

No. _____

In the
United States Supreme Court
October Term, 2022

Jackie Mitchell,

Petitioner

v.

United States of America,

Respondent

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

Petition for Writ of Certiorari

Gary W. Crim
Counsel of Record
943 Manhattan Avenue
Dayton, Ohio 45406-5141
(937) 276-5770
garywcrim@gmail.com

Counsel for Petitioner

Question Presented

To resolve a federal defendant's criminal history, must a circuit court panel use the current state court interpretations of state conviction, or may it rely on earlier panel decisions predating the most recent state court decisions and ignoring state court interpretations for the federal court's own interpretation of state law?

Parties to the Proceeding

Petitioner, Jackie Mitchell, was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

Table of Contents

<i>Question Presented</i>	<i>i</i>
<i>Parties to the Proceeding</i>	<i>ii</i>
<i>Table of Contents</i>	<i>iii</i>
<i>Table of Authorities</i>	<i>iv</i>
<i>Citations of the Official and Unofficial Reports of the Opinions and Orders</i>	<i>1</i>
<i>Statement of Jurisdiction</i>	<i>1</i>
<i>Introduction</i>	<i>2</i>
<i>Statement</i>	<i>2</i>
<i>Ohio Domestic Violence, OHIO REV. CODE § 2919.25</i>	<i>5</i>
<i>The Sixth Circuit has a strict rule about a panel overruling an earlier decision of another panel</i>	<i>8</i>
<i>Reasons for Granting the Writ: This case. This case allows the Court to clarify what federal courts need to do when state courts adjust state law with federal implications.</i>	<i>11</i>
<i>Conclusion</i>	<i>12</i>
<i>Appendix</i>	<i>13</i>
Appendix A: Court of Appeals Opinion (October 21, 2022)	1a
Appendix B: Court of Appeals denying Petition for Rehearing and Rehearing En Banc (January 23, 2023).....	7a
Appendix C: DISTRICT COURT Judgment, R. 33, September 22, 2021, PageID # 160, 161	8a
Appendix D: OHIO REV. CODE § 2901.01.....	15a
Appendix E: OHIO REV. CODE § 2919.25	22a

Table of Authorities

	Page(s)
Federal Cases	
<i>Descamps v. United States</i> , 570 U.S. 254, 261, (2013)	10
<i>Johnson v. United States</i> , 559 U.S. 133 (2010)	<i>passim</i>
<i>Moncrieffe v. Holder</i> , 569 U.S. 184 (2013)	10
<i>Taylor v. United States</i> , 495 U.S. 575 (1990)	9
<i>Turner v. United States</i> , 848 F.3d 767 (6th Cir. 2017)	9
<i>United States v. Burris</i> , 912 F.3d 386 (6th Cir. 2019)	10
<i>United States v. Camp</i> , 903 F.3d 594 (6th Cir. 2018)	8
<i>United States v. Gatson</i> , 776 F.3d 405 (6th Cir. 2015)	5, 9, 10
<i>United States v. Melendez-Perez</i> , No. 20-3925, 2021 U.S. App. LEXIS 21695 (6th Cir. July 20, 2021).....	10
<i>United States v. Moody</i> , 206 F.3d 609 (6th Cir. 2000)	8, 9
<i>United States v. Solomon</i> , 763 F. App'x 442 (6th Cir. 2019)	10
State Cases	
<i>Sharp v. Union Carbide Corp.</i> , 38 Ohio St.3d 69 (1988)	6
<i>State v. Alston</i> , 2015-Ohio-4127 (Ct. App.).....	6

