No. 24 –

In the Supreme Court of the United States

OCTOBER TERM, 2024

GERALD SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

*GREGORY STUART SMITH
Law Offices of Gregory S. Smith
913 East Capitol Street, S.E.
Washington, D.C. 20003
(202) 460-3381
gregsmithlaw@verizon.net
Counsel for Gerald Smith

*Counsel of Record

July 12, 2024

QUESTION PRESENTED

I. Whether this Court should grant a writ of certiorari to determine whether 21 U.S.C. § 848(e)(1)(A) represents a qualifying "crime of violence" under 18 U.S.C. § 924(c), and to clarify how the rule of lenity should properly be applied?

PARTIES TO THE PROCEEDINGS

Petitioner is Gerald Smith, who filed this action under 28 U.S.C. § 2255 and was the Appellant below. Respondent is the United States of America, which was the Appellee below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

STATUTES & RULES

No. 24-_____

In the Supreme Court of the United States

GERALD SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Gerald Smith respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals, issued on June 14, 2024, is published at --- F.3d ---, 2024 U.S. App. LEXIS 14470 (June 14, 2024) and reproduced in the Appendix to this Petition ("App.") at 1a. The district court's Memorandum Opinion, issued May 16, 2022, is published at 605 F. Supp. 3d 1 (D.D.C. 2022) and included in the Appendix at App. at 21a. Its Opinion granting a Certificate of Appealability to Petitioner, issued on October 17, 2022, found at 2022 U.S. Dist. LEXIS 189238 (D.D.C. filed Oct. 17, 2022) is included in the Appendix at App. at 45a.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2024. App. 1a. This Court has jurisdiction over this Petition for a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL & STATUTORY PROVISIONS

Title 18 U.S.C. § 924(c)(3)(A) provides that a predicate offense will be a qualifying "crime of violence" if it is

> 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….

Title 21 U.S.C. § 848(e)(1)(A), the "CCE murder" statute, provides that:

> [A]ny person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) or section 960(b)(1) of this title who intentionally kills ***or*** counsels, commands, induces, procures or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment….

(emphasis added).

Title 28 U.S.C. § 2255(a) provides as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

A. Overview and Procedural History

On July 11, 1995, when he was 24 years old, Gerald Smith was arrested and charged in a superseding indictment with committing 21 separate federal and D.C. local offenses, arising from his participation while aged 18-21 in "the so-called Fern Street Crew." *United States v.*

Sumler, 136 F.3d 188, 189 (D.C. Cir. 1998). Gerald Smith was convicted in a jury trial, and as required under the then-mandatory U.S. Sentencing Guidelines, District Judge Stanley Sporkin sentenced him to an aggregate term of life imprisonment without parole; he also imposed 65 years of consecutive imprisonment on four 18 U.S.C. § 924(c) counts. On direct appeal, the court of appeals affirmed Mr. Smith's convictions and sentences, except for two local D.C. Code convictions vacated as merged, *id.* at 189 n.1. This Court then denied his petition for a writ of certiorari. 525 U.S. 907 (1998).

On May 24, 2016, Mr. Smith sought leave from the court of appeals to file a second or successive § 2255 petition,[1] claiming *Johnson v. United States*, 576 U.S. 591 (2015) was a "new rule of law" on which he could seek relief. His hand-written filing said that "in light of *Johnson* … Smith's 924(c) convictions are constitutionally infirm." A typed brief was attached to this request. On September 13, 2016, the court of appeals in Appeal No. 16-3050 granted him leave to file a second or successive petition, and it also directed that Mr. Smith's appellate filings be docketed in the district court as an "abridged" motion under 28 U.S.C. § 2255.

Mr. Smith's appellate filing was then docketed in district court as the operative Motion. No further proceedings ensued for almost three years. After Mr. Smith later filed a separate *pro se* Motion for Reduction [of] Sentence Under Section 404(b) of the First Step Act on July 8, 2019, the district court directed the Federal Public Defender and Government to propose a briefing schedule. Supplemental § 2255 filings on Mr. Smith's behalf were made by the Federal Public Defender. It then moved to withdraw, citing a potential conflict of interest. Undersigned

[1] Gerald Smith's first § 2255 Motion had been a *pro se* petition docketed on March 15, 2004, ECF #568, which District Judge Thomas Hogan denied on February 3, 2011 (almost seven years later) as time-barred. ECF #582. After Mr. Smith's present issues were filed, his case was heard below by District Judge Beryl Howell.

counsel was appointed to represent Mr. Smith, and entered an appearance on January 21, 2022 – after all of the substantive briefing on Mr. Smith's § 2255 motion had already been completed.

