NO:

In the Supreme Court of the United States

JEROME RAYBON,

Petitioner,

v.

UNITED STATES of AMERICA,

Respondent.

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

---

PETITION FOR WRIT OF CERTIORARI

FEDERAL DEFENDER OFFICE

Colleen P. Fitzharris
Andrew Wise
Counsel for Petitioner

613 Abbott St., 5th Floor
Detroit, Michigan 48226
Telephone No. (313) 967-5542
colleen_fitzharris@fd.org

QUESTIONS PRESENTED FOR REVIEW

(1) In *Johnson v. United States (Johnson II)*, 135 S. Ct. 2551 (2015), this Court held unconstitutionally vague the residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii). In *Welch v. United States*, 136 S. Ct. 1257 (2016), this Court held that *Johnson II* announced a new substantive rule of constitutional law retroactively applicable to cases on collateral review. Jerome Raybon was sentenced as a career offender under the identically worded residual clause of the then-mandatory guidelines, U.S.S.C. § 4B1.2. He filed his petition within one year of *Johnson II*, asserting that its rule renders his sentence unconstitutional.

Did Mr. Raybon file his § 2255 motion within one year of "the date on which the right asserted was initially recognized by the Supreme Court," which "has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"? 28 U.S.C. § 2255(f)(3).

(2) Michigan Compiled Laws § 750.84 has two elements: (1) an assault, which includes mere offensive touching; and (2) intent to commit great bodily harm. The state does not need to prove that any harm actually resulted from the assault.

Does Mich. Comp. Laws § 750.84 have "as an element the use, attempted use, or threatened use of physical force against the person of another"? U.S.S.G. § 4B1.2(a)(1).

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

IN THE
SUPREME COURT OF THE UNITED STATES

No:

JEROME RAYBON,
Petitioner,

v.

UNITED STATES of AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Jerome Raybon respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's published opinion affirming the denial of Mr. Raybon's 28 U.S.C. § 2255 motion to vacate the judgment notwithstanding *Johnson v. United States*, 135 S. Ct. 2551 (2015), is reported at 867 F.3d 625 (6th Cir. 2017), and included in the Appendix at A-1. The Sixth Circuit's unreported order denying Mr. Raybon's petition for rehearing en banc is included in the Appendix at A-2. The

District Court's unpublished order denying Mr. Raybon's § 2255 motion is included in the Appendix at A-3.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2012) and Part III of the Rules of the Supreme Court of the United States. The court of appeals denied rehearing of Mr. Raybon's petition for rehearing *en banc* on December 6, 2017. Mr. Raybon sought and received an extension to file up to and including May 5, 20018. May 5, 2018 is a Saturday, and so this petition is timely filed pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

STATUTORY PROVISIONS INVOLVED

Section 2255 of Title 28 states in pertinent part:

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * *

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

* * *

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review . . . .

28 U.S.C. § 2255(f)(3) (2012).

Section 924(e)(2)(B) of Title 18 states, in pertinent part:

§ 924. Penalties

* * *

> **(e)(2)** As used in this subsection –
>
> * * *
>
> **(B)** the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, . . . , that –
>
> > **(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > **(ii)** is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; . . .

18 U.S.C. § 924(e)(2)(B) (2012).

Section 3553 of Title 18 states, in pertinent part:

§ 3553. Imposition of a sentence

* * *

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

18 U.S.C. § 3553(b)(1) (2012).

Section 3742 of Title 18 states, in pertinent part:

§ 3742. Review of a sentence

* * *

Consideration.--Upon review of the record, the court of appeals shall determine whether the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

18 U.S.C. §3742(e) (2012).

The version of **Michigan Compiled Laws § 750.84** in effect at the time of Mr. Raybon's conviction states:

> **Sec. 84.** Assault with intent to do great bodily harm less than murder-- Any person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars.

Mich. Comp. Laws § 750.84 (1989).

U.S. SENTENCING GUIDELINES PROVISIONS INVOLVED

United States Sentencing Guideline 4B1.1(a) states, in pertinent part:

§ 4B1.1. Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

	Offense Statutory Maximum	Offense Level*
(A)	Life	37
(B)	25 years or more	34
(C)	20 years or more, but less than 25 years	32
(D)	15 years or more, but less than 20 years	29
(E)	10 years or more, but less than 15 years	24
(G)	More than one year, but less than 5 years	12.

*If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

U.S.S.G. § 4B1.1(a) (2004).

United States Sentencing Guideline 4B1.2 states, in pertinent part:

§ 4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that —

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2 (2004).

INTRODUCTION

Jerome Raybon is one of many federal prisoners whose sentence was fixed by the residual clause of the mandatory career-offender guideline, U.S.S.G. § 4B1.2(a)(2) (2004). In *Johnson v. United States (Johnson II)*, 135 S. Ct. 2551 (2015), this Court held unconstitutionally vague the identically worded residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii) (2012). In *Welch v. United States*, 136 S. Ct. 1257 (2016), this Court held that *Johnson II* announced a new substantive rule of constitutional law retroactively applicable to cases on collateral review.

Less than one year after *Johnson II*, Mr. Raybon filed a 28 U.S.C. § 2255 (2012) motion to vacate, set aside, or correct his sentence, asserting that *Johnson II* recognized a new, retroactive rule that entitles him to a resentencing. The district court denied the motion as untimely, and Mr. Raybon appealed. The Sixth Circuit Court of Appeals affirmed and held that the motion was untimely "[b]ecause . . . whether *Johnson* applies to the mandatory Guidelines . . . is an open question, [and therefore] is *not* a 'right' that 'has been newly recognized by the Supreme Court' let alone one that was 'made retroactively applicable to cases on collateral review' . . . by the Supreme Court." *Raybon v. United States*, 867 F.3d 625, 630 (6th Cir. 2017). The Sixth Circuit also held that Mr. Raybon's prior conviction for assault with intent to commit great bodily harm less than murder, Mich. Comp. Laws § 750.84 (1989), has as an element the use, attempted use, or threatened use of force. *Raybon*, 867 F.3d at 631–32.

This petition presents two questions: (1) whether petitioners who were sentenced as career offenders under the mandatory guidelines filed timely 28 U.S.C. § 2255 motions if they filed their motions within one year of *Johnson II*; and (2) whether Michigan Compiled Laws § 750.84 "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2.