<i>State v. Bishop</i> , 2010-Ohio-2124 (Ct. App.).....	6
<i>State v. Blonski</i> , 707 N.E.2d 1168 (Ohio App. 1997)	6, 8
<i>State v. Bolling</i> , 2011-Ohio-2790 (Ct. App.).....	7
<i>State v. Brumley</i> , 2017-Ohio-8803 (Ct. App.).....	6
<i>State v. Butler</i> , 2012-Ohio-5030 (Ct. App.).....	6
<i>State v. Ford</i> , 2013-Ohio-1883 (Ct. App.).....	7
<i>State v. Howell</i> , 81 N.E.3d 114 (Ct. App.)	7
<i>State v. Jackson-Williams</i> , 2020-Ohio-1118 (Ct. App.).....	8
<i>State v. Martin</i> , 2000 Ohio App. Lexis 3649 (Ct. App. Aug. 14, 2000).....	6
<i>State v. Nielsen</i> , 585 N.E.2d 906 (Ohio App. 1990)	6, 8
<i>State v. Parker</i> , 2020-Ohio-4607 (Ct. App.).....	6
<i>State v. Roof</i> , 1978 Ohio App. Lexis 7744 (Ct. App. Nov. 8, 1978).....	6
<i>State v. Thompson</i> , 2021-Ohio-2166 (Ct. App.).....	7
<i>State v. Vore</i> , 2014-Ohio-1583 (Ct. App.).....	7, 11
<i>State v. Ward</i> , 2010-Ohio-4614 (Ct. App.).....	7

Federal Statutes

18 U.S.C. § 922.....	2
18 U.S.C. § 924.....	2, 11
26 U.S.C. § 5861(d)	3
28 U.S.C. § 1254(1)	1
USSG § 2K2.1	9
USSG § 4B1.1.....	9, 12
USSG § 4B1.2.....	2, 11

State Statutes

OHIO REV. CODE § 2901.01.....	<i>passim</i>
OHIO REV. CODE § 2919.25.....	<i>passim</i>

Other Authorities

Webster's Third New International Dictionary 1131 (1993)	6
--	---

No. _____

In the
United States Supreme Court

Jackie Mitchell,
Petitioner

v.

United States of America,
Respondent

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

Jackie Mitchell petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Citations of the Official and Unofficial Reports of the Opinions and Orders.

The Sixth Circuit Court of Appeals decision is not reported but is published at 2022 U.S. App. LEXIS 29423, 2022 WL 12230276 and attached. Appx. A, 1a.

Statement of Jurisdiction

The Sixth Circuit Court of Appeals issued its opinion on October 21, 2022; extended the time for filing the rehearing petition; and denied the timely filed Petition for Rehearing on January 23, 2023. Appx. B, 7a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Introduction

The question at the core of this case is: Can the offense of Domestic Violence, OHIO REV. CODE § 2919.25, be committed without violent force? *Johnson v. United States*, 559 U.S. 133, 142 (2010). Under the Guidelines, an offense is a “crime of violence” if it has as an element the use, attempted use, or threatened use of physical force against the person of another. USSG § 4B1.2(a)(1). “Physical force” means violent force, force capable of causing physical pain or injury to another person. *Johnson v. United States*, 559 U.S. at 140, interpreting 18 U.S.C. § 924(e)(2)(B)(i)).

Mitchell objected to including the Domestic Violence offenses in the Guideline calculation. The Domestic Violence charges all involved one person, T.T., who married Mitchell on February 14, 2019, after many of the Domestic Violence charges occurred. PIR, ¶ 77, PageID # 122. If all of the Domestic Violence offenses are included in the calculation, then the Guideline Range would have been 188 months to 235 months. PIR, ¶ 96, PageID # 126. But, if the Domestic Violence offenses are excluded from the calculation, the Guideline Range would have been 92 months to 115 months. Defendant’s Sentencing Memorandum, etc., R. 29, September 14, 2021, pp. 4-5, PageID # 144-45.

Statement

1. Petitioner, Jackie Mitchell appealed his sentence from the District Court of the Northern District of Ohio. Mitchell accepted responsibility for his actions and did not go to trial. He pled guilty without a plea agreement to Felon in Possession of Firearm, 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and to Possession of

Unregistered Short-Barrel Shotgun, 26 U.S.C. § 5861(d). Mitchell has been in a relationship with T.T. since he was seventeen, and they married in early 2019, about ten years after their relationship began. Final Presentence Investigation Report, R. 27, September 8, 2021, ¶ 77, PageID # 122, (“PIR”).

