

No. _____

IN THE
Supreme Court of the United States

MARTIN HUNT
XAVIER GREENE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under 18 U.S.C. § 924(c)(3)(A), a felony qualifies as a “crime of violence” if it “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” The courts of appeals are split on how to apply the use-of-force language to crimes that require proof of a victim’s bodily injury or death but can be committed by *inaction*—that is, by omission. On one side of the split, the Fourth Circuit (in the decision below) held that a crime that requires proof of death or bodily injury *necessarily* involves the use of physical force, even if it can be committed by through inaction—such as failing to provide medicine to someone who is sick or by failing to feed a child.

The question presented is:

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.

In *Delligatti v. United States*, S. Ct. No. 23-825, this Court has already granted certiorari to resolve the circuit split on this same question.

2. Additionally, in *Lora v. United States*, 599 U.S. 453, 455 (2023), this Court held that a sentence under 18 U.S.C. § 924(j) for causing death through the use of a firearm during and in relation to a “crime of violence” can run either concurrently or consecutively to another sentence. Nonetheless, the petitioners were sentenced before this Court’s decision issued in *Lora*. At the time of sentencing, Fourth Circuit law—under *United States v. Bran*, 776 F.3d 276, 280-82 (4th Cir. 2015)—mandated that a sentence for a § 924(j) offense run consecutive to any other sentence. Adhering to *Bran*, the district court concluded that the sentences on the § 924(j) counts “must be

served consecutively to each other and to the sentences imposed on all other counts.”
App. 148-49, 186.¹

The question presented is:

Whether the district court’s imposition of mandatory consecutive sentences on petitioners’ § 924(j) convictions is in conflict with this Court’s decision in *Lora*, 599 U.S. at 455.

¹ “App.” refers to the appendix attached to this petition.

RELATED PROCEEDINGS

United States District Court (E.D.Va.):

United States v. Hunt et al., No. 4:17-CR-52

United States Court of Appeals (4th Cir.):

United States v. Hunt, No. 21-4231(L)
(Apr. 16, 2024)

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OPINIONS BELOW

The opinion of the court of appeals is reported at *United States v. Hunt*, 99 F.4th 161 (4th Cir. 2024), and is reprinted at App. 1-49. The district court's written opinion is at App. 105-125 and also on Pacer, at Memorandum Order, *United States v. Hunt et al*, No. 4:17-CR-52, Dkt. No. 348 (E. D. Va. August 8, 2019). The district's court final judgments are at App. 227-33 and App. 234-239 and also on Pacer, at *United States v. Hunt et al*, No. 4:17-CR-52, Dkt. Nos. 777 (E.D. Va. May 7, 2021) & 834 (E. D. Va. July 2, 2021).

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2024. App. 1-50.

The court of appeals denied a timely petition for rehearing on May 17, 2024. App. 240.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924 of Title 18 of the United States Code provides:

(c)(1)(A) 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 or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) 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—

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years,

* * *

(3) 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.

* * *

(j) A person, who in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

Additional statutory provisions—specifically Virginia Code §§ 18.2-26 and 18.2-32—are reprinted at App. 241-42.

INTRODUCTION

This case involves two issues:

First, one can only be convicted for a federal firearm charge under both 18 U.S.C. §§ 924(c) and (j), if the firearm was possessed in furtherance of, or used during and in relation to, an underlying offense that constitutes a “crime of violence.” In turn, an underlying offense only qualifies as a “crime of violence” if it “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 924(c)(3)(A). To determine whether an offense satisfies this definition, which is commonly referred to as the use-of-force clause, a court applies the categorical approach: Looking at the elements necessary to sustain the conviction, the court must determine whether the least-serious conduct covered under those elements satisfies the use-of-force clause in all instances.

This case presents an acknowledged circuit conflict over how to apply the use-of-force language to an important category of offenses: crimes that require proof of bodily injury or death, but can be committed solely through the defendant’s *inaction*. Under the law of some States, a person who has a duty to act but fails to do so—such as by failing to provide medicine to someone who is sick or by neglecting to feed a

dependent—may face criminal liability. If the defendant’s nonfeasance results in death, he or she may even be convicted of homicide.