On May 16, 2022, the district court issued an Order and Opinion granting in part and denying in part Mr. Smith's § 2255 Petition. The district court's decision vacated one § 924(c) conviction whose predicate offense was federal kidnapping (after the Government *conceded* that it was *not* a qualifying "crime of violence"), but it declined all other requested relief. Mr. Smith, though undersigned counsel, then timely appealed, but that appeal was stayed by the D.C Circuit pending a decision on whether the district court would issue a Certificate of Appealability.

The district court's Order denying § 2255 relief had also directed the parties to promptly file supplemental briefs on the still-outstanding First Step Act (FSA) issue. Undersigned counsel then filed a Supplemental FSA motion. He also sought a § 2255 Certificate of Appealability. On October 17, 2022, the district court denied FSA relief but simultaneously granted a § 2255 Certificate of Appealability. App. at 45a, 61a-62a. Mr. Smith appealed these rulings to the court of appeals, which ultimately denied any substantive relief on Mr. Smith's claims. App at 1a.[2]

B. Relevant Facts and the District Court's Opinions

The basic underlying facts of Gerald Smith's crimes while part of the so-called "Fern Street Crew" are described in the court of appeals' decision in his direct appeal. *See United States v. Sumler*, 136 F.3d 188 (D.C. Cir. 1998).[3] The issue involved in this petition, by contrast,

[2] The court of appeals remanded the case only for the limited purpose of making a technical change in order to correct Mr. Smith's Judgment & Commitment Order, since his original J&C had never been amended after his direct appeal declared two of his D.C. state charges vacated.

[3] Gerald Smith's crimes occurred over 30 years ago (1988-92), at a time when he was just 17-21 years old, with almost all of his violent offenses confined to a very short three-month duration (Oct.-Dec. 1992). He has now been imprisoned over half of his life (and about 5/6 of his adulthood). He is 54 years old and currently slated to spend the rest of his life in federal prison.

involves a pure legal challenge to specified counts (his § 2255 motion sought to vacate all of his § 924(c) convictions after this Court's decision in *Johnson* and its progeny, since their predicate offenses no longer qualify as "crimes of violence" under § 924(c)(3)(A).

All of Mr. Smith's 1996 convictions on federal charges had been upheld on direct appeal, included his four counts of violating 18 U.S.C. § 924(c). Three of those § 924(c) offenses listed a predicate offense of "CCE murder," under 21 U.S.C. § 848(e)(1)(A), while the other § 924(c) offense was based on the predicate crime of kidnapping, under 18 U.S.C. § 1201.

After Mr. Smith's convictions were final, this Court held in *Johnson v. United States*, 576 U.S. 591 (2015), that the residual clause in the Armed Career Criminal Act (18 U.S.C. § 924(e)(2))'s definition of "crime of violence" was unconstitutionally vague. Within a year of that decision, Mr. Smith timely filed a *pro se* § 2255 petition challenging all four of his § 924(c) convictions under *Johnson*. On September 13, 2016, the court of appeals granted Mr. Smith leave to file a second or subsequent petition for that purpose. Later, in *United States v. Davis*, 588 U.S. 445, 470 (2019), this Court then held 18 U.S.C. § 924(c)(3)(B)'s analogous "residual" clause, similarly defining "crime of violence," was void for vagueness and unconstitutional.

The district court here therefore addressed Mr. Smith's § 2255 petition in light of *Johnson* and *Davis.* It agreed that § 924(c)(3)(B)'s "residual" clause had been invalidated as unconstitutionally vague, and that this meant Mr. Smith's § 2255 petition required that all of his challenged § 924(c) convictions must be vacated unless they were based on a predicate offense that satisfied § 924(c)'s separate "elements" clause. As the district court explained:

> The effect of the Supreme Court's decisions in the *Johnson* line of cases is that, in order to receive an enhanced consecutive penalty of five to thirty years' imprisonment for use of a firearm during a crime of violence, under 18 U.S.C. § 924(c)(1), a defendant must have been convicted of an offense qualifying as a crime of

> violence under the elements clause of § 924(c)(3)(A) – *i.e.*,, of a felony offense "that has as an element the use, attempted use, or threatened use of physical violence against the person or property of another."

Appx-365. Applying that test and § 924(c)'s remaining "elements" clause, the district court granted in part but denied in part Mr. Smith's § 2255 petition. It agreed his § 924(c) conviction based on the predicate federal crime of kidnapping (Count 23) had to be vacated, but it denied relief and left in place Mr. Smith's three other § 924(c) convictions (Counts 20-22), which were based on the predicate crime set forth in 21 U.S.C. § 848(e)(1)(A), described colloquially as "CCE murder." In doing so, the district court declared that the CCE murder statute, 21 U.S.C. § 848(e)(1)(A), satisfies the parameters of 18 U.S.C. § 924(c)(3)(A)'s "elements" clause.

Mr. Smith argued below that this decision was wrong, particularly after some of the district court's analysis was called into question by this Court in a later-issued opinion, *United States v. Taylor*, 142 S. Ct. 2015 (2022). Following that decision, the district court agreed to grant Mr. Smith a Certificate of Appealability, acknowledging that *Taylor*, "which issued after this Court's § 2255 decision, could be read to lend some support for his position." App. at 62a.

C. The Court of Appeals' Opinion

The court of appeals granted oral argument but later affirmed the district court's conclusion, finding that, as a matter of law, a 21 U.S.C. § 848(e)(1)(A) violation categorically represents a crime of violence under 18 U.S.C. § 924(c)(3)(A)'s "elements" clause. The court of appeals reasoned that "[b]ecause CCE murder applies only in cases where an intentional killing takes place, the plain text of the statute categorically requires the use of physical force against another." App at 11a. But this statement is *not true*. As noted below, not *every* case "where an intentional killing takes place" actually involves "physical force against the person of another."

21 U.S.C. § 848(e)(1)(A) does permit – and *historically has even allowed* – a conviction based on mere recklessness, and it therefore cannot validly serve as a § 924(c) predicate offense. The court of appeals also improperly misapplied the rule of lenity, as explained more fully below.

REASONS FOR GRANTING THE PETITION

A writ of certiorari should be granted to resolve a Circuit split over whether mere "omissions" can satisfy the parameters of 18 U.S.C. § 924(c)'s elements clause, to clarify whether 21 U.S.C. § 848(e)(1)(A)'s "CCE murder" statute itself represents such a crime of violence, and to clarify how the rule of lenity should properly be analyzed in this context.

The lone predicate offense (21 U.S.C. § 848(e)(1)(A) that underlies all three of Mr. Smith's remaining § 924(c) convictions for using a firearm during a crime of violence, does not validly qualify as a § 924(c) "crime of violence." Section 924(c) had originally defined crimes of violence in two clauses: an "elements" clause under § 924(c)(3)(A), and a "residual" clause under § 924(c)(3)(B). In *United States v. Davis*, 588 U.S. 445, 470 (2019), this Court declared that "residual" clause void for vagueness, and unconstitutional. Since then, a predicate offense can only be a § 924(c) crime of violence if it satisfies the "elements" clause of § 924(c)(3)(A). "CCE murder" fails to satisfy § 924(c)(3)(A)'s "elements" clause, since it does not categorically require, *as an element*, the intentional use, attempted use, or threatened use of physical force against a person or property. Mr. Smith's § 924(c) convictions therefore must be vacated.

In recent years, given the extremely harsh, mandatory consecutive penalties required by 18 U.S.C. § 924(c), this Court has often granted writs of certiorari to clarify whether a particular predicate offense qualifies as a "crime of violence" under § 924(c)(3)(A). This case represents

another one where this critical question should properly be answered – to provide guidance to the courts of appeals, and to clarify if a 21 U.S.C. § 848(e)(1)(A) violation is a "crime of violence."

As this Court explained two years ago in *Taylor*, 142 S. Ct. 2015 (2022):

> [T]he clause [§ 924(c)(3)(A)] poses the question whether the federal felony at issue "has as an *element* the use, attempted use, or threatened use of physical force." § 924(c)(3)(A) (emphasis added). And answering that question does not require – in fact, it precludes – an inquiry into how any particular defendant may commit the crime. The only relevant question is whether the federal felony at issue always requires the government to prove – beyond a reasonable doubt, as an element of its case – the use, attempted use, or threatened use of force.

Id. at 2020 (emphasis in original).

That "only relevant question" here is therefore exactly like the one posed in *Taylor*, namely: "What are the elements the government must prove to secure a conviction for [CCE murder]?" *Id.* An examination of that "CCE murder" statute, 21 U.S.C. § 848(e)(1)(A), reveals that it reads in pertinent part as follows:

> "[A]ny person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) or section 960(b)(1) of this title who intentionally kills ***or*** counsels, commands, induces, procures or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment….

21 U.S.C. § 848(e)(1)(A) (emphasis added).

Based on this statute's language, and despite the court of appeals' contrary conclusion, it simply cannot properly be said as a categorical matter that *every* CCE murder conviction requires as an element the intentional use, attempted use or threatened use of physical force. In fact, this

CCE murder statute fails to contain either the necessary *mens rea* element or the necessary *actus reus* element required of a qualifying crime of violence under § 924(c)(3)(A).

