No. 23-825

IN THE

Supreme Court of the United States

SALVATORE DELLIGATTI,

Petitioner,

v.

UNITED STATES

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF FEDERAL PUBLIC DEFENDER OFFICES IN THE SECOND CIRCUIT AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are federal public defender organizations for districts within the Second Circuit: the Offices of the Federal Public Defender for the Southern District of New York, the Northern District of New York, the Western District of New York, the District of Vermont, and the District of Connecticut. Each year, federal defenders represent tens of thousands of indigent criminal defendants in federal court. That includes numerous defendants whom prosecutors charge with violations of 18 U.S.C. § 924(c), the provision at issue here. Moreover, federal defenders routinely litigate which criminal offenses may apply to their alleged conduct and advocate for their clients at sentencing within the framework of statutory minimums and maximums set out by Congress. Accordingly, amici have particular expertise and interest in the subject matter of this litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

A "crime of violence" is an offense that invariably calls for proof of "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). "Plainly, this language requires the government to prove that the defendant took specific actions against specific persons or their property." *United States v. Taylor*, 596 U.S. 845, 856 (2022).

But no such specific actions must be shown to prove attempted murder in New York. As Delligatti details,

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[1] Pursuant to Supreme Court Rule 37, counsel for amici curiae affirm that no counsel for a party authored this brief in whole or part, and no person or entity other than amici or their counsel funded its preparation or submission.

it is enough to show the defendant failed to provide needed medical care to someone who needed it, *i.e.*, intentionally sat and watched when a heart attack struck a person in his care. Pet. Br. 18. This criminal refusal to render aid "does not have 'as an element the use, attempted use, or threatened use of physical force against th[at] person,'" as it "amounts to a form of inaction." *Chambers v. United States*, 555 U.S. 122, 127-28 (2009). And "shoehorning it into statutory sections where it does not fit" is no option. *Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004). New York's crime of attempted murder is not a federal "crime of violence."

Though that might surprise a "man on the street," *United States v. Scott*, 990 F.3d 94, 99 (2d Cir. 2021) (en banc), it is unremarkable in this niche area of law. Offenses including murder, manslaughter and rape have been held to fall outside the "crime of violence" definition that was narrowed in *Johnson v. United States*, 576 U.S. 591 (2015), and *United States v. Davis*, 588 U.S. 445 (2019). But Congress has not rewritten that definition in response—no doubt because there has been no need. Focusing on "the seriousness of the offense" and the need "to protect the public," 18 U.S.C. §§ 3553(a)(2)(A), (a)(2)(C), judges impose long prison sentences for defendants perceived as dangerous even if their crimes are not technically ones of "violence."

The Court should therefore reverse the judgment below. In so doing, the Court can be confident that judges will still base punishment on actual conduct rather than what label attaches (or not) to a crime.

ARGUMENT

Myriad Violent-Sounding Crimes Have Been Held Not to Fit Within the "Crime of Violence" Definition That *Johnson* and *Davis* Narrowed, But Judges Have Continued to Take Full Account of Actual Conduct at Sentencing.

Section 924(c) sets out various mandatory minimum sentences for people who possess or use a gun during a "crime of violence." And § 924(e), the Armed Career Criminal Act (ACCA), requires a 15-year minimum for someone who possesses a gun in violation of § 922(g) after sustaining three convictions for a "violent felony." But *Davis* and *Johnson* invalidated, as void for vagueness, the residual clauses at § 924(c)(3)(B) and § 924(e)(2)(B)(ii).

Consequently, courts deciding if an offense is a "crime of violence" under § 924(c)(3)(A) or a "violent felony" under § 924(e)(2)(B)(i) have an exceedingly "straightforward job: Look at the elements." *Taylor*, 596 U.S. at 860. "The only relevant question is whether the . . . felony at issue always requires the government to prove," *id*. at 850, the "use, attempted use, or threatened use of physical force against" other people or property. 18 U.S.C. §§ 924(c)(3)(A), 924(e)(2)(B)(i).

