhance Mr. Olds's sentence,” the Eleventh Circuit held that Mr. Olds had failed to show that it was more likely than not that his sentence was enhanced under ACCA's now-invalid residual clause. App. 3a. Because binding Eleventh Circuit precedent required him to satisfy this “more likely than not” test to obtain habeas relief, the Eleventh Circuit denied Mr. Olds's habeas petition. App. 2a–3a.

3. This case is a serious candidate for review, presenting an important and recurring issue on which the federal courts of appeals disagree: whether, or under what circumstances, a criminal defendant pursuing a second or successive motion under 28 U.S.C. § 2255 is entitled to relief under a retroactive

constitutional decision invalidating a federal statutory provision, where the record is silent as to whether the district court based its original judgment on that provision or another provision of the same statute. The Third, Fourth, and Ninth Circuits have held that a defendant bringing a successive motion under Section 2255 is entitled to *Johnson* relief so long as he shows that his sentence *may have* relief on the residual clause—at least where, as here, there is currently no other statutory basis to support his sentence. *See, e.g., United States v. Peppers*, 899 F.3d 211, 221 (3d Cir. 2018); *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017); *United States v. Donnelly*, 710 F. App’x 335, 335 (9th Cir. 2018). But the Eleventh Circuit, like the First, Sixth, Eighth, and Tenth Circuits, has held that a defendant in this situation may obtain relief only if he somehow proves that the court *in fact* based his ACCA sentence on the residual clause. *See Dimott v. United States*, 881 F.3d 232, 242–43 (1st Cir.), *cert. denied sub nom. Casey v. United States*, 138 S. Ct. 2678 (2018); *Potter v. United States*, 887 F.3d 785, 787–88 (6th Cir. 2018); *United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 789 (2019); *Beeman v. United States*, 871 F.3d 1215, 1221–22 (11th Cir. 2017), *cert. denied*, 139 S. Ct. 1168 (2019).

This case presents an excellent opportunity to resolve the conflict between the federal courts of appeals because the Eleventh Circuit here indicated that Mr. Olds would be entitled to habeas relief but for its “more likely than not” rule. App. 2a–3a. The question presented is thus perfectly teed up for this Court and is outcome-determinative of the appeal.

5. This application for a 30-day extension seeks to accommodate Mr.

Olds's legitimate needs. Mr. Olds has recently affiliated with undersigned counsel at O'Melveny & Myers LLP. The extension is needed for undersigned counsel and other members of the firm to fully familiarize themselves with the record, the decisions below, and the relevant statutes and case law. In light of counsel's many other obligations—including oral argument before the Ninth Circuit on March 25, 2020 in *Stiner v. Brookdale Senior Living, Inc.*, No. 19-15334; oral argument before the Eleventh Circuit on March 31, 2020 in *Stein v. United States*, No. 18-13762; and oral argument before this Court on April 1, 2020 in *Our Lady of Guadalupe v. Morrissey-Berru*, No. 19-267—counsel would not be able to adequately complete these tasks by the current due date.

6. For these reasons, Mr. Olds requests that the due date for his petition for a writ of certiorari be extended to April 20, 2020.

Respectfully submitted,

By: 

Anton Metlitsky
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036
(212) 326-2000

Megan Saillant
FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF
FLORIDA
Sun Center
101 SE 2nd Place, Ste. 112
Gainesville, FL 32601
(352) 373-5823

Jeffrey L. Fisher
Counsel of Record
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025
(650) 473-2600
jlfisher@omm.com

Kendall Turner
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

Dated: March 6, 2020

APPENDIX

1a

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-13195-E

JOHNNY LEE OLDS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

ORDER:

Johnny Lee Olds is a federal prisoner serving a 210-month sentence after pleading guilty in 2009 to unlawfully possessing a firearm as a convicted felon. Mr. Olds filed the instant 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence after this Court granted his application to file a second or successive § 2255 motion based on *Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding that the residual clause of the Armed Career Criminal Act (“ACCA”) was unconstitutionally vague). In his motion, Mr. Olds raised a single claim for relief, namely, that his enhanced sentence under the ACCA was unconstitutional in light of *Johnson*. In support, he noted that his prior convictions included convictions for burglary of a structure, attempted robbery, sale of cocaine, and aggravated battery on a pregnant woman. Mr. Olds did not dispute that his prior conviction for sale of cocaine qualified as a predicate serious drug offense under the ACCA. However, he argued that his convictions for burglary, attempted robbery, and aggravated

battery on a pregnant woman no longer qualified as ACCA predicate violent felonies in light of *Johnson*.

The district court dismissed Mr. Olds's § 2255 motion for lack of jurisdiction under § 2255(h) because he had failed to make a *prima facie* showing of a valid *Johnson* claim. The court found that Mr. Olds had not met his burden under *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), of showing that the sentencing court more likely than not enhanced his sentence based solely on the now-unconstitutional residual clause of the ACCA or that his prior convictions qualified as violent felonies under only the residual clause at the time of his sentencing. Thus, the court concluded that Mr. Olds's § 2255 motion did not fall within the scope of the new rule announced in *Johnson* and that it lacked jurisdiction under § 2255(h) to consider his claim.

In order to obtain a COA, a movant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong,” or that the issues “deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted).

Here, reasonable jurists would not debate the district court’s dismissal of Mr. Olds’s § 2255 motion. *See Slack*, 529 U.S. at 484. As Mr. Olds concedes, his record of conviction is completely silent as to what clause or clauses of the ACCA formed the bases for his sentencing enhancement. Thus, in that regard, he failed to meet his burden under *Beeman* because he did not show that, more likely than not, it was the use of the residual clause that led to the court’s enhancement of his sentence. *See Beeman*, 871 F.3d at 1221-22. Further, Mr. Olds failed to show that precedent at the time of his sentencing held or otherwise made obvious that his specific predicate conviction for Florida burglary qualified as a violent felony under only the residual clause. *See id.* at 1224.

Moreover, as Mr. Olds was convicted for burglary of a structure, it is at least just as likely that, at the time of his sentencing, that conviction qualified as a violent felony under the ACCA's enumerated-offense clause. *See Taylor v. United States*, 495 U.S. 575, 602 (1990) (holding that "an offense constitutes 'burglary' for purposes of [an ACCA] enhancement if its statutory definition substantially corresponds to the 'generic' burglary," which has as basic elements the "unlawful or unprivileged entry into [. . .] a building or structure, with intent to commit a crime.").

To the extent Mr. Olds argues that he met his standard under *Beeman* to show that his aggravated battery on a pregnant person was more likely than not determined to qualify as a violent felony under the residual clause, his argument fails because it relies only on precedent from after his sentencing. Such precedent is not relevant to the historical fact of whether the sentencing court actually relied solely upon the residual clause to enhance his sentence, and, as noted *supra*, the record is otherwise silent as to whether the sentencing court relied on the residual clause to enhance Mr. Olds's sentence. *See Beeman*, 871 F.3d at 1224 n.5. Finally, insofar as Mr. Olds argues that he is entitled to a COA because *Beeman* was incorrectly decided, "no COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015).

Thus, after inquiring into the record, the district court correctly concluded that Mr. Olds had not met the requirements of § 2255(h)(2) because he did not fall within the scope of the rule announced in *Johnson*. *See In re Thomas*, 823 F.3d 1345, 1348-40 (11th Cir. 2016) (holding that, to satisfy § 2255(h)(2), a prisoner must show that he falls within the scope of the substantive rule that was announced in *Johnson*). Accordingly, Mr. Olds's motion for a COA is DENIED.


UNITED STATES CIRCUIT JUDGE