The courts of appeals have reached different conclusions about how to apply use-of-force language to such offenses. Eight circuits, including the Fourth Circuit in the decision below, have held that any crime requiring proof of death or bodily injury categorically requires the use of physical force, even if it can be committed through inaction. But two circuits have taken the position that the use of force is *not* an element of such an offense if the offense may be committed by the defendant’s failure to act.

In light of this conflict, this Court already granted certiorari on this exact issue in *Delligatti v. United States*, No. 23-825 (certiorari granted June 3, 2024). Specifically, in *Delligatti*, at issue is whether a VICAR² attempted murder under New York law (which served as the underlying predicate for the § 924(c) conviction) meets the use-of-force requirement under the § 924(c) “crime of violence” definition. The defense’s position is that because VICAR New York attempted murder can be committed by omission, it does not qualify as a “crime of violence” under the use-of-force clause. Petition for Certiorari, *Delligatti v. United States*, No. 23-825.

Similarly, at issue in these cases is whether VICAR Virginia murder and attempted murder (which served as the underlying predicates for the relevant §§ 924(c) and (j) convictions) meet the use-of-force requirement under the §924(c) “crime of violence” definition. Just like Mr. Delligatti, the petitioners here are arguing that

² “VICAR” refers to violent crime in aid of racketeering in violation of 18 U.S.C. § 1958(a).

VICAR Virginia murder and attempted murder (which can both be committed by an act of omission) are not “crimes of violence” under the use-of-force clause. Thus, this Court’s ruling in *Delligatti* will have direct impact here. If this Court voids Mr. Delligatti’s § 924(c) conviction based on the crime of omission argument, then the same fate will come of the petitioners’ §§ 924(c) and (j) convictions. As a result, this Court should hold this petition in abeyance pending its decision in *Delligatti* and then grant certiorari, vacate the judgment of the Fourth Circuit, and remand the case for further proceedings in light of *Delligatti*.

Second, even if this Court does not grant certiorari on the crime of omission issue discussed above, this Court should grant certiorari on another important ground. In particular, the petitioners were unlawfully sentenced in violation of this Court’s holding in *Lora v. United States*, 599 U.S. 453 (2023). In *Lora*, this Court held that a sentence for a § 924(j) conviction can run either concurrently with or consecutively to another sentence. *Id.* at 455.

However, in direct conflict with *Lora*, the district court sentenced petitioners to a consecutive mandatory life sentence on each of their § 924(j) counts of conviction. The court did so upon declaring that it had no other choice under *United States v. Bran*, 776 F.3d 276, 280-82 (4th Cir. 2015), which at the time of sentencing mandated consecutive sentences for § 924(j) convictions in the Fourth Circuit. But in *Lora*, 599 U.S. at 457 n.1, this Court overruled *Bran* and held the opposite. Therefore, the petitioners’ consecutive life sentences on their § 924(j) convictions are now plainly unlawful. This Court should reverse this injustice by granting certiorari and remanding these cases for resentencing.

STATEMENT OF THE CASE

Section 924(c) makes it a federal offense to possess a firearm in furtherance of, or use a firearm during and in relation to, an offense that constitutes a “crime of violence.” 18 U.S.C. § 924(c)(1)(A). A § 924(c) conviction carries a mandatory-minimum sentence of five years—more if the firearm is brandished (seven years) or discharged (ten years)—and a maximum of life. 18 U.S.C. § 924(c)(1)(A)(i)-(iii). Section 924(c) sentences must run consecutively to any other sentence. 18 U.S.C. § 924(c)(1)(D)(ii).