If the crime does not "always" require such proof, then it is not "violent" under those clauses. And that describes many crimes that would sound violent to a "man on the street" unfamiliar with this area of law. *Scott*, 990 F.3d at 99. Such crimes include murder, manslaughter, rape, kidnapping, carjacking, robbery, assault, bombing and arson. Courts have correctly refused to "shoehorn[]" those offenses "into statutory sections where," after *Davis* and *Johnson*, they do "not fit." *Leocal*, 543 U.S. at 13.

Congress has not amended § 924(c) and ACCA to reach those crimes, however—doubtless because there is no need. Citing actual conduct, judges still sentence dangerous people to long prison terms. And they grant lower sentences where merited, in cases previously controlled by inflexible minimums.

A. Conspiring and Attempting to Murder

A "conspiracy" is "merely an agreement to commit [an] act proscribed by [law]." *United States v. Feola*, 420 U.S. 671, 676 (1975). Because that entails no "use, attempted use, or threatened use of physical force," 18 U.S.C. § 924(c)(3)(A), a conspiracy—even a "conspiracy to commit murder"—"'is *not* a qualifying offense under § 924(c).'" *United States v. Capers*, 20 F.4th 105, 119 (2d Cir. 2021) (quotation marks and citation omitted). The *Capers* court thus vacated a § 924(j) conviction despite the fact that Capers "shot and killed Allen McQueen." *Id*. at 112. His § 924(j) count was based on his having "'conspired'" to engage in "acts that included murder," which "required proof beyond a reasonable doubt only that Capers and others agreed to do those things, not that Capers (or anyone else, for that matter) ever actually committed those crimes." *Id*. at 121 (emphasis omitted). A substantive crime might require the use of force, but "a conspiracy to commit it does not." *Id*.

Capers did not benefit, however, from his "crime of violence" win. Though his § 924(j) conviction was vacated, that was not his only count—which is usually (if not always) the case in § 924(c) prosecutions. Initially sentenced to "444 months" for his other convictions, plus "60 months" on the § 924(j) count, for a total of 504 months, *id.* at 111, Capers was resentenced to the exact same thing—"504 Months"—despite facing no mandatory minimum. *United States*

v. Capers, No. 15-cr-607, Docket Entry No. 344 at 2 (S.D.N.Y.). The judge, citing "the nature and circumstances of the offense, as well as the need for the sentence to reflect the seriousness of the offense and to provide just punishment," reasoned that there was "no question that these factors weigh overwhelmingly in favor of an extremely lengthy term of imprisonment." *Id*., Docket Entry No. 348 at 54. "Of course, most significant for today's sentencing, there was Mr. Caper's [*sic*] participation in the violent and deadly rivalry with the Taylor Avenue crew that culminated with Mr. Capers murdering another human being." *Id*. at 56. "As Mr. McQueen was running away with his daughter in his arms, Mr. Capers fired several shots. . . . Mr. McQueen collapsed while clutching his young daughter, and died on the street." *Id*. at 56-57. "Mr. Capers poses a tremendous danger to society." *Id*. at 58. The court was thus able to take into account Capers' conduct despite the vacatur of the § 924(j) conviction.

Besides conspiracy, attempting "murder-for-hire" under 18 U.S.C. § 1958 also is not a "crime of violence," as it is committed "when a defendant simply 'travel[s] in interstate commerce with the intent that a contract murder be committed.'" *United States v. Cordero*, 973 F.3d 603, 625 (6th Cir. 2020) (citation omitted). That involves no necessary "'use, attempted use, or threatened use of physical force' against another person." *Id*. at 625-26; *see also United States v. Boman*, 873 F.3d 1035, 1042 (8th Cir. 2017) ("[M]urder for hire can only constitute a crime of violence under the residual clause of § 924(c)(3)(B), and not under the force clause of § 924(c)(3)(A).").

