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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 LORENZO GALINDO-VEGA,
12 Petitioner,
13 v.
14 UNITED STATES OF AMERICA,
15 Respondent.
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Case Nos.: 16cv1405; 14cr0341

**ORDER DENYING PETITION TO
SET ASIDE, VACATE, OR
CORRECT SENTENCE**

(Doc. No. 30)

19 Presently before the Court is a motion to vacate, set aside, or correct sentence
20 pursuant to 28 U.S.C. § 2255, filed by Lorenzo Galindo-Vega (“Galindo-Vega”). (Doc.
21 No. 30.) Pursuant to the Court’s order, the Government filed a response in opposition on
22 July 19, 2016. (Doc. No. 33.)

23 **I. BACKGROUND**

24 In 2010, Galindo-Vega was convicted of possession of heroin for sale, in violation
25 of California Health and Safety Code section 11351. (Doc. No. 21 at 6.) Following this
26 conviction, Galindo-Vega was removed to Mexico, his country of origin, once in 2011
27 and again in 2013. (*Id.* at 7.) On January 16, 2014, a United States Border Patrol Agent
28 encountered Galindo-Vega near Otay Mesa, California. (*Id.* at 3.) Galindo-Vega admitted

1 that he was a citizen of Mexico and that he was in the United States illegally, at which
2 point he was placed under arrest and charged in a single count information with illegal
3 reentry in violation of 8 U.S.C. § 1326(a) and (b). (*Id.*); (Doc. No. 11.)

4 On February 13, 2014, Galindo-Vega pled guilty pursuant to a written plea
5 agreement to illegal re-entry. (*See* Doc. No. 16.) As part of the plea agreement, Galindo-
6 Vega:

7 “waive[d] to the full extent of the law, any right to appeal or to
8 collaterally attack the conviction and sentence, except a post-
9 conviction collateral attack based on a claim of ineffective
10 assistance of counsel, unless the Court impose[d] a custodial
11 sentence above the high end of the guideline range
recommended by the Government” pursuant to the plea
agreement.

12 (Doc. No. 16 at 7.)

13 At sentencing, the United States recommended a sentence of 46 months based on
14 the following calculations in its sentencing summary chart:

15 Base Offense Level: 8
16 Prior Felony: +16
17 Acceptance of Responsibility: -3
18 Fast Track: -4

19 The 16-level enhancement was suggested pursuant to United States Sentencing
20 Guidelines (“USSG”) § 2L1.2, from Galindo-Vega’s prior conviction for violating
21 California Health and Safety Code section 11351. The calculations produced an adjusted
22 base offense level of 17. When considered in combination with Galindo-Vega’s criminal
23 history category of V, it resulted in a guidelines range of 46 to 57 months custody.
24 Probation concurred with the sentencing recommendation, including the 16-level
25 enhancement under § 2L1.2 based on Galindo-Vega’s prior conviction for violating
California Health and Safety Code section 11351.

26 Petitioner objected to the 16-level enhancement, arguing the section 11351
27 conviction did not qualify as a “drug trafficking offense” under USSG § 2L1.2, because
28 the documents associated with that conviction did not adequately establish that it

1 involved a federally controlled substance. (Doc. No. 21.) Thus, Petitioner argued that
2 only a 4-level enhancement should apply. (*Id.*) The Government filed a response to
3 Petitioner’s arguments regarding the propriety of the 16-level enhancement citing *United*
4 *States v. Galindo-Vega*, 522 Fed. App’x. 388, 389 (9th Cir. 2013).

5 At the sentencing hearing, the Court determined that the 16-level enhancement
6 properly applied as the prior conviction for violation of section 11351 was a “drug
7 trafficking offense” involving a federally controlled substance. Galindo-Vega was
8 sentenced to the low end of the recommended guidelines range at 46 months in custody.
9 Judgment was entered on April 30, 2014. (Doc. No. 29.)

10 Galindo-Vega did not file an appeal or otherwise challenge his sentence. On June
11 6, 2016, Galindo-Vega filed the instant motion to vacate, correct, or set aside sentence
12 based on two recent decisions of the United States Supreme Court: *Johnson v. United*
13 *States*, 135 S. Ct. 2551 (2015) and *Welch v. United States*, 136 S. Ct. 1257 (2016). The
14 Government filed an opposition on July 19, 2016. (Doc. No. 33.) Galindo-Vega filed a
15 traverse to the Government’s opposition on August 11, 2016. (Doc. No. 35.)

