

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION No. 10-716-9  
 :  
v. : CIVIL ACTION No. 15-4770  
 :  
FERNANDO NIEVES :

**MEMORANDUM**

**Juan R. Sánchez, J.**

**January 12, 2016**

Defendant Fernando Nieves has filed a pro se motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence, seeking relief under the United States Supreme Court's recent decision, *United States v. Johnson*, 135 S. Ct. 2551 (2015). Because the record conclusively shows Nieves is not entitled to relief, the motion will be denied without an evidentiary hearing.

**FACTS**

On August 19, 2010, a confidential informant alerted investigating officers that Nieves would be meeting other individuals to purchase narcotics. Acting on the tip, the officers set up surveillance and observed Nieves and another individual arrive by car at the destination described by the informant, enter and exit a stable area, and drive away. The officers contacted uniformed police officers, who stopped Nieves and removed him and the passenger from the vehicle. After a trained canine sensed narcotics in the vehicle, the officers searched the vehicle with Nieves's written consent, recovering, among other things, cash, phencyclidine (PCP), and cocaine. Investigating officers later searched a property linked to Nieves, after his girlfriend consented to the search, and found additional PCP, a sawed off shotgun, and ammunition. Nieves was arrested and confessed to purchasing cocaine and that the PCP, shotgun, and ammunition belonged to him.

On November 3, 2010, Nieves was charged by indictment with conspiracy to distribute 280 grams or more of cocaine base (crack), cocaine, heroin, and PCP, in violation of 21 U.S.C. § 846 (Count 1); possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (Count 19); possession of PCP with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (Count 20); and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1) (Count 21).<sup>1</sup> Nieves pleaded guilty to the indictment pursuant to a written plea agreement. At Nieves's October 22, 2014, sentencing hearing, the Court found Nieves was a "career offender" under the United States Sentencing Guidelines based on two prior felony controlled substance convictions. Using the career offender guidelines, U.S.S.G. § 4B1.1, the Court found Nieves was subject to a Guidelines range of 262 months to 327 months, plus an additional 10-year consecutive mandatory minimum term of imprisonment for Count 21, for a total advisory Guidelines range of 383 months to 447 months imprisonment. The Court, however, granted the Government's motion for a departure below the Guidelines range and the mandatory minimum sentence, and sentenced Nieves to 60-months imprisonment on Counts 1, 19, and 20, to run concurrently, followed by a consecutive 72-month term of imprisonment on Count 21.

On August 10, 2015, Nieves filed a pro se motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, and, in accordance with this Court's instruction, refiled the motion on September 15, 2015. Nieves contends he is entitled to relief under *United States v. Johnson*, 135 S. Ct. 2551 (2015).

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<sup>1</sup> The twenty-seven count indictment included related offense against twelve other defendants.

## DISCUSSION

A prisoner in federal custody may collaterally attack his conviction or sentence by moving the sentencing court to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a). A prisoner may bring a collateral attack based on a Supreme Court decision recognizing a new right, so long as the right has been made retroactively applicable to cases on collateral review. *Id.* § 2255(f)(3).

Nieves challenges his sentence under *Johnson*, which invalidated the so-called “residual clause” of the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(2)(B), as unconstitutionally vague and violative of the Constitution’s guarantee of due process. *Johnson*, 135 S. Ct. at 2562-63. Under the ACCA, if a criminal defendant who violates 18 U.S.C. § 922(g) has three or more previous convictions for a “serious drug offense” or a “violent felony,” then the defendant is subject to increased penalties: a mandatory minimum prison term of 15 years and a maximum of life. 18 U.S.C. § 924(e)(1). The Court in *Johnson* examined the meaning of “violent felony” under the ACCA, defined as

any crime punishable by imprisonment for a term exceeding one year . . . that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

*Id.* § 924(e)(2)(B) (emphasis added); *see Johnson*, 135 S.Ct. at 2555-56. As the Court noted, “[t]he closing words of this definition, italicized above, have come to be known as the Act’s residual clause.” *Johnson*, 135 S. Ct. at 2556. In *Johnson*, the defendant pleaded guilty to being a felon in possession of a firearm in violation of § 922(g) and received an enhanced sentence under the ACCA because the sentencing court found he had three prior convictions for violent felonies,

including a conviction for unlawful possession of a short-barreled shotgun, which the sentencing court found qualified as a violent felony under the ACCA’s residual clause. *Id.* Unable to ascertain how the ACCA’s residual clause converted possession of a shotgun into a “violent offense,” the Supreme Court found that “[i]nvolving so shapeless a provision to condemn someone to prison for 15 years does not comport with the Constitution’s guarantee of due process.” *Id.* at 2560. The Court expressly limited the reach of its holding, however, preserving the remainder of the ACCA and declaring the “decision does not call into question application of the Act to the four enumerated offenses [listed in § 924(e)(2)(b)(ii)], or the remainder of the Act’s definition of a violent felony.” *Id.* at 2563.