1. CCE Murder Lacks § 924(c)(3)(A)'s *Mens Rea* Element

On the *mens rea* side, this statute cannot satisfy the requirements of a crime of violence. As this Court has held, a predicate crime that contains a *mens rea* of only "recklessness" cannot properly qualify as a § 924(c) "crime of violence." The court of appeals itself agreed that this principle is clear from this Court's opinions in *Borden v. United States*, 593 U.S. 420 (2021), when the plurality opinion and Justice Thomas' concurring opinion there are read together. App. at 13a ("Under either the plurality's approach or Justice Thomas's, a crime that may be committed with merely reckless conduct is not a crime of violence under the ACCA"); *id.* at 14a ("Both parties agree with that bottom-line holding and that it applies to the almost-identically worded Section 924(c).").

Here, as noted above, Section 848(e)(1)(A) mentions nothing about "attempted" or "threatened" use of physical force, and its word "intentionally" only modifies the word "kills" – ***not*** "counsels, commands, induces, procures or causes the intentional killing of an individual." Congress' grammar usage matters. If Congress had wanted "intentionally" to modify all of the words in this list, it could have easily done so through the following modification: "intentionally kills[,] ~~or~~ counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results." *See In re Espy*, 80 F.3d 501, 505 (D.C. Cir. 1996) ("a statute written in the disjunctive is generally construed as 'setting out separate and distinct alternatives"); *United States v. Moore*, 613 F.2d 1029, 1039 (D.C. Cir. 1979) ("Normally, of course, 'or' is to be accepted for its disjunctive connotation, and not as a word interchangeable with 'and'" unless that interpretation would frustrate legislative intent). Any remaining doubt is

resolved by Congress' use of an Oxford comma, clarifying "counsels, commands, induces, procures or causes" are part of a list from which "intentionally kills" is excluded.

Indeed, this phrase must be interpreted in the disjunctive, for otherwise it would make no sense – it would then sanction anyone who "intentionally kills … an individual *and such killing results*," thus rendering this italicized language superfluous, in contravention of established rules of statutory construction. *See Marx v. Gen. Rev. Corp.*, 568 U.S. 371, 385-86 (2013) ("[T]he canon against surplusage … gives effect to every clause and word of a statute").

The word "intentionally" is plainly best read grammatically as modifying only the word "kills" in § 848(e)(1)(A). How did the court of appeals avoid this? First, it asserted that Congress had "twice explicitly and once implicitly" used the word "intentionally" when describing *other* portions of § 848(e)(1)(A). Rather than viewing the *lack* of this descriptor for the ensuing types of actions listed after this "or" divider as most naturally suggesting it was *not* intended to apply to those ensuing terms, the court of appeals remarkably claimed that "the logical reading is that the statutorily designated *mens rea* extends to each means of committing the same crime." App. at 15a. After thus importing this mental state from a different clause to all the others where it was so conspicuously absent, the court of appeals then essentially said that *grammar doesn't matter here*. *See id.* ("rule applies regardless of whether the 'most natural grammatical reading' of the statute might suggest otherwise").

Respectfully, the court of appeals' admittedly anti-grammatical reading of "intentionally" as extending to acts that it never modified, was improper. The appropriate question is thus what *mens rea* does apply under this "CCE murder" statute for someone who "counsels, commands, induces, procures or causes the intentional killing of an individual"? The statute's silence does not mean it has no *mens rea* at all, since this Court has recognized "an interpretive presumption

that *mens rea* is required" for all criminal statutes, and it also "has on a number of occasions read a state-of-mind component into an offense even when the statutory definition did not in terms so provide." *United States v. Gypsum*, 438 U.S. 422, 437 (1978); *see also United States v. Project on Gov't Oversight*, 616 F.3d 544, 550 (D.C. Cir. 2010). But this presumption in favor of a *mens rea* component does not require a *mens rea* of intentional misconduct – instead, the law is that it "requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269 (2000); *see also United States v. Burwell*, 690 F.3d 500, 505 (D.C. Cir. 2012) ("The Supreme Court developed the presumption in favor of *mens rea* for one particular reason: to avoid criminalizing otherwise lawful conduct").

In this case, a *mens rea* of recklessness is the one most properly implied. "[T]he Model Penal Code establishes recklessness as the default minimum *mens rea* for criminal offenses when a mental state is not specified." *See Borden v. United States*, 141 S. Ct. 1817, 1845 (2021) (Kavanaugh, dissenting) (quoting Model Penal Code § 2.02, Comment 5, at 244 (1985)). "[A]s the Model Penal Code explains, 'no one has doubted' that a reckless mental state is 'properly the basis for criminal liability.'" *Id.* And reckless conduct is hardly benign; federal second-degree murder can be committed recklessly, and this Court has even held that reckless disregard for human life can sometimes justify the death penalty. *Tison v. Arizona*, 481 U.S. 137, 157 (1987). It also makes the most sense that Congress would want a lesser *mens rea* in this context of CCE murder. Congress, after all, was targeting drug kingpins when it enacted the Continuing Criminal Enterprise statute. *See Garrett v. United States*, 471 U.S. 773, 781 (1985) (CCE statute was "designed to reach the 'top brass' in the drug rings"). There is no reason to presume Congress must have intended for CCE murder to require a higher *mens rea* than recklessness

when such an individual who "commands" the "intentional killing of an individual and such killing results." And there is every reason Congress would want this statute to ensnare those leading a continuing criminal enterprises who also recklessly cause killings. It is not difficult at all to imagine an example of a CCE leader recklessly causing another to intentionally kill someone – such as by telling his foot soldiers to "take care of it," with an expectation that his soldiers will resolve the problem through whatever means are necessary – *i.e.*, consciously disregarding the substantial risk that his soldier will intentionally kill the person. Even if this CCE leader did not specifically know or intend a victim to die, it seems highly unlikely Congress would not want to hold that CCE leader responsible under § 848(e)(1)(A) for causing the murder.

In fact, even beyond theoretical examples, there have actually been cases in real life in which CCE murder liability under § 848(e)(1)(A) has been extended to reckless conduct. As the Sixth Circuit recognized in *United States v. Alvarez*, 266 F.3d 587, 594-95 (6th Cir. 2001), § 848(e)(1)(A) "could be read to include" a variety of acts, including "intentionally engag[ing] in conduct which the defendant knew would create a grave risk of death to a person other than one of the participants in the offense and resulting in death to the victim." The Modern Federal Jury Instructions also include language regarding a "grave risk of death." Plainly, this "risk" of death extends beyond the intentional use of physical force. *See United States v. Winston*, 55 Fed. App'x 289, 300-01 (6th Cir. 2003) (upholding murder instruction that allowed for conviction based on a *mens rea* of extreme recklessness).

The court of appeals did discuss *Alvarez*, and it did not deny that the jury in that case had been instructed that "intentional killing" could be read to include "engaging in conduct *which the defendant knew would create a grave risk of death*," App. at 16a (emphasis added) – classic recklessness. The court of appeals tried to distinguish that case by asserting that this instruction

had been drawn from a jury charge outlining since-repealed statutory aggravating factors for a death penalty determination. But the reality remains – the *Alvarez* jury instruction literally allowed a conviction to be returned based on merely reckless *mens rea*.[4]

As noted, § 848(e)(1)(A) sanctions anyone who "intentionally kills ***or*** counsels, commands, induces, procures or causes the intentional killing of an individual and such killing results." The court of appeals claimed that "the actions that Section 848(e)(1)(A) proscribes themselves connote intentionality." App. at 15a. But while that perhaps might be said as to *some* of these terms, such as "counsels," "induces" or "procures," it is *simply not true* of the broader term "causes." Even the court of appeals acknowledged this word was far tougher. After defining "causes" as merely "bring[ing] into existence," *id.* at 15a, it tried to claim this definition might "fit the mold of intentional actions," but it also conceded "some other definitions could, considered in isolation, reach more broadly." *Id.* The court of appeals then simply decided to lump this term "causes" in with all of the other verbs nearby. *Id.* at 16a ("read as a whole, the list of verbs identifies equivalent alternative paths to 'intentionally kill[ing]' someone"). It also said that "even absent 'the word intent' itself," it would find that the statute "strongly intimate[s] an intentional *mens rea* requirement." *Id*. Respectfully, § 924(c)'s massive liability here cannot properly turn on a merely "intimated" *mens rea* requirement of intent – particularly since that deviates from what is traditionally intimated – the default *mens rea* of recklessness, *see supra*, and when it deviates from a plain grammatical reading.