16 **II. LEGAL STANDARD**

17 Under 28 U.S.C. § 2255, a federal prisoner in custody under sentence may move
18 the court that imposed the sentence to vacate, set aside, or correct the sentence on the
19 ground that:

20 [T]he sentence was imposed in violation of the Constitution or
21 laws of the United States, or that the court was without
22 jurisdiction to impose such sentence, or that the sentence was in
23 excess of the maximum authorized by law, or is otherwise
subject to collateral attack....

24 If it is clear the movant has failed to state a claim, or has “no more than conclusory
25 allegations, unsupported by facts and refuted by the record,” a district court may deny a §
26 2255 motion without an evidentiary hearing. *United States v. Quan*, 789 F.2d 711, 715
27 (9th Cir. 1986).

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1 **III. DISCUSSION**

2 Galindo-Vega requests the Court vacate his 46-month sentence and resentence him
3 in light of recent Supreme Court authority. Citing *Johnson* and *Welch*, Galindo-Vega
4 asserts his sentence is unconstitutional because the Supreme Court has held that the
5 residual clause of the Armed Career Criminals Act is unconstitutionally vague in
6 *Johnson*. Relying on *Welch*, Galindo-Vega asserts *Johnson* applies retroactively on
7 collateral review. (*See* Doc. No. 30.)

8 In opposition, the Government asserts several grounds for denial of Galindo-
9 Vega’s petition, including that he waived his right to collaterally attack his sentence, his
10 claims are procedurally defaulted and time-barred, and that *Johnson* is inapplicable to the
11 facts underlying Galindo-Vega’s sentence. (*See* Doc. No. 33.)

12 Turning first to the merits of Galindo-Vega’s collateral attack, the Court examines
13 the Supreme Court’s decisions in *Johnson* and *Welch*.¹ In *Johnson*, the Supreme Court
14 considered a section of the Armed Career Criminal Act (“ACCA”) known as the
15 “residual clause,” which provided a definition of “violent felony.” *Johnson*, 135 S. Ct. at
16 2555. The ACCA residual clause provided that a violent felony was one that “otherwise
17 involves conduct that presents a serious potential risk of physical injury to another.” 18
18 U.S.C. § 924(e)(2)(B)(ii). The Supreme Court held that this clause was unconstitutionally
19 vague. *Id.* at 2557. In doing so, the Court found the clause “vague in all its applications,”
20 *id.* at 2561, and concluded that “[i]ncreasing a defendant’s sentence under the clause
21 denies due process of law.” *Id.* at 2557.

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24 ¹ The Government asserts Galindo-Vega waived his right to appeal or collaterally attack
25 his sentence as part of his plea agreement. In *United States v. Bibler*, the Ninth Circuit
26 held that an “appeal waiver will not apply if. . .the sentence violates the law.” 495 F.3d
27 621, 624 (9th Cir. 2007). The court explained that a sentence violates the law if it
28 “exceeds the permissible statutory penalty for the crime or violates the Constitution.” *Id.*
Because Galindo-Vega purports to raise a constitutional challenge premised on *Johnson*,
the Court finds the waiver of appeal inapplicable.

1 In *Welch v. United States*, the Supreme Court held that *Johnson* has retroactive
2 effect in cases on collateral review. *Welch*, 136 S. Ct. at 1268 (holding that *Johnson*
3 “announced a substantive rule that has retroactive effect in cases on collateral review”).

4 The reach of *Johnson* and *Welch* has been extended to similar language in the
5 USSG, as the Guidelines’ definition of “crime of violence” includes a sentence identical
6 to the ACCA residual clause. *See* USSG § 4B1.2(a)(2) (providing that a “crime of
7 violence means any offense...[that] otherwise involves conduct that presents a serious
8 potential risk of physical injury to another”); *see also United States v. Spencer*, 724 F.3d
9 1133, 1138 (9th Cir. 2013) (holding that the Ninth Circuit makes “no distinction between
10 the terms ‘violent felony’ [as defined in the ACCA] and ‘crime of violence’ [as defined
11 in § 4B1.2(a)(2) of the Sentencing Guidelines] for purposes of interpreting the residual
12 clause[s]”). Thus, although *Johnson*’s holding was specific to the ACCA, it has been
13 applied to language in the USSG. *See, e.g., United States v. Benavides*, 617 F. App’x 790
14 (9th Cir. 2015) (remanding case for resentencing in light of the government’s concession
15 that *Johnson* applies to the Sentencing Guidelines); *Gilbert v. United States*, No. C15-
16 1855, 2016 WL 3443898, at *1 (W.D. Wash. June 23, 2016) (granting § 2255 motion in
17 light of *Johnson*’s application to the Sentencing Guidelines).

