No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRIAN GENE MCCOY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. § 924(c)(1)(A) prohibits the use of a firearm during and in relation to a federal "crime of violence." "Crime of violence" is defined in § 924(c)(3)(A) as a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

Federal voluntary manslaughter is the unlawful killing of a human being without malice upon a sudden quarrel or heat of passion. It can be committed by reckless conduct, and it can be committed by a pregnant person's prenatal conduct that results in the death of an infant after birth.

The question presented is whether federal voluntary manslaughter qualifies as a "crime of violence" under § 924(c)(3)(A) where it can be committed by reckless conduct and by prenatal conduct before there is another "person" within the meaning of federal law.

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

RELATED PROCEEDINGS

United States v. McCoy, No. 1:05-cr-00091, United States District Court for the District of North Dakota. Judgment entered December 21, 2006.

United States v. McCoy, No. 07-1052, United States Court of Appeals for the Eighth Circuit. Judgment entered August 7, 2007.

McCoy v. United States, No. 1:16-cv-00213, United States District Court for the District of North Dakota. Judgment on Petition Pursuant to 28 U.S.C. § 2255 entered October 4, 2016.

McCoy v. United States, No. 16-3953, United States Court of Appeals for the Eighth Circuit. Judgment denying Certificate of Appealability entered February 23, 2017.

McCoy v. United States, No. 17-5484, Supreme Court of the United States. Judgment entered June 15, 2018.

McCoy v. United States, No. 16-3953, United States Court of Appeals for the Eighth Circuit. Judgment entered May 26, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Brian Gene McCoy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-7a) is reported at 960 F.3d 487. The district court's order denying McCoy's motion to vacate his sentence under 28 U.S.C. § 2255 (App. 8a-10a) is unpublished.

JURISDICTION

The court of appeals entered judgment on May 26, 2020. McCoy's timely petition for rehearing *en banc* was denied by the court of appeals on August 3, 2020. This petition is timely filed under the Court's March 19, 2020 order, which extended the deadline for all petitions for writs of certiorari to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1112(a) provides:

> (a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
>
> Voluntary—Upon a sudden quarrel or heat of passion.
>
> Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

18 U.S.C. § 924(c)(3) provides:

> (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.

1 U.S.C. § 8(a) provides:

> (a) In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words "person", "human being", "child", and "individual", shall include every infant member of the species homo sapiens who is born alive at any stage of development.

STATEMENT OF THE CASE

1. In 2006, McCoy was convicted at trial of voluntary manslaughter in violation of 18 U.S.C. §§ 1112 and 1152(a), and using a firearm during and in relation to a crime of violence (voluntary manslaughter) in violation of 18 U.S.C. § 924(c)(1)(A). App. 1a, 12a. He was sentenced to consecutive terms of 96 months in prison and 36 months of supervised release for voluntary manslaughter and 120 months in prison and 60 months of supervised release for the § 924(c) offense. *Id.* at 1a-2a, 12a-14a. The 120-month prison term for the § 924(c) offense was the mandatory minimum sentence under 18 U.S.C. § 924(c)(1)(A)(iii).

2. In 2016, McCoy filed a motion to vacate his § 924(c) conviction and sentence under 28 U.S.C. § 2255 based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See id.* at 2a. McCoy argued that the residual clause of 18 U.S.C. § 924(c)(3)(B) was void for vagueness under *Johnson* and that voluntary manslaughter only qualified as a crime of violence under this now-invalidated clause. *Id.* McCoy's motion was denied, and the United States Court of Appeals for the Eighth Circuit denied his request for a certificate of appealability. *Id.*

3. McCoy filed a petition for a writ of certiorari. This Court granted his petition, vacated the judgment, and remanded the case for further consideration in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). *Id.*

4. The court of appeals then granted a certificate of appealability on the issue of whether the § 924(c) residual clause was unconstitutionally vague and, if so, whether McCoy was entitled to relief. *Id.* at 3a.

