

A P P E N D I X

APPENDIX

A-1	Sixth Circuit Order Denying Rehearing En Banc, <i>Raybon v. United States</i> , No. 16-2522 (6th Cir. Dec. 6, 2017).....	APP 001
A-2	Sixth Circuit Opinion, <i>Raybon v. United States</i> , No. 16-2522 (6th Cir. Aug. 14, 2017).....	APP 003
A-3	District Court Opinion & Order Denying § 2255 Motion , <i>Raybon v. United States</i> , No. 03-cr-50064 (E.D. Mich. Oct. 28, 2016).....	APP 012
A-4	Judgment, <i>Raybon v. United States</i> , No. 03-cr-50064 (E.D. Mich. Sept. 1, 2004).....	APP 018
A-5	Brief of Amicus Curiae in Support of Rehearing En Banc, No. 16-2522 (6th Cir. Oct. 18, 2017).....	APP 024

A-1

No. 16-2522

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 06, 2017
DEBORAH S. HUNT, Clerk

JEROME RAYBON,

Petitioner-Appellant,

V.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

BEFORE: NORRIS, SUHRHEINRICH, and GRIFFIN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision. The petition then was circulated to the full court. Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Wm L. Hunt

Deborah S. Hunt, Clerk

APP001

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
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Filed: December 06, 2017

Ms. Colleen P. Fitzharris
Mr. Andrew N. Wise

Re: Case No. 16-2522, *Jerome Raybon v. USA*
Originating Case No. : 2:16-cv-12174 : 2:03-cr-50064-1

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Jennifer Niles Coffin
Mr. Shane N. Cralle
Ms. Elizabeth B. Ford
Mr. Michael C. Holley
Mr. Henry A. Martin

Enclosure

APP002

A-2

File Name: 17a0176p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JEROME RAYBON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 16-2522

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

Nos. 2:03-cr-50064-1; 2:16-cv-12174—Bernard A. Friedman, District Judge.

Decided and Filed: August 14, 2017

Before: NORRIS, SUHRHEINRICH, and GRIFFIN, Circuit Judges.

COUNSEL

ON BRIEF: Joan E. Morgan, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Flint, Michigan, for Appellant. Shane Cralle, UNITED STATES ATTORNEY’S OFFICE, Detroit, Michigan, for Appellee.

OPINION

SUHRHEINRICH, Circuit Judge. Petitioner Jerome Raybon appeals the district court’s denial of his 28 U.S.C. § 2255 motion, claiming that his Michigan offense of assault with intent to do great bodily harm no longer qualifies as a crime of violence under the Sentencing Guidelines after *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson 2015*). We conclude that his claim is not timely under 28 U.S.C. § 2255(f)(3).

I.

In 2004, during the pre-*Booker* era when the Sentencing Guidelines were deemed mandatory, see *United States v. Booker*, 543 U.S. 220, 233 (2005), Raybon pleaded guilty to distributing more than 50 grams of cocaine base in violation of 21 U.S.C. § 841(a)(1). As part of his plea agreement, Raybon agreed to be “held accountable for between 50 and 150 grams of cocaine base which results in a base offense level of 32.” Raybon further agreed that he qualified as a career offender under the United States Sentencing Guidelines, U.S.S.G. § 4B1.1, based on a prior drug trafficking conviction and a conviction for assault with intent to do great bodily harm less than murder. The career offender designation increased his guidelines range to 262 to 327 months’ imprisonment (from 140 to 175 months).¹ The district court sentenced Raybon to 295 months’ imprisonment. Raybon appealed. This court affirmed based on an appeal waiver in the plea agreement.

Ten years later, under a different regime of “effectively advisory” Guidelines, see *Booker*, 543 U.S. at 245, Raybon moved to vacate his sentence pursuant to § 2255 based on *Johnson 2015*. *Johnson 2015* invalidated the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), as being unconstitutionally void for vagueness.² *Johnson 2015*, 135 S. Ct. at 2557. Raybon argued that his predicate conviction for assault with intent to do great bodily harm no longer qualified as a crime of violence under an identically-worded

¹More specifically: without the career offender designation, Raybon’s offense level would have been 32 and his criminal history category would have been V. After a three-point reduction for acceptance of responsibility, his offense level would have been 29. Raybon’s sentencing range would have been 140 to 175 months. With the career offender designation, Raybon’s offense level was raised to 37 and his criminal history category became VI. After a three-point reduction for acceptance of responsibility lowered his offense level to 34, the resulting sentencing range was 262 to 327 months.

²Section 924(e) of the ACCA provides that a person who violates 18 U.S.C. § 922(g) and who “has three previous convictions” for “a violent felony” “committed on occasions different from one another” shall be imprisoned for a minimum of fifteen years and a maximum of life. A “violent felony” is defined as “any crime punishable by imprisonment exceeding one year” that:

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another [elements clause]; or
- (ii) is burglary, arson, or extortion, involves use of explosives [enumerated clause], or otherwise involves conduct that presents a serious potential risk of physical injury to another [residual clause] [.]

§ 924(e)(2)(B).

residual clause in the career offender guideline, U.S.S.G. § 4B1.2(a)(2).³ The district court denied the motion as untimely, because it perceived Raybon’s argument as actually based not on *Johnson 2015*, but on *Johnson v. United States, Johnson 2010*, 559 U.S. 133 (2010) (*Johnson 2010*), which held that the term “physical force” in the identically-worded elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), means *violent* force. 559 U.S. at 140. The district court held that although Raybon mentioned *Johnson 2015* and asserted that it applied to his case, he basically argued that his assault conviction did not satisfy the elements clause of U.S.S.G. § 4B1.2(a)(1) because Michigan law does not require proof of “the use, attempted use, or threatened use of physical force” and was not one of the four enumerated offenses listed in U.S.S.G. § 4B1.2(a)(2). Because Raybon’s argument “focuse[d] on other clauses that were not at issue in *Johnson [2015]*,” the district court held that his claims should have been raised in 2006, when his conviction became final, or at the latest in 2010, after *Johnson 2010* was decided. The district court also ruled on the merits, holding that assault with intent to do great bodily harm was a crime of violence under the elements clause of U.S.S.G. § 4B1.2(a)(1). Raybon appealed, and the district court issued a certificate of appealability.

II.

This court reviews the district court’s denial of a motion to vacate under § 2255 de novo. *Moss v. United States*, 323 F.3d 445, 454 (6th Cir. 2003).

A.

We agree with the district court that Raybon’s § 2255 petition was untimely, but follow a different analytical path. A § 2255 motion must be filed within one year of “the date on which

³U.S.S.G. § 4B1.2(a) (2004) provided as follows:

(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 [the elements clause], or

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

Application Note 1 states that “crime of violence” also includes “aggravated assault.” § 4B1.2(a) cmt. n.1 (2004).

the judgment of conviction becomes final.” 28 U.S.C. § 2255(f)(1). A conviction becomes final upon conclusion of direct review. *Sanchez-Castellano v. United States*, 358 F.3d 424, 426 (6th Cir. 2004). If the defendant takes a direct appeal to the court of appeals, the judgment of conviction becomes final after the ninety-day period to file a petition for writ of *certiorari* expires. *Id.* Here, the district court entered judgment on September 1, 2004. Raybon appealed. This court entered its order on November 4, 2005, so the ninety-day period to file a petition for writ of *certiorari* expired on February 2, 2006. Thus, Raybon had until February 2, 2007, to file his § 2255 motion. But he did not file it until June 14, 2016. His petition is therefore untimely unless he satisfies one of the exceptions found in § 2255(f).⁴

Raybon asserts that his petition is timely under § 2255(f)(3), which provides that a § 2255 petition may be filed within one year of “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.” § 2255(f)(3). Raybon filed this petition on June 14, 2016, within one year of the Supreme Court’s decision in *Johnson 2015*, which was decided on June 26, 2015.

