

APPENDIX 1

UNITED STATES DISTRICT COURT
Southern District of Mississippi
Jackson Division

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
NOV 19 2003
J. T. NOBLIN, CLERK
DEPUTY

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

V.

Case Number: 3:03cr37BN-001

GREGORY MOLETTE

Defendant's Attorney: Nathan Elmore
401 E. Capitol Street
Jackson, MS 39201

THE DEFENDANT:

- pleaded guilty to Count(s) single-count Indictment
- pleaded nolo contendere to Count(s) _____
which was accepted by the Court.
- was found guilty on Count(s) _____
after a plea of not guilty.

NOV 20 2003
U.S. DISTRICT COURT
JACKSON, MISSISSIPPI

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 2113(a) and (d)	Armed Bank Robbery	01/30/03	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- The defendant has been found not guilty on Count(s) _____
- Count(s) _____ is are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 425-29-8257

Defendant's Date of Birth: 05/18/65

Defendant's USM No.: 11683-039

Defendant's Residence Address:

517 Helveston Road

Hattiesburg, MS 39401

(Last Known Address)

Defendant's Mailing Address:

Same

November 12, 2003

Date of Imposition of Judgment

William H. Barbour, Jr.
Signature of Judicial Officer

William H. Barbour, Jr., U. S. District Judge
Name and Title of Judicial Officer

11/18/03
Date

A TRUE COPY - I HEREBY CERTIFY.
J. T. NOBLIN, CLERK
DEPUTY CLERK

DEFENDANT: MOLETTE, Gregory
CASE NUMBER: 3:03cr37BN-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 188 months. The cost of incarceration is waived.

■ The Court makes the following recommendations to the Bureau of Prisons:
The defendant be assigned to the FCI in Yazoo City, Mississippi if the defendant meets the security classification for that facility and space is available.

■ The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

by _____ a.m. p.m. on _____

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The above drug testing condition is suspended, based on the Court's determination that the defendant poses a low risk of future substance abuse.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000.

The defendant shall comply with the standard conditions that have been adopted by this Court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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SPECIAL CONDITIONS OF SUPERVISION

- a. The defendant shall provide any personal or business financial information requested by the supervising U.S. Probation Officer, and shall not obtain any new credit without prior permission from the probation officer.
- b. The defendant shall submit to random urinalysis testing and complete any substance abuse treatment program deemed necessary by the supervising U.S. Probation Officer.

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CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth on Sheet 5, Part B.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$ 1,500.00	\$

The determination of restitution is deferred until _____ . An Amended Judgment in a Criminal Case (AO245C) will be entered after such determination.

The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

<u>Name of Payee</u>	<u>*Total Amount of Loss</u>	<u>Amount of Restitution Ordered</u>	<u>Priority Order or Percentage of Payment</u>
TOTALS	\$ _____	\$ _____	

If applicable, restitution amount ordered pursuant to plea agreement \$ _____

The defendant shall pay interest on any fine or restitution of more than \$2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The Court determined that the defendant does not have the ability to pay interest, and it is ordered that:

the interest requirement is waived for the fine and/or restitution.

the interest requirement for the fine and/or restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

- A Lump sum payment of \$ _____ due immediately, balance due
 not later than _____, or
 in accordance with C, D, or E below; or
- B Payment to begin immediately (may be combined with C, D, or E below); or
- C Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of not less than \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in monthly (e.g., equal, weekly, monthly, quarterly) installments of not less than \$ 50.00 over a period of 30 months (e.g., months or years), to commence 30 days (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Special instructions regarding the payment of criminal monetary penalties:

Unless the Court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

UNITED STATES OF AMERICA

VS.

**CRIMINAL NO. 3:03-cr-37-WHB
CIVIL ACTION NO. 3:16-cv-479-WHB**

GREGORY MOLETTE

OPINION AND ORDER

This cause is before the Court on two related Motions. The first is Defendant's Motion to Vacate, Set Aside, or Correct a Sentence by a Person in Federal Custody Under 28 U.S.C. § 2255 ("Motion to Vacate"). The second is the Motion of the Government that seeks dismissal of Defendant's Motion to Vacate. Having considered the pleadings, the record in the underlying criminal case, and supporting and opposing authorities, the Court finds the Motion to Dismiss is well taken and should be granted.

