No. _____

IN THE SUPREME COURT OF THE UNITED STATES

FREDERICK GARCIA-CRUZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the Ninth Circuit misapplied this Court's "debatable among jurists of reason" standard for a certificate of appealability.

2. Whether the residual clause of the mandatory Sentencing Guidelines at U.S.S.G. § 4B1.2(a)(2) is void for vagueness.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases

Docketed Cases

Federal Statutes

Sentencing Guidelines

Other

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

Petitioner Frederick Garcia-Cruz respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on August 22, 2019.

OPINIONS BELOW

Before the district court, Mr. Garcia-Cruz filed a petition for a writ of habeas corpus under 28 U.S.C. § 2255 challenging his designation as a "career offender" under U.S.S.G. § 4B1.2(a). The district court denied this petition and declined to issue him a certificate of appealability. *See* Appendix A. The court of appeals then denied Mr. Garcia-Cruz's request for a certificate of appealability in an unpublished order. *See United States v. Garcia-Cruz*, No. 17-56117 (9th Cir. Aug. 22, 2019). *See* Appendix B).

JURISDICTION

On August 22, 2019, the court of appeals denied Mr. Garcia-Cruz's request for a certificate of appealability from the denial of his petition for a writ of habeas corpus. *See* Appendix B. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND SENTENCING GUIDELINE INVOLVED

The pertinent Sentencing Guideline, former U.S.S.G. § 4B1.2(a) (1995), 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.

The statute governing certificates of appealability states, in relevant part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

STATEMENT OF FACTS

In 1996, a jury found Mr. Garcia-Cruz guilty of a single count of Aggravated Sexual Abuse under 18 U.S.C. § 2241(a). In calculating his Sentencing Guidelines range, the Presentence Report alleged that Mr. Garcia-Cruz was a career offender under U.S.S.G. § 4B1.1(a) by relying on that offense, as well as his prior convictions for assault with a deadly weapon and assault within a maritime or territorial jurisdiction.

Without the career offender designation, Mr. Garcia-Cruz would have had a Guidelines range of 151-188 months. But *with* the career offender designation, Mr. Garcia-Cruz was placed in Criminal History Category VI, resulting in a Guidelines range of 360 months to life. Thus, the career offender status more than doubled his Guidelines range. At sentencing, the district court then agreed that Mr. Garcia-Cruz was a career offender and imposed a low-end sentence of 360 months.

In 2015, 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. Garcia-Cruz 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. Garcia-Cruz requested that the district court vacate his sentence

under the mandatory Guidelines and resentence him without the career offender enhancement.

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).

In 2017, the district court denied Mr. Garcia-Cruz's habeas petition. *See* Appendix A. The district court found that Mr. Garcia-Cruz's claim "superficially satisfies the requirements of [28 U.S.C. §] 2255(h)(2) in that "*Johnson* announced a new rule of constitutional law," and the Court's decision in *Welch v. United States,* 136 S. Ct. 1257 (2016), deemed that "*Johnson* applies retroactively to cases on collateral review." Appendix A at 5. But on the merits, the district court found that *Beckles* had "declined to determine whether *Johnson* should be extended to the pre-*Booker* mandatory Guidelines." Appendix A at 6. Citing other district court cases, the court held that the right to challenge the mandatory Guidelines was "a logical *extension* of the right recognized in *Johnson*" but not "the same right recognized in

Johnson." Appendix A at 6. Thus, the district court found that "it is not for this Court to determine whether *Johnson* invalidates the residual clause of Section 4B1.2 of the Guidelines in effect at the time of Defendant's sentencing" and denied Mr. Garcia's Cruz's petition. Appendix A at 7. The court also denied Mr. Garcia-Cruz a certificate of appealability. *See* Appendix A at 7.

Mr. Garcia-Cruz 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 multiple district court judges across the country who had concluded that *Johnson* applies directly to the mandatory Guidelines. But the Ninth Circuit denied Mr. Garcia-Cruz's request for a certificate of appealability in a single sentence, stating that he had "not shown that jurists of reason would find it debatable." Appendix B (quotations omitted). This petition for a writ of certiorari follows.

SUMMARY OF THE ARGUMENT

In a series of cases, this Court has defined the lenient standard for a certificate of appealability—that a petitioner need *not* show they would prevail on the merits, but only that the legal issue is debatable among jurists of reason. Here, Mr. Garcia-Cruz pointed to a plethora of district court and circuit court judges who believe that *Johnson* invalidates the residual clause of the mandatory Guidelines. The Ninth Circuit's denial of a certificate of appealability in the face of this judicial disagreement shows that it is grossly misapplying the Court's precedent.