The first question is one that has divided the lower federal courts into two camps. Some hold that motions like Mr. Raybon's are timely, and others hold the opposite. *Compare United States v. Greer*, 881 F.3d 1241, 1247–49 (10th Cir. 2018) (holding as untimely § 2255 motions asserting entitlement to relief because the residual clause of the career-offender guideline is unconstitutionally vague); *Raybon*, 867 F.3d at 630 (same); *United States v. Brown*, 868 F.3d 297, 303 (4th Cir. 2017) (same), *with Moore v. United States*, 871 F.3d 72, 81–83 (1st Cir. 2017) (authorizing filing a second and successive motion, holding it timely, and rejecting the reasoning of *Raybon*); *In re Hoffner*, 870 F.3d 301, 311–12 (3d Cir. 2017) (authorizing a second or successive motion because, under *Teague*, application of *Johnson II* to the Guidelines would not require recognizing a new rule). The courts holding these § 2255 motions to be untimely have misapplied this Court's precedents.

This question impacts many federal prisoners who were sentenced as career offenders when the Sentencing Guidelines were mandatory. The very same residual clause that *Johnson II* deemed unconstitutionally vague fixed their sentences. Asserting that a simple application of *Johnson II* would make them eligible for resentencing, federal prisoners, like Jerome Raybon, filed § 2255 motions within one year of *Johnson II*. Whether their petitions were timely and can be adjudicated on the merits is a question that impacts this substantial class of people and also divides the federal courts.

The second question concerns proper application of *Johnson v. United States (Johnson I)*, 559 U.S. 133, 140 (2010), where this Court clarified that crimes that have "as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. § 924(e)(2)(B), must require proof of "*violent* force—that is, force capable of causing physical pain or injury to another person." The phrase "physical force against the person of another" appears in U.S.S.G. 4B1.2(a)(1), and has the same meaning. Under this definition, assault or battery statutes, such as Florida's, are not "violent felonies" because "[t]he most nominal contact, such as a tap on the shoulder without consent, establishes a violation." *Johnson I*, 559 U.S. at 138 (internal quotation marks, alteration, citations omitted) (discussing the battery element of Fla. Stat. § 784.03(2)).

Mr. Raybon was convicted of assault with intent to commit great bodily harm in violation of Michigan Complied Laws § 750.84, which has only two elements: (1) an assault; (2) with intent to do great bodily harm less than murder. *People v. Brown*, 703 N.W.2d 230, 236 (Mich. 2005). No bodily injury must result from the assault. And Michigan's definition of assault, which derives from the common law, encompasses mere offensive touching, such as spitting. The Sixth Circuit nonetheless found this to be a crime of violence because jury instruction for the offense defines "'great bodily harm' as any 'physical injury that could seriously harm the health or function of the body.'" *Raybon*, 867 F.3d at 632 (quoting Mich. Crim. J.I. 17.7(4)) (emphasis omitted). The court also said Mr. Raybon's conviction must contain a use-of-force element simply because no commercial databases, like Westlaw and Lexis Nexis, have opinions by Michigan appellate courts where someone was convicted of this offense by mere offensive touching. *See id.*

Knowing whether Mich. Comp. Laws § 750.84 constitutes a crime of violence matters for Mr. Raybon and those who have prior convictions in Michigan for this offense. But answering this question will clarify whether *mens rea* alone can make an offense violent, and whether the analytical approach the Sixth Circuit used is proper. The First Circuit has parted company with the Sixth Circuit on this point. It emphasized that the absence of a case on point is not very telling because few states report the original charges and final disposition. *See Whyte v. Lynch*, 807 F.3d 463, 469–70 (1st Cir. 2015) (citing Peter M. Brien, Bureau of Justice Statistics, U.S. Dep't of Justice, *Improving Access to and Integrity of Criminal History Records* 9 (2005)).

With this petition this Court has an opportunity to explain how § 2255's statute of limitations applies, provide greater clarity about when a statute contains a use-of-force element, and bring uniformity to how federal courts must analyze whether a statute requires proof of violent force. It should be granted.

STATEMENT OF THE CASE

1. In November 2003, a grand jury issued a two-count indictment alleging that Mr. Raybon distributed 50 grams or more of cocaine base, in violation of 21 U.S.C. § 841(a)(1) (2004). By plea agreement, Mr. Raybon pleaded guilty to one count, and the government dismissed the other count. He also stipulated that he would be held accountable for 50–150 grams of cocaine base, and so his base offense level under the Guidelines would be 32. The government agreed that Mr. Raybon's sentence would be capped at the mid-point of the mandatory Guidelines range.

2. The government and Mr. Raybon concurred that the total offense level would increase to 37 because he was a career offender as defined by U.S.S.G. § 4B1.1 (2004). At the time, the Guidelines mandated an increase to the base offense level

> If (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a).

3. Mr. Raybon had two prior felony convictions: (1) a 1989 conviction for assault with intent to commit great bodily harm less than murder, in violation of

Mich. Comp. Laws § 750.84; and (2) a 2000 conviction for delivering a controlled substance, in violation of Mich. Comp. Laws § 333.7401 (2000). Seeing these two convictions, the probation department found that Mr. Raybon was a "career offender." That classification nearly doubled Mr. Raybon's mandatory Guidelines range. When Mr. Raybon was sentenced, the district court was bound by the Guidelines as a matter of law. *See* 18 U.S.C. § 3553(b) (2004); *United States v. Booker*, 543 U.S. 220, 233–34, 259 (2005).

4. At the time of Mr. Raybon's sentencing, the Guidelines defined a "crime of violence" as follows:

> Any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another.*

U.S.S.G. § 4B1.2(a) (emphasis added).

The italicized clause is known as the residual clause, *Beckles v. United States*, 137 S. Ct. 886, 891 (2017). The practical effect of the residual clause was that few defendants, including Mr. Raybon, challenged career-offender designations because of the way courts interpreted the residual clause. Consequently, Mr. Raybon did not directly appeal his sentence or file any motions to vacate his conviction and sentence until June 14, 2016, when he filed this motion after the Supreme Court decided *Johnson II*.

5. In June 2016, this Court recognized that defendants have a right not to have a sentence fixed by the unconstitutionally vague residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B). *Johnson II*, 135 S. Ct. at 2556–57, 2563. The ACCA's residual clause is identical to the Guidelines' residual clause in the definition of "crime of violence." *Compare* 18 U.S.C. § 924(e)(2)(B), *with* U.S.S.C. § 4B1.2(a)(2). Invoking *Johnson II*'s new retroactive rule, Mr. Raybon filed a § 2255 motion within one year of this Court's opinion.

