NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

GREGORY MOLETTE
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 17-60253

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The specific question presented for review is whether the United States Court of Appeals for the Fifth Circuit erred by denying Mr. Molette a Certificate of Appealability in this § 2255 case. The underlying question is **whether, under the law set forth *Johnson v. United States*, 135 S.Ct. 2551 (2015), Mr. Molette should be resentenced without application of the career offender provisions of the Sentencing Guidelines.**

Resolving this issue hinges in large part on whether the holdings in *Johnson* apply to cases that defendants were sentenced when application of the United States Sentencing Guidelines was mandatory. That is, when the sentences were decided prior to this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005).

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

The United States District Court for the Southern District of Mississippi entered a Judgment of Conviction against Petitioner Gregory Molette on November 19, 2003.[1] The conviction was for one count of bank robbery in violation of 18 U.S.C. § 2113(a) and (d). His sentence was enhanced under the "career offender" provisions of the United States Sentencing Guidelines (hereinafter "Guidelines" or "Sentencing Guidelines"). The district court case number is 3:03cr37-BN. The subject § 2255 Petition arises out of the sentence ordered for the bank robbery conviction. The conviction itself is not at issue.

In 2015, after Mr. Molette's conviction and sentence, this Court ruled that the "residual clause" portion of the "violent felony" definition in the Armed Career Criminal Act (hereinafter "ACCA") is unconstitutional. *See Johnson v. United States*, 135 S.Ct. 2551 (2015).[2] Mr. Molette filed the subject § 2255 Petition on June 21, 2016. The district court assigned the § 2255 Petition civil case number 3:16cv479-WHB.

[1] The district court's Judgment is attached hereto as Appendix 1.

[2] This Petition cites two important Supreme Court cases captioned "*Johnson v. United States*." One was filed in 2015 and published at 135 S.Ct. 2551. That case renders the residual clause of § 924(e)(2)(B)(ii) unconstitutional. The other was filed in 2010 and published at 559 U.S. 133. That case defines the phrase "physical force" in § 924(e)(2)(B)(i). In this Petition, *Johnson v. United States*, 135 S.Ct. 2551 (2015) is referred to as "*Johnson* (2015)," and *Johnson v. United States*, 559 U.S. 133 (2010) is referred to as "*Johnson* (2010)."

Invoking the holdings in *Johnson* (2015) Mr. Molette Argued in his § 2255 Petition that he should be resentenced without application of the career offender sentence enhancement provisions of the Guidelines. The district court entered an Order denying the relief sought in the § 2255 Petition and denying a Certificate of Appealability (hereinafter "COA") on April 4, 2017. The district court also entered a Final Judgment regarding the § 2255 Petition on April 4, 2017.[3]

Mr. Molette appealed the case to the United States Court of Appeals for the Fifth Circuit on April 4, 2017. The Fifth Circuit case number is 17-60253. Because the district court denied a COA, Mr. Molette was required to petition the appellate court for a COA before it would hear the merits of the case. *See* Rule 11(a), Rules Governing § 2255 Proceedings; Rule 22(b)(1), Federal Rules of Appellate Procedure; 28 U.S.C. § 2253(c). So he filed an Application for COA in the Fifth Circuit on May 30, 2017. The Fifth Circuit entered an Order denying the Application for COA on January 4, 2018, without hearing the merits of the case.[4] This Petition for Writ of Certiorari followed.

[3] The district court's Order and Judgment are attached hereto as composite Appendix 2. The denial of a COA is stated on page 5 of the Order.
[4] The Fifth Circuit's Order is attached hereto as Appendix 3.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit entered its Order denying the Application for COA on January 4, 2018. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Order, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case pursuant to the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISION INVOLVED

In *Johnson* (2015), a the case that Mr. Molette's argument is based on, this Court found that the "residual clause" portion of ACCA's definition of "violent felony" is unconstitutional under the Due Process Clause of the Fifth Amendment to the United States Constitution. 135 S.Ct. at 2563. The Due Process Clause of the Fifth Amendment states: "No person shall … be deprived of life, liberty, or property, without due process of law[.]"

