



Supreme Court Clarifies That a “Crime of Violence” May Be Committed by “Omission”

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Federal law, at 18 U.S.C. § 924(c), triggers a mandatory minimum penalty of five years of imprisonment for using or carrying a firearm in the commission of a “crime of violence.” Section 924(c) further defines a “crime of violence” for purposes of this mandatory minimum to include an offense that is a felony and that “has as an element the use . . . of physical force against the person . . . of another.” An open question has been whether a person who knowingly refrains from action to cause death or bodily injury to another uses physical force for purposes of Section 924(c). As examples, consider circumstances in which someone knowingly allows another to fall through an open manhole cover, neglects to provide lifesaving medicine or nutrition to another, permits a hostage to starve, fails to rescue a drowning swimmer, or does not stop his vehicle as it heads downhill toward another person. Whether a Section 924(c) “crime of violence” may be committed by omission, or a failure to act, has engaged and divided ten federal appeals courts in line-drawing challenges.

On March 21, 2025, the Supreme Court in *Delligatti v. United States* resolved the circuit split, holding by a 7-2 vote that a defendant who causes bodily injury or death to another necessarily uses “physical force” within the meaning of Section 924(c) even if the result is caused “by omission rather than action.” This Sidebar begins with an overview of Section 924(c), gives background information on *Delligatti*, and covers the majority and dissenting opinions from the Court. The Sidebar concludes with considerations for Congress.

Section 924(c)

The term “crime of violence” appears in numerous federal statutes. Three federal criminal laws contain definitions of the term or similar terms. The Comprehensive Crime Control Act of 1984, found in 18 U.S.C. § 16, provides a definition of “crime of violence” in an effort to standardize the definition of the term in federal criminal law. The Armed Career Criminal Act, located in 18 U.S.C. § 924(e), subjects an individual who commits a firearms offense and who has three previous convictions for a “violent felony” or a “serious drug offense” to a fifteen-year mandatory minimum sentence. Section 924(c) subjects individuals who use or carry a firearm in connection with a “crime of violence” to a five-year mandatory minimum. The definitions of a “crime of violence” or “violent felony” in these statutes are similar in that

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they contain two subparts—the first known as the elements clause, and the second the residual clause. In particular, Section 924(c) defines a “crime of violence” as “an offense that is a felony” that

has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Delligatti v. United States

Background

In this case, the defendant Salvatore Delligatti was connected to an organized crime entity. Delligatti had hired members of the “Crips” gang to murder a person who was both bothering Delligatti’s associate and posing a potential competitive threat to the entity. Delligatti supplied a gun and a car to be used in the murder. Those who were to carry out the murder approached the target’s home, but they abandoned the plan due to the presence of potential witnesses. They attempted a second time, but by this time law enforcement knew of the plot and subsequently arrested Delligatti and others.

Delligatti was charged with and convicted of committing several crimes, including possessing a firearm in furtherance of a “crime of violence” under 18 U.S.C. § 924(c). The predicate offense for the Section 924(c) violation was attempted second-degree murder, under N.Y. Penal Law § 125.25(1), in aid of racketeering, under 18 U.S.C. § 1959(a)(5). On appeal before the U.S. Court of Appeals for the Second Circuit (Second Circuit), Delligatti pointed out that second-degree murder in New York may be committed by act or omission. He argued, among other things, that an omission cannot serve as a crime of violence. Applying circuit precedent, the Second Circuit rejected this proposition, reasoning that a defendant’s intentional use of physical force against another qualifies as a crime of violence “whether a defendant acts by commission or omission.” Delligatti asked the Second Circuit to reconsider its ruling in light of the Supreme Court’s 2022 opinion in *United States v. Taylor*—in which the Court held that the “categorical approach” applies to determining whether an offense falls within the elements clause of Section 924(c) and that a federal robbery offense does not so fall. On rehearing, the Second Circuit reached the same conclusion on the defendant’s omission argument, affirming his conviction under Section 924(c). In doing so, the Second Circuit joined seven circuits (the U.S. Courts of Appeals for the First, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits) in finding that an omission is enough for Section 924(c) purposes, with two circuits (the U.S. Courts of Appeals for the Third and Fifth Circuits) coming to the opposite conclusion.

