No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT LEONARD WOOD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Court should resolve the question left open by *Beckles v. United States*, 137 S. Ct. 886 (2017), that continues to divide the courts of appeal: whether the residual clause of the mandatory Sentencing Guidelines at U.S.S.G. § 4B1.2(a)(2) is void for vagueness.

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT LEONARD WOOD,
Petitioner,

- v. -

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Robert Leonard Wood respectfully prays that the Court issue a writ of certiorari to review the orders of the United States Court of Appeals for the Ninth Circuit entered on February 27, 2019, and March 1, 2019.

OPINIONS BELOW

Before the district court, Mr. Wood filed petitions for a writ of habeas corpus under 28 U.S.C. § 2255 in two separate criminal cases, both of which designated him a "career offender" under U.S.S.G. § 4B1.2(a). The Court of Appeals then denied Mr. Wood's request for a certificate of appealability in both cases in two separate, unpublished orders. *See United States v. Wood*, No. 18-55683 (9th Cir. March 1, 2019), and *United States v. Wood*, No. 18-55712 (9th Cir. February 27, 2019) (attached here as Appendices A and B).

JURISDICTION

On February 27, 2019, and March 1, 2019, the Court of Appeals denied Mr. Wood's requests for a certificate of appealability from the denial of his petitions for a writ of habeas corpus. *See* Pet. App. 1a and 2a. The Court has jurisdiction under 28 U.S.C. § 1254(1).

SENTENCING GUIDELINE INVOLVED

The pertinent Sentencing Guideline, former U.S.S.G. § 4B1.2(a) (2003), defined a "crime of violence" as an offense that:

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT OF FACTS

Robert Leonard Wood grew up in a San Diego neighborhood that was entrenched in gang culture. After becoming involved with the West Coast Crips, he was arrested and charged with various drug and racketeering crimes in two separate federal cases. Ultimately, he pleaded guilty in 2003 to one count of conspiracy to distribute a controlled substance in one case and one count of violent crimes in aid of racketeering in the other case.

In both cases, the sentencing court determined that Mr. Wood was subject to a career offender sentencing enhancement under U.S.S.G. § 4B1.2(a). This enhancement applied in part because 15 years earlier, Mr. Wood had been convicted of attempted robbery under California Penal Code section 211—an offense for which

he received a total sentence of 270 days in jail and a $100 fine. Although the Ninth Circuit has held that California robbery does not require an element of force and thus cannot satisfy § 4B1.2(a)(1), *see United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015), at the time of Mr. Wood's sentencing it nevertheless qualified as a "crime of violence" under the residual clause of § 4B1.2(a)(2). And because the sentencing court at that time was bound by the mandatory nature of Sentencing Guidelines, this conviction led Mr. Wood to receive a 300-month sentence.

But in prison, Mr. Wood turned his life around. He earned an Associates of Arts degree in Sociology, graduating with honors. He was invited to join the national honor society of Alpha Sigma Lambda. He then pursued a double major in Small Business Management and Marketing, earning two Bachelor of Science degrees and graduating *magna cum laude*. He was awarded multiple scholarships from the Unicor Scholarship Program and the Prison Scholar Fund. Currently, Mr. Wood is pursuing a Masters of Business Administration with an emphasis in business leadership.

Mr. Wood then began sharing his education with others. He served as a volunteer GED and college tutor for other inmates pursuing their studies. He began teaching classes through the Bureau of Prisons' educational system. To date, he has taught classes in African-American History, screenwriting, public speaking, and reentering society. In particular, the latter classes have focused on using business principles to teach inmates confidence and life-planning skills that will assist them to avoid recidivating and succeed upon their release.

Mr. Wood also began giving back in other ways. After writing tweets and blog stories for the Prison Scholar Fund, he became its Senior Social Media advisor, as well as a member of its board of directors on the basis of his exceptional service. He became a team leader for Start Taking an Alternative Route Today ("START"), an outreach program for at-risk youth. Through the START program, Mr. Wood has spent many hours talking to young people brought in from juvenile halls and probation departments, urging them to avoid gangs and drugs and a life in prison.

In 2015, after Mr. Wood had spent 13 years in prison, this Court issued its decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), striking down the residual clause of the Armed Career Criminal Act ("ACCA"). Within one year, Mr. Wood obtained permission from the Ninth Circuit to file a second or successive petition for a writ of habeas corpus under 28 U.S.C. § 2255 and timely did so. This petition argued that the identically-worded residual clause of the career offender provision in § 4B1.2 was void for vagueness. On this basis, Mr. Wood requested that the district court vacate his sentence under the mandatory Guidelines and permit him to present evidence of his substantial rehabilitation at a new sentencing hearing.

While his petition was pending, this Court issued its decision in *Beckles v. United States*, 137 S. Ct. 886 (2017). In *Beckles*, the Court held that "the advisory Sentencing Guidelines, including §4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine." *Id.* at 896. But *Beckles* stressed that its holding only applied to the "advisory" Sentencing Guidelines, using the

words "advisory," "discretionary," and "discretion" no fewer than 40 times. *Id.* at 890-97. Indeed, *Beckles* distinguished the current discretionary nature of the Guidelines from the mandatory nature of the Guidelines before 2005, noting that "the due process concerns that require notice in a world of mandatory Guidelines no longer apply." *Id.* at 894 (quotations omitted).

The day after *Beckles* issued, Mr. Wood filed supplemental briefing to the district court explaining that *Beckles* did not foreclose Mr. Wood's petition for relief. In fact, he argued, *Beckles* actually *supported* it because the mandatory Guidelines—like the Armed Career Criminal Act—"fixed the permissible range" of a sentence, instead of providing guidance as to a reasonable sentence. *Id.* at 895.

