No. _____

In the Supreme Court of the United States

STEPHEN DUANE BURGESS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari

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Question Presented

Whether a conviction for federal "second degree murder" under 18 U.S.C. § 1111(a) is a "crime of violence" under 18 U.S.C. § 924(c)(3).

Related Proceedings

This case arises from the following proceedings in the United States District Court for the Eastern District of Washington and in the United States Court of Appeals for the Ninth Circuit:

United States v. Burgess, 1:14-cr-2022-TOR, Judgment (E.D. Wash. Sept. 8, 2015)

United States v. Burgess, 15-30261, panel memorandum opinion published at 2022 WL 3700844 (9th Cir. Aug. 26, 2022)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Stephen Duane Burgess respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case affirming his conviction in the United States District Court below.

OPINIONS AND ORDERS BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit is published at *United States v. Burgess*, 2022 WL 3700844 (9th Cir. Aug. 26, 2022), and can be found attached at Appendix A. The judgment of the United States District Court for the Eastern District of Washington is attached at Appendix B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition is timely. The Ninth Circuit panel issued its opinion on August 26, 2022. *See* Appendix A. Mr. Burgess did not file a petition for rehearing. Mr. Burgess applied for an extension of time to file his petition for a writ of certiorari, which this Court (specifically Justice Kagan) granted on November 29, 2022, extending his filing deadline to December 26, 2022. *See* Application No. 22A465, letter dated November 29, 2022. Because this Court was closed on December 26, 2022, for a federal holiday, this petition is timely filed today.

STATUTES AND REGULATIONS INVOLVED

18 U.S.C. § 1111 – Murder

(a) Murder is the unlawful killing of a human being with malice aforethought.

Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditate killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditate design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

18 U.S.C. § 924 – Penalties

(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 … (including a crime of violence … 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 the furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence…—

(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.

18 U.S.C. § 924 – Penalties (continued)

(c)(1)(D) Notwithstanding any other provision of law—

…

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence … during which the firearm was used, carried, or possessed.

(c)(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.

STATEMENT OF THE CASE[1]

In March 2014, the United States indicted Mr. Burgess, charging him with second degree murder (in violation of 18 U.S.C. §§ 1111 and 1153) ("Count One") and discharge of a firearm in furtherance of a crime of violence (in violation of 18 U.S.C. §924(c)(1)(A)) ("Count Two"). Both counts arose from an incident that occurred on or about November 19, 2009. The predicate "crime of violence" for Count Two was the murder charge in Count One. Following his arrest a few months later, Mr. Burgess was arraigned on May 30, 2014. The district court ordered him detained pending trial. He has continuously been in custody ever since.

Mr. Burgess filed several pretrial motions, including one motion to dismiss the indictment due to jury selection issues and a motion to suppress various statements Mr. Burgess made that were used to convict him. The district court denied the motion to dismiss based on jury selection issues.[2] The district court granted in part and denied in part his motion to suppress.[3]

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[1] A fuller recitation of the facts appears in the parties' briefs filed in the Ninth Circuit. *See* Defendant-Appellant's Opening Brief, *United States v. Burgess*, 15-30261, 2016 WL 1003314 at pp. 2-15 (9th Cir. Mar. 11, 2016); Brief for Appellee, *United States v. Burgess*, 15-30261, 2016 WL 3682832 at pp. 2-9 (9th Cir. July 6, 2016).

[2] Mr. Burgess did appeal this issue to the Ninth Circuit, which affirmed the district court's ruling. Mr. Burgess does not continue to pursue this argument in the instant petition.

[3] Mr. Burgess also appealed this issue to the Ninth Circuit, which affirmed the district court's ruling. Mr. Burgess does not continue to pursue this argument in the instant petition.