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a Petition filed under 28 U.S.C. § 2255, in which Mr. Molette sought to be resentenced without application of the career offender provisions of the Sentencing Guidelines. The § 2255 Petition concerns an underlying conviction and sentence filed in the United States District Court for the Southern District of Mississippi for bank robbery. The Southern District of Mississippi had jurisdiction over the case under 18 U.S.C. § 3231 because the conviction arose from the laws of the United States of America.

B. Statement of material facts.

Facts relevant to the issue in this Petition pertain solely to sentencing. Specifically, the facts focus on the district court's application of the "career offender" provisions of the Sentencing Guidelines and the "residual clause" portion of the "crime of violence" definition in the Guidelines.

This § 2255 action arises out of a conviction entered against Mr. Molette for armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d). Mr. Molette took responsibility for his actions by pleading guilty to the charge on August 13, 2003. The district court conducted a sentencing hearing on November 13, 2003.

At sentencing, the Court deemed Mr. Molette a career offender under the combined provisions of U.S.S.G. §§ 4B1.1 and 4B1.2. The career offender finding

increased his adjusted offense level from 25 to 34. It also increased his criminal history category from IV to VI.

Mr. Molette's total offense level at sentencing was 31. At a criminal history category of VI and an offense level of 31, his Guidelines sentencing range was 188 to 235 months in prison. The court ordered him to serve 188 months in prison. It entered a Judgment reflecting that sentence on November 13, 2003.

Without the career offender enhancements Mr. Molette's offense level would have been 22 (adjusted offense level of 25 less three points for acceptance of responsibility). His criminal history category would have been IV. This combination yields a Guidelines sentencing range of 63 to 78 months in prison. *See* Guidelines Sentencing Table.

As stated above, Mr. Molette is not contesting his guilt in regard to the underlying bank robbery conviction. His sentence is the contested issue. Two prior qualifying convictions were required to trigger the career offender enhancement under § 4B1.1. Mr. Molette purportedly had three. All three were bank robbery convictions under federal law. As analyzed below, these convictions no longer qualify as "crimes of violence" under U.S.S.G. §§ 4B1.1 and 4B1.2. Removal of these convictions from the purview of crimes of violence significantly reduces Mr. Molette's Guidelines sentencing range.

V. ARGUMENT:

Under the law set forth *Johnson* (2015), Mr. Molette should be resentenced without application of the career offender provisions of the Sentencing Guidelines

A. Review on certiorari should be granted in this case.

Supreme Court Rule 10 states, "[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons." One such reason is when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important issue." Sup. Ct. R. 10(c).

Resolving the subject issue hinges in significant part on whether the holdings in *Johnson* (2015) apply to the Sentencing Guidelines when the sentence at issue was ordered prior to this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). Prior to *Booker*, applying the Guidelines was mandatory. *Booker* rendered their application advisory, and not mandatory.

Beckles v. United States, 137 S.Ct. 886 (2017) holds that *Johnson* (2015) does not apply to the Guidelines. However, as argued below, *Beckles* limited its ruling to the *advisory* Sentencing Guidelines. Many defendants that were sentenced pre-*Booker* when application of the Guidelines was *mandatory*, like Mr. Molette in this case, seek to benefit from the holdings in *Johnson* (2015).

Circuit court decisions conflict on whether *Johnson* (2015) potentially applies to the Guidelines in pre-*Booker* sentencings. In *United States v. Moore*, 871 F.3d 72 (1st Cir. 2017) and *In re: Hoffner*, 870 F.3d 301 (3d Cir. 2017), the First and Third Circuits granted COAs to defendants seeking to file second or successive § 2255 petitions. In both of those cases, the defendants argued that *Johnson* (2015) applies to the Guidelines in the context of pre-*Booker* sentencing proceedings. While the *Moore* and *Hoffner* courts did not definitively conclude that *Johnson* (2015) applies to the Guidelines in regard to pre-*Booker* sentencing issues, both courts found that the issue presented a close enough call that COAs should be granted.

In contrast, The Tenth Circuit in *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018) found that a COA should not be granted because *Johnson* (2015) does not apply to the Guidelines in pre-*Booker* sentencings. Likewise, the Fourth and Sixth Circuits, both of which were deciding § 2255 petitions on the merits, found that *Johnson* (2015) does not apply to the Guidelines in pre-*Booker* sentencings. *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017); *Rayborn v. United States*, 867 F.3d 625 (6th Cir. 2017). *Brown* was a split decision with Chief Judge Gregory dissenting from the majority.

