CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 2023 Term

RONALD D. HOUSTON

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
To the Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Submitted By:

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QUESTION PRESENTED

The United States Courts of Appeal disagree as to a district court's power to preclude appellate review for significant procedural error required by *Gall v. United States*, 552 U.S. 38, 51 (2007), such as miscalculation of the advisory Sentencing Guidelines range by imposing a sentence "regardless" of any Guidelines error. Here, the Government explicitly exhorted the judge impose "regardless" of any error in its Guidelines calculation. The District Court agreed this Court's ruling in *Borden v. United States*, 141 S. Ct. 1817 (2021) cast doubt on Eighth Circuit precedent declaring Petitioner's teenage conviction for resisting arrest a "crime of violence" which increased the advisory guideline range from 84-105 months to 100-125 months because the crime occurs if an arrestee holds stubbornly still or recklessly injures an officer. Yet, at the Government's request, the district court imposed concurrent 120-month sentences "regardless" of any guidelines error. The Eighth Circuit affirmed the sentence without determining if the Guidelines range and affirmed the sentence because the district court said any guidelines error "would not matter."

Mr. Houston seeks certiorari because a deeply entrenched split exists amongst the Circuits and the Eighth Circuit's rule of foregoing review for significant procedural error such as Guidelines miscalculations conflicts with *Gall* and the purpose for which this Court established reasonableness review to serve Congress's creation of the Guidelines to limit unwarranted sentence disparities in *United States v. Booker*, 543 U.S. 220 (2005). The case raises two issues:

1. Whether the Circuits may forego appellate review of significant procedural error under *Gall* because a judge imposes a sentence "regardless" of the Guidelines.

2. Whether resisting arrest by holding still or reckless injury is "the use of force."

Parties to the Proceedings

Petitioner Ronald D. Houston was represented in the lower court proceedings by his appointed counsel, Nanci H. McCarthy, Public Defender, and Assistant Federal Public Defender Tyler Keith Morgan, 1010 Market, Suite 200, Saint Louis, Missouri 63101. The United States was represented by United States Attorney Sayler Fleming and Assistant United States Attorney Donald S. Boyce, Thomas Eagleton Courthouse, 111 South 10th Street, Saint Louis, Missouri 63102.

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings:

- United States v. Houston, 4:21-CR-00080-JAR-1, (E.D. Mo) (criminal proceeding), judgment entered July 29, 2022,

- United States v. Houston, 22-1663 (8th Cir.) (direct criminal appeal), appellate judgment entered July 20, 2023,

- United States v. Houston, 22-1663 (8th Cir.) (direct criminal appeal), order denying petition for rehearing *en banc* and panel rehearing entered Sept. 20, 2023, and

- Houston v. United States, 23A516 (Supreme Court) (Application to extend time to file a petition for a writ of certiorari) order granting additional time entered Feb. 17, 2024.

There are no other proceedings related to this case within the meaning of Rule 14.1(b)(iii).

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is not published. It is accessible on Westlaw at 2023 WL 4636783. The slip opinion appears in the Appendix ("Appx.," at 1-2).

JURISDICTION

The Eighth Circuit Court of Appeals entered its judgment on July 20, 2023. Appx. 1-2. Mr. Houston filed a timely motion for rehearing and rehearing *en banc*, which was denied September 20, 2023. Appx. 9. Justice Kavanaugh granted Mr. Houston's timely application for additional time in which to file his petition up through February 17, 2024, 2024. Appx. 4. This petition is timely filed within the time Justice Kavanaugh granted on the first open court day following that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISIONS

18 U.S.C. § 922 Unlawful acts (2020)

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

. . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 3553, provides in relevant part:

(a) Factors to be considered in imposing a sentence. – . . . The court, in determining the particular sentence to be imposed, shall consider –

* * *

(4) the kinds of sentence and the sentencing range established for-

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines-

(i) issued by the Sentencing Commission.

(5) any pertinent policy statement-

(A) issued by the Sentencing Commission

Federal Sentencing Guidelines

U.S.S.G. § 2K2.1. Firearms. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions involving Firearms or Ammunition General Admissibility of Relevant Evidence.

(a) Base Offense Leel (Apply the Greatest):

(3) **22,** if . . . (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) **20,** if . . . (B)the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine[.]

