**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 2022

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**CHARLES HEARD,**

**Petitioner,**

**v.**

**UNITED STATES OF AMERICA,**

**Respondent.**

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

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ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does a VICAR murder conviction, which is in turn based upon a second-degree murder under California law, constitute a categorical crime of violence for purposes of a related conviction under 18 U.S.C. § 924(j)?

2. Did the United States Court of Appeals for the Ninth Circuit act capriciously in refusing to consider the merits of the question set forth above, and instead rule that the question was not fairly presented in the parties' briefing?

## LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner and the United States).

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Charles Heard respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit issued on July 22, 2022, affirming the judgment of conviction. Appx. A.

## OPINION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit affirming petitioner's convictions is unpublished and is attached as Appendix A to this petition.

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit affirming petitioner's judgment of conviction and sentence was entered on July 22, 2022. Appx. A. This Petition is filed within 90 days of October 18, 2022, the date on which the Ninth Circuit denied a timely filed petition for rehearing. Appx. B. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 924(j) provides:

> (j) A person who, in the course of a violation of subsection ©, causes the death of a person through the use of a firearm, shall—
>
> (1) if the killing is a murder (as defined in section 1111 [18 USCS § 1111]), be punished by death or by imprisonment for any term of years or for life; and
>
> (2) if the killing is manslaughter (as defined in section 1112 [18 USCS § 1112]), be punished as provided in that section.

Section 924© provides for additional punishments for a defendant who "during and in relation to any crime of violence or drug trafficking crime….uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm…"

## STATEMENT OF THE CASE

Counts 6 and 7 of a Second Superseding Indictment charged petitioner Charles Heard and a codefendant with two counts of murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1). The murders were alleged to be violent crimes in aid of racketeering on the basis that they constituted murders under California law, in violation of

Cal. Pen. Code §§ 187, 188, and 189. Count 8 alleged that on August 14, 2008, the defendants used a firearm during the course of the murders in aid of racketeering, and caused the death of those persons through the use of the firearm, in violation of 18 U.S.C. § 924(j).

During the trial, the court instructed the jury on the elements of California murder:

> Murder means unlawfully killing a person with malice aforethought. There are two kinds of malice aforethought: express malice aforethought and implied malice aforethought. Proof of either is sufficient to establish the state of mind required for murder. A person acts with express malice aforethought if he has a specific intent to unlawfully kill. A person acts with implied malice aforethought if (i) the killing results from an intentional act; (ii) the natural and probable Consequences are dangerous to human life; and (iii) the act was performed with knowledge of the danger and with conscious disregard to human life. Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before committing the act that causes the victim's death. It does not require deliberation or the passage of any particular period of time.

The jury convicted Mr. Heard of counts Six and Seven pursuant to this instruction.

The jury also convicted Mr. Heard of Count Eight, a violation of 18 U.S.C. § 924(j) which depended on his having committed a crime of

violence, namely the VICAR charges presented in Counts Six and Seven.[1] The court instructed the jury that murder was a crime of violence as a matter of law. Otherwise, the instruction required that the defendant knowingly used a firearm during or in relation to the crime of violence or possessed a firearm in furtherance of the crime of violence and that the use of the firearm caused the unlawful killing with malice aforethought. The court also instructed the jury on conspiratorial liability principles for counts 6-8.

On appeal, petitioner Heard joined in the argument presented by co-appellant Jaquain Young, that his § 924(j) conviction was void because the VICAR murder counts were not crimes of violence. The co-appellant relied primarily on the panel opinion in *United States v. Begay,* 934 F.3d 1033, 1038-41 (9th Cir. 2019) which had held that second-degree murder was not a crime of violence.

For its part, the government contended that the VICAR statute was intended to reach homicidal conduct that constitutes "murder," however defined." The government explicitly recognized that California

[1] Count Eight of the Second Superseding Indictment alleged that the killing was murder as defined by 18 U.S.C. § 1111, but the court did not instruct jury on section 1111. 40-ER-11282-83.

murder law governed the question whether the murder was a crime of violence and addressed the argument that VICAR murder did not categorically require the "use of physical force." *Id.* The government contended that offenses which can be committed recklessly may still involve the use of force, citing to *Borden v. United States,* 593 U.S. ___, 141 S. Ct. 1817 (2021), then pending before this Court.

