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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 Ervin Morelli,

12 Petitioner,

13 v.

14 United States of America,

15 Respondent.
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Case No.: 3:16-cv-01470-GPC;
Related Case No.: 3:15-cr-00029-GPC-2

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

[ECF. No. 78.]

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18 Before the Court is Petitioner Ervin Morelli's ("Petitioner's" or "Morelli's")
19 motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. The motion was
20 filed on June 13, 2016. (Dkt. No. 78.)¹ Respondent United States of America
21 ("Respondent" or "Government") opposes. (Dkt. No. 84.) For the reasons set forth
22 below, the Court **DENIES** Petitioner's 28 U.S.C. § 2255 motion.

23 **BACKGROUND**

24 On or about December 9, 2014, Morelli transported, moved, or attempted to
25 transport or move, aliens within the United States in violation of 8 U.S.C. §
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28 ¹ All citations to the record are based upon the pagination generated by the CM/ECF system in
3:15-cr-00029-GPC-2.

1 1324(a)(1)(A)(ii) and (v)(II). (Dkt. No. 1.) Morelli pleaded guilty to the § 1324 offense
2 on February 24, 2015. (Dkt. No. 40.) Morelli was sentenced on May 29, 2015 with a
3 guidelines calculation that incorporated an adjustment under USSG § 2L1.1(b)(6).² (Dkt.
4 No. 68.) He was sentenced to a below-guidelines term of thirty months in custody and
5 three years of supervised release. (*Id.*)

6 On June 13, 2016, while in custody, Morelli timely filed the instant § 2255 motion
7 to vacate, set aside, or correct the sentence pursuant to the Supreme Court’s decision in
8 *Johnson v. United States*, 135 S. Ct. 2551 (2015).³ (Dkt. No. 78.) Petitioner argues that
9 the Court’s imposition of an increased sentence under USSG § 2L1.1(b)(6) violated his
10 due process rights under the Fifth Amendment. (*Id.*) Specifically, Morelli contends that
11 (1) USSG § 2L1.1(b)(6) “now falls under the Residual Clause” of the Armed Career
12 Criminal Act (“ACCA”); (2) Petitioner’s prior state convictions do not qualify as
13 predicate offenses for ACCA enhancement; (3) and *Johnson* retroactively applies to his
14 sentence. (*Id.*)

15 On August 3, 2016, the Court appointed the Federal Defenders of San Diego, Inc.
16 to represent Morelli. (Dkt. No. 79.) Petitioner’s counsel subsequently notified the Court
17 that after thoroughly researching the case, counsel did not intend to file any supplement
18 to Morelli’s § 2255 motion or present any additional argument or legal authority on
19 Morelli’s behalf. (Dkt. No. 83.)

20 On October 7, 2016, the Government filed an opposition. (Dkt. No. 84.) Morelli
21 filed a reply, *nunc pro tunc* to October 28, 2016. (Dkt. No. 86.)
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24 ² Morelli inaccurately stated that his sentence incorporated a guidelines adjustment under USSG
25 § 2K2.1(A) in his motion. (Dkt. No. 78 at 1.) His reply brief clarified that the relevant USSG section is
26 USSG § 2L1.1(b)(6). (Dkt. No. 86 at 1.)

27 ³ A petitioner can file a 28 U.S.C. § 2255 motion if he is a “prisoner in custody under sentence of
28 a court established by Act of Congress.” 28 U.S.C. § 2255(a). A petitioner on supervised release may
also file a § 2255 motion even though he is not in physical custody of the United States. *Mujahid v.*
Daniels, 413 F.3d 991, 994 (9th Cir. 2005) (“[A] habeas petitioner remains in the custody of the United
States while on supervised release.”). It is timely if it is filed under the one-year period of limitation
from the date on which the judgment of conviction becomes final. 28 U.S.C. § 2255(f)(1).

