NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20__

Zacharia Allen Clark- Petitioner,

vs.

United States of America - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a statute that only requires causation-of-injury and not the affirmative application of force satisfies the violent force requirement of the Armed Career Criminal Act?

(2) Whether a statute that criminalizes a failure to act that causes injury satisfies the violent force requirement of the Armed Career Criminal Act?[1]

[1] A petition for writ of certiorari is currently pending on this question in *Gerald Scott v. United States*, 20-27778.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

United States v. Clark, 3:19-cr-00027-001 (S.D. Iowa) (criminal proceedings), judgment entered February 26, 2020.

United States v. Clark, 20-1506 (8th Cir.) (direct criminal appeal), judgment entered June 21, 2021.

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The petitioner, Zacharia Clark, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in case No. 20-1506, entered June 21, 2021.

OPINION BELOW

On June 21, 2021, a panel of the Court of Appeals entered its ruling affirming the judgment of the United States District Court for the Southern District of Iowa. The decision is published and available at 1 F.4th 632.

JURISDICTION

The Court of Appeals entered its judgment on June 21, 2021. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1) (2012):

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under § 922(g).

18 U.S.C. § 924(e)(2):

> As used in this subsection –
>
> (A) the term "serious drug offense" means--
>
> > (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
> > (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law . . . .

IOWA CODE § 708.4 Willful Injury

> Any person who does an act which is not justified and which is intended to cause serious injury to another commits willful injury, which is punishable as follows:

2. A class "D" felony, if the person causes bodily injury to another.

IOWA CODE § 702.2 Act

> The term "act" includes a failure to do any act which the law requires one to perform.

720 Ill. Comp. Stat. 5/12-3.05(d) Aggravated Battery

> A person commits aggravated battery when, in committing a battery, other than by discharge of a firearm, he or she knows the individual battered to be [certain law enforcement personnel conducting their duties]."

720 Ill. Comp. Stat. 5/12-3 Battery

> (a) A person commits battery if he or she knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.

STATEMENT OF THE CASE

On September 23, 2018, law enforcement responded to a shots fired call at a gentleman's club in Davenport, Iowa. (PSR ¶ 7).[2] Witnesses reported that Mr. Clark arrived at the club, and as he was approaching the entrance a man shoved and

[2] In this brief, "DCD" refers to the criminal docket in Northern District of Iowa Case No. 3:19-cr-00027-001, and is followed by the docket entry number. "PSR" refers to the presentence report, followed by the relevant paragraph number in the report. "Sent. Tr." refers to the sentencing transcript in Southern District of Iowa Case No. 3:19-cr-00027-001.

punched Mr. Clark. (PSR ¶ 8). Mr. Clark produced a firearm and shot towards the man. *Id*. All parties then fled the scene. (PSR ¶ 10).

Mr. Clark's vehicle was stopped pursuant to a traffic stop. (PSR ¶ 12). He was arrested. (PSR ¶ 15). Ammunition was found in his hooded sweatshirt after arrest. *Id*.

On August 7, 2019, Mr. Clark was indicted in the Southern District of Iowa on one count of possession of ammunition by a felon, in violation of 18 U.S.C. §§ 922(g)(1) & 924(a)(2). (DCD 2). Eventually, Mr. Clark pleaded guilty as charged, without a plea agreement. (DCD 53).

A presentence investigation report (PSR) was created. The presentence investigation report (PSR) determined that Mr. Clark was an Armed Career Criminal. (PSR ¶ 37).[3] The PSR identified Mr. Clark's predicates as two Iowa convictions for willful injury causing bodily injury, under Iowa Code § 708.4(2) (PSR ¶¶ 49, 54), and one conviction for Illinois aggravated battery, under 720 Ill. Comp. Stat. 5/12-3.05(d).[4] (PSR ¶ 52).

[3] Initially, the PSR asserted that Mr. Clark's prior conviction for Iowa intimidation with a weapon was a violent felony. However, the government conceded that the intimidation with a weapon conviction did not qualify. (DCD 64).

[4] Paragraph 52 describes two convictions for Illinois aggravated battery. However, the government conceded that only one count arguably qualified.

Iowa's willful injury statute and Illinois's aggravated battery statute are similar in that they only require a defendant to cause injury. First, Iowa's willful injury statute states: "Any person who does an act which is not justified and which is intended to cause serious injury to another commits willful injury." Mr. Clark's conviction was a class D felony because the act caused bodily injury. *Id*. Iowa Code § 702.2 notes that the term "act" includes "a failure to do any act which the law requires one to perform."

