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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
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10 ELIAS ROSAS-NUNEZ AKA JOSE
11 MANUEL NUNEZ-ROSAS,

12 Movant,

13 v.

14 UNITED STATES OF AMERICA,

15 Respondent.

Case No.: 3:16-cv-01415-BEN
3:14-cr-01255-BEN

**ORDER DENYING MOTION TO
VACATE, SET ASIDE, OR
CORRECT SENTENCE UNDER 28
U.S.C. § 2255**

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17 Movant, Elias Rosas-Nunez, also known as Jose Manuel Nunez-Rosas, proceeding
18 pro se, filed a Motion to Vacate, Set Aside, or Correct his Sentence pursuant to 28 U.S.C.
19 § 2255. Respondent, the United States, filed a response, opposing the motion. For the
20 reasons set forth below, this Court **DENIES** Movant's Motion.

21 **BACKGROUND**

22 On May 1, 2014, Movant waived indictment and was charged by a criminal
23 information with attempted reentry of a previously deported alien in violation of 8 U.S.C.
24 § 1326. (Docket Nos. 9, 10).¹ Movant pleaded guilty to the charged offense. (Docket
25 Nos. 40, 44). The plea agreement included a waiver of appeal and collateral attack,
26 "except for a post-conviction collateral attack based on a claim of ineffective assistance
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28 ¹ All docket citations refer to the criminal case docket, No. 14-cr-1255.

1 of counsel, unless the Court imposes a custodial sentence above 70 months.” (Docket
2 No. 39). The parties agreed to jointly recommend Movant be sentenced to 70 months in
3 custody. (Id.) The factual basis for the plea also included an admission that on or about
4 February 21, 2001, Movant was convicted of a felony for willful infliction of corporal
5 injury upon a spouse or cohabitant in violation of California Penal Code section 273.5(a).
6 (Id.) The parties agreed that there should be a +16 upward adjustment in sentencing
7 under U.S.S.G. § 2L1.2(b)(1). (Id.)

8 Prior to sentencing, the presentence investigation report revealed that Movant’s
9 criminal history “dates back 25 years and consists of multiple felony convictions for
10 offenses including cultivating marijuana, purchase/possession of cocaine for sale, assault
11 with a deadly weapon, possession of a controlled substance, inflicting corporal injury on
12 a spouse, and illegal reentry after deportation.” (Docket No. 43 at 15). The report
13 concurred that a 16-level enhancement was applicable under U.S.S.G. §
14 2L1.2(b)(1)(A)(ii) for committing a crime of violence. (Id. at 6). The report stated that
15 the advisory guideline range for a custodial sentence was 77 to 96 months. (Id. at 15)
16 This Court ultimately sentenced Movant to 70 months in custody and a term of
17 supervised release of three years. (Docket No. 51).

18 On June 8, 2016, Movant filed the instant motion. (Docket No. 52). His filing is
19 captioned as a “Notice of Timely Johnson Retroactivity Claim and Preservation of Right
20 Filed Defensively.” (Id.) The full extent of his motion states that he has “file[d] this
21 Johnson retroactivity claim in a timely fashion, with-in [sic] one year of the Supreme
22 Court ruling [in Johnson v. United States, 135 S. Ct. 2551 (2015)] . . . as a general
23 objection to all unconstitutional vagueness in his conviction, with an explicit reservation
24 of the right to amend for specificity upon collateral review.” (Id.)

25 **LEGAL STANDARD**

26 Under section 2255, a movant is entitled to relief if the sentence: (1) was imposed
27 in violation of the Constitution or the laws of the United States; (2) was given by a court
28 without jurisdiction to do so; (3) was in excess of the maximum sentence authorized by

1 law; or (4) is otherwise subject to collateral attack. 28 U.S.C. § 2255; *United States v.*
2 *Speelman*, 431 F.3d 1226, 1230 n.2 (9th Cir. 2005). If it is clear the movant has failed to
3 state a claim, or has “no more than conclusory allegations, unsupported by facts and
4 refuted by the record,” a district court may deny a § 2255 motion without an evidentiary
5 hearing. *United States v. Quan*, 789 F.2d 711, 715 (9th Cir. 1986).

