

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

United States of America,

Plaintiff,

v.

Case No. 07-20099-17-JWL

Carlos Cervantes-Samaniego,

Defendant.

MEMORANDUM & ORDER

In August 2009, defendant Carlos Cervantes-Samaniego pled guilty to conspiracy to distribute and possession with intent to distribute more than 1000 kilograms of marijuana and more than 5 kilograms of cocaine. Utilizing U.S.S.G. § 2D1.1, the presentence investigation report (PSR) calculated Mr. Cervantes-Samaniego's total offense level as 36 with a criminal history category of I, with a resulting advisory guideline range of 188 months to 235 months. After resolving objections to the PSR, the court ultimately assessed a total offense level of 38 and a criminal history category of I, with a resulting advisory guideline range of 235 months to 295 months. The court sentenced Mr. Cervantes-Samaniego to 235 months imprisonment, the low-end of the range. The court has since reduced Mr. Cervantes-Samaniego's sentence to 151 months imprisonment based on retroactive amendments to the Guidelines.

This matter is now before the court on Mr. Cervantes-Samaniego's motion to reduce his sentence in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). Because the *Johnson*

decision does not apply to Mr. Cervantes-Samaniego's sentence in any respect, Mr. Cervantes-Samaniego is not entitled to relief.¹

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), dictates a minimum fifteen-year sentence if the offender violates § 922(g) and has “three previous convictions . . . for a violent felony or a serious drug offense.” *Id.* § 924(e). Under the ACCA,

the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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.*

18 U.S.C. § 924(e)(2)(B)(i)-(ii) (emphasis added). The emphasized language is commonly referred to as the “residual clause.” *In re Gieswein*, 802 F.3d 1143, 1145 (10th Cir. 2015) (citing *Johnson*, 135 S. Ct. at 2556). In *Johnson*, the Supreme Court held that enhancing a sentence under the residual clause violates a defendant's right to due process because that portion of the ACCA is unconstitutionally vague. *Id.* (citing *Johnson*, 135 S. Ct. at 2557, 2563). The Tenth Circuit has applied *Johnson* to the residual clause of the definition of a “crime of violence” under the career offender guideline because that clause is nearly identical to the clause struck down by the Court in *Johnson*. See *United States v. Madrid*, 805 F.3d 1204, 1210 (10th Cir. 2015) (residual clause of U.S.S.G. § 4B1.2(a)(2) is void for vagueness in light of *Johnson*).

¹ Mr. Cervantes-Samaniego does not identify the procedural vehicle for his motion. Regardless, because *Johnson* does not apply to Mr. Cervantes-Samaniego's situation, there is no statute that would authorize the reduction requested.

A review of Mr. Cervantes-Samaniego's PSR reveals that he was not deemed an armed career criminal under the ACCA and none of the Guidelines utilized in calculating Mr. Cervantes-Samaniego's sentence are implicated by the Supreme Court's decision in *Johnson*. The holding in *Johnson*, then, is inapplicable to Mr. Cervantes-Samaniego's situation and the court may not reduce Mr. Cervantes-Samaniego's sentence based on the *Johnson* decision. Mr. Cervantes-Samaniego suggests that the two-level firearm enhancement he received under § 2D1.1(b)(1) is akin to the ACCA's residual clause, but he fails to show that § 2D1.1(b)(1), or the applicable commentary to that provision, contain the language at issue in *Johnson*. His claim, then, is not based on the holding in *Johnson* that invalidated the residual clause of the definition of "violent felony" in the ACCA. *See In re Verdin-Garcia*, No. 16-3236 (10th Cir. Aug. 22, 2016) (*Johnson* does not apply to firearm enhancement). The holding in *Johnson*, then, is inapplicable to this case and has no bearing on Mr. Cervantes-Samaniego's sentence. *See Galvin v. United States*, 2016 WL 3855881, at *2 (N.D. Tex. July 5, 2016) (*Johnson* has no application to firearm enhancement under § 2D1.1(b)(1)); *Heard v. United States*, 2016 WL 3219718, at *2 (M.D. Fla. June 10, 2016) (same); *Carrasco v. United States*, 2016 WL 3275397, at *2 (S.D.N.Y. June 3, 2016) (same).

IT IS THEREFORE ORDERED BY THE COURT THAT Mr. Cervantes-Samaniego's motion to reduce sentence (doc. 1021) is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this 7th day of September, 2016, at Kansas City, Kansas.

s/ John W. Lungstrum

John W. Lungstrum
United States District Judge