6. In October 2016, the district court *sua sponte* rejected Mr. Raybon's petition as untimely under 28 U.S.C. § 2255(f)(3), reasoning that his motion was not based on *Johnson I*, but on a 2010 case (also involving a man named Johnson) interpreting the use-of-force clause of the ACCA. APP 016(citing *Johnson I*, 559 U.S. at 140.)

7. Mr. Raybon appealed to the Sixth Circuit Court of Appeals. Without oral argument, the Sixth Circuit affirmed the dismissal of Mr. Raybon's motion as untimely but for a different reason. The panel reasoned that because this Court had not yet decided whether the residual clause of the mandatory guidelines is unconstitutionally vague, he had not asserted a "'right' that 'has been newly recognized by the Supreme Court' let alone one that was 'made retroactively applicable to cases on collateral review.'" *Raybon*, 867 F.3d at 630 (quoting 28 U.S.C. § 2255(f)(3) and *Tyler v. Cain*, 533 U.S. 656, 663–64 (2001).

7. Mr. Raybon filed a petition for rehearing en banc. After requesting a response from the government, the court denied rehearing.

REASONS FOR GRANTING THE WRIT

Federal prisoners seeking to vacate, correct, or amend their sentences must file motions for relief under 28 U.S.C. § 2255 within one year of the date on which "the judgment became final" or "the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(1), (3). Section 2255(f)(3) therefore has three requirements: (1) that the petitioner assert a right newly recognized by the Supreme Court; (2) that the right has been made retroactive; and (3) that the petitioner filed the motion within one year of the Supreme Court's recognition of the new right. There is no dispute that Mr. Raybon filed his petition within one year of *Johnson II*. This Court has made *Johnson II*'s rule retroactive. *See Welch*, 136 S. Ct. at 1265.

The courts of appeals cannot agree, however, about whether *Johnson II*'s new, retroactive rule applies to sentences imposed under the mandatory career-offender guideline. This disagreement is entrenched. Without this Court's intervention, many federal prisoners are being denied the opportunity to seek relief under *Johnson II*. In other circuits, both first- and second-time movants are being resentenced. This Court should intervene quickly to resolve this question to prevent federal prisoners from serving unconstitutional sentences.

I. This Court should clarify whether federal prisoners who were sentenced under the mandatory career-offender guideline filed timely § 2255 motions within one year of *Johnson II*.

This Court should grant Mr. Raybon's petition because the first question presented is one that affects many federal prisoners and about which the federal courts disagree.

A. There is an entrenched circuit split on this question.

Three circuits have said the § 2255 motions filed by federal prisoners who were sentenced under the mandatory career-offender guideline who filed within one year of *Johnson II* are untimely: the Fourth Circuit, the Sixth Circuit, and the Tenth Circuit. *See Greer*, 881 F.3d at 1247–49; *Raybon*, 867 F.3d at 630; *Brown*, 868 F.3d at 303. Although these courts agree on the result, their reasoning differs somewhat.

The Fourth and Sixth Circuits relied on Justice Sotomayor's observation that the majority opinion "at least leaves open" whether defendants sentenced under the mandatory guidelines as proof that application of *Johnson II* to the mandatory guidelines would constitute a new rule. *Raybon*, 867 F.3d at 629–30 (citing *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring in the judgment); *Brown*, 868 F.3d at 302 (same). But this Court had no occasion to determine whether *Johnson*'s rule applies to mandatory guidelines; the question was only whether *Johnson II* applied to advisory guidelines. *See Beckles*, 137 S. Ct. 890–91.

All three courts used jurisprudence that is not applicable to first-time § 2255 movants to hold that these motions are untimely. The Fourth and Tenth Circuits relied on AEDPA jurisprudence that applies to state habeas petitioners. They reasoned that federal prisoners filing § 2255 motions could benefit from only this Court's holdings, relying on 28 U.S.C. § 2254(d)(1) and *Williams v. Taylor*, 529 U.S. 362, 412 (2000). *Greer*, 881 F.3d at 1247; *Brown*, 868 F.3d at 301. The Sixth Circuit conflated the rules that apply to first-time movants with the restrictions 28 U.S.C. § 2255(h)(2) places on federal prisoners' ability to file second or successive motions. *See Raybon*, 867 F.3d at 630 & n.5 (citing *Tyler*, 533 U.S. 656).

The Sixth Circuit suggested the career-offender guideline might not be unconstitutional, a position it inferred from what it described as this Court's statement that *Johnson II*'s holding did not cast "constitutional doubt" on "textually similar" laws that "required an evaluation of the particular facts of the case." *Raybon*, 867 F.3d at 630 (citing *Johnson II*, 135 S. Ct. at 2561; *Welch*, 136 S. Ct. at 1262).

On the other side are the First and Third Circuits. The First Circuit expressly held that the defendant's motion challenging his mandatory career-offender sentence was timely under § 2255(f)(3) because it was filed within one year of *Johnson*. *Moore*, 871 F.3d at 77 n.3. In doing so, the court rejected the reasoning of the Sixth and Fourth Circuits. *Id.* at 82–83. It also concluded that it would not need to "make new constitutional law in order to hold that the pre-*Booker* SRA fixed sentences." *Id.* at 81. The Third Circuit reached a similar conclusion, noting that the courts must undertake a *Teague* analysis to determine whether applying *Johnson* to the mandatory guidelines would create a "second new rule." *Hoffner*, 870 F.3d at 311–12.

Relying on *Moore*, district courts in the First Circuit have held as timely first-time § 2255 motions like Mr. Raybon's, which were filed within one year of *Johnson II* and challenged the constitutionality of a sentence imposed pursuant to the then-mandatory career-offender guideline. *United States v. Roy*, 282 F. Supp. 3d 421, 427 (D. Mass. 2017); *United States v. Hardy*, No. 00-cr-10179 (D. Mass. Jan. 26, 2018) (oral ruling, Dkt #69). The government has not appealed those decisions. A magistrate judge in the Western District of Texas similarly held a first-time motion to vacate a mandatory guidelines sentence as timely in light of *Johnson II. See Zuniga-Munoz*, No. 1:02-cr-00134 (W.D. Tex. Apr. 26, 2018).