The Court should also grant certiorari on the merits because the question of whether *Johnson* applies to the mandatory Sentencing Guidelines is not going away. The inter-circuit split is permanently entrenched. District and circuit 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. Garcia-Cruz's case presents these precise issues. His 1996 career offender enhancement was triggered by an offense 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. He showed beyond any doubt that this issue is debatable among jurists of reason. And Mr. Garcia-Cruz would prevail on the merits, because, as in *Johnson*, courts applied the "ordinary case" analysis to the residual clause in the mandatory Guidelines at § 4B1.2(a)(2), rendering it void for vagueness. Accordingly the Court should grant Mr. Garcia-Cruz's petition.

REASONS FOR GRANTING THE PETITION

I.

The Courts of Appeals Are Misapplying the Standard for a Certificate of Appealability.

In a series of recent cases, this Court has defined the standard for granting habeas petitioners a "certificate of appealability." *See* 28 U.S.C. § 2253(c). To make a "substantial showing of the denial of a constitutional right" under § 2253(c)(2), a petitioner "need not show that he should prevail on the merits." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). Rather, he need only show the issue presents a "question of some substance"—that is, an issue that (1) is "debatable among jurists of reason," (2) could be "resolved in a different manner" by courts, (3) is "adequate to deserve encouragement to proceed further," or (4) is not "squarely foreclosed by statute, rule or authoritative court decision" or "lacking any factual basis in the record." *Id.* at 893-94 & n.4 (quotations omitted). *See also Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The bar for a certificate of appealability is not high: a court "should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Miller-El*, 537 U.S. at 337. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [the movant] will not prevail." *Id.* at 338. All an applicant need show is that the issues presented were "adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484.

The Ninth Circuit's denial of Mr. Garcia-Cruz's certificate of appealability grossly misapplied this standard. The question at issue in Mr. Garcia-Cruz's case—whether the residual clause of the mandatory Guidelines is void for vagueness—is the very epitome of an issue that is "debatable among jurists of reason." At least two circuits have answered this question in the affirmative.[1] Eight have held to the contrary.[2] And many of these decisions have not been unanimous.[3] It is difficult to imagine a *more* perfect example of an issue that reasonable judges can disagree upon such that it meets the standard for a certificate of appealability.

Indeed, this Court itself has confirmed that the question remains open to debate. In *Beckles*, the Court repeatedly distinguished the advisory Guidelines from

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[1] *See Cross v. United States*, 892 F.3d 288 (7th Cir. 2018); *Moore v. United States*, 871 F.3d 72 (1st Cir. 2017).

[2] *See United States v. Green*, 898 F.3d 315 (3d Cir. 2018); *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017); *United States v. London*, 937 F.3d 502 (5th Cir. 2019); *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017); *Russo v. United States*, 902 F.3d 880 (8th Cir. 2018); *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018); *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018); *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016).

[3] *See Brown*, 868 F.3d at 304 (Gregory, C.J., dissenting); *London*, 937 F.3d at 510 (stating that the Fifth Circuit is on "the wrong side of a split") (Costa, J., concurring); *Chambers v. United States*, 763 F. App'x 514, 519 (6th Cir. 2019) (stating that *Raybon* "was wrong on this issue") (Moore, J., concurring); *Hodges v. United States*, 778 F. App'x 413, 414 (9th Cir. 2019) (stating that "*Blackstone* was wrongly decided" and "the Seventh and First Circuits have correctly decided" the issue) (Berzon, J., concurring); *In re Sapp*, 827 F.3d 1334, 1336-41 (11th Cir. 2016) ("Although we are bound by *Griffin*, we write separately to explain why we believe *Griffin* is deeply flawed and wrongly decided.")) (Jordan, Rosenbaum, Pryor, J., dissenting).

the pre-2005 mandatory Guidelines, noting that "the due process concerns that require notice in a world of mandatory Guidelines no longer apply." 137 S. Ct. at 894 (quotations omitted). As Justice Sotomayor rightly noted, this "at least leaves open the question" of whether the mandatory Guidelines are void for vagueness. 137 S. Ct. at 903 n.4. And the Court recently ordered the Solicitor General to file a response to a petition raising this exact issue. *See Bronson v. United States*, 19-5316 (response requested on Sept. 6, 2019). So the Court's statements and actions alone confirm that the issue remains open and debatable.