U.S.S.G. § 4B1.2. Definitions of Terms used in Section 4B1.1.

(a) CRIME OF VIOLENCE.—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[.]

Missouri Statutes

Mo. Rev. Stat. §575.150.1 (2017)

1. A person commits the offense of resisting or interfering with arrest, detention, or stop if he or she knows or reasonably knows 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 or by fleeing from such officer[.]

STATEMENT OF THE CASE

This case raises a persistent circuit conflict as to the right to appellate review and relief from procedural sentencing error in the miscalculation of the advisory Sentencing Guidelines established in *United States v. Booker*, 543 U.S. 220 (2004), and *Gall v. United States*, 552 U.S. 38 (2007). The view of the Eighth and Eleventh Circuits that a district court's conclusion that it would impose the same sentence "regardless" of the Guidelines is all it needs to establish without determining if a miscalculation occurred directly conflict with this Court's decisions.

This case presents an excellent vehicle to examine the issue due to the clarity of the Guidelines error Mr. Houston cited and the Circuit conflict demonstrating that his Guidelines range would have been calculated very differently just three miles east of St. Louis, Missouri in the Southern District of Illinois in the Seventh Circuit. The district court in Missouri adopted a Presentence Report calculating an advisory Sentencing Guidelines range enhanced on the basis that he had a prior conviction for a "crime of violence" as defined in U.S.S.G. § 4B1.2(a)(1), requiring as an element the "use of force" based on a Missouri conviction for resisting arrest. Mo. Rev. Stat. 575.150.1 (2017). Missouri case law shows that the crime is satisfied by "reckless force" and in its least serious form encompasses simply holding still as an officer pushes a disobedient arrestee. The Guidelines "force clause" definition is interpreted interchangeably with the "force clause in 18 U.S.C. § 924(e)(2)(B)(i), which this Court has held excludes "reckless" crimes. *See Borden v. United States*, 141 S. Ct. 1817, 1833 (2021) (plurality opinion); *id.* at 1835 (Thomas, J., concurring). The Probation Office noted salient grounds for a variance *below* the Guidelines range in Mr. Houston's case based on his childhood history of deprivation and intellectual challenges, making this an excellent vehicle to assess the unwarranted sentencing disparity promoted by the Eighth Circuit's rule dismissing appellate review for significant

procedural error consisting of miscalculated guidelines by the expedience of the District Court's declaring a sentence chosen "regardless" of a properly calculated Sentencing Guidelines range.

Background. The United States charged Mr. Houston with unlawful possession of a firearm following a prior felony conviction, contrary to 18 U.S.C. § 922(g)(1). Mr. Houston pled guilty and stipulated that on September 16, 2020, he held an Alien Armory Tactical .223 caliber semi-automatic rifle belonging to his brother Jerald Blackman at a neighborhood market parking lot after another car entered the parking lot and began firing shots on the parking lot where Mr. Blackman's mother and the mother of his child had also come to shop. Five seconds after the shooting started, Mr. Houston opened the door of his car and fired one shot before accidently kicking the gun ahead of him as he fumbled for cover. No person was struck by any gunfire in this brief incident. Police later recovered an Alien Armory semi-automatic rifle from a car in which Mr. Blackman was fatally shot on October 5, 2020. No evidence indicated Mr. Houston was present or in any way involved in the October 5 incident. Shell casings recovered from the USA Market lot on September 16 matched the semi-automatic rifle police recovered on October 5. On January 21, 2021, St. Louis City police chased and apprehended Mr. Houston driving a stolen truck. Inside the truck they found two pistols. Mr. Houston admitted knowing one of pistols was in the vehicle to which shell casings from the September 16 scene were matched.

The Sentencing. A Presentence Report ("PSR") calculated a Sentencing Guidelines range using an enhanced base offense level of 22 recommended for unlawful gun possession after a prior conviction for a "crime of violence" having as an element "the use, attempted use, or threatened use of force against the person of another." U.S.S.G. § 2K2.1(a)(3). The PSR based this on Mr. Houston's 2017 Missouri conviction for resisting arrest by "physical force." To this it added two levels to reflect grouped offenses involving a total of three firearms, two more

levels because one of the guns was stolen, and four more levels to reflect possession of a firearm in connection with another felony offense (either an angry exhibition of the semi-automatic rifle on September 16 or his subsequent flight from police in the stolen truck on January 21, 2021).

