

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

UNITED STATES OF AMERICA,

Plaintiff,

v.

HERACLIO GAONA-SEPULVEDA,

Defendant.

Case No. 00-20066-06

MEMORANDUM AND ORDER

This case is before the court on defendant Heraclio Gaona-Sepulveda's pro se Motion to Reduce Sentence (Doc. 297) and Motion for Permission to Proceed under 28 U.S.C. § 2255(h) (Doc. 301). Defendant claims that the sentence enhancement for possession of a firearm by a person who commits a drug offense, under U.S.S.G. § 2D1.1(b)(1), is unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). For the reasons set forth below, this court dismisses defendant's motion to reduce sentence and denies his motion requesting permission to proceed under 28 U.S.C. § 2255(h).

I. Background

Defendant was found guilty by a jury of conspiracy to distribute and possess with intent to distribute at least one kilogram of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The court imposed a 264-month sentence (which was later reduced to 235 months per Amendment 782). Defendant directly appealed, and the Tenth Circuit affirmed the district court and issued a mandate on August 19, 2002. Defendant's writ of certiorari was denied on December 2, 2002.

II. Motion to Reduce Sentence

On June 17, 2016, defendant filed his current motion to reduce sentence. “A federal court generally ‘may not modify a term of imprisonment once it has been imposed.’” *United States v. Bowman*, 645 F. App’x 774, 775 (10th Cir. 2016) (citing *Dillon v. United States*, 560 U.S. 817, 819 (2010)). Although not specifically cited by defendant, 18 U.S.C. § 3582(c)(2) is not a means for “challeng[ing] the constitutionality of a sentence based on a decision of the United States Supreme Court.” *Bowman*, 645 F. App’x at 776 (“[Section 3582(c)(2) authorizes a sentence reduction only if a defendant’s guideline range ‘has subsequently been lowered by the Sentencing Commission.’”). Defendant must challenge the constitutionality of his sentence on direct appeal or in a § 2255 petition.

Id. Defendant’s motion to reduce sentence is dismissed

III. Motion to Proceed Under § 2255

Defendant requests permission to proceed under § 2255 more than a decade after his conviction was final. He relies on the right that the United States Supreme Court recognized in *Johnson*, which was made retroactively applicable to cases on collateral review in *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). *See* 28 U.S.C. § 2255(f)(3). But *Johnson* did not clearly invalidate the sentence enhancement under U.S.S.G. § 2D1.1(b)(1). *See United States v. Romero*, No. 05-20017-02-JWL, 2016 WL 4128418, at *1 (D. Kan. Aug. 3, 2016) (“The only connection between *Johnson* and § 2D1.1(b)(1) is that both concern unlawful possession of a firearm.”) (quoting *United States v. Munoz*, 198 F. Supp. 3d 1040, 1044 (D. Minn. 2016)). Instead, *Johnson* held that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague. *See Johnson*, 135 S. Ct. at 2563. Even if the court construes defendant’s motion to reduce sentence as a collateral challenge filed pursuant to § 2255 motion, it would be untimely under the statutory one-year limitation period. *See* 28 U.S.C. § 2255(f)(1). Defendant’s motion requesting permission to proceed under § 2255 is denied.

IT IS THEREFORE ORDERED that defendant Heraclio Gaona-Sepulveda's Motion to Reduce Sentence (Doc. 297) is dismissed.

IT IS FURTHER ORDERED that defendant's Motion for Permission to Proceed under 28 U.S.C. § 2255(h) (Doc. 301) is denied.

Dated this 10th day of May, 2017, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge