

UNITED STATES COURT OF APPEALS

MAY 25 2000

TENTH CIRCUIT

PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NELSON BEGAY,

Defendant-Appellant.

No. 99-4153
(D.C. No. 99-CV-123)
(Utah)

ORDER AND JUDGMENT*

Before **SEYMOUR**, Chief Judge, **EBEL**, and **BRISCOE**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cause is therefore ordered submitted without oral argument.

Nelson Begay brought this action under 28 U.S.C. § 2255 attacking a district court order dated October 2, 1998, which revoked his supervised release and sentenced him to nine months incarceration to be followed by twenty-seven

*This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, or collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

months of supervised release. The district court dismissed the section 2255 proceeding on the ground that Mr. Begay had not brought a direct appeal of the above order and had failed to show cause for his failure to do so. Mr. Begay appeals.

The order denying Mr. Begay's section 2255 petition was filed July 13, 1999. On October 21, 1999, the district court entered an order finding excusable neglect for Mr. Begay's failure to file a timely appeal under Federal Rule of Appellate Procedure 4(b) of the October 2, 1998 order resentencing him after revocation of his supervised release. We have on this date issued an order and judgment in the appeal from the resentencing in which we affirm the sentence imposed by the district court on the basis of the Supreme Court's opinion in *Johnson v. United States*, No. 99-5153, 2000 WL 574359 (U.S. May 15, 2000). See *United States v. Begay*, No. 98-4195, 2000 WL _____ (10th Cir. _____). Our decision in that case rejecting the same argument Mr. Begay makes here renders this proceeding moot.

Accordingly, we **DISMISS** this appeal.

ENTERED FOR THE COURT

Stephanie K. Seymour
Chief Judge