But here, despite the obvious disagreement among jurists of reason, the Ninth Circuit defied this Court's well-established precedent by denying Mr. Garcia-Cruz a certificate of appealability. To do so, the Ninth Circuit cited *inter alia* its decision in *United States v. Blackstone*, which held that "*Johnson* did not recognize a new right applicable to the mandatory Sentencing Guidelines on collateral review." 903 F.3d 1020, 1028 (9th Cir. 2018). By citing *Blackstone*, the Ninth Circuit appeared to suggest that its decision in that case rendered this question not "debatable among jurists of reason." This is incorrect, for two reasons.

First, nothing in this Court's precedent suggests that the pool of "jurists of reason" is limited to the judges of a particular circuit. For instance, while judges in the Ninth Circuit may be *bound* by *Blackstone*, this does not mean the legal issue is not *debatable* between judges of the Ninth Circuit and judges of other circuits.[4]

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[4] Other circuit courts have also erroneously concluded that in-circuit precedent foreclosing a void-for-vagueness challenge to the mandatory Guidelines

Indeed, the split between the First and Seventh Circuits on one side and the Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits on the other side confirms the opposite.

Second, even if the pool of "jurists of reason" *were* limited to a particular circuit, an issue remains debatable among judges of that circuit so long as no en banc precedent dictating that conclusion exists. For instance, *Blackstone* was issued by a three-judge panel, and although the petition for rehearing en banc was denied, the judges of the Ninth Circuit could always change their minds and grant rehearing in the future. Indeed, Judge Berzon recently opined in a concurrence that *Blackstone* was "wrongly decided." *Hodges*, 778 F. App'x at 414. So when judges deny a certificate of appealability on the basis of a decision from a three-judge panel, it effectively forecloses petitioners like Mr. Garcia-Cruz from the opportunity to even *request* en banc rehearing, thereby enshrining the three-judge precedent from any further review.

In other words, the Ninth Circuit (and other courts of appeals) are straying far from this Court's well-established standard for a certificate of appealability by placing insurmountable barriers in front of habeas petitioners who deserve to have

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renders an issue not "debatable among jurists of reason." *See, e.g., United States v. Martinez,* 772 F. App'x 766, 767 (10th Cir. 2019) ("Given this binding circuit precedent, no reasonable jurist could debate the district court's conclusion that Mr. Martinez's § 2255 motion was untimely."); *Posey v. United States*, No. 17-6374, 2018 WL 6133751, at *2 (6th Cir. May 7, 2018) (citing in-circuit precedent to hold that "[r]easonable jurists would not debate whether the district court was correct in finding that Posey's motion was time-barred").

their day in court. While the well-intentioned restrictions on a certificate of appealability may make sense to weed out frivolous arguments or overly-litigious petitioners, they do *not* make sense in situations where there is a demonstrated circuit split and an acknowledgment by this Court that the issue remains open. For this reason, the Court should grant Mr. Garcia-Cruz's petition to correct the circuit courts' misapplication of the phrase "debatable among jurists of reason."

II.

The Court Should Resolve Whether the Residual Clause of the Mandatory Guidelines Is Void for Vagueness.

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.[5] 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.

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[5] *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; *Whisby v. United States*, U.S. No. 18-6375; *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; *Cannady v. United States*, U.S. No. 18-7783; *Green v. United States*, No. 18-8435; *Blackstone v. United States*, U.S. No. 18-9368.

2017); *United States v. Roy*, Withdrawal of Appeal in No. 17–2169 (CA1)). On the 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); *United States v. Raybon*, 867 F.3d 625 (6th Cir. 2017); *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018)).

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. Garcia-Cruz'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, the judges of the Eleventh Circuit recently voted to deny a petition for rehearing en banc in a multi-part 27-page slip opinion. *See Lester v. United States*, 921 F.3d 1306 (11th Cir. 2019). One judge wrote separately to explain why the court's prior decisions denying relief to mandatory Guidelines petitioners were correct. *See id.* at 1307-17 (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 1317-28 (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 1328-33 (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 1331. 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 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.[6] With

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[6] *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).

over one thousand mandatory Guidelines cases still pending, this means that it 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." *S. Pac. Transp. Co. v. Interstate Commerce Com.,* 871 F.2d 838, 848 (9th Cir. 1989).

III.

Mr. Garcia-Cruz's Case Squarely Presents These Issues.