Mr. Houston filed objections to the calculations, among them a challenge to the designation of Missouri resisting arrest as a crime of violence and the use of a base offense level of 22 instead of level 20 under U.S.S.G. §2K2.1(a)(4)(A). He cited Missouri state court cases showing the least conduct required to convict a person for resisting arrest by the use of physical force consisted of holding still as an officer applied force against a disobedient arrestee. He cited this Court's new *Borden* ruling interpreting a "force clause" definition identical to the one in U.S.S.G. §4B1.2(a)(1) as excluding crimes defined by conduct like recklessness. He also cited a Seventh Circuit pre-*Borden* ruling that a resisting arrest law that could be violated by merely holding still as officers used forced to compel movement did not constitute the use of physical force against the person of another, *United States v. Bennett*, 863 F.3d 679, 681 (7th Cir. 2017).

In response, the Government cited a 2016 ruling by the Eighth Circuit which summarily declared that "the Missouri statute includes conduct that falls under the ACCA's force clause, such as resisting arrest, stop, or detention 'by using or threatening the use of violence or physical force.'" *United States v. Shockley*, 816 F.3d 1058, 1063 (8th Cir. 2016). The District Court deemed *Shockley* binding authority and declared the resisting arrest conviction a crime of violence. Even so, it noted that appellant's arguments citing *Borden* "are very well-taken" and that "the law is not completely clear as it relates to this[.]" It used a base offense level of 22 under U.S.S.G. § 2K2.1(a)(3) (2022), instead of level 20 based on conduct involving a semiautomatic firearm capable of accepting a large capacity magazine under U.S.S.G. § 2K2.1(a)(4)(B)(i) (2022).

Mr. Houston's timely admission of his guilt earned a reduction of three offense levels for a total offense level of 27. His previous criminal history points arose from teenage convictions: a misdemeanor fight at age 17, carrying a concealed firearm at age 18, and a 2017 conviction for resisting arrest at age 19. Two more criminal history points were added because he possessed the firearm on September 16, 2021, while on parole for the 2017 offense. The Probation Office also noted that the Court might find grounds to vary below Mr. Houston's Sentencing Guidelines range in light of his impoverished childhood and diagnoses for attention deficit disorder and attention deficit hyperactivity disorder by the Special School District of the City of St. Louis. Born at 34 weeks, his 19-year-old mother lacked access to prenatal care and could not read. The young family experienced many periods when their utilities were shut off, they had no food, and evictions led to frequent moves to find housing, at times requiring that they all shared one bed. His mother worked in retail and food service until Mr. Houston was seven, when her diabetes qualified her for SSI benefits. Even thereafter her annual income from 2004 to 2013 fell from eight percent below the federal poverty line to 26% below.

Mr. Houston's IQ never scored above the threshold for intellectual disability, though teachers noted his earnest work efforts, often struggling to manage his emotions when he could not keep up with schoolwork or social dynamics. His learning challenges were aggravated by constant changes as he attended 15 different schools, the longest stay measuring two-and-a-half years at an elementary school (six months of which were spent at yet another facility). His prospects improved under one-on-one supervision. In January 2005, Mr. Houston was referred to the Special School District and diagnosed with intellectual disability, a diagnosis reaffirmed in 2012. When Mr. Houston was twenty, the Missouri Department of Corrections found he tested positive for dementia and rated his academic achievement at a third-grade level.

Defense Counsel further noted the community violence defining Mr. Houston's childhood. While in Fifth Grade, one of his cousins died violently. At age 14, Mr. Houston suffered severe assaults in two incidents two weeks apart: strangers knocked him unconscious and thereafter a group fired ten shots at him, one bullet striking his arm, requiring surgery. Many of his behavioral and physical challenges correspond with the trauma young persons with intellectual disability stand more likely to suffer after adverse life events. Psychologists reported signs of Mr. Houston's trauma in 2018 that continued through 2020 as he served a four-year prison term for his conviction for resisting arrest. Counsel further noted a Sentencing Guidelines departure provision for a person suffering from a significantly reduced mental capacity in light of Mr. Houston's IQ score of 71.