Based on the above case law, circuit courts of appeal are struggling with determining whether *Johnson* (2015) applies to the pre-*Booker* mandatory

Guidelines system. That is the exact scenario under which Supreme Court Rule 10(c) envisions granting certiorari. Therefore, this Petition for Writ of Certiorari should be granted.

B. Procedure for reviewing a § 2255 ruling on appeal.

Appeal of a denied § 2255 petition is procedurally unique because the right to appeal hinges on obtaining a COA. In *Buck v. Davis*, 137 S.Ct. 759 (2017), this Court described the required procedure. The Court held:

> A … prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal. Federal law requires that he first obtain a COA from a circuit justice or judge. 28 U.S.C. § 2253(c)(1). A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case.
>
> The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims."

Id. at 773 (case law citations omitted).

Under *Buck*, an appellate court lacks jurisdiction to consider the merits of an argument presented in a § 2255 petition until it answers the threshold question of whether "the applicant has made a substantial showing of the denial of a constitutional right." 137 S.Ct. at 773 (holding that when an appeal court sidesteps

the COA process by deciding the issue on the merits, "it is in essence deciding an appeal without jurisdiction."

In Mr. Molette's case, the Fifth Circuit followed proper procedure. That is, the court decided whether it believed that Mr. Molette was entitled to a COA, and it did not address the merits of the issue. This begs the question of what this Court can review at this point in the case.

The first option is to limit review to deciding whether the Fifth Circuit erred by denying a COA. If the Court agrees with Mr. Molette's argument, then the remedy under this option will be to remand the case to the Fifth Circuit and order the Court to rule on the merits of the subject arguments.

The second option is limitless review, allowing this Court to review the merits of the subject arguments. That is the option that the Court followed in *Buck*. 137 S.Ct. at 774-75 (holding "[w]ith respect to this Court's review, § 2253 does not limit the scope of our consideration of the underlying merits, and at this juncture we think it proper to meet the decision below and the arguments of the parties on their own terms.").

Given the detailed level of briefing that has been submitted to the courts below, Mr. Molette suggests that this case is ripe for review on the merits. However, he recognizes that the decision is left to this Court's discretion.

C. Section 2255 standard.

Mr. Molette's Petition is filed under the provisions of 28 U.S.C. § 2255. Section 2255(a) states:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the **sentence was imposed in violation of the Constitution** or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(Emphasis added).

Mr. Molette contends that his sentence "was imposed in violation of the Constitution." His argument is based on the rulings in *Johnson* (2015), a case decided by this Court on June 26, 2015. The Court later held that *Johnson* (2015) is retroactively applicable to cases on collateral review. *United States v. Welch*, 136 S.Ct. 1257 (2016).

D. The holdings in *Johnson* (2015).

The initial paragraph of the *Johnson* (2015) opinion provides a good synopsis of the issue addressed by the Court. This paragraph states:

> Under the Armed Career Criminal Act of 1984, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a "violent felony," a term defined to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). We must decide **whether this part of the definition of a violent felony survives the Constitution's prohibition of vague criminal laws**.

Johnson (2015), 135 S.Ct. at 2555 (emphasis added).

The opinion analyzes a provision of the ACCA codified in 18 U.S.C. § 924. The relevant provision of § 924 states:

> (e)(1) In the case of a person who violates section 922(g)[5] of this title and has three previous convictions by any court referred to in section 922(g)(1)[6] of this title for a **violent felony** or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and **imprisoned not less than fifteen years**, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(1) (emphasis added; bracketed footnotes added).

The holdings in *Johnson* (2015) focus on the "violent felony" language in § 924(e). This phrase is defined in 18 U.S.C. § 924(e)(2)(B) as follows:

> (e)(2) As used in this subsection –
>
> * * * * *
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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, arson, or extortion, involves use of explosives, **or otherwise involves conduct that presents a serious potential risk of physical injury to another**[.]

(Emphasis added).

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[5] 18 U.S.C. § 922(g) makes it a crime for a convicted felon to possess a firearm.

[6] 18 U.S.C. § 922(g)(1) limits the definition of a convicted felon to a felon "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[.]"