A year later, the district court denied Mr. Wood's habeas petition. *See* Appendix C. The district court found that no procedural obstacle, such as his waiver of appeal or procedural default, barred his request for relief. *See* Appendix C at 3-8. But on the merits, the district court held that "it would appear from the Supreme Court's holding in *Beckles* that Petitioner's challenge to the residual clause on vagueness grounds is impermissible." Appendix C at 11. And even assuming that *Beckles* did not foreclose such a challenge in the context of the mandatory Guidelines, the district court held that Mr. Wood could not make such a challenge to the mandatory Guidelines because the Supreme Court had not yet "carve[d] this exception to the rule against vagueness challenges to the Guidelines." Appendix C at 11. On this basis, the district court denied Mr. Wood's habeas petition and denied

him a certificate of appealability, finding that no reasonable jurist could disagree with its decision. Appendix C at 13.

Mr. Wood timely filed a request for a certificate of appealability to the Ninth Circuit Court of Appeals. In this request, he explained that the Ninth Circuit should grant him a certificate of appealability because reasonable jurists could (and had) disagreed with the district court's conclusion. Specifically, he pointed to the Seventh Circuit's decision rejecting the Government's argument that relief is not available "unless and until the Supreme Court explicitly extends the logic of *Johnson* to the pre-*Booker* mandatory guidelines." *Cross v. United States*, 892 F.3d 288, 293 (7th Cir. 2018). The Seventh Circuit then granted relief, concluding that the defendant asserted "precisely that right" that had been asserted in *Johnson*—the right "not to have his sentence *dictated* by the unconstitutionally vague language of the mandatory residual clause." *Id. See also Moore v. United States*, 871 F.3d 72, 80-84 (1st Cir. 2017) (explaining that "[w]e are not sufficiently persuaded that we would need to make new constitutional law in order to hold" the residual clause of the mandatory Guidelines void for vagueness); *United States v. Brown*, 868 F.3d 297, 304-10 (4th Cir. 2017) (Gregory, C.J., dissenting) (arguing that the majority's view "unnecessarily tethers" *Johnson*'s holding to ACCA and "divests [it] from the very principles on which it rests").

Nevertheless, the Ninth Circuit denied Mr. Wood's request for a certificate of appealability in a single sentence, stating that he "has not made a substantial

showing of the denial of a constitutional right." Appendix A; Appendix B (quotations omitted). This petition for a writ of certiorari follows.

SUMMARY OF THE ARGUMENT

The question of whether *Johnson* applies to the mandatory Sentencing Guidelines is not going away. The inter-circuit split is permanently entrenched. Lower court judges spend countless hours adjudicating mandatory Guidelines petitions and appeals, sometimes leading to contentious disputes with their colleagues. Department of Justice attorneys and federal defenders spend countless hours briefing a repetitive version of the same issue. Petitioners spend countless hours awaiting unsatisfying decisions, while the Bureau of Prisons spends over $36 million a year incarcerating prisoners who might otherwise be released. All it would take to spare everyone this unnecessary waste of time and resources is for the Court to reach the merits of this issue in a single case.

Mr. Wood's case should be that case. His 2003 career offender enhancement was triggered by a 1987 attempted robbery that *only* qualifies as a "crime of violence" under the residual clause of § 4B1.2(a)(2). He preserved his legal claims and filed them timely at every stage of litigation. What's more, in his 17 years in prison, he has secured two scholarships, earned three degrees (with honors), shared his education with others, and devoted hours of community service to ensuring that at-risk youth do not follow in his footsteps. Mr. Wood is the poster child for *Johnson* relief and deserves the opportunity to receive a decision on the merits of his claim. But without immediate intervention from this Court, he never will.

The Court should also intervene because Mr. Wood would prevail on the merits. As in *Johnson*, the identically-worded language of the residual clause in § 4B1.2(a)(2) is void for vagueness. Because courts apply the "ordinary case" to both ACCA and § 4B1.2(a)(2), and because it is precisely this "ordinary case" that rendered ACCA unconstitutional, *Johnson* also invalidates § 4B1.2(a)(2).

REASONS FOR GRANTING THE PETITION

I.

The Court's Failure to Resolve this Entrenched Inter-Circuit Split Is Burdening Judges, Lawyers, the Bureau of Prisons, and Defendants Alike.

Four years ago in *Johnson*, the Court struck down as unconstitutionally vague the "residual clause" of the Armed Career Criminal Act of 18 U.S.C. § 924(e)(2)(B)(ii). In its wake, courts, lawyers, and prisoners immediately began evaluating *Johnson*'s impact on U.S.S.G. § 4B1.2(a)(2), an identically-worded provision in the Sentencing Guidelines that triggers a "career offender" sentencing enhancement.

Less than one year later, the Court held that *Johnson* had no impact on § 4B1.2(a)(2) for defendants sentenced under the *advisory* Sentencing Guidelines. *See Beckles*, 137 S. Ct. at 896. But the Court took pains to clarify that its holding applied only in that context, using the words "advisory" and "discretion" or "discretionary" nearly 40 times. *Id.* at 890-97. As Justice Sotomayor rightly noted, this "at least leaves open the question" of whether defendants sentenced under the mandatory Guidelines could raise a similar challenge. *Id.* at 903 n.4.

But in the several years since, no petitioner has been able to get an answer from the Court on the question *Beckles* left open. This is not for lack of trying. No fewer than 30 petitions have presented this issue.[1] The Court has denied them all.