1 Morelli’s supervised release term commenced on February 24, 2017. (Dkt. No.
2 87.)

3 LEGAL STANDARD

4 28 U.S.C. § 2255 allows a court to “vacate, set aside, or correct the sentence” of a
5 federal prisoner on “the ground that the sentence was imposed in violation of the
6 Constitution or laws of the United States, or that the court was without jurisdiction to
7 impose such sentence, or that the sentence was in excess of the maximum authorized by
8 law, or is otherwise subject to collateral attack[.]” 28 U.S.C. § 2255(a). Where a
9 petitioner exhausts or waives his direct appeal, the Court is entitled to presume that he
10 stands fairly convicted. *United States v. Frady*, 456 U.S. 152, 164 (1982). However, §
11 2255 warrants relief if a prisoner alleges a constitutional or jurisdictional error, or a
12 “fundamental defect which inherently results in a complete miscarriage of justice [or] an
13 omission inconsistent with the rudimentary demands of fair procedure.” *United States v.*
14 *Timmreck*, 441 U.S. 780, 783 (1979) (quoting *Hill v. United States*, 368 U.S. 424, 428
15 (1962)).

16 DISCUSSION

17 Morelli contends he is entitled to habeas relief in light of the Supreme Court’s
18 decision in *Johnson*. (*Id.*) His claims fail for the reasons set forth below.

19 **A. *Johnson* is Inapplicable.**

20 In *Johnson*, the Supreme Court examined language from the ACCA, which
21 provides for a mandatory sentence of fifteen years of imprisonment for a defendant who
22 violates 18 U.S.C. § 922(g) and has three prior convictions for a “violent felony” or a
23 “serious drug offense.” 18 U.S.C. § 924(e). There are three “clauses” in the statute
24 defining what type of prior crime qualifies as a “violent felony”: (1) the “elements”
25 clause: “has an element the use, or attempted use, or threatened use of physical force
26 against the person of another”; (2) the “enumerated offenses” clause: “is burglary, arson,
27 or extortion, [or] involves use of explosives”; and (3) the “residual” clause: “or otherwise
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1 involves conduct that presents a serious potential risk of physical injury to another.” 18
2 U.S.C. § 924(e)(2)(B).

3 The Court held that the ACCA’s residual clause is void for vagueness, and that
4 “imposing an increased sentence under the residual clause of the Armed Career Criminal
5 Act violates the Constitution’s guarantee of due process.” *Johnson*, 135 S. Ct. at 2563.
6 Put simply, a statute can be void for vagueness “‘if it fails to provide people of ordinary
7 intelligence a reasonable opportunity to understand what conduct it prohibits’ or ‘if it
8 authorizes or even encourages arbitrary and discriminatory enforcement.’” *Id.* at 2566
9 (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). Rather than “gauging the riskiness
10 of conduct in which an individual defendant engages *on a particular occasion*,” the
11 residual clause “requires application of the ‘serious potential risk’ standard to an
12 idealized ordinary case of the crime.” *Id.* at 2561. No “principled and objective
13 standard” could identify what crimes fell under its language. *Id.* at 2557. Thus, the
14 residual clause violates due process, as it “both denies fair notice to defendants and
15 invites arbitrary enforcement by judges.” *Id.*

16 *Johnson* is inapplicable to Morelli’s case. First, Morelli was not sentenced under
17 the ACCA. Morelli pleaded guilty to charges under 8 U.S.C. § 1324(a)(1)(A)(ii) and
18 (v)(II). (Dkt. No. 40.) Second, he received an increased sentence pursuant to USSG §
19 2L1.1(b)(6), not the ACCA’s residual clause. (Dkt. No. 68.) The retroactive holding in
20 *Johnson* does not provide Morelli with a vehicle for relief.

21 **B. USSG § 2L1.1(b)(6) is Not Void for Vagueness.**

22 Morelli argues that USSG § 2L1.1(b)(6) is void for vagueness. In other words, he
23 argues he is entitled to habeas relief because the residual clause analysis in *Johnson*
24 applies equally to USSG § 2L1.1(b)(6)’s “specific offense characteristics” clause.⁸ (Dkt.
25 No. 40.)

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27 ⁸ USSG § 2L1.1(b)(6) provides: “If the offense involved intentionally or recklessly creating a
28 substantial risk of death or serious bodily injury to another person, increase by 2 levels, but if the
resulting offense level is less than level 18, increase to level 18.”

1 First, the Supreme Court recently held in *Beckles v. United States* that the Federal
2 Sentencing Guidelines “are not subject to vagueness challenges under the Due Process
3 clause.” 137 S. Ct. 886, 890 (2017). Unlike the ACCA, “the advisory Guidelines do not
4 fix the permissible range of sentences,” but “merely guide the exercise of a court’s
5 discretion in choosing an appropriate sentence within the statutory range.” *Id.* at 892.
6 Here, this Court exercised its discretion in increasing Morelli’s sentence under USSG §
7 2L1.1(b)(6). (Dkt. No. 68.)