18 Galindo-Vega was not sentenced under the ACCA or the residual clause of the
19 Sentencing Guidelines. He did receive a 16-level enhancement under § 2L1.2 of the
20 USSG, which mandates an increase of 16 levels “if the defendant previously was
21 deported, or unlawfully remained in the United States after—(A) a conviction for a
22 felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13
23 months. . . .” A “drug trafficking offense” is defined as “an offense under federal, state,
24 or local law that prohibits the manufacture, import, export, distribution, or dispensing of,
25 or offer to sell a controlled substance (or a counterfeit substance) or possession of a
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1 controlled substance (or a counterfeit substance) with intent to manufacturer, import,
2 export, distribute, or dispense.” Application Note 1(B)(iii) to USSG 2L1.2.²

3 Although other courts have invalidated similarly vague language in the USSG, the
4 language of § 2L1.2 is not unconstitutionally vague, or otherwise invalidated by the
5 Supreme Court’s holding in *Johnson*. In *Johnson*, the Supreme Court held the residual
6 clause of the ACCA “denied fair notice to defendants and invites arbitrary enforcement
7 by judges.” *Johnson*, 135 S. Ct. at 2557. The Court also noted that the clause had
8 “created numerous splits among the lower federal courts, where it proved nearly
9 impossible to apply consistently.” *Id.* at 2559.

10 Section 2L1.2 does not mimic the language of the residual clause in either the
11 ACCA or the USSG, and does not present the same vagueness issues. What constitutes a
12 “drug trafficking offense” to warrant the 16-level enhancement is clearly defined in the
13 USSG. Specific to Galindo-Vega, the Ninth Circuit has already concluded that his prior
14 conviction for violation of California Health and Safety Code section 11351 properly
15 constitutes a “drug trafficking offense.” See *United States v. Galindo-Vega*, 522 Fed.
16 Appx. 388 (“Galindo-Vega’s prior conviction qualifies as a drug trafficking offense for
17 the purposes of U.S. Sentencing Guidelines Manual § 2L1.2.”). Because Galindo-Vega
18 was not sentenced under the ACCA or the residual clause of the USSG, and the
19 provisions of the USSG he was sentenced under—§ 2L1.2—is not vague or otherwise
20 unconstitutional, the § 2255 petition fails on the merits.³

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23 ² The court focuses its inquiry on the 16-level enhancement applied to Galindo-Vega’s
24 sentencing guideline factors as the only sentencing guideline provision presumably
25 challenged. Galindo-Vega does not challenge his base offense level and *Johnson* and
26 *Welch* do not apply to determination of a defendant’s base offense level. Additionally,
27 aside from the 16-level enhancement, Galindo-Vega only received departures: a three
28 level departure for acceptance of responsibility and a four level departure for fast track.


³ The Government additionally argues that Galindo-Vega’s collateral attack on his
sentence is procedurally defaulted and time barred. However, finding the petition fails on
the merits, the Court declines to address these additional arguments.

1 **IV. CONCLUSION**

2 For the reasons detailed above, Galindo-Vega's petition fails on the merits as he
3 was not sentenced under the residual clause of the ACCA or the USSG. The provision of
4 the USSG that Galindo-Vegas was sentenced under does not include any of the language
5 declared unconstitutional in *Johnson*. As *Johnson* does not apply, the Supreme Court's
6 decision in *Welch* is also inapplicable. The petition is **DENIED**. The motion hearing
7 presently set for August 15, 2016, is **VACATED**.

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9 **IT IS SO ORDERED.**

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11 Dated: August 11, 2016


12 Hon. Anthony J. Battaglia
13 United States District Judge
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