Two Justices of this Court have consistently dissented from the denials of these petitions. *See, e.g., Brown v. United States*, 139 S. Ct. 14 (2018) (Sotomayor, J., with whom Ginsburg, J. joins, dissenting from denial of certiorari). They point out that one court of appeals permits challenges to the residual clause of the mandatory Guidelines while another "strongly hinted" that it would, after which the Government "dismissed at least one appeal that would have allowed the court to answer the question directly." *Id.* at 15-16 (citing *Moore v. United States*, 871 F.3d 72, 80-84 (1st Cir. 2017), and *United States v. Roy*, 282 F.Supp.3d 421 (D.Mass. 2017); *United States v. Roy*, Withdrawal of Appeal in No. 17–2169 (CA1)). On the

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[1] *Lester v. United States*, U.S. No. 17-1366; *Allen v. United States*, U.S. No. 17-5684; *Gates v. United States*, U.S. No. 17-6262; *James v. United States*, U.S. No. 17-6769; *Robinson v. United States*, U.S. No. 17-6877; *Cottman v. United States*, U.S. No. 17-7563; *Miller v. United States*, U.S. No. 17-7635; *Molette v. United States*, U.S. No. 17-8368; *Gipson v. United States*, U.S. No. 17-8637; *Wilson v. United States*, U.S. No. 17-8746; *Greer v. United States*, U.S. No. 17-8775; *Raybon v. United States*, U.S. No. 17-8878; *Homrich v. United States*, No. 17-9045; *Sublett v. United States*, U.S. No. 17-9049; *Brown v. United States*, U.S. No. 17-9276; *Chubb v. United States*, U.S. No. 17-9379; *Smith v. United States*, U.S. No. 17-9400; *Buckner v. United States*, U.S. No. 17-9411; *Lewis v. United States*, U.S. No. 17-9490; *Garrett v. United States*, U.S. No. 18-5422; *Posey v. United States*, U.S. No. 18-5504; *Kenner v. United States*, U.S. No. 18-5549; *Swain v. United States*, U.S. No. 18-5674; *Allen v. United States*, U.S. No. 18-5939; *Jordan v. United States*, U.S. No. 18-6599; *Robinson v. United States*, U.S. No. 18-6915; *Bright v. United States*, U.S. No. 18-7132; *Allen v. United States*, U.S. No. 18-7421; *Sterling v. United States*, U.S. No. 18-7453; *Russo v. United States*, U.S. No. 18-7538; *Green v. United States*, No. 18-8435.

other side, three courts of appeals have held that *Johnson* does not invalidate identical language in the mandatory Guidelines, while one has concluded that the mandatory Guidelines themselves cannot be challenged for vagueness. *Id.* at 15-16 (citing *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017); *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017); *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018)). In other words, about half of the courts of appeals have now weighed in and come to differing conclusions.

Because of this, the two Justices opined that "[r]egardless of where one stands on the merits of how far *Johnson* extends," cases such as Mr. Wood's present "an important question of federal law that has divided the courts of appeals." *Id.* at 16. The Justices also note that such a decision could "determine the liberty of over 1,000 people" who are still incarcerated pursuant to this enhancement under the mandatory Guidelines. *Id.* They conclude, "[t]hat sounds like the kind of case we ought to hear." *Id.*

It is difficult to overstate the negative effects of this Court's reluctance to grant certiorari on this issue. To begin, lower-court judges have long awaited guidance from this Court on the issue of whether *Johnson* applies to the mandatory Guidelines, ever since Justice Sotomayor's concurrence acknowledging it as an "open question" made its resolution seem imminent. But with no guidance forthcoming, low-court judges must now expend substantial time and resources to arrive at a conclusion on their own—often leading to contentious results.

For instance, only several days ago, the judges of the Eleventh Circuit voted to deny a petition for rehearing en banc in a multi-part 64-page slip opinion. *See Lester v. United States*, __ F.3d __, 2019 WL 1896580 (11th Cir. Apr. 29, 2019). One judge wrote separately to explain why the court's prior decisions denying relief to mandatory Guidelines petitioners were correct. *See id.* at *1-9 (William Pryor, J.). Another judge, joined by two others, wrote to explain why one of the court's prior decisions was wrongly decided, noting that the petitioner's case was "a testament to the arbitrariness of contemporary habeas law, where liberty can depend as much on geography as anything else." *Id.* at *10 (Martin, J., joined by Rosenbaum, J. and Jill Pryor, J.). And a third judge, joined by two others, wrote to "add a few points in response" to the first judge's statement respecting the denial of rehearing en banc. *Id.* at *18 (Rosenbaum, J., joined by Martin, J., and Jill Pryor, J.). Specifically, Judge Rosenbaum responded to Judge William Pryor's claim that the Guidelines were "never really mandatory" by stating that such a claim was "certainly interesting on a metaphysical level" but that it "ignores reality." *Id.* at 21. Judge Rosenbaum explained, "Back here on Earth, the laws of physics still apply. And the Supreme Court's invalidation of a law does not alter the space-time continuum" for defendants who "still sit in prison" because of the mandatory Guidelines. *Id.*

This judicial jousting exemplifies the desperate need of lower courts for guidance on the mandatory Guidelines issue. Without such guidance, judges will continue to struggle to interpret this Court's precedent in *Johnson* and *Beckles*, leading to evermore clashes and judicial sniping. And it will force judges to continue

to invest significant time in opinions—time that could have been spent on the thousands of other cases piling up on their dockets.

The lack of guidance on this issue burdens other public servants as well. Virtually all lawyers providing briefing for the courts in these cases are employed by the Department of Justice or a federal defender organization. As employees or contractees of a government organization, they do not receive extra remuneration for these cases—they must absorb them into their already-overflowing caseloads. And while many mandatory Guidelines cases present similar fact patterns, attorneys on both sides must comb through the details of each case to avoid error and spend endless hours drafting repetitive opening, answering, reply, or supplemental briefs. So every mandatory Guidelines brief represents time that could have been better spent on cases that pose a greater threat to the public—terrorism, drug trafficking, or white-collar fraud schemes, to name a few. The longer the Court delays resolving this issue, the more time dedicated public servants will spend needlessly litigating nearly-identical cases with no clear outcome.

