

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

United States of America,
Plaintiff,

vs.

Case No. 13-10037-01-JTM

Case No. 16-1280-JTM

Jesus Clemente,
Defendant.

MEMORANDUM AND ORDER

Defendant Jesus Clemente has moved *pro se* to vacate his sentence as unconstitutional in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015). Clemente pled guilty to possession with intent to distribute methamphetamine. The court sentenced him to 84 months imprisonment. In *Johnson*, the Supreme Court held that the term “crime of violence” as used in residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague. *See also United States v. Madrid*, 805 F.3d 1204, 1210 (10th Cir. 2015).

The court will deny the defendant’s motion. Clemente’s sentence was not enhanced under the ACCA. Rather, his sentence was entered pursuant to a binding plea agreement (Dkt. 45, at 2) and reflects a sentence substantially less than the otherwise applicable

statutory minimum of 10 years imprisonment, 21 U.S.C. § 841(b)(1)(B), pursuant to the “safety valve” limitation of U.S.S.G. § 5C1.2. *See* 18 U.S.C. § 3553(f). And indeed the sentence was less than the otherwise applicable guideline range of 135 to 168 months. Because defendant not charged with a firearm offense or indeed any offense under Title 18, the discussion of 18 U.S.C. § 924(3) in *Johnson* provides no grounds for a further reduction of his sentence.

The court further determines that the defendant has not made a substantial showing that he has been denied a constitutional right, as 28 U.S.C. § 2253(c)(2) requires. Accordingly, the court will deny a certificate of appealability.

IT IS ACCORDINGLY ORDERED this 25th day of August, 2016, that the defendant’s Motion to Vacate (Dkt. 111) is hereby denied.

s/J. Thomas Marten
J. THOMAS MARTEN, JUDGE