Section 924(j) makes it a federal offense to cause a death through the use of a firearm during and in relation to a “crime of violence.” In relevant part, if the death constitutes a murder (as defined under 18 U.S.C. § 1111), then one can be punished under the statute by death or any term of imprisonment for any years or life. And § 924(j) sentences (in contrast to § 924(c) sentences) can run either concurrently with or consecutively to another sentence. *Lora*, 599 U.S. at 455.

For purposes of both a § 924(c) offense and a § 924(j) offense, the “crime of violence” definition is the same. Specifically, under § 924(c)(3)(A), a “crime of violence” includes a felony that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another”—the use-of-force clause.

1. Turning to this case, Mr. Hunt was convicted in December 2019 (after a jury trial) of three § 924(c) counts (Counts 13, 31, and 33) that, in relevant part, were predicated on VICAR Virginia attempted murder in violation of Va. Code Ann. §§

18.2-32[and] 18.2-26.³ App. 75-76, 94-97, 128-130. In addition, the jury convicted Mr. Hunt of two § 924(j) counts (Counts 7 and 9), and Mr. Greene of three § 924(j) counts (Counts 3, 7, and 9), all of which were, in relevant part, predicated on VICAR Virginia murder in violation of Va. Code Ann. § 18.2-32.⁴ App. 65-66, 69-71, 126-28, 132-33.⁵

Prior to trial, the petitioners moved to dismiss the §§ 924(c) and (j) counts, upon arguing that Virginia attempted murder and murder were not “crimes of violence” under the use-of-force clause. C.A. App. 217; *see also* Dkt. No. 274, *United States v. Hunt et al*, No. 4:17-CR-52, (E. D. Va. May 10, 2019).⁶ But the district court denied the motion, and the petitioners were thereafter convicted on these counts. App. 106a-108a.

The district court sentenced the petitioners to multiple consecutive sentences on the §§ 924(c) and (j) counts. Specifically, the court sentenced Mr. Hunt to two consecutive life terms on the § 924(j) counts (Counts 7 and 9), upon finding that the court was required to run them consecutive under the Fourth Circuit’s decision in

³ The petitioners had several co-defendants who were also convicted of various counts in the case. Their cases were consolidated for purposes of the Fourth Circuit appeal. App. 1-3. Several of those co-defendants have filed a separate petition in this Court. *See Taybron et al. v. United States*, No. 24-5243 (filed August 2, 2024).

⁴ In addition to Virginia murder and attempted murder, the predicate offenses under Counts 3, 7, 9, and 13, also included conspiracies. App. 66, 70, 72, 76, 127-29, 132-33. However, it is well settled that conspiracies do not constitute “crimes of violence” under the use-of-force clause. *See United States v. Simmons*, 11 F.4th 239, 257 (4th Cir. 2021). Therefore, the §§ 924(c) and (j) convictions under Counts 3, 7, 9, and 13 cannot be sustained based on conspiracy.

⁵ The petitioners were also convicted of several other offenses. *See* App. 227, 234.

⁶ “C.A. App.” refers to the appendix in the court of appeals below.

Bran. App. 148-49, 229. Additionally, the court sentenced Mr. Hunt to a total consecutive term of 300 months' imprisonment on the § 924(c) counts (Counts 13, 31, and 33). App. 229.⁷ For Mr. Greene, the court imposed three consecutive life sentences on the § 924(j) counts, plus concurrent life terms on Counts 1, 2, 6, and 8, and a 120-month term on Count 14. App. 186, 235.

2. On appeal, Mr. Hunt challenged the validity of his § 924(c) convictions (Counts 13, 31, and 33), upon arguing that attempted murder under Va. Code Ann. §§ 18.2-32 and 18.2-26 does not satisfy the use-of-force clause because it "can be committed by acts of omission, which are distinct from indirect force; and do not require the use, attempted use, or threatened use of physical force." Def. C.A. Br. at 59; *id.* at 62-63 (citing Virginia case law confirming that Virginia murder can be committed by "malicious act[s] of omission.").