I. Discussion

Gregory Molette ("Molette") pleaded guilty to one count of armed bank robbery in violation of 18 U.S.C. § 2113, and was sentenced to a 188-month term of imprisonment. Molette's sentence was calculated from an Offense Level of 34 because he was deemed a career offender within the meaning of U.S.S.G. § 4B1.1.

In 2016, Molette filed the subject Motion to Vacate seeking correction of his sentence under 28 U.S.C. § 2255. In his Motion,

Molette challenges his federal sentence on the grounds that it was calculated using the career offender enhancement under U.S.S.G. §§ 4B1.1 and 4B1.2(a)(2). Molette argues that because the United States Supreme Court held that the residual clause language in the Armed Career Criminal Act was unconstitutional, see Johnson v. United States, 135 S.Ct. 2551 (2015), which was held to apply retroactively by Welch v. United States, 136 S. Ct. 1257 (2016), the nearly identical residual clause language in U.S.S.G. § 4B1.2(a)(2) must likewise be unconstitutional and, therefore, his federal sentence should be recalculated to exclude the career offender enhancement.

The Government responded by seeking dismissal of Molette's Motion to Vacate. In support of its Motion to Dismiss, the Government first argues that Molette is precluded from seeking relief under 28 U.S.C. § 2255 because he knowingly and voluntarily waived his right to challenge his sentence as part of his plea agreement. Second, the Government argues that Molette's Motion to Vacate is time-barred because the United States Court of Appeals for the Fifth Circuit specifically rejected extending the retroactive application of Johnson/Welch to collateral challenges that are predicated on the manner in which federal sentences were calculated under the Sentencing Guidelines.¹ Thus, according to

¹ See Mot. to Dismiss [Docket No. 31], at 4-5 (citing United States v. Gonzalez-Longoria, 2016 WL 4169127, at *9 ("[T]his court has repeatedly rebuffed vagueness challenges to

the Government, Molette's argument that Johnson is applicable to the residual clauses in the Sentencing Guideline provisions lacks merit, and "without the benefit of Johnson's having been given retroactive application to Guidelines cases on collateral review, Molette's § 2255 claim is untimely, having been filed more than a decade after his conviction became final." Resp. [Docket No. 31], 4 (citing Taylor v. United States, 2016 WL 3702992, at *2 (N.D. Tex. 2016) (dismissing untimely § 2255 motion for lack of jurisdiction: "Johnson and Welch are not helpful to movant unless he can demonstrate that the § 924(e)(2)(B)(ii) residual clause was a factor in his sentence.")).

After Molette filed his Motion to Vacate, the Supreme Court granted Certiorari in the case of Beckles v. United States, No. 15-8544, which asked that Court to consider, *inter alia*, whether its ruling in Johnson applied retroactively to collateral cases challenging federal sentences enhanced under the residual clause in U.S.S.G. § 4B1.2(a)(2). Beckles was decided on March 6, 2017. The Supreme Court began its decision by recognizing that the vagueness

Guidelines sentencing"); In re Arnick, 2016 WL 3383487, at *1 (5th Cir. 2016) (the Supreme Court has not "held that a Guidelines enhancement that increases the Guidelines range implicates the same due process concerns as a statute that increases a statutory penalty" and "even if Johnson does implicate Section 4B1.2(a)(2), the Supreme Court has not addressed whether this arguably new rule of criminal procedure applies retroactively to cases on collateral review"); United States v. Wilson, 622 F. App'x 393, 405 n.51 (5th Cir. 2015) (rejecting that a defendant can bring a vagueness challenge against a Sentencing Guideline provision despite Johnson).

challenge in Johnson was directed at the residual clause of a sentencing statute, specifically the Armed Career Criminal Act ("ACCA"), codified at 18 U.S.C. § 924(e)(2)(B). The Beckles Court found that unlike the statutory language being challenge in Johnson that sentencing court are required to follow, the United States Sentencing Guidelines "merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range." See Beckles v. United States, --- U.S. ---, 137 S. Ct. 886, 892 (2017). Because of their advisory nature, the Supreme Court held that the "Guidelines are not subject to a vagueness challenge under the Due Process Clause" and, therefore, "[t]he residual clause in §4B1.2(a)(2) ... is not void for vagueness." Id.