Next, Illinois's aggravated battery statute states: "A person commits aggravated battery when, in committing a battery, other than by discharge of a firearm, he or she knows the individual battered to be [certain law enforcement personnel conducting their duties]." 720 Ill. Comp. Stat. 5/12-3.05(d). To commit an aggravated battery, an individual must commit the underlying offense of battery. Under Illinois law, a person "commits battery if he or she knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." 720 Ill. Comp. Stat. 5/12-3. Courts have found Illinois battery statute to be divisible, and the government asserted that the *Shepard*[5] documents established Mr. Clark was convicted under the "causes bodily harm to an individual" alternative.

Mr. Clark objected to the PSR's finding that he was an Armed Career Criminal. (DCD 31). He challenged all three convictions, asserting the statutes did not require

[5] *Shepard v. United States*, 544 U.S. 13 (2005).

violent force. His arguments were the same for each conviction—under each statute, he was only required to *cause* injury, and causing injury alone is insufficient to satisfy the force clause. Additionally, Mr. Clark noted that Iowa's willful injury statute is overbroad because it includes the failure to act.

At sentencing, Mr. Clark maintained his objections to the Armed Career Criminal finding. After hearing argument on the issue, the district court found that Mr. Clark's Iowa willful injury convictions and Illinois aggravated battery conviction qualified as predicates under Eighth Circuit precedent. (Sent. Tr. p. 11). The district court calculated Mr. Clark's range to be 188 to 235 months, based on a total offense level of 31 and criminal history category VI. (Sent. Tr. pp. 11-12). The district court then imposed a sentence of 200 months of imprisonment. (Sent. Tr. p. 22).

Mr. Clark appealed to the Eighth Circuit Court of Appeals, challenging the Armed Career Criminal finding. The Eighth Circuit affirmed. *United States v. Clark*, 1 F.4th 632 (8th Cir. 2021). First, the court determined that the Illinois aggravated battery conviction qualified, even though it only required an individual to cause bodily harm, based upon the circuit's decision in *United States v. Rice*, 813 F.3d 704, 706 (8th Cir.), cert. denied, 137 S. Ct. 59, 196 L. Ed. 2d 59 (2016). *Rice* had, in turn, relied on the force-clause analysis of 18 U.S.C. § 921(a)(33) in *United States v. Castleman*, 572 U.S. 157, 134 S. Ct. 1405, 188 L. Ed. 2d 426 (2014).

As to the Iowa willful injury statute, the circuit again noted that *Rice* required it to reject the "causing bodily injury" argument. Additionally, the court found that

the Iowa willful injury statute satisfied the force clause, even though the statute defined an act "act" to include "a failure to do any act which the law requires one to perform." The circuit noted that it had rejected "a similar argument in *United States v. Peeples*, 879 F.3d 282, 286-87 (8th Cir.), cert. denied, 138 S. Ct. 2640, 201 L. Ed. 2d 1042 (2018), which itself relied on *Rice* and *United States v. Castleman*, 572 U.S. 157, 134 S. Ct. 1405, 188 L. Ed. 2d 426 (2014)."

REASONS FOR GRANTING THE WRIT

I. CIRCUITS ARE SPLIT ON WHETHER CRIMINAL STATUTES WHICH ONLY REQUIRE AN INDIVIDUAL TO CAUSE INJURY OR CAN BE COMMITTED BY A FAILURE TO ACT SATISFY THE VIOLENT FORCE REQUIREMENT OF THE ARMED CAREER CRIMINAL ACT.

Mr. Clark's case presents an opportunity to address two similar circuit splits regarding the violent force requirement of the Armed Career Criminal Act. First, circuits are split on whether statutes that only have a causation-of-injury requirement satisfy the force clause. The First and Fourth circuits have held that causing injury alone is insufficient to satisfy the force clause. *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015); *United States v. Middleton*, 883 F.3d 485 (4th Cir. 2018). The Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh circuits have held otherwise. *Villanueva v. United States*, 893 F.3d 123 (2d Cir. 2018); *United States v. Chapman*, 866 F.3d 129 (3d Cir. 2017); *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc); *United States v. Waters*, 823 F.3d 1062 (7th Cir. 2016); *United States v. Rice*, 813 F.3d 704, 706 (8th Cir.), cert. denied, 137 S. Ct. 59, 196 L. Ed. 2d 59 (2016); *United States v. Calvillo-Palacios*, 860 F.3d 1285, 1291

(9th Cir. 2017); *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 2005 (2018); *United States v. Haldemann*, 664 F. App'x 820 (11th Cir. 2016).

