No. 23-6841

SUPREME COURT OF THE UNITED STATES

RONALD D. HOUSTON.	)
	)
Petitioner,	)
	)
v.	)
	)
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 REHEARING OF DENIAL OF CERTIORARI

Submitted by:

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PETITION FOR REHEARING OF DENIAL OF CERTIORARI IN LIGHT OF *SALVATORE DELLLIGATTI v. UNITED STATES*

Petitioner respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari entered on June 24, 2024, and (2) granting the petition or, in the alternative, holding the petition until the Court rules on *Delligatti v. United States*, No. 23-825, which will address whether crimes defined by a person's inaction (*e.g.*, withholding food or medicine from another) fit the "use of force" definition in 18 U.S.C. § 924(c)(1)(A), a definition nearly identical to a definition that enhanced Mr. Houston's Sentencing Guidelines in U.S.S.G. § 4B1.2(a)(1).

BACKGROUND

Petitioner sought a Writ of Certiorari to the Eighth Circuit based on whether federal recidivist definitions of crimes requiring "the use, attempted use, or threatened use of physical force against the person of another" encompass resisting arrest crimes established by the act of holding still as an officer tries to force a disobedient arrestee to move. Mr. Houston's Sentencing Guidelines range was increased based on a Missouri conviction for resisting arrest offenses that

can be violated by non-violent force, like holding stubbornly still. *See State v. Belton,* 108 S.W.3d 171, 175 (Mo. Ct. App. 2003) (resisting arrest established where Belton ignored orders and stiffened his body as arresting officer tried to pull hm out of a car), *State v. M.L.S.,* 275 S.W.3d 293 (Mo. Ct. App. 2008) (M.L.S. stiffened his arms to resist being handcuffed, which forced an officer to struggle while attempting to get M.L.S.'s arms behind his back). He argued that this did not qualify as a use of force "targeted" to injure the person of another that this Court held to be required to satisfy an identical "force clause" definition in the Armed Career Criminal Act,18 U.S.C. § 924(e)(2)(B)(i) ("ACCA") in *Borden v. United States*, 593 U.S. 420, 433 (2021) (plurality); *id.* at 446 (Thomas, J., concurring). The Eighth Circuit declined to reach the merits of his claim, citing statements the District Court made at the request of the United States that it would have imposed the same sentence "regardless" of the Guidelines. Appendix to Petition for Certiorari at 1-2.

Mr. Houston's petition also cited circuit conflict concerning the application of "harmless error" to deny relief based on district court proclamations that the same sentence would be imposed "regardless" of any Guidelines error. Petition for a Writ of Certiorari, at 2, 18-21. He cited the unpublished ruling in his case as proof the Eighth Circuit's extreme version conflicted with this Court's express mandate that in every sentencing the Court of Appeals must "first ensure no significant procedural error" occurred, and specifically, no Guidelines miscalculation. Cert. Petition at 20, 22, 24, citing *Gall v. United States*, 552 U.S. 38, 51 (2007). The Eighth Circuit followed the Government's contrary direction that the first issue to be decided was whether the District Court would have imposed the same sentence no matter what the Guidelines advised. Petition for Certiorari, at 16-17. In contrast, the Fifth Circuit in a virtually identical situation in *United States v. Kinzy*, No. 22-30169, 2023 WL 4763336 (5th Cir., July 26, 2023)

(unpub.) first determined that a Louisiana resisting arrest statute satisfied by "reckless" causation of injury did *not* satisfy the "force clause" definition, but ultimately decided the error was harmless. Reply to Government's BIO at 6, 12. One day after the Eighth Circuit issued its unpublished ruling affirming Mr. Houston's enhanced sentence without determining if Missouri resisting arrest satisfied the "force clause" definition, another panel of the Court issued a published ruling declaring that Missouri resisting arrest satisfied that definition in an appeal which did not raise the challenge Mr. Houston. *Id.* at 8, discussing *United States v. Brown*, 73 F. 4th 1011 (8th Cir. 2023).

This Court denied Mr. Houston's petition for a writ of certiorari on June 24, 2024. This petition is filed within 25 days of that order consistent with Supreme Court Rule 44.2.

The Court's ruling on whether crimes of inaction or omission resulting in injury constitute "the use of force" will bear on whether the act of holding still does, too.

Three weeks before Mr. Houston's Petition for a Writ of Certiorari was denied, the Court granted a petition to decide whether crimes based on inaction or omission resulting in injury to another constitute "the use . . . of physical force against the person of another" defined in 18 U.S.C. § 924(c)(3). *Salvatore Delligatti v. United States*, No. 23-285, Order granting Certiorari (June 3, 2024). The precedents of this Court that plainly bear on the issue in *Delligatti* also apply to the very similar claim Mr. Houston preserved in his original sentencing and on direct appeal in the Eighth Circuit. A decision for Delligatti may well confirm the Sentencing Guidelines error the Eighth Circuit failed to address—contrary to *Gall*—in Mr. Houston's direct appeal given the almost identical "force clause" definitions involved. Thus, the pending decision in *Delligatti* poses an intervening circumstance of substantial or controlling effect under Supreme Court Rule 44.2.

The *Delligatti* petition detailed an entrenched circuit split wherein eight circuits hold that any crime resulting in death or bodily injury "necessarily involves the use of violent force," even if the crime may be committed by inaction or omission. *Delligatti* Cert Petition at 15, citing *United States v. Scott*, 990 F.3d 94, 112-13 (2d Cir. 2021) (en banc); *United States v. Peeples*, 879 F.3d 282, 286-87 (8th Cir. 2018), among other authorities. All eight of these circuits apply the same analysis, one that broadly reads this Court's ruling in *United States v. Castleman*, 572 U.,S. 157 (2014), that "knowing or intentional causation of bodily injury necessarily involves the use of physical force." *Delligatti* Cert Petition at 15. In fact, the Court in *Castleman* "[d]id not reach" the question of whether "causation of bodily injury necessarily entails violent force,", *id.* at 167. Yet these eight circuits reason that the assertion in *Castleman* compels the conclusion that any serious bodily injury must necessarily entail violent force under *Castleman*'s "injury ergo force" phrasing. *Delligatti* Cert Petition at 15, quoting *United States v. Baez-Martinez,* 950 F.3d 538, 131-32 (1st Cir. 2020), quoting *Castleman,* 572 U.S. at 169-70.

Two Circuits reject the foregoing analysis. The Third Circuit held in 2018 that if a crime resulting in death or bodily injury can be committed through inaction, such as "the deliberate failure to provide food or medical care" despite a duty to do so," then the offense does not "include an element of 'physical force." *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018). The Third Circuit noted that this Court in *Castleman* addressed the distinct question of "whether the 'knowing or intentional causation of bodily injury' satisfies 'the common-law concept of 'force.'" *Id.* The en banc *Mayo* decision also explicitly did not reach the issue of whether causing "bodily injury" necessarily involves the use of "violent force," which Circuits including the Eighth Circuit apply to the Guidelines "force clause" definition based on this Court's interpretation of the identical definition in ACCA. *See Johnson v. United States*, 559 U.S. 133,

140 (2010); *United States v. Medearis*, 65 F. 4th 981, 9987-88 (8th Cir. 2023), quoting *Curtis Johnson*, 559 U.S. at 140; *United States v. Moore*, 635 F.3d 774, 777 & n.9 (5th Cir. 2011).

The Fifth Circuit has also concluded that an offense is "not categorically a crime of violence" if it "may be committed by both acts and omissions, *United States v. Martinez-Rodriguez*, 857 F.3d 282, 286 (5th Cir. 2017). Martinez-Rodriguez was sentenced under a provision of the Immigration and Nationality Act (INA) authorizing up to 20 years of imprisonment for a non-citizen who unlawfully reenters the country following a conviction for an "aggravated felony," defined in 8 U.S.C. § 1326(b)(2). The INA defines "aggravated felony" to encompass a felony "crime of violence," 8 U.S.C. § 1101(a)(43)(F), defined to include "an offense that 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. § 16(a). The Fifth Circuit also held that an "act of omission could not satisfy the functionally identical Guidelines definition of "crime of violence" for illegal reentry crimes in U.S.S.G. §2L1.2(b)(1)(A)(ii) & app. N. 1(b)(iii) (2013) in *United States v. Resendiz-Moreno*, 705 F.3d 203, 205-06 (5th Cir. 2013). In this case, the Fifth Circuit vacated a sentence that had been enhanced based on a conviction for a Georgia conviction for "first-degree cruelty to a child," Ga. Code Ann. § 16-5-70(b) (2010). The Georgia law was satisfied by maliciously depriving a child of medicine or by some other act of omission not involving the use of force. 705 F.3d at 205. *See also United States v. Trevino-Trevino*, 178 Fed. App'x 701, 702-03 (9th Cir. 2006) (unpub.) (a North Carolina law satisfied by a culpably negligent act or omission was not a crime of violence under the illegal-reentry guideline because "one cannot use . . . force against another in failing to do something.").

