No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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JAMES LACKEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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## QUESTION 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.

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IN THE SUPREME COURT OF THE UNITED STATES

JAMES LACKEY,
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- v. -

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 James Lackey 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. Lackey 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. Lackey's request for a certificate of appealability in an unpublished order. *See United States v. Lackey*, No. 18-55576 (9th Cir. Aug. 22, 2019). *See* Appendix B.

## JURISDICTION

On August 22, 2019, the court of appeals denied Mr. Lackey'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) (1993), 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 1993, a jury convicted Mr. Lackey of one count of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) and one count of using a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). At sentencing, the district court applied an enhancement to Mr. Lackey's sentence under USSG § 4B1.1, relying on Mr. Lackey's prior convictions for first-degree burglary under California Penal Code § 459 and robbery under California Penal Code § 211 to find that he was a "career offender."

Without the career offender designation, Mr. Lackey would have had a Guidelines range of 110-137 months. But *with* the career offender designation, Mr. Lackey was placed in Criminal History Category VI, resulting in a Guidelines range of 262-300 months, or nearly twice as high. At sentencing, the district court agreed that Mr. Lackey was a career offender and imposed a sentence of 300 months, plus 60 months for the § 924(c) conviction, for a total sentence of 360 months, or 30 years.

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. Lackey 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. Lackey 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 2018, the district court denied Mr. Lackey's habeas petition. *See* Appendix A. The district court found that Mr. Lackey's claim had not been procedurally defaulted. *See* Appendix A at 3-4. But the district court concluded that "the Supreme Court did not determine whether its holding in Johnson should be extended to the mandatory Guidelines pre-Booker." Appendix A at 5. Accordingly, "this Court does not agree that Johnson applies to Petitioner's challenge to the language of the mandatory Guidelines." Appendix A at 5. The district court also declined to issue Mr. Lackey a certificate of appealability, finding that "no issues are debatable among jurists of reason and no issues could be resolved in a different manner." Appendix A at 8.

Mr. Lackey 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 out that at least one circuit court and multiple district courts had granted *Johnson* relief to defendants who, like Mr. Lackey, were sentenced under the mandatory Guidelines. But the Ninth Circuit denied Mr. Lackey'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. Lackey 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. Lackey's case presents this precise issue. His 1993 career offender enhancement was triggered by offenses that *only* qualify as "crimes of violence" under the residual clause of § 4B1.2(a)(2) pursuant to binding Ninth Circuit law. He preserved his legal claims and filed them timely at every stage of litigation. And Mr. Lackey 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. Lackey'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. Lackey's certificate of appealability grossly misapplied this standard. The question at issue in Mr. Lackey'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 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

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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).

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. Lackey 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 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").

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. Lackey 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 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. Lackey'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 v. United States*, 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. Lackey'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 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.[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. Lackey's Case Squarely Presents This Issue.

Mr. Lackey's case squarely presents the issue in need of resolution. He was sentenced under the mandatory Guidelines in 1993. His career offender enhancement was triggered by two convictions that Ninth Circuit law hold may *only* qualify as "crimes 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. Lackey's case to distract this Court from resolving once and for all the mandatory Guidelines question left open by *Beckles*. 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 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

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

Respectfully submitted,

Date: November 20, 2019

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# APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES LACKEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No.: 16cv0892 JAH
Criminal No.: 93cr0821 JAH

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

Petitioner James Lackey moves this Court to vacate and correct his sentence under 28 U.S.C. section 2255. Respondent opposes the motion. After a thorough review of the record and the parties' submissions, and for the reasons set forth below, this Court DENIES Petitioner's motion.

## BACKGROUND

On December 6, 1993, a jury convicted Petitioner of one count of armed bank robbery in violation of 18 U.S.C. section 2113(a) and (d) and one count of using a firearm during a crime of violence in violation of 18 U.S.C. section 924(c). On February 24, 1994, upon finding Petitioner qualified as a career offender, the Hon. Irma E. Gonzalez sentenced him to 300 months in prison on count 1 and 60 months on count 2, to run consecutively, followed by supervised release for 5 years on count 1 and 3 years on count 2 to run concurrently.

Petitioner appealed his conviction, and the Ninth Circuit Court of Appeals affirmed. Petitioner filed a document entitled "Ex Parte Motion Requesting this Court's Directive Instructions; Referencing the Filing of a Late Section 2255 motion" which Judge Gonzalez construed as a motion to vacate under section 2255 and denied. Petitioner sought reconsideration of the order which Judge Gonzalez granted and provided Petitioner an opportunity to file an amended motion pursuant to section 2255. Judge Gonzalez denied the motion and Petitioner appealed. The Ninth Circuit denied Petitioner's motion for a certificate of appealability.

