CASE NO. 23-6841

IN THE SUPREME COURT OF THE UNITED STATES

October 2023 Term

RONALD D. HOUSTON

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Submitted By:

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FEDERAL STATUTORY PROVISIONS

18 U.S.C. § 924(e)(2) provides in relevant part:

> **(B)** the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, . . . that—
>
> > **(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another[.]

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

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

Federal Sentencing Guidelines

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[.]

ARGUMENT

I. *Kinzy*'s petition proves that omitting *Gall* review for Guideline miscalculation promotes sentencing disparities *Booker* sought to reduce. The Court should clarify the Government's burden to prove no grave doubt remains that a preserved claim of Guidelines error affected the choice of sentence. The many profound mitigating factors Houston's case presents make it the best vehicle for this Court to address proper harmless analysis of preserved error.

The Brief in Opposition ("BIO") confirms that the Eighth Circuit's failure to "first ensure" no Guidelines miscalculation occurred perpetuates the sentencing disparities this Court sought to prevent through appellate review in *United States v. Booker*, 543 U.S. 220, 261 (2005) and *Gall v United States*, 552 U.S. 38, 51 (2007). It cites the petition in *Kinzy v. United States*, No. 23-578, wherein the Fifth Circuit followed *Gall* to first review for Guidelines miscalculation. BIO at 9. The Fifth Circuit agreed with the parties that Louisiana's resisting arrest law was not a "crime of violence" because it could be based on reckless injury. *United States Kinzy*, No. 22-30169, 2023 WL 4763336, *2-6 (5th Cir., July 26, 2023). This confirms the error Houston cited in Missouri's resisting arrest "by violence or physical force" based on this Court's exclusion of reckless conduct as "the use of force against a person" in *Borden v. United States*, 141 S. Ct. 1817, 1833, 1835 (2021), and Missouri cases stating that the crime is satisfied by non-violent force and reckless injury. Petition for Certiorari at 16, 25, citing *State v. Belton*, 108 S.W.3d 171, 175 (Mo. Ct. App. 2003), *State v. M.L.S.*, 275 S.W.3d 293 (Mo. Ct. App. 2008). *Kinzy* proves the Eighth Circuit's denial of *Gall* review fuels sentencing disparity.

Any doubt that *Gall* review would have led the Eighth Circuit to exclude Missouri's resisting arrest by "violence or physical force" as a "crime of violence" abates in light of a 2019 Eighth Circuit oral argument before a panel that included one of the judges (the Honorable David Stras) that affirmed Houston's sentence without deciding his Guidelines claim. *See Colvin v.*

United States, No. 18-2283, Oral Argument (8th Cir., April18, 2019).[1] Colvin sought postconviction relief from an enhanced mandatory fifteen-year sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B) after this Court invalidated a "residual" definition for "violent felonies" in Section 924(e)(2)(B)(ii) in *Johnson v. United States*, 576 U.S. 591 (2015). Colvin argued on appeal his Missouri conviction for resisting arrest by "violence or physical force" could not still qualify as a "crime of violence" under the "element of force" definition citing the same Missouri cases Houston relied on plus the ruling in *United States v. Bennett*, 863 F.3d 679 (7th Cir. 2017). The Eighth and almost every other circuit interpret the identical Guidelines and ACCA "element of force" definitions interchangeably. *See, e.g., United States v. Williams*, 537 F.3d 969, 971 (8th Cir. 2008); *United States v. Moore*, 635 F.3d 774, 776 (5th Cir. 2011).

At Colvin's argument, Judge Stras rejected the Government's attempts to equate holding still as the use of force. *See id.* at 05:40-05:43 (Judge Stras) ("merely stiffening yourself is not taking force against anyone"); *id.* at 19:00-19:03 ("At the very least, it doesn't require any force against anyone else"); *id.* at 25:15-25:18 ("I don't know how by itself stiffening can cause injury to another person"). The panel in *Colvin* did not explicitly reach the merits but remanded the case for the district court to confirm whether it originally relied on the "residual clause" to qualify the proposed ACCA predicates. *Colvin v. United States*, 772 Fed. Appx. 392, 393-394 (8th Cir. 2019). Still, Eighth Circuit precedent precludes remand when "the merits make clear that a movant is not entitled to relief." *Jones v. United States,* 922 F.3d 864, 867 & n.3 (8th Cir. 2019). The *Colvin* panel explicitly recognized Colvin could pursue his challenge to his resisting arrest conviction. 772 Fed. Appx. at 394. On remand, the Government stipulated Colvin

[1] Accessible at media-oa.ca8.uscourts.gov/OAaudio/2019/4/182283.MP3 (last accessed June 10, 2024).

deserved relief, but disavowed any concession that resisting arrest no longer constituted a violent felony. *Colvin v. United States*, 4:16-cv-00744-ERW, Doc. 31, p. 2 (E.D. Mo. Nov. 20, 2019).