The *Johnson* (2015) holdings particularly focus on the language of § 924(e)(2)(B)(ii), which states that the definition of "violent felony" includes any act that "otherwise involves conduct that presents a serious potential risk of physical injury to another." This language is commonly referred to as the ACCA's "residual clause." *See Johnson* (2015), 135 S.Ct. at 2555-56.

Following is a summary of the relevant facts in *Johnson* (2015) and the Court's framing of the issue in light of the case-specific facts:

> After his eventual arrest, Johnson pleaded guilty to being a felon in possession of a firearm in violation of § 922(g). The Government requested an enhanced sentence under the Armed Career Criminal Act. It argued that three of Johnson's previous offenses – including unlawful possession of a short-barreled shotgun, *see* Minn. Stat. § 609.67 (2006) – qualified as violent felonies. The District Court agreed and sentenced Johnson to a 15-year prison term under the Act. The Court of Appeals affirmed. We granted certiorari to decide whether Minnesota's offense of unlawful possession of a short-barreled shotgun ranks as a violent felony under the residual clause. We later asked the parties to present reargument addressing the compatibility of the residual clause with the Constitution's prohibition of vague criminal laws.

Johnson (2015), 135 S.Ct. 2556 (citations to procedural history omitted).

In relation to the residual clause of the ACCA, the *Johnson* (2015) Court held:

> [I]mposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process. Our contrary holdings in *James*[7] and *Sykes*[8] are overruled. Today's decision does not call into question application of the Act to the four

[7] The full cite for *James* is *James v. United States*, 550 U.S. 192, 180 L.Ed.2d 60 (2007).
[8] The full cite for *Sykes* is *Sykes v. United States*, —— U.S. ——, 131 S.Ct. 2267 (2011).

> enumerated offenses, or the remainder of the Act's definition of a violent felony.

Johnson (2015), 135 S.Ct. at 2563 (bracketed footnotes added).

Under the above holdings in *Johnson* (2015), it is unconstitutional to increase a defendant's sentence under § 924(e)(1) because he has any prior "violent felonies," as defined under the residual clause of § 924(e)(2)(B)(ii). This ruling does not apply to the enumerated "violent felonies" stated in § 924(e)(2)(B)(ii), which are burglary, arson, extortion or crimes involving the use of explosives.

To summarize, post-*Johnson* (2015) a prior conviction qualifies as a "violent felony" under the ACCA if the conviction falls into one of two categories enumerated under 18 U.S.C. § 924(e)(2)(B). The crime of conviction must:

(1) have "as an element the use, attempted use, or threatened use of physical force against the person of another" (§ 924(e)(2)(B)(i)); or

(2) be "burglary, arson, or extortion" or "involve[] use of explosives" (§ 924(e)(2)(B)(ii)).

Prior to *Johnson* (2015), if a crime of conviction fell under a third category, the residual clause of § 924(e)(2)(B)(ii), then the prior conviction was a violent felony. Under the residual clause, a prior conviction is deemed a violent felony if it "otherwise involve[ed] conduct that present[ed] a serious potential risk of injury to

another[.]" *Id.* Since *Johnson* (2015) declared the residual clause unconstitutional, it is no longer applicable to the violent felony analysis.

E. The Sentencing Guidelines provisions at issue.

Mr. Molette's sentence was increased because he was deemed a career offender under U.S.S.G. § 4B1.1 and 4B1.2. The language of § 4B1.2(b) is at issue in this case. At the time of Mr. Molette's sentencing, § 4B1.2 defined "crime of violence" as follows:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, 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*.

(Emphasis added). The emphasized language is identical to the residual clause stated in § 924(e)(2)(B)(ii), which *Johnson* (2015) found unconstitutionally vague.

F. *Beckles* does not bar Mr. Molette's *Johnson*-related arguments.

In this case, the district court never addressed whether bank robbery is a crime of violence under the Guidelines because it found that Mr. Molette's arguments are barred by the holdings in *Beckles v. United States*, 137 S.Ct. 886 (2017). For the following reasons, *Beckles* does not bar his claims.