Johnson 2015 held that the residual clause of the ACCA is unconstitutionally vague because it “both denies fair notice to defendants and invites arbitrary enforcement by judges.” *Johnson 2015*, 135 S. Ct. at 2557. In *Welch v. United States*, the Supreme Court held that *Johnson 2015* announced a new substantive rule that has retroactive effect in cases on collateral

⁴28 U.S.C. § 2255(f) provides that:

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

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (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; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

review. 136 S. Ct. 1257, 1265 (2016). *See also In re Watkins*, 810 F.3d 375, 379, 382 (6th Cir. 2015) (same; issued prior to *Welch*).

Beckles decided that *Johnson 2015* does *not* apply to the *advisory* sentencing guidelines. *See Beckles*, 137 S. Ct. at 894. And whether it applies to the mandatory guidelines, which contain identical language as the ACCA provision at issue in *Johnson 2015*, is an open question. Justice Thomas, writing for the majority, explicitly and repeatedly stated that the Court was not addressing the pre-*Booker*, mandatory Guidelines scheme. And Justice Sotomayor made this point clear in her concurring opinion (without objection from the majority): “The Court’s adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in [*Booker*] . . . may mount vagueness attacks on their sentences.” *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring in the judgment). Echoes of this sentiment are also found in *Johnson 2015* and *Welch*. *See Johnson 2015*, 135 S. Ct. at 2561 (rejecting the government’s argument that it was placing textually similar laws into “constitutional doubt”); *Welch*, 136 S. Ct. at 1262 (stating that *Johnson 2015* “cast no doubt” on laws using similar language but that required an evaluation of the particular facts of the case).

Because it is an open question, it 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.” *See* § 2255(f)(3). *See generally Tyler v Cain*, 533 U.S. 656, 663-64 (2001) (holding that “made” means “held” under identical language in § 2244(b)(2)(A) and that it must be held retroactive by the Supreme Court).⁵ Thus, as recently explained by a district court addressing the identical issue presented here:

The analysis turns . . . to whether the holding of *Johnson [2015]* established the same right that Petitioner seeks to assert in this case. It is clear that it does not, as *Johnson [2015]*’s holding was limited to the ACCA and did not extend to other legal authorities such as the Sentencing Guidelines. *Welch* specifically described the substantive right established by *Johnson [2015]* as one relating to the ACCA, stating that *Johnson [2015]*: “changed the substantive reach of the Armed Career

⁵That holding need not be express, but may be made through “multiple holdings that logically dictate the retroactivity of the new rule.” *Watkins*, 810 F.3d at 381 (quoting *Tyler v. Cain*, 533 U.S. 656, 668 (2001) (O’Connor, J., concurring)).

Criminal Act, altering the range of conduct or the class of person that the Act punishes.” *Welch*, 136 S. Ct. at 1265 (internal quotation marks omitted). *Welch* also stated that *Johnson* [2015] “cast no doubt” on laws using similar language but that required an evaluation of the particular facts of the case. *Welch*, 136 S. Ct. at 1262. *Johnson* [2015] itself rejected arguments by the Government that it was placing the other laws textually similar to the ACCA into “constitutional doubt.” See *Johnston* [sic] [2015], 135 S. Ct. at 2561.

Mitchell v. United States, No. 3:00-CR-00014, 2017 WL 2275092, at * 4 (W.D. Va. May 24, 2017) (footnotes omitted). In other words, “[b]ecause the Supreme Court has not decided whether the residual clause of the mandatory Sentencing Guidelines is unconstitutionally vague—and did not do so in *Johnson* [2015]—Petitioner’s motion is untimely under § 2255(f)(3)” *Id.* at *5; see also *id.* at * 7 (holding that the petitioner’s challenge to his sentence under the mandatory Guidelines were procedurally barred by §§ 2255(f)(3) and 2255(h)(2) because *Johnson* [2015]’s holdings extend only to individuals convicted under the ACCA; but not issuing a final order until the Fourth Circuit issues its opinion on the same questions in *United States v. Brown*, Case No. 16-7056, argued May 11, 2017). See generally *Dodd v. United States*, 545 U.S. 353, 357-58 (2005) (stating that § 2255(f)(3) is clear—relief is available one year after the Supreme Court initially recognizes the right).

Stated differently, Raybon’s untimely motion cannot be saved under § 2255(f)(3) because he “is asking for the recognition of a new right by this court—that individuals have a Constitutional right not to be sentenced as career offenders under the residual clause of the mandatory Sentencing Guidelines.” *Mitchell*, 2017 WL 2275092, at *3.⁶ See *id.* at *5; *Linder v. United States*, No. 5:16-cv-00018-RLV, 2017 WL 2190067, at * 3 (W.D. N.C. May 18, 2017) (holding in abeyance the petitioner’s § 2255 motion pending Fourth Circuit’s decision in *Brown*); *Hodges v. United States*, Case No. C16-1521JLR, 2017 WL 1652967, at *3 (W.D. Wash. May 2, 2017) (holding that the petitioner’s collateral attack on the residual clause in U.S.S.G. § 4B1.2(a)(2) did not meet the requirements of § 2255(f)(3) “[u]ntil further pronouncement of the Supreme Court concerning the applicability of *Johnson* [2015] to the Guidelines as they were applied prior to *Booker*”); *United States v. Russo*, No. 8:03CR413, 2017

⁶This conclusion was foreshadowed in *In re Embry*: “if the *Pawlak* rule is distinct from the *Johnson* [2015] rule, [the petitioner in a successive § 2255 motion] has a problem because the Supreme Court has not yet recognized this rule or made it retroactive.” *In re Embry*, 831 F.3d 377, 379 (6th Cir. 2016).

WL 1533380, at *2-4 (D. Neb. Apr. 27, 2017) (rejecting the petitioner’s § 2255 petition seeking to extend the rule in *Johnson 2015* to his 2004 sentence under the mandatory guidelines, stating that “[b]ecause the plain language of § 2255(f)(3) reserves the creation of such a rule to the Supreme Court, the Defendant may not rely upon § 2255(f)(3) for the filing of his § 2255 Motion, and the § 2255 Motion is time-barred”); *but see Reid v. United States*, No. 03-CR-30031-MAP, 2017 WL 2221188, at *5 (D. Mass. May 18, 2017) (holding that *Beckles* does not apply to pre-*Booker* sentences imposed under mandatory Sentencing Guidelines and “[t]he Supreme Court’s *Johnson* precedents make clear now that the court’s employment of the Career Offender provisions of the Guidelines at the 2004 sentencing violated the Due Process Clause of the Fifth Amendment”; granting the petitioner’s § 2255 motion without discussion of § 2255(f)(3)); *United States v. Tunstall*, No. 3:00-cr-050, 2017 WL 2619336, at *5-6 (S. D. Ohio June 6, 2017) (magistrate judge’s report and recommendation) (finding that *Johnson 2015* applies to petitioners who had their sentence enhanced under the mandatory guidelines and recommending that the petitioner’s § 2255 successive petition be granted on the merits).