On April 12, 2016, Petitioner, appearing *pro se*, filed a motion seeking relief under section 2255, and later, sought to amend the motion through counsel. Noting Petitioner filed an application for leave to file a second or successive petition with the Ninth Circuit, this Court stayed the matter until the Ninth Circuit issued its decision. The Ninth Circuit granted the application and directed this Court to proceed on Petitioner's amended motion filed on June 3, 2016. This Court lifted the stay of the proceedings and set a briefing schedule on the amended motion. Respondent filed an opposition and Petitioner filed a reply. Thereafter, Petitioner filed supplemental briefing.

## LEGAL STANDARD

A section 2255 motion may be brought to vacate, set aside or correct a federal sentence on the following grounds: (1) the sentence "was imposed 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).

## DISCUSSION

Petitioner moves this Court to vacate and correct his sentence under section 2255 based upon the Supreme Court's decision in Johnson v. United States, ___, U.S. ___, 135 S.Ct. 2551 (2015). He asserts, based upon the ruling in Johnson, he is not a career offender because his conviction for first degree burglary under California Penal Code section 459 is not a crime of violence, his conviction for robbery under California Penal Code section

211 is not a crime of violence and his conviction for armed bank robber under 18 U.S.C. section 2113(a) does not qualify as a crime of violence. He further argues his armed bank robbery conviction does not qualify as a crime of violence under 18 U.S.C. section 924(c).

In opposition, Respondent argues the motion should be dismissed for procedural default because Plaintiff failed to raise this argument in his appeal to the Ninth Circuit and as untimely because it was filed beyond the one year limitations period. Respondent further argues the motion is without merit because Johnson does not apply to collateral cases challenging federal sentences enhanced under the residual clause of section 4B1.2(a)(2) and armed bank robbery remains a violent felony post Johnson.

In reply, Petitioner maintains any procedural default is excused by cause and prejudice because his claim was not reasonably available to him at the time of sentencing and additional custodial time caused by an erroneous sentencing enhancement is prejudicial. He further argues his petition, which was filed within a year of the Supreme Court's decision in Johnson is timely, and he should prevail on the merits of his claim because Johnson retroactively applies to the guidelines.

Petitioner also filed supplemental briefing following the Supreme Court's decision in Beckles v. United States, ___ U.S. ___, 137 S.Ct 886 (2017) and argues the decision does not foreclose his motion. He also filed supplemental briefing following the decision in Sessions v. Dimaya, ___ S.Ct. ___, 2018 WL 1800371 (2018) in support of his argument that his conviction for using a firearm during a crime of violence under 18 U.S.C. section 924(c) must be vacated.

**I. Procedural Bar**

A federal prisoner who fails to raise a claim on direct appeal procedurally defaults the claim and must demonstrate cause and prejudice or actual innocence to obtain relief under section 2255. Bousley v. United States, 523 U.S. 614, 622 (1998).

Respondent argues Petitioner did not argue that his convictions for federal armed bank robbery or for California robbery were not crimes of violence for the purpose of

qualifying as a career offender in his appeal to the Ninth Circuit. Respondent further argues Petitioner fails to show cause and prejudice for his procedural default.

Petitioner maintains any procedural default is excused by cause and prejudice because his claim was not reasonably available to him at the time of sentencing and additional custodial time caused by an erroneous sentencing enhancement is prejudicial, and, alternatively, he can show actual innocence in regards to the section 924 claim.

A petitioner may demonstrate cause if his "constitutional claim is so novel that its legal basis is not reasonably available to counsel." Reed v. Ross, 468 U.S. 1, 16 (1984). Prior to the Supreme Court's ruling in Johnson, vagueness challenges to the residual clause of the Armed Career Criminal Act ("ACCA") were not reasonably available. Similarly, the possible extension of the reasoning of Johnson to the guidelines' similar language was not reasonably available. As such, Petitioner demonstrates cause.

Petitioner also demonstrates prejudice because an application of an incorrect Guidelines range and sentencing affects a defendant's substantial rights. Molina-Martinez v. United States, 136 S. Ct. 1338, 1346-47 (2016); United States v. Bonilla-Guizar, 729 F.3d 1179, 1188 (9th Cir. 2013).