[4] The court of appeals claimed the *Alvarez* "court's language instead repeatedly indicated that the statute required an 'intentional killing.'" App. at 16a. But as noted above, this term "intentional killing" *itself* was *defined as* including recklessness – merely "creat[ing] a grave risk of death"). That no one specifically argued "recklessness" is also irrelevant – this jury instruction, in an actual § 848(e)(1)(A) case, *allowed Alvarez to be convicted based on mere recklessless.*

The court of appeals also grappled with the example cited above: a mob boss ordering a lieutenant to "take care of Jones," which then resulted in an intentional killing committed by the subordinate. The court of appeals claimed "it is doubtful that the words without more amount to the mob boss 'commanding' an 'intentional killing.'" App. at 16a. But the far harder question – whether this "cause[d]" an intentional killing – was oddly never addressed, perhaps because it could not be. Surely such a mob boss begins a "causal" chain with such a directive. And it also means he could commit a § 848(e)(1)(A) offense by recklessly causing an intentional killing.

The court of appeals resisted this approach, also cautioning "courts should not contort the statue's every word so as to hypothesize one or two strained applications." *Id.* at 16a. But exploring the outer range of such hypotheticals is in fact *exactly what courts are supposed to do* in this § 924(c) context. That § 848(e)(1)(A) may encompasses many offenses that include an intentional *mens rea* is irrelevant. As this Court explained in *Taylor*, "The only relevant question is whether the federal felony at issue *always* requires the government to prove – beyond a reasonable doubt – as an element of its case – the use, attempted use, or threatened use of force." 142 S. Ct. at 2020 (emphasis added). *See id.* at 2022 ("*some* cases are not *all* cases").

Not *every* hypothetical factual situation that fits within § 848(e)(1)(A)'s scope includes an intentional (as opposed to reckless) *mens rea* – and as noted, an actual example of a published decision involving a federal defendant convicted of § 848(e)(1)(A) under a recklessness standard of proof *already exists in the published precedent*. That is far more than typically exists in this Court's cases evaluating predicate offenses for § 924(c) "crime of violence" compliance.

Mr. Smith has identified both hypothetical and even actual CCE murder cases where the needed *mens rea* was lacking. Accordingly, this Court should grant a writ of certiorari and reverse the court of appeals' decision to leave in place Mr. Smith's § 924(c) convictions.

2. CCE Murder Lacks § 924(c)(3)(A)'s *Actus Reus* Element

The *actus reus* of a "CCE murder" conviction under 21 U.S.C. § 848(e)(1)(A) does not require a criminal defendant to "use, attempt to use or threaten to use physical force," as required to qualify as a § 924(c) predicate crime of violence.

There is no assurance (i.e., element) that every defendant who merely "brings into existence" an intentional death has used (or attempted or threatened to use) *force*. Such a death could be "brought about," for example, by a mere *omission*, such as by depriving someone of food or medicine. According to several Circuits, a statute that criminalizes mere omissions cannot satisfy § 924(c)(3)(A)'s "force" clause. *See, e.g., United States v. Burris*, 912 F.3d 386, 388-402 (6th Cir. 2019); *United States v. Mayo*, 901 F.3d 218 (3rd Cir. 2018); *United States v. Trevino-Trevino*, 178 Fed. App'x 701, 703 (9th Cir. 2006); *United States v. Resendiz-Moreno*, 705 F.3d 203, 205 (5th Cir. 2013), *overruled on other grounds*, 910 F.3d 169, 183-84 (5th Cir. 2018) (en banc). *See also United States v. Bowers*, 2022 WL 17718686 (W.D. Pa. Dec. 15, 2022) ("a statute that criminalizes an omission does not have, as an element, the use, attempted use, or threatened use of physical force"; Circuit split noted).

The court of appeals disagreed with this analysis, claiming that "intentionally withholding food or medicine with the object of causing another person's death – whether styled as an 'omission' or otherwise – involves deliberately causing bodily injury through physical processes." App. at 12a. But the legal treatises it cited, finding that battery extends to mere omissions, involve situations "where there is a duty to act." *Id.* (citing W. LaFave, Substantive Criminal Law § 16.2(b) (defining "Battery"). But even if the terms "battery" and "force" were identical – which they are not (the latter is plainly a narrower term) – nothing in this statute requires that an omission be coupled with a duty to act. Plenty of hypothetical examples exist in

which a defendant who owes no such duty at all nevertheless "causes … an intentional killing" by withholding food or water, or perhaps medicine from someone who has an illness, including in a situation in which the existing supply of available medication has ended. The court of appeals argued this represents force in itself, based on this Court's language in *United States v. Castleman*, 572 U.S. 157, 170 (2014) ("It is impossible to cause bodily injury without applying force."). But that argument is circular, and has no application to a situation where a defendant with no duty *literally does nothing* except allow a victim become killed *by their own frailties*.

The court of appeals did acknowledge that a Circuit split exists in this context. It claimed it was siding with the majority of other Circuits holding "that a deliberate omission that results in an intentional killing necessarily involves the use of force." App. at 12a. It acknowledged, however, that the Third Circuit may have "considered federal law" and yet ruled differently. App. at 13a. It also sought to distinguish a Sixth Circuit decision from the situation here.[5] This Court should now grant a writ of certiorari in order to resolve this Circuit split.

