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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,
Plaintiff,

v.

MANUEL BORBOA (2),
Defendant.

Case No.: 12cr286-MMA-2
Related Case No.: 16cv1377

**ORDER GRANTING DEFENDANT’S
MOTION FOR VOLUNTARY
DISMISSAL;**

[Doc. No. 433]

**DISMISSING DEFENDANT’S
MOTION TO VACATE, SET ASIDE,
OR CORRECT CONVICTION AND
SENTENCE PURSUANT TO 28
U.S.C. § 2255**

[Doc. No. 402]

On May 31, 2012, Defendant Manuel Borboa pleaded guilty to conspiring to distribute methamphetamine, in violation of Title 21, United States Code, sections 841(a)(1) and 846. *See* Doc. No. 138. The Court sentenced Defendant to a term of 262 months imprisonment. *See* Doc. No. 246. On June 6, 2016, Defendant, proceeding through counsel, filed a motion to vacate, set aside, or correct his conviction and sentence pursuant to 28 U.S.C. § 2255, based on the Supreme Court’s holding in *Johnson v.*

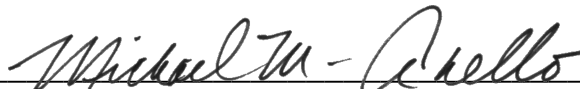
1 *United States*, 576 U.S. ---, 135 S. Ct. 2551 (2015), and a related constitutional challenge
2 to Section 4B1.2(a) of the United States Sentencing Guidelines. *See* Doc. Nos. 402, 404.
3 On March 6, 2017, the Supreme Court ruled that *Johnson*'s holding does not extend to
4 the Sentencing Guidelines, in so far as "the advisory Guidelines are not subject to
5 vagueness challenges under the Due Process Clause." *Beckles v. United States*, 137 S.
6 Ct. 886, 197 L. Ed. 2d 145 (2017).

7 Defendant now moves for voluntary dismissal of his 2255 motion under Federal
8 Rule of Civil Procedure 41(a).¹ *See* Doc. No. 433. Under *Beckles*, "it plainly appears
9 from the face of the motion" that Defendant "is not entitled to relief." *See* Rule 4(b) of
10 the Rules Governing Section 2255 Proceedings for the United States District Courts. As
11 such, the Court finds that dismissal of Defendant's 2255 motion is appropriate.

12 Accordingly, the Court **DISMISSES** Defendant's pending 2255 motion pursuant
13 to Federal Rule of Civil Procedure 41(a)(2). The Court **DECLINES** to issue a certificate
14 of appealability. The Clerk of Court is instructed to close the related civil case.

15 **IT IS SO ORDERED.**

16 DATE: April 7, 2017

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18 _____
19 HON. MICHAEL M. ANELLO
20 United States District Judge
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24 _____
25 ¹ The Court may apply the Federal Rules of Civil Procedure to this proceeding as set forth in Rule 12 of
26 the Rules Governing Section 2255 Proceedings for the United States District Courts. Defendant moves
27 for dismissal pursuant to Rule 41(a)(1)(A)(i), which provides for dismissal without a court order before
28 the opposing party serves an answer or motion for summary judgment. However, as Defendant
acknowledges, the government filed a response to Defendant's 2255 motion. Therefore, dismissal is
arguably not appropriate under Rule 41(a)(1)(A)(i). Rather, Rule 41(a)(2) applies, which states in
pertinent part: "Except as provided in Rule 41(a)(1), an action may be dismissed at the [moving party's]
request only by court order . . ."