

No. 20-6788

IN THE SUPREME COURT OF THE UNITED STATES

BRIAN GENE MCCOY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 6-9) that the court of appeals erred in determining that his conviction for voluntary manslaughter, in violation of 18 U.S.C. 1112(a), was a “crime of violence” under 18 U.S.C. 924(c) (2000). Specifically, he asserts (Pet. 6-7) that because federal voluntary manslaughter can be committed with a mens rea of “depraved heart” recklessness, see Pet. App. 4a, it does not include as an element the “use, attempted use, or threatened use of physical force against the person or property of another” under Section 924(c)’s elements clause, 18 U.S.C. 924(c) (3) (A). This Court has granted review in Borden v. United States, No. 19-5410 (argued Nov. 3, 2020), to address whether

crimes that can be committed with a mens rea of recklessness can satisfy the definition of a "violent felony" under a similarly worded provision of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2) (B) (i).

This Court's resolution of that question could potentially -- but will not necessarily -- affect the court of appeals' disposition of this case. In United States v. Báez-Martínez, for example, the First Circuit concluded that depraved-heart recklessness is a "heightened form of recklessness" and thus "is sufficient for purposes of the [ACCA's elements] clause," even though that court had previously concluded that "ordinary recklessness is not." 950 F.3d 119, 124 (2020), petition for cert. pending, No. 20-5075 (filed July 10, 2020). As the First Circuit recognized, if this Court holds in Borden "that reckless crimes can be violent felonies, then a fortiori crimes requiring heightened recklessness can, too." Id. at 125 n.5. But if this Court were to hold that offenses committed with a mens rea of recklessness cannot satisfy the ACCA's elements clause, the possible inclusion of reasoning broad enough to sweep in even depraved-heart recklessness could implicate the court of appeals' resolution of this case, which relied on circuit precedent addressing ordinary recklessness. See Pet. App. 4a (citing United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017)). The petition for a writ of certiorari

should therefore be held pending the decision in Borden and then disposed of as appropriate in light of that decision.*

Respectfully submitted.

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* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.