After this Court issued its decision in *Borden v. United States,* the parties engaged in further litigation on the question in letters submitted pursuant to Fed. R. App. P. 28(j). The codefendant submitted an October 4, 2021, letter, citing to an unpublished disposition, *United States v. Mejia-Quintanilla,* 859 Fed. Appx. 834 (9th Cir. 2021), which held "a conviction for generic murder under California Penal Code section 187 is not categorically a crime of violence." Appx. C. *Mejia-Quintanilla* relied on *Borden* for its ruling. The government wrote on October 6, 2021, that "VICAR murder under California law is an extreme recklessness offense," and that *Borden* left open the question whether an offense that required a *mens rea* of extreme recklessness could be a crime of violence. Appx. D.

Subsequently, the Ninth Circuit issued its en banc decision in *United States v. Begay,* 33 F.4th 1081 (9th Cir. 2022), holding second degree murder under 18 U.S.C. § 1111 was categorically a crime of violence. Then, the panel ordered the parties to provide supplemental briefing regarding the validity of the § 924(j) convictions.

In his supplemental brief, petitioner Heard addressed the remaining question in more detail. Petitioner reiterated the fundamental claim that the VICAR murder in this case was based on California murder law and that the second-degree murder conviction had thereunder was not categorically a crime of violence. Petitioner Heard explained that implied malice murder was the lowest form of California murder for purposes of the categorial approach. Petitioner specifically responded to the Ninth Circuit's Order by addressing the unresolved question in this case: whether a VICAR murder based upon a California second-degree murder constituted a crime of violence.

In its supplemental brief, the government contended simply that *Begay* controlled the outcome, because it held that second-degree murder was a crime of violence. The government then added a new and different argument. Apparently abandoning its contention that

California implied malice murder was a crime of violence, the government instead contended that the question whether a VICAR murder was a crime of violence was solely a question of federal law and did not turn on the elements of an underlying state statute. The government argued that all Section 924(j) convictions required as an element that a murder as defined in Section 1111 occurred. Therefore, the government reasoned, whether the predicate murder qualifies as a crime of violence turns on whether murder under Section 111 is a 'crime of violence,' rather than the crime as defined by state law. This argument diverged entirely from the argument made in the Answering Brief, in which the government conceded that the question presented was whether a murder under California law was a crime of violence. The argument also conflicts with holdings of the United States Courts of Appeals for the Fourth and Tenth Circuit. *United States v. Manley,* 52 F.4th 143, 147-48 (4th Cir. 2022)(state crimes underlying VICAR counts were crimes of violence); *United States v. Toki,* 23 F.4th 1277, 1281-82 (10th Cir. 2022)(§924© conviction reversed, because state crimes underlying VICAR counts were not crimes of violence).

The panel ruled:

> In post-argument briefing, Heard and Young for the first time argue that second-degree murder *under California law* is not a crime of violence. They did not brief this specific issue in their initial briefing. Instead, relying solely on the panel decision in *Begay,* they argued that their § 924 convictions were invalid because, the predicate crime of violence, "murder in violation of 18 U.S.C. § 1959(a)(1), can be grounded in a conviction/finding of second-degree murder," and "second-degree murder is not a crime of violence under the elements clause of § 924(c) because it can be committed recklessly."

Appx. A at 19-20. The panel continued:

> Heard and Young advance new and expansive arguments for the first time in simultaneous briefing and, thus, deprived the government of the opportunity to respond.

*Id.* at 20. The panel ruled that appellants' arguments were waived. The panel's ruling was an unwarranted attempt to evade the critical question whether the VICAR murder convictions, as charged in this case, were crimes of violence.

## III. REASONS FOR GRANTING THE WRIT

### *A. The Question Whether California Implied Malice Murder is a Crime of Violence Merits Consideration by this Court.*

In *Borden,* this Court concluded that crimes, even ones ending in violence, that only require a statement of mind of recklessness, are not crimes of violence. 593 U.S. ___, 141 S. Ct. at 1825. The Court wrote:

"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. …The treatment of reckless offenses as 'violent felonies' would impose large sentencing enhancements on individuals (for example, reckless drivers) far afield from the 'armed career criminals' ACCA addresses.'" *Id.*

*Borden* left open whether the state of mind amounting to reckless indifference or extreme recklessness would qualify as crimes of violence. In *United States v. Begay,* the Ninth Circuit addressed that question in the context of the federal second-degree murder statute, 18 U.S.C. § 1111. The Ninth Circuit concluded that second-degree murder under § 1111 is a crime of violence, differentiating the criminal *mens rea* of recklessness or gross negligence from the higher degree of recklessness required to be convicted of § 1111. *United States v. Begay,* 33 F.4th 1081, 1093-94 (9th Cir. 2022)(en banc). The en banc majority characterized the requisite criminal *mens rea* as a heightened degree of recklessness evidencing extreme disregard for human life. *Id.* at 1093-94. This Court, however, has not addressed whether an offense allowing for conviction

on a heightened degree of recklessness qualifies as a crime of violence, nor what degree of heightened recklessness is required.