**II. Timeliness**

Respondent argues Petitioner is barred by the one year statute of limitations. A motion filed under section 2255 must be filed within a year of

> (1) the date on which the judgment of conviction becomes final;
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

Plaintiff contends his motion is timely because it was filed within a year of the decision in Johnson, which he asserts recognized that the language of the residual clause was unconstitutionally vague.

**A. Guidelines**

In Johnson, the Supreme Court held that the "residual clause" of the ACCA, which authorized a sentence enhancement based on a finding that a defendant's prior conviction "present[ed] a serious potential risk of physical injury to another," was unconstitutionally vague and could not be relied upon to enhance a sentence. 135 S.Ct. 1557. The Court determined the decision in Johnson was substantive and has retroactive effect on collateral review in Welch v. United States, ___ U.S. ___, 136 S.Ct. 1257 (2016). In Beckles, the Supreme Court addressed the question of whether the holding in Johnson applies to the residual clause of section 4B1.2(a) of the guidelines which contains the same language as the ACCA residual clause. The Court determined the residual clause of section 4B1.2(a) is not void for vagueness, reasoning the Guidelines are merely advisory, guiding a court's discretion, and do not implicate vagueness concerns of notice and preventing arbitrary enforcement. 137 S.Ct. at 892 - 895. Petitioner contends Beckles is not applicable to his motion because he was sentenced when the Guidelines were mandatory. He contends his sentence is unconstitutional under the holding of Johnson.

The Court agrees the holding in Beckles does not apply to Petitioner's motion because he was sentenced prior to the decision in United States v. Booker, 543 U.S. 220 (2005), which determined the Guidelines were advisory. Contrary to Petitioner's contention, the Supreme Court did not determine whether its holding in Johnson should be extended to the mandatory Guidelines pre-Booker. See Beckles, 137 S.Ct. at 896 n.4 (Sotomayor, J. concurring) ("That question is not presented by this case and I, like the majority take no position on its appropriate resolution"). The holding in Beckles clearly relies upon the advisory nature of the Guidelines. As such, this Court does not agree that Johnson applies to Petitioner's challenge to the language of the mandatory Guidelines. Nearly all the courts in the Ninth Circuit addressing the issue have determined that

extending the reasoning of Johnson to the sentencing enhancements of the pre-Booker Guidelines is a new rule not recognized by the Supreme Court in Johnson. See United States v. Gildersleeve, 2017 WL 5895135 (D.Or. November 2017); United States v. Patrick, 2017 WL 4683929 (D.Or. October 2017); United States v. Colasanti, 282 F.Supp.3d 1213 (D.Or. September 2017) (Finding the right recognized in Johnson is limited to the ACCA's residual clause); United States v. Garcia-Cruz, 2017 WL 3269231 (S.D.Cal. August 2017); United States v. Beraldo, 2017 WL 2888565 (D.Or. July 2017) (Finding the right asserted by the petitioner has not been recognized by the Supreme Court); Hirano v. United States, 2017 WL 2661629 (D. Hawaii June 2017) (Determining the petitioner's claim for relief from sentencing enhancements requires a new rule that must come from the Supreme Court); Hodges v. United States, 2017 WL 1652967 (W.D.Wash. May 2017). This Court agrees with the sound reasoning of these district courts. Petitioner seeks to extend the rule in Johnson which must come from the Supreme Court. Accordingly, Johnson is not applicable and Petitioner's motion is untimely.

**B. Section 924(c)**

Petitioner maintains his conviction for using a firearm during a "crime of violence" under 18 U.S.C. section 924(c) must be vacated because his conviction for armed bank robbery does not qualify as a crime of violence under the statute. Section 924(c) defines a "crime of violence" as an offense that is a felony and

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). Courts generally refer to clause (A) as the "force clause" and to clause (B) as the "residual clause." See United States v. Gutierrez, 876 F.3d 1254, 1256 (9th Cir. 2017).

Petitioner argues the definition of crime of violence in the residual clause of section 924(c) is identical to the provision of 18 U.S.C. section 16 the Ninth Circuit found

unconstitutionally vague in Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015) after Johnson. He further argues the "force clause" of the statute is identical to the force clause of the Career Offender Guidelines.

Respondent argues Johnson does not invalidate section 924(c) because the Court made clear in its decision that the reach of Johnson is limited. Respondent further argues section 924(c) does not suffer from the same flaws as the ACCA's residual clause and the holding of Dimaya is not applicable here.