2. The PIR recited the incident and similar recitations of the facts of earlier incidents. On October 21, 2020, Akron Police Department officers responded to 2294 7th Street Southwest, Akron, due to shots fired into a residence. Officers arrived on the scene and knocked on the front door. While waiting for Mitchell to open the door, one officer saw a child crawl out of the second-story window onto the roof, yelling for help. The front door opened, and officers talked with T.T. and Mitchell. Mitchell was yelling, stating he did nothing. The officers calmed the defendant. PIR, ¶¶ 5-8; PageID # 103. T.T. told officers Mitchell argued with her, grabbed her, pushed her against the wall, and pointed a rifle at her. T.T. was upstairs when the defendant fired several shots downstairs. She called the police, reporting shots fired at her residence. PIR, ¶ 8, PageID # 103.

3. Mitchell told officers that nothing had happened and denied firing shots inside the residence. When officers told Mitchell he was under arrest and asked him to stand up, Mitchell jumped off the front porch into the path of other officers. Officers took the defendant to the ground, but he continued to fight. PIR, ¶ 9, PageID # 103. Officers transported Mitchell to a hospital for possible drug ingestion. PIR, ¶ 10, PageID # 103.

4. The PIR's recitation of Mitchell's criminal history related to the Domestic Violence incidents: May 31, 2010, involving T.T., PIR, ¶ 34, PageID # 107; June 16, 2014, involving T.T., PIR, ¶ 48, PageID # 111; August 14, 2015, involving T.T., PIR, ¶ 52, PageID # 113; February 27, 2017, involving Mitchell's fiancée and mother of his child, PIR, ¶ 53, PageID # 116, and April 29, 2019, involving T.T., PIR ¶ 60, PageID # 118. And the PIR revealed a drug trafficking offense on December 8, 2010, PIR, ¶ 36, PageID # 107. The District Court noted that Mitchell's cases involved using drugs and alcohol. Sent. Hearing, R. 45, PageID # 258. The District Court imposed a sentence of 180 months and five years of supervised release. Judgment, R. 33, September 22, 2021, PageID 161-63.

5. The PIR also revealed abuse that Mitchell related as a child from his mother and grandmother from the ages of three to eight and abuse from his father PIR, ¶ 83, PageID # 123. The PIR also reported on his mental health diagnoses. PIR, ¶¶ 82-84, PageID ##123-24. Mitchell had been diagnosed with Fetal Alcohol Syndrome, Attention Deficit Hyperactivity Disorder and Attention Deficit Disorder as a juvenile. PIR, ¶ 82, PageID # 123. The PIR also reported his substance abuse, ecstasy and alcohol being the current focus. PIR, ¶¶ 86-89, PageID # 24.

6. Mitchell objected to including the convictions under OHIO REV. CODE § 2919.25 as offenses of violence. Defendant's Sentencing Memorandum and Motion, etc., R. 29, September 14, 2021, PageID # 141; Transcript of Sent. Hearing, R. 45, PageID ## 226-47. Including the Domestic Violence convictions yielded a sentencing Guideline Range of 188 months to 235 months. PIR, ¶ 96, PageID # 126. Excluding

the Domestic Violence convictions yielded a sentencing Guideline Range of 92 months to 115 months. Defendant's Sentencing Memorandum and Motion for a Downward Variance, R. 29, September 14, 2021, pp. 4-5, PageID # 144-45.

7. In making these objections, Mitchell's counsel acknowledged that *United States v. Gatson*, 776 F.3d 405 (6th Cir. 2015), was binding Sixth Circuit authority. Sent. Hearing, R. 45, PageID ## 236-39. The District Court rejected Mitchell's objections and imposed the minimum sentence of 180 months. PageID # 160, 161.

8. In the Sixth Circuit, Mitchell again argued that the convictions under OHIO REV. CODE § 2919.25 should have been excluded from the guideline calculations. The Sixth Circuit panel affirmed based on the earlier panel decision in *United States v. Gatson*, 776 F.3d 405 (6th Cir. 2015), And no judge called for a vote to review en banc, 2022 U.S. App. LEXIS 29423.