B.

Although Raybon’s § 2255 motion was untimely, we can also decide this issue on the merits. *See Pough v. United States*, 442 F.3d 959, 965 (6th Cir. 2006) (holding that a district court can avoid a statute of limitations question if it would be easier to simply deny relief on the merits). Raybon argues that assault with intent to do great bodily harm less than murder is no longer a crime of violence under U.S.S.G. § 4B1.2(a)(2) because the second element—intent to do great bodily harm less than murder—does not require proof of actual physical injury. According to Raybon, Mich. Comp. Laws § 750.84(a) is a simple assault statute that requires some evidence of intent to do great bodily harm, but does not require the actual use, or even threatened use, of physical force capable of causing injury to another person.

Assuming the residual clause is void, and applying the “categorical approach” because the Michigan statute is not divisible, *see United States v. Harris*, 853 F.3d 318, 320 (6th Cir. 2017), we conclude that Raybon’s conviction still qualifies as a crime of violence under the elements clause. First, it has as an element the use, attempted use, or threatened use of physical force. As noted above, physical force means “*violent* force—that is, force capable of causing

physical pain or injury to another person.” *Johnson 2010*, 559 U.S. at 140. Although the statute does not otherwise define what conduct it prohibits, the statute in effect when Raybon was convicted proscribed an “[a]ssault[] [of] another with intent to do great bodily harm, less than the crime of murder.” Mich. Comp. Laws § 750.84(1)(a).⁷ The Michigan courts have held that this requires “(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm *less than murder*.” *People v. Brown*, 703 N.W.2d 230, 236 (Mich. Ct. App. 2005). It is a specific intent crime. *People v. Parcha*, 575 N.W.2d 316, 318 (Mich. Ct. App. 1997). It requires “an intent to do serious injury of an aggravated nature,” *Brown*, 703 N.W.2d at 236, but an actual injury need not occur, *People v. Dillard*, 845 N.W.2d 518, 522 (Mich. Ct. App. 2013), *abrogated on other grounds by People v. Barrera*, 892 N.W.2d 789 (Mich. 2017). The offense is thus context-specific; although any injury inflicted by the defendant is “not *necessarily* proof of any intent beyond that necessary to inflict the particular injury[,] . . . the extent of any injury . . . can nevertheless be strongly probative of the intent to cause the requisite quantum of harm.” *Id.*

“Physical force against the person of another” means “*violent* force,” which means “force capable of causing physical pain or injury to another person.” *Johnson 2010*, 559 U.S. at 140. That sounds a lot like “great bodily harm,” which means “force or violence to do corporal harm.” Contrary to his assertion, Raybon could not have been convicted of nonviolent assault because the crime he was convicted of included as an element an intent to do great bodily harm. In fact, the Michigan Model Criminal Jury Instruction for assault with intent to do great bodily harm defines “great bodily harm” as any “physical injury that could *seriously harm the health or function of the body*.” Mich. Crim. J.I. 17.7(4) (emphasis added). Thus, as the district court held, Raybon’s crime under Mich. Comp. Laws § 750.84 qualifies as a crime of violence under the elements clause because “an element of his assault conviction was the use or threat of the type of force required by *Johnson 2010*.” See generally *Harris*, 853 F.3d at 321-22 (noting that “[t]he categorical approach doesn’t require that *each* element of an offense involve use of force; it requires that the offense *overall* include use of violent force”; holding that Michigan felonious

⁷The current version, effective April 1, 2013, is not materially different. See Mich. Comp. Laws § 750.84(a)(1) (2013).

assault involves violent force “because it proscribes not common law assault but common law assault *with a dangerous weapon*”).

While we must consider the least objectionable conduct that would violate the statute, see *United States v. Amos*, 501 F.3d 524, 527 (6th Cir. 2007), “there must be a realistic probability, not a theoretical possibility” that Michigan would apply the statute to conduct that does not satisfy the elements clause, *Harris*, 853 F.3d at 322. Raybon has not provided any examples where Michigan courts have swept nonviolent simple assaults within the reach of this statute. This forecloses his claim.

Because we conclude that Raybon’s conviction under Mich. Comp. Laws § 750.84(1)(a) qualifies as a crime of violence, we do not consider the United States’ alternative argument that the conviction is a crime of violence under the enumerated offense clause.

III.

For the foregoing reasons, the district court’s judgment is **AFFIRMED**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 03-CR-50064
Civil Action No. 16-CV-12174

vs.

HON. BERNARD A. FRIEDMAN

JEROME RAYBON,

Defendant.

OPINION AND ORDER DENYING DEFENDANT'S § 2255 MOTION

This matter is presently before the Court on defendant's motion to vacate his sentence under 28 U.S.C. § 2255 [docket entry 63]. The government has filed a response in opposition and defendant has filed a reply. Pursuant to E.D. Mich. LR 7.1(f)(2), the Court shall decide this motion without a hearing.

In November 2003, defendant was charged with two counts of distributing 50 grams or more of cocaine base, in violation of 21 U.S.C. § 841(a)(1). In May 2004, defendant entered into a Rule 11 Plea Agreement wherein he agreed to plead guilty to count two of the indictment in exchange for the government's agreement to dismiss count one. Defendant further agreed to be "held accountable for between 50 and 150 grams of cocaine base which results in a base offense level of 32." *Id.* ¶ 1.C. The parties agreed that defendant's sentence would not exceed the mid-point of the sentencing guideline range. *Id.* ¶ 2.A.

In a worksheet attached to the Rule 11 Plea Agreement, the parties agreed that plaintiff's offense level was increased to 37 under the career offender provision of the sentencing guidelines, U.S.S.G. § 4B1.1. Under that section of the guidelines, a defendant qualifies as 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.

U.S.S.G. § 4B1.1(a). There is no dispute that defendant met the first and second conditions. As to the third condition, the parties' worksheet identified two prior felony convictions: a 1989 conviction for assault with intent to commit great bodily harm less than murder and a 2000 conviction for delivering a controlled substance. The issue raised by the instant motion is whether the first of these convictions counts as a "crime of violence" under § 4B1.1(a).¹

The term "crime of violence" is defined in U.S.S.G. § 4B1.2(a) as

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.*

¹ Defendant's designation as a career offender nearly doubled his sentence. Without the career offender designation, the parties agreed that defendant's offense level would have been 32 and his criminal history category would have been V. *See* Rule 11 Plea Agreement, Worksheet D. With a three-point reduction for acceptance of responsibility, defendant's offense level would have been 29. His sentencing range would have been 140 to 175 months, the mid-point of which would have been 157.5 months. With the career offender designation, however, defendant's offense level and criminal history category were raised to 37 and VI, respectively. With a three-point reduction for acceptance of responsibility, defendant's offense level was lowered to 34. This resulted in a sentencing range of 262 to 327 months, the mid-point of which was 294.5 months. In September 2004 the Court sentenced defendant to 294 months. *See* Judgment, p. 2 [docket entry 22]. The court of appeals affirmed in November 2005 [docket entries 36, 37].