a. While McCoy's appeal was pending, this Court held in *United States v. Davis*, 139 S. Ct. 2319 (2019) that the § 924(c) residual clause is void for vagueness. *Id.*

b. After *Davis*, a panel of the court of appeals held that voluntary manslaughter still qualifies as a crime of violence under the remaining force clause in 18 U.S.C. § 924(c)(3)(A) and affirmed the denial of McCoy's § 2255 motion. *Id.* at 1a-7a. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

c. Judge Kelly concurred, explaining that one of the central issues in the case, the question of "whether a reckless mens rea is sufficient for purposes of § 924(c)(3)(A)[,] is a question deserving of a more thorough analysis than [the court of appeals had] thus far provided." *Id.* at 7a.

5. McCoy timely filed a petition for rehearing *en banc*. The court of appeals denied his motion in a summary order. *Id.* at 11a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This case involves an important question of federal law: does federal voluntary manslaughter qualify as a crime of violence under the force clause in 18 U.S.C. § 924(c)(3)(A)? There are two issues at the heart of this question—first, whether reckless conduct is sufficient for the "use of physical force against the person . . . of

another" within the meaning of the § 924(c) force clause, and second, whether a statute that covers prenatal conduct that results in the death of an infant after birth requires the use of physical force against the "person" of another. The status of federal voluntary manslaughter as a crime of violence under § 924(c) is an important question for people in Indian Country and other federal enclaves. This Court should grant McCoy's petition for a writ of certiorari to resolve this important question.

I. Voluntary manslaughter must fall under the force clause in 18 U.S.C. § 924(c)(3)(A) to qualify as a "crime of violence."

Federal law prohibits the use of a firearm during and in relation to a federal "crime of violence." 18 U.S.C. § 924(c)(1)(A). Section 924(c)(3) defines "crime of violence" as a felony offense that:

> (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.

18 U.S.C. § 924(c)(3). Subsection (A) is known as the "force clause." Subsection (B) is known as the "residual clause." In *United States v. Davis*, this Court held that the residual clause in § 924(c)(3)(B) was unconstitutionally vague. 139 S. Ct. at 2336. Thus, for federal voluntary manslaughter to qualify as a "crime of violence," it must fall under the § 924(c) force clause.

The categorical approach governs this inquiry. *See Stokeling v. United States*, 139 S. Ct. 544, 555 (2019) (applying categorical approach to similarly-worded force clause in 18 U.S.C. § 924(e)(2)(B)(i)). Under this approach, the Court looks not to the facts of the particular case, but instead to whether the elements of the statute in question categorically fall under the federal definition (here, the § 924(c) force clause). *See Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). The key under the categorical approach "is elements, not facts." *Descamps v. United States*, 570 U.S. 254, 261 (2013). The Court must consider the "least of the acts criminalized" by the statute in question "and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe*, 569 U.S. at 191 (cleaned up). Here, that inquiry involves considering whether federal voluntary manslaughter, which covers both reckless conduct and prenatal conduct committed before there is another "person" under federal law, meets the requirements of the § 924(c) force clause. Both questions warrant review by this Court.

II. Voluntary manslaughter can be committed recklessly, so it does not require the "use, attempted use, or threatened use of physical force against the person or property of another" within the meaning of the § 924(c) force clause.

Federal manslaughter is defined as "the unlawful killing of a human being without malice." 18 U.S.C. § 1112(a). Voluntary manslaughter is manslaughter committed "[u]pon a sudden quarrel or heat of passion." *Id.* This offense can be committed with a mental state of a general intent to kill, intent to do serious bodily

injury, or depraved heart recklessness. *McCoy v. United States*, 960 F.3d 487, 489 (8th Cir. 2020); *United States v. Serawop*, 410 F.3d 656, 666 (10th Cir. 2005); *United States v. Paul*, 37 F.3d 496, 499 (9th Cir. 1994). The fact that voluntary manslaughter can be committed with a mens rea of recklessness makes this offense broader than the § 924(c) force clause.

