

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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NEW ORLEANS, LA 70130

June 10, 2021

#48168-280
Mr. Rigoberto Melero Aguirre
FCI LaTuna
P.O. Box 3000
Anthony, NM 88021-0000

No. 21-50242 In re: Rigoberto Aguirre

Dear Mr. Aguirre,

28 U.S.C. Section 2244(b)(3)(E) does not permit review of the denial of your request to file a successive petition. We are taking no action on this document.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Monica R. Washington, Deputy Clerk
504-310-7705



United States Court of Appeals for the Fifth Circuit

A True Copy

Certified order issued May 21, 2021

Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

No. 21-50242

United States Court of Appeals
Fifth Circuit

FILED

May 21, 2021

Lyle W. Cayce
Clerk

Movant.

IN RE: RIGOBERTO MELERO AGUIRRE,

Motion for an order authorizing
the United States District Court for the
Western District of Texas to consider
a successive 28 U.S.C. § 2255 motion

Before HIGGINBOTHAM, SMITH, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:

Rigoberto Melero Aguirre, federal prisoner # 48168-280, moves for authorization to file a successive 28 U.S.C. § 2255 motion challenging his sentence for conspiring to possess with the intent to distribute more than five kilograms of cocaine. He contends that the district court erroneously relied on his prior Texas conviction for manufacture or delivery of a controlled substance to sentence him under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), to sentence him as a career offender under U.S.S.G. § 4B1.1, or to enhance his sentence pursuant to 21 U.S.C. § 851. In support of his argument, he cites *Johnson v. United States*, 576 U.S. 591 (2015); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps v. United States*, 570 U.S. 254 (2013); *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016); and *United*

No. 21-50242

States v. Tanksley, 848 F.3d 347 (5th Cir.), *supplemented by* 854 F.3d 284 (5th Cir. 2017).

Before filing a successive § 2255 motion, Aguirre must obtain this court's authorization. *See* 28 U.S.C. § 2244(b)(3)(C); § 2255(h). This court may authorize the filing of a successive § 2255 motion if he makes a prima facie showing that his motion contains either (1) "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense" or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255(h); *see* § 2244(b)(3)(C); *Reyes-Requena v. United States*, 243 F.3d 893, 897-99 (5th Cir. 2001) (recognizing § 2244(b)(3)(C)'s incorporation into § 2255).

Johnson is not applicable to Aguirre's case because he was not sentenced under the ACCA. *See In re Lampton*, 667 F.3d 585, 590 (5th Cir. 2012). Aguirre's invocation of *Hinkle*, *Tanksley*, *Mathis*, and *Descamps* is also unavailing because none of those cases set forth a new rule of constitutional law made retroactively applicable on collateral review by the Supreme Court. *See In re Lott*, 838 F.3d 522, 523 (5th Cir. 2016); *In re Jackson*, 776 F.3d 292, 296 (5th Cir. 2015); *see also In re Sparks*, 657 F.3d 258, 260-61 (5th Cir. 2011); *In re Tatum*, 233 F.3d 857, 859 (5th Cir. 2000).

IT IS ORDERED that Aguirre's motion for authorization to file a successive § 2255 motion is DENIED. This is Aguirre's second motion for authorization to file a successive § 2255 motion, and one of the claims he now seeks to raise is essentially identical to the claim he identified in his prior motion for authorization. Accordingly, Aguirre is WARNED that the filing of repetitious or frivolous motions for authorization to file successive § 2255 motions will invite the imposition of sanctions, including dismissal, monetary

AO 245 B (Rev. 06/05)(W.D. TX.) - Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
Western District of Texas
EL PASO DIVISION

1-12-11

UNITED STATES OF AMERICA

v.

Case Number EP-09-CR-1267-FM(2)
USM Number 48168-260

Rigoberto Melero Aguirre, aka: Rigo, TN: RIGOBERTO AGUIRRE MELERO

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, Rigoberto Melero Aguirre, aka: Rigo, TN: RIGOBERTO AGUIRRE MELERO, was represented by Mary Stillingner.

On motion of the United States, the Court has dismissed the Second Superseding Indictment and Counts 12 and 15 of the Third Superseding Indictment.

The defendant pled guilty to Count 11 of the Third Superseding Indictment on March 26, 2010. Accordingly, the defendant is adjudged guilty of such Count, involving the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. 841 and 846	Conspiring to possess with intent to distribute a quantity of cocaine > 5 kilograms	02-17-2010	11

As pronounced on January 12, 2011, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 12 day of January, 2011.



FRANK MONTALVO
United States District Judge

Judgment-Page 2

Defendant: Rigoberto Melero Aguirre, aka: Rigo, TN: RIGOBERTO AGUIRRE MELERO
Case Number: EP-09-CR-1267-FM(2)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of life.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

United States Marshal

By _____
Deputy Marshal

AO 245 B (Rev. 06/05)(W.D.TX.) - Supervised Release

Judgment--Page 3

Defendant: Rigoberto Melero Aguirre, aka: Rigo, TN: RIGOBERTO AGUIRRE MELERO
Case Number: EP-09-CR-1267-FM(2)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on non-reporting supervised release for a term of life.

While on non-reporting supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court as set forth on pages 4 and 5 of this judgment.