6 **DISCUSSION²**

7 Movant’s motion fails because he validly waived his right to collaterally attack his
8 sentence. The record discloses no issues as to the voluntariness of Movant’s plea. And,
9 contrary to his contentions, his sentence was not unconstitutionally enhanced under
10 *Johnson*. In *Johnson*, the Supreme Court considered language in the Armed Career
11 Criminal Act (“ACCA”). The ACCA imposes a mandatory minimum sentence of 15
12 years for a defendant who violates 18 U.S.C. § 922(g) and “has three previous
13 convictions by any court . . . for a violent felony or serious drug offense, or both.” 18
14 U.S.C. § 924(e)(1). The Supreme Court examined the definition of “violent felony” and
15 held that a portion of that definition known as the “residual clause” is void for vagueness.
16 Imposing an increased sentence under the residual clause of the definition of “violent
17 felony” violates the Constitution’s guarantee of due process. 135 S. Ct. at 2563. The
18 Supreme Court expressly confined its holding to this particular portion of the statute and
19 confirmed that its holding does not apply to the “serious drug offense” clause or the
20 remainder of the “violent felony” definition. *Id.*

21 But *Johnson* is not applicable because Movant was not sentenced under the
22 residual clause of the violent felony definition of the ACCA. See *United States v. Ruiz-*
23 *Diaz*, 668 F. App’x 289, 290 (9th Cir. 2016) (“Because the [sentencing] enhancement
24 was not predicated on a residual clause like the one struck down in *Johnson*, there is no
25 arguable issue as to whether [defendant’s] sentence is illegal.”). Rather, he was
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28 ² The Court determines there is no need for an evidentiary hearing.

1 sentenced pursuant to § 2L1.2(b)(1) of the U.S. Sentencing Guidelines. Movant, in fact,
2 agreed to the 16-level upward adjustment for his admitted prior crime of violence. See
3 United States v. Mora-Duardo, No. 14-cr-3598-GPC, 2017 WL 2664194, at *3 (S.D. Cal.
4 June 20, 2017) (denying § 2255 petition based on Johnson because petitioner was
5 sentenced under § 2L1.2(b), rather than the residual clause of the ACCA).

6 Movant’s motion may be construed as challenging the U.S. Sentencing Guidelines
7 as unconstitutionally vague based on the same reasoning as Johnson. (See Mot. at 1
8 (asserting “a general objection to all unconstitutional vagueness in his conviction”).
9 However, the Supreme Court rejected such an argument earlier this year. In Beckles v.
10 United States, 137 S. Ct. 886 (2017), the Supreme Court held that the federal sentencing
11 guidelines are not subject to vagueness challenges under the due process clause. Id. at
12 890, 892, 895.

13 As there are no arguable grounds as to whether Movant’s sentence is illegal, the
14 Court enforces the collateral attack waiver. Ruiz-Diaz, 668 F. App’x at 290 (citing
15 United States v. Watson, 582 F.3d 974, 988 (9th Cir. 2009)). Alternatively, Movant’s
16 motion is denied on the merits.

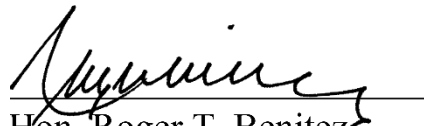
17 CONCLUSION

18 The Motion to Vacate, Set Aside, or Correct Sentence is **DENIED**.

19 A court may issue a certificate of appealability where the movant has made a
20 “substantial showing of the denial of a constitutional right,” and reasonable jurists could
21 debate whether the motion should have been resolved differently, or that the issues
22 presented deserve encouragement to proceed further. See Miller-El v. Cockrell, 537 U.S.
23 322, 335 (2003). This Court finds that Movant has not made the necessary showing. A
24 certificate of appealability is therefore **DENIED**.

25 **IT IS SO ORDERED.**

26 Dated: September 27, 2017

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28 Hon. Roger T. Benitez
United States District Judge