NO. _____

IN THE

Supreme Court of the United States

_____ TERM, 20__

KAYNE RUSSELL DONATH,

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 WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The district court increased Mr. Donath's sentence based upon his prior state of Iowa conviction for assault causing bodily injury or mental illness. In so doing, the court found that "causing bodily injury or mental illness" requires violent force. Mr. Donath's petition asks this Court to address:

1) **Whether a statute that does not require the affirmative use of force has, as an element, the use, attempted use, or threatened use of physical force?**[1]

2) **Whether a defendant establishes that a state conviction is broader than the generic definition of a criminal sentencing enhancement provision by pointing to *both* the statute's plainly overbroad language and a case example applying the statute in an overbroad manner?**

In 2023, the United States Sentencing Commission amended USSG §3E1.1(b), the acceptance of responsibility Guideline, at the urging of this Court, to resolve a circuit split. The amendment clarified that acceptance of responsibility should not be denied based upon pretrial motions or sentencing challenges. In Mr. Donath's case, the district court granted a two-level reduction for acceptance, but the prosecution refused to move for the third level based upon Mr. Donath's sentencing challenges. Mr. Donath's petition then asks this Court to address:

3) **Whether the recently amended acceptance of responsibility United States Sentencing Guideline provides federal prosecutors with sole discretion on whether to move for a third-level reduction?**

[1] This Court granted certiorari on a virtually identical question in *Delligati v. United States*, 23-825. This case is currently pending.

PARTIES TO THE PROCEEDINGS

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

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Northern District of Iowa and the United States Court of Appeals for the Eighth Circuit:

United States v. Donath, 2:22-cr-01028-001, (N.D. Iowa) (criminal proceedings) judgment entered April 17, 2023.

United States v. Donath, 23-1912 (8th Cir.) (direct criminal appeal), judgment entered July 12, 2024.

United States v. Donath, 23-1912 (8th Cir.) (direct criminal appeal), Order denying Petition for Rehearing entered August 29, 2024.

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kayne Donath respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's published opinion in Mr. Donath's case is available at 107 F.4th 830 and is reproduced in the appendix to this petition at Pet. App. p. 16.

JURISDICTION

The Eighth Circuit entered judgment in Mr. Donath's case on July 12, 2024. Pet. App. p. 29. This Court has jurisdiction over this case under 28 U.S.C. § 1254(1). Mr. Donath filed a petition for rehearing *en banc*. The Eighth Circuit denied this petition on August 29, 2024. Pet. App. p. 31. Mr. Donath filed one extension of time to file a petition for writ of certiorari, which this Court granted.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

USSG §4B1.2(a)

> (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; or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

USSG §3E1.1 – Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level. The term "preparing for trial" means substantive preparations taken to present the government's case against the defendant to a jury (or judge, in the case of a bench trial) at trial. "Preparing for trial" is ordinarily indicated by actions taken close to trial, such as preparing witnesses for trial, in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. Preparations for pretrial proceedings (such as litigation related to a charging document, discovery motions, and suppression motions) ordinarily are not considered "preparing for trial" under this subsection. Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered "preparing for trial."

STATEMENT OF THE CASE

Mr. Donath was indicted in the Northern District of Iowa on one count of possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). R. Doc. 3[2]. Eventually, Mr. Donath pleaded guilty to the sole count, without a plea agreement. R. Doc. 28.

A presentence investigation report (PSR) was created in preparation for sentencing. The PSR recommended a base offense level of 20, asserting that Mr. Donath had a prior conviction for a crime of violence. PSR ¶ 9. Specifically, the PSR found that Mr. Donath's prior Iowa assault on persons in certain occupations, causing bodily injury or mental illness, was crime of violence. PSR ¶¶ 9, 25.

Next, the PSR recommended a four-level increase for possessing the firearm in connection with another felony offense under USSG §2K2.1(b)(6)(B). PSR ¶ 10. The basis for this enhancement was that the driver of the vehicle alleged Mr. Donath threatened her with a firearm, and that is why she fled once law enforcement initiated the traffic stop. PSR ¶¶ 10, 5.

After a three-level reduction for acceptance of responsibility, Mr. Donath's total offense level was 21. PSR ¶ 18. Combined with a criminal history category VI, Mr. Donath's advisory Guideline range was 77 to 96 months of imprisonment. PSR ¶ 78.