Defense counsel noted the lack of a protective mentor to watch out for and help Mr. Houston navigate perilous and unstable environs and stressed he incurred only two prior felony convictions and showed positive growth while in stable settings. Counsel argued that a term of 60 months would be sufficient while being not greater than necessary to meet the goals of sentencing rather than a decade in prison only to be released when his infant was a teenager.

The Government urged the Court to impose a sentence of 121months in prison, asking the Court to explicitly chose this sentence "regardless" of the Guidelines calculation. The District Court said it considered the Sentencing Guidelines range while noting that "[t]he guideline calculations in this case were not simple," in light of intervening case law yet it calculated a guidelines range of 100-125 months Guidelines based on the designation of teenage resisting arrest conviction as a "crime of violence" requiring as an element "the use of force." The District Court granted the Government's request to couch its sentence as a choice made "regardless" of the Sentencing Guidelines and imposed concurrent terms of 120 months. It cited

the risks posed by the gunfire and reckless driving and cited the prior resisting arrest conviction. The offense circumstances the District Court cited formed the basis of offense level increases and criminal history points incorporated into the Guidelines range at 84-105 months Mr. Houston calculated—in fact, without those enhancements his Sentencing Guidelines range would have been 57-71 months based on a total offense level of 21 in Criminal History Category IV.

Proceedings in the Eighth Circuit Court of Appeals. Mr. Houston appealed his sentence, arguing that the District Court committed procedural error in calculating the Sentencing Guidelines by designating his teenage resisting arrest conviction a crime of violence. He cited this Court's ruling in *Borden* interpreting a "force clause" definition in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), identical to the Guidelines definition for prior crimes of violence employed by in U.S.S.G. § 4B1.2(a)(1). Five Members of this Court in *Borden* interpreted the "force clause" language referring to the "use . . . of force against the person of another" excluded crimes defined by conduct, "like recklessness" that did not target force to cause injury to another person. *Id.* at 1827 (plurality decision); *id.* at 1835 (Thomas, J., concurring). Mr. Houston cited Missouri state court cases indicating that the offense of resisting arrest by force was satisfied by a disobedient arrestee holding still while an officer pushed against him with no effort by the arrestee to direct injurious force to the officer, *State v. M.L.S.*, 275 S.W.3d 293 (Mo. Ct. App. 2008), or by recklessly causing accidental injury by pulling away from an officer's grasp, *State v. Summers*, 653 S.W.3d 155, 166-167 (Mo. Ct. App. 2022).

The Government argued the "threshold matter" the Eighth Circuit had had to decide was whether any Guidelines error was harmless. *United States v. Houston*, No. 22-1663, Appellee Brief, p. 11 Mr. Houston rebutted this proposal by citing the mandate in *Gall* that in reviewing the reasonableness of a sentence, this Court "must first ensure that the district court committed

no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range[.]" Appellant's Reply Brief at 11, citing *Gall*, 552 U.S. at 51.

The panel issued a per curium decision that did not decide whether the District Court miscalculated the Sentencing Guidelines. It granted the Government's request to affirm based on the District Court's declaration of a sentence chosen "regardless" of the Guidelines:

> "The legal question that Houston wants us to address is whether the felony version of resisting arrest by force, *see* Mo. Rev. Stat. § 575.150.1, is a "crime of violence," U.S.S.G. § 4B1.2(a). The answer does not matter, however, because any error was harmless. See Fed. R. Crim. P. 52(a); *see also United States v. Kemp*, 908 F.3d 1138, 1140–41 (8th Cir. 2018)."
>
> "The district court made clear at sentencing that, 'regardless of how' it 'calculated the [G]uideline[s] range,' Houston would receive the same 120-month sentence. *See United States v. Marin*, 31 F.4th 1049, 1056 (8th Cir. 2022) ("Incorrect application of the Guidelines is harmless error where the district court specifies the resolution of a particular issue did not affect the ultimate determination of a sentence." (citation omitted)). It also gave reasons, including the fact that Houston created a 'risk of harm to others' and had resisted arrest before. *See* 18 U.S.C. § 3553(a) (explaining that the district court 'shall consider . . . the nature and circumstances of the offense and the history and characteristics of the defendant'). In light of this "alternatively imposed" sentence, *United States v. White*, 863 F.3d 1016,1020 (8th Cir. 2017) (citation omitted), we need not decide the crime-of-violence question. *See United States v. Grimes*, 888 F.3d 1012, 1017 (8th Cir. 2018).

