NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROGER WAYNE BATTLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Michael C. Holley
Assistant Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203-3805
(615) 736-5047

QUESTION PRESENTED

Whether the crime of murder by omission, such as letting one's child starve to death, "has as an element the use . . . of physical force" such that it qualifies as a crime of violence under the 18 U.S.C. § 924(c)(3)(A)?

TABLE OF CONTENTS

TABLE OF CITATIONS

Other

PRAYER

Petitioner Roger Battle respectfully petitions for a writ of certiorari issue to review to review the judgment of the U. S. Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion denying relief is unpublished but available at Pet. App. 2. The district court's order is available at Pet. App. 11.

JURISDICTION

The court of appeals entered its judgment on March 14, 2023. This petition is filed within 90 days of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 924(c) of Title 18 of the U.S. Code provides, in relevant part:

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]

Section 39-13-202 of the Tennessee Code Annotated provides, in relevant part:

(a) First degree murder is:

(1) A premeditated and intentional killing of another; . . .

INTRODUCTION

In 2012, Roger Battle was convicted of, *inter alia*, violating 18 U.S.C. § 924(c) and (j) by using a firearm during a "crime of violence," and that crime of violence was identified as Tennessee first-degree premeditated murder. Such a murder, like a federal murder, can be committed by omission, such as by letting one's child starve to death.

After Battle's conviction, this Court struck down part of § 924(c)'s definition of "crime of violence," known as the residual clause. *United States v. Davis*, 139 S. Ct. 2319 (2019). Thus, Battle's § 924(c) and (j) convictions had to be vacated unless Tennessee premeditated murder—potentially a murder by omission—"has as an element the use, attempted use, or threatened use of physical force." 18 U.S.C. § 924(c)(3)(A). Denying Battle relief, the Sixth Circuit Court of Appeals held that murder by omission does in fact have an element of the use of force, following its own recent precedent on point. *United States v. Harrison*, 54 F.4th 884, 889 (6th Cir. 2022) ("The malicious parent uses the force that lack of food exerts on the body to kill his child."). The Sixth Circuit has acknowledged there is a 7-to-1 circuit split on this issue, with the Third Circuit in the minority. *Id.* at 890.

For some time, the Third Circuit's precedent, *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018), was under attack. The Third Circuit certified a question to the Pennsylvania Supreme Court, namely, whether Pennsylvania aggravated assault, which can be committed by starving one's child to death, involves the use of some force. The Pennsylvania Supreme Court answered the question in the negative, shoring up *Mayo*. *United States v. Harris*, 289 A.3d 1060, 1074 (Pa. 2023). Hence, the circuit split is now firm, and most circuits are in error. They have deviated from the plain language of the statute in order to compensate for the loss of the residual clause. This Court should grant certiorari to address the issue and correct the law.

STATEMENT OF THE CASE

Section 924(c) of Title 18 makes it a federal crime to, *inter alia*, use a firearm during and in relation to a "crime of violence." Section 924(c)(3) defines "crime of violence" through two clauses: (1) the elements clause, which states that a crime of violence is any felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another;" and, (2) the residual clause, which states that it is any felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3).

In 2012, Roger Battle was convicted at trial of 57 crimes, including two counts of committing murder in aid of a racketeering enterprise in violation of 18 U.S.C. § 1959(a) ("VICAR murder"). "VICAR murder is conventionally charged as an underlying state murder committed in aid of racketeering; here, the state murder was Tennessee first-degree premeditated murder." Pet. App. 3. The jury also convicted Battle of two counts of using or carrying a firearm during and in relation to a "crime of violence" and using a firearm to cause the death of a person, in violation of 18 U.S.C. § 924(c) and (j). "The 'crimes of violence' underlying the § 924(c) and (j) convictions are the two counts of VICAR murder[,]" which were, as mentioned, charged as Tennessee first-degree premeditated murder. *Id.* 4. In total, Battle received three consecutive life sentences, plus 335 years.

This Court subsequently struck down § 924(c)(3)'s residual clause in *United States v. Davis*, 139 S. Ct. 2319 (2019). *Davis* had retroactive effect. In a 28 U.S.C. § 2255 motion, Battle filed for relief under *Davis*, and he was entitled to relief if his VICAR murder offense did not satisfy the elements clause, which is all that remains of the "crime of violence" definition.