Ohio Domestic Violence, OHIO REV. CODE § 2919.25

The substantive provisions of OHIO REV. CODE § 2919.25 includes both attempting and actual completion. The sentencing provision distinguishes between felony and misdemeanor premised not on the perpetrator's conduct of the offense but a defendant's prior convictions, as one can have a conviction under the felony provisions and subsequently be charged with a misdemeanor under the same Ohio code section.

Ohio Courts have stated that a defendant may be found guilty of Domestic Violence even if the victim sustains only minor injuries or sustains no injury.

Our review of the record shows that the prosecutor did not misstate the elements of domestic violence. In his closing argument, the prosecutor correctly explained that a defendant can be found guilty of Domestic Violence even if the victim sustains only minor injuries. We note that R.C. 2919.25 does not require the state to prove that a victim has sustained actual injury since a defendant can be convicted of Domestic Violence for merely attempting to cause physical harm to a family member. Accordingly, we do not find that appellant's substantial rights have been violated and appellant's second assignment of error is found not well taken.

State v. Nielsen, 585 N.E.2d 906, 908 (Ohio App. 1990); *State v. Blonski*, 707 N.E.2d 1168, 1175 (Ohio App. 1997).

Ohio courts rely on the statutory definitions in OHIO REV. CODE § 2901.01(A) (3) & (5) to resolve violations of OHIO REV. CODE § 2919.25. *State v. Parker*, 2020-Ohio-4607, ¶ 72 (Ct. App.); *State v. Brumley*, 2017-Ohio-8803, ¶ 30 (Ct. App.); *State v. Alston*, 2015-Ohio-4127, ¶ 6 (Ct. App.); *State v. Butler*, 2012-Ohio-5030, ¶ 23 (Ct. App.); *State v. Bishop*, 2010-Ohio-2124, ¶¶ 19-22 (Ct. App.).

OHIO REV. CODE § 2901.01(A) provides no definitions of “reckless serious physical injury.” The term is accorded its common, ordinary, everyday meaning. *State v. Martin*, 2000 Ohio App. Lexis 3649, at *13 (Ct. App. Aug. 14, 2000); *Sharp v. Union Carbide Corp.*, 38 Ohio St.3d 69, 70 (1988). “Impair” means to “make worse” or “diminish in quantity, value, excellence, or strength.” Webster’s Third New International Dictionary 1131 (1993). “Physiological” means “characteristic of or appropriate to an organism’s healthy or normal functioning.” *Id.* at 1707. The term “physiological impairment” may, therefore, “be defined as a damaging or lessening of a person’s normal physical functioning.” *State v. Roof*, 1978 Ohio App. Lexis 7744 (Ct. App. Nov. 8, 1978).

The Ohio Courts have conflated attempts with completion of OHIO REV. CODE § 2919.25.

In *State v. Vore*, 2014-Ohio-1583, ¶ 18 (Ct. App.), the Court faced a bank teller who “froze” and did not “snap out of it” until a manager walked by and asked her if something was wrong after a bank robbery. The court ruled that this established a physiological impairment as defined under physical harm in OHIO REV. CODE § 2901.01(A)(3). The Court found, “The teller’s testimony clearly established appellant’s actions diminished or lessened her normal physical functioning, at least for a short period of time.” *Id.* Such conduct is outside the violent force required in *Johnson v. United States*, 559 U.S. at 140.

Many Ohio cases emphasize that one need not injure anyone to be guilty of Domestic Violence. *State v. Howell*, 81 N.E.3d 114, 117 (Ct. App.) (affirming a conviction under OHIO REV. CODE § 2901.01(A)(3) where the defendant let go of a bat over which the two were struggling; the bat then struck the victim in the face, causing an injury to her lip). *State v. Bolling*, 2011-Ohio-2790, ¶ 18 (Ct. App.) (affirming a conviction under OHIO REV. CODE § 2901.01(A)(3) where the defendant grabbed the victim’s scarf during an argument).