Similarly, circuits are split on whether statutes that only require a failure to act—an omission—satisfy the force clause. The Third, Fifth, Sixth and Ninth Circuits have held that omissions do not satisfy the force clause. *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018); *United States v. Resendiz-Moreno*, 705 F.3d 203 (5th Cir. 2013); *United States v. Burris*, 912 F.3d 386 (6th Cir. 2019) (en banc); *United States v. Trevino-Trevino*, 178 F. App'x 701 (9th Cir. 2006). The First, Second, Seventh, Eighth, Tenth, and Eleventh Circuits have held that omissions can satisfy the force clause. *United States v. Baez-Martinez*, 950 F.3d 119 (1st Cir. 2020); *United States v. Scott*, 990 F.3d 94 (2d Cir. 2021) (en banc)[6]; *United States v. Waters*, 823 F.3d 1062 (7th Cir. 2016); *United States v. Peeples*, 879 F.3d 282 (8th Cir. 2018); *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017); *United States v. Sanchez*, 940 F.3d 526 (11th Cir. 2019). The Fourth Circuit appears to have conflicting decisions on this question. *Compare United States v. Rumley*, 952 F.3d 538 (4th Cir. 2020) (finding omissions can still satisfy the force clause), *with United States v. Del Carmen Gomez*, 690 F.3d 194, 201 (4th Cir. 2012) (finding a child abuse statute which can be violated by neglecting to act does not require the use of physical force).

Certiorari is necessary to address these two related circuit splits to ensure uniformity in federal sentencings.

[6] A petition for writ of certiorari is currently pending in this case, under case number 20-27778.

II. *BORDEN* ESTABLISHES THAT THE AFFIRMATIVE USE OF FORCE IS REQUIRED TO SATISFY THE FORCE CLAUSE.

Additionally, certiorari is necessary to address the circuit court's improper reliance on *Castleman* when analyzing the violent force requirement. Instead, this Court's decisions on the violent force requirement establish that the active deployment of force is required—a violent result alone is not enough. First, in *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004), this Court clearly and unequivocally stated that, in the context of "crimes of violence," the term "physical force . . . suggests a category of violent, *active* crimes[.]" (emphasis added). And in *Johnson v. United States*, 559 U.S. 133, 138 (2010), this Court held that the word "physical" in the phrase "physical force" "plainly refers to force exerted by and through concrete bodies – distinguishing physical force from for example, intellectual force or emotional force." It further held that "physical force" means "*violent* force –that is, force capable of causing physical pain or injury to another person." *Id.*

A few years later, in *Castleman*, this Court was asked to analyze the force clause of a different statute—18 U.S.C. § 921(a)(33)(A)(ii). Specifically, this Court analyzed whether a Tennessee statute criminalizing domestic assault was a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g), which is defined by 18 U.S.C. § 921(a)(33)(A)(ii) as an offense that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon . . . ." *Castleman*, 134 S. Ct. at 1409.

The Court held that in the specific context of § 921(a)(33)(A)(ii), Congress intended the term "force" to have its common-law meaning, which includes mere offensive touching as well as indirect uses of force, such as poisoning a victim, reasoning that "it is impossible to cause bodily injury without applying force in the common-law sense." *Id*. at 1415. The Court recognized that the common-law definition of force is broader than the "violent force" requirement of *Johnson*, which is applicable to "crime of violence" determinations under the Armed Career Criminal Act. In rejecting *Johnson*'s violent-crime definition of force, the Court went so far as to refer to § 921(a)(33)(A)'s force clause as a "comical misfit" to a violent-crime provision's force clause. *Castleman*, 572 U.S. at 163 (quoting *Johnson*, 559 U.S. at 145). Therefore, *Castleman*'s force analysis expressly applied only to the "common-law" definition of force applicable to § 921(a)(33)(A)(ii), and did not examine the "violent force" requirement of the Armed Career Criminal Act.

Despite the *Castleman* Court's clear statement that it was applying the common-law definition of force specifically to the definition of "misdemeanor crime of domestic violence," the Eighth Circuit (and others) have relied upon *Castleman* to find that causation-of-injury and failure-to-act statutes satisfy the violent force requirement. *See, e.g., United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016) (relying on *Castleman* to find that a statute which only required a defendant to cause injury "necessarily" requires violent force); *United States v. Ontiveros*, 875 F.3d 533, 538 (10th Cir. 2017) (relying on *Castleman* to reason, *in toto*, that if it is "impossible

to commit a battery without applying force, and a battery can be committed by an omission to act, then [Colorado] second-degree assault must also require physical force"); *United States v. Waters*, 823 F.3d 1062, 1066 (7th Cir 2016) (summarily concluding that "withholding medicine causes physical harm, albeit indirectly, and thus qualifies as a use of force under *Castleman*").