This Court's construction of the ACCA's identical "force clause" definition in *Borden* as excluding crimes that do not require force targeted to cause injury to another person will almost

certainly play a significant role in this Court's resolution of *Delligatti*, as it did in Mr. Houston's challenge to resisting arrest crimes satisfied by holding still as a law enforcement officer applies force to get a suspect to comply with an order. The Government's Brief in *Delligatti* cited *Borden*'s holding that the ACCA "force clause" required force "directed or targeted at another," although it argued that inactions or intentional omissions still satisfied that definition. *Delligatti,* Brief for the United States, p. 11, quoting *Borden*, 593 U.S. at 431, 443 (plurality opinion). Delligatti's original petition also noted that the Third Circuit maintained its view that crimes of inaction or omission fail to qualify as the use of force against another in the wake of *Borden*'s interpretation of "use . . . of physical force against the person of another" as "exclude[ing] conduct, like recklessness, that is not directed or targeted at another." *Delligatti*, Petition for a Writ of Certiorari, at 13, citing *United States v. Harris*, 68 F. 4th 140, 146 (3d Cir. 2023).

This Court's determination in *Delligatti* of whether acts of omission or inaction constitute the "use of force" in the functionally identical definition in Section 924(c)(3)(A) will very likely impact the answer to the claim Houston timely and fully litigated at his original sentencing and direct appeal in the Eighth Circuit. In fact, this Court has already rejected an argument that the force clause definition in Section 924(c)(3)(A) at issue in *Delligatti* encompasses "abstract" threats posed by an offender's conduct:

> "The statute speaks of the 'use' or 'attempted use' of 'physical force against the person or property of another.' Plainly, this language requires the government to prove that the defendant took specific actions against specific persons or their property."

United States v. Taylor, 596 U.S. 845, 855-56 (2022). A determination by this Court that the "force clause" definition does not encompass crimes of inaction or omission could well make clear that crimes satisfied by simply "holding still" likewise fall out of its scope. Such a ruling would support Mr. Houston's claim on a remand to the Eighth Circuit for reconsideration of his

preserved claim that significant procedural error occurred in the miscalculation of his Sentencing Guidelines range based on the District Court's finding that Missouri resisting arrest constituted a "crime of violence." As noted in Mr. Houston's Reply to the Government's Brief In Opposition, the Eighth Circuit panel included one judge who has strongly challenged claims by the Government that a resisting arrest law satisfied by "holding still" constituted the use or attempted use of force against the person of another. Reply to BIO, at 6-8, citing . *See Colvin v. United States*, No. 18-2283, Oral Argument at 19:00-19:03, 25:15-25:18 (8th Cir., April18, 2019).[1]

The Eighth Circuit's ruling in *Brown* perpetuates use of a common Missouri offense to wrongly inflate not only Sentencing Guidelines calculations as in Mr. Houston's case, but also sharply enhanced sentences for unlawful firearm possession under the ACCA despite this Court's precedents negating its qualification under the "force clause" definition. The Eighth Circuit's repeated avoidance of the merits of this issue negates the very purpose of reducing sentencing disparities for which this Court established and designed appellate review in *United States v. Booker,* 543 U.S. 220 (2005) and procedural reasonableness in *Gall*. Rehearing of the denial of Mr. Houston's Petition for a Writ of Certiorari is strongly warranted in light of the impact *Delligatti* may have on this issue.

[1] Accessible at media-oa.ca8.uscourts.gov/OAaudio/2019/4/182283.MP3 (last accessed July 19, 2024).

CONCLUSION

In light of the intervening and substantial ground that this Court's grant of certiorari and prospective decision in *Delligatti* and its likely impact on the issues Mr. Houston raises in his petition for a writ of certiorari, see S. Ct. R. 44.2, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, and grant review of the questions presented in his original petition for a writ of certiorari. In the alternative, Petitioner prays that this Court grant rehearing of the order of denial and hold his petition for conference and decision after the Court issues its decision in *Delligatti*.

Respectfully submitted,

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CERTIFICATION REGARDING GROUNDS FOR REHEARING
ON THE DENIAL OF PETITION FOR A WRIT OF CERTIORARI

As counsel for the petitioner, I, Tyler Keith Morgan, hereby certify that the attached petition for rehearing from the denial of certiorari in the above-styled case is restricted to the grounds specified Supreme Court Rule 44.2 and that the petition is presented in good faith and not for delay.

Executed on July 19, 2024

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