

No. 17-8368

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IN THE SUPREME COURT OF THE UNITED STATES

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GREGORY MOLETTE, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 7-25) that the court of appeals erred in denying a certificate of appealability on his claim -- which he brought in a motion under 28 U.S.C. 2255 -- that the residual clause in Section 4B1.2(a)(2) of the previously mandatory United States Sentencing Guidelines is void for vagueness under Johnson v. United States, 135 S. Ct. 2551 (2015). That issue does not warrant review, for the reasons stated in the government's briefs in opposition to the similar petitions for writs of certiorari in Robinson v. United States, cert. denied, No. 17-6877 (May 21, 2018), and Gates v. United States, cert. denied, No.

17-6262 (May 21, 2018).<sup>1</sup> This Court has recently and repeatedly denied review of other petitions presenting the same question. See, e.g., Allen v. United States, No. 17-5684 (May 21, 2018); James v. United States, No. 17-6769 (May 21, 2018). The same result is warranted here.

First, petitioner challenges only his sentence, not his conviction, see Pet. 1, 6, and his challenge to his sentence is moot because petitioner was released from prison on January 31, 2017.<sup>2</sup> See Br. in Opp. at 16-18, Gates, supra (No. 17-6262).

Second, petitioner's motion under 28 U.S.C. 2255 was not timely, because petitioner filed the motion more than one year after his conviction became final and this Court's decision in Johnson did not recognize a new retroactive right with respect to the formerly mandatory Sentencing Guidelines. See 28 U.S.C. 2255(f)(1) and (3); Br. in Opp. at 8-14, Robinson, supra (No. 17-6877). Every court of appeals to have considered the issue has so held. Br. in Opp. at 13-14, Robinson, supra (No. 17-6877) (discussing cases); see also United States v. Greer, 881 F.3d 1241, 1248-1249 (10th Cir. 2018), petition for cert. pending, No. 17-8775 (filed May 1, 2018).

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<sup>1</sup> We have served petitioner with a copy of the government's briefs in opposition in Robinson and Gates.

<sup>2</sup> See Fed. Bureau of Prisons, Find an Inmate, <https://www.bop.gov/inmateloc> (search for inmate register number 11683-039).

Third, the Probation Office applied Sentencing Guidelines Section 4B1.2 to petitioner based on his three prior federal convictions for bank robbery, see Pet. 6, and when petitioner was sentenced pursuant to the 2002 Sentencing Guidelines, the official commentary to Guidelines Section 4B1.2 expressly stated that a “[c]rime of violence’ includes \* \* \* robbery.” Sentencing Guidelines § 4B1.2 comment., (n.1) (2002); see Pet. 18. Petitioner therefore cannot establish that the residual clause of Sentencing Guidelines Section 4B1.2 was unconstitutionally vague as applied to him. See Br. in Opp. at 15-16, Robinson, supra (No. 17-6877).

Fourth, petitioner’s prior convictions for federal bank robbery were predicates for Sentencing Guidelines Section 4B1.2 irrespective of the residual clause, because those prior offenses “ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another.” Sentencing Guidelines § 4B1.2(a)(1) (2002). Every court of appeals to have considered the question has agreed. See, e.g., United States v. Armour, 840 F.3d 904, 909 (7th Cir. 2016) (applying the similarly worded provision in 18 U.S.C. 924(c)(3)(A)); Holder v. United States, 836 F.3d 891, 892 (8th Cir. 2016) (per curiam) (same); In re Sams, 830 F.3d 1234, 1239 (11th Cir. 2016) (same); United States v. McNeal, 818 F.3d 141, 153 (4th Cir.) (same), cert. denied, 137 S. Ct. 164 (2016); Johnson v. United States, 779 F.3d 125, 128-129 (2d Cir.) (same), cert. denied, 136 S. Ct. 209 (2015); United States v. Wright, 215 F.3d 1020, 1028 (9th Cir.) (same), cert.

denied, 531 U.S. 969 (2000); Royal v. Tombone, 141 F.3d 596, 602 (5th Cir. 1998) (per curiam) (same).

The petition for a writ of certiorari should be denied.<sup>3</sup>

Respectfully submitted.

NOEL J. FRANCISCO  
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JUNE 2018

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<sup>3</sup> The government waives any further response to the petition unless this Court requests otherwise.