Numerous district courts outside the Fourth and Sixth Circuits have also disagreed with *Raybon*'s analysis. *See, e.g., Long v. United States*, No. CV 16-4464 CBM, at 1–7 (C.D. Cal. Sept. 15, 2017) (holding *Johnson* invalidates the mandatory Guidelines' residual clause and petition was timely); *United States v. Parks*, No. 03-CR-00490-WYD, 2017 WL 3732078, at *1–7 (D. Colo. Aug. 1, 2017) (same); *Sarracino v. United States*, No. 95-CR-210-MCA, 2017 WL 3098262, at *2–5 & n.3 (D.N.M. June 26, 2017) (same). One district court within the Sixth Circuit has criticized the holding of *Raybon*, granting a certificate of appealability and noting that the Sixth Circuit's restrictive reading of § 2255(f)(3) "invites Potemkin disputes about whether [this Court] has explicitly applied its precedents to a specific factual circumstance rather than asking whether the *right* the Supreme Court has newly recognized applies to that circumstance." *United States v. Chambers*, No. 1:01-CR-172, 2018 WL 1388745, at *2 (N.D. Ohio Mar. 20, 2018). Members of the Sixth Circuit have noted "the irony that a defendant in a similar position to that of the defendant in *Johnson* seems unable even to seek the same relief." *Gipson v. United States*, 710 F. App'x 697, 698 (6th Cir. 2018) (Kethledge, J.).

In short, the existing split between the lower federal courts is entrenched. This petition presents an ideal vehicle to intervene to clarify whether federal prisoners like Mr. Raybon filed timely first-time § 2255 motions.

B. Courts should use the analysis described in *Teague* to determine whether the rule invoked is "new."

A first-time § 2255 movant "has one year from the date on which the right he asserts was initially recognized by this Court." *Dodd v. United States*, 545 U.S. 353, 357 (2005) (discussing 28 U.S.C. § 2255(f)(3)). This text makes clear that the dispositive question is whether Mr. Raybon has "asserted" that his sentence violates *Johnson II*, not whether *Johnson II* ultimately applies to his sentence (although it does). Mr. Raybon's § 2255 motion unquestionably *claimed*, or "asserted," that his sentence violates a right newly recognized by this Court, and whether that right in fact applies to the facts of his case is a separate, merits issue.

Without examining whether there are any relevant differences between the residual clauses of the ACCA and the mandatory Guidelines, the Sixth Circuit rejected Mr. Raybon's motion, reasoning that he filed it too soon because this Court had not yet expressly recognized that *Johnson II* applies to the mandatory Guidelines' residual clause. *Raybon*, 867 F.3d at 629–31. In doing so, the Sixth Circuit did not use the correct analytical framework—this Court's "new rule" jurisprudence under *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny. Mr. Raybon does not assert a right that would "break[] new ground"; he asserts a right that is "merely an application" of *Johnson* to the mandatory Guidelines. *Chaidez v. United States*, 568 U.S. 342, 347–48 (2013).

To determine whether "the right asserted has been newly recognized by the Supreme Court" under § 2255(f)(3), federal courts apply the "new rule" jurisprudence under *Teague* and its progeny. *See, e.g., United States v. Morgan*, 845 F.3d 664, 667–68 (5th Cir. 2017) (applying *Teague* to hold that *Descamps v. United States*, 570 U.S. 254 (2013), did not recognize a new right under § 2255(f)(3)); *Headbird v. United States*, 813 F.3d 1092, 1095 (8th Cir. 2016) (explaining that § 2255(f)(3) was "enacted against the backdrop" of existing "new rule" precedent); *United States v. Smith*, 723 F.3d 510, 515 (4th Cir. 2013) (citing *Teague* when deciding whether a § 2255 motion invokes a "new rule" and is therefore timely); *Figuereo-Sanchez v. United States*, 678 F.3d 1203, 1207–08 (11th Cir. 2012) ("In deciding retroactivity issues under § 2255(f)(3), we have applied the rubric developed in *Teague*" to "first answer whether the Supreme Court decision in question announced a new rule"); *cf. In re Conzelmann*, 872 F.3d 375, 376 (6th Cir. 2017) ("To decide whether a rule is 'new' for purposes of § 2255(h)(2), we look to *Teague*." (citation omitted)).

The Sixth Circuit ignored this well-established persuasive authority, and did not address whether Mr. Raybon's § 2255 motion "asserted . . . [a] right [that] has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).

As *Teague* instructs, a case announces a "new rule" when it "breaks new ground," but "a case does *not* 'announce a new rule, when it is merely an application of the principle that governed' a prior decision." *Chaidez*, 568 U.S. at 347–48 (quoting *Teague*, 489 U.S. at 307) (emphasis in original). "To determine what counts as a new rule," the question is whether the rule the petitioner "seeks can be meaningfully distinguished from that established by [existing] precedent." *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, concurring in the judgment). If a "factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful," and the rule is not new. *Id.*

Mr. Raybon invokes the right recognized in *Johnson II* and contends that the rule applies to his circumstances, which differ from Mr. Johnson's in only one respect: a provision of the Guidelines fixed his sentence. There is no difference between the text of the ACCA's definition of a "violent felony" and the sentencing Guidelines' definition of a "crime of violence." *See, e.g.*, *United States v. Pawlak*, 822 F.3d 902, 905 (6th Cir. 2016) (citing *United States v. Ford*, 560 F.3d 420, 421 (6th Cir. 2009)). And "[t]he answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing Guidelines is that the mandate to apply the Guidelines is itself statutory." *United States v. R.L.C.*, 503 U.S. 291, 297 (1992) (citing 18 U.S.C. § 3553(b)).

"*Johnson [II]* is a straightforward decision, with equally straightforward application" to the residual clause of the mandatory career-offender guideline. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018). *Johnson II* announced a new rule: the "ordinary case" interpretation of the residual clause paired with a "hazy risk threshold" of the does not provide a clear standard by which sentences may be fixed. *Dimaya*, 138 S. Ct. at 1218; *Johnson II*, 135 S. Ct. at 2556–57. As the residual clauses of the ACCA and the career-offender guideline are identical, they are vague for the same reasons.

Mr. Raybon "seeks to benefit from [the] holding in [*Johnson II*]," *Dodd*, 545 U.S. at 360, which applies to another law that fixed sentences using an identically-worded and identically-interpreted residual clause—the mandatory career-offender guideline. *See* 18 U.S.C. § 3553(b); U.S.S.G. § 4B1.2(a)(2). The mandatory guidelines range fixed sentences within a prescribed range, just as the ACCA fixed sentences within a prescribed range. "Because they [were] binding on judges, [this Court] consistently held that the Guidelines have the force and effect of laws." *Booker*, 543 U.S. at 234; *see also id.* at 238.