In this CCE murder *actus reus* arena – just as with *mens rea* – this Court once again also need not limit itself to mere theoretical examples. In *United States v. Aguilar*, 585 F.3d 652 (2d Cir. 2009), the Second Circuit affirmed the conviction of a defendant who solicited his drug associate to kill his girlfriend's ex-boyfriend, by "promising in return to forgive [his] drug debts and to resume supplying drugs to him on consignment." *Id.* at 654. As promised, after his associate killed the ex-boyfriend, the defendant forgave his drug debts and arranged for him to

[5] The court of appeals' analysis on this point is not persuasive. In that case, *United States v. Burris*, 912 F.3d 386 (6th Cir. 2019), the Sixth Circuit found that a state aggravated assault statute did not categorically require force, because a person could be convicted for inflicting certain serious mental harms without using physical force. Similarly, here, it is possible that a person could violate 21 U.S.C. § 848(e)(1)(A) by inflicting severe mental harms on a victim, and the court of appeals never explained why that scenario was impossible.

receive drugs. *Id.* at 655. The defendant was charged and convicted of CCE murder. The case, while charged as a CCE murder because of the criminal enterprise, was in all its basic respects a murder for hire, where the defendant did not use any physical force at all. *Compare* 18 U.S.C. § 1958. Yet that CCE murder conviction was affirmed.

After *Johnson*, many courts analyzed whether murder-for-hire constitutes a "crime of violence," with a majority declaring that it does not satisfy § 924(c)(3)(A)'s force clause. *See, e.g., United States v. Bowman*, 873 F.3d 1035, 1042 (8th Cir. 2017) ("murder for hire [cannot] constitute a crime of violence … under the force clause of § 924(c)(3)(A)"); *United States v. Herr*, 2016 WL 6090714 (D. Mass. Oct. 18, 2016) (same); *Dota v. United States*, 368 F. Supp. 3d 1354, 1360 (C.D. Cal. 2018) (same). Later, in a merits brief before this Court in *Grzegorczyk v. United States*, No. 21-5967, the Solicitor General's Office itself formally conceded that the federal murder-for-hire statute cannot satisfy § 924(c)(3)(A)'s elements clause, and is not a valid § 924(c) predicate offense. *See id.* Brief for the United States, at 7 ("The government agrees that petitioner's Section 1958(a) offense does not qualify as a crime of violence").[6]

In declaring in the instant case that CCE murder can be a § 924(c) crime of violence, the court of appeals also suggested it was "in good company" by claiming that § 924(c)(3)(A) force clause's elements could be satisfied by the actions of *others* – citing to how "[e]leven out of eleven courts of appeals to have addressed the question have held that 'aiding and abetting a crime of violence is itself a crime of violence.'" App. at 13a (citations omitted). But as this

[6] The court of appeals sought to distinguish 21 U.S.C § 848(e)(1)(A) from these murder-for-hire cases, on the ground that § 848(e)(1)(A) requires that an "intentional killing [in fact] result." *See* App. at 11a, n.2. But that is a distinction without a difference. The fact that an intentional killing "result[ed]" is something that occurs at the end of the process. It does not describe any level of force the defendant himself must manifest as the event itself is occurring.

Court clarified in *Rosemond v. United States*, 572 U.S. 65 (2014), aiding and abetting liability requires a mental state comparable to the principal's – which is *not* required by the statute here, where merely "causing" an intentional killing is enough. Moreover, these cases now appear dubious, following this Court's later-issued *Taylor* opinion. The manner in which the threat was communicated <u>*was*</u> deemed important in *Taylor*, and indeed was pivotal to that case's outcome. And it was not defendant's proposed narrow definition of "crime of violence" that troubled this Court in *Taylor*, but rather the Government's attempts to read the statute too *expansively*. *See* 142 S. Ct. at 2023 ("the government's competing interpretation would vastly expand the statute's reach by sweeping in conduct that poses an abstract risk to community peace and order, whether known or unknown to *anyone* at the time").