In his supplement briefing filed following the Supreme Court's decision in Sessions v. Dimaya, Petitioner argues the Supreme Court rejected the arguments asserted by Respondent here in the context of section 16(b) and did not limit its holding to section 16(b). Petitioner further asserts the dissent explicitly acknowledged the holding called into question convictions under the residual clause of section 924(c).

The Supreme Court in Johnson limited the application of its holding to the residual clause of the ACCA. Johnson, 135 S.Ct. at 2563. ("Today's decision does not call into question application of the Act to...the remainder of the Act's definition."). As such, Johnson is not applicable to Petitioner's conviction under section 924(c) and his petition is untimely.

Additionally, in United States v. Wright, the Ninth Circuit held that armed bank robbery under 18 U.S.C. section 2113(a) and (d) qualifies as a crime of violence under 18 U.S.C. section 924(c)(3) "because one of the elements of the offense is a 'taking by force and violence or by intimidation'." 215 F.3d 1020, 1028 (9th Cir. 2000). Following the decision in Johnson, the Ninth Circuit has repeatedly determined no intervening authority has overruled Wright and it remains controlling precedent. See United States v. Cross, 691 Fed.Appx. 312 (9th Cir. 2017); United States v. Pritchard, 692 Fed.Appx. 349 (9th Cir. 2017); United States v. Jordan, 680 Fed.Appx. 634 (9th Cir. 2017). On February 1, 2018, the Ninth Circuit, again determined armed bank robbery under section 2113(a) and (d) qualifies as a crime of violence under section 924(c) in United States v. Watson. 881 F.3d 782 (9th Cir. 2018). The court in Watson utilized the categorical approach in making its

determination that armed bank robbery qualified as a crime of violence under the force clause. The categorical approach compares the elements of the statutory offense to the generic definition of a crime of violence and determines whether the offense matches or is broader than the generic definition. See Mathis v. United States, ___ U.S. ___, 136 S.Ct. 2243, 2248 (2016); United States v. Piccolo, 441 F.3d 1084, 1086 (9th Cir. 2006). The court reasoned that a conviction for armed bank robbery requires proof of all the elements of unarmed bank robbery, and therefore, armed bank robbery does not require conduct that involves less force than unarmed bank robbery. Watson, 881 at 786. Accordingly, Petitioner's argument that his conviction under section 924(c) must be vacated because his conviction for armed bank robbery does not qualify as a crime of violence is without merit.

**CERTIFICATE OF APPEALABILITY**

Pursuant to Rule 11 of the Rules following 28 U.S.C. section 2254, a district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant" in Section 2255 cases such as this. A habeas petitioner may not appeal the denial of a Section 2255 habeas petition unless he obtains a certificate of appealability from a district or circuit judge. 28 U.S.C. § 2253(c)(1)(B); see also United States v. Asrar, 116 F.3d 1268, 1269-70 (9th Cir. 1997) (holding that district courts retain authority to issue certificates of appealability under AEDPA). A certificate of appealability is authorized "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 threshold showing, a petitioner must show that: (1) the issues are debatable among jurists of reason, (2) that a court could resolve the issues in a different manner, or (3) that the questions are adequate to deserve encouragement to proceed further. Lambright v. Stewart, 220 F.3d 1022, 1025-26 (9th Cir. 2000) (citing Slack v. McDaniel, 529 U.S. 473 (2000)).

Based on this Court's review of the record, this Court finds no issues are debatable among jurists of reason and no issues could be resolved in a different manner. This Court further finds that no questions are adequate to deserve encouragement to proceed further. Therefore, Petitioner is not entitled to a certificate of appealability.

## CONCLUSION AND ORDER

Based on the foregoing, IT IS HEREBY ORDERED:

1. Petitioner's motion to vacate, set aside or correct his sentence is **DENIED**; and

2. Petitioner is **DENIED** a certificate of appealability.

DATED: April 30, 2018

JOHN A. HOUSTON
United States District Judge

# APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 22 2019

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

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|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>JAMES A. LACKEY,<br><br>Defendant-Appellant. | No. 18-55576<br><br>D.C. Nos. 3:16-cv-00892-JAH<br>3:93-cr-00821-JAH-1<br>Southern District of California,<br>San Diego<br><br>ORDER |

Before: SCHROEDER and PAEZ, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) 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); *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018).

Any pending motions are denied as moot.

**DENIED.**