On April 16, 2024, the Fourth Circuit rejected that argument as foreclosed by circuit precedent because:

we have held that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force." *United States v. Rumley*, 952 F.3d 538, 549 (4th Cir. 2020) (quoting *United States v. Castleman*, 572 U.S. 157, 169, 134 S. Ct. 1405, 188 L.Ed.2d 426 (2014)).

App. 20-21. The Fourth Circuit accordingly affirmed Mr. Hunt's § 924(c) convictions and sentences predicated on VICAR Virginia attempted murder.⁸

⁷ The district court additionally sentenced Mr. Hunt to a concurrent sentence of life on Counts 1, 6, and 8, and 120 months' imprisonment on Counts 12, 30, and 32. App. 229.

⁸ On appeal, the petitioners did not make a "crime of violence" challenge to their § 924(j) convictions. Likewise, they did not challenge their consecutive § 924(j) sentences under *Lora*. Therefore, the Fourth Circuit's opinion did not speak to these issues.

Codefendant Deshaun Richardson petitioned for rehearing, which the Fourth Circuit denied on May 17, 2024. App. 240.

3. On June 3, 2024, this Court granted certiorari in *Delligatti* to address the same “crime of violence” question presented here:

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.

Petition for Certiorari at (i), *Delligatti v. United States*, No. 23-825.

The predicate crime underlying Delligatti’s § 924(c) conviction was VICAR New York attempted second-degree murder, in violation of N. Y. Penal Law § 125.25(1). *Id.* at 11. New York attempted second-degree murder can be committed by “failure to perform a legally imposed duty.” *Id.* at 20 (quoting *People v. Steinberg*, 595 N.E.2d 845, 847 (N.Y. 1992)).

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari on the crime of omission question here because it has already done so in *Delligatti*.

The courts of appeals are intractably divided on the question of whether a crime that requires proof of bodily injury or death, but can be committed by failing to take action, has an element the use, attempted use, or threatened use of physical force. This Court has already recognized that this issue is of exceptional importance by granting certiorari in *Delligatti*. Because these cases involve the same issue, this Court should hold his case in abeyance pending *Delligatti* and grant certiorari if it is resolved in the defense’s favor.

A. The circuits are split on how the use-of-force requirement applies to crimes committed by inaction.

Eight circuits (including the Fourth Circuit) hold that if a crime results in death or bodily injury, it “necessarily involves the use of violent force,” even if the crime may be committed “by omission.” *United States v. Scott*, 990 F.3d 94, 112-13 (2d Cir. 2021) (en banc), *United States v. Báez-Martínez*, 950 F.3d 119, 130-33 (1st Cir. 2020); *United States v. Rumley*, 952 F.3d 538, 549-51 (4th Cir. 2020); *United States v. Harrison*, 54 F.4th 884, 890 (6th Cir. 2022); *United States v. Jennings*, 860 F.3d 450, 460-61 (7th Cir. 2017); *United States v. Peeples*, 879 F.3d 282, 286-87 (8th Cir. 2018); *United States v. Ontiveros*, 875 F.3d 533, 536-38 (10th Cir. 2017); *United States v. Sanchez*, 940 F.3d 526, 535-36 (11th Cir. 2019).

Two circuits—the Third and the Fifth—recognize that the causation of bodily injury does not necessarily equate to the use of violent force, and therefore crimes that can be committed by omission do not categorically qualify as “crimes of violence.” *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018); *United States v. Martinez-Rodriguez*, 857 F.3d 282, 286 (5th Cir. 2017).

Like the Fourth Circuit did in this case, circuits on both sides of the split have doubled down on their positions, rendering the split intractable. *Hunt*, 99 F.4th at 179 (relying on *Rumley* notwithstanding the concerns articulated in Judge Motz’s dissent in that case); *United States v. Harris*, 68 F.4th 140, 146 (3d Cir. 2023); *United States v. Harris*, 88 F.4th 458, 465 (3d Cir. 2023) (Jordan, J., concurring in the denial of rehearing en banc and noting conflict will persist absent further review).

Hence, it was critical for this Court to grant certiorari in *Delligatti* to resolve this split, and it remains critical for this Court to hold the petitioners' cases in abeyance—which presents the same issue—until *Delligatti* is resolved.

B. This court has already granted certiorari in *Delligatti* to resolve the same question presented in this petition, which will be dispositive of the petitioners' claims.

Importantly, this Court's disposition of the “crime of violence” issue in *Delligatti* will determine the legality of the petitioners' § 924(c) and (j) convictions predicated on Virginia attempted murder and completed murder.⁹

Like VICAR New York attempted murder at issue in *Delligatti*, VICAR Virginia attempted murder and completed murder can also be committed by omission (i.e., by failing to act). Def. C.A. Br. at 62-63 (citing *Vaughan v. Commonwealth*, 7 Va. App. 665, 674, 376 S.E.2d 801, 806 (1989) (“a person [who] maliciously omits to perform a duty of care that is owed and that omission results in death” has committed murder); *Davis v. Commonwealth*, 230 Va. 201, 205, 335 S.E.2d 375, 378 (1985) (“If the death results from a malicious omission of the performance of a duty, the offense is murder.”); *Biddle v. Commonwealth*, 206 Va. 14, 20, 141 S.E.2d 710, 714 (1965) (“if death is the direct consequence of the malicious omission of the performance of a duty, such as of a mother to feed her child, this is a case of murder”).

⁹ Although the petitioners did not make a “crime of violence” challenge to their § 924(j) convictions on appeal, a holding in *Delligatti* that an offense which can be committed by omission categorically fails to qualify as a “crime of violence” would necessarily render the petitioners' § 924(j) convictions void because they were predicated on the underlying offense of VICAR Virginia murder, which can be committed by omission. Therefore, this Court's certiorari grant on the crime of omission issue equally impacts both the § 924(c) and (j) counts.

Therefore, Mr. Delligatti's predicate and the petitioners' predicates, while technically different offenses, are equivalent in all respects relevant to the question presented. Consequently, if the Court finds that VICAR New York attempted murder is not a § 924(c) "crime of violence," then it will necessarily follow that VICAR Virginia attempted murder and murder are not § 924(c) "crimes of violence." In turn, the petitioners' §§ 924(c) and (j) convictions will be rendered void.

In short, *Delligatti* will be dispositive of the petitioners' "crime of violence" claim. Thus, the most efficient and appropriate resolution here is to hold the petition in abeyance pending this Court's decision in *Delligatti*, and then grant certiorari (if warranted) subsequent to the decision.

II. This Court should grant certiorari because the petitioners were sentenced in conflict with this Court's decision in *Lora* holding that consecutive sentences are not mandatory under 18 U.S.C. § 924(j).

Even if this Court does not grant certiorari based on the act of omission issue, it should still grant certiorari to remedy the unlawful sentence imposed on the petitioners. As the district court explicitly noted, it imposed consecutive life sentences on the petitioners' § 924(j) convictions because Fourth Circuit law (*Bran*) at the time mandated it to do so. App. 148-49, 186. But as this Court held in *Lora*, 599 U.S. at 455, no such requirement exists under § 924(j). Rather, courts are free to impose a consecutive or concurrent sentence under the statute. Because the petitioners' consecutive life sentences cannot be reconciled with this Court's precedent, this Court should grant certiorari and remand this case for resentencing.¹⁰

¹⁰ Although the petitioners did not raise this issue on appeal, this Court should grant certiorari considering the magnitude of the sentence here. It goes without saying that two mandatory

CONCLUSION

For the foregoing reasons, this Court should hold this case for disposition pending its decision in *Delligatti* and then grant certiorari, vacate the judgment of the Fourth Circuit, and remand the case for further proceedings in light of *Delligatti*. Even if this case does not grant certiorari in light of *Delligatti*, it should grant certiorari in light of *Lora*, vacate the district court judgment, and remand the case for resentencing.

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consecutive sentences are severe. The only just result here is to grant certiorari so that this grave error can be remedied.