A. The circuits are split on whether reckless conduct is sufficient for the § 924(c) force clause.

The question of whether reckless conduct is sufficient to show the "use, attempted use, or threatened use of physical force against the person or property of another" within the meaning of the § 924(c) force clause has divided the circuits. *Compare In re Hall*, 979 F.3d 339, 344 (5th Cir. 2020) (holding that the § 924(c) force clause encompasses "conduct that recklessly disregards the risk of injury to another person"); *McCoy*, 960 F.3d at 489-90 (holding that reckless conduct is sufficient under the § 924(c) force clause); *United States v. Mann*, 899 F.3d 898, 902 (10th Cir. 2018) (same) *with United States v. Tsarnaev*, 968 F.3d 24, 101-03 (1st Cir. 2020) (holding that the § 924(c) force clause does not encompass reckless conduct); *United States v. Begay*, 934 F.3d 1033, 1038-40 (9th Cir. 2019) (holding that second-degree murder in violation of 18 U.S.C. § 1111(a) was not a crime of violence under the § 924(c) force clause because it could be committed recklessly).

This circuit split developed after the Court held in *Voisine v. United States*, 136 S. Ct. 2272 (2016) that reckless conduct was sufficient to trigger the federal

firearms prohibition for people convicted of "misdemeanor crime[s] of domestic violence" as defined in 18 U.S.C. § 921(a)(33)(A). Before *Voisine*, the courts of appeals almost uniformly held that recklessness was not sufficient for the "use" of force. *United States v. Castleman*, 572 U.S. 157, 169 n.8 (2014). Now, the courts of appeals disagree on whether the Court's holding in *Voisine* means that the § 924(c) force clause encompasses reckless conduct. The Court should grant certiorari to resolve this circuit split.

B. Alternatively, this case should be held in abeyance pending the Court's decision in *Borden v. United States*, which will resolve the issue of whether reckless conduct is sufficient for the use of force against the person of another in a nearly identical statutory context.

This Court has granted certiorari to resolve whether reckless conduct is sufficient to qualify as a violent felony under the force clause of the Armed Career Criminal Act (ACCA). *See Borden v. United States*, No. 19-5410. Because *Borden* will likely resolve the question presented here, McCoy's petition should be held in abeyance pending the Court's opinion in that case.

The language of the § 924(c) force clause at issue here and the language of the ACCA force clause at issue in *Borden* are materially indistinguishable. *Compare* 18 U.S.C. § 924(c)(3)(A) (defining "crime of violence," in part, as a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another") *with* 18 U.S.C. § 924(e)(2)(B)(i) (defining "violent

felony," in part, as a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"). Indeed, courts routinely apply cases interpreting the ACCA force clause in interpreting the § 924(c) force clause. *See, e.g.*, *Tsarnaev*, 968 F.3d at 101-02; *United States v. Evans*, 924 F.3d 21, 29 n.4 (2d Cir. 2019). Thus the Court's holding in *Borden* will shed light on the issue here—whether an offense that can be committed recklessly qualifies as a crime of violence under the similarly-worded § 924(c) force clause. McCoy's petition should be held in abeyance pending *Borden*.

III. Voluntary manslaughter encompasses prenatal conduct, which is not conduct "against the person . . . of another" within the meaning of the § 924(c) force clause.

The question of whether voluntary manslaughter qualifies as a crime of violence under the § 924(c) force clause raises another important question worthy of review by the Court—does a statute (like federal manslaughter) that covers a pregnant person's prenatal conduct that results in the death of a later-born infant require the "use, attempted use, or threatened use of physical force against *the person . . . of another*" as required by the § 924(c) force clause? This question involves the complex interplay between the language of the § 924(c) force clause, the federal definition of "person," and the federal manslaughter statute.