(Emphasis added.) The italicized “residual clause” has been invalidated for being void for vagueness. *See United States v. Johnson*, 135 S. Ct. 2551 (2015) (invalidating an identically worded clause in the Armed Career Criminal Act (“ACCA”)); *United States v. Pawlak*, 822 F.3d 902, 911 (6th Cir. 2016) (applying *Johnson* to the residual clause of § 4B1.2(a)(2)). Defendant argues that based on *Johnson* and *Welch v. United States*, 136 S. Ct. 1257 (2016) (holding that *Johnson* announced a new rule of law that applies retroactively on collateral review), he “is being . . . held, in violation of the Constitution.” Def.’s Mot. at 2.

Having reviewed the matter, the Court concludes that defendant’s motion must be denied as untimely. Under 28 U.S.C. § 2255(f), a motion collaterally challenging a federal sentence is subject to a one-year limitations period. Section 2255(f) states:

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

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (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; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

In the present case, defendant missed the filing deadline under subsection (1) because his judgment

of conviction became final years before he filed the instant motion. As noted above, the court of appeals affirmed defendant's conviction and sentence in November 2005, and defendant did not file a petition for a writ of certiorari with the Supreme Court. Nor does defendant argue that the untimeliness of the instant motion is excused under subsection (2) or (4).

This leaves only subsection (3), which applies when the right that defendant asserts has been "newly recognized" (i.e., announced no more than one year before the § 2255 motion was filed) by the Supreme Court and made retroactively applicable on collateral review. This subsection would apply in this instant case, and eliminate the timeliness concern, if the right that defendant asserts were based on the Supreme Court's 2015 decision in *Johnson*, which, as noted, announced a new, retroactively applicable rule less than one year before defendant filed the instant motion. However, while defendant mentions *Johnson* in his motion and reply, his argument is that his assault conviction does not qualify as a crime of violence because it fails to satisfy the "elements clause" of § 4B1.2(a)(1), not that it fails to qualify due to *Johnson* having invalidated the "residual clause" of § 4B1.2(a)(2).

For example, in his § 2255 motion defendant notes in ¶¶ 2 and 3 that *Johnson* invalidated the residual clause of the ACCA and that the Sixth Circuit has extended *Johnson* to career offender cases, and in ¶ 11 he asserts that *Johnson* "applies to [his] case." Throughout the rest of his motion, however, defendant argues that his assault conviction does not satisfy § 4B1.2(a)(1) because, under Michigan law, this crime does not require proof of "the use, attempted use, or threatened use of physical force." Similarly, at pp. 1-5 of his reply brief defendant argues that under *Johnson* the residual clause of § 4B1.2(a)(2) is unconstitutionally vague and that the rule from *Johnson* applies retroactively; and at pp. 6-8 defendant argues that he could not have challenged the

residual clause previously because “a solid wall of Supreme Court and Circuit authority . . . would have rendered his claim futile.” Def.’s Reply at 6 (citations and internal quotation marks omitted). In applying the law to his case, however, at pp. 8-15, defendant does not argue that he is entitled to relief based on *Johnson* having invalidated the residual clause of § 4B1.2(a)(2); rather, he argues that the assault for which he was convicted was not a crime of violence because it does not meet the elements of § 4B1.2(a)(1) and was not one of the four “enumerated offenses” listed in § 4B1.2(a)(2).

Defendant’s motion is untimely because it is not based on *Johnson* and, indeed, has nothing to do with the now invalidated residual clause of § 4B1.2(a)(2). Instead, defendant’s argument focuses on other clauses that were not at issue in *Johnson*, and any arguments as to those clauses had to be raised, if at all, before defendant’s conviction became final in early 2006.²

Even if defendant’s motion were timely, the Court would deny it on the merits. In *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010), the Supreme Court stated that “in the context of a statutory definition of ‘violent felony,’ the phrase ‘physical force’ means *violent* force – that is, force capable of causing physical pain or injury to another person.” (Emphasis in original.) Under § 4B1.2(a)(1), the crime for which defendant was convicted must have “as an element the use,

² Defendant tacitly concedes that he could have made his argument concerning the “elements clause” at that time because he believes that under a 2004 decision “[t]he Michigan Supreme Court has made clear that proof of an assault does not necessarily involve the use, attempted use, or threatened use of physical force.” Def.’s Mot. at 2. At the latest, defendant could have made this argument in a § 2255 motion in 2010 because in that year the Supreme Court decided *Johnson v. United States*, 130 S. Ct. 1265 (2010) (“*Johnson 2010*”). Defendant concedes that “[i]n defining physical force [as used in the Armed Career Criminal Act] *Johnson 2010* required use of violent physical force capable of causing actual injury to another person. . . . After *Johnson 2010*, the definition of physical force in the elements clause no longer encompasses all forms of offensive touching.” Def.’s Mot. at 3-4. Thus, even assuming *Johnson 2010* announced a new, retroactive rule regarding the elements clause of § 4B1.2(a)(1), defendant had one year from the announcement of that decision – i.e., until March 2, 2011 – to file a § 2255 motion based thereon. He missed this filing deadline by five years.

attempted use, or threatened use of” such force against another. The crime of “assault with intent to do great bodily harm less than murder,” Mich. Comp. Laws § 750.84, meets this definition because an element of this offense is either the use or the threat of violent force. *See People v. Parcha*, 227 Mich. App. 236, 239 (1997) (“Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.”); *People v. Lugo*, 214 Mich. App. 699, 710 (1995) (“The elements of the crime of assault with intent to do great bodily harm less than murder are (1) an attempt or offer with force or violence to do corporeal hurt to another (an assault), (2) coupled with an intent to do great bodily harm less than murder.”). Michigan Model Criminal Jury Instruction 17.7 also makes clear that an element of this crime is “that the defendant tried to physically injure another person” (available at: <http://courts.mi.gov/Courts/MichiganSupremeCourt/criminal-jury-instructions>). Defendant’s challenge to the elements clause clearly lacks merit because an element of his assault conviction was the use or threat of the type of force required by *Johnson 2010*. Accordingly,

IT IS ORDERED that defendant’s § 2255 motion is denied.

S/ Bernard A. Friedman _____
BERNARD A. FRIEDMAN
SENIOR UNITED STATES DISTRICT JUDGE

Dated: October 28, 2016
Detroit, Michigan

UNITED STATES DISTRICT COURT
Eastern District of Michigan

UNITED STATES OF AMERICA

v.

Case Number CR 03-50064-FL

USM No. 31133-039

Hon. Paul V. Gadola

JEROME RAYBON,
Defendant.

FILED

SEP - 1 2004

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987) **U.S. DISTRICT COURT
FLINT, MICHIGAN**

The defendant, JEROME RAYBON, was represented by Charles Grossmann.

- The defendant pleaded guilty to count **Two of Indictment**.
- Count **One of Indictment** is dismissed on the motion of the United States.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. 841(a)(1)	Distribution of 50 Grams or More of Cocaine Base	10/31/03	Two

The defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed: 9/1/04September 1, 2004

Date of Imposition of Judgment

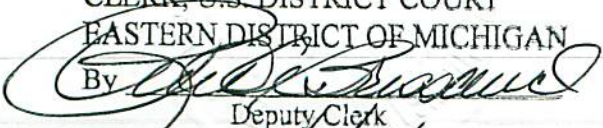


Paul V. Gadola

United States District Judge

I hereby certify that the foregoing is
a true copy of the original on file in this
Office.

