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High Court 'Violent Crimes' Case Tangled Up In Hypotheticals

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In a case to be argued next week, Delligatti v. U.S., the U.S. Supreme Court will decide whether attempted murder under New York law constitutes a crime of violence for the purposes of an enhanced sentence under federal firearms law.[1]

Although the answer to this question may seem obvious, a series of court rulings going back several decades has turned this subject into a thought experiment with fanciful hypotheticals, the likes of which could be found on law school exams.

In this article, we discuss the background law and the briefing in Delligatti, and we propose a way to resolve the complicated issues presented by this case.

Relevant Case Law

A person who does not practice criminal law might wonder, "How could it be that attempted murder is not a crime of violence?"

The answer begins with a study of the so-called categorical approach, the method by which the Supreme Court has directed lawyers and judges to decide whether a particular crime is a crime of violence under federal firearms law.[2]

The categorical approach looks not to the specific facts of the underlying crime — that is, whether the crime was committed in a manner that involved the use of violence — but rather solely considers the elements defining the particular crime in question.[3] If those elements in all instances would require the use of violence, then the crime is a "crime of violence."

The Supreme Court first required the categorical approach in its 1990 Taylor v. U.S. decision,[4] based on congressional intent and the potential complications that sentencing courts would face if they needed to consider the underlying criminal conduct.[5]

Delligatti's Conviction and Sentence

Delligatti concerns Title 18 of the U.S. Code, Section 924(c), which imposes a mandatory minimum five-year sentence, on top of the sentence imposed for the underlying crime, for someone who is found to have used a firearm to further a crime of violence.[6] The sentence is longer if the firearm was brandished (seven years) or discharged (10 years) in the course of the offense.

For purposes relevant here, Section 924(c) defines a "crime of violence" as "a felony [that] has as an element the use, attempted use or threatened use of physical force against the person or property of another."[7]

Under the categorical approach, courts ask whether the minimum criminal conduct that is required for a conviction under the felony statute involves the use, attempted use or threatened use of physical force.[8]

Delligatti was convicted of using a firearm in furtherance of the crime of attempted murder in aid of racketeering, in particular, a state law predicate offense of attempted second-degree murder under New York Penal Law Section 125.25(1).[9]

Under the categorical approach, it makes no difference what Delligatti actually did; all that matters is whether or not it would be possible to commit attempted murder under this statute without the "use, attempted use, or threatened use of physical force."[10]

In 2018, Delligatti received a five-year sentence under Section 924(c) in the U.S. District Court for the Southern District of New York.[11] The U.S. Court of Appeals for the Second Circuit affirmed, and on June 3, the Supreme Court granted Delligatti's certiorari petition.[12]

Merits Briefing in the Supreme Court

Delligatti argues to the court that attempted second-degree murder under New York law[13] is not a crime of violence because it could be completed by omission rather than by force.[14]

While most attempted murders involve force, the New York Court of Appeals has held that a person can commit attempted second-degree murder by omission by failing to obtain lifesaving medical care, notwithstanding a legal duty to do so.[15]

Delligatti claims that a crime of violence cannot be committed by omission because failing to act does not "categorically involve the use of physical force against another."[16]

Delligatti explains that Section 924(c)'s language and purpose weigh against finding murder by omission a crime of violence, arguing that "use, attempted use or threatened use of physical force against the person or property of another" all "require[] affirmative conduct."[17]

Delligatti analyzes each part of the definition. First, the "use of force" requires an act to "knowingly ... cause physical harm."[18] Next, "physical force" means force that is "exerted by and through concrete bodies," requiring "that one object has touched another and applied pressure to it."[19] Finally, the phrase "against the person or property of another" means that an "offender 'direct[s] force at another.'"[20]

None of these cover someone who fails to act, and so attempted murder by omission is not a crime of violence. A person who does nothing cannot commit a crime of violence.[21]

In opposition, the government makes two principal points. First, the government offers a broader interpretation of the elements clause.[22] Even if brought about by an omission, intentionally "causing a person's body to cease functioning," such as by intentional omissions, constitutes physical force.[23]

Omissions may constitute a crime of violence, as the use of "lethal force" to cause death "can be accomplished by abstaining from a legal duty ... just as much as it can by any other deliberate employment of force."[24]

Beyond its textual arguments, the government also looked to statutory intent: Can it really be that Congress passed a law that granted sentence enhancements based on crimes of violence that does not apply to the most violent of crimes, like attempted murder? Such an "interpretation ... would effectively render Section 924(c)... 'self-defeating.'"[25]

Delligatti's reply brief argues that "[t]he Government's interpretation of Section 924(c)(3)(A) relies on 'the broadest imaginable definitions of its component words,'" and would require the Supreme Court to "give each [word] idiosyncratic definitions," as opposed to their ordinary meaning.[26]

Moreover, a Senate report in 1981 defined the meaning of a "crime of violence" to exclude "a person who 'refuse[s]' to take action to avoid 'jeopardy' to human life."[27]

Amici Discuss Implications of Categorical Approach

The government's fear that reversal will lead courts to conclude that other seemingly violent crimes are not crimes of violence has already come to pass. Courts have held that many offenses are not crimes of violence, even though they may seem obviously violent to "a man on the street," as noted by the Federal Public Defender Offices in the Second Circuit's amicus brief.[28]

In its 2022 decision in U.S. v. Taylor, the Supreme Court held that attempted armed robbery under the Hobbs Act is not a crime of violence because the attempted and threatened use of force may not involve any actual violence.

At oral argument, defense counsel used a novel hypothetical to demonstrate how this could be possible: A defendant could drive to a store with an unloaded gun and a threatening note, not enter the store, and then be stopped by police on the way home and confess.[29] This would be sufficient to show attempted robbery by threat, but would not involve any actual or threatened force.[30]

Nor is the type of abstraction in Taylor unique — as the Federal Public Defender Offices explained in their brief, many seemingly violent crimes are not crimes of violence.[31]

For example, the U.S. Court of Appeals for the Eleventh Circuit found in its 2017 U.S. v. Davis decision that, under Alabama law, "sexual abuse by forcible compulsion" — i.e., rape — is not a "crime of violence," because the contact could be the "merest touching," which would not meet the requirement of physical force.[32]

Additionally, the amicus brief notes, federal kidnapping is not a crime of violence because it could be achieved "by means of inveiglement and/or decoy ... and then maintained solely by psychological force."[33]

Furthermore, four federal circuits have found that Title 18 of the U.S. Code, Section 844(i), which criminalizes bombing — i.e., "destroying property by means of an explosive" — is not a crime of violence as one could be convicted for using explosives to destroy their own property,[34] not "the person or property of another."[35]

If rape, kidnapping, bombing and now attempted murder are not crimes of violence, one wonders whether Section 924(c) makes any sense at all.

Delligatti and a Modest Solution for Resolving Future Section 924(c) Litigation: Repeal the Statute

Delligatti shows how the categorical approach relies on hairsplitting legal hypotheticals and reaches absurd results.

Although it is never certain how the justices will rule in a given case, one can look to the court's 2022 Taylor decision for guidance. In Taylor, a 7-2 majority found in favor of Taylor and held that attempted armed robbery under the Hobbes Act — a violent-sounding crime, to be sure — is not a crime of violence.[36]

The Taylor majority relied upon the categorical approach when interpreting Section 924(c).[37] Given the court's avowed commitment to textualism and its reliance on the categorical approach, one would think that Delligatti is likely to prevail.

The court has little issue with the seeming contradiction of treating violent crimes, like armed robbery and attempted murder, as not being crimes of violence.

So long as the Supreme Court remains supportive of the categorical approach and requires its implementation when analyzing elements clauses, lower courts cannot simply get rid of the categorical approach.

However, Congress can get rid of Section 924(c), with minimal consequences. As the federal defenders explained in their amicus brief, even without Section 924(c), those convicted of violent crimes will still face long sentences, "even if their crimes are not technically ones of 'violence.'"[38]

For example, in its 2021 U.S. v. Gillis decision, while the Eleventh Circuit held that kidnapping was not a crime of violence, Gillis was still sentenced to 365 months.[39]

Even without mandatory sentences, judges can impose sentences that fit the specific circumstances of individual defendants. In some cases, this might reduce the costs of our overgrown carceral system. And where it is warranted, decadeslong incarcerations can still be imposed without Section 924(c), and without the time-wasting uncertainty caused by the categorical approach.

After Delligatti, Congress should recognize that requiring hypertechnical arguments regarding enhancements leads to counterintuitive outcomes and unnecessarily long prison sentences, and repeal Section 924(c).

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[1] See 18 U.S.C. § 924(c)(1)(A)(i).

[2] See Johnson v. United States, 576 U.S. 591 (2015) (using the categorical approach when reviewing the Armed Career Criminal Act).

[3] United States v. Taylor, 596 U.S. 845, 850 (2022).

[4] Taylor v. United States, 495 U.S. 575 (1990).

[5] Id. at 600–601.

[6] 18 U.S.C. § 924(c)(1)(A).

[7] 18 U.S.C. § 924(c)(3)(A).

[8] United States v. Pastore, 83 F.4th 113, 118 (2d Cir. 2023).

[9] Id. at 115.

[10] 18 U.S.C. § 924(c)(3)(A).

[11] Brief for the United States at 8, Delligatti v. United States, No. 23-825 (Sept. 30, 2024).

[12] See generally Pastore, 83 F.4th 113; Delligatti v. United States, 144 S. Ct. 2603 (June 3, 2024) (mem).

[13] A person is guilty of second-degree murder if "with intent to cause the death of another person, he cause[d] [or aided and abetted] the death of such person or a third person." New York Penal Law § 12.25(1). Someone would be guilty of attempted second degree murder if they took "action . . . so near to the crime's accomplishment that in all reasonable probability the crime itself would have been committed." Pastore, 83 F.4th at 120.

[14] Brief for Petitioner at 7, Delligatti v. United States, No. 23-825 (Aug. 8, 2024).

[15] People v. Best, 609 N.Y.S.2d 478, 480 (4th Dep't 1994), aff'd, 648 N.E.2d 782 (N.Y. 1995) (mother who failed to seek medical attention for her child whom she had beaten committed depraved indifference murder); People v. Steinberg, 79 N.Y.2d 673,681 (N.Y. 1992) (father committed first-degree manslaughter after beating his daughter, causing blunt head trauma, and failing to get medical attention).

[16] Brief for Petitioner, supra note xiv, at 11.

[17] Id.

[18] Id. at 12 (quoting United States v. Castleman, 572 U.S. 157, 171 (2014)).

[19] Id. at 17.

[20] Id. at 22 (quoting Borden v. United States, 593 U.S. 420, 431–32 (2004)).

[21] Brief for Petitioner, supra note xiv, at 23–24.

[22] See generally Brief for the United States, supra note xi.

[23] Id. at 9.

[24] Id. at 21

[25] Id. at 9, 29, 31.

[26] Reply Brief for Petitioner at 1-2, Delligatti v. United States, No. 23-825 (Oct. 30, 2024) (quoting Dubin v. United States, 599 U.S. 110, 120 (2023)).

[27] Id. at 14–15 (citing S. Rep. No. 97-307, at 591 (1981) (addressing statute with "identically worded elements clause").

[28] Brief of Federal Public Defender Offices in the Second Circuit as Amici Curiae in Support of Petitioner ("FD Amicus"), Delligatti v. United States, No. 23-825 at 2 (Aug. 30, 2024).

[29] Transcript of Oral Argument at 47, United States v. Taylor, 596 U.S. 845 (2022) (No. 20-1459).

[30] Id. at 47–48.

[31] FD Amicus, supra note xxviii, at 3.

[32] Id.

[33] Id. at 13 (quoting United States v. Gillis, 938 F.3d 1181, 1209 (11th Cir. 2019)).

[34] Id. at 18 (citing United States v. Mathews, 37 F.4th 622, 624 (9th Cir. 2022); In re Franklin, 950 F.3d 909, 911 (6th Cir. 2020); United States v. Salas, 889 F.3d 681, 684 (10th Cir. 2018); United States v. Wilder, 834 F. App'x 782, 784 (4th Cir. 2020)).

[35] 18 U.S.C. § 924(c)(3)(A).

[36] See generally Taylor, 596 U.S. 845.

[37] Id. at 850.

[38] FD Amicus, supra note xxviiii, at 2.

[39] Id. at 13–14 (citing Gillis).