Legal Issues

Litigation regarding whether a predicate offense constitutes a “crime of violence” generally has coalesced around several issues, including the constitutionality of Section 924(c), the proper analysis courts are to use in assessing whether a crime constitutes a crime of violence, the mental state required under Section 924(c), and the amount of force sufficient for the “physical force” element of Section 924(c). These issues also arose in the course of the *Delligatti* case.

Courts have evaluated whether the residual clause is unconstitutionally vague. A court may determine that a statute is vague under the Fifth Amendment if it fails to give a person fair warning as to what conduct is unlawful and therefore may lead to criminal penalties. In *Davis v. United States*, the Supreme Court held that the residual clause violates this principle. In *Delligatti*, the defendant initially raised a vagueness challenge at the Second Circuit level before *Davis* was decided. After *Davis*, the Second Circuit only

addressed whether the predicate offenses are “crimes of violence” under the remaining elements clause. Given this limited scope, the defendant did not **ask** the Supreme Court to weigh in on the constitutionality of Section 924(c).

Courts have also decided which analytical approach should be used to determine if an offense qualifies as a “crime of violence.” Here, the parties **agreed** that the “categorical approach” governed the analysis of whether the defendant’s predicate offense constituted a crime of violence. Under the “categorical approach,” a court probes whether the statutory elements of the predicate offense are identical to or less inclusive than the elements of the federal crime of violence statute. This approach does not consider the defendant’s offense conduct or the facts underlying the conviction. Here, the defendant did commit some act: ordering the murder and providing the gun and the car. Under the categorical approach, however, the facts of the case are immaterial.

In addition, courts have looked at whether a “crime of violence” requires a specific mental state. The foundational components of criminal liability generally encompass a guilty act (*actus reus*) committed with a culpable state of mind (*mens rea*). As the Supreme Court **wrote** in *Morissette v. United States*, a crime typically requires the “concurrence of an evil-meaning mind with an evil-doing hand.” Here, the federal appeals court **observed** that Delligatti intended to cause the death of another, which the defendant did not seem to **contest**. Because intent or purpose is the highest mental state under general criminal law principles, the defendant’s uncontested mental state was not a factor in this case.

Finally, courts have examined the amount of force that is necessary for an act to satisfy the “physical force” component of the “crime of violence” definition. Here, the parties **agreed** that “physical force” under Section 924(c) involves “violent force.” As to the quantum of force, the defendant **accepted** the position that even verbally convincing an individual to come into contact with a violent force is sufficient use of physical force.

As indicated, the general issues that arise in the “crime of violence” context were discussed in the course of the *Delligatti* litigation. Left outstanding in the case was an additional question related to the *actus reus* that divided the federal appeals courts and that the Supreme Court had yet to resolve: whether the defendant must engage in affirmative conduct for the offense to count as a crime of violence for Section 924(c) purposes.

The Parties’ Arguments

In the main, the defendant **argued** that the elements clause of Section 924(c) requires “active conduct” and, as such, predicate crimes that may be committed by omission do not satisfy Section 924(c)’s elements clause. The plain meaning of the word “use” in the elements clause, the defendant **contended**, refers to a “volitional act,” channeling force to alter the path it would otherwise take, directing it to another. Force that “has been unleashed into the world by someone or something else” and that would continue its course in the absence of an individual’s presence or action indicates that the individual has not “used” force in the ordinary sense, the defendant **added**. The defendant **argued that** failing to counteract force is not the same as affirmatively using force. The defendant conceded that force may be applied directly (e.g., a punch or a push) or indirectly (e.g., pulling a trigger or poisoning a drink), but in either instance the individual has “used” force. Turning to other language in the elements clause, the defendant **posited** that an “attempt” requires taking a substantial step and that to “threaten” requires communicating, both signaling active conduct.