Mr. Garcia-Cruz's case squarely presents the issues in need of resolution here. He was sentenced under the mandatory Guidelines in 1996. His career offender enhancement was triggered by a conviction that *only* qualifies as a "crime of violence" under the residual clause. He preserved his legal claims at every stage of litigation. All of his petitions and appeals were timely filed. He presented more than enough evidence of judicial disagreement to qualify for a certificate of appealability. There is nothing in Mr. Garcia-Cruz's case to distract this Court from resolving the questions presented here: whether the courts of appeals are misapplying the certificate-of-appealability standard and whether the residual clause of the mandatory Guidelines is void for vagueness. Whatever the outcome, he deserves a fair, final, and objective answer to his good-faith legal claim.

IV.

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).[7] 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*.

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

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[7] *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.*, 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, 1253-57 (11th Cir. 2010); *United States v. Thomas*, 361 F.3d 653, 660 (D.C. Cir. 2004), *vacated on other grounds sub nom.*, 543 U.S. 1111 (2005).

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 894-95 (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 discGarretion 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

For these reasons, Mr. Garcia-Cruz respectfully requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

Date: November 19, 2019

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. FREDERICK GARCIA-CRUZ, Defendant.	Case No.: 96cr1908-MMA *Related Case No.: 16cv1508-MMA* **ORDER DENYING DEFENDANT'S MOTION TO VACATE UNDER 28 U.S.C. § 2255** [Doc. No. 110]

On March 17, 1998, the Court sentenced Defendant Frederick Garcia-Cruz as a career offender to a term of 360 months imprisonment. *See* Doc. No. 74. Defendant appealed his conviction and sentence, alleging ineffective assistance of trial counsel. *See* Doc. No. 76. The United States Court of Appeals for the Ninth Circuit dismissed the appeal, indicating that Defendant's claims were not suitable for direct review. *See* Doc. No. 83. On April 13, 2000, Defendant, proceeding *pro se*, sought collateral review by filing a motion in this Court to vacate, set aside, or otherwise correct his sentence pursuant to 28 U.S.C. § 2255, raising six grounds for relief. *See* Doc. No. 90. On April 28, 2000, the Court denied Defendant's 2255 motion in all respects. *See* Doc. No. 106. Both this Court and the circuit court denied Defendant's request for a certificate of appealability. *See* Doc. Nos. 108, 109.

Defendant has filed a second or successive motion pursuant to Section 2255, proceeding through counsel, challenging his classification as a career offender under the United States Sentencing Guidelines in light of *Johnson v. United States*, 576 U.S. ---, 135 S. Ct. 2551 (2015). *See* Doc. No. 110. On January 24, 2017, the Ninth Circuit granted Defendant's application for authorization to file a second or successive 2255 motion, finding that Defendant made a prima facie showing for relief under *Johnson*. *See* Doc. No. 116 (citing *Welch v. United States*, 136 S. Ct. 1257, 1264-68 (2016) (*Johnson* announced a new substantive rule that has retroactive effect in cases on collateral review)). The government filed a response to Defendant's motion, to which Defendant replied. *See* Doc. Nos. 117, 118. For the reasons set forth below, the Court **DENIES** Defendant's 2255 motion.

BACKGROUND

On April 19, 1995, while incarcerated at the Metropolitan Correctional Center in San Diego, California, Defendant placed his cellmate in a headlock, threatened to break his neck, and forcibly sodomized him. *See* Doc. No. 106 at 3.[1] On June 6, 1997, a jury found Defendant guilty of one count of aggravated sexual abuse, in violation of 18 U.S.C. § 2241(a). *See* Doc. No. 47.

The Court sentenced Defendant in accordance with the Presentence Report and United States Sentencing Guidelines in effect at the time the offense occurred. *See* U.S.S.G. § 1B1.11(b)(1). At that time, the Sentencing Guidelines were mandatory. *See United States v. Booker*, 543 U.S. 220, 245 (2005) (rendering previously mandatory sentencing guidelines advisory). Based on the applicable Guidelines provisions, Defendant's conviction for aggravated sexual abuse established a Base Offense Level of 27. *See* U.S.S.G. § 2A3.1(a) (1995 Ed.). The offense level was increased to 29 because Defendant's victim was in the custody of the Bureau of Prisons at the time of the offense.

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[1] Citations to documents in the record refer to the pagination assigned by the CM/ECF system.

See id. § 2A3.1(b)(3). With Defendant's criminal history category of VI, this established a Guidelines range of 151 to 188 months imprisonment. *See id.* § 5C1.1(f).

The Court next determined that Defendant qualified as a career offender, based on the instant conviction and his prior felony convictions for crimes of violence. *See id.* § 4B1.1. As such, the Court increased his offense level to 37. *See id.* With a criminal history category of VI, this established an enhanced Guidelines range of 360 months to life imprisonment. *See id.* § 5C1.1(f). The Court sentenced Defendant at the low end of the range to a term of 360 months imprisonment. *See* Doc. No. 74.

Defendant now moves to vacate and correct his sentence, arguing that after the Supreme Court's holding in *Johnson* the instant conviction no longer qualifies as a crime of violence under the residual clause of Section 4B1.2 of the Guidelines.[2] The government opposes Defendant's motion. The government argues, *inter alia*, that *Johnson*'s holding does not extend to the residual clause of the Guidelines, and even if it did, Defendant's conviction for aggravated sexual assault remains a crime of violence.

DISCUSSION

1. Legal Standard

If a defendant in a federal criminal case collaterally challenges his conviction or sentence, he must do so pursuant to Title 28, section 2255. *Tripati v. Henman*, 843 F.2d 1160, 1162 (9th Cir. 1988). A court may grant relief to a defendant who challenges the imposition or length of his incarceration on the ground that: (1) the sentence was imposed

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[2] The version of Section 4B1.2 in effect at the time of Defendant's sentencing provided as follows:

> The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that--(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) 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(1) (1995 Ed.). The residual clause is italicized. Section 4B1.2 was amended in November 2016. The current version eliminated the residual clause in light of the Supreme Court's holding in *Johnson*.

in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a).

A court may grant relief to a defendant on a second or successive 2255 motion only if the defendant shows: "1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h).

The circuit court's determination that a defendant has made a prima facie showing for relief does not preclude the district court from ultimately denying a defendant's motion for failing to satisfy the statutory requirements for filing a second or successive motion.[3] *See United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164 (9th Cir. 2000). "[U]nder section 2244(b)(4), a district court must conduct a thorough review of all allegations and evidence presented by the prisoner to determine whether the motion meets the statutory requirements for the filing of a second or successive motion." *Id.* at 1165. Section 2244(b)(4) provides that "[a] district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section." 28 U.S.C. § 2244(b)(4).

2. Analysis

In this case, because his second or successive motion is not based upon newly discovered evidence, Defendant must demonstrate "that the claim relies on a new rule of

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[3] The Court notes that the Ninth Circuit granted Defendant's application to file the instant motion several months prior to the Supreme Court issuing its ruling *Beckles v. United States*, 137 S.Ct. 886, 896 (2017).

constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2244(b)(2)(A); § 2255(h)(2). Defendant claims his conviction for aggravated sexual assault does not qualify as a predicate offense under the career offender provisions of the Guidelines in light of *Johnson*'s holding that the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B) ("ACCA"), was void for vagueness, and *Welch*'s holding that *Johnson* applies retroactively to cases on collateral review. Defendant's claim superficially satisfies the requirements of Sections 2255(h)(2) and 2244(b)(4). *Johnson* announced a new rule of constitutional law and *Welch* explicitly made it retroactive to cases on collateral review. *Johnson*'s rule was previously unavailable to Defendant for use in his initial 2255 motion. Defendant has presented a sufficient legal basis for his claim, such that he has satisfied the statutory prerequisite for filing a second or successive motion. The Court turns to the merits of Defendant's claim.

In *Johnson*, the Supreme Court held the residual clause in the definition of a "violent felony" in the ACCA to be unconstitutionally vague and a violation of the Due Process Clause of the Fifth Amendment. 135 S. Ct. at 2557. Defendant's case is distinguishable because he was not sentenced under the ACCA's residual clause. As explained above, he was sentenced based on the career offender enhancement provision of the Sentencing Guidelines. Nonetheless, Defendant argues that *Johnson*'s holding is applicable, because the ACCA's residual clause is identical in language to Section 4B1.2's former residual clause.

On March 6, 2017, the Supreme Court ruled that *Johnson*'s holding does not extend to the Sentencing Guidelines, in so far as "the *advisory* Guidelines are not subject to vagueness challenges under the Due Process Clause." *Beckles v. United States*, 137 S.Ct. 886, 896 (2017) (emphasis added). However, once again, Defendant's case is distinguishable because he was sentenced prior to the Supreme Court's holding in *Booker*. At that time, the Sentencing Guidelines were still mandatory.