Finally, petitioners and even their jailers deserve a final resolution. The Bureau of Prisons spends over $36,000 a year to incarcerate a federal inmate.[2] With over one thousand mandatory Guidelines cases still pending, this means that it

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[2] *See* "Annual Determination of Average Cost of Incarceration," Federal Register, April 30, 2018, *available at*: https://www.federalregister.gov/documents/2018/04/30/2018-09062/annual-determination-of-average-cost-of-incarceration (stating that the average cost of incarceration for federal inmates in 2017 was $36, 299.25).

costs the Bureau of Prisons approximately $36 million a year to incarcerate people who might otherwise be released. And for many petitioners, even an unfavorable answer to their good-faith claim under the mandatory Guidelines would be better than no answer at all. Spending four years living in hope, only to see that hope extinguished in an unsatisfyingly-vague expiration of one's claim before a lower court, is hardly a guarantee of due process. "At some point, justice delayed is justice denied." *Southern Pacific Transp. Co. v. Interstate Commerce Com.,* 871 F.2d 838, 848 (9th Cir. 1989).

II.

Mr. Wood's Case Not Only Squarely Presents This Issue, He Is a Deserving Candidate for Relief.

As a legal matter, Mr. Wood's case squarely presents the issue in need of resolution. He was sentenced under the mandatory Guidelines in 2003. His career offender enhancement was triggered by a 1987 attempted robbery that *only* qualifies as a "crime of violence" under the residual clause pursuant to Ninth Circuit law. He preserved his legal claims at every stage of litigation. All of his petitions and appeals were timely filed. There is nothing in Mr. Wood's case to distract this Court from resolving once and for all the mandatory Guidelines question left open by *Beckles.*

What's more, it would be difficult to find a more deserving candidate for *Johnson* relief. Mr. Wood has earned two scholarships and three degrees (with honors) and is currently completing his MBA. He has shared his knowledge with others by tutoring and teaching African-American history and life-skills courses

that assist other inmates to acquire the confidence and tools they need to succeed on the outside. And he has devoted significant time to diverting at-risk youth from following in his footsteps.

Quite simply, when it comes to his post-conviction rehabilitation and legal challenges, Mr. Wood has done everything right. Whatever the outcome, he deserves a fair, final, and objective answer to his good-faith legal claim.

III.

Johnson Applies to the Mandatory Guidelines.

As Justice Sotomayor explains, urgent reasons exist to grant certiorari "[r]egardless of where one stands on the merits." *Brown*, 139 S. Ct. at 16. But the Court should also grant certiorari because the residual clause of § 4B1.2(a)(2) is void for vagueness.

The core of *Johnson*'s holding was that "[t]wo features of the residual clause conspire to make it unconstitutionally vague." *Johnson*, 135 S. Ct. at 2557. First, the residual clause "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* At the same time, courts must determine whether this "judge-imagined abstraction" rises to the level of a "violent felony." *Id.* at 2558. "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony," the residual clause "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* Said another way, the ACCA residual clause's flaw was that it applied the

categorical approach to a risk-based definition. *See Welch v. United States*, 136 S. Ct. 1257, 1262 (2016) ("The vagueness of the residual clause rests in large part on its operation under the categorical approach.").

This is precisely the same analysis § 4B1.2(a)(2) requires. To determine whether an offense falls under § 4B1.2(a)(2), every court of appeals has applied the "ordinary case" test set forth in *James v. United States*, 550 U.S. 192 (2007).[3] Because courts apply the "ordinary case" to both ACCA and § 4B1.2(a)(2), and because it is precisely this "ordinary case" that rendered ACCA unconstitutional, *Johnson* also invalidates § 4B1.2(a)(2).

Simply put, while the *outcome* of *Johnson* was to strike down the ACCA residual clause, its *holding* was that applying the categorical approach to a risk-based definition is unconstitutional. And because courts apply the categorical approach to the risk-based definition of § 4B1.2(a)(2), it too is unconstitutional under *Johnson*.

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[3] *See United States v. Jonas*, 689 F.3d 83 (1st Cir. 2012); *United States v. Mead*, 773 F.3d 429, 432–33 (2d Cir. 2014); *United States v. Hopkins*, 577 F.3d 507, 510 (3d Cir. 2009); *United States v. Carthorne*, 726 F.3d 503, 513-14 (4th Cir. 2013); *United States v. Gonzalez-Longoria*, 831 F.3d 670, 675 n. 4 (5th Cir. 2016) (en banc); *United States v. Stoker*, 706 F.3d 643, 649 (5th Cir. 2013); *United States v. Rogers*, 594 F.3d 517, 521 (6th Cir. 2010), *vacated on other grounds sub nom. Rogers v. United States*, 131 S. Ct. 3018 (2011); *United States v. Scanlan*, 667 F.3d 896, 899 (7th Cir. 2012); *United States v. Ross*, 613 F.3d 805, 807 (8th Cir. 2010); *United States v. Crews*, 621 F.3d 849, 852-53 (9th Cir. 2010); *United States v. Williams*, 559 F.3d 1143, 1148 (10th Cir. 2009); *United States v. Alexander*, 609 F.3d 1250, 1253-1257 (11th Cir. 2010); *United States v. Thomas*, 361 F.3d 653, 660 (D.C. Cir. 2004), *vacated on other grounds sub nom. Thomas v. United States*, 543 U.S. 1111 (2005).

Beckles confirmed this. In ruling that the advisory Guidelines were not subject to void-for-vagueness challenges, the Court made clear that the reason they could not be challenged was precisely because they *were* advisory. The Court pointed out that it had only ever invalidated two kinds of criminal laws as void for vagueness—"laws that define criminal offenses and laws that fix the permissible sentences for criminal offenses." *Id.* (cite) (emphasis deleted). And because the advisory Guidelines "merely guide the district courts' discretion" rather than constraining it, those advisory Guidelines "do not implicate the twin concerns underlying the vagueness doctrine—providing notice and preventing arbitrary enforcement." *Id.* at 894.