Justice Kavanaugh, Circuit Justice for the Eighth Circuit, granted petitioner's request for additional time to file Mr. Houston's petition for a writ of certiorari which he now does timely on February 20, 2024. Appx. 4.

GROUNDS FOR GRANTING THE WRIT

I. The Eighth and Eleventh Circuits rule that appellate review of procedural error based on Sentencing Guidelines miscalculation is precluded when a district court pronounces a sentence chosen "regardless" of the Guidelines contrary to *Gall* and *Booker* and the views of at least six other circuits.

A district court's miscalculation of the advisory Sentencing Guidelines range frustrates Congress's intent to limit unwarranted sentencing disparities, yet in the Eighth and the Eleventh Circuits a district court's choice of a sentence "regardless" of the Guidelines is enough to omit the appellate review mandated in *Gall v. United States*, 552 U.S. 38, 51 (2007). Six circuits recognize that pronouncements of sentences "regardless" of the Guidelines repudiate this Court's mandate to identify such "significant procedural error" in *Gall* and *United States v. Booker*, 543 U.S. 220 (2005). This case presents an excellent vehicle to resolve the Circuit divide, as the District Court abandoned its consideration of the Guidelines range even as it recognized this Court's ruling in *Borden* cast doubt on Eighth Circuit precedent declaring his teenage Missouri conviction for resisting arrest a "crime of violence" inflating his Guidelines range to 100-125 months because its least serious form it consisted of holding still as an officer pushed against a stubborn arrestee. The Government's express strategy to secure a prison term "regardless" of the Guidelines to make harmless error "the threshold issue" in the Eighth Circuit highlights the urgency for this Court to address the deliberate contravention of *Gall* and the goal of limiting unwarranted sentencing disparity this Court tried to maintain in *Booker* and *Gall.*

The conflict between the Eighth and Eleventh Circuits' denial of review for procedural sentencing error with this Court's rulings in *Gall* and *Booker* constitutes grounds for certiorari and even summary disposition. *See Spears v. United States*, 555 U.S. 261, 263 (2009) ("Because the Eighth Circuit's decision on remand conflicts with our decision in *Kimbrough*, we grant the petition for certiorari and reverse."). The persisting conflict amongst the Circuits on the propriety

of district court's inoculating significant procedural error from correction on appeal also warrants certiorari. *See Rosemond v. United States*, 572 U.S. 65, 69 (2014) (granting certiorari to resolve circuit conflict over what it takes to aid and abet an offense under 18 U.S.C. § 924(c)). *See also Rita v. United States*, 551 U.S. 338, 341 (2007) (granting certiorari to address the practice of circuits in the wake of *Booker* of presuming Sentencing Guidelines range sentences to be substantively reasonable).

A. The Eighth Circuit view that pronouncement of a sentence chosen "regardless" of the applicable Guideline suspends the right to review for significant procedural error contrary to *Booker* and *Gall.*

The Eighth Circuit view that district courts may elect to suspend appellate review for "significant procedural error" based on miscalculation of the advisory Sentencing Guidelines directly conflicts with the decisions by this Court establishing and mandating such review in *Booker* and *Gall.* After this Court in *Booker* held that the mandatory Guidelines system was a violation of the right to a jury finding of every fact necessary to sentencing, 543 U.S. at 258-259, the Court determined that the remaining statutory structure of the Sentencing Reform Act

> "nonetheless require[d] judges to consider the Guidelines 'sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant, the pertinent Sentencing Commission policy statements, the needs to avoid unwarranted sentencing disparities, and the need to provide restitution to victims."

Id. at 259-260 (internal citations omitted). The surviving provisions also embodied a right of appellate review "to determine whether the sentence 'is unreasonable' with regard to" the factors Congress identified for district courts to consider in sentencing under 18 U.S.C. § 3553(a), including the applicable Guidelines range they were obliged to calculate pursuant to section 3553(a)(4)(A)(i). *Id.* at 261. Although the advisory system would not provide the same degree of uniformity Congress originally intended through a mandatory Guidelines system, review for reasonableness would meaningfully serve the purpose of reducing unwarranted disparities:

> "the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly. *See* 28 USC § 994 (2000 ed. and Supp. IV). The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing. . . . The courts of appeals review sentencing decisions for unreasonableness. These features of the remaining system, while not the system Congress enacted, nonetheless continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary. We can find no feature of the remaining system that tends to hinder, rather than to further, these basic objectives. . . ."

Id. at 264-265 (citations omitted).

Within three years the Court in *Gall* revisited the practice of reasonableness review because the Eighth Circuit developed a requirement that district courts had to justify below-guideline sentences by articulating "extraordinary justifications" approximating the mathematical percentage by which a sentence fell below the guideline range. 552 U.S. at 40-41. This Court clarified that review for reasonableness employed a deferential "abuse of discretion" standard of review. *Id.* at 46. At the same time, this Court made clear "that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications." *Id.* This Court spelled out specific incidents of reasonableness review applicable to every sentencing appeal:

> "Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence--including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard."

552 U.S. at 51.

After *Gall* was decided, the Government developed a practice of asking district courts to state whether they would have imposed the same sentence regardless of disputed Guidelines calculations. *See, e.g., United States v. Davis*, 583 F.3d 1081, 1094-95 (8th Cir. 2009). Early examples were upheld in the face of transcripts showing the district court considered the competing views of the proper Guidelines calculation and provided a considered determination to establish harmless error. *Id.* (district court explained how its choice of 293 months fell within the overlapping Guidelines ranges applicable to Davis's designation or disqualification as a career offender). As demonstrated in Petitioner's case and others, however, the Eighth Circuit's practice now also encompasses summarily affirming challenged sentences without establishing whether the District Court in fact miscalculated the Sentencing Guidelines range before acceding to the Government's requests to state that the Guidelines simply "did not matter." Appx. 2. *Accord United States v. David M. Foston*, 2022 U.S. App. LEXIS 12909 (8th Cir. May 13, 2022) (unpub.); *United States v. Cyrano Irons*, 2022 WL 852853, * 1 (8th Cir. 2022) (unpub.). The Eleventh Circuit employs similar rules. *See United States v. Henry*, 1 F. 4th 1315, 1327 (11th Cir. 2021) (district court's statement it would have imposed the same sentence "either way . . . 'is all we need to know' to hold that any potential error was harmless.").

In this case, the Court imposed concurrent statutory maximum sentences (120 months) after adopting a mistakenly inflated guideline range of 100-to 125 months, whereas the proper Guidelines calculation made in light of *Borden* would have recommended sentences totaling 85-105 months. It explicitly made this choice "regardless" of the accurate Guidelines calculation, a stark rejection of the "serious consideration" of the extent of deviation a sentence represents from the Guidelines range that *Booker* and *Gall* continue to mandate based on Section 3553(a)(4)(i). This Court should grant certiorari and promptly resolve this conflict because, as

this case illustrates, the minority view of the Eighth and Eleventh Circuits invites erroneously inflated sentences and contravenes the Congressional goal of avoiding unwarranted disparities in federal sentencing this Court sought to further through reasonable review in *Booker* and *Gall.*

B. Six Circuits reject the Eighth Circuit rule that dismisses review to discern Guidelines miscalculation for sentences imposed regardless of the Guidelines.

The majority of circuits to address the question conclude that a district court's declaration that it would have sentenced the defendant to the same sentence regardless of any Guidelines error does not establish harmless error on appeal or negate the need to determine the correct Guidelines range. The Seventh Circuit has explained that a sentencing court's statement dismissing any error in the guideline calculation as affecting its sentence could not render its sentencing errors harmless, reasoning that the broader discretion the *Booker* remedy established did not "permit the judge to nullify the guidelines by way of a simple assertion that any latent errors in the guidelines calculation would make no difference to the choice of sentence." *United States v. Asbury,* 27 F. 4th 576, 579 (7th Cir. 2022). Recognizing this Court's requirement that district courts accurately calculate the applicable Sentencing Guidelines range, the Seventh Circuit declared that "'a conclusory comment tossed in for good measure' is not enough to make a guidelines error harmless." *Id.* at 581.