The mandatory nature of the pre-*Booker* guidelines matters. Unlike advisory guidelines, which are not susceptible to vagueness challenges, mandatory guidelines "fix the permissible range of sentences." *Beckles*, 137 S. Ct. at 892. When Mr. Raybon was sentenced, district courts could "rely exclusively on the guidelines range," which "constrain[ed] [their] discretion." *Id.* at 894 (internal quotation marks omitted). A vague mandatory guideline does not give ordinary people guidance about how to avoid an enhanced sentence, which the district court is bound to impose. *Cf. id.* (explaining that "perfectly clear [advisory] Guidelines could not provide notice" because district courts "retain discretion to impose the enhanced sentence"). Vague mandatory guidelines also invite arbitrary enforcement in the same way that vague statutes do; they "permit[] [judges] to prescribe the sentencing range available" "without any legally fixed standards." *Id.* (internal quotation marks omitted). For those reasons, mandatory guidelines "implicate the twin concerns underlying the vagueness doctrine—providing notice and preventing arbitrary enforcement." *Id.*

C. The Sixth Circuit confused the requirements of a first-time § 2255 motion with those for a second or successive motion.

The Sixth Circuit confused 28 U.S.C. § 2255(h)(2)'s requirements for second or successive petitioners with § 2255(f)(3)'s requirements for first-time petitioners. *See Raybon*, 867 F.3d at 630 & n.5 (citing *Tyler*, 533 U.S. 656). SOS movants may rely on only new rules of constitutional law "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255(h)(2).

In contrast, first petitioners file timely motions when they "assert" a right newly recognized by the Supreme Court and "made retroactively applicable to cases on collateral review." *Id.* § 2255(f)(3). Any court can make a right retroactive for purposes of § 2255(f)(3). *See Dodd*, 545 U.S. at 357–58, 359 (under § 2255(f)(3), "a court must have made the right retroactively applicable to cases on collateral review"; under § 2255(h)(2), the rule must be "made retroactive . . . by the Supreme Court"). These textual differences make the panel's reliance on *Tyler*—a § 2255(h)(2) case—inappropriate.

Although the Sixth Circuit recognized that "'multiple holdings [can] logically dictate the retroactivity of the new rule,'" *Raybon*, 867 F.3d at 630 n.5 (quoting *In re Watkins*, 810 F.3d 375, 381 (6th Cir. 2015) (quoting *Tyler*, 533 U.S. at 668 (O'Connor, J., concurring)), it held that *Johnson II*'s holding was retroactively applicable to only sentences fixed by the ACCA. *Raybon*, 867 F.3d at 630–31. This holding does not survive *Dimaya*, which applied *Johnson* to a different statute, 18 U.S.C. § 16(b) (2012), which used slightly different wording to define "crime of violence." *Dimaya* explained that "*Johnson* is a straightforward decision, with equally straightforward application" to other provisions that, like U.S.S.G. § 4B1.2(a), require courts to assess whether the "ordinary case" of a crime meets an imprecisely defined threshold of risk. 138 S. Ct. at 1213–16. If there was any doubt before, *Dimaya* makes clear that *Johnson*'s holding extends to all mandatory laws that share the same constitutionally problematic features of the ACCA. This Court need not separately take up and explicitly strike down each and every statute that shares those features to recognize that none of them can stand.

D. The Fourth and Tenth Circuits used rules applicable to state habeas petitioners to conclude that motions by federal prisoners are untimely.

Relying on 28 U.S.C. § 2254(d)(1) and *Williams*, 529 U.S. at 412, the Fourth and Tenth Circuits reasoned that federal prisoners filing § 2255 motions could benefit only from this Court's holdings. *Brown*, 868 F.3d at 301; *Greer*, 881 F.3d at 1247. But § 2254(d)(1) is a relitigation bar that applies to state prisoners asserting federal claims already adjudicated on the merits by the state courts. The standard described in § 2254(d)(1) is designed to give maximum deference to state courts. *See Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015).

Comity and federalism are not concerns limiting the remedies available to federal prisoners in federal court. When a federal prisoner files her first § 2255 motion, she has not presented her claims to a co-equal court and has never had any other opportunity to litigate them. Thus, as this Court has explained, "AEDPA did not codify *Teague*, and . . . the AEDPA and *Teague* inquiries are distinct." *Greene v. Fisher*, 565 U.S. 34, 39 (2011) (internal quotation marks omitted). "The retroactivity rules that govern federal habeas review on the merits—which include *Teague*—are quite separate from the relitigation bar imposed by AEDPA; neither abrogates or qualifies the other." *Id.*

E. The Sixth and Tenth Circuits misinterpreted this Court's statements in *Johnson II* and *Beckles*.

The Sixth Circuit relied on *Beckles*, which held that the residual clause of the *advisory* career-offender guideline was not subject to vagueness challenges, and a footnote in Justice Sotomayor's concurrence. Justice Sotomayor wrote that the majority's "adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment . . . during the period in which the Guidelines *did* fix the permissible range of sentences, may mount vagueness attacks on their sentences." *Beckles*, 137 S. Ct. at 903 n.4 (internal citations and quotation marks omitted). This comment is irrelevant to the question whether Mr. Raybon's petition is timely. As this Court has acknowledged, "'the mere existence of a dissent,' like the existence of conflicting authority in state or lower federal courts, does not establish that a rule is new." *Chaidez*, 568 U.S. at 354 n.11 (quoting *Beard v. Banks,* 542 U.S. 406, 416 n.5 (2004)).

In any event, Justice Sotomayor's observation had nothing to do with the statute of limitations, which was not an issue in *Beckles*. This Court could not have held that the vagueness doctrine applies to the mandatory Guidelines without rendering an advisory opinion in violation of Article III because Mr. Beckles was sentenced under advisory guidelines. *See Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring in the judgment) ("That question is not presented by this case.").