As for inviting arbitrary judicial enforcement, *Beckles* made clear that "[t]he *advisory* Guidelines also do not implicate the vagueness doctrine's concern with arbitrary enforcement" because they "*advise* sentencing courts how to exercise their discretion within the bounds established by Congress," rather than fixing bounds that courts must follow. *Beckles*, 137 S. Ct. at 894-895 (emphasis added). In Mr. Beckles's own case, the Court pointed out, "the [district] court relied on the career-offender Guideline merely for advice in exercising its discretion to choose a sentence within those statutory limits." *Id.* at 895. By contrast, the *mandatory* Guidelines expressly "fetter[ed] the discretion of sentencing judges to do what they have done for generations – impose sentences within the broad limits established by Congress." *Mistretta v. United States*, 488 U.S. 361, 396 (1989).

In sum, *Johnson* by its own terms held that the "ordinary case" analysis required by the language of § 924(e)(2)(B) cannot constitutionally be used to fix the bounds constraining a judge's discretion in selecting a sentence. And *Beckles* clarified that *Johnson* could not apply to *advisory* Guidelines precisely due to their advisory nature: they "merely guide," rather than constrain, that discretion. Combined, these cases lead to the conclusion that the residual clause of the mandatory Guidelines is void for vagueness.

CONCLUSION

To relieve the burden on judges, lawyers, the Bureau of Prisons, and petitioners alike, the Court should grant Mr. Wood's petition for a writ of certiorari and resolve the mandatory Guidelines question once and for all.

Respectfully submitted,

Date: May 2, 2019

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APPENDIX A

USCA No. 18-55683

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT LEONARD WOOD, Defendant-Appellant.	No. 18-55683 D.C. Nos. 3:16-cv-01630-L 3:02-cr-00624-L-2 Southern District of California, San Diego ORDER

Before: TROTT and MURGUIA, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX B

USCA No. 18-55712

FILED

FEB 27 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT LEONARD WOOD, AKA Shorty Mac, Defendant-Appellant.	No. 18-55712 D.C. Nos. 3:16-cv-01512-L 3:02-cr-00625-L-2 Southern District of California, San Diego ORDER

Before: TROTT and MURGUIA, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX C

02cr0624-2-MJL
02cr0625-2-MJL

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ROBERT LEONARD WOOD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No.: 02-CR-0624-2-L
02-CR-0625-2-L

ORDER:

(1) DENYING MOTION TO VACATE, SET ASIDE, or CORRECT SENTENCE UNDER 28 U.S.C. 2255, and

(2) DENYING CERTIFICATE OF APPEALABILITY

Petitioner, Robert Leonard Wood ("Petitioner") filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct his sentence. Respondent filed a Response and Opposition to the Motion. The Court has reviewed the record, the submissions of the parties, and the supporting exhibits. For the reasons set forth below, the Court **DENIES** Petitioner's Motion without prejudice.

//

I. BACKGROUND

Petitioner Robert Leonard Wood was charged on March 7, 2002 in two indictments as follows: in case number 02-CR-0624-L Petitioner was charged with three counts of conspiracy to commit murder in violation of 18 U.S.C. § 1959(a)(5), characterized as violent crimes in aid of racketeering ("VCAR"); and in case number 02-CR-0625-L Petitioner was charged with one count of conspiracy to distribute cocaine and cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 846. (Indictment, Case No. 02-CR-0624 [ECF NO. 8]; Indictment, Case No. 02-CR-0625 [ECF NO. 1.])

On February 28, 2003, Petitioner pled guilty to Count One of the indictment in Case No. 02-CR-0624-L and Count One of the indictment in Case No. 02-CR-0625-L and entered a plea agreement. (Plea Agreement Case No. 02-CR-0624 [ECF NO. 53]; Plea Agreement, Case No. 02-CR-0625 [ECF NO 144.]) On July 10, 2003, Petitioner was sentenced by this Court to concurrent sentences of 120 months, three years supervised release, a $1000 fine, and a special assessment of $100 in Case No. 02-CR-0624-L ("the VCAR case"); and 300 months, five years supervised release and a special assessment of $100 in Case No. 02-CR-0625-L ("the drug case"). (Amended Judgment, Case No. 02-CR-0624 [ECF NO. 104]; Amended Judgment, Case No. 02-CR-0625 [ECF NO. 300.])[1]

On July 29, 2003, Petitioner filed a Notice of Appeal. [Notice, Case No. 02-CR-0624 [ECF NO. 94]; Notice, Case No. 02-CR-0625 [ECF NO. 242.]) The Ninth Circuit dismissed Petitioner's appeal upon the determination that he knowingly and voluntarily entered a plea waiver, waiving his right to appeal. *United States v. Wood*, 117 F.App'x 519, 521 (9th Cir. 2004). Petitioner filed his first petition under 28 U.S.C. 2255 in this Court on December 2, 2005. (Mot. [ECF NO. 176.]) On July 24, 2007, this Court dismissed Petitioner's petition as barred by his appellate waiver, and to the extent

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[1]The Judgments were amended for clerical error.

Petitioner's claims were not barred by waiver, the Court denied his claims on the merits. (Order [ECF NO. 224.])

On May 17, 2016, Petitioner filed an application in the Ninth Circuit Court of Appeals for leave to file a second or successive section 2255 motion in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015). *Wood v. United States*, Application, Case No. 16-71500, (9th Cir. May 17, 2016). On June 24, 2016, Petitioner filed the current petition in case numbers 02-CR-0624 and 02-CR-0625 to protect the statute of limitations while the application for leave to file a second or successive section 2255 petition was pending before the Ninth Circuit. [Motion, Case No. 02-CR-0624 [ECF NO. 297]; Motion, Case No. 02-CR-0625 [ECF NO. 689.] On December 22, 2016, the Ninth Circuit granted Petitioner's application for leave to file a second or successive petition. *See Wood v. United States*, C.A. No. 16-71500. This Court issued a briefing schedule on Petitioner's Motion and the Government filed a Response in Opposition on May 19, 2017, followed by Petitioner's Reply on May 22, 2017.

