

petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). A defendant must show “something more than the absence of frivolity or the existence of mere good faith on his or her part.” *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quoting *Barefoot*, 463 U.S. at 893). The court must “indicate which specific issue or issues satisfy the showing required” § 2253(c)(3). If the district court denies a certificate, the parties may seek a certificate from the Tenth Circuit.

Defendant suggests that he should be granted a certificate of appealability because the circuits are split on whether the Supreme Court’s decision in *Johnson* should apply to identical language in § 4B1.2. The court agrees. As defendant notes, whether his petition will ultimately prevail in this circuit is irrelevant to whether a certificate should be granted. The petition is not frivolous as there is a circuit split on the issue of whether the *Johnson* decision should entitle individuals sentenced under § 4B1.2, while the guidelines were mandatory, to retroactive collateral review of their sentences. The court grants defendant’s request for a certificate of appealability.

IT IS THEREFORE ORDERED that defendant’s Motion to Reconsider Pursuant to Rule 59(e) (Doc. 225) is denied, but the court grants defendant’s request for a certificate of appealability on the denial of the underlying habeas petition.

Dated this 12th day of July, 2018, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge