

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MELVIN ANDREW MORRIS-- PETITIONER,

VS.

UNITED STATES OF AMERICA -- RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court
Of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Stevens J. Jacobs (P35020)
Attorney at Law
45 N. Tuscola Road
Bay City, Michigan 48708
(989)892-8611

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court who judgment is the subject of this petition is as follows:

SOLICITOR GENERAL OF THE UNITED STATES
ROOM 5614, DEPARTMENT OF JUSTICE
950 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20530-0001

MATTHEW SCHNEIDER
U.S. ATTORNEY
211 W. FORT STREET, SUITE 2001
DETROIT, MI 48226
(313) 226-9100

ANCA POP
ASSISTANT U.S. ATTORNEY
U.S. ATTORNEY'S OFFICE
101 FIRST STREET, SUITE 200
BAY CITY, MI 48708
(989) 895-5712

STEVENS J. JACOBS
ATTORNEY FOR PETITIONER
45 N. TUSCOLA ROAD
BAY CITY, MI 48708
(989) 892-8611

TABLE OF CONTENTS

LIST OF PARTIES	i
TABLE OF CONTENTS CITED	ii
TABLE OF AUTHORITIES CITED	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .	2
.STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	9
CONCLUSION	11

Index of Appendences

Appendix A

Opinion of the United States Court of Appeals for the Sixth Circuit . 03/15/2018

TABLE OF AUTHORITIES CITED

CASES:

<i>Beckles vs. United States</i> ; 137 SCt. 886 (2017)	5 & 9
<i>James vs. United States</i> ; 550 U.S. ;192, 208 (2007)	6
<i>James 550 U.S. at 199-200.</i>	6
<i>James 550 U.S. at 194-7.</i>	7
<i>Klein vs. Long</i> , 275 F.3d , 554, 551 (6 th Cir. 2001).	6
<i>People vs. Bryant</i> , 264 N.W. 2d 13, 16 (Mich. Ct. App. 1978).	6
<i>People vs. Reeves</i> , 510 N.W. 2d, 433	5
<i>People vs. Terry</i> , 553 N.W. 2d, 23, 25, (Mich. Ct. App. 1996).	6
<i>United States vs. Castleman</i> ; 134 SCt. 1405 (2014)	6
<i>United States vs. Jose Risciliano Garcia-Cantu</i> , Fifth Circuit No. 15-4022	8
<i>United States vs. Paulak</i> ; 822 Fed. 3d 902 Sixth Circuit (2016)	5
<i>United States vs. Phillips</i> ; 752, Fed. 3d 1047 Sixth Circuit (2014)	6&7

STATUTES:

28 U.S.C. § 1254 (1)	1
21 U.S.C, 3841 (a)(1) & (b) (l) (c).	3
USSG 4B1.1.	3
18 U.S.C § 2	3
M.C.L. § 750.81(2)	4
M.C.L. 750.81.	6 & 7
USSG §§ 4B1.1(a)	4
4B1.2(a)(1).	5
4B1.2(a)(2).	5

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, MELVIN ANDREW MORRIS , respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on March 15, 2018.

OPINION BELOW

On March 15, 2018, the Sixth Circuit Court of Appeals entered its opinion affirming the conviction of Petitioner and issued a Mandate April 6, 2018. A copy of the opinion is attached as Appendix A which has been recommended for full text publication.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its decision March 15, 2018, and Mandate April 6, 2018.

A petition for rehearing was not filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- I. The Sixth Circuit Court of Appeals opinion affirming the trial court's ruling that Michigan's Felony Domestic Violence conviction is a crime of violence pursuant to the United States Sentencing Guidelines utilizing the "Residual Clause" is fundamentally unfair.