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

By 

Deputy Clerk

Dated 9/1/04**SEP 02 REC'D****APP018**

AO 245 S (Rev. 11/97) Sheet 2 - Imprisonment

Defendant: JEROME RAYBON
Case Number: CR 03-50064-FL

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 294 months .

The Court waives the imposition of a fine, the costs of incarceration and the costs of supervision, due to the defendant's lack of resources.

■ The Court makes the following recommendations to the Bureau of Prisons: that the defendant be designated to F.C.I. Milan, Michigan. It is a further recommendation of the Court that the defendant be allowed to participate in the Comprehensive Drug Treatment Program.

■ The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

United States Marshal

By _____
Deputy Marshal

APP019

Defendant: JEROME RAYBON
Case Number: CR 03-50064-FL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 10 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

- The defendant shall not commit another federal, state or local crime.
- The defendant shall not illegally possess a controlled substance.

FOR OFFENSES COMMITTED ON OR AFTER SEPTEMBER 13, 1994

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

- The defendant shall not own or possess a firearm, destructive device, or dangerous weapon as defined in 18 U.S.C. § 921.

If this judgment imposes a fine, or a restitution obligation, it shall be a condition of supervised release that the defendant pay, as directed by the Probation Office, any such fine, assessments, costs, or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with any additional conditions as listed on the attached page entitled special conditions of supervision

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer at least 10 days prior to any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: JEROME RAYBON
Case Number: CR 03-50064-FL

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall be lawfully and gainfully employed on a full-time basis, or shall be seeking such lawful, gainful employment on a full-time basis. "Full-time" is defined as 40 hours per week. In the event that the defendant has part-time employment, he shall devote the balance of such 40 hours per week to his efforts of seeking additional employment.

AO 245 S (Rev. 11/97) Sheet 5, Part A - Criminal Monetary Penalties

Defendant: JEROME RAYBON
Case Number: CR 03-50064-FL

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	\$ 100.00	\$ 0.00	\$ 0.00
If applicable, restitution amount ordered pursuant to plea agreement			\$0.00

AO 245B (Rev. 12/03) Sheet 6 — Schedule of Payments

DEFENDANT: JEROME RAYBON
CASE NUMBER: 03-50064-FL

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☐ Lump sum payment of \$ _____ due immediately, balance due
☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instructions above, while in custody, the defendant shall participate in the Inmate Financial Responsibility Program. The Court is aware of the requirements of the program and approves of the payment schedule of this program and hereby orders the defendant's compliance. All criminal monetary penalty payments are to be made to the Clerk of the Court, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States: See attached

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IDENTITY AND INTEREST OF AMICI

Amici comprise seven of the eight federal defender offices in the Sixth Circuit, with the exception of the office in the Eastern District of Michigan, which represents Petitioner-Appellant Jerome Raybon. Following the Supreme Court's decision in *Johnson v. United States*, [135 S. Ct. 2551](#) (2015), Amici expended substantial resources to identify clients who could benefit from *Johnson*'s ruling and to ensure that claims were filed on those clients' behalf within the one-year limitations period provided by [28 U.S.C. § 2255\(f\)\(3\)](#).

Together, Amici represent approximately 65 individuals who would benefit from a holding that *Johnson* applies to the mandatory guidelines. An estimate based on data from the Sentencing Commission and the defender program suggests that such a holding could affect approximately 1,187 cases nationally, including 114 in the Sixth Circuit. See Appendix at 2a-3a. For the vast majority of Amici's clients, a favorable ruling would render them eligible for immediate or near-immediate release.

Counsel of record for Jerome Raybon consents to the filing of this brief.¹

¹ No part of this brief was authored by counsel for Raybon, and no party or other

No. 16-2522

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**JEROME RAYBON,
Petitioner-Appellant,**

v.

**UNITED STATES OF AMERICA,
Respondent-Appellee.**

PETITION FOR REHEARING EN BANC

**Brief of *Amici Curiae* Federal Public and Community Defenders for the
Western District of Kentucky, Western District of Michigan, Northern
District of Ohio, Southern District of Ohio, Eastern District of Tennessee,
Middle District of Tennessee, and Western District of Tennessee
in Support of Petitioner-Appellant Jerome Raybon's
Petition for Rehearing *En Banc***

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Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
IDENTITY AND INTEREST OF AMICI CURIAE	1
INTRODUCTION	2
I. Waiting for a Supreme Court decision unnecessarily risks depriving Sixth Circuit defendants of any relief; en banc review is needed now	3
II. By ignoring <i>Teague</i> , the Panel reached the wrong conclusion.....	7
III. The briefing before the Panel did not address the <i>Teague</i> doctrine	11
CONCLUSION	12
CERTIFICATE OF SERVICE	13
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION	13
APPENDIX	1a
Estimated Number of Pending § 2255 Cases for Prisoners Sentenced Under the Mandatory Career Offender Guideline Seeking Relief Under <i>Johnson</i>	1a

TABLE OF AUTHORITIES

Cases

<i>Charles v. Chandler</i> , 180 F.3d 753 (6th Cir. 1999).....	5
<i>Descamps v. United States</i> , 133 S. Ct. 2276 (2013).....	4, 10
<i>Ezell v. United States</i> , 778 F.3d 762 (9th Cir. 2015).....	5
<i>Francis v. Franklin</i> , 471 U.S. 307 (1985)	9-10
<i>In re Hoffner</i> , ___ F.3d ___, 2017 WL 3908880 (3d Cir. Sept. 7, 2017).....	11
<i>In re Liddell</i> , 722 F.3d 737 (6th Cir. 2013)	5
<i>Jackson v. United States</i> , No. 13-cr-2731, 2016 U.S. Dist. LEXIS 65196 (W.D. Tenn. May 18, 2016).....	5
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015)	<i>passim</i>
<i>Moore v. United States</i> , ___ F.3d ___, 2017 WL 4021654 (1st Cir. Sept. 13, 2017) ...	5
<i>Raybon v. United States</i> , 867 F.3d 625 (6th Cir. 2017).....	8
<i>Sandstrom v. Montana</i> , 442 U.S. 510 (1979)	9-10
<i>Stanko v. Davis</i> , 617 F.3d 1262 (10th Cir. 2010)	5
<i>Stringer v. Black</i> , 503 U.S. 222 (1992).....	8-9
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	<i>passim</i>
<i>Headbird v. United States</i> , 813 F.3d 1092 (8th Cir. 2016).....	5
<i>United States v. Morgan</i> , 845 F.3d 664 (5th Cir. 2017)	5

<i>United States v. Vinson</i> , 805 F.3d 120 (4th Cir. 2015).....	12
<i>United States v. Winestock</i> , 340 F.3d 200 (4th Cir. 2003).....	5
<i>Welch v. United States</i> , 136 S. Ct. 1257 (2016).....	7
<i>Yates v. Aiken</i> , 484 U.S. 211 (1988)	10

Statutes and Rules

28 U.S.C. § 2244(b)(1)	5
28 U.S.C. § 2255(f)(3)	<i>passim</i>
Fed. R. App. P. 29(c)(5)	2

Other Materials

Brief of the United States, <i>Descamps v. United States</i> , 133 S. Ct. 2276 (2013).....	4
Supplement to § 2255 Motion, <i>United States v. Bibbs</i> , No. 1:00-Cr-84 (E.D. Tenn. May 11, 2017) (Doc. 51).....	6

INTRODUCTION

The Panel held, in a published decision entered without oral argument, that Raybon's motion is untimely under § 2255(f)(3). Although the Panel went on to consider (and reject) Raybon's claim on the merits, its timeliness holding will affect scores of defendants in this Circuit with meritorious *Johnson*-based claims. They will be forced to wait to file a challenge to their mandatory career offender sentences until the Supreme Court specifically holds that *Johnson* voids the mandatory guidelines' residual clause, which it may never do.