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[2] In this brief, the following abbreviations will be used:
"R. Doc" -- district court clerk's record, followed by docket entry and page number, where noted;
"PSR" – Final presentence report, followed by the paragraph number, where noted; and
"Sent. Tr." – Sentencing hearing transcript, followed by page number.

Mr. Donath objected to PSR's Guideline calculation. R. Doc. 35, 48. First, he objected to the increase to his base offense level, arguing his Iowa assault conviction was not a crime of violence. R. Doc. 35, 48. Mr. Donath acknowledged that the Eighth Circuit had previously ruled this offense was a crime of violence under the force clause in *United States v. Hamilton*, 46 F.4th 864 (8th Cir. 2022), because the defendant in that case had failed to provide a case example establishing the statute was applied in an overbroad manner. R. Doc. 35, 48. In response, Mr. Donath noted he had found a case where the Iowa Court of Appeals had applied the statute in an overbroad manner, *State v. Hauck*, 908 N.W.2d 880 (Iowa Ct. App. Sept. 13, 2017), and that this satisfied the realistic probability test. R. Doc. 35, 48.

Mr. Donath also objected to the four-level increase for committing the offense in connection with another felony offense. R. Doc. 35. He generally denied the driver's report that Mr. Donath had threatened her with a firearm. R. Doc. 35. In its sentencing memorandum, the prosecution noted that Mr. Donath's objections to the PSR may impact whether he is eligible for a reduction for acceptance of responsibility under USSG §3E1.1. R. Doc. 50-1, p. 6 n.3, p. 10 n.4. The prosecution asserted this was based on both Mr. Donath's legal challenge to the base offense level and his factual objection to the four-level increase. R. Doc. 50-1, p. 6 n.3, p. 10 n.4.

The case proceeded to sentencing. At sentencing, Mr. Donath maintained his Guideline objections. Sent. Tr. pp. 4-5. The parties presented evidence on the contested four-level increase.

After hearing argument on the contested issues, the district court overruled Mr. Donath's Guideline objections. First, the court overruled Mr. Donath's objection to the base offense level, finding the Iowa Court of Appeals decision identified by Mr. Donath failed to establish a realistic probability of overbreadth and that *Hamilton* was binding on the district court. Sent. Tr. pp. 103-04; Pet. App. pp. 2-3.

Next, the court overruled Mr. Donath's challenge to the four-level increase, finding he did threaten the driver with a firearm. Sent. Tr. p. 104; Pet. App. p. 3. The court found the driver's testimony about the incident credible. Sent. Tr. p. 105.

After this ruling, the prosecution argued that the court should deny any reduction for acceptance of responsibility. Sent. Tr. p. 112; Pet. App. p. 4. The prosecution stated it would not move for the third level, regardless of the district court's ruling on the two-level reduction, because Mr. Donath had denied relevant conduct that went to a sentencing enhancement. Sent. Tr. pp. 112-13; Pet. App. pp. 4-5. In response, defense counsel noted that the objection was not frivolous, as the factual dispute came down to credibility, and that an upcoming amendment to the Guidelines clarified that sentencing challenges were not a proper basis for prosecutors to refuse to move for the third level of acceptance of responsibility. Sent. Tr. pp. 113-15; Pet. App. pp. 5-7.

The district court overruled the prosecution's objection and granted the two-level reduction for acceptance of responsibility. Sent. Tr. pp. 115-16; Pet. App. pp. 7-8. The court found the factual objection was not frivolous and acknowledged the

chilling effect denying acceptance would have on a defendant's ability to put the prosecution to its burden of proof. Sent. Tr. pp. 115-16; Pet. App. pp. 7-8. The court also declined to require the prosecution to move for the third level of acceptance or otherwise vary downward. Sent. Tr. p. 116; Pet. App. p. 8.

The court calculated Donath's advisory Guideline range at 84 to 105 months of imprisonment, based upon a total offense level of 22 and a criminal history category VI. Sent. Tr. p. 116; Pet. App. p. 8. The district court then imposed a sentence of 90 months of imprisonment. Sent. Tr. p. 135; Pet. App. p. 10. In doing so, the court stated:

> To be clear, I'm not sure that I would impose the same sentence if I was wrong on my assessment on the guideline calculations. I think it's important that the defense have an opportunity to appeal the base offense level ruling here. I think we can all benefit from some additional guidance from the Court of Appeals on that issue. And so I want to make it clear that I may or may not impose the same sentence if I'm wrong on the base offense level, and so I want to give that opportunity and make it clear that -- so that is an opportunity to appeal.