II. DISCUSSION

Under 28 U.S.C. § 2255, a federal prisoner "may move the court which imposed the sentence to vacate, set aside or correct the sentence" on "the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). A prisoner seeking relief pursuant to section 2255 must allege a constitutional, jurisdictional, or otherwise "fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962). It is incumbent on the petitioner to show by a preponderance of the evidence that he is entitled to relief. *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002).

Petitioner contends that his sentence was improperly enhanced under the residual clause of the career offender statute, U.S.S.G. § 4B1.2, which he contends has since been

found to be unconstitutional under *Johnson*. (Mot. at 2). Petitioner argues by analogy that the Armed Career Criminal Act ("ACCA") residual clause held void-for-vagueness in *Johnson* is identical to the "residual clause" in the career offender definition of a "crime of violence" under USSG § 4B1.2(a)(2), therefore the Court must reconsider his sentence without the career offender designation. (*Id.*) Despite the passage of a great deal of time since Petitioner's sentencing, he argues that his claims are not procedurally barred because he could not have raised them prior to *Johnson's* holding. (*Id.* at 16).

The Government objects and contends the Court should dismiss or deny the Petition for six reasons: (1) Petitioner waived his right to collaterally attack his sentence through his plea; (2) Petitioner procedurally defaulted his claim regarding the career offender guidelines calculation because he did not raise this claim on appeal; (3) Petitioner cannot demonstrate that the residual clause in USSG § 4B1.2 was relied upon in his sentencing; (4) Petitioner cannot raise a due process challenge to the application of the advisory or mandatory guidelines after *Beckles v. United States*, 137 S.Ct. 886, 890 (2017); (5) even if *Johnson* allows due process vagueness challenges to mandatory guidelines, it represents a procedural and not substantive rule which does not apply retroactively to seek collateral relief; (6) California Penal Code § 211 remains an enumerated crime of violence independent of the residual clause therefore the Court had an independent basis upon which to find that Petitioner qualified as a career offender. (Oppo at 2).

A. Waiver and Successiveness

As part of his plea agreement, Petitioner waived the right to appeal and to collaterally attack his judgment and sentence under 28 U.S.C. § 2255 unless the Court imposed a sentence in excess of the high end of the guideline range. (Plea Agreement at 14, Case No. 02-cr-0624 [ECF NO. 53]; Plea Agreement at 14, Case No. 02-cr-0625 [ECF NO. 144]). The Court previously found that Petitioner's waiver of his appellate and collateral attack rights was knowing and voluntary, and that none of the potential limitations to the validity of his waiver were applicable. (Order at 3 [ECF NO. 482.]) Petitioners waiver

would therefore appear to foreclose his right to bring this challenge, however the 9th Circuit in *United States v. Torres*, 828 F.3d 1113, 1125 (9th Cir. 2016), held that a defendant's waiver does not bar an appeal if the defendant was sentenced under a Guidelines provision that has since been found to be unconstitutionally vague. Although the reasoning of the Ninth Circuit is sparse in *Torres*, the Court finds that Petitioner's prior waiver does not prohibit him from challenging his sentence to the extent it was enhanced under the now unconstitutional residual clause of § 4B1.2.

As previously noted, Petitioner has likewise overcome the hurdle to filing a second or successive petition pursuant to section 2255 in light of the Ninth Circuit's authorization under 28 U.S.C. § 2255 (h)(2) finding that Petitioner's motion "makes a prima facie showing for relief under *Johnson v. United States*." (*Wood v. United States*, No. 16-71500 (Dec. 22, 2016).) The appellate Court further noted that "*Johnson* announced a new substantive rule that has retroactive effect in cases on collateral review," citing *Welch v. United States*, 136 S.Ct. 1257, 1264-68 (2016). (*Id.*)

B. Procedural Default

A petitioner must first raise his claim on direct appeal before challenging his sentence under § 2255 or he procedurally defaults the claim. *United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir.2003). A procedural default may be overcome and a petitioner may raise the claim in a habeas petition "'only if the defendant can first demonstrate either cause and actual prejudice or that he is actually innocent.' " *United States v. Braswell*, 501 F.3d 1147, 1149 (9th Cir.2007)

The Government argues that Petitioner procedurally defaulted his claim because he did not raise it on appeal and he does not attempt to excuse this default by demonstrating cause and prejudice. (Oppo 12). Nor is it possible for Petitioner to demonstrate cause for his default, in the Government's view, because challenges to sentencing guidelines as unconstitutionally vague were not novel at the time he appealed his sentence, and his attorney should have known that a challenge to the residual clause on vagueness grounds could be raised. (*Id.*) Petitioner has also failed to show he suffered actual prejudice as a

result of the alleged sentencing error according to the Government, and instead he has only alleged that the Court misapplied the sentencing guidelines. (*Id.* 15)

Petitioner claims that his challenge to the residual clause is novel and could not have previously been raised because attacks on the constitutionality of the residual clause had failed until *Johnson,* which explicitly overruled precedent and overturned widespread practices, citing *Reed v. Ross*, 468 U.S. 1, 16 (1984). (Reply 4). Petitioner argues he is serving more time in custody as a result of the enhancement because he was exposed to a sentence range with a low-end of 290 months as a result of the career offender enhancement, but without the enhancement, the low-end exposure would have been 235 months, a difference of almost five years. (*Id.*) The career offender designation thus prejudiced him by exposing him to a higher sentencing range which resulted in a higher sentence.

1. ***Cause***

Cause can be demonstrated by showing that the procedural default is "due to an objective factor that is external to the petitioner and cannot be fairly attributed to him." *Manning v. Foster*, 224 F.3d 1129, 1133 (9th Cir. 2000)(internal quotes omitted). The Supreme Court has excused procedural default on collateral review where (1) the claim was "novel" in a court proceeding, *Reed*, 468 U.S. at 16, (2) the defendant received ineffective assistance of counsel, *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000), or (3) the defendant is actually innocent. *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1932 (2013). A petitioner can demonstrate cause for the failure to pursue a claim if he can show that "the factual or legal basis for a claim was not reasonably available to counsel" at the time of direct appeal. *Murray v. Carrier*, 477 U.S. 478.

Contrary to the Government's position, the Court finds that Petitioner's claim is sufficiently novel to demonstrate cause for his failure to raise it on appeal. A petitioner may demonstrate that a claim is novel if it fits into one of three categories identified by the Supreme Court which represent "a clear break with the past." *Desist v. United States*, 394 U.S. 244, 248 (1969). First, a decision of this Court may explicitly overrule one of

the Supreme Court's precedents. *Reed*, 468 U.S. at 17. Second, a decision may "overtur[n] a longstanding and widespread practice to which the Supreme Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Id.* Finally, "a decision may 'disapprov[e] a practice this Court arguably has sanctioned in prior cases.'" *Id.*

Constitutional challenges to the residual clause had been raised prior to Petitioner's sentencing, and the Ninth Circuit denied those challenges, holding that the residual clause was not void for vagueness. *James v. United States*, 550 U.S. 192, 209 (2007) and *Sykes v. United States*, 564 U.S. 1, 16 (2011). However, *Johnson* overruled *James* and *Sykes,* placing Petitioner's claim squarely within the first of *Reed's* three categories. *See Johnson*, 135 S.Ct at 2563 ("Our contrary holdings in *James* and *Sykes* are overruled.") In addition, the Supreme Court held that *Johnson* was a "new substantive rule that has retroactive effect in cases on collateral review." *Welch*, 136 S.Ct. at 1268.

Where, as here, retroactive effect is given to a case which falls into one of the first two categories, an attorney will have had no reasonable basis to raise the claim where it would undoubtedly meet defeat, instead "the failure of a defendant's attorney to have pressed such a claim before a . . . court is sufficiently excusable to satisfy the cause requirement." *Reed*, 468 U.S. at 17. Therefore, a vagueness challenge to the residual clause of section 4B1.2 was foreclosed at the time of Petitioner's sentence by Supreme Court precedent. *United States v. Savage*, 231 F.Supp. 542, 563 (9th Cir. 2017).

In addition, at the time of petitioner's sentencing and during the time within which he would have appealed, there was a longstanding and widespread practice of courts enhancing sentences under § 4B1.2's residual clause which was overturned by *Johnson*. *See* e.g. *United States v. Park*, 649 F.3d 1175, 1177-78 (9th Cir. 2011) (holding California residential burglary to be a "crime of violence" under the residual clause of § 4B1.2); *United States v. Spencer*, 724 F.3d 1133 (9th Cir. 2013)(holding Hawaii criminal property damage in the first degree was "crime of violence" under residual clause of §

4B1.2). Petitioner's claim is novel under either of the first two categories in *Reed*, therefore, Petitioner has demonstrated cause for his failure to previously raise his claim.

2. ***Prejudice***

To establish "prejudice," Petitioner must demonstrate that he suffered actual prejudice from the claimed violation, meaning it worked to his "actual and substantial disadvantage." *United States v. Braswell*, 501 F.3d 1147, 1149-50 (9th Cir. 2007). "[I]n the ordinary case a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder." *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1347 (2016).

Petitioner was designated as a career offender under U.S.S.G. § 4B1.2 as a result of his prior California robbery conviction, which changed his criminal history score from IV to VI, thereby increasing the applicable sentencing range from a low-end of 235 to a low-end of 292. The Court added 8 months to the low-end of the career offender range as requested by the Government, for a sentence of 300 months. The Court applied the correct Guidelines range in effect at the time of his sentencing, however, if it is determined that Petitioner's sentence was enhanced under the arguably unconstitutional residual clause of section 4B1.2, and all other sentencing factors remained the same, he has demonstrated he suffered actual prejudice as required under *Molina-Martinez* because he is serving a longer term of confinement as a result of the career offender designation.

For the above reasons, the Court finds Petitioner has sufficiently demonstrated cause and prejudice to overcome the procedural default of his claim.

C. Merits

The career offender guidelines increase the base offense level and criminal history category for a defendant whose "instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense" and who "has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1. A "crime of violence" was defined at the time of Petitioner's

sentencing as "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that" –

> (1) has an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*.

U.S.S.G. § 4B1.2(a) (emphasis added).

Courts typically refer to section 4B1.2(a)(1) as the "force" or "elements" clause, and to the first part of section 4B1.2(a)(2) which lists four specific offenses as the "enumerated offenses" clause. *United States v. Molinar*, 881 F.3d 1064, 1067 (9th Cir. 2017). The italicized clause is commonly called the "residual clause." *Id.*

At the time Petitioner was sentenced, the application Note of the Commentary to Section 4B1.1 further refined the definition of "crime of violence" to include the following:

> Murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, *robbery*, arson, extortion, extortionate extensions of credit, and burglary of a dwelling. Other offenses are included as "crimes of violence" is (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e. expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2 Application note 1 (emphasis added).

In *Johnson*, the Supreme Court considered the residual clause of the ACCA, a similar sentence enhancing statute which imposes a fifteen-year minimum prison sentence on anyone who violates 18 U.S.C. § 922(g) and has three prior convictions for either violent felonies or serious drug offenses. *Id.* at 2555; 18 U.S.C. § 924(e)(1). *Johnson*, 135 S.Ct. at 2556. Under the ACCA, there are three definitions for "violent felony," one of which states that a felony that "involves conduct that presents a serious

potential risk of physical injury to another" and is referred to as the residual clause for its catch-all nature. *Id.* 2555-56; § 924(e)(2)(B)(ii). The Court employed the categorical approach and struck down the residual clause as unconstitutionally vague, finding that the language of the residual clause "fails to give ordinary people fair notice of the conduct it punishes" and "invites arbitrary enforcement," thereby violating due process. *Id.* at 2556.

