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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 2019 TERM

QUENTIN HERNDON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether a federal court must defer to a state court's interpretation of the elements of a state criminal statute to determine if that offense requires the use of physical force against the person of another for purposes of constituting a crime of violence pursuant to USSG 4B1.2(a)?

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Petitioner Quentin Herndon respectfully requests this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The Eighth Circuit's judgment and opinion (unpublished) affirming the judgment of the district court is reported at 773 Fed.Appx. 342 (8th Cir. 2019), and is included at Appendix A. The Eight Circuit's order denying Mr. Herndon's petition for rehearing was entered September 5, 2019, and is included at Appendix B.

JURISDICTION

The decision of the Court of Appeals affirming the district court's judgment and sentence was entered on July 16, 2019. This petition is filed within the ninety day of the denial of the petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1291 and Sup. Ct. R. 13.3.

LEGAL PROVISIONS INVOLVED

USSG § 4B1.2 provides:

(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.

Mo. Rev. Stat. 575.150 provides:

1. A person commits the offense of resisting or interfering with arrest, detention, stop if he or she knows or reasonably should know that a law enforcement officer is making an arrest or attempting to lawfully detain or stop an individual or vehicle, and for the purpose of preventing the officer from effecting the arrest, stop or detention, he or she:

(1) Resists the arrest, stop or detention of such person by using or threatening the use of violence or physical force of by fleeing from such officer.

INTRODUCTION

Mr. Herndon's petition for certiorari raises an issue warranting plenary review by this Court. Specifically, the judgment below has resolved an important federal question in a way that conflicts with relevant decisions of this Court. Sup. Ct. Rule 10(c).

STATEMENT OF THE CASE

On March 3, 2016, Mr. Herndon was charged with unlawful possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2). Mr. Herndon pled guilty on October 10, 2017.

Prior to sentencing, both the government and Mr. Herndon objected to the presentence investigation report's classification of his conviction for resisting arrest as a crime of violence

pursuant to USSG § 4B1.2(a)(1) of the Sentencing Guidelines. The court overruled the objection. That ruling resulted in an increase in Mr. Herndon's advisory guideline range from 41 to 51 months' imprisonment to 77-96 months' imprisonment. The district court sentenced Mr. Herndon to 78 months' imprisonment (ST at 12).

On direct appeal, the Eighth Circuit affirmed the judgment by relying on *United States v. Shockley*, 816 F.3d 1058 (8th Cir. 2016).

REASON FOR GRANTING THE WRIT

The court must apply the categorical approach to determine if a prior conviction qualifies as crime of violence. *Taylor v. United States*, 495 U.S. 575, 600-601 (1990). As such, the court can only look to the elements of the offense as defined by statute; if the statute is indivisible, the court may not resort to the modified categorical approach. *Descamps v. United States*, 133 S.Ct. 2276, 2282 (2013). The categorical approach assumes that the defendant committed the least culpable act to satisfy the count of conviction. *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013) (citing *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

In conducting this inquiry, the court is bound by state courts' interpretations of state law. *Johnson*, 559 at 138. Despite the clear mandate of *Johnson*, the judgment below ignores extant Missouri case law that establishes that the Missouri offense of resisting arrest does not require, as an element, the use, attempted use, or threatened use of violent physical force against the person of another. In *State v. Belton*, 108 S.W.3d 171 (Mo. App. 2003), the Missouri Court of Appeals sustained a conviction for resisting arrest by threatening the use of violence or physical force. Belton was arrested during a traffic stop. *Id*. at 174. After being handcuffed, Belton resumed his

place in the passenger front seat of the car. *Id*. The only question for the Court of Appeals was whether the defendant used "physical force" in resisting his arrest when he refused to exit the vehicle while the officer tried to pull him out. *Id*. at 173-74.

The Court found that Belton had not made any threat of violence or force against the arresting officer. "The only force that he used was to exert sufficient resistance to keep [the officer] from pulling him from the car." *Id*. at 174. The court nevertheless found the evidence sufficient to sustain the conviction. In doing so, the court noted that the statute separately lists "violence" and "physical force." The court explained that the "legislature obviously intended for 'physical force' to include nonviolent force," and to conclude otherwise "would render the term 'physical force' mere surplusage." *Id*. at 175.

The holding in *Belton* also makes it clear that the physical force (including non-violent force) required by the Missouri statute does not have to be used against the person of another. The force in *Belton*, as noted above, was the physical strength the defendant exerted to keep himself in the car. *Id*. at 174-75. *See also State v. Miller*, 172 S.W.3d 838 (Mo App. 2005) (affirming conviction for resisting arrest when defendant attempted to held onto steering wheel as officers removed her from the vehicle*); State v. Feagan*, 835 S.W.2d 448 (Mo. App. 1992) (affirming conviction for resisting arrest when defendant stiffened his arms as officers placed him into handcuffs).

Instead of addressing these binding state authorities, the Eighth Circuit simply ignores them in their entirety. In doing so, the Eighth Circuit also ignores this Court's holding in *Johnson v. United States*, 559 U.S. 133, 138 (2010), which establishes that a federal court is bound by state court interpretations of state law, including determination of the elements and what conduct

or level of force satisfies a particular element. This Court should rectify this blatant violation of binding precedent.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the petition for certiorari should be granted. In the alternative, this Court should grant, vacate, and remand the case given the obvious error underlying the judgment below.

Respectfully submitted,

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APPENDIX

Appendix A – Judgment and Opinion of the Eighth Circuit Court of Appeals.

Appendix B – Order denying Petition for Rehearing.