Starting with the language of the § 924(c) force clause, this clause requires that the offense have 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) (emphasis added). Here, the key requirement is that the force must be against the "person" of another. The term "person" is defined under federal law to exclude unborn children. It includes only infants who have been born alive: "In determining the meaning of any Act of Congress, . . . the words 'person', 'human being', 'child', and 'individual', shall include every infant member of the species homo sapiens who is born alive at any stage of development." 1 U.S.C. § 8(a). Thus, to qualify as a crime of violence under the § 924(c) force clause, the offense must have as an element the use, attempted use, or threatened use of physical force against a person who has been born alive.

Turning back to the federal manslaughter statute, manslaughter is defined generally as "the unlawful killing of a human being without malice." 18 U.S.C. § 1112(a). "It is of two kinds"—voluntary, which is committed upon "sudden quarrel or heat of passion," and involuntary, which is committed in "the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death." *Id.* At least one circuit has held that the general definition of manslaughter encompasses a pregnant person's prenatal conduct as long as it results in the death of a later-born infant. *United States v. Flute*, 929 F.3d 584, 587, 590 (8th Cir. 2019) (addressing involuntary manslaughter). The court of appeals interpreted the phrase "the unlawful killing of a human being" and the federal definition of "human being"

and found that the manslaughter statute covered prenatal acts that resulted in the death of an infant after birth. *Id.*[1]

Because the federal manslaughter statute reaches purely prenatal conduct, which is by definition conduct that takes place before there is another "person" under federal law, it is broader than the § 924(c) force clause. Recall that the § 924(c) force clause requires that the offense have as an element the use of force against another "person." Because an unborn child is not a "person" within the meaning of federal law, a pregnant person's prenatal conduct does not qualify as the use of force "against the person . . . of another" because there was not another "person" at the time of the use, attempted use, or threatened use of force. Because the federal voluntary manslaughter statute covers prenatal conduct, it does not qualify as a crime of violence under the § 924(c) force clause.

This Court should grant McCoy's petition to resolve whether federal voluntary manslaughter qualifies as a crime of violence under the § 924(c) force clause even

[1] Nothing in the court of appeals' opinion rested on the difference between involuntary and voluntary manslaughter. The key statutory language—"the unlawful killing of a human being"—is the same for both forms of manslaughter. *See* 18 U.S.C. § 1112(a). There is no reason to believe that the court of appeals' interpretation of this phrase is limited to prosecutions for involuntary manslaughter. Indeed, at least one circuit has applied the so-called born alive doctrine to a murder prosecution—albeit against a third party—under the federal murder statute, 18 U.S.C. § 1111. *See United States v. Spencer*, 839 F.2d 1341 (9th Cir. 1988).

though it covers conduct that takes place before there is another "person" within the meaning of federal law.

IV. This case is an ideal vehicle for the question presented.

Finally, this case is an ideal vehicle for the Court to address the status of federal voluntary manslaughter as a "crime of violence" under § 924(c). That question is squarely at issue in this case. This Court's opinion in *Davis* resolved the procedural defenses raised by the government below. The only question left is whether voluntary manslaughter qualifies as a crime of violence under the § 924(c) force clause or only under the now-invalidated residual clause. If voluntary manslaughter qualifies under the § 924(c) force clause, McCoy's motion was properly denied. If it does not, his motion should be granted and his conviction and sentence for the § 924(c) offense vacated.[2]

[2] McCoy is scheduled to be released from prison within the next year. Even if he is released before his case is resolved, his case will not become moot. This is because he is challenging his § 924(c) *conviction*, not just his sentence. This Court presumes that a wrongful criminal conviction has continuing collateral consequences that satisfy the Constitution's case-or-controversy requirement. *See Spencer v. Kemna*, 523 U.S. 1, 7-8 (1998). Moreover, McCoy will still receive real-world relief if his § 924(c) conviction and sentence are vacated. His term of post-prison supervised release must be reduced from 60 months (under § 924(c)) to no longer than 36 months (the maximum term of supervised release for voluntary manslaughter). *See* App. 14a.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, McCoy's petition should be held in abeyance pending the Court's decision in *Borden*.

Dated this 29th day of December, 2020.

Respectfully submitted,

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