Sent. Tr. p. 135.

Mr. Donath appealed, and the Eighth Circuit Court of Appeals affirmed the district court. *United States v. Donath*, 107 F.4th 830 (8th Cir. 2024); Pet. App. p. 16. First, as to the base offense level argument, the panel declined to reevaluate its prior decision in *Hamilton* or evaluate whether the Iowa Court of Appeals decision in *Hauck* established Mr. Donath's prior conviction was overbroad. Pet. App. p. 22. The panel determined it was required by the prior panel rule to treat *Hamilton* as binding. Pet. App. pp. 22-23.

Next, the panel rejected Mr. Donath's challenge to the denial of the third level of acceptance. Pet. App. p. 26. The panel agreed that Mr. Donath had preserved error and agreed that the amended Guideline applied to Mr. Donath on appeal, as the amendment was a "clarification." Pet. App. pp. 24-25.

Still, the panel found no error, based upon commentary note 6 to §3E1.1. Pet. App. p. 26. The commentary states that the third level "*may only* be granted upon a formal motion by the Government at the time of sentencing." Pet. App. p. 26. According to the panel, the prosecution has the sole discretion to determine if the third level is warranted. Pet. App. p. 26.

The panel did acknowledge that the prosecutor's decision must not be based on an unconstitutional motive or irrational. Pet. App. p. 26. The panel found that objecting to a sentencing enhancement, an objection that the district court determined was nonfrivolous, was a rational basis to deny the third level. Pet. App. p. 27. According to the panel, the amended Guideline that explicitly removed sentencing hearings from "preparation for trial" did not change that. Pet. App. p. 27.

Mr. Donath filed a petition for rehearing *en banc*. The circuit denied the petition. Pet. App. p. 31.

REASONS FOR GRANTING THE WRIT

Mr. Donath's sentence was increased based on a prior conviction for Iowa assault on persons in certain occupations causing bodily injury or mental illness, in violation of Iowa Code § 708.3A(3). The lower courts agreed that this conviction was a crime of violence under the force clause because it required the use of violent force. Iowa Code § 708.3A(3) states that an individual who commits an assault, as defined under Iowa Code § 708.1, on persons in certain occupations, and "causes bodily injury or mental illness," is guilty of an aggravated misdemeanor. It was undisputed below that Iowa generic assault under § 708.1 does not satisfy the force clause. Therefore, the statute can only be used to increase Mr. Donath's sentence if "causes bodily injury or mental illness" satisfies the force clause.

This presents two questions appropriate for review from this Court. First, the statute does not require the affirmative use of force. This Court is currently addressing a circuit split on whether the affirmative use of force is necessary to satisfy the force clause in *Dellagati v. United States*. Second, the Eighth Circuit's requirement for the level of proof to show overbreadth under the categorical approach is inconsistent with this Court's precedent. This Court's case law supports that overbroad statutory language is sufficient to establish overbreadth. Below, the Eighth Circuit determined overbroad language *and* a case example showing overbreadth were insufficient to show a categorical mismatch. This Court should grant the petition to address these questions.

I. Mr. Donath's sentence was increased based upon a prior state assault conviction that does not require the affirmative use of force. This Court is addressing whether a similar statute satisfies the force requirement in *Delligati v. United States*.

First, because the statute only requires that conduct "cause" injury, it does not necessarily require violent force. Courts are presently split on this question. *United States v. Scott*, 990 F.3d 94, 113 (2d Cir. 2021) (discussing split). Courts disagree on the application of *United States v. Castleman*, 572 U.S. 157 (2014), when analyzing the necessary level of force in the sentencing context. The Eighth Circuit, relying upon *Castleman*, held that the affirmative use of force is not required to satisfy the force clause. *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016). The Eighth Circuit's application of *Castleman* outside of the misdemeanor crime of domestic violence context is error.

In *Castleman*, this Court was asked to decide whether a Tennessee statute criminalizing domestic assault was a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g), which is defined by 18 U.S.C. § 921(a)(33)(A)(ii) as an offense that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon ...." *Castleman*, 572 U.S. at 161. The Court held that in the specific context of § 921(a)(33)(A)(ii), Congress intended the term "force" to have its common-law meaning, which includes mere offensive touching as well as indirect uses of force, such as poisoning a victim, reasoning that "it is impossible to cause bodily injury without applying force in the common-law sense." *Id*. at 170-71. The Court recognized that the common-law definition of force is broader than the "violent force"

requirement . . . which is applicable to "crime of violence" determinations under the ACCA. The *Castleman* Court's review was limited to the unique context of domestic violence; it could not have implicitly resolved the question of whether a particular crime involves "*violent* force" under the ACCA because "the majority opinion [in *Castleman*] explicitly reserved" that question.

Because *Castleman*'s force analysis expressly applied only to the "common-law" definition of force applicable to § 921(a)(33)(A)(ii), and did not examine the "violent force" requirement of USSG §4B1.2(a)(1), Mr. Donath respectfully suggests that *Rice*'s reliance on it as dispositive was erroneous.

This Court should address this split on whether simply causing an injury is sufficient to satisfy the violent force requirement. Likely, the Supreme Court will address this question in the currently pending *Delligati v. United States*, 23-825. Therefore, Mr. Donath requests that this Court either grant his petition or alternatively hold the petition until this Court's decision in *Delligati*, in the likely circumstance that this decision is dispositive to Mr. Donath's case.

II. The Eighth Circuit's application of the realistic probability test has further strayed from this Court's precedent. The Eighth Circuit held that both overbroad statutory language and a case example establishing overbreadth are insufficient to show a categorical mismatch.

On its plain language, Mr. Donath's prior conviction is overbroad. An individual can be convicted under this statute for causing "mental illness." However,

under Eighth Circuit precedent, overbroad language is insufficient to establish a categorical mismatch and satisfy the "realistic probability test."

First, Mr. Donath asserts the petition for writ of certiorari should be granted because requiring more than plainly overbroad language is inconsistent with this Court's precedent. Most recently, in *Taylor v. United States*, 596 U.S. 845 (2022), this Court unequivocally held that overbroad statutory language alone establishes a mismatch. In *Taylor*, the Court addressed whether attempted Hobbs Act robbery was a crime of violence under 18 U.S.C. § 924(c)(3)(A). Mr. Taylor asserted that attempted Hobbs Act robbery was overbroad because it did not require a communicated threat of force. As relevant to this petition, the government asserted that Mr. Taylor needed to identify a specific case where the government had successfully prosecuted an individual for attempted Hobbs Act robbery without proving a communicated threat.

This Court rejected the government's argument. 596 U.S. at 857. The Court first noted the "oddity of placing a burden on the defendant to present empirical evidence about the government's own prosecutorial habits," and it pointed to the practical burdens such a requirement would present, as most cases end in guilty pleas and are not accessible via legal databases. *Id.*

This Court also found *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007)—which held that a case example is required to establish a mismatch when the statutory language is vague—inapplicable when the statutory language was overbroad on its face. The Court held that *Duenas-Alvarez* was distinguishable, because in that case

"the elements of the relevant state and federal offenses clearly overlapped and the only question the Court faced was whether state courts also 'appl[ied] the statute in [a] special (nongeneric) manner.'" *Id*. at 858-59 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)) (alterations in original). Instead, as in *Taylor*, when the relevant statutes simply do not match the generic definition, that "ends the inquiry, and nothing in *Duenas-Alvarez* suggests otherwise." *Id*. The Eighth Circuit's failure to follow *Taylor* requires correction.

Second, this Court should grant the petition because the Eighth Circuit went a step further and allowed the sentencing enhancement to stand *even* when Mr. Donath provided a case example. Below, the circuit did not even address whether this case example established overbreadth because it determined it was bound to follow its prior decision in *United States v. Hamilton*, 46 F.4th 864 (8th Cir. 2022), where the defendant only relied upon the statute's plain language and did not provide a case example establishing overbreadth. The panel in Mr. Donath's case said it could only reconsider the question *en banc*, but then the Eighth Circuit declined *en banc* review.