Under 21 U.S.C. § 848(e)(1)(A), it is apparent that not every person who merely "causes" (or even "counsels") other people to take actions in a CCE murder will have used, attempted to use, or threatened to use physical violence. Both the "how" and the "who" of what occur are relevant. At bottom the range of possible defendants *convictable* under § 848(e)(1)(A) plainly extends (and historically has extended) beyond a limited universe in which every possible defendant's CCE Murder offense would necessarily fall within § 924(c)'s force clause and definition of a "crime of violence." *See Taylor*, 142 S. Ct. at 2023 ("Plainly, this [§ 924(c)(1)(A)] language requires the government to prove that *the defendant* took specific actions against specific persons or their property.") (emphasis added).[7]

[7]The district court's claim that in this case, "the jury was instructed that it must find beyond a reasonable doubt that defendant 'had the specific intent to kill the decedent[s],'" App. at 9a, is irrelevant under *Taylor*: the instant issue "does not require – in fact it precludes – an inquiry into how any particular defendant may commit the crime. The only relevant question is whether the federal felony at issue always requires the government to prove – beyond a reasonable doubt, as an element of its case – the use, attempted use, or threatened use of force." 142 S. Ct. at 2020.

Not just in theory but also in practice, CCE murder convictions falling below the necessary thresholds are possible and even exist. Only if the lower courts were correct on both the *mens rea* and *actus reus* prongs can their § 2255 rulings be sustained. But as a matter of law, the CCE murder statute fails to satisfy § 924(c)(3)(A)'s force clause on either prong, because both its *mens rea* and *actus reus* requirements are too broad to ensure that *all* persons convictable under 21 U.S.C. § 848(e)(1)(A) categorically have committed crimes of violence.

In this area of law, courts cannot paint with broad brush strokes, as the court of appeals attempted to do below. Instead, as *Taylor* clarified, courts must do the work of digging deep into the elements of every asserted § 924(c) predicate offense to determine its outer parameters. The categorical approach is not going away, *see* 142 S. Ct. at 2021 n.1 (majority rejects Justice Thomas' suggestion in dissent that "we should overrule 30 years' worth of our categorical approach precedents"), and the two *Taylor* dissenters' lament about "strange" results in this area did not deter this Court's majority from taking and reversing those conviction. Appellate courts must look beneath the surface of this statute's "CCE murder" title, when evaluating its parameters and § 924(c) eligibility. Under *Taylor*, a deeper statutory dive was required before § 924(c)'s very lengthy, and mandatory consecutive penalties could properly be laden atop this defendant's other sentences and sustained. And when that inquiry is properly performed, it is apparent that CCE murder fails to qualify as a § 924(c) predicate offense.

3. The Rule of Lenity Was Misapplied by the Court of Appeals

At the very least, even if statutory ambiguity might remain about the scope of § 924(c)(3)(A) and 21 U.S.C. § 848(e)(1)(A), the law requires that such ambiguities concerning its *mens rea* and *actus reus* requirements should be resolved against the Government in this context, under the venerable rule of lenity. *See, e.g., United States v. Granderson*, 511 U.S. 39 (1994).

Unfortunately, the court of appeals badly misread the rule of lenity. It wrongly concluded (without any citation of authority) that "lenity principles cut *against* Smith's argument, which would criminalize a broader range of conduct." *Id.* at 16a. What the court of appeals apparently means here is that in another, *separate* case, *not* involving § 924(c), a *different* defendant might benefit from a narrower reading of § 848(e)(1)(A). But that has no application here, where lenity as applicable to Mr. Smith plainly requires the opposite. There is no incongruity in reading an *ambiguous* statute in two different cases in a manner that will individually benefit each of them in their particular case. Indeed, if Congress *has not written a statute clearly*, that is exactly how the rule of lenity *should* be applied, so that neither defendant languishes in prison when Congress has not clearly required that they do so. *See United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (rule of lenity is "rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said that they should").

Accordingly, this Court should grant a writ of certiorari to clarify that the concept of lenity is appropriately tailored to the needs of a given case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

_____
Gregory Stuart Smith
Law Offices of Gregory S. Smith
913 East Capitol Street, S.E.
Washington, D.C. 20003
Telephone: (202) 460-3381
gregsmithlaw@verizon.net
Attorney for Gerald Smith

No. 24-_____

In the Supreme Court of the United States

GERALD SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have arranged for a true and exact copy of this Petition for Writ of Certiorari, including the Appendix, and Petitioners' Motion for Leave to Proceed *In Forma Pauperis*, to be mailed this 12th day of July, 2024, via U.S. mail, with first-class postage pre-paid, to: Solicitor General of the United States, Room 5614, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Washington, D.C. 20530. I have also arranged for a copy of same to be emailed to:

supremectbriefs@usdoj.gov

I also certify that all parties required to be served have been served.

_____

GREGORY S. SMITH
Law Offices of Gregory S. Smith
913 East Capitol Street, SE
Washington, DC 20003
Telephone: (202) 460-3381
gregsmithlaw@verizon.net