Battle lost in the district court and on appeal on the theory that a murder by omission—which is the least conduct necessary to commit a Tennessee first-degree premeditated murder—necessarily involves the use of physical force. Pet. App. 5-6. So holding, the Sixth Circuit followed its recent precedent on point, *United States v. Harrison*, 54 F.4th 884 (6th Cir. 2022). In *Harrison*, the Sixth Circuit proposed that "[a] victim dies only if some 'physical force' damages his body so severely that the body no longer functions." *Id.* at 889. According to the Sixth Circuit, in the case of murder by starvation, the "physical force" being used is the victim's own metabolism: "The malicious parent uses the force that lack of food exerts on the body to kill his child." *Id.* Simply put, instead of pulling the trigger on a gun to kill someone, the malicious parent does nothing, letting metabolism do its work. "So in every murder, the murderer uses physical force in some way to cause death," even when doing absolutely nothing. *Id.* Based on that reasoning, Battle was denied relief.

The *Harrison* court said it was joining one side of a circuit split as it identified seven other circuits that had concluded a crime of omission that causes bodily harm satisfies the elements clause. *Id.* at 890 (citing *United States v. Baez-Martinez*, 950 F.3d 119, 130-33 (1st Cir. 2020); *United States v. Scott*, 990 F.3d 94 (2d Cir. 2021) (en banc); *United States v. Rumley*, 952 F.3d 952, 949-51 (4th Cir. 2020); *United States v. Waters*, 823 F.3d 1062, 1066 (7th Cir. 2016); *United States v. Peeples*, 879 F.3d 282, 286-87 (8th Cir. 2018); *United States v. Ontiveros*, 875 F.3d 533, 536-38 (10th Cir. 2017); *Thompson v. United States*, 924 F.3d 1153, 1158 (11th Cir. 2019)). It acknowledged the Third Circuit held the opposite in *United States v. Mayo*, 901 F.3d 218, 226-30 (3d Cir. 2018).

REASONS FOR GRANTING THE PETITION

The circuits are divided on an important question of federal criminal law: whether the crime of murder by omission—and, more generally, any crime of omission resulting in bodily injury—satisfies the elements clause, which is central to so many firearms cases prosecuted under the Armed Career Criminal Act and Section 924(c). Unfortunately, most circuits have reached the wrong conclusion by deviating from the plain language of the elements clause in order to compensate for the loss of the residual clause. They have interpreted the elements clause as if it merely required the offender to be the *legal cause* of physical injury, rather than to *use* physical force.

A. The circuits are firmly divided.

In 2018, the Third Circuit held Pennsylvania's aggravated-assault statute did not necessarily require proof the defendant threatened to use, attempted to use, or actually used physical force. *Mayo*, 901 F.3d at 226-30. It so held in light of *Commonwealth v. Thomas*, 867 A.2d 594 (Pa. Super. Ct. 2005), which sustained the defendant's Pennsylvania aggravated-assault conviction based on having "'starved her four-year-old son to death.'" *Mayo*, 901 F.3d at 227 (quoting *Thomas*, 867 A.2d at 597). The *Thomas* court had held that "'evidence of the use of force or the threat of force is not an element of the crime of aggravated assault.'" *Id.* Rather, the crime was committed as long as the defendant was the legal cause of the physical injury to her son, even without having used physical force. *Id.*

In *United States v. Harris*, the Third Circuit sua sponte granted en banc review in order to revisit the *Mayo* issue. *United States v. Harris*, No. 17-1861 (3d Cir. June 7, 2018) (order). But after en banc oral argument, the court sent the case back to the Panel. *Id.* (Sept. 17, 2021) (order). The Panel then acknowledged it was "bound by our precedent in *Mayo*." *United States v. Harris*,

2022 U.S. App. LEXIS 37014, *7 (3d Cir. Jan. 4, 2022). Yet the Panel certified a question to the Pennsylvania Supreme Court, whose answer might undermine *Mayo*. *Id.* at *9. It asked the Pennsylvania Supreme Court to state whether its first-degree aggravated assault statute "requires some use of physical force." *Id.* *9.

The Pennsylvania Supreme Court answered that question in the negative, upholding *Thomas* and thereby shoring up *Mayo*. *United States v. Harris*, 289 A.3d 1060, 1074 (Pa. 2023). Its ruling was based on the obvious: causing physical injury and using physical force are not one and the same thing. *Id.* It said: "the exercise of direct or indirect physical force is a means by which serious bodily injury can be inflicted, but it is not the exclusive means." *Id.* That is because an "act of omission, without the use or attempted use of physical force," can be deemed the legal cause of serious bodily injury. *Id.*

Since the *Harris* Panel is "bound by [its] precedent in *Mayo*," *Harris*, 2022 U.S. App. LEXIS at *7, the Third Circuit is firmly opposed to the other circuits on this issue, and the circuit split is firm.

