No. 16-3591

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: CHARLES CHUBB,	)	
	)	ORDER
Movant.	)	

Before: KEITH, SUTTON, and DONALD, Circuit Judges.

Charles Chubb, a federal prisoner proceeding through counsel, moves this court for an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. *See* 28 U.S.C. §§ 2244(b), 2255(h).

In 1992, a jury found Chubb guilty of conspiracy to distribute cocaine and cocaine base, in violation of 21 U.S.C. § 846; possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841; and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(c). According to Chubb, he was determined to be a career offender under the Sentencing Guidelines as the result of a 1981 Ohio attempted robbery conviction and a 1984 Ohio kidnapping conviction. *See* USSG § 4B1.1.

In this motion, Chubb seeks relief from his career-offender designation on the basis of *Johnson v. United States*, 135 S. Ct. 2551 (2015), in which the Supreme Court held that the residual clause of the definition of "violent felony" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B), is unconstitutionally vague. Although Chubb was sentenced under the Sentencing Guidelines, and not the ACCA, he argues that the residual clause of the definition of "crime of violence" in the Guidelines is similar to the ACCA's residual clause and that *Johnson* should apply to his sentence. He claims that his prior conviction for kidnapping was counted under the residual clause and no longer qualifies as a predicate offense.

Appendix 1

The government opposes Chubb's motion for leave, arguing that *Johnson* applies retroactively on collateral review only to defendants sentenced under the ACCA, not those sentenced as career offenders under the Guidelines.

We may authorize the filing of a second or successive § 2255 motion when the applicant makes a prima facie showing that his proposed claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). In a case involving the ACCA, the Supreme Court has held that *Johnson* announced a new, "substantive rule that has retroactive effect in cases on collateral review." *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). Whether *Johnson* applies to the sentencing guidelines, and if so whether it applies retroactively, will be decided by the Supreme Court next term. *See Beckles v. United States*, 136 S. Ct. 2510 (2016) (granting certiorari). We have recently granted career offenders permission to file second or successive § 2255 motions when they have made a prima facie showing that their sentences may be affected if *Johnson* applies retroactively to their cases. *See In re Patrick*, 833 F.3d 584, 587-88 (6th Cir. 2016); *In re Embry*, 831 F.3d 377, 382 (6th Cir. 2016). Chubb has made a sufficient prima facie showing that he may be entitled to relief from his career offender designation based on *Johnson*. *See United States v. Kaplansky*, 42 F.3d 320, 323 (6th Cir. 1994) (holding that Ohio kidnapping is a crime of violence under ACCA's residual clause).

Accordingly, we **GRANT** Chubb's motion and **TRANSFER** the case to the United States District Court for the Southern District of Ohio. The district court is instructed to hold the case in abeyance pending the outcome of *Beckles*, although it is free to consider terminating the stay under appropriate circumstances, either on motion or sua sponte.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix 1