In addition, the Sixth and Tenth Circuits misunderstood this Court's statement that its holding did not cast "constitutional doubt" on "textually similar" laws. *Raybon*, 867 F.3d at 630 (citing *Johnson II*, 135 S. Ct. at 2561; *Welch*, 136 S. Ct. at 1262); *Greer*, 881 F.3d at 1247 n.5, 1248. That caveat in *Johnson II*—that laws requiring an assessment of conduct "*on a particular occasion*" survive—plainly has no application to U.S.S.G. § 4B1.2(a)(2). The circuits have unanimously held that § 4B1.2(a)(2) requires courts to evaluate whether the offense, in the ordinary case, presents a serious potential risk of injury to another, just as the ACCA does. *E.g.*, *United States v. Wray*, 776 F.3d 1182, 1185 (10th Cir. 2015); *United States v. Denson*, 728 F.3d 603, 610 (6th Cir. 2013). The caveat in *Johnson II* does not apply to a provision that, just like the ACCA, "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts." *Johnson II*, 135 S. Ct. at 2257. This Court was referring to laws that require "gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*," like 18 U.S.C. § 16(b), and not the Guidelines. *Johnson II*, 135 S. Ct. at 2561 (emphasis in original); *see also Welch*, 136 S. Ct. at 1262 (same).

For these reasons, this Court has recognized a right that invalidates the sentencing guidelines' residual clause. It follows that Mr. Raybon's post-conviction motion is timely under 28 U.S.C. § 2255(f)(3). It likewise follows that the Guidelines' residual clause, when applied in a mandatory way, is unconstitutionally vague.

F. The question presented is exceptionally important.

Resolution of this question will affect approximately 1,200 people. *See* APP 041 (Amicus Br. by 6th Cir. Fed. Defenders). Because this Court invalidated the mandatory Guidelines in 2005, these men and women have already served at least twelve years in prison. The career-offender enhancement has a well-known and dramatic impact on sentencing outcomes: for 48.6% of career offenders in 2016, the enhancement increased the average guidelines minimum from 70 months to 168 months, a 240% increase; for another 33.2%, it increased the minimum from 84 months to 188 months, a 223% increase. *See* U.S. Sent'g Comm'n, *Quick Facts – Career Offenders* (June 2017), available at https://www.ussc.gov; *see also* U.S.S.G § 5A (sentencing table). There is therefore a real possibility that these men and women have already spent more time in prison than the Constitution permits.

Moreover, the effect of the timeliness holdings of the Sixth, Fourth, and Tenth Circuit, is that federal prisoners sentenced under mandatory guidelines must wait for this Court to declare the mandatory career-offender guideline unconstitutional and retroactive to file § 2255 motions. But that day may never come to pass. Not one of these prisoners has an active case on direct appeal. Thus, there are only two mechanisms for these men and women to obtain relief: filing a § 2255 motion or an original petition for a writ of habeas corpus in this Court. *See* Judiciary Act of 1789 § 14; *Felker v. Turpin*, 518 U.S. 651, 660 (1996).

Further complicating matters are decisions by the Sixth Circuit holding that 28 U.S.C. § 2244(b)(1) requires dismissal of claims presented in a second or successive § 2255 that were previously presented in a prior § 2255 motion. *E.g.*, *In re Liddell*, 722 F.3d 737, 738 (6th Cir. 2013); *Charles v. Chandler*, 180 F.3d 753, 758 (6th Cir. 1999). While Mr. Raybon does not agree that § 2244(b)(1) applies to § 2255 motions, as other circuit courts have recognized, see e.g., *United States v. Winestock*, 340 F.3d 200, 204-05 (4th Cir. 2003) (doubting that § 2244(b)(1) applies to second or successive applications under § 2255); *Moore*, 871 F.3d at 78 (noting that § 2244(b)(1) "only appear[s] to apply to § 2254 motions by [its] terms"), the Sixth Circuit's decisions could operate to preclude new filings raising *Johnson* based claims—or at least create further uncertainty and complexity while the issue is litigated. For those serving unconstitutionally severe sentences, some decades longer than the correct guideline range, dismissal of their claims because they brought them *too soon* would strike an especially cruel blow. These federal prisoners diligently pursued their claims, as statutes of limitations encourage them to do. *Cf. CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) ("Statutes of limitations require plaintiffs to pursue 'diligent prosecution of known claims.'" (quoting Black's Law Dictionary 1546 (9th ed. 2009))).

Finally, the disparate treatment of § 2255 motions involving mandatory career-offender guidelines also works great injustice. District courts within the Sixth Circuit are denying § 2255 motions and certificates of appealability filed by federal prisoners like Mr. Raybon. *See, e.g.*, *Swain v. United States*, No. 1:03-cr-20031-DML (E.D. Mich. Sept. 26, 2017); *United States v. Sinclair*, No. 13-CR-20829, 2017 WL 3977888, at *4–5 (E.D. Mich. Sept. 11, 2017) (dismissing the petition and denying a certificate of appealability); *Price v. United States*, No. 16-CV-12623, 2017 WL 3581324, at *1–2 (E.D. Mich. Aug. 18, 2017) (same); *Eady v. United States*, No. 1:16-CV-588, 2017 WL 3530081, at *4–5 (W.D. Mich. Aug. 17, 2017) (same). Disagreeing with the Sixth Circuit, other district courts are granting certificates of appealability. *See Chambers*, 2018 WL 1388745, at *3; *Crowder v. United States*, No. CR 01-80098, 2018 WL 1141805, at *3 (E.D. Mich. Mar. 2, 2018). Meanwhile, in other districts, federal prisoners presenting identical grounds for relief. *See Roy*, 282 F. Supp. 3d at 428, 432.

II. This Court should clarify whether mens rea alone can make a simple assault "violent" under the use-of-force clause.

Without the residual clause, there remain two categories of crimes that qualify as crimes of violence in the Guidelines' career-offender provision: (1) offenses that "has as an element the use, attempted use, or threatened use of physical force against the person of another" (a force offense); or (2) "burglary of a dwelling, arson, . . . extortion, or involves use of explosives" (an enumerated offense). U.S.S.G. § 4B1.2(a). Although *Johnson I* clarified that the force used must be violent, *Johnson I*, 559 U.S. at 140, left open the question of how to determine whether violent force is an element when the actus reus is a simple assault.

The Sixth Circuit has identified four requirements of U.S.S.G. § 4B1.2(a)(1): "(1) conduct giving rise to force (*e.g.*, pulling a trigger on a gun); (2) certain consequences from that conduct (*i.e.*, the application of "physical force against the person of another"); and two types of *mens rea*, namely that (3) the conduct giving rise to the force be "volitional" rather than accidental, and that (4) the defendant be at least reckless as to the consequences of that conduct." *Higdon v. United States*, 882 F.3d 605, 607 (6th Cir. 2018) (citation omitted) (citing *United States v. Verwiebe*, 874 F.3d 258, 264 (6th Cir. 2017); *United States v. Harper*, 875 F.3d 329, 330–33 (6th Cir. 2017)) (noting intra-circuit disagreement about whether a reckless state of mind qualifies). But *Raybon* is inconsistent with *Higdon* because Mich. Comp. Laws. § 750.84 does not require proof of harm. The intent is the aggravating factor. This cases is therefore an ideal vehicle to explain how courts should determine when a simple assault becomes violent.

