

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 29 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 18-35036

Plaintiff-Appellee,

D.C. Nos. 1:16-cv-01127-AA

1:11-cr-30009-AA-3

v.

SERGIO SALDIVAR GUTIERREZ,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Submitted May 21, 2019**

Before: THOMAS, Chief Judge, FRIEDLAND and BENNETT, Circuit Judges.

Sergio Saldivar Gutierrez appeals from the district court's order denying his 28 U.S.C. § 2255 motion to vacate the 180-month mandatory minimum sentence imposed pursuant to the Armed Career Criminal Act (ACCA). We have

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction under 28 U.S.C. § 2253. Reviewing de novo, *see United States v. Hill*, 915 F.3d 669, 673 (9th Cir. 2019), we affirm.

Gutierrez contends that he is entitled to relief because his four prior convictions for assault with a deadly weapon under California Penal Code § 245(a) are not violent felonies under the ACCA, 18 U.S.C. § 924(e)(2)(B)(i). Gutierrez’s argument is foreclosed by *United States v. Vasquez-Gonzalez*, 901 F.3d 1060, 1065-68 (9th Cir. 2018), which was decided while this appeal was pending. In *Vasquez-Gonzalez*, this court held that section 245(a)(1) is a categorical crime of violence under 18 U.S.C. § 16(a), which is materially identical to 18 U.S.C. § 924(e)(2)(B)(i). *See id.* at 1068; *see also United States v. Studhorse*, 883 F.3d 1198, 1203 (9th Cir.), *cert. denied*, 139 S. Ct. 127 (2018) (18 U.S.C. § 16(a) and 18 U.S.C. § 924(e)(2)(B)(i) have “near-identical language”). Accordingly, *Vasquez-Gonzalez* controls here and the district court did not err in denying Gutierrez’s motion.

AFFIRMED.