

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JACOBY ERVIN,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No. 1:16-CV-645

(Criminal Case No. 1:14:CR:215-3)

HON. GORDON J. QUIST

MEMORANDUM OPINION

Movant, Jacoby Ervin, has filed a Motion to Vacate, Set Aside or Correct a Sentence by a Person in Federal Custody Pursuant to 28 U.S.C. § 2255, arguing that he is entitled to relief pursuant to *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015), which held that the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), is unconstitutionally vague. The Supreme Court has held that *Johnson* announced a new substantive rule that is retroactively applicable to cases on collateral review. *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257 (2016). Ervin was not sentenced as a career offender under the ACCA. Instead, he was sentenced as a career offender under § 4B1.1 of the United States Sentencing Guidelines.

Although § 4B1.2(a)(2) of the Sentencing Guidelines contains a residual clause that is identical to the ACCA's residual clause, the Supreme Court has not yet said whether the reasoning in *Johnson* extends to the residual clause under § 4B1.2(a)(2). However, the Supreme Court is set to decide in its upcoming term whether the Sentencing Guidelines are subject to the same due process challenge upheld in *Johnson* and, if so, whether such is a new rule that is afforded retroactive application. *See Beckles v. United States*, No. 15-8544, ___ U.S. ___, ___ S. Ct. ___, 2016

WL 1029080 (U.S. June 27, 2016). The Sixth Circuit has held that the reasoning in *Johnson* extends to the residual clause in § 4B1.2(a)(2) of the Sentencing Guidelines, *United States v. Pawlak*, 822 F.3d 902 (6th Cir. 2016), but recently it concluded that, in light of the unanswered questions that *Johnson* raises with regard to the Sentencing Guidelines—particularly whether *Johnson*, if applied to the Sentencing Guidelines, would constitute a new substantive rule that applies retroactively—district courts should hold *Johnson*-related § 2255 motions in abeyance pending the Supreme Court’s decision in *Beckles*. *In re Embry* __ F.3d __, 2016 WL 4056056, at *4–5 (6th Cir. July 29, 2016).

Pursuant to the Court’s July 14, 2016 Order for a response, the Government has responded and states that, regardless of the pending issues to be considered in *Beckles*, the Court need not stay the case because Ervin is not entitled to relief in the first instance. That is because Ervin was not found to be a career offender under the residual clause of § 4B1.2(a)(2). Instead, he was sentenced as a career offender based on three prior convictions for felony drug trafficking offenses. Having reviewed Ervin’s Presentence Investigation Report (PSR), the Court confirms that Ervin was in fact found to be a career offender based not on the residual clause, but instead because he had at least two previous felony drug trafficking convictions. (See PSR, ECF No. 184 at Page ID.788, ¶ 128; Page ID.789, ¶¶ 131–32.) Therefore, Ervin plainly is not entitled to relief under *Johnson*, regardless of the potential outcome in *Beckles*. See *Carter v. United States*, No. 1:15-CV-1196, 2016 WL 3027197, at *3 (W.D. Mich. May 27, 2016) (concluding that the movant could not rely on *Johnson* to save his untimely § 2255 motion because “Movant was not sentenced under the residual clause of the career-offender guideline. . . [but instead] was sentenced under the clause which identifies ‘controlled substance’ offenses as predicate offenses giving rise to the career-offender enhancement”).