Yet the defendant in *Cordero* received no great benefit from his appellate victory. He "wanted to kill Goines" and was to "receive a significant payout for

murdering Goines." 973 F.3d at 613. Thus, at resentencing, the judge had little difficulty choosing essentially the same punishment she had originally. She imposed a "240-month sentence," which is "22 months less than the 262 I originally gave you. . . . You might have hoped for more. You don't deserve more." N.D. Ohio 17-cr-342, Docket Entry 139 at 56. "[Y]ou were still under [a] criminal justice sentence but in the community when you committed this horrific offense, intending to kill someone for pecuniary gain." *Id*. at 53.

B. Murder and Manslaughter

If anything sounds like a "crime of violence," homicide does: causing someone's death surely entails the "use of physical force against" the victim. 18 U.S.C. §§ 924(c)(3)(A), 924(e)(2)(B)(i). Yet courts have held otherwise. Given the broad ways in which state and federal laws define murder and manslaughter, several such offenses have been ruled to fall outside the "crime of violence" definition. This is due largely to the narrowing of that definition in *Davis* and *Johnson*, but those are not the only relevant precedents.

In *Leocal*, this Court held—unanimously—that the Florida offense of driving drunk and causing "serious bodily injury" is "not a crime of violence." 543 U.S. at 3-4. The offense "does not require proof of any particular mental state," *id*. at 7, and thus reaches injuries caused "negligently." *Id*. at 8. Yet "an offense, to qualify as a crime of violence, must have 'as an element the use, attempted use, or threatened use of physical force against the person or property of another.'" *Id*. And this language "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id*. at 9. "Drunk driving is a nationwide problem, as evidenced by the efforts of legislatures to prohibit such conduct and impose

appropriate penalties. But this fact does not warrant our shoehorning it into statutory sections where it does not fit." *Id.* at 13.

Left open in *Leocal* was the "question whether a state or federal offense that requires proof of the *reckless* use of force against a person or property of another qualifies as a crime of violence." *Id*. (emphasis in original). The Court answered that question in *Borden v. United States*, 593 U.S. 420 (2021). "The phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual. Reckless conduct is not aimed in that prescribed manner." *Id*. at 429 (plurality op.). "Offenses with a *mens rea* of recklessness do not qualify." *Id*. at 445. A "crime that can be committed through mere recklessness does not have as an element the 'use of physical force.'" *Id*. at 446 (Thomas, J., concurring).

Because a reckless offense is not a "crime of violence," a ruling that "Texas murder . . . qualifies as a violent felony," *United States v. Vickers*, 967 F.3d 480, 487 (5th Cir. 2020), was vacated after *Borden*. *Vickers v. United States*, 141 S. Ct. 2783 (2021). On remand, the district court held that, "[b]ecause Texas murder could be established by reckless conduct, it does not qualify as a use of force [crime] to support enhancement under the ACCA." *Vickers v. United States*, 2024 WL 1863114, at *3 (N.D. Tex. Apr. 29, 2024). The government did not appeal.

Indeed, the government has acknowledged that "some forms of federal first-degree murder [under 18 U.S.C. § 1111], namely first-degree felony murders predicated on felonies that do not require the use of force against a person, are not crimes of violence." U.S. Supp. Br., *United States v. Ross*, No. 18-2800, 2022 WL 1028063, at *18 (8th Cir.). "[K]idnapping, in violation

of 18 U.S.C. § 1201, is not a crime of violence under the force clause because it can be committed through means, such as decoy and inveiglement, that do not require the use, attempted use, or threatened use of force." *Id.* at *3. And as "§ 1201(a) does not require any mental state for the death-resulting element, kidnapping resulting in death is no longer a crime of violence." *Id.* at *5-*6. This "position is not taken lightly, but after *Borden*, it is what the categorical approach requires." *Id.* at *18. The Eighth Circuit agreed and vacated a § 924(j) conviction: "kidnapping resulting in death is not a crime of violence." *United States v. Ross*, 2022 WL 4103064, at *1 (8th Cir. 2022).

Yet Ross saw no benefit from this legal ruling given his actual conduct. He and an accomplice abducted a man whose wife was in labor and tried to get him to withdraw money from ATMs; when that attempt failed, Ross "shot the man because he wanted [him] to know 'he wasn't playing.'" *United States v. Ross*, 969 F.3d 829, 836 (8th Cir. 2020). Initially sentenced to "life terms of imprisonment" on various counts, *id.*, after his "crime of violence" win on appeal the judge again imposed a life sentence on all counts that permitted it—including those that did not mandate it. *United States v. Ross*, No. 16-cr-305, Docket Entry No. 217 at 2 (W.D. Mo.).