Based on the decision in Beckles, which in essence held that the decision in Johnson does not apply to the residual clause in § 4B1.2(a) of the Sentencing Guidelines, the Court finds that Johnson did not extend the period of time in which Molette could seek relief under 28 U.S.C. § 2255. The Court additionally finds that because judgment in Molette's criminal case became final for the purposes of Section 2255 in 2004, but his Motion to Vacate under that statute was not filed until 2016, his Motion to Vacate was clearly filed outside the governing one-year limitations period and is, therefore, time-barred. Accordingly, the Court finds the Motion of the Government, to the extent it seeks dismissal of

Molette's Motion to Vacate as untimely, should be granted. As the Court has only considered the procedure aspects of Molette's Motion to Vacate, and has not considered the merits of any of his claims, dismissal will be without prejudice. See e.g. Pack v. Yusuff, 218 F.3d 448, 454 (5th Cir. 2000).

II. Conclusion

For the foregoing reasons:

IT IS THEREFORE ORDERED that the Motion of the Government to Dismiss [Docket No. 31] is hereby granted to the extent it seeks dismissal of Defendant's Motion for Relief under 28 U.S.C. § 2255 as time-barred.

IT IS FURTHER ORDERED that Defendant's Motion to Vacate, Set Aside, or Correct a Sentence by a Person in Federal Custody Under 28 U.S.C. § 2255 [Docket No. 25] is hereby denied.

IT IS FURTHER ORDERED that a Final Judgment dismissing this case shall be entered this day. A Certificate of Appealability will not issue because Defendant has failed to make a substantial showing of the denial of a constitutional right.

SO ORDERED this the 4th day of April, 2017.

s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

UNITED STATES OF AMERICA

VS.

CRIMINAL NO. 3:03-cr-37-WHB
CIVIL ACTION NO. 3:16-cv-479-WHB

GREGORY MOLETTE

FINAL JUDGMENT

In accordance with Rule 58 of the Federal Rules of Civil Procedure, and with the Opinion and Order that granted the Motion of the Government to dismiss Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, this case is hereby dismissed without prejudice.

SO ORDERED this the 4th day of April, 2017.

s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60253



A True Copy
Certified order issued Jan 04, 2018

Steph W. Coyle
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

GREGORY MOLETTE, also known as Gregory Mollette,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Mississippi

ORDER:

Gregory Molette, formerly federal prisoner # 11683-039, seeks a certificate of appealability (COA) to appeal the district court's dismissal as untimely of his 28 U.S.C. § 2255 motion challenging his 2003 sentence for federal bank robbery. *See* 18 U.S.C. § 2113. According to Molette, his prior convictions for federal bank robbery did not constitute crimes of violence under the career offender provisions of U.S.S.G. §§ 4B1.1 and 4B1.2, in light of *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).

To obtain a COA, where, as here, the district court has dismissed a claim on procedural grounds, the movant must show both "that jurists of reason would find it debatable whether the [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*

No. 17-60253

v. McDaniel, 529 U.S. 473, 484 (2000); *see also United States v. Orozco-Ramirez*, 211 F.3d 862, 864 n.4 (5th Cir. 2000). This court must decide whether to grant a COA “without full consideration of the factual or legal bases adduced in support of the claims” and without deciding the merits of the appeal. *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (internal quotation marks and citation omitted).

Molette has not made the required showing. *See United States v. Brewer*, 848 F.3d 711, 714-16 (5th Cir. 2017); *Houser v. Dretke*, 395 F.3d 560, 561 (5th Cir. 2004). The motion for a COA is DENIED.

/s/ Edith Brown Clement

EDITH BROWN CLEMENT
UNITED STATES CIRCUIT JUDGE