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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 v.
14 DIEGO RIVERA-VAZQUEZ,
15 Defendant.

Case No.: 13cr1307-CAB

**ORDER DENYING MOTION TO
VACATE [Doc. Nos. 49 and 55]**

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17 On May 2, 2016, Defendant/Petitioner Diego Rivera-Vazquez filed a motion under
18 28 U.S.C. § 2255 to vacate, set aside, or correct a sentence. [Doc. No. 49.] On
19 September 22, 2016, Plaintiff/Respondent United States of America filed a response to
20 the motion. [Doc. No. 52.] On October 20, 2016, the Court received a document from
21 Petitioner that was deemed to be a motion to amend the original, pending petition. [Doc.
22 Nos. 54, 55.] The motion sought leave to add an additional ground to vacate, set aside or
23 correct his sentence based upon “new amendment 794 to USSG §3B.1.1.” [Doc No. 55 at
24 4.] On October 28, 2016, Petitioner’s motion to amend the original petition to add an
25 additional ground was granted. [Doc. No. 56.] Respondent was ordered to file a response
26 to the additional ground set forth in Doc. No. 55 by November 30, 2016. To date, no
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1 further response has been filed by Respondent.¹ For the reasons set forth below,
2 Petitioner's motion to vacate based on both grounds [Doc. Nos. 49 and 55] is **DENIED**.

3 **BACKGROUND**

4 On March 20, 2013, Petitioner drove a vehicle into the Otay Mesa, California,
5 Port of Entry. At the time Petitioner drove the vehicle into the United States, concealed
6 within the vehicle was approximately 2.26 kilograms of Methamphetamine and .64
7 kilograms of Heroin. [Doc. No. 25 at 3.] Petitioner was arrested and charged with two
8 counts of violating 21 U.S.C. §§ 952 and 960. [Doc. No. 28.]

9 During a plea hearing held before the U.S. Magistrate Judge Ruben Brooks on
10 November 7, 2013, Rivera-Vazquez pled guilty pursuant to a plea agreement to the two-
11 count Superseding Information filed against him. [Doc. Nos. 31 and 33.] The parties
12 jointly recommended the following Guidelines:

13 1. Base Offense Level [USSG § 2D1.1] 34

14 2. Minor Role -2*

15 [*If defendant truthfully discloses to the government all information and evidence
16 the defendant has concerning the offense and relevant conduct, and if defendant
17 otherwise qualifies for "mitigating role" under § 3B1.2, the government will recommend
18 a two-level reduction under § 3B1.2.]

19 3. Acceptance of Responsibility -2

20 [USSG § 3E1.1]

21 4. Adjusted Offense Level 30.

22 [Doc. No. 33 at 8-9.]

23 At sentencing on November 15, 2013, the United States complied with the plea
24 agreement and recommended the following Guidelines calculations in its sentencing
25 summary chart:

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28 ¹ Although Respondent failed to submit the requested briefing, the Court has chosen to review the additional claim on the merits.

1 Base Offense Level 34

2 Minor Role -2

3 Acceptance of Responsibility [USSG § 3E1.1] -2

4 [Doc. No. 37.] The United States noted that the above Guideline calculations produced an
5 Adjusted Offense Level of 30 which, in combination with Petitioner’s Criminal History
6 Category of III², produced a Guideline Range of 121 to 151 months’ custody. [*Id.*] The
7 United States recommended a sentence of 121 months’ custody, the low end of that
8 Guideline Range. [*Id.*] The Court accepted the Government’s minor role recommendation
9 and ultimately sentenced the Petitioner to a total of 108 months, thirteen months below
10 the Guideline Range. [Doc. No. 43 at 7-8.]

11 After the judgment issued in November 18, 2013, Petitioner did not appeal the
12 sentence. In June 2016, more than two years after his sentence became final, Petitioner
13 filed this motion for habeas relief where he claims that: (1) the Supreme Court’s decision
14 in *Johnson v. United States*, 135 S.Ct. 2551 (2015), compels his case be remanded for re-
15 sentencing; and (2) he should have received a downward adjustment for his alleged minor
16 role in the offense pursuant to USSG §3B1.2.