To hold otherwise would violate the rule this Court created in *Gall* requiring district courts to first calculate the baseline Guideline range accurately in every case and to explain any sentencing decisions departing from that range in light of the applicable range. *Id.* at 579. The Seventh Circuit notes "[t]here are no 'magic words in sentencing. If there were, the judge would have no incentive to work through the guideline calculations; she could just recite at the outset that she does not find the [G]uidelines helpful and proceed to sentence based exclusively on her own preferences.'" *Id.* at 581. The record in Mr. Houston's case demonstrates that this is

precisely what the Government enticed the District Court to do in Mr. Houston's case, from which the Government then succeeded in urging the Eighth Circuit to make harmless error its "threshold inquiry." Opinion, Appx. 1-2.

The Second Circuit also holds that district courts cannot insulate their sentencing judgments by asserting that the Guidelines calculation "made no difference to [their] determination." *United States v. Seabrook*, 968 F.3d 224, 233-34 (2nd Cir. 2020). The Second Circuit recognizes this Court's view that "[e]ven if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence.*'" *United States v. Bennett*, 839 F.3d 153, 163 (2d Cir. 2016), quoting *Molina-Martinez v. United States*, 578 U.S. 189, 199 (2016) (emphasis in original). Accurate calculation still maters.

The Third, Fifth, Ninth and Tenth Circuits have taken similar positions. *See, e.g., United States v. Wright*, 642 F.3d 148, 154 n. 6 (3d Cir. 2011) (disavowals of the impact of procedural error do not establish harmlessness because the court "must still begin by determining the correct alternative Guidelines range and properly justify the chosen sentence" with regard to it); *United States v. Smalley*, 517 F.3d 208, 212 (3d Cir. 2008) (reversing despite district court claim "it would have given the same sentence" even if it agreed to Smalley's guideline calculation because *Gall* requires starting with correctly calculated range); *United States v. Williams*, 5 F.4th 973, 978 (9th Cir. 2021) (reversing despite the district court's assertions "it would have imposed the same sentence" regardless of the Guidelines); *United States v. Gieswein*, 887 F.3d 1054, 1062-1063 (10th Cir. 2018) (rejecting the notion that district courts can insulate sentencing decisions from review by declaring that the sentencing "conclusion would be the same 'even if

all of the defendant's objections to the presentence report had been successful," yet affirming a judge's chose driven by the statutory maximum after establishing Guidelines error occurred).

Two other circuits, the Fourth and the Sixth, grant some deference to statements by a district court declaring that any Guidelines error was harmless, but these circuits still examine closely the district court's reasoning before endorsing the conclusion. The Sixth Circuit maintains that Guidelines miscalculations require reversal unless the appellate court concludes with "certainty that the error at sentencing did not cause the defendant to receive a more severe sentence" and that the upward variance embodied in the judgment "would have been reasonable." *United States v. Collins*, 800 Fed. Appx. 361, 362 (6th Cir. 2020). The Fourth Circuit similarly maintains that to declare harmless error, the appellate court must be certain the district court would have reached the same result even if it had adopted the Guidelines range the defendant argued and independently determine that such an upward variance would be reasonable. *United States v. Del Carmen Gomez*, 690 F.3d 194, 203 (4th Cir. 2012).

The Fifth Circuit recognizes two alternative ways to show harmless error if the wrong Guidelines range is employed. *See United States v. Guzman-Rendon*, 864 F.3d 409, 411 (5th Cir. 2017). The first is "to show that the district court considered both ranges (the one now found incorrect and the one now deemed correct) and explained that it would give the same sentence either way." *Id.* The second method "applies even if the correct guidelines range was not considered" in which case the government must "convincingly demonstrate both (1) that the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing." *Id.* (cleaned up) (quoting *United States v. Greer*, 20 F. 4th 1071, 1073 (5th Cir. 2021)).