This conflation occurs because a defendant can be convicted for merely attempting to cause physical harm, *State v. Ford*, 2013-Ohio-1883, ¶ 16 (Ct. App.); *State v. Ward*, 2010-Ohio-4614, ¶ 9 (Ct. App.). More recent cases follow this approach. In *State v. Thompson*, 2021-Ohio-2166, ¶ 20 (Ct. App.), the trial court found the defendant guilty not because she caused any physical harm to the victim but

because she attempted to cause physical harm to him. The Court emphasized that OHIO REV. CODE § 2919.25(A) prohibits both causing and attempting to cause physical harm and can thus be proven by evidence demonstrating that the defendant engaged in actions that constitute an attempt to inflict physical harm. In *State v. Jackson-Williams*, 2020-Ohio-1118, ¶ 25 (Ct. App.), the Court said that OHIO REV. CODE § 2919.25(A),: “does not require the state to prove that the victim sustained any actual injury, ‘since a defendant can be convicted of Domestic Violence for merely attempting to cause physical harm,’” citing *Nielsen* and *Blonski*. The Court affirmed the conviction, inferring that the victim may have had good reasons for delaying medical treatment and reporting the actual crime. *Jackson-Williams*, 2020-Ohio-1118, ¶ 48.

The Ohio Courts have interpreted OHIO REV. CODE § 2919.25 to include conduct that falls outside of force capable of causing physical pain or injury to another person. *Johnson v. United States*, 559 U.S. at 140.

***The Sixth Circuit has a strict rule about a panel
overruling an earlier decision of another panel***

The Sixth Circuit has long relied on a strict rule forbidding a panel from overruling an earlier decision of another panel.

This panel may not overrule the decision of another panel; the earlier determination is binding authority unless a decision of the United States Supreme Court mandates modification or this Court sitting en banc overrules the prior decision. *United States v. Moody*, 206 F.3d 609, 615 (6th Cir. 2000).

United States v. Camp, 903 F.3d 594, 597 (6th Cir. 2018)

Notwithstanding this thoughtful reasoning, we must follow the precedent of *Moody* and *Kennedy*. This panel should not overrule the decision of another panel; the earlier determination is binding authority unless a decision of the Supreme Court mandates modification or this Court sitting en banc overrules the prior decision. Whether Turner in fact received ineffective assistance of counsel during the preindictment plea negotiations in the federal case against him we do not know, and we cannot reach the question today based on our prior rulings. We therefore must affirm the district court's judgment that Turner's right to counsel had not attached.

Turner v. United States, 848 F.3d 767, 773 (6th Cir. 2017)

Various panels have not analyzed the issue of whether Ohio's Domestic Violence meets the federal standards for an offense of violence. Instead these panels have deemed themselves bound by the earlier panel decision finding that Domestic Violence is a crime of violence for federal purposes, *United States v. Gatson*, 776 F.3d 405, 410 (6th Cir. 2015). *Gatson* did not examine how the Ohio Courts have interpreted the definitions of "Physical harm to persons," OHIO REV. CODE § 2901.01. The statutory definitions include conduct outside of violent force, and the Ohio Courts have interpreted conduct outside of violent force.

Treating the convictions for Domestic Violence as crimes of violence impacts the calculation of the Guideline Range in two ways. First, the Base Offense goes to 26 from 20, USSG § 2K2.1. Second, treating the convictions as crimes of violence makes the defendant an Armed Career Criminal under USSG § 4B1.1(b)(1). The Armed Career Criminal Act ("ACCA") mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses and not to the particular facts underlying those convictions. *Taylor v. United States*, 495 U.S. 575, 577

(1990); *Descamps v. United States*, 570 U.S. 254, 261, (2013); *United States v. Burris*, 912 F.3d 386, 392 (6th Cir. 2019).