In *Beckles*, the Supreme Court ruled that the holdings in *Johnson v. United States*, 135 S.Ct. 2551 (2015) do not apply to the United States Sentencing

Guidelines. Specifically, the Court held "[b]ecause the *advisory* Sentencing Guidelines are not subject to a due process vagueness challenge," the *Johnson* (2015) holdings are inapplicable to the residual clause in U.S.S.G. 4B1.2. *Beckles*, 137 S.Ct. at 897 (emphasis added). *Beckles did not* address the issue of whether *Johnson* (2015) applies to sentences ordered pre-*Booker*. *Beckles*, 137 S.Ct. at 903 n.4 (stating "[t]hat question is not presented by this case and I, like the majority, take no position on its appropriate resolution." (Sotomayor, J., concurring in the Judgment)).

Prior to the United States Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005) on January 12, 2005, the Sentencing Guidelines were *mandatory* in the Fifth Circuit. *See United States v. De La Fuente*, 214 Fed. App'x 490, 490-91 (5th Cir. 2007) (referring to the pre-*Booker* Sentencing Guidelines as the mandatory guidelines system). Judges are now free to reject the Guidelines "based on a disagreement with the Commission's views." *Beckles*, 137 S. Ct. at 894.

Further, the statute in effect when Mr. Molette was sentenced, 18 U.S.C. § 3553(b), made the Guidelines "mandatory and impose[d] binding requirements on all sentencing judges." *Booker*, 543 U.S. at 259. The Guidelines "[had] the force and effect of laws," *id*. at 234, by virtue of § 3553(b), a mandatory directive, later excised in *Booker*, 543 U.S. at 259, requiring "that the court '*shall* impose a

sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited circumstances," *id*. at 234 (emphasis in original).

Departures were to be determined by considering "*only* the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. § 3553(b) (emphasis added). The policy statements and commentary, which prohibited and restricted departures, were themselves "binding." *Stinson v. United* States, 508 U.S. 36, 42-43 (1993). Courts were not permitted "to decide for themselves, by reference to the . . . goals of" § 3553(a)(2), "whether a given factor ever [could] be an appropriate sentencing consideration," *Koon v. United States*, 518 U.S. 81, 108 (1996), or to "substitute their policy judgments for those of Congress and the Sentencing Commission," U.S.S.G. § 5K2.0, comment. (backg'd) (2003). "In most cases, as a matter of law, . . . no departure [was] legally permissible [and] the judge [was] bound to impose a sentence within the Guidelines range." *Booker*, 543 U.S. at 234.

Mr. Molette was sentenced on November 13, 2003. *Booker* was decided in 2005. Therefore, the Sentencing Guidelines were mandatory at the time of Mr. Molette's sentencing hearing. As analyzed above, the mandatory pre-*Booker* Sentencing Guidelines had the same functional effect as statutes, which we know are subject to vagueness challenges. For these reasons, the holdings in *Beckles* do not apply to defendants, such as Mr. Molette, who were sentenced prior to *Booker*.

See Reid v. United States, No. 03-CR-30031-MAP, 2017 WL 2221188 at *1 (D. Mass. May 18, 2017) (holding: "Because *Beckles* itself makes clear that its holding does not govern sentences imposed under the non-advisory, pre–*Booker* sentencing regime, and because the logic of the *Johnson* decisions makes them fully applicable in a pre–*Booker*, mandatory Guidelines context, the court will allow Defendant's motion to correct his sentence and set the case for re-sentencing.").

For all of these reasons, Mr. Molette's arguments are not barred by the holdings in *Beckles*.

G. Crimes that are enumerated in the Commentary to the Guidelines but not in the body of the body of the applicable Guidelines provision itself cannot be considered crimes of violence in the career offender analysis.

U.S.S.G. § 4B1.2(a)(2) states a number of enumerated crimes of violence. Bank robbery, Mr. Molette's three relevant prior crimes of conviction, are not enumerated in this Guidelines provision. However, robbery is an enumerated offense under the Commentary to § 4B1.2(a)(2). *See* U.S.S.G. § 4B1.2(a)(2), Application Note 1. Therefore, we must analyze the effect of including robbery in the Commentary, but not in the body of § 4B1.2(a)(2) itself.