17 DISCUSSION

18 A. Legal Standard.

19 A federal prisoner in custody under sentence may move the court that imposed the
20 sentence to vacate, set aside, or correct the sentence if “the sentence was imposed in
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23 ² Petitioner has two known convictions in his record. The first is a violation of CAL. VEHICLE CODE
24 § 14061.1(a) for driving on a suspended license in Riverside, California, for which he received 10 days
25 jail and 36 months of probation. [Doc. N. 25 at 6.] The second known conviction occurred in 2012 for
26 five counts of violations of California law, including three felony counts of violating CAL. PENAL
27 CODE § 496 for stolen public property. [*Id.*] Petitioner received 210 days jail and 36 months of
28 probation for this conviction. Petitioner received an additional +2 to his criminal history at sentencing
because he was on probation at the time of the instant offenses. [*Id.*] However, the Court reduced
Petitioner’s criminal history category because his criminal history was a “little overstated.” [Doc. No. 43
at 7.]

1 violation of the Constitution or laws of the United States, or that the court was without
2 jurisdiction to impose such sentence, or that the sentence was in excess of the maximum
3 authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255. To
4 warrant relief under § 2255, a prisoner must allege a constitutional, jurisdictional, or
5 otherwise “fundamental defect which inherently results in a complete miscarriage of
6 justice [or] an omission inconsistent with the rudimentary demands of fair procedure.”
7 *United States v. Timmreck*, 441 U.S. 780, 783 (1979). If it is clear the movant has failed
8 to state a claim, or has “no more than conclusory allegations, unsupported by facts and
9 refuted by the record,” a district court may deny a § 2255 motion without an evidentiary
10 hearing. *United States v. Quan*, 789 F.2d 711, 715 (9th Cir. 1986). “Errors of law which
11 might require reversal of a conviction or sentence on appeal do not necessarily provide a
12 basis for relief under § 2255.” *United States v. Wilcox*, 640 F.2d 970, 973 (9th Cir. 1981).

13 *B. Johnson.*

14 In arguing that his applicable sentencing provisions were unconstitutionally vague,
15 Petitioner relies on *Johnson v. United States*, 135 S.Ct. 2551 (2015). In *Johnson*, the
16 Supreme Court examined language from the Armed Career Criminal Act (“ACCA”),
17 which provides for a mandatory minimum sentence of 15 years of imprisonment for a
18 defendant who violates 18 U.S.C. § 922(g) and has three prior convictions for a “violent
19 felony” or a “serious drug offense.” 18 U.S.C. §924(e). There are three “clauses” in the
20 statute defining what type of prior crime qualifies as a “violent felony”:

21 The “elements” clause: “has as an element the use, or attempted use, or
22 threatened use of physical force against the person of another”;

23 The “enumerated offenses” clause: “is burglary, arson, or extortion, [or]
24 involves use of explosives” and

25 The “residual” clause: “or otherwise involves conduct that presents a serious
26 potential risk of physical injury to another.”

27 18 U.S.C. § 924(e)(2)(B). In *Johnson*, the Supreme Court held that imposing an increased
28 sentence under ACCA’s residual clause violates the Due Process Clause because the

1 residual clause is impermissibly vague on its face. Because no “principled and objective
2 standard” could identify what crimes fell under the language of the residual clause, the
3 Supreme Court held that it “both denies fair notice to defendants and invites arbitrary
4 enforcement by judges.” *Id.* at 2557.

5 The Court explicitly noted that its decision “does not call into question application
6 of the [ACCA] to . . . the remainder of the Act’s definition of a violent felony,” including
7 a felony offense that “has as an element the use, attempted use, or threatened use of
8 physical force against the person of another,” 18 U.S.C. § 924(e)(2)(B)(i), and a felony
9 offense that “is burglary, arson, or extortion, [or] involves use of explosives,” 18 U.S.C. §
10 924(e)(2)(B)(ii). 135 S. Ct. at 2563. It also does not affect ACCA’s definition of “serious
11 drug offense.” 18 U.S.C. § 924(e)(2)(A).