Petitioner argues that the residual clause found to be void-for-vagueness in *Johnson,* mirrors the residual clause in the career offender statute, rendering it unconstitutionally vague as well. He claims that this Court must have relied upon the residual clause and Note 1's list of included offenses when finding that his prior robbery conviction qualified as a "crime of violence" for purposes of enhancing his sentence, because California robbery does not qualify as a "crime of violence" under the force clause or enumerated offenses clause. (Mot. 7-8).

As a primary matter, the Court finds no support in the record for Petitioner's contention that the residual clause served as the basis of his career offender designation to the exclusion of other portions of section 4B1.2. It is Petitioner's burden to prove his claims by a preponderance of the evidence and yet Petitioner has cited to no portion of the record, nor any sentencing documents, to verify his assertion that the residual clause formed the foundation for his enhancement. *Silva*, 279 F.3d at 835. Additionally, the Court finds no merit to Petitioner's assertion that application Note 1 applies exclusively to the residual clause. Recently the Ninth Circuit explained that Note 1 applies to the enumerated offenses clause under the career offender guidelines. *United States v. Givens*, 268 F.Supp. 3d 1108, 1118 (9th Cir. 2017) ("It is . . . clear that the Sentencing Commission . . . intended robbery and the other felonies listed in application note 1 to constitute an expanded list of crimes of violence under the enumerated-offense clause.")

Further support for Note 1's application to the enumerated offenses clause rather than the residual clause appears in the most recent Guidelines themselves. After the decision in *Johnson*, the Sentencing Commission made changes to the career-offender guideline including the removal of the offending residual clause, and the inclusion of the

list of felonies in application Note 1 directly into the enumerated offense clause. *See* U.S.S.G. §4B1.2(a)(2016). As evidenced above, it is clear that Note 1 applies to the enumerated offense clause and not the residual clause as Petitioner claims.

Even if Petitioner could demonstrate that the Court relied upon the residual clause when determining his career offender designation, it would appear from the Supreme Courts holding in *Beckles* that Petitioner's challenge to the residual clause on vagueness grounds is impermissible. *Beckles*, 137 S.Ct. at 888. The *Beckles* court held that the advisory Guidelines, "including § 4B1.2(a)'s residual clause, are not subject to vagueness challenges under the Due Process Clause" because "the advisory Guidelines do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range." *Id.* at 892.

Petitioner contends that *Beckles* does not apply to him because he was sentenced under the mandatory Guidelines in place at the time, and the holding applies only to sentences under the advisory Guidelines. (Supp. Brief. 4). Where guidelines firmly set the sentencing range, as with the mandatory Guidelines, Petitioner claims that void for vagueness attacks are permissible. Indeed, Justice Sotomayor's concurrence in *Beckles* seems to indicate that vagueness challenges against mandatory Guidelines may not be completely foreclosed noting "the Court's adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment . . . during the period in which the Guidelines did 'fix the permissible range of sentences,' … may mount vagueness attacks on their sentences." *Beckles*, 137 S.Ct. at 903 n.4. However, the Supreme Court did not carve this exception to the rule against vagueness challenges to the Guidelines, therefore, this Court finds Petitioner's void-for-vagueness challenge to his sentence is impermissible.

Instead, Petitioner was properly considered a career offender because California Penal Code § 211 qualifies as a "crime of violence" under the enumerated offenses clause

giving the Court an independent basis upon which to rest its sentencing decision. To determine whether a state statute of conviction meets the career offender Guidelines definition of "crime of violence," a court applies the categorical approach as articulated in *Taylor v. United States,* 495 U.S. 575 (1990). Under the categorical approach, a court may only "compare the elements of the statute forming the basis of the defendant's [prior] conviction with the elements of the generic crime." *Descamps v. United States*, 570 U.S. 254 (2013).

Here, the Court must compare California Penal Code section 211 and the federal generic definition of robbery. Under section 211, robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Cal. Penal Code § 211. Under Ninth Circuit authority, "generic robbery" is defined as "aggravated larceny, containing at least the elements of misappropriation of property under circumstances involving immediate danger to the person." *U.S. v Becerril-Lopez*, 541 F.3d 881, 891 (9th Cir. 2008).

In *Molinar*, the Ninth Circuit compared Arizona's armed robbery statute with federal generic robbery statute under the enumerated offenses clause. *United States v. Molinar*, 881 F.3d 1064, 1070 (9th Cir. 2017). In determining that the Arizona's statute qualified as a crime of violence under 4B1.2's enumerated clause, the Court held that "for a state crime to be equivalent to generic robbery it must require property to be taken from a person or a person's presence by means of force or putting in fear." *Id.* After considering the definitions of "force" and "fear" the Court held that "Arizona robbery is coextensive with generic robbery and is thus a crime of violence under Section 4B1.2's enumerated felonies clause." *Id.* at 1075. Similarly, California robbery requires that personal property must be taken from a person or a person's immediate presence, against his will, accomplished by means of force or fear, which renders it coextensive with federal generic robbery. Cal Pen. Code § 211.

Accordingly, the Court finds that Petitioner's prior California Penal Code § 211 robbery conviction qualified as a "crime of violence" under the enumerated offense clause of the career offender statute thereby properly enhancing his sentence. For the above reasons, the Court **DENIES** his claim.

D. CERTIFICATE OF APPEALABILITY

A certificate of appealability is authorized "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet this standard, Petitioner must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Petitioner does not have to show "that he should prevail on the merits. He has already failed in that endeavor." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (internal quotation omitted).

Having reviewed the matter, the Court finds that Petitioner has not made a substantial showing that he was denied a constitutional right and the Court is not persuaded that jurists could disagree with the Court's resolution of his claims or that the issues presented deserve encouragement to proceed further. Therefore, a certificate of appealability is **DENIED** .

E. CONCLUSION

For the foregoing reasons, Petitioner's Motion under section 2255 is **DENIED** without prejudice. Further, the Court **DENIES** a certificate of appealability.

IT IS SO ORDERED

Dated: May 24, 2018

Hon. M. James Lorenz
United States District Judge