AO 245 B (Rev. 05/04)(W.D.TX.) - Supervised Release

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Defendant: Rigoberto Melero Aguirre, aka: Rigo, TN: RIGOBERTO AGUIRRE MELERO
Case Number: EP-09-CR-1267-FM(2)

CONDITIONS OF SUPERVISION

Mandatory Conditions:

- 1) The defendant shall not commit another federal, state, or local crime.
- 2) The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
- 3) In supervised release cases only, the defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.
- 4) If convicted of a felony, the defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.
- 5) The defendant shall cooperate in the collection of DNA as directed by the probation officer if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).
- 6) If convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4), the defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer.
- 7) If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.
- 8) If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.

Standard Conditions:

- 1) The defendant shall not leave the judicial district without permission of the court or probation officer.
- 2) The defendant shall report to the Probation Officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the Probation Officer and follow the instructions of the Probation Officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the Probation Officer for schooling, training or other acceptable reasons.
- 6) The defendant shall notify the Probation Officer at least ten days prior to any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the Probation Officer.
- 10) The defendant shall permit a Probation Officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the Probation Officer.
- 11) The defendant shall notify the Probation Officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the Court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245 B (Rev. 05/04)(W.D.TX.) - Supervised Release

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Defendant: Rigoberto Melero Aguirre, aka: Rigo, TN: RIGOBERTO AGUIRRE MELERO

Case Number: EP-09-CR-1267-FM(2)

- 14) If convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4), or has a prior conviction of a State or local offense that would have been an offense as described in 18 U.S.C. § 4042 (c)(4) if a circumstance giving rise to Federal jurisdiction had existed, the defendant shall participate in a sex offender treatment program approved by the probation officer. The defendant shall abide by all program rules, requirements and conditions of the sex offender treatment program, including submission to polygraph testing, to determine if the defendant is in compliance with the conditions of release. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based on the defendant's ability to pay.
- 15) The defendant shall submit to an evaluation for substance abuse or dependency treatment as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a program approved by the probation officer for treatment of narcotic addiction or drug or alcohol dependency which may include testing and examination to determine if the defendant has reverted to the use of drugs or alcohol. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.
- 16) The defendant shall submit to an evaluation for mental health counseling as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a mental health program approved by the probation officer. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.
- 17) If the defendant is excluded, deported, or removed upon release from imprisonment, the term of supervised release shall be a non-reporting term of supervised release. The defendant shall not illegally re-enter the United States. If the defendant lawfully re-enters the United States during the term of supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.
- 18) If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.
- 19) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.
- 20) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the payment schedule.

The Court further adopts such of the following special conditions applied to the supervised person by the judge at the time of sentencing:

- 1) **COMMUNITY CONFINEMENT:** The defendant shall reside in a Community Corrections Center for a period of _____ months to commence on _____. Further, once employed, the defendant shall pay 25% of his/her weekly gross income for his/her subsistence as long as that amount does not exceed the daily contract rate.
- 2) **HOME DETENTION:** The defendant shall participate in the Home Confinement Program for a period of _____ days/months. During this time the defendant shall remain at his/her place of residence except for employment and other activities approved in advance by the probation officer. The defendant shall maintain a telephone at his/her place of residence without "call forwarding," a "modem," "caller ID," "call waiting," or portable cordless telephones for the above period. At the direction of the probation officer, the defendant shall wear an electronic monitoring device and follow electronic monitoring procedures specified by the probation officer. The court further orders that the defendant shall pay for the costs of Home Confinement, as directed by the probation officer.
- 3) **COMMUNITY SERVICE:** The defendant shall perform _____ hours of community service work without pay, at a location approved by the probation officer, at a minimum rate of four hours per week, to be completed during the first _____ months of supervision.

Defendant: Rigoberto Melero Aguirre, aka: Rigo, TN: RIGOBERTO AGUIRRE MELERO
Case Number: EP-09-CR-1267-FM(2)

CRIMINAL MONETARY PENALTIES/ SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 511 E. San Antonio Street, Room 219 El Paso, Texas 79901.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTAL:	\$100.00	\$1,000,000.00	\$0

Special Assessment

It is ordered that the defendant shall pay to the United States a special assessment of \$100.00. Payment of this sum shall begin immediately.

Fine

The defendant shall pay a fine of \$1,000,000.00. Payment of this sum shall begin immediately.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column above. However, pursuant to 18 U.S.C. § 3664(f), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than \$2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1998.

AO 245 B (Rev. 06/05)(W.D.TX.) - Forfeiture

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Defendant: Rigoberto Melero Aguirre, aka: Rigo, TN: RIGOBERTO AGUIRRE MELERO
Case Number: EP-09-CR-1267-FM(2)

FORFEITURE

The defendant is ordered to forfeit the following property to the United States:

1. Real property located at 1109 Meadows Road, Canutillo, TX, whose legal description is Lot 6, Block 1, WESTVIEW HEIGHTS, El Paso County, Texas, according to the map thereof on file in Book 59, Page 9 of the Plat Records of El Paso County, Texas.
2. Real property located at 4920 Garry Owen Road, El Paso, TX, whose legal description is Lot 6, Block 1 TERRY ALLEN ADDITION, an Addition to the City of El Paso, El Paso County, Texas according to the map thereof on file in Book 3, Page 6, Plat Records of El Paso County, Texas, Save and Except a 0.029 acre tract.