*Begay* did not resolve the question presented in this case, whether a California second-degree murder requires the heightened degree of recklessness necessary to be a crime of violence. This question is significant: California is the most populous state in the union and in this circuit. Countless criminal defendants have been convicted of VICAR murder under California law and related § 924 counts based thereon. Many more may face enhanced sentences based on prior convictions. Yet, the Ninth Circuit dodged the question. This Court should take it up.

### *1. A California Second-Degree Murder based upon Implied Malice Is Not a Crime of Violence under the Elements Clause.*

California law allows for a second-degree murder conviction to be based upon a myriad of theories.[2] Implied malice murder is the least culpable act criminalized by Cal. Pen. Code § 187(a). *See People v. Swain,* 12 Cal.4th 593, 606-07 (1996)(holding that conspiracy to commit

2 Recent changes in California law do not affect implied malice murder. *See* Cal. Pen. Code §§ 188, 189 (amended effective 2019).

murder cannot be based on implied malice murder because conspiracy to commit murder requires the express intent to kill).

Cal. Pen. Code § 187 generally defines murder as the killing of another human being with malice aforethought. Section 188 defines malice as doing an unlawful and felonious act, intentionally and without legal excuse. *People v. Balkwell,* 143 Cal. 259 (1904); *see* Cal. Pen. Code § 188. California recognizes two types of malice aforethought: express and implied. *Swain,* 12 Cal. 4th at 599. Express malice requires an intent to kill; implied malice does not. *Id.*

Instead, implied malice requires only "an intent to do some act, the natural consequences of which are dangerous to human life." *Swain,* 12 Cal. 4th at 602. The California Supreme Court explained:

> *When the killing is the direct result of such an act,* the requisite mental state for murder--malice aforethought--is implied. (CALJIC No. 8.31, italics added.) In such circumstances, ". . . it is not necessary to establish that the defendant intended that his act would result in the death of a human being." Hence, under an *implied malice* theory of second degree murder, the requisite mental state for murder--malice aforethought --is by definition 'implied,' as a matter of law, from the specific intent to do some act dangerous to human life *together with the circumstance that a killing has resulted from the doing of such act.*

*Id.* at 602-03 (emphasis in original). Implied malice does *not* require "a defendant's awareness that his or her conduct had a *high probability* of resulting in death," only that the conduct endangers life. *People v. Johnson*, 243 Cal. App. 4th 1247, 1285 (2016). More importantly, implied malice does not demand a heightened level of recklessness, evidencing an extreme disregard for life, as posited by *Begay*. Rather, implied malice is "tolerably [] identified as recklessness." *People v. Scott,* 14 Cal. 4th 544, 554 (1996)(Mosk, J., concurring).

California's implied malice murder thus does not qualify as a crime of violence, because it does not require the level of criminal *mens rea* demanded of a crime of violence. *Borden v. United States,* 141 S. Ct. at 1825-26; *People v. Knoller,* 41 Cal. 4th 139, 151 (2007); *see United States v. Vederoff,* 914 F.3d 1238, 1246-48 (9th Cir. 2019)(concluding that Washington second-degree murder statute which allowed conviction to be based on the commission or attempt to commit a felony which resulted in death was not a crime of violence). Even an accidental death resulting from the commission of a misdemeanor can be murder if malice is shown. *People v. Nieto Benitez,* 4 Cal. 4th 91, 108-10 (1992).

*2. California Implied Malice Murder Does Not Require the Extreme Recklessness Identified by Begay as a Necessary Element of Second-Degree Murder.*

Under California law, implied malice is present when a defendant commits an intentional act, the natural and probable consequence of which is dangerous to human life. *Knoller,* 41 Cal. 4th at 152. Nothing more is required.

