

NO. 17-6105

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO TURNER, *Petitioner*,

-vs-

UNITED STATES OF AMERICA, *Respondent*.

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT ON REPLY

This Court should accept Mr. Turner’s case for review, because the question of whether physical harm necessarily involves violent force remains an open legal question. The government attempts to neutralize Mr. Turner’s argument by claiming he is seeking simply correction for plain error. (Opp. pp. 5-6). Not so. This Court specifically acknowledged in *United States v. Castleman*, 134 S. Ct. 1405, 1413 (2014), that it was leaving open the question of whether any bodily injury could satisfy the definition of violent force. Ohio’s felonious assault statute takes that legal question one step further, because it criminalizes purely mental harms in addition to physical ones.

This Court explained in *United States v. Johnson*, 559 U.S. 133, 139 (2010), that the kind of violent force required to satisfy the use of force clause was violent, physical force “distinguishing physical force from, for example, intellectual force or emotional force.” Ohio’s felonious assault statute can be satisfied by intellectual or emotional force that results in a purely mental harm. As a result, the Sixth Circuit’s conclusion that Ohio’s felonious assault statute satisfies the use of force clause in the

U.S. Sentencing Guidelines (“Guidelines”), conflicts with this Court’s interpretation of federal law. Therefore, Mr. Turner’s petition should be granted.

I. Ohio felonious assault is satisfied by mental harms alone.

The government wrongly asserts that Ohio’s felonious assault statute can only be satisfied where a mental harm results from a defendant’s use of physical force against another – thereby satisfying the use of force contemplated by the Guidelines. (Opp. P. 8). This Court should begin its inquiry with the language of the state statute itself. Ohio Revised Code Ann. § 2903.11(A)(1) is satisfied when an individual knowingly causes “serious physical harm to another or another’s unborn.” The Ohio Revised Code defines “serious physical harm” to include “[a]ny mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment.” Ohio Rev. Code Ann. § 2901.01(A)(5). The plain language of the statute does not require there be physical harm in order to establish a mental harm.

Further, the Commentary to Ohio Rev. Code Ann. § 2901.01 includes a 1974 Committee Comment from the Ohio General Assembly that removes any remaining doubt that purely mental harms satisfy the statute. 1974 Committee Commentary to Ohio Gen. Assembly H.B. 511, codified as § 2901.01. The Committee states in defining “physical harm to persons” that

in the context of the criminal law a precedent trauma is not viewed as a necessary requirement before it can be held that personal harm is caused or threatened, **such as when an offender deliberately, through other than traumatic means, sets out to drive his victim mad** or arranges for his victim to contract pneumonia.

Id. (Emphasis added). The Ohio General Assembly intended for “serious physical harm” to be satisfied by mental harms, as well as physical harms. The government’s interpretation that a physical harm, or precedent trauma, is always required for felonious assault was expressly rejected by the Ohio General Assembly.

In fact, the Committee goes on to clarify that mild mental disturbances do not satisfy the statute. Rather, “Serious mental conditions are reserved for the definition of serious physical harm to persons. . .” *Id.* The Ohio General Assembly took the time to not only include purely mental harms in the definitional section of § 2901.01(A)(5) but to clarify its meaning that serious mental conditions – exclusive of actual physical harm – satisfy the felonious assault statute.

Moreover, the 1974 Committee Comment to Ohio’s felonious assault statute itself states that § 2903.11 “is not based on the means used to commit the offense.” 1974 Committee Commentary to Ohio Gen. Assembly H.B. 511, codified as § 2903.11. Rather, the Committee’s goal in revising the felonious assault statute was to provide language to address the gravity of the offense. *Id.* Considerations of gravity include “the seriousness of the actual or potential harm involved.” *Id.* That language suggests that actual physical harm is not necessary to satisfy the statute. Rather, the potential for harm that the conduct involves is what triggers the statute. In that way, the drafters intentions covered conduct that sounds in the now invalidated residual clause of the Guidelines – conduct that carries only a potential for harm.

The government argues that because Ohio’s case law does not contain an example of a felonious assault case stemming from a purely mental harm, that Mr.

Turner's interpretation of the statute is wrong. (Opp., p. 8). But the Commentary provided by the Ohio General Assembly controls. It clarifies that serious mental illness alone, without an accompanying physical harm, satisfies Ohio's felonious assault statute.