Beckles does not directly control Defendant's motion, but this fact offers Defendant no relief. Defendant contends that the Due Process Clause prohibits enhancing his mandatory Guidelines range pursuant to the former residual clause of Section 4B1.2, because that clause is void for vagueness. *Johnson* did not establish that rule, the Supreme Court expressly declined to extend *Johnson* to the advisory Guidelines, s*ee Beckles*, 137 S.Ct. at 896, and likewise declined to determine whether *Johnson* should be extended to the pre-*Booker* mandatory Guidelines, *see id.* at 903 n.4 (2017) (Sotomayor, J., concurring) ("That question is not presented by this case and I, like the majority, take no position on its appropriate resolution.").

The Court agrees with its sister courts who have determined that claims such as Defendant's do not involve "a mere application of *Johnson* but rather require[] a new rule extending *Johnson*." *Hirano v. United States*, No. 16-00686 ACK-KJM, 2017 U.S. Dist. LEXIS 94989, at *19 (D. Haw. June 20, 2017) (citing *United States v. Russo*, No. 8:03CR413, 2017 U.S. Dist. LEXIS 63875, 2017 WL 1533380, at *3 (D. Neb. Apr. 27, 2017) (quoting *Donnell v. United States*, 826 F.3d 1014, 1016 (8th Cir. 2016), which denied a § 2255 motion requiring an extension of *Johnson* to the advisory guidelines); *see also Hodges v. United States*, Case No. C 16-15621JLR, 2017 U.S. Dist. LEXIS 67694, 2017 WL 1652967, at *3 (W.D. Wash. May 2, 2017) (denying 2255 motion for career offender sentence given pursuant to the mandatory guidelines)); *see also United States v. Beraldo*, No. 3:03-cr-00511-AA, 2017 U.S. Dist. LEXIS 104050, at *4 (D. Or. July 5, 2017) ("The right asserted by defendant is the right not to be subjected to a sentence enhanced by a vague mandatory sentencing guideline. Particularly in view of the *Beckles* Court's statements about the differences between mandatory and advisory sentencing guidelines, that right is a logical *extension* of the right recognized in *Johnson*. But after *Beckles*, it is doubtful that right is the same right recognized in *Johnson*." (emphasis added)).

In sum, Defendant's claim arises out of an extension, not an application, of the rule announced in *Johnson*. The authority to extend *Johnson*'s rule in a manner that would

implicate cases on collateral review lies solely within the province of the Supreme Court. *See* 28 U.S.C. § 2255(h)(2) ("a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court"). As such, it is not for this Court to determine whether *Johnson* invalidates the residual clause of Section 4B1.2 of the Guidelines in effect at the time of Defendant's sentencing. Accordingly, the Court **DENIES** Defendant's motion.[4]

CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A defendant must obtain a certificate of appealability before pursuing any appeal from a final order in a Section 2255 proceeding. *See* 28 U.S.C. § 2253(c)(1)(B). Because Defendant has not made a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and because the Court finds that reasonable jurists would not debate the denial of Defendant's motion, the Court declines to issue a certificate of appealability. *Slack v. McDaniel*, 529 U.S. 473, 483 (2000), superseded on other grounds by 28 U.S.C. § 2253(c)(2); *see also Mendez v. Knowles*, 556 F.3d 757, 771 (9th Cir. 2009).

CONCLUSION

Based on the foregoing, the Court **DENIES** Defendant's 2255 motion. The Court **DECLINES** to issue a certificate of appealability. The Clerk of Court is instructed to enter judgment in accordance herewith and close the related civil case.

IT IS SO ORDERED.

DATE: July 31, 2017

HON. MICHAEL M. ANELLO
United States District Judge

[4] The Court declines to hold an evidentiary hearing in this case because the motion and record conclusively demonstrate that Defendant is not entitled to relief. *See* 28 U.S.C. § 2255(b); *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984) (citing *United States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir.1980)).

APPENDIX B

FILED

AUG 22 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. FREDERICK GARCIA-CRUZ, Defendant-Appellant.	No. 17-56117 D.C. Nos. 3:16-cv-01508-MMA 3:96-cr-01908-MMA-1 Southern District of California, San Diego ORDER

Before: SCHROEDER and PAEZ, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not shown that "jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Blackstone*, 903 F.3d 1020, 1027-28 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2762 (2019).

Any pending motions are denied as moot.

DENIED.