The United States **stressed** that, at common law and throughout American jurisprudence, an individual may bear criminal culpability for both a voluntary act and for a failure to act. The United States also **relied on** *Castleman v. United States*, in which the Supreme Court **rejected** the proposition that a “crime of domestic violence” cannot be committed without making contact of any kind. The *Castleman* Court suggested that the “use” of physical force **refers** to employing physical force or making physical force the

user's instrument. As an example, the Court *observed* that an individual who tricks another into drinking poison, thereby unleashing the toxic nature of poison upon the body of another, has used physical force without directly administering the poison to the victim. The United States *urged* that the difference between passive failure to then give an antidote or affirmatively withholding the antidote is semantic, reducing "use" to "word games."

Delligatti sought to *distinguish Castleman* on the ground that, in the poison example, the application of physical force "originated" with the perpetrator and that the hypothetical still involves an affirmative act on the part of the perpetrator: a deceitful communication. In this sense, the defendant *argued*, *Castleman* does not support the conclusion that an individual "uses" physical force when those forces exist and persist independent of the individual.

Supreme Court Opinions

By a 7-2 margin, the Justices ruled for the United States. In an *opinion* for the majority, Justice Thomas *framed* the question before the Court as whether *Castleman*'s interpretation of a crime of violence in the domestic violence context should be extended to the elements clause of Section 924(c). The Court *held* that, "[a]s in *Castleman*, the 'use' of 'physical force' in Section 924(c) encompasses the knowing or intentional causation of bodily injury," regardless of whether "an offender causes bodily injury by omission rather than affirmative act." The Court *recounted* a principle from *Castleman* that, "A person uses force in that sense when he makes force his 'instrument,' whether directly or indirectly." The Court *added that* in other "crime of violence" caselaw, the Court has equated "use" with converting to one's service or to employ. This understanding of "use" comports with ordinary usage, the Court *wrote*—for example, when a car owner "uses" rain to wash his vehicle by leaving it outside. The Court explained that intentionally causing the death of another may be committed by omission, emphasizing that this view has "deep roots in the common law" and that the *causation requirement* ensures that the death may be traced to the defendant. To highlight the point, the Court *said* that, "When a young child starves to death after his parents refuse to give him food, that harm would not have occurred but for the parents' choice."

Justice Gorsuch, in a dissenting *opinion* joined by Justice Jackson, registered several complaints with the majority's holding. He *contended* that "use" refers to active conduct, not inaction or inactivity. The Court's *caselaw* and a *Senate Report* on federal criminal law—which provides that an "'operator of a dam [who] refuse[d] to open the floodgates during a flood, thereby placing the residents of an upstream area in jeopardy of their lives'" would not commit a 'crime of violence' since 'he did not . . . use physical force'"—confirms this ordinary usage, Justice Gorsuch suggested. Moreover, the use of physical force does not include "letting a pre-existing force of nature run its course," he *maintained*. Furthermore, he *continued*, a violent act is to be more than *mere touching*, and if certain physical acts are insufficient, then it follows that non-physical acts are insufficient, too. Congress has expressly mentioned "omission" in other statutes, and did not do so here, which indicates, *according* to the dissent, that Congress did not intend for a crime of violence to reach omissions. Justice Gorsuch also *claimed* that *Castleman* is inapposite, as the Court did not discuss omissions. The dissent also charged that, to the extent that traditional understandings of omissions in criminal law are relevant, criminal culpability for an omission would attach under common law only when there was a *duty* to act and the defendant failed to take action.

Considerations for Congress

The elements clause of a "crime of violence" under Section 924(c) implicates several fundamental concepts in criminal law, including mental state, degree of force, causation, and the resulting harm. Each of these concepts, and others, has produced significant debate, if not serious disagreement, among judges. Beyond the elements clause, the residual clause of "crime of violence" has been *found* to be unconstitutionally vague. As *Delligatti* demonstrates, the Supreme Court at times has struggled to *discern*

congressional intent as to the meaning of a “crime of violence” in the context of federal criminal law. If Congress believes that the courts’ decisions do not align with congressional intent, Congress retains the authority to revisit and revise the definition of a “crime of violence” in Section 924(c) and elsewhere to provide clarity to the courts, practitioners, and the public.

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