In *Stinson*, 508 U.S. at 38, the Supreme Court held, "[w]e decide that commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Put another

way, the Commentary may illuminate or illustrate a Guidelines provision's language, but it may not expand its scope or alter its meaning. *United States v. Shell*, 789 F.3d 335, 345 (4th Cir. 2015) (citing *Stinson*, 508 U.S. at 43) (holding "§ 4B1.2 provides a separate two-part definition of crime of violence in its text, with the commentary serving only to amplify that definition, and any inconsistency between the two resolved in favor of the text[.]"); *United States v. Rayo-Valdez*, 302 F.3d 314, 318 n.5 (5th Cir. 2002) (holding that the commentary to the Guidelines carries the same force as the Guidelines provisions themselves "as long as the language and the commentary are not inconsistent.").

Prior to *Johnson* (2015), when the residual clause of § 4B1.2(a)(2) was in force, including robbery as a crime of violence in the Commentary was consistent with the language of § 4B1.2(a)(2). It simply reflected the Sentencing Commission's determination in the residual clause that robbery "otherwise involves conduct that presents a serious potential *risk of physical injury* to another." Indeed, this is precisely the conclusion reached by the Supreme Court in *James v. United States*, 550 U.S. 192 (2007) when analyzing this same Application Note's inclusion of "attempt" offenses within the crime of violence definition. The Court held:

> The Commission has determined that "crime[s] of violence" for the purpose of the Guidelines enhancement "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." § 4B1.2, comment, n. 1. This judgment was based on the Commission's review of empirical

> sentencing data and presumably reflects an assessment that attempt crimes often pose a similar *risk of injury* as completed offenses.

James, 550 U.S. at 206 (emphasis added).[9]

In other words, the Application Note to § 4B1.2 includes a list of offenses the Commission believed fell within that Guidelines provision's residual clause because they involve a "risk of injury" comparable to the enumerated crimes. It does not reflect a freestanding determination, detached from the actual language of that Guidelines provision, that the stated offenses independently qualify as crimes of violence. *See United States v. Armijo*, 651 F.3d 1226, 1236-37 (10th Cir. 2011) (application note listing manslaughter as a crime of violence could not trump Guideline language limiting crime of violence predicate to offenses involving intentional conduct); *Shell*, 789 F.3d at 340-41 (holding that the Application Note listing "forcible sex offense" as a crime of violence did not qualify rape conviction as a predicate where that conviction did not satisfy crime of violence definition contained in Guidelines' text).

Now that the Supreme Court has declared the residual clause unconstitutionally vague, any Application Note purporting to define the residual clause's reach or enumerate its contents is simply irrelevant and inapplicable. The Application Note in issue does just that because it attempts to expand the residual

[9] *James* was overruled by *Johnson* (2015). The particular proposition for which *James* is now cited was not affected by *Johnson* (2015).

clause to include a number of offenses, including robbery, that are not in the text of § 4B1.2. Therefore, Application Note 1 is inapplicable to Mr. Molette's case, and robbery cannot be considered an enumerated offense under § 4B1.2(a)(2).

H. Mr. Molette's three prior federal court convictions for "Bank Robbery" are not "crimes of violence" under the Guidelines because the offense fails to meet the "physical force" test stated in § 4B1.2(a)(1).

Mr. Molette has a three prior federal court conviction for bank robbery. While the PSR does not state the statute of conviction, we reasonably assume that the convictions were under 18 U.S.C. § 2113(a). Section 2113 is titled "Bank robbery and incidental crimes." Since bank robbery is not an enumerated crime under § 4B1.2(a)(2) (*see supra*), and since *Johnson* (2015) rendered the residual clause unconstitutional, the only possible option under which the prior attempted robbery conviction can be deemed a "crime of violence" is under the physical force clause of § 4B1.2(a)(1).

Under the physical force clause, we must analyze whether bank robbery under § 2113(a) and (d) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]" *See* § 4B1.2(a)(1). If it does not, then the bank robbery convictions cannot be deemed crimes of violence under the Guidelines.

In *Johnson* (2010)[10] this Court defined the level of force required to meet the "physical force" requirement of § 924(e)(2)(B)(i).[11] "[T]he phrase 'physical force' means **violent** force – that is, force capable of causing physical pain or injury to another person." *Johnson* (2010), 599 U.S. at 141 (emphasis in original; citation omitted). "It plainly refers to force exerted by and through concrete bodies – distinguishing physical force from, for example, intellectual force or emotional force." *Id.* at 138.