12 In this case, Petitioner was not sentenced under 18 U.S.C. § 924, the statute at
13 issue in *Johnson*. Nor was Petitioner sentenced pursuant to any provisions similar to the
14 challenged portions of 18 U.S.C. § 924. To the contrary, the sentence that Petitioner now
15 challenges was based entirely on a conviction for crimes that fall outside the realm of
16 *Johnson*. Petitioner did not receive any enhancement or violent felony considerations,
17 because none were present in this case. *Johnson* is wholly inapplicable here.

18 Accordingly, Petitioner’s motion which is premised on *Johnson* [Doc. No. 49] is denied.

19 C. Amendment 794.

20 Petitioner also argues that he should have received a downward adjustment for his
21 alleged minor role in the offense pursuant to USSG § 3B1.2. [Doc. No. 55 at 4.]

22 USSG § 3B1.2 directs the court to decrease the offense level in two circumstances:
23 (1) If the defendant was a minimal participant in any criminal activity, decrease by four
24 levels; and (2) if the defendant was a minor participant in any criminal activity, decrease
25 by two levels. U.S.S.G § 3B1.2.

26 First, Petitioner did receive a minor role reduction pursuant to U.S.S.G. § 3B1.2.
27 [Doc. No. 43 at 7.] Therefore, the motion to vacate on this basis is moot. Nevertheless,
28 even if Petitioner had not received such a reduction, he still has no claim for relief.

1 In support of his motion, Petitioner cites to *United States v. Quintero-Leyva* and
2 Amendment 794, which provided five factors courts should use to determine whether a
3 defendant should be granted a minor role reduction. *United States v. Quintero-Leyva*, 823
4 F.3d 519, 523 (9th Cir. 2016). Petitioner argues that he should be given the retroactive
5 benefit of Amendment 794. [Doc. No. 55 at 15-17.] However, this type of claim may
6 only be brought under 18 U.S.C. § 3582 and not § 2255. *See Hamilton v. United States*,
7 67 F.3d 761, 763 (9th Cir. 1995) (holding that a § 2255 claim can be based only on a
8 claim of constitutional error, an error resulting in a “complete miscarriage of justice,” or a
9 “proceeding inconsistent with the rudimentary demands of fair procedure”) (citing
10 *Timmreck*, 441 U.S. at 783–84). Even if the Court were to construe this as a § 3582
11 motion, Petitioner's claim fails because Amendment 794 is not retroactive for purposes of
12 a § 3582 motion. *See Quintero-Leyva*, 823 F.3d at 523 (holding that Amendment 794 was
13 a “clarifying amendment”); *United States v. Stokes*, 300 Fed. Appx. 507, 508 (9th Cir.
14 2008) (holding that a “clarifying amendment” does not apply retroactively in a motion for
15 reduction of a sentence under § 3582). Therefore, Petitioner’s motion to vacate on the
16 grounds of Amendment 794 is denied.

17 Given the disposition above, the Court does not reach Respondent’s arguments
18 regarding waiver and procedural default.

19 D. Certificate of appealability.


20 Under Rule 11 of the Rules Governing Section 2255 Proceedings for the United
21 States District Courts, “[t]he district court must issue or deny a certificate of appealability
22 when it enters a final order adverse to the applicant.” Rule 11, 28 U.S.C. foll. § 2255. A
23 certificate of appealability may issue under 28 U.S.C. § 2253 “only if the applicant has
24 made a substantial showing of the denial of a constitutional right.” 28 U.S.C. §
25 2253(c)(2). The court must either issue a certificate of appealability indicating which
26 issues satisfy the required showing or must state the reasons why such a certificate should
27 not issue. Fed. R. App. P. 22(b). For the reasons set forth in this order, Petitioner has not
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1 made a substantial showing of the denial of a constitutional right. Accordingly, the court
2 declines to issue a certificate of appealability.

3 CONCLUSION

4 For the reasons set forth above, Petitioner's motion to vacate under 28 U.S.C.
5 §2255 [Doc. Nos. 49 and 55] is **DENIED**. The court declines to issue a certificate of
6 appealability.

7 Dated: December 29, 2016



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Hon. Cathy Ann Bencivengo
United States District Judge