The defendant in *Vickers* did receive a benefit: reduction of his initial ACCA sentence from 190 months to § 922(g)'s then-applicable statutory maximum of "120 months." *United States v. Vickers,* No. 06-cr-229, Docket Entry No. 88 at 2 (N.D. Tex.). By his release in 2018, however, Vickers had already served more than 10 years in prison for his gun possession in 2005. *See id.*, Docket Entry Nos. 1, 88. His murder conviction from "1982" was decades old, moreover, *Vickers*, 967 F.3d at 486, and he followed the

law upon his release in 2018. *See* No. 06-cr-229 (N.D. Tex.) (reflecting no violations of supervised release).

As with the state and federal murder offenses above, state and federal crimes of manslaughter have also been held not to fit within the narrowed "crime of violence" definition.

"Texas intoxication manslaughter," for example, "does not qualify as a 'crime of violence,'" as it "does not require a 'higher degree of intent than negligent or merely accidental conduct.'" *United States v. Trujillo*, 4 F.4th 287, 290-91 (5th Cir. 2021) (quoting *Leocal*, 543 U.S. at 9).

But this legal win did Trujillo no good. The record made clear that his judge's deeming his 1995 manslaughter conviction as being for a "violent" crime "did not affect his sentence in any way." *Id*. at 291. "So there is no need to remand for resentencing." *Id*. at 289.

The error was not harmless in *United States v. Middleton*, 883 F.3d 485 (4th Cir. 2018). The judge's deeming South Carolina involuntary manslaughter a "violent" crime, *id*. at 487, resulted in Middleton receiving ACCA's mandatory minimum sentence of 15 years rather than punishment within § 922(g)'s then-applicable range of 0 to 10 years. This was error, as the manslaughter offense "sweeps more broadly than the physical force required under the ACCA's force clause," *id*. at 489, in that it reaches someone who "illegally sold alcohol" to a minor who drank it and then "crash[ed] his car." *Id*. "[S]elling alcohol to minors, without more, falls short of [using] violent force." *Id*. at 492.

By the time Middleton was resentenced to time served in May 2018, he had spent 14 years in custody for his gun possession in May 2004. *See United States*

v. Middleton, No. 04-cr-1094, Docket Entry Nos. 1, 120 (D.S.C.).

Besides state manslaughter offenses, "involuntary manslaughter" under 18 U.S.C. § 1112 is not "a 'crime of violence' under § 924(c)." *United States v. Benally*, 843 F.3d 350, 351-52 (9th Cir. 2016). It requires only "a mental state of 'gross negligence.'" *Id*. at 353.

In *Benally*, the defendant was initially convicted of involuntary manslaughter under § 1112 and gun discharge under § 924(c) and sentenced to 153 months: 33 months for the manslaughter, plus the 120-month mandatory minimum for the gun discharge. *See United States v. Benally*, No. 13-cr-8095, Docket Entry No. 135 at 18 (D. Ariz.). That is what the government requested, *see id*. at 14, noting Benally had "no criminal history points" and a single "DUI prior conviction," *id*., from 14 years earlier. *See id*., Docket Entry No. 128 at 2. After his § 924(c) conviction was vacated on appeal, he was resentenced to 33 months. *See id*., Docket Entry No. 162. That is clearly low for a crime that took a life, but the statutory maximum for involuntary manslaughter is only "8 years," § 1112(b), and the judge had earlier explained that Benally was "very intoxicated" when he "shot and killed [his] relative," a "tragic and a serious event." No. 13-cr-8095, Docket Entry No. 135 at 15. Unusual for a homicide case, moreover, Benally was released on bond rather than detained pending trial. *See id*., Docket Entry No. 12. His lawyer explained at the bond hearing that, after Benally shot his relative while very drunk, he was "severely beaten" by others on the scene. *Id*., Docket Entry 62 at 5. After his win on appeal, his judge determined a 33-month sentence was sufficient given this context. The government did not appeal, and Benally completed his 3-year term of supervised release without incident.

The cases above reveal that even the most violent-sounding crimes—murder and manslaughter—do not always fit within the narrowed "crime of violence" definition. No harm has come from this, however, as people who pose a continuing danger of violence are kept in prison.

C. Rape

"[S]exual abuse by forcible compulsion" in Alabama is not a "violent" crime. *United States v. Davis*, 875 F.3d 592, 600 (11th Cir. 2017). "Because sexual contact, as defined by [Alabama], can be satisfied by '[a]ny touching,' or what the Supreme Court in *Johnson* termed 'merest touching,' it cannot satisfy the physical force requirement." *Id*. (quoting *Johnson v. United States*, 559 U.S. 133, 139 (2010) (citation omitted)). "That leaves only the forcible compulsion element." *Id*. Alabama law "indicates that where the victim is a child and the defendant is an authority figure in that child's life 'an implied threat of some sort of disciplinary action' can be sufficient to support a conviction." *Id*. at 602 (citation omitted). And "[t]here are all kinds of parental disciplinary actions that do not involve physical force." *Id*. at 603. Thus, "sexual abuse by forcible compulsion does not categorically include as an element the use, attempted use, or threatened use of physical force." *Id*. at 604.

Davis, initially sentenced to 188 months under ACCA, *id*. at 596, was resentenced in 2018 to the then-applicable statutory maximum of 120 months—a still-significant sentence. *See United States v. Davis*, No. 15-cr-158, Docket Entry No. 68 (S.D. Ala.).

Illinois "aggravated criminal sexual abuse" is also not a "crime of violence." *United States v. Williams*, 949 F.3d 1056, 1066 (7th Cir. 2020). It occurs when one "17 years or older [] 'commits an act of sexual conduct

with a victim who is under 13 years of age.' Sexual conduct means 'any knowing touching . . . for the purpose of sexual gratification.' This statute does not require 'the use, attempted use, or threatened use of physical force.'" *Id*. at 1067 (citations omitted). *See also Johnson*, 559 U.S. at 140 ("'[P]hysical force' means *violent* force.") (emphasis in original).

Despite winning that legal claim on appeal, Williams was not resentenced. Though deeming aggravated criminal sexual abuse a "crime of violence" wrongly labeled Williams a career offender under the Sentencing Guidelines, his judge "would have imposed the same 180-month sentence regardless." 949 F.3d at 1068. She explained that the career offender guideline "'applies in this case legally; but even if it did not, this is still the sentence that I would impose.'" *Id*. at 1069. "'The bottom line is: My duty is to protect the public from [Williams], and I do think that a significant sentence in this case is necessary to do that. . . . There's too much at stake.'" *Id*.

Besides the rape offenses above, "attempted rape" in Virginia is also not a "violent" crime. *United States v. Al-Muwwakkil*, 983 F.3d 748, 756 (4th Cir. 2020). It can be established "with proof that does not involve the use of physical force . . . , such as by proof that the victim was underage or . . . blind." *Id*. at 760.

But this did not help Al-Muwwakkil. Though the court held that his attempted rape conviction could not serve as an ACCA predicate, on remand the government identified another of his convictions to fill in: "Use or Display [of] a Firearm During the Commission of Felony Abduction" in violation of Virginia law. *United States v. Al-Muwwakkil*, No. 01-cr-92, Docket Entry No. 112 at 5 (E.D. Va.). "Virginia law clearly establishes," the judge ruled, this "conviction as one which 'has as an element [] the use,

attempted use, or threatened use of physical force against the person of another.'" *Id*. at 7. The judge nonetheless granted a modest sentence reduction: "from 280 months to 270 months." *Id*., Docket Entry No. 110.

D. Kidnapping

New York "kidnapping . . . is not categorically a crime of violence." *United States v. Eldridge*, 63 F.4th 962, 964 (2d Cir. 2023). As one "could be convicted . . . if he used deception to hold a victim in a place where it is unlikely that victim will be found," it "does not require 'the use, attempted use, or threatened use of physical force.'" *Id*. at 965.

Eldridge's actual conduct has stood in the way, however, of his benefitting from this legal win. After his case was remanded, he moved for release pending resentencing but the judge refused: Eldridge still faces "a maximum term of life imprisonment," and "the Court has had multiple previous occasions to assess Defendant's dangerousness, which weighs heavily against his release." *United States v. Eldridge*, No. 09-cr-329, Text Order of July 18, 2024 (W.D.N.Y.). His "criminal history is egregious and contains numerous offenses involving drugs and violence and firearms," and although the jury didn't reach a verdict on the "Defendant's alleged murder of Sam Jones, Jr.," the judge plans to consider it at resentencing. *Id*.

As with New York kidnapping, "federal kidnapping may be committed by means of inveiglement and/or decoy (without the use of physical force) and then maintained solely by psychological force." *United States v. Gillis*, 938 F.3d 1181, 1209 (11th Cir. 2019).

But this did Gillis no good. "The actual, real-world conduct that Gillis solicited was a kidnapping by physical violence, including hooding, blindfolding, and

snagging the victim M.O., putting her in a van, and then using her as a sex slave." *Id*. at 1196. Gillis was initially sentenced "to a total of 365 months' imprisonment, but, following an appeal, we reversed one of his convictions." *United States v. Gillis,* 2021 WL 4817709, at *1 (11th Cir. 2021). "On remand, the district court . . . reimposed the same total sentence." *Id*. The circuit affirmed: "The district court gave great weight to two of the § 3553(a) factors—specifically, the need for the total sentence to reflect the seriousness of the offense, 18 U.S.C. § 3553(a)(2)(A), and to protect the public from further crimes of the defendant, *id*. § 3553(a)(2)(C)—and Gillis has not shown that this weighing was improper." *Id*. at *3.

E. Carjacking

"California carjacking is not a crime of violence" for two reasons. *Gutierrez v. Garland*, 106 F.4th 866, 881 (9th Cir. 2024). First, "a defendant need not use force; accomplishing carjacking through fear alone is sufficient." *Id*. at 873. And California courts have "rejected the proposition that the use of fear necessarily includes the threat of force." *Id*. at 874. For example, where someone simply "drove away" in an idling car while its owner was about to put her son in the rear car seat, which caused her to "'fear[] for her safety and the safety of her son,'" the "'carjacking was accomplished by the use of fear'" rather than "through force." *Id* (citation omitted). Second, there is no "*mens rea* requirement for the 'force or fear' element," meaning carjacking can be "committed through the unintentional use of force." *Id*. at 877 (citing *Borden*).

F. Armed and Unarmed Robbery

"[A]ggravated robbery with a deadly weapon" under Ohio law, "without further information that the aggravated-robbery conviction is predicated on a

particular underlying theft offense, is not a crime of violence." *United States v. Ivy*, 93 F.4th 937, 941 (6th Cir. 2024). That is because the crime occurs upon any "'use'" of a gun during "'a theft offense,'" and there are "more than 30 different 'theft offenses,'" including "tampering with coin machines, safecracking, insurance fraud, and workers' compensation fraud." *Id*. at 942 (citations omitted). Those require no "'knowing or purposeful use, attempted use, or threatened use of physical force against the person of another." *Id*. (quotation marks omitted).

Ivy benefitted modestly from his appellate win because his armed robbery conviction was a prior conviction that simply increased his Sentencing Guidelines range, and his criminal conduct at issue was nonviolent. He had gone "to a drug house to purchase drugs" and, while there, "police officers executed a search warrant on the house. When the police arrived, Ivy picked up a gun and placed it inside a kitchen drawer. The police recovered the gun" and "29 methamphetamine pills." *Id*. at 941. Ivy pleaded guilty to "possession with intent to distribute methamphetamine" and "being a felon in possession of a firearm." *Id*. Initially sentenced to "a below-Guidelines sentence of 75 months' imprisonment," *id*., he was resentenced to "51 months." *United States v. Ivy*, No. 22-cr-59, Docket Entry No. 82 at 2 (N.D. Ohio).

California robbery is also not a "violent" crime, as it can be committed "by *accidentally* using force." *United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015) (emphasis in original). Specifically, the robbery statute reaches a "defendant [who] uses force against a person, but only accidentally or negligently, rather than intentionally (thereby failing the element test of 18 U.S.C. § 924(e)(2)(B)(i) as interpreted by . . .

Leocal)." *Id*. Thus, California robbery "cannot serve as a predicate 'violent felony' conviction for the application of a mandatory minimum sentence under the ACCA." *Id*. at 1199.

Dixon's case illustrates how "crime of violence" rulings not only do no harm: they occasionally do some good. Dixon's ACCA prosecution resulted from police finding a "revolver among [the] work tools" in his truck. *Id*. at 1194. His judge, ruling before *Johnson* that his prior California robbery conviction was a "violent felony," said at his 2014 sentencing that she had been "continuing this sentencing for quite some time because I did not feel comfortable in the idea that it was the right thing to do." *United States v. Dixon*, No. 12-cr-222, Docket Entry No. 102 at 36 (D. Nev.). "I do have [] discretion in most cases. In this case I just simply don't." *Id*. at 36-37. She sentenced Dixon to "the minimum sentence in this case, which is a term of 180 months." *Id*. at 39. This is "more than necessary to comply with the purposes of sentencing. But, unfortunately, Congress has felt that it's important, for some reason, to prevent the courts from exercising discretion in these particular cases. And, therefore, I find that I don't have any other option. If I did have another option, I certainly would exercise it." *Id*. Given that option after Dixon's appellate win, the judge resentenced him in 2016 to time served. *Id*., Docket Entry No. 129 at 2.

G. Armed and Unarmed Assault

The "North Carolina offense of assault with a deadly weapon on a government official" is not a "violent" crime, *United States v. Simmons*, 917 F.3d 312, 315 (4th Cir. 2019), as it "can be established through proof of 'culpable negligence.'" *Id*. at 321 (citing *Leocal*, 543 U.S. at 9); *see also United States v.*

Young, 809 F. App'x 203, 209 (5th Cir. 2020) (same as to "Louisiana aggravated assault with a firearm").

But Simmons did not benefit from this legal win. He had prompted a "high-speed car chase" when he fled from police and then "sideswiped Trooper Altman's vehicle." *Id*. at 315. For this "his supervised release [was] revoked and [he] was sentenced to 36 months' imprisonment." *Id*. After prevailing on appeal, his judge, citing the need "to protect the public from further dangerous and criminal conduct," again imposed a "sentence of 36 months," *United States v. Simmons,* No. 14-cr-17, Docket Entry No. 1087 at 20 (W.D.N.C.), which was the statutory maximum. *Id*. at 3.

"[A]ssault resulting in serious bodily injury," in violation of 18 U.S.C. § 113(a)(6), is also not a "crime of violence." *United States v. Devereaux*, 91 F.4th 1361, 1362 (10th Cir. 2024). It can be committed "recklessly," *id*. at 1368, and a "crime that can be committed recklessly categorically does not have 'as an element the use, attempted use, or threatened use of physical force against the person of another.'" *Id.* at 1369 (quoting *Borden*, 593 U.S. at 424).

Devereaux benefitted modestly from this ruling. Sentenced to "60 months" at first, *id*. at 1364, the judge imposed a new term of "Fifty (50) months." *United States v. Devereaux*, No. 21-cr-352, Docket Entry No. 61 at 2 (D. Colo.).

Massachusetts assault and battery is also not a "violent" crime. A "criminal complaint alleging that a defendant 'did assault and beat' a victim can, under Massachusetts law, charge offensive battery where the defendant intentionally touched a victim, however slightly, without the victim's consent." *Weeks v. United States*, 930 F.3d 1263, 1279 (11th Cir. 2019). Such

conduct "could not have counted under the elements clause." *Id*. at 1280; *see Johnson*, 559 U.S. at 140 (requiring "*violent* force").

Weeks was resentenced to the then-applicable statutory maximum of 10 years. *See United States v. Weeks*, No. 08-cr-393, Docket Entry No. 166 (N.D. Ga.).

H. Bombing and Arson

"[D]estroying property by means of an explosive, in violation of 18 U.S.C. § 844(i)," is not a "crime of violence." *United States v. Mathews*, 37 F.4th 622, 624 (9th Cir. 2022). Such a crime is one "committed against 'the person or property *of another*,'" but a "person can be convicted under Section 844(i) for using an explosive to destroy his or her *own* property." *Id*. at 626 (emphasis in *Mathews*). The court thus "join[ed] [its] sister circuits in holding that a conviction under Section 844(i) is not a crime of violence for purposes of Section 924(c)(3). *See 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)." *Id*.

This ruling erased Mathews' § 924(c) conviction, but he had several others stemming from his "plac[ing] a 'bomb packed with steel balls (to increase the risk of personal injury)' in [an] alley" and its inflicting "serious injuries" on someone. *Id*. at 624 (citation omitted). Yet by the time Mathews was resentenced, his judge noted, he was 70 years old. *United States v. Mathews*, No. 91-cr-663, Docket Entry No. 188 at 73 (S.D. Cal.). And he had "served 31 years in prison. That's enough. That's a long time. . . . So after considering the 3553(a) factors, I'm satisfied that time served is appropriate." *Id*. at 66.

As with bombing, "arson" under § 844(f) "is not a 'crime of violence.'" *United States v. Lung'aho*, 72 F.4th 845, 847 (8th Cir. 2023). It "can be committed recklessly," and therefore "does not necessarily involve the 'use of physical force against the person or property of another.'" *Id.* (citing *Borden*).

Although Lung'aho secured this legal win (on a government appeal of the judge's dismissal of the § 924(c) counts), he then pleaded guilty to arson based on his "destroying, by means of [Molotov cocktails], law enforcement vehicles." *United States v. Lung'aho*, No. 20-cr-288, Docket Entry No. 296 at 1 (E.D. Ark.). Imposing a term of "66 months," the judge said this "was not a crime of violence as that—that is a legal term of art. Only a lawyer could love that phrase because what was done was violent. And that is precisely what concerns me and why I come to the sentence that I do." *Id*., Docket Entry No. 338 at 30-31. The "law in its essence is designed to protect people." *Id*. at 32.

* * *

The cases above reflect the narrowing of the "crime of violence" definition. And they confirm that judges continue to do what they did before *Johnson* and *Davis*: they craft punishments reflecting "the seriousness of the offense" and need "to protect the public" based on the facts of the case and the defendant's actual conduct. 18 U.S.C. §§ 3553(a)(2)(A), (a)(2)(C).

Delligatti's judge will have the same opportunity to consider the seriousness of Delligatti's actual conduct. Besides the "crime of violence" charge under § 924(c), Delligatti was convicted of offenses including "attempted murder" and was sentenced initially to "300 months' imprisonment." *United States v. Pastore*,

83 F.4th 113, 116 (2d Cir. 2023). The § 924(c) conviction accounted for only "60 months." *United States v. Delligatti*, No. 15-cr-491, Docket Entry No. 729 at 3 (S.D.N.Y.).

Whatever similarly (or identically) long prison term Delligatti might receive at any resentencing, he is correct that physical inaction is not a "use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A). And most courts have correctly rejected calls for "shoehorning" crimes into that statutory definition, *Leocal*, 543 U.S. at 13, as "it is for Congress, not [a] Court, to rewrite the statute." *Blount v. Rizzi*, 400 U.S. 410, 419 (1971).

That Congress has not done so in the years since *Johnson* and *Davis* is likely because there has been no need. Judges sentence defendants they perceive as dangerous to lengthy prison terms even when the mandatory minimums of § 924(c) and ACCA do not apply. And, as *Dixon* illustrates, they do justice in cases where unyielding minimums previously tied their hands.

A ruling for Delligatti will change none of that; it will simply reflect fidelity to plain text and precedent.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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