No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

QUINTON BIRDINGROUND, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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Question Presented

In *Borden v. United States*, 141 S.Ct. 1817, 1825 (2021), this Court held that, in order to qualify as a crime of violence, an offense must require proof that "the perpetrator direct his action at, or target, another individual." Federal second degree murder, which can be committed with extreme recklessness, does not require proof that the perpetrator directed his action in such a manner. In light of this fact, the question in this case is whether the Ninth Circuit erred in holding that federal second degree murder is a crime of violence under 18 U.S.C. § 924(c)(3).

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

The Petitioner, Quinton Birdinground, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Opinions Below

The district court's order granting Birdinground's 28 U.S.C. § 2255 motion is unpublished. It is reproduced in the Appendix. (App., *infra*, 1a-32a). The Court of Appeals' unpublished memorandum reversing the district court's order is also reproduced in the appendix. (App., *infra*, 1b-2b).

Jurisdiction

The Ninth Circuit's memorandum vacating the district court's order granting Birdinground's 28 U.S.C. § 2255 motion was filed on November 21, 2022. (App., *infra*, 1b-2b). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

Title 18 U.S.C. § 1111(a) provides as follows:

> 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 premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated 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 premeditated design unlawfully and maliciously to effect the death of any human being other him who is killed, is murder in the first degree.
>
> Any other murder is murder in the second degree.

Title 18 U.S.C. § 924(c)(3) provides, in relevant part, as follows:

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and [] has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . .

Proceedings Below

A. District Court Proceedings

In February of 2003, Birdinground shot and killed a man in a jealous rage after finding the man with his ex-girlfriend. As a result of his actions, Birdinground was convicted of second degree murder in violation of 18 U.S.C. § 1111(a), assault resulting in serious bodily injury in violation of 18 U.S.C. § 113(a)(6), and discharging a firearm during and in relation to a crime of violence

in violation of 18 U.S.C. § 924(c). He was convicted of all three offenses following a jury trial and was ultimately sentenced to a term of 168 months on the murder charge, 120 months concurrent on the assault charge, and 120 months consecutive for the § 924(c) offense. Following sentencing, he unsuccessfully pursued an appeal to the Ninth Circuit arguing that his trial had been marred by erroneous evidentiary rulings and the denial of one of his proposed jury instructions. *United States v. Birdinground*, 114 Fed.App'x 841 (9th Cir. 2004).

In June of 2016, Birdinground filed a 28 U.S.C. § 2255 motion seeking to set aside his § 924(c) conviction under *Johnson v. United States*, 576 U.S. 591 (2015). The district court granted his motion and resentenced Birdinground to a term of 168 months imprisonment but, because of the amount of time he had already served, the court ordered his immediate release from prison. Over the ensuing five and a half years, Birdinground has served his term of supervised release without incident.

B. Ninth Circuit Proceedings

The Government appealed the district court's order granting Birdinground's § 2255 motion in August of 2018, but its appeal was stayed for one reason or another for four years. The stay was eventually lifted after the Ninth Circuit issued its *en banc* decision in *United States v. Begay*, 33 F.4th 1081 (2022) (en banc). In *Begay*, the court held that second degree murder, as defined by 18 U.S.C. § 1111(a), "qualifies as a crime of violence pursuant to the elements clause of § 924(c)(3)." *Begay*, 33 F.4th at 1096. In its order lifting the stay, the court ordered the parties to file supplemental briefing regarding the impact of *Begay* on the Government's appeal. After receiving the parties' submissions, the court vacated the district court's order and remanded Birdinground's case for "further proceedings consistent with *Begay*." (App. 1b-2b).

Reasons for Granting the Writ

I. The Ninth Circuit's majority opinion in *Begay II* – which held that federal second degree murder is categorically a crime of violence – directly conflicts with the rationale of *Borden.*

A. Under the rationale of *Borden*, federal second degree murder cannot qualify as a crime of violence under 18 U.S.C. § 924(c)(3).