STATEMENT OF THE CASE

On July 23, 2014, a 23-count Indictment was filed in the United States District Court the for Eastern District of Michigan, Northern Division charging Joseph Lamont Jeffrey, Kwame Amin Mathew, William Alexander McCaskey, Melissa Nanette Laponsie, Melvin Andrew Morris, Vincent Kent Williams and Rodney Aron Daniels. The Appellant was charged in Counts 3, 15, 16, 17 and 18 alleging Distribution of Cocaine Base and Aiding and Abetting, in violation of 21 U.S.C 3841 (a)(1) & (b)(1)(c) and 18 U.S.C. § 2. The offense conduct contained in the Indictment for all defendants occurred from August 29, 2013, until May 19, 2014.

Petitioner pled guilty to a Rule 11 Plea Agreement but neither the defense or the Government anticipate a finding that he was a career offender pursuant to USSG 4B1.1 and subject to the enhanced sentencing guideline recommendations. The Plea Agreement suggested a guideline range of thirty (30) to thirty-seven (37) months in prison and because of an amendment forthcoming, the government did not object to a two level downward variance resulting with the suggested guideline range of twenty-four (24) to thirty (30) months.

Petitioner could withdraw his plea if the court would impose a

sentence higher than thirty-seven (37) months.

Petitioner had two (2) felony Domestic Violence convictions pursuant to M.C.L. §750.81(2). The Michigan statute provides that a person's first two (2) Domestic Assault convictions are misdemeanors and that the third and subsequent conviction are felonies.

The Trial Court determined that Petitioner qualified as a Career Offender finding his two (2) prior Domestic Violence convictions qualify as crimes of violence inasmuch as the statute had "as an element the use of . . . physical force against the person of another. "The court utilized the modified categorical approach reviewing the guilty plea transcripts of Petitioner's convictions.

Petitioner withdrew his plea, proceeded to jury trial and was found guilty.

The Career Offender determination resulted in an offense level of thirty-two (32), a criminal history category of VI and a guideline range of 210 to 262 months. The trial court varied downward and imposed a sentence of 180 months. Petitioner's timely appealed.

The 2015 guidelines have three ways in which an offense could be designated as a crime of violence. They include the "elements clause" found

in sections 4B1.2(a)(1). The enumerated offense clause, found in 4B1.2(a)(2) and a residual clause, which is “conduct that presents a serious potential risk of physical injury to another.” Even though the residual clause was found unconstitutionally vague in *United States vs. Paulak*; 822 Fed. 3d 902 (Sixth Circuit 2016) that decision was abrogated by *Beckles vs. United States*; 137 Supreme Court 886 (2017). The U.S. Supreme Court held in *Beckles*, supra, that the advisory guidelines are not subject to a “void for a vagueness challenge”.

The Sixth Circuit found that the district court erred in using the modified category approach in this case. Furthermore, that Michigan’s Domestic Violence statute is not a crime of violence pursuant to the “elements clause” inasmuch as Michigan’s Domestic Violence statute does not include the use, or attempted use, or threatened use of violent force against the person of another.

A person can commit a battery by mere offensive, but not harmful, touching of the victim’s person or of something closely connected with the victim’s person. See *People vs. Reeves*; 510 N.W. 2d, 433. Therefore, an offensive touching can be accomplished without using force capable of causing physical pain or injury.

In Michigan, battery is “the willful touching of the person of another

by the aggressor or by some substance put in motion by him”. *Klein vs. Long*, 275 F.3d 554, 551 (6th Cir. 2001) (quoting *People vs. Bryant*, 264 N.W. 2d 13, 16 (Mich. Ct. App. 1978)). In Michigan, the touching need not result in physical injury. (*People vs. Terry*, 553 N.W. 2d, 23, 25, (Mich. Ct. App. 1996)). Furthermore, the term “battery” as used in Michigan’s Domestic Violence statute therefore extends to mere offensive touching, and accordingly does not require violent force as contemplated by the Sentencing Guidelines. Both assault and battery can be accomplished in Michigan without the use, attempted use, or threat of violent force, as when a person intentionally spits on another. *See Terry, supra* 553 N.W. 2d, Page 25.

Lastly, the Sixth Circuit rejected the Government’s request to use the meaning articulated in *United States vs. Castleman*, 134 S.Ct. 1405 (2014), as the definition of physical force.

