NOT RECOMMENDED FOR PUBLICATION

No. 17-1209

UNITED STATES COURTS OF APPEALS
FOR THE SIXTH CIRCUIT

DANIEL MASS, JR.,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ON APPEAL FROM THE
	)	UNITED STATES DISTRICT
UNITED STATES OF AMERICA,	)	COURT FOR THE EASTERN
	)	DISTRICT OF MICHIGAN
Respondent-Appellee.	)	
	)	
	)	

BEFORE: McKEAGUE, GRIFFIN, and WHITE, Circuit Judges.

PER CURIAM. Petitioner-Appellant Daniel Mass, Jr. appeals the district court's order denying his 28 U.S.C. § 2255 motion, which argues that in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015) ("*Johnson II*"), his 1993 California assault conviction no longer qualifies as a predicate "crime of violence" for career-offender status under the Sentencing Guidelines, U.S.S.G. §§ 4B1.1(a), 4B1.2(a) (2002), which were mandatory at the time he was sentenced. *See United States v. Booker*, 543 U.S. 220 (2005). We **AFFIRM**.

I. BACKGROUND

In 2002, Mass pleaded guilty to conspiracy to distribute and possess with intent to distribute fifty kilograms or more of marijuana in violation of 21 U.S.C. §§ 846 and 841(a)(1). (R. 201, PID 126–28.) Because of his prior convictions, the district court found that Mass qualified as a career

offender under § 4B1.1(a)[1] of the then-mandatory Guidelines and sentenced him to 211 months' imprisonment. Mass did not appeal.

On May 26, 2016, thirteen years after his conviction became final, Mass filed the instant 28 U.S.C. § 2255 motion. Relying on *Johnson II*, Mass argued that his prior California conviction of assault[2] could no longer serve as a predicate "crime of violence" under U.S.S.G. § 4B1.2(a),[3] and that his earlier designation as a career offender was thus unconstitutional. Mass's argument rested on the premise that *Johnson II*'s holding invalidated not only the Armed Career Criminal Act's ("ACCA") residual clause, but also the like-worded residual clause in the Sentencing Guidelines.

The government filed a response in opposition and a motion to stay proceedings pending the Supreme Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017). The district court denied the motion for a stay, and considered and denied Mass's § 2255 motion on the merits, finding that the assault conviction "qualifies as a predicate offense through the force clause." (R. 264. PID 392.) Mass appeals.

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[1] Section 4B1.1(a) states:

> 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.

[2] Mass had three prior convictions potentially qualifying as "crime[s] of violence" or "controlled substance offense[s]": (1) a 1991 California conviction of possession of cocaine for sale, in violation of Cal. Health & Safety Code § 11351; (2) a 1993 California conviction of assault, in violation of Cal. Penal Code § 245(a)(1); and (3) a 2002 California conviction of possession of a controlled substance while armed, in violation of Cal. Health & Safety Code § 11370.1. (R. 201, PID 136.) Mass concedes that (1) is a predicate offense, (Appellant's Br. at 5), and the government concedes that (3) is not a predicate offense, (R. 264, PID 382). Thus, only (2) is at issue.

[3] Before its amendment in 2016, section 4B1.2(a) stated:

> 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 ["force clause"], 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.

II. DISCUSSION

We review the district court's denial of Mass's § 2255 motion de novo. *Moss v. United States*, 323 F.3d 445, 454 (6th Cir. 2003).

Putting aside other possible obstacles to Mass's petition,[4] we conclude that the district court correctly determined that Mass's 1993 California assault conviction qualifies as a "crime of violence" under the Guidelines' force clause.

Mass was convicted of violating California Penal Code § 245(a)(1), which at the time of his conviction criminalized "[a]ny person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury." Because all agree that § 245(a)(1) is not divisible, we apply the "categorical approach," *Descamps v. United States*, 570 U.S. 254, 260 (2013), meaning that we look only to the elements of the offense's statutory definition—not the facts underlying the conviction—to determine whether the offense is a crime of violence. *Taylor v. United States*, 495 U.S. 575, 600 (1990). Thus, we ask whether § 245(a)(1) necessarily includes "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). As the Supreme Court has explained, "physical force" means "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson I*").

Section 245(a)(1), reframed as elements, requires (1) an assault either (2)(a) with a deadly weapon or instrument other than a firearm or (2)(b) by any other means of force likely to produce great bodily injury. Apparently conceding that a (2)(b) assault necessarily entails violent force,

[4] See *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017) and *Potter v. United States*, 887 F.3d 785 (6th Cir. 2018).