Approximately two weeks after the Court denied in part his motion to suppress, Mr. Burgess gave notice of his intent to plead guilty. He pled guilty to both Counts One and Two pursuant to a written plea agreement on March 24, 2015. The written agreement permitted Mr. Burgess to appeal denial of his pretrial motion to dismiss and motion to suppress. The district court sentenced Mr. Burgess to a total term of 384 months' imprisonment (264 months on Count One and the mandatory minimum 120 months consecutive on Count Two) on September 8, 2015.

Mr. Burgess filed a timely appeal to the United States Court of Appeals for the Ninth Circuit. Mr. Burgess presented four issues on appeal: 1) whether the district court erred in denying his motion to suppress; 2) whether the district court erred in denying his motion to dismiss; 3) whether a violation of 18 U.S.C. § 1111(a) for "second degree murder" is a valid "crime of violence" predicate for his § 924(c) conviction;[4] and 4) whether his sentence on Count One was substantively unreasonable.[5] Following oral argument, supplemental briefing, and extensive stays pending rulings from both the Ninth Circuit and this Court in related cases, the Ninth Circuit issued a memorandum opinion on August 26, 2022 affirming Mr. Burgess' conviction and sentence.[6]

[4] Mr. Burgess will only address this issue in the instant petition.
[5] *See* Defendant-Appellant's Opening Brief, 2016 WL 1003314 at *1.
[6] *See United States v. Burgess*, 2022 WL 3700844 (9th Cir. Aug. 26, 2022).

Mr. Burgess did not file a petition for rehearing in the Ninth Circuit. This Court (specifically Justice Kagan) granted him an extension until December 26, 2022, to file the instant petition. Because the Court was closed due to a federal holiday on December 26, the instant petition is timely filed today. This petition follows.

REASONS FOR GRANTING THE WRIT

I. A conviction for "second degree murder" in violation of 18 U.S.C. § 1111(a) is not a "crime of violence" under 18 U.S.C. § 924(c)(1)(A). Therefore, Mr. Burgess' conviction on Count Two is unlawful and must be vacated.

The only question presented in the instant petition is whether Mr. Burgess' conviction on Count Two for discharge of a firearm in furtherance of a "crime of violence" was lawfully predicated on his conviction for second degree murder in Count One of the same indictment. As argued herein, this Court's rationale in *Borden v. United States* compels the conclusion that second degree murder under § 1111 is not a "crime of violence" predicate offense to support a conviction under § 924(c). Therefore, Mr. Burgess' conviction on Count Two is unlawful and must be vacated.[7]

[7] Mr. Burgess recognizes that this Court has denied prior petitions for certiorari raising the same question, including in the controlling *en banc* Ninth Circuit case that Mr. Burgess' panel cited in affirming his conviction. *See Begay v. United States*, 143 S. Ct. 340 (Oct. 11, 2022). Mr. Burgess files the instant petition to preserve this issue in the event the Supreme Court later addresses the question presented, which it explicitly disclaimed addressing in *Borden v. United States*, 141 S. Ct. 1817 (2021).

The Ninth Circuit affirmed Mr. Burgess' conviction on Count Two, citing its *en banc* ruling in *United States v. Begay*, 33 F. 4th 1081 (9th Cir. 2022).[8] The *en banc* majority in *Begay* distinguished this Court's ruling in *Borden v. United States*, 141 S. Ct. 1817 (2021), which explicitly declined to address whether an offense committed with a mental state of "extreme recklessness" would qualify as a "crime of violence" under § 924(c).[9] The majority in *Begay* essentially found that a conviction for second degree murder under 18 U.S.C. § 1111 qualifies as a crime of violence because it necessarily involves a use of force and awareness of a high degree of indifference toward human life.[10] The majority also found that this Court's reasoning in *Borden* "sufficiently undermines our prior authority suggesting that anything less than intentional conduct does not qualify as a crime of violence."[11]

Three Ninth Circuit justices dissented from the majority's holding, finding that a conviction for second degree murder under 18 U.S.C. § 1111 is not a "crime of violence" as defined under 18 U.S.C. § 924(c).[12] Moreover, the original panel majority in *Begay* reached the same conclusion.[13] Thus, five members of the Ninth Circuit have