Although California cases contain statements that implied malice murder requires a level of intent higher than gross negligence, case holdings are to the contrary. California courts routinely uphold convictions for implied malice murder in circumstances that neither exhibit the *mens rea* of extreme reckless indifference to human life nor involve the use of force or threatened force by the defendant. For example, in *People v. Knoller,* the Court found evidence of implied malice sufficient when the defendant exited her apartment with two large dogs which she could not control. 41 Cal. 4th at 158; *see also People v. Jackson,* 2020 Cal. App. Unpub. LEXIS 7036 (2020) (failure to restrain dogs who were known to have menaced passersby); *Berry v. Superior Court,* 1989 U.S. App. Unpub. LEXIS 188 (1989)(failure to

take reasonable precautions to prevent children from accessing tethered dog).[3]

California frequently charges and convicts defendants for second-degree murder based on driving while intoxicated. *E.g., People v. Sanchez,* 24 Cal. 4th 983 (2001)(drunk driving supported finding of implied malice); *People v. Watson,* 30 Cal. 3d 290, 295-97 (1981); *People v. Alvarez* 32 Cal. App. 5th 781, 784 (2019) (second-degree murder conviction based on driving while intoxicated despite lack of prior convictions); *People v. Johnigan,* 196 Cal. App. 4th 1084, 1091-92 (2011). This reality is in sharp contrast to the *Begay* majority's comment, relying on the First Circuit's conclusion that "the decision to charge a defendant with murder only arises in the unusual drunk driving case." *Begay, id.,* 33 F.4th at 1096 (quoting *United States v. Baez-Martinez,* 950 F.3d 119, 128 (1st Cir. 2020)). Although California has a separate statute for vehicular homicide, driving while intoxicated frequently results in second-degree murder convictions. Indeed, a

[3] Unpublished decisions of the California Court of Appeal lack precedential value. Petitioner offers these decisions to demonstrate the nature of the intent required for conviction of second-degree implied malice murder.

defendant can be convicted of both second-degree murder and vehicular homicide, because the latter is not a lesser included offense of second-degree murder. *Sanchez,* 24 Cal. 4th at 990-93.

Further, California has allowed second-degree murder prosecutions and affirmed second-degree murder convictions that are based on reckless driving in the absence of intoxication. *E.g. People v. Moore,* 187 Cal. App. 4th 937, 941 (2010)(reckless driving sufficient for second-degree murder conviction); *People v. Superior Court (Costa),* 183 Cal. App. 4th 690, 699-700 (2010)(upholding second-degree murder charges for commercial truck driver who drove with knowledge of faulty and smoky brakes); *People v. Contreras,* 26 Cal. App. 4th 944, 956-57 (1994) (history of reckless driving, racing other tow truck drivers to scene and knowledge of faulty brakes sufficient proof of implied malice).

Finally, implied malice can exist "even if the act results in an accidental death." *People v. Superior Court (Valenzuela),* 73 Cal. App. 5th 485, 502 (2021). Unsurprisingly, therefore, a parent has been convicted of second-degree murder based on a failure to protect, *People v. Rolon,* 160 Cal. App. 4th 1206, 1219 (2008), and a doctor has been convicted because her prescribing standards fell below the standard of a

reasonable physician, *People v. Tseng,* 30 Cal. App. 5th 117, 129-31 (2018); *cf. Ruan v. United States,* 142 S. Ct. 2370, 2377-79 (2022).

California case law establishes that a second-degree murder conviction based on the theory of implied malice may be based on the state of mind of recklessness. Such a conviction does not qualify as a crime of violence under the categorical approach.

### *3. Implied Malice Murder May Be Based upon an Omission, and Therefore Does Not Require the Type of Targeted Force Demanded by the Elements Clause.*

California law allows for a defendant to be convicted of second-degree murder based on omissions, as well as acts that while reckless, may not be targeted or oppositional. There is far more than a realistic probability that the state allows omissions to serve as the basis for a second-degree murder conviction. *See Moncrieffe v. Holder,* 569 184, 191 (2013). In *People v. Rolon,* 160 Cal. App. 4th at 1219, the defendant's second-degree murder conviction was based upon her failure to take reasonably necessary steps to protect her child. *See also People v. Burden,* 72 Cal. App. 3d 603, 619-20 (1977) (defendant's failure to feed child supported conviction for second-degree murder). In *People v. Latham,* 203 Cal. App. 4th 319, 327-28 (2012), the court affirmed a

second-degree murder conviction based upon the defendant's failure to obtain timely medical care for their 17-year old child's diabetes. Unpublished decisions make clear that *Rolon* is not an outlier. *People v. Ogg,* 2019 Cal. App. Unpub. LEXIS 6443 (2019); *People v. Garcia,* 2015 Cal. App. Unpub. LEXIS 1559 (2015).[4]

The California Supreme Court's decision in *People v. Knoller, supra,* provides further support for this conclusion. Although the court characterized the defendant's behavior as "actions," the Court's description of defendant's behavior seems more like an omission -- or simply gross negligence. The California Supreme Court wrote "The immediate cause of Whipple's death was Knoller's own conscious decision to take the dog Bane unmuzzled through the apartment building, where they were likely to encounter other people, knowing that Bane was aggressive and highly dangerous and that she could not control him." *Knoller*, 41 Cal. 4th at 158. The defendant's behavior is as easily characterized as the failure to exercise adequate control or the omission of a muzzle, as an "act."