The defendant in *Begay* was, like Birdinground, convicted of second degree murder and use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). On appeal, he sought to overturn his § 924(c) conviction on the grounds that second degree murder can be committed recklessly and therefore cannot qualify as a crime of violence. A divided three judge panel accepted this argument and reversed *Begay's* § 924(c) conviction. *United States v. Begay*, 934 F.3d 1033, 1038 (9th Cir. 2019) (Begay I). The Government petitioned for rehearing and, while its petition was pending, this Court granted certiorari in *Borden v. United States*, 141 S.Ct. 1817 (2021), to consider "whether a criminal offense can count as a 'violent felony' [under the Armed Career Criminal Act] if it requires only a *mens rea* of recklessness." *Id.* at 1821. Deeming the issue in *Borden* "closely related" to that presented in *Begay*, the Ninth Circuit held the Government's petition in abeyance. *Begay*, 33 F.4th at 1086.

In *Borden*, the defendant was convicted of illegally possessing a firearm and was sentenced as an armed career criminal.[1] On appeal, he challenged his sentence, arguing that his conviction for Tennessee reckless aggravated assault could not qualify as a violent felony under ACCA's elements clause "because a mental state of recklessness suffices for conviction." *Borden*, 141

[1] The Armed Career Criminal Act (ACCA) enhances the sentence of anyone convicted under 18 U.S.C. § 922(g) of being a felon in possession of a firearm if he has three or more convictions for a "violent felony."

S.Ct. at 1822. ACCA's elements clause defines "violent felony" as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." *See*, 18 U.S.C. § 924(e)(2)(B)(i).

In a plurality opinion, authored by Justice Kagan, the Court agreed with Borden and held that reckless conduct cannot meet the standard for a "violent felony" because "[t]he phrase 'against another' when modifying the 'use of force' demands that the perpetrator direct his action at, or target, another individual." *Borden*, 141 S.Ct at 1825. Because reckless conduct is not normally directed at an individual, the Court held that crimes that can be committed recklessly cannot qualify as a "violent felony."

In coming to this conclusion, the Court focused on *Leocal v. Ashcroft*, 543 U.S. 1 (2004). In *Leocal*, the Court addressed the application of the "crime of violence" definition in 18 U.S.C. § 16(a) to DUI offenses that "require only a negligent mental state." *Borden*, 141 S.Ct. at 1824.[2] Critical to the Court's analysis was § 16(a)'s requirement that the perpetrator use physical force "against the person or property of another." *Borden*, 141 S.Ct. at 1824. The Court held that, because this language suggests a "higher degree of intent than negligent conduct," negligent offenses do not fit within the definition. *Id.*

Extending *Leocal*'s logic, *Borden* held that the phrase "against the person of another" excludes reckless, as well as negligent offenses, because when modifying "the use of force," this phrase "demands that the perpetrator direct his action at, or target, another individual," and "[r]eckless conduct is not aimed in that prescribed manner." *Id.* at 1825. The Court reserved the

[2] The elements clause of § 16(a) – like the clause in § 924(c)(3)(A) at issue here – is "relevantly identical" to ACCA's elements clause. *Borden*, 141 S.Ct. at 1824.

question of whether the same analysis applies to crimes requiring "extreme" or "depraved heart" recklessness. *Id.* at 1825 n.4.

In arriving at its decision in *Borden*, the Court rejected the Government's main contention – that its decision in *Voisine v. United States*, 579 U.S. 686 (2016) "establishes that ACCA's elements clause covers reckless offenses." *Borden*, 141 S.Ct. at 1832. *Voisine* held that the definition of "misdemeanor crime of domestic violence" – which uses the phrase "use of physical force" but not the phrase "against the person of another" -- covers reckless conduct. The Court found this textual difference critical. It held that the *mens rea* requirement in ACCA's elements clause does not come from the word "use." It comes from the phrase "against the person of another." That phrase, "when modifying the 'use of physical force,' introduces that action's conscious object" and it therefore "excludes conduct, like recklessness, that is not directed or targeted at another." *Borden*, 141 S.Ct. at 1833.

After *Borden* was decided, the Ninth Circuit lifted its stay in *Begay*. Sitting *en banc*, the Court confronted the issue left open by *Borden* – whether the term "use of physical force against the person of another" captures "extreme" or "depraved heart" recklessness. *United States v. Begay*, 33 F.4th 1081 (9th Cir.) (en banc), *cert. denied*, 143 S.Ct. 340 (Oct. 11, 2022) (*Begay II*). The Court found that it does. Second degree murder qualifies as a crime of violence, the Court held, "because a defendant who acts with the requisite *mens rea* to commit second degree murder necessarily employs force 'against the person or property of another' and rather than acting with ordinary recklessness, the defendant acts with recklessness that rises to the level of extreme disregard for human life." *Begay II*, 33 F.4th at 1093.

The holding in *Begay* conflicts with *Borden* because, as pointed out by Judge Ikuta, second degree murder "does not necessarily include the element of targeting." *Begay*, 33 F.4th at 1102

(Ikuta, J., dissenting). "To convict a defendant of depraved heart murder, the government needs to show only that the defendant engaged in conduct (that resulted in the death of a human being) with the mental state of depraved heart or reckless indifference." It is enough, in other words, that "the defendant's conduct created a '*very high* degree of risk' of injury to other persons and the defendant had 'an awareness of [that] extreme risk,' exhibiting 'an extreme indifference to the value of human life.'" *Id.* Because second degree murder can be committed with extreme recklessness, it cannot qualify as a crime of violence under § 924(c)(3)'s elements clause, which "demands that the perpetrator direct his action at, or target, another individual." *Borden*, 141 S.Ct. 1825.

B. Depraved heart or extreme recklessness, even if it involves the use of a firearm, does not necessarily involve targeted force.

In determining whether a predicate offense qualifies as a crime of violence, courts use the categorical approach as set forth in *Taylor v. United States*, 495 U.S. 575 (1990). Under *Taylor*, courts are directed to determine whether the elements of the predicate offense denote a "crime of violence;" it does not look to the specifics of the defendant's conduct or the facts elicited at trial. In some cases, it is necessary to look beyond the language defining the predicate offense to determine whether there is a "realistic probability, not a theoretical possibility," that the government would apply the statute defining the offense "to conduct that falls outside the generic definition of a crime." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). In those cases, in order to establish that the predicate offense has been applied to conduct that falls outside the definition of crime of violence, a defendant must point to cases where courts "in fact did apply the statute in the special (non-generic) manner for which he argues." *Id.* .

A review of both federal and state case law establishes that convictions have been upheld for depraved heart crimes that did not involve targeted action.[3] The federal courts, for example, have upheld second degree murder convictions in cases involving drunk driving, even though the defendant's conduct did not involve the use of targeted force. *United States v. Merritt*, 961 F.3d 1105, 1118 (10th Cir. 2020)(upholding a conviction for federal second degree murder resulting from drunk driving in the wrong lane when defendant "was aware his drunk driving posed a serious risk of death or serious bodily harm to others"); *United States v. Sheffy*, 57 F.3d 1419, 1431 (6th Cir. 1995)(upholding a second-degree murder conviction for striking and killing another driver while driving under the influence of alcohol and prescription drugs even though the defendant did not intend to hurt anyone); *United States v. Fleming*, 739 F.2d 945 (4th Cir. 1984)(affirming second degree murder conviction where defendant sped and drove the wrong way on a highway; to show malice aforethought, "the government need only have proved that the defendant intended to operate his car in the manner in which he did with a heart that was without regard for the life and safety of others").

Federal courts have also upheld second degree murder convictions for reckless crimes involving a firearm. *United States v. Pineda-Doval*, 614 F.3d 1019, 1039 (9th Cir. 2010)(noting that "classic examples of second degree murder include shooting a gun into a room that the defendant knows to be occupied, playing a game of Russian roulette, and driving a car at very high speeds along a crowded main street"); *United States v. Hicks*, 389 F.3d 514, 530 (5th Cir.

[3] Courts may consider state cases because "[m]alice aforethought is a concept that originated with the common law and is used in 18 U.S.C. § 1111(a) in its common law sense," and therefore courts "do not confine [their] consideration of the precedents to decisions interpreting the federal statute but rather consider other sources which may shed light on the issues of this case." *United States v. Fleming*, 739 F.2d at 945, 947 n.2 (4th Cir. 1984).