En banc review of the Panel's timeliness ruling is urgently needed for three reasons. *First*, for the many defendants in the Sixth Circuit with meritorious claims, the time for relief is likely now or never. Even if the Supreme Court later holds that *Johnson* applies to the mandatory guidelines, such a ruling likely would not trigger a new one-year filing period under § 2255(f)(3). And even if it does, certain decisions by this Court barring second or successive claims in § 2255 cases could still preclude new filings raising *Johnson*-based claims. *Second*, the Panel's timeliness holding is wrong, premised on a mistaken view of what it means for a question to be "open" in this context. *Third*, the timeliness issue was not adequately briefed before the Panel. The parties did not even cite the *Teague*

person provided money to fund its preparation or submission. FRAP 29(c)(5).

doctrine, nor did the Panel address it. Such an important issue of law warrants more thorough briefing.

I. Waiting for a Supreme Court decision unnecessarily risks depriving Sixth Circuit defendants of any relief; en banc review is needed now.

As a result of the Panel’s decision, scores of defendants with meritorious claims must wait for the Supreme Court to expressly hold that *Johnson* applies to the mandatory career offender guideline. The Panel seemed to assume that such a holding would then allow these defendants to pursue relief from their unconstitutional sentences. But the Panel failed to consider or apply the proper analysis under *Teague v. Lane*, [489 U.S. 288](#) (1989), and its progeny to determine whether such a holding would actually constitute a “new” right triggering a new statute of limitations under § 2255(f)(3). As Raybon persuasively demonstrates, (Pet. at 4, 9-11), applying *Johnson* to the mandatory guidelines is a straightforward “application of the principle[s] that governed” in *Johnson* to a law that “fixed sentences” just as the ACCA fixes sentences, using an identically-worded and identically-interpreted residual clause. The applicable principles having already been announced in *Johnson*, the Supreme Court need not—and may never—expressly hold that those principles invalidate the mandatory guidelines’ residual clause.

Even if the Supreme Court were to eventually hold that *Johnson* applies to the mandatory guidelines, the government would almost certainly do an about-face and argue that the ruling isn't "new" under *Teague* and, thus, doesn't trigger a new limitations period under § 2255(f)(3).

The government recently did just that in litigation surrounding the *Descamps* decision. Before *Descamps*, it was an open question whether the modified categorical approach was limited to divisible statutes, and the circuit courts had reached conflicting decisions. In its merits briefing, the government argued that the Supreme Court had "never held that the modified categorical approach is limited to [divisible] crimes." Brief of the United States at 17, *Descamps v. United States*, 133 S. Ct. 2276 (2013). The Supreme Court resolved the open question in the defendant's favor, holding "that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements." *Descamps v. United States*, 133 S. Ct. at 2282.

Since *Descamps*, the government has repeatedly argued that the *Descamps* rule is not "new" under *Teague* because it was dictated by the Supreme Court's prior decisions—even though the government had previously argued that the Supreme Court's precedent dictated the opposite rule. At least three circuits have accepted the government's argument and held that *Descamps* is not a "new" rule,

United States v. Morgan, [845 F.3d 664](#) (5th Cir. 2017); *Headbird v. United States*, [813 F.3d 1092](#) (8th Cir. 2016); *Ezell v. United States*, [778 F.3d 762](#) (9th Cir. 2015), and district courts in this Circuit have followed suit, *see, e.g., Jackson v. United States*, No. 13-cr-2731, [2016 U.S. Dist. LEXIS 65196](#), at *8-9 (W.D. Tenn. May 18, 2016).

Further complicating matters are decisions by this Court 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 Amici do not agree that § 2244(b)(1) applies to § 2255 motions,² these 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. Meanwhile, similarly

² *See, e.g., Stanko v. Davis*, [617 F.3d 1262, 1269](#) (10th Cir. 2010) (recognizing that § 2244(b)(1) concerns only habeas corpus applications under § 2254); *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); *see also Moore v. United States*, ___ F.3d ___, [2017 WL 4021654](#), at *11 (1st Cir. Sept. 13, 2017) (noting that § 2244(b)(1) “only appear[s] to apply to § 2254 motions by [its] terms”).

situated defendants in other Circuits will be granted relief and released from prison.

Such a possible state of affairs defies any concept of justice for the many defendants with clearly meritorious claims who have diligently pursued their rights—defendants like Arteria Bibbs, convicted at age 25 of a street-level crack offense for which he was sentenced to 262 months as a career offender based on state convictions committed while he was still a teenager (attempted possession of cocaine for resale and reckless endangerment).³ Abandoned by his parents as a child, Mr. Bibbs started his adult life angry and illiterate, but has turned his life around while incarcerated. He earned his GED, completed drug education and numerous other courses, and as of March 2016 had a clean disciplinary record. Although the Sentencing Commission has on three occasions reduced sentences for crack offenders, Mr. Bibbs has not been able to benefit from these changes because he was wrongly classified as a career offender. He is now 42 years old. His correct guideline sentence today is 120 months—a term that he fully served *over seven years ago*.

³ See Supplement to § 2255 Motion at 3-4, *United States v. Bibbs*, No. 1:00-Cr-84 (E.D. Tenn. May 11, 2017) (Doc. 51).

The Panel’s decision will force Mr. Bibbs and the many others like him to unnecessarily await a Supreme Court decision that may never come, and if it does, may still leave confusion and litigation in its wake. Worse, not all will have the aid of counsel to navigate the course. Those sentenced in the Eastern District of Kentucky, where there is no federal defender office and where counsel is rarely appointed in post-conviction proceedings, would be on their own.

In the absence of any *Teague* analysis, it is unknown whether the Panel considered—or was even aware of—the far-reaching implications of its timeliness holding. For Sixth Circuit defendants, the time for relief from an unconstitutional sentence under the mandatory guidelines may be now or never. This Court should grant en banc review to engage in the proper analysis now, rather than wait for hypothetical future action.

II. By ignoring *Teague*, the Panel reached the wrong conclusion.

Section 2255(f)(3) allows a federal prisoner to file a § 2255 motion within one year of the Supreme Court recognizing a new “right.” The Supreme Court recognizes a new “right” for § 2255 purposes whenever it issues a “new rule” within the meaning of *Teague v. Lane*, [489 U.S. 288](#) (1989). (See Pet. at 9 n.3.) The Supreme Court issued a “new rule” when it issued *Johnson*. *Welch v. United States*, [136 S. Ct. 1257, 1264](#) (2016). Within one year of the issuance of *Johnson*’s

new rule, Raybon “asserted” his claim under *Johnson*, and thus he has filed his motion on time. [28 U.S.C. § 2255\(f\)\(3\)](#).