The court concluded that the categorical approach should have been used to determine the nature of a crime without regard to the specific offense characteristics of Defendant’s offense under the “residual clause” analysis.

Whether an offense presents a “serious potential risk of physical injury to another” rests on inherently probabilistic concepts. See *James vs. United States*; 550 U.S. 192, 208 (2007). . .and the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another.

The Government argued that M.C.L. § 750.81 is a crime of violence because the nature of domestic conflict are volatile and have a tendency to escalate over the course of time, creating a risk of confrontation that “might result in bodily injury”. *James*, 550 U.S. at 199—200. The Government asserted that due to the face-to-face confrontation required by the statute, the risk of bodily injury is significant, at least as significant as the risk present during an attempted burglary. In *United States vs. Phillips*, 752 F.3d 1047, 1050 (6th Cir. 2014) the court held that, under ACCA’s residual clause, Florida’s third-degree burglary constituted a predicate offense due to the risk of confrontation.

The Sixth Circuit found that the face to face confrontation required in a Domestic Violence situation, that the risk of bodily injury is significant, at least as significant as the risk presented during an attempted burglary. See *United States vs. Phillips*; 752, Fed. 3d 1047 (Sixth Cir. 2014). Furthermore, that in the context of the face to face incident of domestic violence there is a serious risk of personal injury sufficient to conclude that M.C.L. 750.81 is a crime of violence under the residual clause of the guidelines. The Sixth Circuit held that the Supreme Court has noted and emphasized that burglary is a crime of violence due to the risk arising should an innocent person . . . confront the burglar during the crime. See *James* 550 U.S. 194. The circuit decreed that domestic assault

includes a similar risk of confrontation.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit Court of Appeals determination that the residual clause of the United States Sentencing Guidelines should be utilized and in as much as the Supreme Court has held that burglary is a crime of violence due to the risk should “an innocent person. . . confront the burglar during the crime”, that domestic assault includes a similar risk of confrontation, therefore, Michigan’s Felony Domestic Assault statute (MCL 780.81(4)) is a crime of violence is erroneous.

Secondly, the United States Supreme Court decision in *Beckles vs. United States*; 137 SCt. 886 (2017) holding that the advisory guidelines are not subject to a vagueness challenge under the due process clause should be reviewed because the increased career offender advisory guidelines recommend extremely greater sentences than what would normally be imposed.

The residual clause definition of a Crime of Violence has been found unconstitutional, “void for vagueness” pursuant to the Fifth Amendment due process clause utilizing identical language in statutes such as the Armed Career Criminal Act in, *Sessions vs. Dimaya*, *United States Supreme Court*, File No. 15-1498, 548 U.S. ____ (2018) and other statutes such as 18 USC § 16 in *United States of America vs. Jose Risciliano Garcia-Cantu*, 5th Cir. Case No. 15-

40227. To assert the United States Sentencing Guidelines are merely advisory, increasing Petitioner's original recommended guideline range of 24 to 30 months to 210 to 262 months imprisonment is fundamentally unfair. To assert that the court utilized its discretion and sentenced the Defendant below the advisory guideline range to a sentence of imprisonment of fifteen (15) years also is fundamentally unfair.

Police officers are shot and even murdered as a result of routine traffic stops. Therefore, there is a risk of confrontation when a police officer pulls over an individual for a speeding violation. If the speeding violation were enhanced to a felony pursuant to a statute, then a traffic stop has similar risks of confrontation and would qualify as a crime of violence under the residual clause of the United States Sentencing guidelines.

Lastly, one could argue that in any confrontation, there is a serious risk of physical injury therefore all "face to face" crimes are "crimes of violence" pursuant to the sentencing guidelines.

CONCLUSION

For the aforementioned reason, Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

DATED: June 27, 2018

Respectfully submitted,

/s/Stevens J. Jacobs
STEVENS J. JACOBS (P35020)
45 N. Tuscola Road
Bay City, Michigan 48708
(989) 892-8611
Attorney for Petitioner