To determine whether a § 2255 petitioner is entitled to relief under a recent Supreme Court case, the Court ordinarily must resolve whether the case applies retroactively to the petitioner’s case. *See* 28 U.S.C. § 2255(f)(3). Such a determination is unnecessary here, however, as—even if *Johnson* applies retroactively<sup>2</sup>—it is inapplicable to Nieves’s case.

Nieves was sentenced as a career offender under USSG § 4B1.1. He did not receive an enhancement under the ACCA.<sup>3</sup> To be sure, the career offender designation bears some similarity to the armed career criminal classification. Under USSG § 4B1.1, a career offender is one who is over 18 years old at the time of the offense, commits a “crime of violence” or “controlled substance offense,” and has at least two prior felony convictions for a “crime of violence” or “controlled substance offense.” Further, the guideline’s definition of a crime of

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<sup>2</sup> The courts that have considered the issue to date are divided as to whether the new rule announced in *Johnson* applies retroactively on collateral review. *Compare Price v. United States*, 795 F.3d 731, 734-35 (7th Cir. 2015) (applying *Johnson* retroactively); *with In re Williams*, 806 F.3d 322 (5th Cir. 2015) (declining to apply *Johnson* retroactively); *and In re Rivero*, 797 F.3d 986, 988 (11th Cir. 2015) (same).

<sup>3</sup> Indeed, despite Nieves’s status as a career offender, he received a sentence significantly below the Guidelines range and applicable mandatory minimum sentence.

violence is similar to the definition of a violent felony under the ACCA and contains a residual clause identical to that struck down in *Johnson*. See *id.* § 4B1.2 (including in the definition of “crime of violence” an offense punishable by imprisonment for more than a year that “otherwise involves conduct that presents a serious potential risk of physical injury to another”).<sup>4</sup>

Nieves, however, was designated a career offender because of prior felony convictions for *controlled substance* offenses, not crimes of violence. Under the Guidelines, a “controlled substance offense” is

an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

USSG § 4B1.2(b). As noted, the decision in *Johnson* was limited to the residual clause of the definition of a violent felony under the ACCA. The case did not present any issue regarding the ACCA’s definition of a serious drug offense and has no impact on Nieves’s career-offender status by virtue of his prior drug convictions under the Guidelines. Nieves’s claim for relief under § 2255 will be denied.

The Court will also deny Nieves’s request for an evidentiary hearing. When a § 2255 motion is filed, a district court must “grant a prompt hearing” and “determine the issues and make findings of fact and conclusions of law with respect thereto” unless “the motion and the

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<sup>4</sup> The continuing validity of the Guidelines’ residual clause is admittedly unclear in light of *Johnson*, and at least one Circuit has extended *Johnson*’s reasoning to the Guidelines. See *United States v. Madrid*, 805 F.3d 1204, 1211 (10th Cir. 2015) (“Because the Guidelines are the beginning of all sentencing determinations, and in light of the ‘unavoidable uncertainty and arbitrariness of adjudication under the residual clause,’ *Johnson*, 135 S. Ct. at 2562, we hold that the residual clause of § 4B1.2(a)(2) is void for vagueness.”); see also *United States v. Taylor*, 803 F.3d 931, 933 (8th Cir. 2015) (vacating defendant’s sentence and remanding for determination, in light of *Johnson*, “of whether the residual clause of the career offender guideline is unconstitutional”).

files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b). In this case, the record conclusively shows Nieves is not entitled to any relief. See *Machibroda v. United States*, 368 U.S. 487, 495 (1962) (holding § 2255 does not require “that a movant must always be allowed to appear in a district court for a full hearing if the record does not conclusively and expressly belie his claim, no matter how vague, conclusory, or palpably incredible his allegations may be”); *Palmer v. Hendricks*, 592 F.3d 386, 395 (3d Cir. 2010) (“We have repeatedly emphasized that ‘bald assertions and conclusory allegations do not afford a sufficient ground for an evidentiary hearing’ on a habeas petition.” (quoting *Campbell v. Burris*, 515 F.3d 172, 184 (3d Cir. 2008))).

An appropriate order follows.

BY THE COURT:

/s/ Juan R. Sánchez  
Juan R. Sánchez, J.

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**ORDER**

AND NOW, this 12th day of January, 2016, for the reasons set forth in the accompanying Memorandum, it is ORDERED Petitioner Fernando Nieves's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (Document 688) is DENIED. There has been no substantial showing of the denial of a constitutional right warranting the issuance of a certificate of appealability. The Clerk of Court is DIRECTED to mark both of the above-captioned cases CLOSED.

BY THE COURT:

/s/ Juan R. Sánchez  
Juan R. Sánchez, J.