The Panel probably missed this conclusion because it overlooked the *Teague* doctrine. The Panel did not even mention *Teague* and failed to recognize that a new “right” under § 2255(f)(3) is the same thing as a “new rule” under *Teague*.

That oversight distorted the Panel’s analysis. The distortion is most obvious in this instrumental statement: “Because it is an open question [whether *Johnson* applies to mandatory guideline enhancements], it is *not* a ‘right’ that ‘has been newly recognized by the Supreme Court[.]’” *Raybon v. United States*, [867 F.3d 625, 630](#) (6th Cir. 2017) (emphasis in original). That is, the Panel asserted that if a case can be said to present an “open” question, then the “right” to win that case is still not “recognized” under § 2255(f)(3). Since *Teague* defines for us what counts as a new “right” under § 2255(f)(3), the Panel’s assertion is tantamount to saying: If a case presents an “open” question, the only way it can be resolved in the petitioner’s favor is if the court issues a “new rule.” That assertion is incorrect.

Granted, to decide an open question in the petitioner’s favor, a court might have to “break new ground” and thereby issue a new rule. *Teague*, [489 U.S. at 301](#). But that is not always necessary. Sometimes a court can decide an “open” question in the petitioner’s favor without issuing a new rule. *Stringer v. Black*, [503](#)

U.S. 222, 229 (1992). That happens when a court can decide the question by “merely” making “an application of the principle that governed” a prior Supreme Court case. *Teague*, 489 U.S. at 307. In other words, a question can be “open” even when its answer is “dictated by” Supreme Court precedent; that open question is simply answered by “applying” the precedential rule to the pending case, not by issuing a new rule. *Stringer*, 503 U.S. at 229, 237 (reversing Fifth Circuit’s contrary resolution of an “open” question).

Teague itself provides a prime example of a court deciding an open question in the petitioner’s favor without announcing a new rule: *Francis v. Franklin*, 471 U.S. 307 (1985). See *Teague*, 489 U.S. at 307. *Francis* involved the application of *Sandstrom v. Montana*, 442 U.S. 510 (1979), in which the Supreme Court had issued a new rule holding that due process prohibits any jury instruction that creates a mandatory presumption regarding *mens rea*. The instruction invalidated in *Sandstrom* involved a mandatory *conclusive* presumption, whereas the instruction in *Francis* involved a mandatory *rebuttable* presumption. Because the holding in *Sandstrom* did not reach rebuttable presumptions, the dissent argued that using *Sandstrom* to invalidate the *Francis* instruction would “needlessly extend our holding in [*Sandstrom*] to cases” involving rebuttable presumptions. 471 U.S. at 332 (Rehnquist, J., dissenting). But the Court explained that the factual

“distinction” between the instructions in the two cases “d[id] not suffice” to call for a qualification of “the rule of *Sandstrom* and the wellspring due process principle from which it was drawn.” *Id.* at 316, 326; see *Yates v. Aiken*, 484 U.S. 211, 218 (1988) (holding that *Francis* did not announce new rule). In the parlance of *Teague*, *Francis* shows that rejecting an untenable distinction does not serve to announce a new rule; it simply reinforces an old one in a different but materially equivalent context. And this is precisely what courts have said when holding that *Descamps*, which resolved an open question, is not a new rule. See Part I, *supra*.

These examples make it clear that what Raybon asks for is merely an application of *Johnson*, not the issuance of a new rule. Specifically, Raybon asks that this Court hold that *Johnson*’s rule regarding vagueness and the categorical approach applies not just to a sentencing enhancement fixed by statute, but also to a verbatim-the-same enhancement fixed by a Guideline that is made binding by statute. The immaterial factual “distinction” between Raybon’s case and the case adjudicated by *Johnson* does “not suffice” to make the Court’s favorable new application of *Johnson* a new rule. *Francis*, 471 U.S. at 16.

The Panel, of course, did not actually engage in this analysis. The en banc Court should correct this mistake and address this important question using the proper *Teague* framework.

III. The briefing before the Panel did not address the *Teague* doctrine.

The Panel overlooked the *Teague* doctrine probably because the parties did not brief it. Raybon had no reason to address timeliness in his opening brief, as the government raised no timeliness objection below, and in any event the district court *agreed* that Raybon’s motion would be timely if he asserted a right based on the 2015 *Johnson* decision. (Order Denying Pet., R. 75, PageID #213 (recognizing that *Johnson* “announced a new, retroactively applicable rule less than one year before defendant filed the instant motion”)). Shifting gears in this Court, the government argued in its brief that Raybon’s motion was untimely, but did not address the *Teague* doctrine or engage in an analysis informed by its principles. In some other circuits, by contrast, the government recognizes that *Teague* governs in determining whether applying *Johnson* to the Guideline’s residual clause at § 4B1.2 would create a second “new” rule. *In re Hoffner*, __ F.3d __, [2017 WL 3908880](#), at *9 (3d Cir. Sept. 7, 2017) (noting government’s acknowledgement of *Teague*’s relevance). Yet, here its briefing that never once mentioned the governing framework, and the Panel likewise made no mention of it.

The legal questions resolved by the Panel’s decision potentially affect over one hundred defendants with pending claims throughout this Circuit. Where, as here, the Panel decided legal issues of widespread importance that were not fully

briefed and without oral argument, rehearing is necessary to ensure these issues are decided on the basis of thorough briefing informed by the governing law. *See, e.g., United States v. Vinson*, [805 F.3d 120, 122](#) n.1 (4th Cir. 2015) (recognizing that “failure to consider the issue would leave in place our incomplete and thus incorrect analysis”).

CONCLUSION

For the above reasons, the Sixth Circuit Federal Public Defenders respectfully urge the Court grant the Petitioner-Appellant’s petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief of *Amici Curiae* was sent this 5th day of October, 2017, by ECF filing, to the office of the Assistant United States Attorney of record, Shane N. Cralle.

/s/ Elizabeth B. Ford
ELIZABETH B. FORD

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4). It contains 2,598 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). Certification is based on the word count of the word-processing system used in preparing the brief, Microsoft Word 2013.

/s/ Elizabeth B. Ford
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APPENDIX

Estimated Number of Pending § 2255 Cases for Prisoners Sentenced Under the Mandatory Career Offender Guideline Seeking Relief Under *Johnson*

I. Data Source and Methodology Used to Determine Number of Defendants Sentenced Under the Mandatory Career Offender Guideline Likely to Remain in Prison

Data from fiscal year 1992 (the earliest date for which the Commission has made data available) through fiscal year 2004 (just before the Supreme Court decided *United States v. Booker*, 543 U.S. 220 (2005), on January 12, 2005) were used to estimate the number of offenders sentenced under the career offender guideline likely to remain in prison by district and nationwide. The data used for this analysis were extracted from the U.S. Sentencing Commission's Individual Offender Datafiles by Dr. Paul J. Hofer, Policy Analyst, Sentencing Resource Counsel Project, Federal Public and Community Defenders, and former Special Projects Director, U.S. Sentencing Commission.¹ The underlying data are publicly available at the Commission's website.² The estimate of the number likely to remain in prison is based on the TIMESERV variable, which is calculated from the sentence imposed and assumes the offender will serve the sentence imposed less the maximum good time reduction of 54 days per year. This estimate does not account for early releases after sentencing, including pursuant to motions for relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015).