A. The lower courts disagree about whether a simple assault can be violent even when no physical harm results.

Mr. Raybon was convicted of committing an assault with intent to commit great bodily harm in violation of Michigan Complied Laws § 750.84. At the time he was convicted, § 750.84 provided, "Any person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars." Mich. Comp. Laws § 750.84.

There are two elements to the offense: (1) an assault (the actus reus), and (2) specific intent to do great bodily harm less than murder (the mens rea). *Brown*, 703 N.W.2d at 236. Jurors may find a defendant acted with the requisite intent using express statements of intent (*e.g.*, "I'm going to punch you") or inferences drawn from the surrounding facts and circumstances (*e.g.*, the use of a weapon or the number of punches thrown). *People v. Tiwari*, No. 311863, 2013 WL 5812931, at *4 (Mich. Ct. App. Oct. 29, 2013) (citing *People v. Fetterley,* 583 N.W.2d 199 (Mich. Ct. App. 1998)).

Michigan's aggravated assault statute does not require proof of harm. *People v. Jackson*, No. 277926, 2008 WL 4927247, at *2 (Mich. Ct. App. Nov. 18, 2008); *see also People v. Terry*, 553 N.W.2d 23, 25 (Mich. Ct. App. 1996) ("[T]he prosecution needed only to prove that defendant intended to spit on [the victim]; the lack of physical injury was irrelevant."). Instead, what distinguishes the higher degrees of assault from simple assault in Michigan is "the intent with which, and the circumstances under which the assault may have been made." *Hanna v. People*, 19 Mich. 316, 322 (1869); *see also*, *People v. Van Diver*, 263 N.W.2d 370, 372 (Mich. Ct. App. 1977).

Because the statute does not define "assault," Michigan courts turn to the common law.[1] *Cf. People v. Leach*, 319 N.W.2d 652, 653–54 (Mich. Ct. App. 1982) (holding that assault to commit great bodily harm is not a lesser included offense of armed robbery because, even though "the assault utilized to perpetrate the armed robbery was the same act," the two statutes required proof of different mens rea). Under Michigan law, a person can commit an assault one of two ways—(1) an attempted battery, or (2) taking "an unlawful act" that causes another person reasonably to apprehend an immediate battery. *People v. Starks*, 701 N.W.2d 136, 140 (Mich. 2005). "[B]attery is an intentional, unconsented and harmful or offensive

[1] When the Michigan legislature adopted the current penal code, it used the common law as the basis for each offense. Ronald Bretz, *170 Years of a Balancing Act—A Brief History of Criminal Justice in Michigan, in The History of Michigan Law* 168–69 (2006). Assault and battery were misdemeanors at common law, and so the legislature created a number of aggravated assaults that built upon the elements of simple assault. The goal was "to punish more severely those assaults accompanied by some degree of aggravation," such as "serious injury, use of a dangerous weapon[,] or a specific intent." *People v. Johnson*, 284 N.W.2d 718, 723 (Mich. 1979). Thus, to this day, the core of each assaultive offense is a basic assault, but to secure a conviction for an aggravated assault the prosecutor must prove some aggravating circumstance, such as a specific intent. *Id.*

touching of the person of another, or of something closely connected with the person." *People v. Nickens*, 685 N.W.2d 657, 661 (Mich. 2004) (internal quotation marks omitted). Spitting or throwing liquid on a person amounts to an assault under Michigan law. *People v. Terry*, 553 N.W.2d 23, 24–25 (Mich. Ct. App. 1996); *People v. Boyd*, 300 N.W.2d 760, 762 (Mich. Ct. App. 1980).

Section 750.84 lacks two components of an offense that includes as an element the use of force: "conduct giving rise to force . . . [and] consequences from that conduct." *Higdon*, 882 F.3d at 607. Thus, when holding that § 750.84 has as an element use or threatened use of force, relying on jury instructions designed to help factfinders discern the defendant's intent, the Sixth Circuit misapplied the categorical approach by combining two distinct elements—assault and intent. *See Raybon*, 867 F.3d at 632 (citing Mich. Crim. J.I. 17.7(4)). As the instruction explains, "[a]ctual injury is not necessary, but if there was an injury, you may consider it as evidence in deciding whether the defendant intended to cause great bodily harm." Mich. Crim. J.I. 17.7(4).

To be sure, prosecutors usually prove the intent element by pointing to "the circumstances of the assault and the nature of the defendant's acts constituting the assault": the defendant's temper; whether he used a weapon; his statements; or "any other circumstance that may shed light on the defendant's intent." *Roberts v. People*, 19 Mich. 401, 416 (1870). And so most cases will involve actions where the *facts* establish that the defendant used more force than a simple assault. In some cases, however, violent physical force is not required. *See People v. Lane*, 339 N.W.2d 522, 525–26 (1983) (affirming a conviction for § 750.84 where the defendant threw allegedly caustic liquid in the direction of the victim); *People v. Cox*, 232 N.W.2d 188, 188–90 (Mich. Ct. App. 1975) (affirming conviction for assault with intent to commit great bodily harm where the defendant held the victim in a bathtub of hot water). But this Court has repeatedly explained the elements of a crime, not the facts proven at trial are what matter for the categorical approach. "'Elements' are the 'constituent parts' of a crime's legal definition—the things the prosecution must prove to sustain a conviction." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (internal quotation marks and citations omitted).

There is disagreement among the lower federal courts about whether a simple assault without proof of an actual injury involves violent force.

Consider how the Ninth Circuit resolved whether Washington's second-degree aggravated assault statute includes the use or attempted use of force as an element. *See generally United States v. Robinson*, 869 F.3d 933, 938–41 (9th Cir. 2017). In Washington, second-degree aggravated assault is defined as an assault plus one of seven aggravating factors. Wash. Rev. Code § 9A.36.021. As does Michigan, Washington defines assault by referencing the common law: "assault by actual battery is an intentional touching or striking of another person that is harmful or offensive, regardless whether it results in any physical injury." *State v. Cardenas-Flores*, 401 P.3d 19, 31 (Wash. 2017) (internal quotation marks omitted). One of the aggravating circumstances that transforms an assault into an aggravated assault in the second degree is the "intent to commit a felony." Wash. Reve. Code § 9A.36.021(1)(e). The Ninth Circuit held that the inclusion of this means of committing an assault means Wash. Reve. Code § 9A.36.021 does not have as an element the actual or threatened use of violent force. *Robinson*, 869 F.3d at 938–41.[2] The Ninth Circuit's holding therefore conflicts with the Sixth Circuit's view that intent alone can elevate a simple assault to a violent felony.