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[8] *See Burgess*, 2022 WL 3700844 at *1.
[9] *See United States v. Begay*, 33 F. 4th 1081, 1092-93 (9th Cir. 2022) (*citing and discussing Borden v. United States*, 141 S. Ct. 1817 (2021)).
[10] *See Begay*, 33 F. 4th at 1093-95.
[11] *Id.* at 1094.
[12] *See Begay*, 33 F. 4th at 1098-99 (Judge K. Wardlaw, dissenting in part) and 1099-1107 (Judges S. Ikuta and L. VanDyke, dissenting in part).
[13] *See United States v. Begay*, 934 F.3d 1033 (9th Cir. 2019)*, overruled en banc by United States v. Begay*, 33 F. 4th 1081 (9th Cir. 2022).

held that second degree murder is not a crime of violence, which would require reversal of Mr. Burgess' conviction on Count Two. So far as counsel has been able to identify, only one other Circuit Court has squarely addressed whether federal second degree murder is a "crime of violence" post-*Borden.*[14] At least one federal district court has concluded that federal second degree murder is not a "crime of violence" post-*Borden.*[15] Given the number of Circuit Courts yet to weigh in along with the obvious dissention in the Ninth Circuit, this question is far from settled.

This Court's rationale in *Borden* ought to compel the conclusion that federal second degree murder is not a crime of violence under 18 U.S.C. § 924(c)(3). Second degree murder necessarily encompasses offenses with a less than intentional *mens rea.* Notwithstanding the varying degrees of recklessness that this Court (and others) have found to exist under the law, this Court found that reckless behavior lacks the required directing of force against another.[16] Thus, despite the common-sense impulse to conclude otherwise, federal second degree murder simply cannot categorically be a "crime of violence" because it lacks this targeted act.[17]

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[14] *See Alvarado-Linares v. United States*, 44 F. 4th 1334 (11th Cir. 2022) (concluding federal second degree murder is a "crime of violence"). Additionally, the Fourth Circuit has effectively held that it would reach the same conclusion as the Ninth and Eleventh Circuits. *See United States v. Manley*, 52 F. 4th 143, 150-51 (4th Cir. 2022).

[15] *See Gaines v. United States*, 2021 WL 5299668 at *4 (W.D. Ky. Nov. 15, 2021) (concluding that second degree murder under 18 U.S.C. § 1111 is not a "crime of violence" but denying motion to vacate because another predicate offense was).

[16] *See Borden*, 141 S. Ct. at 1826-27.

[17] *See Begay*, 33 F. 4th at 1102-03 (Judges S. Ikuta and L. VanDyke, dissenting in part).

To be sure, this is no purely hypothetical argument. Many defendants have been convicted of second degree murder, or so-called "depraved heart" murder, under 18 U.S.C. § 1111 or comparable state laws for conduct that did not involve any conscious use of force directed at or targeting another person.[18] Even intentional discharge of a firearm as a "warning shot" could lead to a death and resulting conviction for second degree "depraved heart" murder.[19] Moreover, though a § 924(c) conviction with a § 1111 second degree murder predicate necessarily must involve a firearm by nature of the charge itself, the categorical approach precludes consideration of the particular facts of any case and instead must examine the least culpable conduct that would violate a statute.[20]

This Court is clearly grappling with whether a crime committed with "extreme recklessness" (i.e. "depraved heart" murder) should qualify as a crime of violence.[21] Whenever it finally answers that question (in response to this Petition or otherwise), the Court should consider that the degree of risk necessary to commit an "extremely

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[18] *See Begay*, 33 F. 4th at 1103-04 (Judges S. Ikuta and L. VanDyke, dissenting in part) (citing several Circuit Court rulings affirming convictions for second degree murder involving drunk driving as well as state court rulings affirming such convictions where an aggressive dog escaped and mauled a child and an arsonist's setting fire to a couch in an abandoned building contributed to the death of a responding fireman).

