

W.D.N.Y.  
08-cv-864  
03-cr-11  
Arcara, J.  
Telesca, J.

United States Court of Appeals  
FOR THE  
SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8<sup>th</sup> day of June, two thousand eighteen.

Present:

Dennis Jacobs,  
Debra Ann Livingston,  
Christopher F. Droney,  
*Circuit Judges.*

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Sylvester Acosta,

*Petitioner,*

v.

16-1492

United States of America,

*Respondent.*

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Petitioner moves for leave to file a successive 28 U.S.C. § 2255 motion, and to file an oversized reply brief. He argues that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), his conviction under 18 U.S.C. § 924(c)(3)(B) is unconstitutional. Upon due consideration, it is hereby ORDERED that the motion to file an oversized reply brief is GRANTED. It is further ORDERED that the motion to file a successive 28 U.S.C. § 2255 motion is GRANTED because Petitioner has “made a prima facie showing that his claim satisfies § 2255(h) and warrants fuller exploration by the district court.” *Blow v. United States*, 829 F.3d 170, 172 (2d Cir. 2016).

Section § 924(c)(3)(B) is essentially identical to 18 U.S.C. § 16(b), which was found unconstitutional by the Supreme Court in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), largely based on the Supreme Court’s analysis in *Johnson*. The Supreme Court has held *Johnson* to be retroactively applicable to cases on collateral review. See *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016); see also *See Tyler v. Cain*, 533 U.S. 656, 666 (2001) (stating that, “with the right

combination of holdings,” the Supreme Court could make a new rule retroactive over the course of two or more cases). For present purposes, we have not examined Petitioner’s other proposed claims. See *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003) (“The court of appeals must examine the [successive] application to determine whether it contains any claim that satisfies . . . § 2255[(h)]. . . . If so, the court should authorize the prisoner to file the entire application in the district court, even if some of the claims in the application do not satisfy the applicable standards.”).

It is further ORDERED that the proceeding is TRANSFERRED to the district court. See 28 U.S.C. § 1631. Finally, it is ORDERED that the stay entered by the Court on July 19, 2016, is TERMINATED.

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court

  