II. Estimated Number of Mandatory Guidelines § 2255 Cases Pending in District Court or Court of Appeals Nationwide

The estimated number of mandatory guidelines § 2255 cases pending nationwide as of October 1, 2017 is 1,187 cases, arrived at as follows:

¹ For a description of the Datafiles, see U.S. Sent'g Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* app. D at 1 (2004).

² See Commission Datafiles, <http://www.ussc.gov/research-and-publications/commission-datafiles>.

Using the data described in Part I, 4,926 offenders who were sentenced under the career offender guideline from fiscal year 1992 through fiscal year 2004 would likely remain in prison, not accounting for early releases after sentence was imposed. However, the number of § 2255 motions seeking relief under *Johnson* that remain pending is necessarily lower. First, some such motions have already been favorably resolved. Second, many prisoners sentenced under the mandatory career offender guideline are not eligible for relief under *Johnson* because, among other things, the majority of career offender predicates (both instant offense and prior convictions) are “controlled substance offenses,”³ and some “crimes of violence” qualify under the elements clause or the enumerated offense clause.

To estimate how many cases actually remain pending, we first identified all Federal Defender Offices that undertook to represent all prisoners sentenced under the mandatory career offender guideline in the district including those who initially filed *pro se*, and filed motions for all who appeared to be eligible for relief under *Johnson*. Those offices reported the number of cases still pending in the district court or court of appeals as of October 1, 2017. That number was then divided by the number of people sentenced under the mandatory career offender in the district who would likely remain in prison based on the data described in Part I. Among those offices, the average ratio of pending cases to career offenders who would likely remain in prison based on the data described in Part I was 24.1 percent. The total number of people sentenced under the mandatory career offender guideline who would likely remain in prison based on the data described in Part I—4,926—was multiplied by 24.1 percent, yielding 1,187 mandatory guidelines cases estimated to be pending nationwide.

III. Estimated Number of Cases Pending in District Court or Court of Appeals in the Sixth Circuit

As shown in the table below, in the nine districts in the Sixth Circuit, 473 people sentenced under the mandatory career offender guideline likely remain in

³ From 1996 through 2016, the instant offense was drug trafficking for 64.9% to 76.2% of career offenders. See U.S. Sent’g Comm’n, *Sourcebook of Federal Sentencing Statistics*, tbl.22 (1996-2016). The Commission’s datafiles do not contain information regarding the types of prior convictions upon which career offender status was based, but the most common “criminal history event” for career offenders sentenced in fiscal year 2014 was drug trafficking. See U.S. Sent’g Comm’n, *Public Data Briefing: “Crime of Violence” and Related Issues* at slide 19, available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/COV_briefing.pdf.

prison based on the data described in Part I. That number was multiplied by 24.1 percent, yielding 114 mandatory guidelines cases estimated to be pending in the Sixth Circuit.

CIRCUIT	DISTRICT	ESTIMATED NUMBER OF CAREER OFFENDERS LIKELY STILL IN PRISON	ESTIMATED NUMBER OF PENDING CASES USING AVERAGE RATIO*
D.C.		58	14
	District of Columbia	58	14
FIRST		153	37
	Maine	27	7
	Massachusetts	65	16
	New Hampshire	17	4
	Puerto Rico	24	6
	Rhode Island	20	5
SECOND		135	33
	Connecticut	32	8
	New York Eastern	23	6
	New York Northern	5	1
	New York Southern	61	15
	New York Western	8	2
	Vermont	6	1
THIRD		294	71
	Delaware	12	3
	New Jersey	44	11
	Pennsylvania Eastern	139	33
	Pennsylvania Middle	43	10
	Pennsylvania Western	52	13
	Virgin Islands	4	1

CIRCUIT	DISTRICT	ESTIMATED NUMBER OF CAREER OFFENDERS LIKELY STILL IN PRISON	ESTIMATED NUMBER OF PENDING CASES USING AVERAGE RATIO*
FOURTH		987	238
	Maryland	109	26
	North Carolina Eastern	168	40
	North Carolina Middle	151	36
	North Carolina Western	120	29
	South Carolina	162	39
	Virginia Eastern	156	38
	Virginia Western	60	14
	West Virginia Northern	25	6
	West Virginia Southern	36	9
FIFTH		418	101
	Louisiana Eastern	32	8
	Louisiana Middle	2	0
	Louisiana Western	43	3
	Mississippi Northern	21	5
	Mississippi Southern	17	4
	Texas Eastern	59	14
	Texas Northern	91	22
	Texas Southern	69	17
	Texas Western	84	20
SIXTH		473	114
	Kentucky Eastern	30	7
	Kentucky Western	43	10
	Michigan Eastern	55	13
	Michigan Western	30	7
	Ohio Northern	65	16
	Ohio Southern	30	7

CIRCUIT	DISTRICT	ESTIMATED NUMBER OF CAREER OFFENDERS LIKELY STILL IN PRISON	ESTIMATED NUMBER OF PENDING CASES USING AVERAGE RATIO*
	Tennessee Eastern	114	27
	Tennessee Middle	32	8
	Tennessee Western	74	18
SEVENTH		406	98
	Illinois Central	87	21
	Illinois Northern	91	22
	Illinois Southern	87	21
	Indiana Northern	20	5
	Indiana Southern	42	10
	Wisconsin Eastern	46	11
	Wisconsin Western	33	8
EIGHTH		382	92
	Arkansas Eastern	34	8
	Arkansas Western	15	4
	Iowa Northern	62	15
	Iowa Southern	58	14
	Minnesota	40	10
	Missouri Eastern	48	12
	Missouri Western	58	14
	Nebraska	46	11
	North Dakota	7	2
	South Dakota	14	3
NINTH		335	<u>81</u>
	<u>Alaska</u>	<u>7</u>	<u>2</u>
	Arizona	25	6
	California Central	89	21
	California Eastern	43	10
	California Northern	20	5
	California Southern	29	7
	Guam	3	1
	Hawaii	11	<u>3</u>
	<u>Idaho</u>	<u>6</u>	<u>1</u>
	Montana	15	4

CIRCUIT	DISTRICT	ESTIMATED NUMBER OF CAREER OFFENDERS LIKELY STILL IN PRISON	ESTIMATED NUMBER OF PENDING CASES USING AVERAGE RATIO*
	Nevada	37	9
	Oregon	30	7
	Washington Eastern	8	2
	Washington Western	12	3
TENTH		172	41
	Colorado	15	4
	Kansas	35	8
	New Mexico	41	10
	Oklahoma Eastern	10	2
	Oklahoma Northern	12	3
	Oklahoma Western	25	6
	Utah	21	5
	Wyoming	13	3
ELEVENTH		1,113	268
	Alabama Middle	14	3
	Alabama Northern	29	7
	Alabama Southern	16	4
	Florida Middle	326	79
	Florida Northern	173	42
	Florida Southern	361	87
	Georgia Middle	62	15
	Georgia Northern	86	21
	Georgia Southern	46	11
TOTAL		4,926	1,187

* Rounded to whole number for each district and circuit.