The Eighth Circuit, in sharp contrast, dismisses the merits of whether a Sentencing Guidelines miscalculation occurred when, as here, the Government succeeds in prompting the district court to impose a sentence stating it would impose the same sentence "'regardless of how' it 'calculated the [G]uideline[s] range[.]" Appx. 2. As the Seventh Circuit and at least five other circuits hold, this violates this Court's mandate that "in every case" the Court of Appeals must ensure no significant procedural error occurred, chief among such mistakes being the miscalculation of the advisory Guidelines range. *Gall*, 552 U.S. at 51.

C. This case provides an excellent vehicle to review these issues: it plainly sets out circuit conflicts relating to (1) resisting arrest as a "crime of violence" before *and* after *Borden*, and (2) the *Gall* mandate to identify Guidelines error in each case.

Petitioner's case makes plain the disparity produced by the minority Eighth Circuit view that district courts may preclude review for significant procedural error due to wrongly inflated advisory ranges by announcing prison terms chosen "regardless" of the Guidelines. As noted, both Mr. Houston's sentencing guidelines calculation and the result of his direct appeal would have been radically different had his case been prosecuted in the United States District Court for the Southern District of Illinois in East Saint Louis, just three miles east of the Thomas Eagleton Federal Courthouse in Saint Louis, Missouri.

Years before this Court's 2021 decision in *Borden*, the Seventh Circuit Court of Appeals determined that an Indiana state statute defining resisting arrest to encompass an arrestee's refusal to move to impede handcuffing or transport did not constitute force "against the person of another" in *Bennett*, 863 F.3d at 681, citing *Whaley v. State*, 843 N.E.2d 1, 5, 10-11 (Ind. Ct. App. 2006); *State v. Belton*, 108 S.W.3d 171, 175 (Mo. Ct. App. 2003) (legislature's specification of "physical force" as alternative means establishes that the legislature intended resisting arrest by force to include "non-violent force"). In the wake of this Court's exclusion of

"reckless" conduct from the identical "use of force" definition in the Armed Career Criminal Act in *Borden*, Petitioner cited additional Missouri case law demonstrating that resisting by force was also established by reckless conduct such as pulling away from the grasp of an officer who loses balance and injuries himself by falling, *see Summers*, 653 S.W.3d at 166-167 (defendant's resistance by pulling away from officer causing him to fall and break a bone established reckless assault). In short, Petitioner's case presents indisputable Guidelines error in the District Court's designation of his teenage resisting arrest conviction as a "crime of violence" and its wrongful inflation of a Guidelines range from 84-105 months to 100-125 months (the range in which the Court's chosen sentence actually fell, notwithstanding its disavowal of any influence from it).

The record in Petitioner's case also demonstrates the disparity of the District Court disregard for the accurate Guidelines range in the face of numerous mitigating factors by imposing concurrent statutory maximum terms of 120 months. The accurate Guidelines range of 84-105 months itself incorporated several enhancements including for the circumstances the District Court briefly cited (including criminal history points for his teenage prior convictions) as it imposed a sentence "regardless" of the Guidelines. Although the District Court summarily referred to the dangerous gunfire on the first of the two incidents, it agreed the preponderance of evidence did not support a conclusion that the single Mr. Houston fired was preplanned rather than a panicked response to a fusillade others launched near his relatives. The record does not clearly support a conclusion the District Court would have deemed 120 months a sentence "not greater than necessary" to punish conduct had it known the Sentencing Commission recommended a range of 85-105 months in light of the mitigating factors of Mr. Houston's mental disability, the impoverished and violent environment he struggled to navigate throughout his young life and his lack of prior imprisonment for a term within the actual guideline range.

See United States v. Collington, 461 F.3d 805, 808 (6th Cir. 2006) (varying 68 months below guideline floor in part because defendant had not previously served so long a sentence). *See also Tennard v. Dretke*, 542 U.S. 274, 287 (2004).

Had Petitioner's appeal been heard by the Seventh Circuit on the East side of the Mississippi River his case would have been reversed to correct the Guidelines error, rather than the summary affirmance he received for a sentence imposed "regardless" of the mandatory consideration of an accurate Guidelines range. *See Asbury*, 27 F. 4th at 581. Petitioner seeks certiorari to resolve this recurrent and critical issue and then remand his case to the Eighth Circuit to properly decide his claim on appeal.

CONCLUSION

WHEREFORE, Petitioner Houston requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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