No. _____

In the
Supreme Court of the United States

Jonathan Feliz,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Daniel Habib
Counsel of Record
Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
daniel_habib@fd.org
(212) 417–8742

Counsel for Petitioner

QUESTION PRESENTED

Whether a crime that requires proof of bodily injury or death, but can be committed by failing to take action, has as an element the use, attempted use, or threatened use of physical force, the question presented in *Delligatti v. United States*, No. 23–825 (U.S.) (cert. granted June 3, 2024).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

OPINIONS AND ORDERS BELOW

The order of the United States Court of Appeals for the Second Circuit denying Petitioner's motion for a certificate of appealability ("COA") appears at Pet. App. 1a. The memorandum decision and order of the United States District Court for the Southern District of New York denying Petitioner's 28 U.S.C. § 2255 motion appears at Pet. App. 2a–13a and is reported at 632 F. Supp. 3d 294. The order of the District Court denying a COA appears at Pet. App. 14a.

JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 2255(a), denied Petitioner's § 2255 motion on September 29, 2022, and denied a COA on November 30, 2022. The Court of Appeals had jurisdiction under 28 U.S.C. § 2253(a) and denied Petitioner's motion for a COA on April 3, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The **Fifth Amendment** provides, in relevant part:

> No person shall ... be deprived of life, liberty, or property, without due process of law.

18 U.S.C. § 924(c)(1)(A) provides, in relevant part:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence ... .for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of

> any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime ...
>
> > (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

The version of **18 U.S.C. § 924(c)(1)(C)(i) (2006 ed.)** applicable at the time of Petitioner's conviction and sentencing provided:

> In the case of a second or subsequent conviction under this subsection, the person shall ... be sentenced to a term of imprisonment of not less than 25 years.

18 U.S.C. § 924(c)(3) provides:

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
>
> > (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> >
> > (B) that 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.

N.Y. Penal Law § 110.00 provides:

> A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

N.Y. Penal Law § 125.25 provides, in relevant part:

> A person is guilty of murder in the second degree when:
>
> > 1. With intent to cause the death of another person, he causes the death of such person or of a third person.

STATEMENT OF THE CASE

This petition is controlled by *Delligatti v. United States*, No. 23–825 (U.S.) (cert. granted June 3, 2024). Petitioner seeks to vacate an 18 U.S.C. § 924(c) conviction predicated on the exact same offense at issue in *Delligatti*, namely, attempted second-degree murder in violation of New York State law. Accordingly,

this petition should be held for *Delligatti* and then disposed of as appropriate in light of that decision.

In 2012, Petitioner pleaded guilty in the United States District Court for the Southern District of New York to a two-count information charging him with: (i) using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i) (Count One); and (ii) using, carrying, and discharging a firearm during and in relation to a crime of violence, 18 U.S.C. §§ 924(c)(1)(A)(iii) and 924(c)(1)(C)(i) (2006 ed.) (Count Two). Pet. App. 2a, 4a–5a; C.A. Doc. No. 20 Exh. B, at 1–2 ¶¶ 1–2. The commission of a predicate crime of violence was an element of the Count Two § 924(c) offense. *See United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). Count Two was predicated on a racketeering act, alleged in a prior charging instrument, which comprised three offenses: a 2006–2008 conspiracy to murder a person named Skeilin Camacho, in violation of N.Y. Penal Law §§ 105.15 and 125.25; a September 25, 2006 attempt to murder Camacho, in violation of N.Y. Penal Law §§ 20.00, 110.00, and 125.25; and a November 23, 2006 attempt to murder Camacho, §§ 20.00, 110.00 and 125.25. Pet. App. 4a–5a; C.A. Doc. No. 20 Exh. B, at 2 ¶ 2 (superseding information, charging predicate racketeering act); C.A. Doc. No. 20 Exh. C, at 6–8 ¶ 8 (racketeering act, charging New York statutory violations). During his guilty plea colloquy, Petitioner "allocuted that he 'carr[ied] a firearm in connection with a plan to kill an individual named [Camacho],' that 'a firearm [was] discharged in the course of that plan,'" and this conduct amounted to an "'attempted murder.'" Pet. App. 5a–6a. In 2013, the

District Court (Daniels, J.) sentenced Petitioner to the then-mandatory term of 30 years: five years on Count One, and a consecutive term of 25 years on Count Two. Pet. App. 2a & n.2. Petitioner did not appeal. Pet. App. 6a.

Following this Court's decisions in *Johnson v. United States*, 576 U.S. 591 (2015) (invalidating residual clause of Armed Career Criminal Act's definition of "violent felony," 18 U.S.C. § 924(e)(2)(B)(ii), as void for vagueness, and *United States v. Davis*, 588 U.S. 445 (2019) (applying *Johnson*; invalidating residual clause of § 924(c)'s definition of "crime of violence," 18 U.S.C. § 924(c)(3)(B), as void for vagueness, Petitioner sought § 2255 relief from Count Two. Pet. App. 2a–3a. As relevant, he argued that Count Two had to be vacated because neither conspiracy to commit murder nor attempted murder qualified as a § 924(c) crime of violence. *See* Pet. App. 3a, 11a–13a. As to the conspiracy predicate, Petitioner argued, and the government conceded, that conspiracy to commit murder could have qualified as a crime of violence only under § 924(c)(3)(B)'s residual clause, which *Davis* had invalidated. Pet. App. 3a. As to the attempt predicate, Petitioner argued, among other things, that attempted murder did not satisfy 18 U.S.C. § 924(c)(3)(A)'s elements clause because it could be completed not just by action but by culpable omission, as, for example, when a parent withholds food or medical care from a child. *See* Pet. App. 11a (noting that Petitioner "strongly urges [the District Court] to adopt" the "position" that "attempted murder does not necessarily involve the use

of force" because of "the possibility of attempted murder being committed by omission"); *see also* D. Ct. Doc. No. 1003, at 10–13; D. Ct. Doc. No. 1023, at 11–16.[1]

The District Court denied the § 2255 motion. Pet. App. 2a–13a. The Court accepted the government's concession that conspiracy to commit murder was not a valid § 924(c) predicate in light of *Davis*. Pet. App. 3a, 7a. However, the Court concluded that attempted murder remained a valid predicate that could support a § 924(c) conviction under *United States v. Pastore*, 36 F.4th 423 (2d Cir. 2022), which had so held. In addition, the Court rejected Petitioner's omission argument in reliance on *United States v. Scott*, 990 F.3d 94, 101 (2d Cir. 2021) (*en banc*), which held that "crimes intentionally causing physical injury are categorically violent even if committed by omission." Pet. App. 11a. The Court denied a COA. Pet. App. 14a.[2]

Petitioner appealed. C.A. Doc. No. 1. The United States Court of Appeals for the Second Circuit held Petitioner's appeal in abeyance pending the issuance of an amended *Pastore* opinion. C.A. Doc. No. 14. In the amended *Pastore* opinion, the Court of Appeals reaffirmed that attempted murder in aid of racketeering, 18 U.S.C. § 1959(a)(5), itself predicated on attempted murder in violation of N.Y. Penal Law §§ 110.00 and 125.25(1), was a § 924(c) crime of violence. 83 F.4th 113, 119—20 (2d Cir. 2023). The amended *Pastore* opinion rejected the argument that "attempted

[1] Petitioner also argued that the plea colloquy reflected that Count Two was predicated on conspiracy to commit murder alone. The District Court rejected that argument (Pet. App. 7a–10a), and Petitioner does not renew it here.
[2] Because the District Court determined that Petitioner's argument failed on the merits, the Court did not address Respondent's argument that Petitioner had procedurally defaulted his *Davis* claim. Pet. App. 3a n.3.

murder is not a crime of violence because it can be committed 'by way of affirmative acts *or omissions*,'" adhering to the analysis in *Scott*. *See* 83 F.4th at 121.

Following issuance of the amended *Pastore* opinion, Petitioner moved the Court of Appeals for a COA on the question whether his Count Two § 924(c) conviction violated due process in light of *Davis*. C.A. Doc. No. 25. Petitioner acknowledged *Pastore*, but "for purposes of preservation ... maintain[ed] that *Pastore* [was] wrongly decided, and that attempted murder under New York State law [was] not a valid § 924(c)(3)(A) predicate." C.A. Doc. No. 25, at 10 ¶ 13. *See also id.* at 11 ¶ 13 ("Attempted murder ... requires only intent to cause death and a substantial step—which need not be violent—toward doing so. Accordingly, this offense does not categorically require the 'use, attempted use, or threatened use of physical force.'" (quoting § 924(c)(3)(A))). The Court of Appeals (Raggi, Lee, Robinson, JJ.) summarily denied a COA. Pet. App. 1a.

After the mandate of the Court of Appeals issued, this Court granted certiorari in *Pastore* (*sub nom. Delligatti*, one of Pastore's co-defendants), on the question "[w]hether a crime that requires proof of bodily injury or death, but can be committed by failing to take action"—such as attempted murder in violation of New York State law—"has as an element the use, attempted use, or threatened use of physical force." Pet. for Cert. i, *Delligatti*, *supra*. Notably, the § 924(c) predicate asserted in *Pastore*/*Delligatti* is the exact same one asserted here—attempted second-degree murder in violation of N.Y. Penal Law §§ 110.00 and 125.25(1). *Compare* Pet. for Cert. 11, *Delligatti*, *supra* (noting that § 924(c) predicate was

"attempted second-degree murder under N.Y. Penal Law § 125.25(1)") *and Pastore*, 83 F.4th at 120 & n.5 (noting that "Delligatti was convicted of attempting to commit murder under N.Y. Penal Law § 125.25(1)") *with* C.A. Doc. No. 20 Exh. C, at 6–8 ¶ 8 (racketeering act, charging conspiracy to commit and attempt to commit "intent[ional]" murder, which is criminalized by § 125.25(1)) *and* D. Ct. Doc. No. 1016, at 11 & n.10 (Respondent's opposition to § 2255 motion, acknowledging that Petitioner's Count Two conviction was predicated on conspiracy to commit and attempt to commit intentional murder, in violation of § 125.25(1)).

REASONS FOR GRANTING THE WRIT

Delligatti controls this petition. *Delligatti* presents the question whether an offense that can be committed not by affirmative action but by culpable omission categorically involves the use, attempted use, or threatened use of physical force. More precisely, *Delligatti* presents the question whether attempted second-degree murder, in violation of N.Y. Penal Law §§ 110.00 and 125.25(1), is a valid § 924(c) predicate. This case is on all fours: Petitioner's Count Two § 924(c) conviction rests on the exact same predicate attempted murder offense, and Petitioner has urged that the offense does not satisfy the § 924(c)(3)(A) elements clause because it can be accomplished by omission. Accordingly, this petition should be held for *Delligatti*.

I. The Petition Should Be Held For *Delligatti*.

Section 924(c)(1)(A) defines a standalone offense, and at the time of Petitioner's conviction mandated a 25-year consecutive sentence, for a defendant "who, during and in relation to any crime of violence ... for which the person may be

prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." The commission of a predicate crime of violence is an element of a § 924(c) offense. *Rodriguez-Moreno*, 526 U.S. at 280. Section 924(c)(3) defines a crime of violence as:

> an offense that is a felony and—
>
> > (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> >
> > (B) that 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.

Davis held that § 924(c)(3)(B)'s residual clause is void for vagueness. 588 U.S. at 470. Accordingly, a valid predicate offense must satisfy § 924(c)(3)(A)'s elements clause. If a § 924(c) conviction lacks a valid predicate, vacatur of the conviction is the remedy, including on § 2255 review. *E.g.*, *United States v. Taylor*, 596 U.S. 845 (2022) (affirming grant of § 2255 relief that vacated § 924(c) conviction predicated on attempted Hobbs Act robbery).

The District Court found that Petitioner's Count Two § 924(c) conviction had two predicates: conspiracy to commit murder and attempted murder, both premised on violations of New York State's second-degree murder statute, § 125.25(1). As all agreed below, the conspiracy predicate no longer supports a § 924(c) conviction in light of *Davis*. *E.g.*, *United States v. Heyward*, 3 F.4th 75, 78 (2d Cir. 2021) ("[O]ur decisions in light of *Davis* preclude 18 U.S.C. § 924(c) from being applied to a murder conspiracy."). As for the attempted murder predicate, the District Court determined that it sufficed under the Second Circuit's decisions in *Pastore* and

Scott. In particular, the District Court invoked *Scott* to reject Petitioner's argument that attempted murder under New York State law did not satisfy § 924(c)(3)(A)'s elements clause because of "the possibility of attempted murder being committed by omission." Pet. App. 11a.

As the petition for a writ of certiorari in *Delligatti* explains (at 20–26), *Scott* was wrongly decided, and the correct analysis is that of the Courts of Appeals on the short side of the split that this Court granted certiorari to resolve. *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018) (cited below by Petitioner, *see* D. Ct. Doc. No. 1023, at 16 n.3); *United States v. Martinez-Rodriguez*, 857 F.3d 282 (5th Cir. 2017). Section 924(c)(3)(A)'s elements clause applies only where a crime "has as an element the *use*, attempted *use*, or threatened *use of physical force*." (emphases added). But where an offense can be committed by "total inaction," the defendant may "exert no physical force at all on the victim." *United States v. Harris*, 88 F.4th 458, 464 (3d Cir. 2023) (Jordan, J., concurring in denial of rehearing *en banc*). Such a crime, even if it results (or is calculated to result) in serious bodily injury or death, does not necessarily involve the use of physical force.

New York State's second-degree intentional murder offense, § 125.25(1), is an example of such a crime. As state appellate courts interpreting that statute have held, § 125.25(1), like other New York State homicide offenses, can be violated by "failure to perform a legally imposed duty." *People v. Steinberg*, 595 N.E.2d 845, 847 (N.Y. 1992). New York State courts have thus upheld the convictions of a father who was charged with the "omission" of "withholding medical care" from a fatally sick

child, *id.* at 848; and of a mother who "fail[ed] to seek medical attention for [her] boy." *People v. Best*, 609 N.Y.S. 2d 478, 480 (N.Y. App. Div. 1994). *See also People v. Wong*, 619 N.E.2d 377, 380 (N.Y. 1993) (accepting the legal validity of prosecuting "passive" parent who "failed to seek medical assistance" after other parent violently shook child). When a crime is committed by failing to take any action, it cannot be said that the defense "use[d] ... physical force" against the victim.

That conclusion flows from § 924(c)(3)(A)'s text, construed in light of the plain meaning of the statutory terms. First, "the word 'use' conveys the idea that the thing used (here, 'physical force') has been made the user's instrument." *United States v. Castleman*, 572 U.S. 157, 170–71 (2014). It is unnatural to say that a person "made" physical force his "instrument" by doing nothing. This Court's cases have consistently understood the term "use" to refer to "active employment." *Bailey v. United States*, 516 U.S. 137, 143 (1995). *See also id.* at 145 (dictionary definitions of "use" "imply action and implementation"); *Voisine v. United States*, 579 U.S. 686, 692–93 (2016) (noting that "[d]ictionaries consistently define the noun 'use' to mean the 'act of employing' something," and construing use to require "active employment"). Next, the phrase "physical force" "plainly refers to force exerted by and through concrete bodies." *Johnson v. United States*, 559 U.S. 133, 138 (2010). That phrase requires the kind of tangible force that produces "the acceleration of mass." *Id.* at 139. Finally, § 924(c)(3)(A) demands not just force but "violent force." *See id.* at 140. Allowing a dependent to starve or die for want of medical attention, although it might involve common-law force, *see Castleman*, 572 U.S. at 170, does

not involve "violent" or "substantial" force "strong enough to constitute power." *Johnson*, 559 U.S. at 140, 142. At a minimum, the rule of lenity compels Petitioner's construction. *See Scott*, 990 F.3d at 137 (Leval, J., dissenting).

Because neither of the predicate offenses for Petitioner's Count Two § 924(c) conviction qualify as a crime of violence under § 924(c)(3)(A)'s elements clause, Petitioner is entitled to § 2255 relief and vacatur of the conviction. At this juncture, however, the correct course is more modest, and straightforward: Because Petitioner challenges the exact same predicate offense at issue in *Delligatti*, and presses the same merits argument as the defendant there, this petition should be held for *Delligatti*. If the defendant in *Delligatti* prevails, Petitioner's § 924(c) conviction would have no valid predicate. This Court should then grant this petition, vacate the order of the Court of Appeals denying a COA, and remand this case for further proceedings. *See, e.g.*, *Howard v. United States*, No. 20–8372 (U.S. June 27, 2022) (GVR'ing order denying COA following *Taylor*, where § 924(c) conviction was predicated on attempted Hobbs Act robbery); *Brito v. United States*, No. 21–5097 (U.S. June 27, 2022) (same).

CONCLUSION

The petition for a writ of certiorari should be held for *Delligatti*.

Respectfully submitted,

/s/
Daniel Habib
Counsel of Record
Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, NY 10007
(212) 417–8742
daniel_habib@fd.org

July 2, 2024