[19] *See Browder v. State*, 751 S.E.2d 354, 294 Ga. 188 (Ga. 2018) (affirming conviction where defendant testified he fired his gun twice, not directed at any person but intending to scare the victim).

[20] *See Begay*, 33 F. 4th at 1105 (Judges S. Ikuta and L. VanDyke, dissenting in part). *See also Borden*, 141 S. Ct. at 1822 (*citing Johnson v. United States*, 559 U.S. 133 (2010)).

[21] *See Borden*, 141 S. Ct. at 1825 n. 4 (declining to address the question).

reckless" act is not much higher than the risk involved in ordinary recklessness. This Court in *Borden* described reckless acts as involving risks that "need not come anywhere close to a likelihood" of harming a person.[22] The *en banc* majority in *Begay* (which the Ninth Circuit relied on below in this appeal) contended that federal second degree murder requires a showing of "malice aforethought" and this in turn "requires a quantum of risk [of injury to others] that is very high."[23] Yet, many second degree murder convictions have been affirmed for deaths caused by drunk driving,[24] which at least four Circuit Courts have broadly categorized as "accidental."[25] Thus, because there is culpable conduct punishable by the statute at issue that would categorically not involve the *mens rea* required under *Borden*, the statute is categorically overbroad.

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[22] *Borden*, 141 S. Ct. at 1824.

[23] *Begay*, 33 F. 4th at 1093.

[24] *See, e.g., United States v. Merritt*, 961 F.3d 1105 (10th Cir. 2020) (affirming conviction for second degree murder where defendant drove in wrong lane against traffic with a blood alcohol content of between 0.23 and 0.25); *United States v. Fleming*, 739 F.2d 945 (4th Cir. 1984) (affirming conviction for second degree murder where defendant drove into oncoming traffic, was excessively speeding, and his blood alcohol content was 0.315).

[25] *See Wolf v. Life Ins. Co. of North America*, 46 F.4th 979 (9th Cir. 2022) (affirming district court's determination that insured's death resulting from drunk driving was an "accident" covered under insurance policy) (*citing Johnson v. Am. United Life Ins. Co.*, 716 F.3d 813 (4th Cir. 2013), *LaAsmar v. Phelps Dodge Corp. Life, Accidental Death & Dismemberment & Dependent Life Ins. Plan*, 605 F.3d 789 (10th Cir. 2010), *and McClelland v. Life Ins. Co. o N. Am.*, 679 F.3d 755 (8th Cir. 2012)). The Ninth Circuit in *Wolf* called deaths caused by drunk driving a "statistical rarity." *Wolf*, 46 F. 4th at 990.

In sum, offenses that can be committed with a mental state of "extreme recklessness" (which includes federal second degree murder under 18 U.S.C. § 1111[26]) do not qualify as a "crime of violence" under *Borden*'s reasoning because they do not require targeted use of force against another person or their property. To hold otherwise would be to effectively render the word "against" in § 924(c)(3)(A) without effect or meaning.[27]

This case is an appropriate vehicle for the Court to take up and answer the question that it left open in *Borden*—whether "depraved heart" murder and other offenses requiring a *mens rea* of "extreme recklessness" rather than an intentional act (including federal second degree murder under § 1111) are crimes of violence. The question is squarely presented and this direct appeal comes from the first Circuit Court to have considered the question post-*Borden*. Moreover, the Ninth Circuit considered this question *en banc* in *Begay*, which is cited as dispositive in the opinion affirming Mr. Burgess's conviction, providing this Court with various opinions and a number of varying judicial perspectives in both the *en banc* ruling and the prior panel ruling. Therefore, this Court should grant the instant Petition and answer the question presented.

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[26] *See United States v. Pineda-Doval*, 614 F.3d 1019, 1037-39 (9th Cir. 2010).
[27] *See Borden*, 141 S. Ct. at 1827-28 (identifying a similar problem regarding an identically worded clause in another statute).

CONCLUSION

For the reasons set forth herein, this Court should grant Mr. Burgess' petition for a writ of certiorari.

Dated: December 27, 2022.

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