B. Most circuits have deviated from the statute's plain language.

Most circuits, including the Sixth, have deviated from the statute's plain language, distorting the elements clause to compensate for the loss of the residual clause.

As mentioned, a crime does not satisfy the elements clause unless it "has as an element, the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). The term "physical force" must be given its "ordinary meaning." *Johnson v. United States*, 559 U.S. 133, 138 (2010). Such "force" means "'strength or energy; active power; . . . *force consisting in a physical act.*'" *Id.* at 139 (quoting dictionaries;

internal punctuation removed; emphasis added). Thus, it is clear that, under the elements clause, in order to use physical force one must at least take some "physical act" against the victim. *Id.*

But in the case of murder by omission, the defendant need not act at all. There is no need for any "physical act." *Id.* That simple fact resolves this issue in favor of the defense. *See Mayo*, 901 F.3d at 230; *United States v. Scott*, 990 F.3d 94, 140 (2d Cir. 2021) (en banc) (Pooler, J., dissenting) (opining that New York manslaughter by omission does not satisfy the elements clause for this same reason).

The Circuits holding the contrary have erred by deciding that to cause physical injury or death, a person must use physical force. They have tried to justify this position in one of two ways, which each rest on the same mistake.

First, the Second Circuit, for example, *Scott*, 990 F.3d at 109, found crucial the common doctrine that the "failure to act where there is a duty to act is the equivalent of affirmative action" for the purpose of imputing liability for causing an injury. Wayne R. LaFave, *Substantive Criminal Law* § 15.4(b); *see id.* § 6.2(e) ("the question of causation is not merely a question of mechanical connection, but rather a question of policy on imputing or denying liability"). The *Scott* court held that this doctrine justified its holding. *Scott*, 990 F.3d at 109. But this doctrine's role is merely *to treat nonaction as if it were the cause* of harm even when the offender's actions had no mechanical connection to the injury. The doctrine does not render nonaction, in fact, "a physical act." *Johnson*, 559 U.S. at 139. And the doctrine does not change the meaning of Congress's statutory standard for classifying crimes since that standard requires a physical act (or a threat or attempt at one), not merely the legal causation of an injury.

Second, the Sixth Circuit, for example, has *sub silentio* relied on this same omission-as-cause doctrine. According to the Sixth Circuit, "[a] victim dies only if some 'physical force'

damages his body so severely that the body no longer functions." *Harrison*, 54 F.4th at 889. And, so the logic goes, in the case of murder by starvation, the "physical force" being used is the victim's own metabolism: "The malicious parent uses the force that lack of food exerts on the body to kill his child." *Id.* "So in every murder, the murderer uses physical force in some way to cause death," even when doing absolutely nothing. *Id.* This reasoning is just a different, and absurdly awkward, way of saying an act of omission can be the legal cause of death. Before the Sixth Circuit issued *Harrison*, it is unlikely any jurist had ever claimed that a person "used" a metabolism to kill somebody. Rather, the jurist would have said the defendant was responsible for the death due to his nonaction in the face of a duty to act. The Sixth Circuit's rationale distorts ordinary English beyond the breaking point.

Some Circuit judges have written separately to comment on "the absurdity of the exercise" of having to decide if murder is a crime of violence. *Scott*, 990 F.3d at 125 (Park, J., concurring); *Battle v. United States*, No. 21-5457, 2023 U.S. App. LEXIS 6157, *8 (Mar. 14, 2023) (Thapar, J., concurring). But there is nothing absurd about the defense's interpretation of the elements clause since it is true to the clause's plain meaning. *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms."). Nor is there anything absurd about the result of the defense's plain-meaning interpretation. *Cf. Crooks v. Harrelson,* 282 U.S. 55, 60 (1930) (saying a court can deviate from the plain meaning of a statute to avoid an absurd result when "the absurdity [is] so gross as to shock the general moral or common sense"). The result of that interpretation is the conclusion that murder by omission does not satisfy the elements clause; that conclusion is not absurd in itself. The absurd result decried by judges is that murder by omission does not qualify

as a crime of violence. But that result is the consequence of the nullification of the residual clause as unconstitutional. That constitutional correction to the statute cannot serve as grounds for embracing an interpretation of the remaining statutory language that deviates from the text. But that is essentially what the courts are doing when they have held that murder by omission satisfies the elements clause.

CONCLUSION

For the foregoing reasons, petitioner Roger Battle respectfully prays that this Court grant certiorari to review the judgment of the Sixth Circuit.

May 2, 2023

Michael C. Holley (BPR #021885)
Assistant Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203-3805
(615) 736-5047