Mass focuses only on the (2)(a) assault-with-a-deadly-weapon variant and argues that because under California law assault can be satisfied by "the least touching," *People v. Rocha*, 479 P.2d 372, 377 n.12 (Cal. 1971),[5] his assault conviction is not categorically a crime of violence because it can be committed with any type of force, not solely violent force. (Appellant's Br. at 15-19). We disagree.

In *United States v. Grajeda*, 581 F.3d 1186 (9th Cir. 2009), the Ninth Circuit held that a conviction under § 245(a)(1) is a crime of violence under the force clause. *Id.* at 1191-92. The court reasoned that although the assault element requires only "the least touching," which does not implicate the sort of "physical force" contemplated by the Guidelines, "even the least touching with a deadly weapon or instrument is violent in nature." *Id.* at 1192. To be sure, *Grajeda* predated the Supreme Court's decision in *Johnson I*, which defined "physical force" as "*violent* force—that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140. But the Ninth Circuit has continued to adhere to *Grajeda*'s reasoning after *Johnson I*. *See, e.g., United States v. Orozco-Madrigal*, 698 F. App'x 483, 483 (9th Cir. 2017) (mem.), *cert. denied*, 138 S. Ct. 982, 200 L. Ed. 2d 261 (2018). That is unsurprising given that *Grajeda* already accounted for *Johnson I*'s requirement that the force threatened, used, or attempted be "violent," 559 U.S. at 140, when it held that "even the least touching with a deadly weapon . . . is *violent* in nature," *Grajeda*, 581 F.3d at 1191 (emphasis added). While we are not bound by *Grajeda*, we find it persuasive and follow it here.

[5] The applicable California statute defines assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code § 240 (1872). However, California courts have further defined "violent" "to include any wrongful act committed by means of physical force against the person of another," and have consistently held that "the kind of physical force is immaterial." *People v. Whalen*, 124 Cal. App. 2d 713, 720 (1954).

Although we agree with Mass that simple assault under California law would not satisfy the force clause because it can be accomplished by a slight touch, we are satisfied that the variant of § 245(a)(1) at issue here satisfies the Guidelines' "crime of violence" definition because it contains the additional element of "a deadly weapon." *See United States v. Harris*, 853 F.3d 318, 321-22 (6th Cir. 2017) ("The 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. Michigan felonious assault involves violent force because it proscribes not common law assault but common law assault *with a dangerous weapon*.").

As we have explained, "[n]ot every crime becomes a crime of violence when committed with a deadly weapon," but when a statute "ha[s] as an element some degree of, or the threat of, physical force in the more general sense (such as 'the least touching')," "[t]he use of a deadly weapon may exacerbate the threat of physical force" and "transform a lesser degree of force into the necessary 'violent force.'" *United States v. Rede-Mendez*, 680 F.3d 552, 558 (6th Cir. 2012). Similarly, in *United States v. Rafidi*, 829 F.3d 437 (6th Cir. 2016), we explained in relation to 18 U.S.C. § 111, the federal-officer assault statute, that:

> if a defendant commits a violation of § 111 through intentionally causing physical contact with the federal officer—even if this physical contact is not in itself "capable of causing physical pain or injury," *Johnson I* []—§ 111(*b*)'s additional required element of using a deadly weapon during this encounter would elevate this lower degree of physical force into "violent force" sufficient to establish § 111(b) as a "crime of violence."

Id. at 446. *See also Harris*, 853 F.3d at 321 ("When a felony must be committed with a deadly weapon and involves some degree or threat of physical force, it is a crime of violence under the [force] clause."); *United States v. Taylor*, 843 F.3d 1215, 1224-25 (10th Cir. 2016) (holding that a conviction under an Oklahoma statute criminalizing assault and battery with a weapon capable of causing death or great bodily harm is a crime of violence even though the amount of force

necessary to constitute a simple assault or simple battery is "only the slightest force or touching"); *United States v. Whindleton*, 797 F.3d 105, 114 (1st Cir. 2015) (holding that Massachusetts assault with a dangerous weapon is a crime of violence because "the harm threatened by an assault is far more violent than offensive touching when committed with a weapon that is designed to produce or used in a way that is capable of producing serious bodily harm or death").

Here, California assault with a deadly weapon threatens the use of "violent force" because committing simple assault with a weapon "capable of producing . . . death or great bodily injury," *People v. Aguilar*, 945 P.2d 1204, 1207 (Cal. 1997) (citation omitted), has the potential to "exacerbate the threat of physical force . . . already present in the underlying crime" of simple assault. *Rede-Mendez*, 680 F.3d at 558. Thus, notwithstanding the minimal touching required for the commission of a California simple assault, doing so with a deadly weapon or instrument constitutes the use or threat of use of "violent force," as required by *Johnson I*.

III. CONCLUSION

We **AFFIRM** the district court's denial of Mass's 28 U.S.C. § 2255 motion.