But Ohio courts' interpretation of the felonious assault statute further supports the Ohio General Assembly's stated intentions. For example, in *State v. Elliott*, 104 Ohio App. 3d 812, 817, 663 N.E.2d 412 (Ohio Ct. App. 10th Dist. 1995), the court noted in dicta that the definition of serious physical harm “**includes purely mental injury.**” (Emphasis added). In *State v. Hunter*, 2d Dist. Champaign No. 2004 CA 5, 2005-Ohio-443, ¶ 17, it was the government who asserted that assault was not a lesser-included offense of felonious assault because Ohio's assault statute, unlike felonious assault, does not encompass mental harm. The state court rejected the government's conclusion as to lesser-included offenses, but explained, “The state is technically correct that felonious assault could be committed without the commission of an assault where the only ‘serious physical harm’ to the victim was mental harm.” *Id.* at ¶ 18. Further, in *State v. McShephard*, 9th Dist. Lorain No. 06CA009024, 2008-Ohio-1460, ¶¶ 9-11, the court noted that the government is not required to present evidence of actual physical “or mental harm” to satisfy the felonious assault statute where only attempt is alleged.

This Court has acknowledged, “As a general rule, this Court defers to a state court's interpretation of a state statute.” *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). Here, this Court has the benefit of both the Commentary

provided by the Ohio General Assembly to explain its intentions in drafting Ohio's felonious assault and related definitional statutes and Ohio's case law interpreting its own statutes. Both sources support that felonious assault in Ohio can be satisfied by purely mental harms. As a result, the statute is too broad to fall under the use of force provision of the U.S. Sentencing Guidelines.

II. The federal courts vary widely as to whether a statute that could be satisfied by a purely mental harm can satisfy the use of force clause.

The Sixth Circuit in Mr. Turner's case concluded that Ohio's felonious assault statute was a crime of violence without specifically analyzing the effect of the statute being satisfied by purely mental harms. *United States v. Turner*, 698 F. App'x 803, 807 (6th Cir. 2017). By contrast, in a concurring opinion, the Fourth Circuit interpreted a North Carolina indecent liberties statute that could be satisfied by mental harms only as not qualifying as a violent felony under the identical use of force clause in the Armed Career Criminal Act. *United States v. Vann*, 660 F.3d 771, 804 (4th Cir. 2011) (King, J., concurring). "But vile conduct is not necessarily violent conduct, and psychological injury alone, though no less real than the physical injury required by the statute, is not an adequate basis for an ACCA predicate." *Id.* Likewise, in *Carter v. United States*, 731, F. Supp. 2d 262, 270 (D. Conn. 2010), a district court held that Connecticut's injury to children statute, which could be satisfied by mental harm, was not a crime of violence because "the statute is broader and criminalizes additional conduct that is not included in the guideline definition of a crime of violence."

An assault statute that can be satisfied by purely mental harm is also not unique to Ohio. For example, Montana defines “serious bodily injury” to include “serious mental illness or impairment.” Mont. Code Ann. § 4-2-101(66). North Carolina’s assault with a deadly weapon has been interpreted by state courts to be satisfied by serious mental injury. *State v. Everhardt*, 326 N.C. 777, 392 S.E. 2d 391 (N.C. 1990). Vermont’s aggravated assault statute includes if “the person intentionally causes stupor, unconsciousness or other physical or mental impairment or injury”. Vt. Stat. Ann. Tit. 13, § 1024. These issues are long-ranging and effect many defendants nationwide.

III. That this case relates to the U.S. Sentencing Guidelines does not preclude this Court’s review.

Finally, the government seeks to reframe Mr. Turner’s argument as a general request for review of the Guidelines. (Opp., p. 12). That is not the case. This Court held that application of an incorrect Sentencing Guideline affects a defendant’s substantial rights. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1341-42 (2016). In fact, this Court granted certiorari in *Molina-Martinez* because of the disagreement between Circuits “over how to determine whether the application of an incorrect Guideline range at sentencing affected the defendant’s substantial rights.” *Id.* at 1345. The government suggests that errors relating to the Guidelines are somehow beneath this Court’s review. But the Guidelines’ “central role in sentencing means that an error related to the Guidelines can be particularly serious.” *Id.* at 1346. Further, this Court has noted the Guidelines are “not only the starting point for most federal sentencing proceedings but also the lodestar.” *Id.*

In reality, this Court should and does accept cases for review when the Guidelines are at issue and their interpretation leads to federal questions. *See e.g. Peugh v. United States*, 569 U.S. 530 (2013) (the Ex Post Facto Clause was violated when defendant was sentenced to a higher punishment under current Guidelines than the applicable punishment available under the Guidelines at the time of his offense); *Beckles v. United States*, 137 S. Ct. 886 (2017) (holding the Guidelines are not subject to Due Process vagueness challenges). Therefore, this Court should reject the government's suggestion that this case is not appropriate for certiorari.

CONCLUSION

For all of the foregoing reasons, and for those set forth in the petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on June 21, 2017.

Respectfully submitted,

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