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Writing Sample

The following writing sample is a final mock brief prepared for the seminar course Criminal Law and Administration. The mock brief is written on behalf of the petitioner, Salvatore Delligatti, in the current Supreme Court case *Delligatti v. United States*. The question presented is whether second degree murder in New York, a crime that can be committed by an act of omission, is a categorical crime of violence.

Subject to course policy, this assignment was completed without viewing or researching any briefs or *amici curiae* filed in this case at any stage of the litigation; thus, all case and other legal research represents my own work.

This final draft was developed after my TAs edited and provided general comments and feedback on a shorter draft/outline. This sample is a 7 page excerpt from the full assignment, which is 20 pages.

STATEMENT OF FACTS

Salvatore Delligatti was a frequent customer of a local gas station owned by Luigi Romano. *United States v. Pastore*, 83 F.4th 113, 117 (2d Cir. 2023). At the time, Romano's gas station was menaced by Joseph Bonelli, who "terrorized" and stole from the gas station. *Id.* Eventually, in May 2014, Romano paid Mr. Delligatti for a hit on Bonelli; Mr. Delligatti accepted. *Id.* To perform the hit, Mr. Delligatti hired a group of gang members and provided them with a gun and a car; afterwards, Mr. Delligatti made no further physical action towards completing crime. *Id.* However, the gang members were arrested by the police before the hit could be performed. *Id.*

Mr. Delligatti was eventually arrested and charged with several crimes, including using and carrying a firearm in relation to—and possessing a firearm in furtherance of—a crime of violence. *Id.* at 118. In March 2018, Mr. Delligatti was convicted of this charge in the Southern District of New York. *Id.* Mr. Delligatti appealed to the Second Circuit, arguing that the charge related to possession of a firearm should be vacated because the other charges were not qualifying "crimes of violence." *United States v. Pastore*, 36 F.4th 423, 426 (2d. Cir. 2022). In particular, Mr. Delligatti argued that attempted murder was not a crime of violence because it could be committed by an act of omission, and therefore Mr. Delligatti's sentencing enhancement under 18 U.S.C. § 924(c) should be vacated. *Id.* at 430. However, the Second Circuit rejected Mr. Delligatti's argument, stating that murder necessarily involves the use of force and that the court had previously rejected similar arguments about omission in manslaughter. *Id.* at 429–430.

ARGUMENT

I. SECOND DEGREE MURDER IN NEW YORK IS NOT A CRIME OF VIOLENCE BECAUSE THE GOVERNMENT DOES NOT NEED TO PROVE ANY USE OF FORCE.

18 U.S.C. § 924(c) is a mandatory minimum sentence applied to those who possess a firearm in furtherance of a "crime of violence." A crime of violence is a crime that "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) ("section 924"). In the context of section 924, an element is "[a] constituent part of a claim that must be proved for the claim to succeed." *Element*, Black's Law Dictionary (12th ed. 2024). Furthermore, this Court defines "physical force" in section 924 as "offensive touching" that is "exerted by and through concrete bodies." *United States v. Castleman*, 572 U.S. 157 at 162–63, 170 (2014) (citing *Johnson v. United States*, 559 U.S. 133, 138 (2010)). This court defines the "use of" force under section 924 as "demanding volition—the 'active employment' of force." *Borden v. United States*, 593 U.S. 420, 428 (2021) (citing *Voisine v. United States*, 579 U.S. 686, 693 (2016)). Thus, combining these definitions, a crime of violence is a crime where the government must prove the actual, attempted, or threatened active employment of physical force, or offensive touching.

To determine whether these required elements exist, courts employ the "categorical approach." In the categorical approach, courts will ignore the particular facts of the case and instead determine whether the elements of the crime at hand involve physical force. *See Mathis v. United States*, 579 U.S. 500, 504 (2016) (applying the categorical approach to elements of generic burglary). Importantly, the court will identify the "least culpable conduct" for the categorical approach: if the least culpable conduct for any element of the crime does not involve physical force, it is not a crime of violence. *Borden*, 593 U.S. at 424 (2021) (citing *Johnson*, 559 U.S. at 137). The identification of the least culpable conduct cannot be "legal imagination"; rather, there must be a "realistic possibility" that a state will encounter the described conduct and apply a statute in the manner prescribed. *See Gonzales v. Duena-Alvarez*, 549 U.S. 183, 193 (2007) (applying state statutes to see whether conduct falls into a generic definition of theft).

A. The least culpable but realistically possible conduct, omission, does not require proof of the use of force.

Mr. Delligatti's second degree murder charge does not require proof of the use, attempted use, or threatened use of force as seen in the burden of proof New York assigns to the government. In New York, a person is guilty of second degree murder when they intend to, and do cause, the death of another person. N.Y. Penal Law § 125.25(1) (McKinney 2024). New York instructs juries considering second degree murder under this statute that:

> In order for you to find the defendant guilty of this crime, the People are required to prove . . . both of the following two elements:
> 1. That . . . the defendant, (defendant's name), caused the death of (specify); and
> 2. That the defendant did so with the intent to cause the death of (specify).

N.Y. Crim. Jury Instr. 2d Penal Law § 125.25(1). A plain reading of the government's burden of proof under the jury instruction indicates no need to prove the use of force; indeed, the statute requires only "causing death", and the word "force" never appears to the jury. Thus, second degree murder in New York requires only proof that an individual caused death, rather than proof of force.

New York courts have confirmed that it is realistically possible to cause death without force by omission. Though causing death without physical force may appear to be legal imagination, in *People v. Steinberg*, the state of New York successfully proved an individual "caused death" by an act of omission, rather than any sort of forceful act.[1] 595 N.E.2d 845, 847 (N.Y. 1992). New York statute defines omission as "a failure to perform an act as to which a duty of performance is imposed by law," N.Y. Penal Law § 15.00 (McKinney 2024). The statutory text indicates no use of physical force needs to be proved to prove omission; in fact, the government must prove the failure to perform an act. Thus, the least culpable but realistically possible conduct

[1] The crime charged in *Steinberg* was first degree manslaughter. The government's burden in that case was "1. That . . . the defendant . . . caused the death of (specify); and 2. That the defendant did so with the intent to cause serious physical injury to (specify)." N.Y. Crim. Jury Instr. 2d Penal Law § 125.20(1).

necessary for conviction of second degree murder in New York, omission, does not require proving physical force.

Applying the categorical approach to omission, second degree murder in New York should not be considered a crime of violence. Keeping with this Court's categorical approach analysis in *Borden*, if the least culpable but realistically possible conduct for conviction of a crime requires no proof of physical force, the crime is not a crime of violence. Here, omission, or a lack of action, is the least culpable conduct necessary for the government to prove second degree murder in New York that is not legal imagination. Lack of action can be proven by the government without any reference to any use of physical force, or the active employment of offensive touching. Therefore, applying the categorical approach reveals second degree murder in New York is not a crime of violence.

Furthermore, this Court's precedent confirms using the categorical approach in this way is appropriate. As this Court recognizes, "Congress task[s] the courts with a . . . straightforward job: Look at the elements of the underlying crime and ask whether they require the government to prove the use, attempted use, or threatened use of force." *United States v. Taylor*, 596 U.S. 845, 860 (2022). This straightforward job is no different here: the underlying crime is second degree murder in New York under § 125.25(1), and that crime in turn requires no proof of the use, attempted use, or threatened use of force because the government may prove omission instead. Thus, applying the categorical approach and this Court's *Taylor* precedent reveals that second degree murder in New York is not a crime of violence.

Altogether, under the categorical approach, second degree murder in New York does not require the government to prove the use, attempted use, or threatened use of force.

B. The government incorrectly construes omission as an act involving physical force.

The government misconstrues the elements of second degree murder in New York when it claims omission may itself be a violent physical act because the government ignores the plain

statutory meaning of omission under N.Y. Penal Law § 15.00. The government argues that omission itself is an action, and it can be construed as a violent act if it causes serious physical injury. *See United States v. Scott*, 990 F.3d 94, 110 (2d. Cir. 2021) (recognizing omission as action in common law, particularly for crimes causing serious physical injury).

However, as previously discussed, N.Y. Penal Law § 15.00 describes omission as "a failure to perform an act," which should not be construed as involving physical force or a violent act. This Court describes "physical force" as "offensive touching," *Castleman*, 572 U.S. at 162–63, whereas omission, or the failure to perform an act, implies no touch or physical contact with a person or object. Likewise, this Court's definition of the "use of" force as "active employment" of force, *Borden*, 593 U.S. at 428 (citation omitted), implies activity that is similarly inconsistent with the lack of action in omission. In fact, other courts readily refute "conflat[ing] an act of omission with the use of force," *United States v. Mayo*, 901 F.3d 218, 230 (3d. Cir. 2018) (citing *Castleman*, 572 U.S. at 169–70), and some have noted the absurdity of classifying failure to render medical care, an instance of omission, as an act involving physical force or violence. *See Scott*, 990 F.3d at 142–143 (Pooler. R., dissenting) (describing how the death of a child by failing to render care to them after an allergic reaction may be hypothetically called an act of physical force). Thus, omission, or the failure to perform an act, should not be construed as involving the use of physical force by the plain language meaning of "omission" and this Court's definition of "use of physical force."

Thus, the government misconstrues omission as an act involving the use of physical force.

C. The government abandons the rule of lenity when arguing for its interpretation of New York Law.

Notwithstanding the government's unjustified rejection of the plain meaning interpretations of the words "cause death" and "omission" in N.Y. Penal Law §§ 15.00, 125.25(1), the government abandons the rule of lenity because it interprets these words to favor itself, rather than Mr. Delligatti. The rule of lenity is a "time-honored interpretive guideline that uncertainty

concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Kozminski*, 487 U.S. 931, 952 (1988) (collecting cases). However, the rule of lenity applies only if there remains ambiguity in a statute after considering its text, structure, history, and purpose. *See Castleman*, 572 U.S. 172–73 (citing *Barber v. Thomas*, 560 U.S. 474, 488 (2010)) (refusing to apply the rule of lenity because the statute there was insufficiently ambiguous).

If the government casts aside Mr. Deligatti's argument that omission does not involve physical force, it cannot also deny there is ambiguity in interpreting N.Y. Penal Law §§ 15.00, 125.25(1). Indeed, the textual provisions stating murder requires proof the defendant "causes the death" of another, N.Y. Penal Law § 125.25(1), sometimes by the "failure to perform an act," N.Y. Penal Law § 15.00, have no clear treatment of the terms "physical force" or "offensive touching" without a plain reading of terms like "physical" and "touching." Thus, if the government rejects the plain reading view of these terms, unresolvable ambiguity emerges in whether a plain reading view should be favored over any other view the government presents.

In an ambiguity between a plain reading view and any other view, the plain reading view favorable to Mr. Delligatti should be adopted. Applying the rule of lenity, factors such as the text and structure of N.Y. Penal Law §§ 15.00, 125.25(1) have resulted in ambiguity as to whether second degree murder by omission necessarily involves physical force in New York. Thus, under the rule of lenity, N.Y. Penal Law §§ 15.00, 125.25(1) should be interpreted to read that second degree murder by omission does not necessarily involve physical force as favorable to Mr. Delligatti.

Altogether, the rule of lenity also implies that second degree murder in New York does not necessarily involve the use of physical force.

II. THE GOVERNMENT'S POLICY ARGUMENT FAILS BECAUSE IT ATTEMPTS TO REVIVE THE UNCONSTITUTIONAL RESIDUAL CLAUSE.

In an attempt to reject this Court's precedent and the categorical approach, the government argues that on policy grounds, the idea that murder in New York could not be a crime of violence is simply "absurd." However, this argument falls short because it would interpret section 924 in a manner that this Court has already struck down as unconstitutionally vague.

Section 924 originally did not define "crime of violence" solely as a crime with the use, attempted use, or threatened use of force as an element (the "elements clause"). Instead, section 924 previously featured the "residual clause," which defined acts that "involve[] a substantial risk that physical force against the person or property of another" as crimes of violence. 18 U.S.C. § 924(c)(3)(b). This Court in *United States v. Davis* held that the residual clause was unconstitutional because its vagueness violated principles of due process and separation of powers. 588 U.S. 445, 464 (2019). Thus, without the residual clause, a crime is a crime of violence only if it fulfills the elements clause.

However, the government's policy argument would sidestep the elements clause and instead apply the residual clause, reviving an unconstitutional statutory provision. As the government points out, Mr. Delligatti's argument about murder by omission should be rejected because courts would otherwise be forced to recognize second degree murder in New York as a non-violent crime. *See Pastore*, 83 F.4th at 121 (citing *Scott*, 990 F.3d at 100). In short, the government rejects Mr. Delligatti's omission argument, which uses the categorical analysis required by the elements clause, to instead argue murder is violent because in most circumstances it poses a substantial risk of physical force against another person, an argument based on the unconstitutional residual clause.

Therefore, the government's policy argument is an attempt to revive the classification of certain crimes as crimes of violence on a standard of "substantial risk of physical force", which has already been rejected by this Court in *Davis*.