[4] See footnote 3.

Cases like *Knoller, Rolon, Latham,* and *Burden* establish that in California a person can be convicted of implied malice murder without any targeted use of physical force against another. *Borden,* 141 S. Ct. at 1825; *Johnson v. United States,* 559 U.S. 559 U.S. 133, 140 (2010). Because California law allows a second-degree murder conviction to be based upon the failure to act, it is not a crime of violence under the elements clause.

### *B. The Question whether Murder under California Law was a Crime of Violence was Fairly Presented to the Ninth Circuit and is Subsumed in the Greater Inquiry into Second-Degree Murder.*

In this case, and directly contrary to the Ninth Circuit panel decision, the record fairly presented the question whether second-degree murder under California law is a crime of violence under the elements clause. Not only was this assumed to be the question for review by the parties, it was necessarily subsumed in the argument that generic second-degree murder was not a crime of violence.

An argument is "fairly presented" when a party alerts the court that he is alleging a particular violation or claim. *See Illinois v. Gates,* 459 U.S. 1028, 1030 (1982); *Casey v. Moore,* 386 F.3d 896, 913 (9th Cir.

2004). Some arguments, however, are subsumed within others. *Skilling v. United States,* 561 U.S. 358, 377 n.10 (2010); *Bell v. Cone*, 543 U.S. 447, 451 (2005); *Madden v. Chattanooga City Wide Serv. Dep't,* 659 F.3d 666, 673 (6th Cir. 2008).

Here, contrary to the panel ruling, the contention that the VICAR murder convictions were not crimes of violence were fairly presented to the Ninth Circuit. Petitioner argued that the VICAR murder convictions –which were premised on violations of California murder law -- were not crimes of violence when analyzed using the categorical approach. A fair reading of this contention is that a California second-degree murder was not a categorically crime of violence. After all, the parties agreed, at least until the Government's Supplemental Brief, that California law provided the applicable law of murder. *See Alvarado-Linares v. United States,* 44 F.4th 1334, 1342-43 (11th Cir. 2022)(finding that since the instructions allowed for a VICAR murder conviction to be based on Georgia malice murder, an inquiry into that offense was merited). This conclusion made sense, because the jury instructions for the VICAR murder charges and quoted in appellant

Young's initial brief, were premised on California law. Indeed, the government explicitly argued the applicable law was that of California.

The Rule 28(j) letters submitted by both parties made this point even more clearly. Appx. C. The government contended that California murder required a state of mind of extreme recklessness. Appx. D. And appellant Young's October 4, 2021, letter discussed *United States v. Mejia-Quintanilla,* 859 Fed. Appx. 834, stating "this Court held that a conviction for generic murder under California Penal Code section 187 is not categorically a crime of violence under section 924 because it can be committed recklessly." Appx. C. The letters reveal that the parties presented on appeal the question whether a second-degree or other generic murder under California law was a crime of violence. Thus, the claim that California implied malice murder was not a crime of violence was fairly presented to the court.

Moreover, the analytical method is the same regardless whether it is California law or federal law which is analyzed. The categorical approach asks the same questions of California and federal law: in all cases, the reviewing court must inquire whether the elements of the statute necessarily involve a defendant's "use, attempted use, or

threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). In all cases, the use of force must be oppositional. *Borden v. United States,* 141 S. Ct. at 1825. The question is one of law. Accordingly, the argument that implied malice murder under California law is not a crime of violence is subsumed within the broader claim concerning second-degree murder generally raised in the initial briefing.

The Ninth Circuit's ruling that petitioner had waived his argument that California implied malice murder was not a crime of violence is capricious. The Ninth Circuit's flawed waiver ruling should not be the basis of declining to grant certiorari in this case.

## IV. Conclusion

Based on the foregoing reasons, this Court should grant certiorari and consider this case on its merits.

Dated: January 10, 2023

Respectfully submitted,

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