In the context of *Johnson* (2010), we must analyze the robbery statute – 18 U.S.C. § 2113(a) and (d). This statute states in relevant part:

> (a) Whoever, by force and violence, or **by intimidation**, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association[.]
>
> * * * * *
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the **use of a dangerous weapon or device**, shall be fined under this title or imprisoned not more than twenty-five years, or both.

Id. (emphasis added).

Under the plain language of § 2113(a), robbery can be committed "by intimidation," which requires no physical force whatsoever. Robbery "by

[10] *See supra*, footnote 2.

[11] The "physical force" language in § 924(e)(2)(B)(i) of the ACCA is identical to the "physical force" language in § 4B1.2(a)(1) of the Sentencing Guidelines.

intimidation" is more akin to committing an offense through exertion of "intellectual force or emotional force," which the *Johnson* (2010) Court explicitly found insufficient to meet the physical force clause. For this reason, robbery under § 2113(a) is not a crime of violence.

Next we consider the "use of a dangerous weapon or device" language of § 2113(d). In this context, we consider the Fifth Circuit's decision in *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006). The defendant in that case was convicted of illegally reentering the United States after deportation following a state court assault conviction. *Villegas-Hernandez*, 468 F.3d at 876-77. At issue was whether defendant's assault conviction was an "aggravated felony" under U.S.S.G. § 2L1.2(b)(1)(C).[12] *Id.* at 877. The district court found that it was, and defendant appealed. *Id.* at 877-78.

Both parties agreed that the applicable subsection of the Texas Misdemeanor assault statute – Texas Penal Code § 22.01 – makes a person guilty of the offense if it is proven that he "intentionally, knowingly, or recklessly causes bodily injury to another[.]" *Villegas-Hernandez*, 468 F.3d at 878. "The government contend[ed] that 22.01(a)(1)'s requirement that a defendant cause bodily injury incorporates a requirement to show the intentional use of force, such that Villegas-Hernandez's

[12] For purposes relevant to defendant's appeal, § 2L1.2's definition of "aggravated felony" is found in 18 U.S.C. § 16(a)'s definition of "crime of violence." *See Villegas-Hernandez*, 468 F.3d at 877.

prior assault conviction satisfies 16(a)'s definition of crime of violence." *Id.* at 878-79. The Fifth Circuit disagreed. *Id.* at 879.

The Fifth Circuit held "an assault offense under section 22.01(a)(1) satisfies subsection 16(a)'s definition of a crime of violence only if a conviction for that offense could not be sustained without proof of the use of "*destructive or violent*" force. *Villegas-Hernandez,* 468 F.3d at 879 (emphasis added). Then, the court went on to provide examples of how a violation of the assault statute could be committed without the use of physical force:

> The bodily injury required by section 22.01(a)(1) is "physical pain, illness, or any impairment of physical condition." Tex. Pen. Code Ann. § 1.07(a)(8). Such injury could result from any of a number of acts, without use of "destructive or violent force", making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim. To convict a defendant under any of these scenarios, the government would not need to show the defendant used physical force against the person or property of another. Thus, use of force is not an element of assault under section 22.01(a)(1), and the assault offense does not fit subsection 16(a)'s definition for crime of violence.

Villegas-Hernandez, 468 F.3d at 879.

While assault, the crime at issue in *Villegas-Hernandez*, is not the same as bank robbery, the crime at issue in Mr. Molette's case, the holdings in *Villegas-Hernandez* are nevertheless applicable. Committing bank robbery under § 2113(d) can be done by using any "dangerous weapon or device." Just as in the example stated in *Villegas-Hernandez*, the dangerous weapon or device could be poison or

numerous other weapons that can be used without exerting physical force on a victim.

Because § 2113(a) and (d) can be violated without application of any physical force, violation of this statute cannot be considered a "crime of violence" under Guidelines § 4B1.2(a)(1). Therefore, Mr. Molette's sentence should be vacated and the case should be remanded to district court for further sentencing proceedings.

VI. CONCLUSION

For all of the reasons stated above, Mr. Molette asks this Court to grant his Petition for Writ of Certiorari.

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