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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 30 2018

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DARRELL SAFI DONAT,

Defendant-Appellant.

No. 17-56169

D.C. No. 2:16-cv-04396-TJH
Central District of California,
Los Angeles

ORDER

Before: NGUYEN and OWENS, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 5) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

United States District Court
Central District of California
Western Division

DARRELL SAFI DONAT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CV 16-04396 TJH
CR 05-00458 FMC

Order

The Court has considered the Ninth Circuit Court of Appeals's remand for the limited purpose of granting or denying a certificate of appealability.

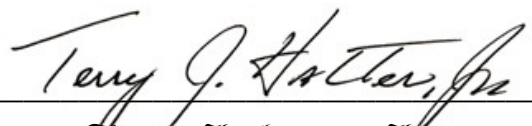
This Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Such a showing requires the petitioner to "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (alterations in original, emphasis omitted). Petitioner has not made a substantial showing of the denial of a constitutional right under any of the above bases.

1 Accordingly,

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3 **It is Ordered** that the District Court declines to issue a certificate of
4 appealability.

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6 **It is Further Ordered** that the Clerk of Court shall convey a copy of this
7 order to the Ninth Circuit Court of Appeals.

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9 Date: September 25, 2017

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11 **Terry J. Haller, Jr.**
12 **Senior United States District Judge**
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United States District Court
Central District of California
Western Division

DARRELL SAFI DONAT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CV 16-04396 TJH
CR 05-00458 FMC

Order

JS-6

The Court has considered Petitioner Darrell Safi Donat's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 and the Government's motion to dismiss, together with the moving and opposing papers.

Petitioner challenged his sentence, contending that *Johnson v. United States*, 135 S.Ct. 2551 (2015), applied to the identically-worded "residual clause" in the career offender definition of a "crime of violence" in U.S.S.G. § 4B1.2(a)(2).

On March 6, 2017, the Supreme Court issued its decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), holding that the advisory Sentencing Guidelines are not

1 subject to a due process vagueness challenge. 137 S. Ct. at 895. The Court held that
2 unlike the Armed Career Criminal Act, which was subject to the Court's decision in
3 *Johnson*, the advisory Sentencing Guidelines "merely guide the exercise of a court's
4 discretion in choosing an appropriate sentence within the statutory range." *Beckles*, 137
5 S. Ct. at 892. Indeed, on this basis, the Supreme Court held that § 4B1.2(a)(2)
6 specifically was not void for vagueness. *Beckles*, 137 S. Ct. at 895. As a result,
7 Petitioner's motion is foreclosed by *Beckles*.

8 Petitioner argues that "because *Beckles* relied on the advisory nature of the
9 Sentencing Guidelines, and because" Petitioner's sentencing occurred prior to
10 *Kimbrough*, 552 U.S. 85 (2007), *Gall*, 552 U.S. 38 (2007), and *Carty*, 465 F.3d 976
11 (9th Cir. 2006) "— at a time when the Supreme Court and Ninth Circuit had yet to
12 delineate the contours of a sentencing court's ability to treat the career offender
13 Guideline as purely advisory — *Beckles* does not foreclose relief." Petitioner is
14 incorrect. The petitioner in *Beckles*, like Petitioner in the instant case, was sentenced
15 after *United States v. Booker*, 543 U.S. 220 (2005), and prior to *Kimbrough*, *Gall*, and
16 *Carty*.

17 Moreover, Petitioner notes that in the years between *Booker* and *Kimbrough*,
18 *Gall*, and *Carty* district courts in this Circuit did, in fact, exercise discretion in
19 imposing below-guideline sentences. Although, as Petitioner notes, such sentences
20 were imposed more frequently following *Kimbrough*, *Gall*, and *Carty*, this is a
21 distinction without a difference. That district courts exercised discretion in imposing
22 below-sentence guidelines, in itself, demonstrates that, at the time, the advisory
23 Sentencing Guidelines "merely guide[d] the exercise of a court's discretion in choosing
24 an appropriate sentence within the statutory range." *Beckles*, 137 S. Ct. at 892.

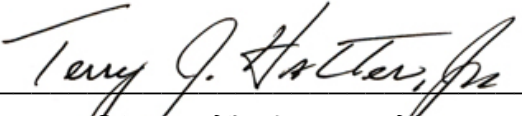
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26 Accordingly,

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28 **It is Ordered** that the motion to vacate, set aside, or correct his sentence under

1 28 U.S.C. § 2255 be, and hereby is, **Denied**.
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3 **It is Further Ordered** that the Government's motion to dismiss be, and
4 hereby is, **Denied** as moot.
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7 Date: July 28, 2017

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9 **Terry J. Hatter, Jr.**
10 **Senior United States District Judge**

11 CC:BOP
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