The Government's misleading claim in this Court that after Houston's appeal was denied the Eighth Circuit established that Missouri resisting arrest satisfies the "element of force" stands as further proof the Eighth Circuit procedure promotes unwarranted sentencing disparity. BIO at 14, citing *United States v. Brown*, 73 F. 4th 1011 (8th Cir. 2023). Brown did not argue or even note that the least conduct required to prove "violence or physical force" consisted of accidental injury or holding still, nor did he cite this Court's rejection of reckless conduct as "the use of force against the person of another" in *Borden*. Brown argued only that Missouri's statute indivisibly listed "violence or physical force" together with nonviolent "flight," disqualifying the entire statute under *Mathis v. United States*, 579 U.S. 500, 517 (2016). The *Brown* Court's rejection of the *Mathis* claim in no way controls the *Borden* issue. A prior decision's implicit resolution of an issue that was neither "raised in briefs or argument nor discussed in the opinion of the Court" is not binding precedent. *Streu v. Dormire*, 557 F.3d 960, 964-965 (8th Cir. 2009), citing *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). Had the Eighth Circuit applied *Gall* in Houston's case, it would have disqualified resisting arrest as the Fifth Circuit did in *Kinzy*.

A. The Government does not address the burden to show harmless *preserved* error.

The Government obfuscates the stark conflict the Eighth Circuit's omission of Guidelines confirmation poses with *Gall* and *Booker* by rewriting the question presented as whether *every* Guidelines miscalculation compels a remand for resentencing. BIO 9-10. Houston made no such claim. *Gall* already holds that the district court in every case must "first ensure no significant procedural error" occurred, and specifically, no Guidelines miscalculation. 552 U.S. at 51.

The BIO also belittles the standards that govern a showing of harmless error in the context of preserved challenges to Guidelines miscalculations, a burden the Government must shoulder when it benefits from such error. *United States v. Davila*, 569 U.S. 597, 607 (2013). This Court has not directly defined the standard applicable to the government's burden as to Guidelines miscalculations under Rule 52(a), but the government logically must provide fair assurance that the district judge was not substantially swayed or influenced by the error. Harmless error is not defined merely by whether the record supports the sentence apart from the error. *See O'Neal v. McAninch*, 513 U.S. 432, 437-38 (1995). This Court has indicated that in the context of non-constitutional trial errors, the government must prove that no "grave doubt" exists as to whether the error substantially influenced the outcome of the proceedings. *See id*; *Kotteakos v. United States*, 328 U.S. 750, 764-65 ((1946). Even in the context of plain error review of unpreserved objections, this Court recognizes that Guidelines miscalculations most often *do* warrant relief. *Rosales-Mireles v. United States*, 585 U.S. 129, 139 (2018).

None of the petitions in the Government's string of cases denied review by certiorari cited a record replete with countervailing sentencing factors like those presented in Houston's case. BIO at 8-9 and n.3. The vast majority of these cases made no reference to *any* mitigating factors that would have enabled this Court to test a district court's claim it would have imposed a sentence within a wrongly inflated Guidelines range "regardless" of that fact. The fact the Eighth Circuit violated *Gall* and *Booker* in an unpublished ruling in Houston's case fails to negate the excellent vehicle it provides this Court to cure this longstanding conflict. It would not be the first time an unpublished ruling provided this benefit, *see, e.g., Tapia v. United States*, 564 U.S. 319, 323 & n.1. (2011) (review granted to review an unpublished decision of the Eleventh Circuit that

divided five circuits on whether 18 U.S.C. §3582(a) allows a court to lengthen a prison term to accommodate rehabilitative treatment).

The Government mistakenly asserts that the Eighth Circuit's practice of skipping step one of *Gall* review does not conflict with *United States v. Seabrook,* 968 F.3d 224 (2nd Cir. 202), and *United States v. Bennett*, 839 F.3d 153 (2d Cir. 2016). BIO at 12-13. Both cases complied with *Gall* to confirm Guidelines miscalculations before ordering resentencing, *see Seabrook,* 968 F.3d at 233-235; *Bennett*, 968 F.3d at 162. The Government's citation of *United States v. Jass*, 569 F.3d 47 (2nd Cir. 2009), is also unfounded. The Second Circuit established Guidelines error that was harmless error in the context of Jass's highly aggravated conspiracy to transport minors to engage in illegal sex activity, production of visual depictions thereof, and sexual exploitation of a child with no countervailing mitigating factors present in Houston's case. The Ninth Circuit also complied with *Gall* to identify Guidelines error in *United States v. Williams*, 5 4th 973 (9th Cir. 2021). So did the Tenth Circuit in *United States v. Gieswein*, 887 F.3d 1054 (10th Cir. 2018). It then proceeded to detail why Gieswein's long string of highly aggravated crimes from car bombing, molestation, violation of protective orders, and failure to register as a sex offender established the "rare case" where the Circuit deemed harmless the Court's imposition of a statutory maximum penalty. *Id.* at 1056. None of these cases justify a denial of certiorari on a record showing multiple circumstances profoundly mitigating the offense and the punishment sufficient to punish Houston in light of his history and background.

B. **Houston's record of countervailing aggravating and mitigating factors presents a unique vehicle to assess harmless error of preserved error absent in prior petitions.**

Houston's sentencing record provides a perfect vehicle to examine the proper application of harmless error of preserved Guidelines error under Rule 52(a). Unlike the string of cases the Government cites this Court denied that cited conflict with *Gall* and *Booker* embodied by

harmless error affirmances of sentences picked "regardless" of Guidelines error, Houston's record is replete with competing factors a district court must consider. Harmless error does not make irrelevant the "overarching" mandate to "impose a sentence sufficient, but not greater than necessary," to fulfill the goals of 18 U.S.C. § 3553(a)(2). *Kimbrough v. United States*, 552 U.S. 85, 101 (2007).

First, the nature and circumstances of Houston's offense included both salient mitigating and aggravating circumstances. The District Court stressed the danger of the sudden exchange of gunshots at a parking lot in the incident underlying Count 1, yet it also held that video of the episode refuted a finding that Houston came to the scene intending to instigate a shootout. It showed that Houston stumbled and dropped his gun *after* occupants of a parked car suddenly opened fire at the strip mall where he and his mother had just arrived to buy groceries. Houston suffered grievous loss in the murder of his brother soon after the surprise assault giving rise to Count I and prior to the second, non-violent instance of gun possession charged in Count 2. While not a defense, these circumstances reflect his impetus was self-defense and defense of family rather than an unyielding bent to shoot others. Second, the District Court stressed that its Guidelines calculation comprised an "important consideration" in its choice of punishment. The statutory maximum terms of 120 months the Court imposed fell within the 100-125 month range it wrongly inflated by finding Houston's resisting arrest conviction a crime of violence and exceeded the correct Guidelines calculation of 84-105 months by 15-36 months.

Third, Houston's background and record present multiple profound and inherently mitigating factors supporting a variance below the Guidelines range, as the Probation Office's Presentence Investigation Report noted. He was born at 34 weeks to his then-19-year-old mother, who lacked access to prenatal care and who could not read. He grew up in poverty and

moved with his mother frequently, often lacking food and experiencing suspensions of their utilities. His IQ never scored above the threshold for intellectual disability. His childhood diagnosis for intellectual disability, and dementia at age 20 with a Third-Grade level academic achievement rating are inherently mitigating. *Tennard v. Dretke*, 542 U.S. 274, 287 (2004).

These weighty mitigating circumstances bear directly on whether grave doubts remain that the district court's significant Guidelines miscalculation led to a sentence higher than the district court would otherwise have imposed. Houston's case presents a practical vehicle to exemplify proper harmless error review of a preserved Guidelines miscalculation.

In fact, the petitions for certiorari by both Houston and Kinzy present an opportunity for this Court to assess manipulation of "harmless error" analysis specifically for the purpose of promoting inflated sentences by shielding miscalculation of the Guidelines, which remains "the lodestone" of federal sentencing. *See Peugh v. United States*, 569 U.S. 530, 544 (2013). Even as the Fifth Circuit affirmed Kinzy's sentence, it cited circumstances that "gave [it] pause" in applying its own harmless error precedent. 2023 WL 473336 at *11. The sentence imposed upon Kinzy exceeded the maximum sentence under the accurate Guidelines range by three years and fell at the mid-point of the wrongly inflated range. The Fifth Circuit also was "unsettle[d]" by the record: the Assistant United States Attorney repeatedly sought to get the judge to say it would impose the same sentence under either parties' view of the Guidelines and based his request on Kinzy's right to appeal his sentence, and the judge's final acquiescence seemed to be an afterthought. *Id.* at *12. The Fifth Circuit admonished all stakeholders involved that

> "the workability and fairness of our harmless-error doctrine depend fundamentally on the good faith of the government, defense counsel, and the district courts. The doctrine is meant to reflect the reality that the Sentencing Guidelines are advisory and that not all errors arising from the complex process of calculating Guideline ranges require reversal and resentencing. The doctrine is not to be deployed as a talisman to insulate sentences

that otherwise ought to be revisited by all participants: opposing counsel, the parties, and sentencing judges."

Id. at *14. Houston submits this caution should also extend subsequent sentencing appeals. The conduct of Houston's appeal plainly warrants this Court's review to address the Eighth Circuit adoption of the Government's explicit request to replace step one of *Gall* review to ensure against any Guidelines miscalculation with a review for harmlessness taking no account of the accurate Guidelines range and the degree of variance as *Gall* requires.

The blatant conflict between the Fifth Circuit's compliance with *Gall* in *Kinzy* and the Eighth Circuit's decision to skip *Gall* review for Guidelines miscalculation at the express request of the Government warrants certiorari and a summary reversal in light of the plain violation of *Gall* and *Booker*. *See Spears v. United States*, 555 U.S. 261, 267-268 (2009) (granting certiorari and summary ruling to correct Eighth Circuit's misapplication of *Kimbrough* by requiring district courts to apply a 100:1 ratio the Guidelines applied pursuant to Congressional mandate to punish crack cocaine crimes more harshly than those involving similar quantities of powder cocaine).

Houston's petition also provides a useful companion case to address the issue posed in *Kinzy*. The Fifth Circuit's approach in *Kinzy* provides a practical contrast to the Eighth Circuit procedure because (1) the Fifth Circuit complied with *Gall* whereas the Eighth Circuit adopted the Government's request to skip it, and (2) the Fifth Circuit's procedure established that resisting arrest laws satisfied by reckless injury are not crimes requiring the use of force against the person of another (an issue the Eighth Circuit has avoided reaching for four years). At the very least, Houston's petition should be held pending any disposition of a grant of certiorari in *Kinzy*.

II. This Court should grant certiorari to end the Eighth Circuit's delay in deciding the claim it tacitly deemed valid in *Colvin* to cure this disparity.

The *Kinzy* decision confirms it would have rejected Missouri resisting arrest as a crime of violence because it encompasses accidental injury. The Government's argument that this Court should leave Houston's claims of inter-circuit conflict to the Sentencing Commission, BIO at 14, cannot justify the Court's denial of certiorari to review the conflict between the Eighth Circuit's violation of *Gall* and *Booker* by skipping the first step of reasonableness review to ensure no Guidelines miscalculation occurred. The Sentencing Commission cannot dictate appellate procedure to the Circuit Courts of Appeals or define reasonableness review.

Further, no conflict exists amongst the circuits on whether the Guidelines definition for "element of force" in U.S.S.G. § 4B1.2(a)(1) should be construed interchangeably with the identical definition in 18 U.S.C. §924(e)(2)(B)(i). *See United States v. Brasby*, 61 F. 4th 127, 133 (3rd Cir. 2023); *United States v. Velez-Vargas*, 32 F. 4th 12, 14 & n. 4 (1st Cir. 2022); *United States v. Ochoa*, 941 F.3d 1074, 1107 (11th Cir. 2019); *United States v. Jones*, 877 F.3d 884, 888 (9th Cir. 2017); *United States v. King*, 673 F.3d 274, 279 n. 3 (4th Cir. 2012); *United States v. Campbell*, 865 F.3d 853, 856 (7th Cir. 2017); *Moore*, 635 F.3d at 776 (5th Cir.) *United States v. Walker*, 595 F3d 441, 443 & n. 1 (2nd Cir. 2010); *United States v. Ford*, 560 F.3d 420 (6th Cir. 2009); *United States v. Tiger*, 538 F.3d 1297, 1298 (10th Cir. 2008); *Williams*, 537 F.3d at 971 (8th Cir.); *United States v. Hill*, 131 F.3d 1056, 1062 & n.6 (D.C. Cir. 1997).

The Eighth Circuit's active avoidance of the case law proving Missouri resisting arrest does not require force against the person despite its tacit recognition of the merits in *Colvin*, *supra* at 6-7, warrants summary correction by this Court in light of the contrary rulings by the Fifth Circuit in *Kinzy* and the Seventh Circuit in *Bennett,* 863 F.3d at 682.

WHEREFORE, Petitioner Houston requests that this Court grant his Petition for a Writ of Certiorari. In the alternative, he requests that this Court hold his petition pending the disposition of the petition in *Kinzy v. United States*, No. 23-578.

Respectfully submitted,

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