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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 RAUL ALVARADO,

12 Movant,

13 v.

14 UNITED STATES OF AMERICA,

15 Respondent.

Case No.: 3:16-cv-01859-BEN
3:13-cr-01128-BEN

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

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17 Movant, Raul Alvarado, proceeding pro se, filed a Motion to Vacate, Set Aside, or
18 Correct his Sentence pursuant to 28 U.S.C. § 2255. Respondent, the United States, filed
19 a response, opposing the motion. For the reasons set forth below, this Court **DENIES** the
20 Motion.

21 **BACKGROUND**

22 On June 13, 2013, Movant waived indictment and was charged by a criminal
23 information with one count of conspiracy to distribute 5 grams or more of
24 methamphetamine in violation of 21 U.S.C. § 841(a)(1) and § 846. (Docket Nos. 222,
25 223).¹ Movant entered a plea agreement with Respondent, in which he “waive[d], to the
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28 ¹ All docket citations refer to the criminal case docket, No. 13-cr-1128.

1 full extent of the law, any right to appeal or to collaterally attack the conviction and
2 sentence . . . unless the Court impose[d] a custodial sentence above the greater of the high
3 end of the guideline range recommended by the United States.” (Docket No. 227).
4 Movant thereafter pleaded guilty and came before this Court for sentencing. (Docket No.
5 225, 239). The Government recommended 235 months in custody as the high end of the
6 guideline range. (Docket No. 316). This Court sentenced Movant below the
7 Government’s high end recommendation. It imposed a 188 month custodial sentence and
8 a period of supervised release of ten years. (Docket No. 384).

9 Almost three years after his sentencing, Movant filed the instant motion. (Docket
10 No. 823). He asserts two grounds for relief. First, he contends that he is serving an
11 illegal sentence based on the U.S. Supreme Court’s ruling in *Johnson v. United States*,
12 135 S. Ct. 2551 (2015). Second, he contends that three of his prior felony convictions
13 have been reduced to misdemeanors under California law, thus making him ineligible for
14 a sentencing enhancement as a career offender.

15 **LEGAL STANDARD**

16 Under section 2255, a movant is entitled to relief if the sentence: (1) was imposed
17 in violation of the Constitution or the laws of the United States; (2) was given by a court
18 without jurisdiction to do so; (3) was in excess of the maximum sentence authorized by
19 law; or (4) is otherwise subject to collateral attack. 28 U.S.C. § 2255; *United States v.*
20 *Speelman*, 431 F.3d 1226, 1230 n.2 (9th Cir. 2005). If it is clear the movant has failed to
21 state a claim, or has “no more than conclusory allegations, unsupported by facts and
22 refuted by the record,” a district court may deny a § 2255 motion without an evidentiary
23 hearing. *United States v. Quan*, 789 F.2d 711, 715 (9th Cir. 1986).

24 **DISCUSSION²**

25 Movant’s motion fails because he validly waived his right to collaterally attack his
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28 ² The Court determines there is no need for an evidentiary hearing.

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

14 But Johnson is not applicable because Movant was not sentenced under the
15 residual clause of the violent felony definition of the ACCA. See *United States v. Ruiz-*
16 *Diaz*, 668 F. App’x 289, 290 (9th Cir. 2016) (“Because the [sentencing] enhancement
17 was not predicated on a residual clause like the one struck down in Johnson, there is no
18 arguable issue as to whether [defendant’s] sentence is illegal.”). Rather, his sentencing
19 enhancements were based on his multiple convictions for drug-related crimes. (See
20 Presentence Report ¶¶ 42-56). Thus, the Court enforces the collateral attack waiver.
21 *Ruiz-Diaz*, 668 F. App’x at 290 (citing *United States v. Watson*, 582 F.3d 974, 988 (9th
22 Cir. 2009)).

23 Alternatively, Movant’s motion is denied on the merits. As noted above, the Court
24 rejects Movant’s first argument that his sentence is illegal under Johnson. Movant’s
25 second ground for relief argues that California’s passage of Proposition 47 reduced three
26 of his prior drug-related offenses from felonies to misdemeanors. He contends that he
27 can no longer be considered a career offender due to the reclassification and must be
28 resentenced. Movant is incorrect. The Ninth Circuit’s holding in *United States v. Diaz*,

1 838 F.3d 968, 975 (9th Cir. 2016), forecloses his argument. In Diaz, the Ninth Circuit
2 held that “Proposition 47 . . . does not undermine a prior conviction’s felony-status for
3 purposes of § 841. California’s later actions cannot change the fact that [the defendant]
4 committed his federal offense ‘after two or more convictions for a felony drug offense
5 [had] become final.’” Id. Regardless of the treatment of Movant’s prior convictions
6 now, “Proposition 47 does not change the historical fact” that Movant had two or more
7 prior felony drug convictions at the time of his sentencing.

8 **CONCLUSION**

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

10 A court may issue a certificate of appealability where the movant has made a
11 “substantial showing of the denial of a constitutional right,” and reasonable jurists could
12 debate whether the motion should have been resolved differently, or that the issues
13 presented deserve encouragement to proceed further. See Miller-El v. Cockrell, 537 U.S.
14 322, 335 (2003). This Court finds that Movant has not made the necessary showing. A
15 certificate of appealability is therefore **DENIED**.

16 **IT IS SO ORDERED.**

17 Dated: September 27, 2017

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19 Hon. Roger T. Benitez
20 United States District Judge
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