Mr. Donath found a case where Iowa courts convicted an individual for "assault causing mental illness" when the use of violent force was not present—*State v. Hauck*, *State v. Hauck*, 908 N.W.2d 880 (Iowa Ct. App. Sept. 13, 2017). In *Hauck*, the defendant pleaded guilty to a similar assault offense, specifically "assault causing bodily injury or mental illness." The factual basis for the offense was as follows:

> In order to establish a factual basis I ask the court to accept as true the minutes of testimony, the date of the offense is 9/18/15 and I admit I did the following: made physical contact with [the victim] which was insulting or offensive and resulted in depression and/or anxiety.

Id. at *1. Specifically, the factual basis admitted (which the Iowa Court of Appeals acknowledged was a sufficient factual basis for the assault) was that the defendant poked the victim in the stomach. *Id.* at *2. Therefore, based upon *Hauck*, Mr. Donath's statute of conviction is overbroad.

This Court should grant the petition for writ of certiorari to ensure the Eighth Circuit's case law on the categorical approach is consistent with this Court's precedent.

III. The Eighth Circuit's interpretation of the recently amended acceptance of responsibility Guideline is inconsistent with the plain language of the Guideline. The circuit's interpretation is a rejection of the Commission's attempt to resolve a circuit split.

Finally, this Court should grant certiorari to address the Eighth Circuit's interpretation of USSG §3E1.1 that grants prosecutors virtually unlimited discretion. The Eighth Circuit's interpretation of USSG §3E1.1 invalidates a recent amendment to the U.S. Sentencing Guidelines. While Mr. Donath's appeal was pending, the U.S. Sentencing Commission's amendment to the acceptance of responsibility Guideline, USSG §3E1.1, went into effect. The amendment was intended to resolve a circuit split, at the urging of this Court, on whether refusing to move for a third-level reduction based upon a sentencing challenge is a proper basis under §3E1.1 and the commentary. *See* Amendments to the Sentencing Guidelines, Circuit Conflicts, pp.

72-74 (April 27, 2023), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf; *see also United States v. Jordan*, 877 F.3d 391, 395-96 (8th Cir. 2017) (discussing circuit split and citing cases). The commission stated:

> The amendment addresses the circuit conflicts by providing a definition of the term "preparing for trial," which appears in §3E1.1(b) and Application Note 6 to §3E1.1. The amendment also deletes hortatory language that the Commission previously added to Application Note 6 roviding that the "government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal." See USSG App. C, amend. 775 (effective Nov. 1, 2013).

Id. The Commission further explained that preparing for sentencing is explicitly not part of the definition of "preparing for trial." *Id.*

Consistent with these goals, the definition of "preparation for trial" under USSG §3E1.1(b) now states:

> The term "preparing for trial" means substantive preparations taken to present the government's case against the defendant to a jury (or judge, in the case of a bench trial) at trial. "Preparing for trial" is ordinarily indicated by actions taken close to trial, such as preparing witnesses for trial, in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. Preparations for pretrial proceedings (such as litigation related to a charging document, discovery motions, and suppression motions) ordinarily are not considered "preparing for trial" under this subsection. Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered "preparing for trial."

Id. In addition, the relevant portions of commentary note 6 now states: "Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under

subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. *See* section 401(g)(2)(B) of Public Law 108–2." *Id.* (emphasis added).

The Eighth Circuit's decision attempts to overrule this amendment. By selectively relying on the second half of commentary note 6, the circuit has given prosecutors virtually unfettered discretion to deny the third level of acceptance of responsibility. This interpretation ignores the first half of the commentary note. It is "a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted). Congress gave prosecutors the authority to move for a third level "[b]ecause the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial . . ." USSG §3E1.1, cmt. (n.6). True, a defendant cannot challenge a prosecutor's assessment that the defendant has (or has not) assisted them in avoiding trial preparation. But to read the second half of the commentary to allow prosecutors to deny third level for reasons outside of trial preparation is inconsistent with the Guideline language itself. Both Congress and the Commission have made clear that the purpose of the third level is avoiding preparing for trial, but the Eighth Circuit's interpretation allows prosecutors the ability to deny for additional reasons. This is improper and will ensure a continued circuit split.

CONCLUSION

For the reasons stated herein, Mr. Donath respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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