In determining the elements of a state offense, federal courts are bound by the state interpretations of the state statute. *Johnson v. United States*, 559 U.S. at 138. In *Moncrieffe v. Holder*, 569 U.S. 184, 194-95 (2013), this Court relied on Georgia cases to resolve the interpretation of Georgia law, not on the Court's own interpretation. The Sixth Circuit has never relied on the Ohio Courts' interpretation of Ohio law for domestic violence, OHIO REV. CODE § 2919.25 to resolve whether it meets the federal definition of a crime of violence. Instead, it relied on its own interpretation of the statute in *Gatson* and has continued to rely *on* that interpretation in all subsequent cases. This failure has been noted but not resolved:

I note that *Gatson's* overbreadth analysis of Ohio's domestic violence statute read in an assumption of force that the statutory language does not include. OHIO REV. CODE § 2919.25 does not specify that the "physical harm" even be inflicted through force. Its plain language requires only that the perpetrator "cause or attempt to cause physical harm"; the means are not specified. OHIO REV. CODE § 2919.25. The *Gatson* court did not proceed further in its overbreadth analysis to assess how the statute is applied in Ohio. *See, e.g., Moncrieffe v. Holder*, 569 U.S. 184, 194-95, 133 S. Ct. 1678, 185 L. Ed. 2d 727 (2013).

United States v. Solomon, 763 F. App'x 442, 449 (6th Cir. 2019); *See also United States v. Melendez-Perez*, No. 20-3925, 2021 U.S. App. LEXIS 21695, at *8-9 (6th Cir. July 20, 2021).

The Sixth Circuit has employed a procedural rule to avoid examining changes by the Ohio Courts interpreting OHIO REV. CODE § 2919.25 and § 2901.01.

Reasons for Granting the Writ: This case. This case allows the Court to clarify what federal courts need to do when state courts adjust state law with federal implications.

The question at the core of this case is: Can a person commit Ohio's offense of Domestic Violence, OHIO REV. CODE § 2919.25, without using violent force? *Johnson v. United States*, 559 U.S. 133, 142 (2010). Under the Guidelines, an offense is a "crime of violence" if it has as an element the use, attempted use, or threatened use of physical force against the person of another. USSG § 4B1.2(a)(1). "Physical force" means violent force, force capable of causing physical pain or injury to another person. *Johnson v. United States*, 559 U.S. at 140, interpreting 18 U.S.C. § 924(e)(2)(B)(i)). Unlike many states, Ohio does not distinguish between felony and misdemeanor domestic violence based on the amount of violence.

Ohio courts consider a person who has been robbed and does not snap out of it immediately as suffering physical harm. The courts base this on a statutory definition that includes physiological impairment in the definition of harm. OHIO REV. CODE § 2919.25(A)(3). This is beyond violent force! *See State v. Vore*, 2014-Ohio-1583, ¶ 18 (Ct. App.).

Ohio's interpretation of physiological impairment is conduct that falls outside of the behavior described in the Guidelines career-offender clause as an offense of violence. Physiological impairment under OHIO REV. CODE § 2901.01(A)(3) encompasses acts that do not involve the force required by the career-offender Guidelines. For example, freezing and not snapping out of it immediately after a robbery is not the violent force, force capable of causing physical pain or injury to another person,

required by the Guidelines. This interpretation of force puts OHIO REV. CODE § 2901.01(A)(3), and thus OHIO REV. CODE § 2919.25(A), beyond the traditional definition of force used in the USSG § 4B1.1(b)(1) to impose Armed Career Criminal status.

Ohio's statute allows a Domestic Violence conviction without violent force, so including those offenses as offenses of violence incorporates conduct outside of violent force. Under this Court's definition of physical force—force capable of causing physical pain or injury to another person, Ohio's Domestic is not an offense of violence for guideline calculations. *Johnson v. United States*, 559 U.S. at 140.

Conclusion

This case gives the Court an opportunity to emphasize the need to interpret state statutes relying on current state court interpretations.

Thus, this Court should grant Mitchell's petition for a Writ of Certiorari and return the case to the Sixth Circuit with instructions to interpret Ohio's Domestic Violence, OHIO REV. CODE § 2919.25 using Ohio law.

s/Gary W. Crim

Gary W. Crim
Counsel of Record
943 Manhattan Avenue
Dayton, Ohio 45406-5141
(937) 276-5770
garywcrim@gmail.com

Attorney for Jackie Mitchell