8 Moreover, while USSG § 2L1.1(b)(6) uses the phrase “substantial risk,” the
9 Supreme Court expressly noted that its holding in *Johnson* “does not put other criminal
10 laws that use terms such as ‘substantial risk’ in doubt, because those laws generally
11 require gauging the riskiness of an individual’s conduct on a particular occasion, not the
12 riskiness of an idealized ordinary case of the crime.” 135 S. Ct. at 2554; *see also id.* at
13 2561 (“As a general matter, we do not doubt the constitutionality of laws that call for the
14 application of a qualitative standard such as ‘substantial risk’ to real-world conduct.”).
15 Therefore, Morelli’s claim that USSG § 2L1.1(b)(6) is void for vagueness does not afford
16 him habeas relief.

17 **C. Morelli’s Additional Claims Fail.**

18 Morelli makes additional contentions in his reply brief. He claims he was (1) a
19 passenger when the car was pulled over; and (2) never given notice by defense counsel of
20 the sentence enhancement and would have otherwise gone to trial. (Dkt. No. 86.) Both
21 of Morelli’s additional claims lack merit. First, Morelli admitted to knowingly
22 transporting or moving, or attempting to transport or move aliens to help them remain in
23 the United States, and accordingly pleaded guilty to 8 U.S.C. § 1324(a)(1)(A)(ii). (Dkt.
24 No. 40.) Upon executing the plea agreement, Morelli signed a waiver certifying he was
25 given notice of the applicable sentencing guidelines and that sentencing is in the
26 discretion of the Court. (*Id.*) He also signed the plea agreement, indicating that he was
27 aware any sentence prediction made by defense counsel was merely a recommendation
28 and not binding. (*Id.*) Therefore, Morelli’s belated contentions are meritless.

1 **D. Evidentiary Hearing**

2 “Unless the motion and the files and records of the case conclusively show that the
3 prisoner is entitled to no relief,” the Court must hold an evidentiary hearing on the merits
4 of a § 2255 motion. 28 U.S.C. § 2255(b). However, a district court may deny a § 2255
5 motion without an evidentiary hearing. *United States v. Rodrigues-Vega*, 797 F.3d 781,
6 791 (9th Cir. 2015). An evidentiary hearing is unnecessary if the allegations, “when
7 viewed against the record, do not state a claim for relief or are so palpably incredible or
8 patently frivolous as to warrant summary dismissal.” *United States v. Leonti*, 326 F.3d
9 1111, 1116 (9th Cir. 2003) (internal quotation marks omitted).

10 Here, for the aforementioned reasons, Morelli’s allegations clearly do not state a
11 claim for relief. Accordingly, the Court finds that Petitioner’s claims do not merit an
12 evidentiary hearing.

13 **E. Certificate of Appealability**

14 Pursuant to 28 § U.S.C. 2253 (c) a petitioner may not appeal from a final order in a
15 proceeding under § 2255, or be granted a Certificate of Appealability (“COA”) unless he
16 has “made a substantial showing of the denial of a constitutional right.” “A petitioner
17 satisfies this standard by demonstrating that jurists of reason could disagree with the
18 district court’s resolution of his constitutional claims or that jurists could conclude that
19 the issues presented here are adequate to deserve encouragement to proceed further.”
20 *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). “When the district court denies a habeas
21 petition on procedural grounds without reaching the prisoner’s underlying constitutional
22 claim, a COA should issue when the prisoner shows, at least, that jurists of reason would
23 find it debatable whether the petition states a valid claim of the denial of a constitutional
24 claim and that jurists of reason would find it debatable whether the district court was
25 correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

26 Here, jurists of reason would not disagree with the Court’s ruling that Morelli’s §
27 2255 petition lacks merit. Accordingly, the Court declines to issue a COA.

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1 **CONCLUSION**

2 For the foregoing reasons, the Court **DENIES** Petitioner's Motion to Vacate, Set
3 Aside or Correct Sentence under 28 U.S.C. § 2255. The Clerk of the Court shall close
4 the case.

5 **IT IS SO ORDERED.**

6 Dated: July 17, 2017

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8 Hon. Gonzalo P. Curiel
9 United States District Judge

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