To illustrate, first, in *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016), the Eighth Circuit applied *Castleman* to find causation-of-injury statutes satisfy the violent force requirement. *Rice* examined whether a conviction for Arkansas second-degree battery – which prohibited "intentionally or knowingly . . . caus[ing] physical injury" to specified persons – qualified as a "crime of violence" under the Sentencing Guidelines. In a 2-1 decision, the Eighth Circuit found that *Castleman* resolved the issue, holding that "Rice's conviction includes the use of violent force as an element 'since it is impossible to cause bodily injury without using force "capable of" producing that result.'" *Rice*, 813 F.3d at 706 (quoting *Castleman*, 134 S. Ct. at 1416–17 (Scalia, J., concurring)). The Eighth Circuit explicitly rejected Rice's argument that a person could commit Arkansas second degree battery "without using physical force, for example, by offering his victim a poisoned drink," stating:

> We believe that *Castleman* resolves the question before our court, however, because there the Court held that even though the act of poisoning a drink does not involve physical force, "the act of employing poison knowingly as a device to cause physical harm' does." *Castleman*, 134 S. Ct. at 1415. The Court explained, "[t]hat the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter," because otherwise "one could say that pulling the trigger on a

> gun is not a 'use of force' because it is the bullet, not the trigger, that actually strikes the victim."

Id. at 706.

Next, in *United States v. Peeples*, 879 F.3d 282 (8th Cir. 2018), the Eighth Circuit relied upon *Rice*'s interpretation of *Castleman* to find that failure-to-act statutes satisfy the violent-force requirement. *Peeples* held that even though the Iowa attempted murder statute was indivisible and could be violated by omissions, an omission made with the intent to cause death "still requires the use of force, satisfying the violent force requirement under the guidelines." *Id*. Using the example of a caregiver that declines to feed a dependent, the Eighth Circuit summarily reasoned as follows: "It does not matter than the harm occurs indirectly as a result of malnutrition. Because it is impossible to cause bodily injury without force, it would also be impossible to cause death without force. Thus, an attempt to cause death would also require the use or attempted use of force." *Id*. (citing *Castleman*, 134 S. Ct. at 1415).

However, after *Borden v. United States*, 141 S. Ct. 1817 (2021), it is clear that the Eighth Circuit and others erred in relying on *Castleman* to find causation-of-injury and failure-to-act statutes satisfy the violent force requirement. *Borden* held that reckless crimes do not count as violent crimes, even though the Court had earlier held, in *Voisine v. United States*, 136 S. Ct. 2272 (2016), that reckless crimes can count as misdemeanor crimes of domestic violence under 18 U.S.C. § 921(a)(33). 141 S. Ct. at 1832-34. As *Borden* explained, the statute at issue in *Voisine* was textually

and contextually different than a violent-crimes provision, and it served different purposes. *Id*. Indeed, as *Borden* explains, whereas the Armed Career Criminal Act violent felony definition requires that the element of force be used "against the person of another," § 921(a)(33)(A)(i) includes a list of individuals who must have "committed" the prior crime (i.e., the domestic abuser). There is no additional requirement that the domestic-abuser defendant's prior act be directed "against the person of another." "So again, we see nothing surprising—rather, the opposite—in the two statutes' dissimilar treatment of reckless crimes." *Id*. at 1834.

Therefore, *Borden* establishes that circuits relying upon *Castleman* to find causation-of-injury and failure-to-act statutes meet the violent-force requirement must be rejected. In *Borden*, this Court held that interpretations of 18 U.S.C. § 921(a)(33) are unpersuasive when interpreting the force-clause requirement. Therefore, the Eighth Circuit and others are erroneously relying upon *Castleman* for the violent felony analysis. Instead, this Court's prior decisions in *Leocal* and *Johnson* establish more is required for the violent force requirement than a violent outcome; a defendant must have affirmatively used violent force.

Mr. Clark's case is an appropriate vehicle for this question because all three of his prior alleged Armed Career Criminal Act predicates are either causation-of-injury or failure-to-act statutes. By their plain language, as the Eighth Circuit's decision acknowledged, they only require causing injury and can be committed by a failure to

act. There is no "legal requirement" that a defendant use, threaten to use, or attempt to use, force in order to convict a defendant under either applicable statute.

CONCLUSION

Overall, the Eighth Circuit's erroneous interpretation of *Castleman* conflicts with the decisions of other Courts of Appeals, and with other Supreme Court cases such as *Borden v. United States*, 141 S. Ct. 1817 (2021), *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004), and *Johnson v. United States*, 559 U.S. 133 (2010). Further, this split has implications well beyond the Armed Career Criminal Act, as virtually identical force clause language is in U.S.S.G. § 4B1.2, 18 U.S.C. § 18(a), § 924(c)(3)(A), and § 3156(a)(4)(A). Mr. Clark respectfully requests that the Petition for Writ of Certiorari be granted to address the circuit split and the application of *Borden* to the causation-of-injury and failure-to-act statutory analysis.

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