In addition, like Michigan, Maryland used to define assault by referencing the common law, and so the elements of assault with intent to rob, Md. Code Art. 27 § 12 (repealed 1992), were as follows: "(1) an assault on the victim; (2) made by the defendant; (3) with the intent to rob." *United States v. Toomer*, No. CR 01-573, 2018 WL 372333, at *2 (E.D. Pa. Jan. 10, 2018) (citing *Bryant v. Maryland*, 244 A.2d 446, 450 (Md. Ct. Spec. App. 1968)). Under Maryland common law, an assault was "an actual battery as well as 'any attempt to apply the least force to the person of another.'" *Id.* (quoting *Lyles v. Maryland*, 269 A.2d 178, 179 (Md. Ct. Spec. App. 1970)). But district courts in the Eastern District of Pennsylvania and District of D.C. concluded that the mens rea element, *i.e.*, intent to rob, did not create a use-of-force element. *Id.* at *3–4; *United States v. Wilson*, 249 F. Supp. 3d 305, 318 (D.D.C. 2017) (assault with intent to rob in Maryland does not require proof of force).

---

[2] The government did not dispute "that subsection (1)(e) criminalizes conduct that is not covered by section [U.S.S.G. §] 2K2.1's definition of 'crime of violence,'" which incorporates § 4B1.2(a)'s definition. *Robinson*, 869 F.3d at 938.

The First Circuit has aligned with the Sixth Circuit. In *United States v. Edwards*, 857 F.3d 420, 424–27 (1st Cir. 2017), the court considered whether Massachusetts's statute criminalizing assault with intent to murder, Mass. Gen. Laws ch. 265, § 18(b), has as an element the actual, attempted, or threatened use of force. The Massachusetts Supreme Judicial Court has explained that "armed assault with an intent to murder requires 'proof of assault (while armed with a dangerous weapon) and a specific intent to kill that equates with malice,' with malice (in this context) meaning a lack of 'justification, excuse, or mitigation.'" *Edwards*, 857 F.3d at 423 (internal quotation marks omitted) (quoting *Commonwealth v. Vick*, 4 910 N.E.2d 339, 350 (Mass. 2009)). The First Circuit held that the offense is a violent felony because "an assault committed with an intent to murder the victim becomes an attempted or threatened harmful battery—and thus an ACCA violent felony—because of the presence of that intent." *Id.* at 425 (footnote omitted).

The Fourth Circuit, citing *Raybon*, 867 F.3d at 631–32, also held that intent alone can transform a simple assault into a violent assault. *United States v. Dinkins*, 714 F. App'x 240, 244 (4th Cir. 2017). South Carolina's statute criminalizing assault and battery with intent to kill contains "three elements: (1) assault, (2) battery, and (3) the *mens rea* requirement." *Id.* at 242 (citing *Suber v. State*, 640 S.E.2d 884, 886 (S. C. 2007); *State v. Sutton*, 532 S.E.2d 283, 285 (S.C. 2000)). The assault element does not satisfy *Johnson I*'s requirement that the act be violent because an assault and battery involves "'any touching of the person of an individual in a rude or angry manner, without justification.'" *Id.* (quoting *State v. Mims*, 335 S.E.2d 237, 237 (S.C. 1985) (citation and internal quotation marks omitted)). Nonetheless, the Fourth Circuit held, "the additional *mens rea* element" elevates the simple assault to a violent assault. *Id.* at 243.

This Court must intervene to resolve this disagreement about whether a simple assault becomes a violent assault when the person's state of mind is violent without proof that any harm resulted.

B. There is disagreement about whether courts can rely on the absence of a case describing non-violent conduct means a crime has as an element the actual, attempted, or threatened use of force.

The Sixth Circuit assumed that for a crime not to have a use-of-force element, there must be an case available in a commercial database, where a state court has affirmed a conviction for this crime when the conduct was non-violent. *See Raybon*, 867 F.3d 631–32. The Eighth Circuit has also used this analytical shortcut to decide whether Iowa's aggravated assault with intent to inflict serious bodily injury is a crime of violence. *See United States v. Chapman*, No. 17-1224, 2018 WL 501408, at *1 (8th Cir. Jan. 16, 2018). As in Michigan, an assault om Iowa is aggravated if committed with intent to inflict a serious injury upon another. Iowa Code §§ 708.1, 708.2(1). Iowa includes "[d]isabling mental illness" among the types of harm that qualify as "serious injury." *Id.* § 702.18. Despite the fact that the text of the statute encompasses a harm that does not require the application of violent force, the Eight Circuit held the conviction was a crime of violence because it had "not found a single case in which a defendant was charged with aggravated assault based solely on intent to inflict disabling mental illness." *Chapman*, 2018 WL 501408, at *1.

The First Circuit disagrees with the Sixth Circuit's view that this is a sound analytical approach to determine whether a conviction constitutes a predicate offense under the Guidelines. The First Circuit has explained that the absence of a case on point is not very telling because few states report the original charges and final disposition. *See Whyte*, 807 F.3d at 469–70 (citing Peter M. Brien, Bureau of Justice Statistics, U.S. Dep't of Justice, *Improving Access to and Integrity of Criminal History Records* 9 (2005)).

Those circuits that rely on database searches to conclude that offenses are violence regardless of the elements apply this Court's precedents incorrectly. Databases like Westlaw and Lexis Nexus identify only appellate cases and do not find cases where a defendant was charged with Mich. Comp. Laws § 750.84, but chose to plead guilty to a lesser charge, or those who chose not to appeal. This exercise privileges facts over elements, which courts conducting the categorical approach may not do. *Mathis*, 136 S. Ct. at 2248. And the *elements* of § 750.84 do not include use of violent force.

This Court should grant review to decide whether the analytical approach used by the Fourth, Sixth, and Eighth Circuits is sound.

CONCLUSION

The petition should be granted.

Respectfully submitted,

By: ______________________________
FEDERAL DEFENDER OFFICE

Colleen P. Fitzharris
Andrew Wise
Counsel for Petitioner Jerome Raybon

Detroit, Michigan
May 7, 2018