2004)(upholding second degree murder where the defendant intentionally fired his gun at a police cruiser, likely knowing it would be occupied).

State courts have followed suit and upheld crimes involving extreme recklessness even without evidence that the defendant targeted anyone. *Browder v. State*, 751 S.E.2d 354, 357 (Ga. 2013)(upholding conviction for depraved heart murder where defendant fired warning shot in the air that hit victim in the neck and resulted in her death); *State v. Davidson*, 987 P.2d 335, 344 (Kan. 1999)(holding that "a defendant whose dogs escaped and mauled a child to death could be convicted of depraved heart murder" even without proof she knew that her dogs would attack and kill, "where the defendant's recklessness, in ignoring her dogs aggressiveness and failing to train or secure her dogs, showed 'an extreme indifference to the value of human life'").

The *Begay II* majority discounted these examples because, as a practical matter, crimes of violence under § 924(c) only arise when a firearm is involved. *Begay II*, 33 F.4th at 1095-96. But this Court recently rejected the idea that the use of a firearm should be factored into § 924(c)'s crime of violence definition:

> There's yet one further and distinct way in which § 924(c)'s history undermines the government's case-specific reading of the residual clause. As originally enacted in 1968, § 924(c) prohibited the use of a firearm in connection with *any* federal felony. The 1984 amendments *narrowed* § 924(c) by limiting its predicate offenses to "crimes of violence." But the case-specific reading [allowing consideration of the use of a firearm] would go a long way toward nullifying that limitation and restoring the statute's original breadth. After all, how many felonies don't involve a substantial risk of physical force when they're committed using a firearm – let alone when the defendant brandishes or discharges the firearm?

United States v. Davis, 139 S.Ct. 2319, 2331 (2019)(emphasis in original)(citations omitted).

Therefore, even granting the fact that a second-degree murder that serves as a predicate for a § 924(c) charge will almost always involve the use of a firearm, "the categorical approach

prohibits consideration of this factual context." *Begay II*, 33 F.4th at 1102 (Ikuta, J. dissenting). And that approach is mandated by the plain text of the statute. *Davis*, 139 S.Ct. at 2328.

This legal principle – combined with the fact that second-degree murder convictions have been upheld in cases involving non-targeted conduct – fatally undermines the rationale of *Begay II*.

II. This case provides an opportunity for the Court to clear up an important federal question.

When *Begay* initially decided, a split three-judge panel held that second degree murder is not a crime of violence. *Begay I*, 934 F.3d at 1033. Shortly afterwards, the First Circuit held that Puerto Rico second-degree murder – which can be committed with extreme recklessness – is a crime of violence. *United States v. Baez-Martinez*, 950 F.3d 119 (1st Cir. 2020). A review of *Baez-Martinez's* reasoning, however, reveals that it conflicts with *Borden*. After *Borden* was decided, the Ninth Circuit issued its *en banc* decision in *Begay II*. That decision generated four separate opinions. *Begay II*, 33 F.4th at 1085-97; *id.* at 1098 (Murguia, Chief J., with whom Clifton, J. joins, concurring); *id.* at 1098-99 (Wardlaw, J., dissenting in part); *id.* at 1098-1107 (Ikuta, J., with whom Vandyke, J. joins, dissenting in part). These opinions, together with their differing rationales, provide the Court with sufficient judicial perspectives to inform the consideration of the issue.

Although *Borden* is less than three years old, the Court can and should answer the question it left open – whether offenses committed with "extreme" recklessness can qualify as a crime of violence. *Borden*, 141 S.Ct. at 1825 n.4. If the Court forgoes this opportunity, other circuits will rely on the faulty reasoning of *Baez-Martinez* and *Begay II* and misapply *Borden's* rationale. Two circuits have already done so. *United States v. Manley*, 52 F.4th 143 (4th Cir. 2022); *Alvardo-*

Linares v. United States, 44 F.4th 1334 (11th Cir. 2022). Those courts relied on *Begay II* to hold that depraved heart murder qualifies as a crime of violence. Neither adequately examined whether "extreme" recklessness crimes necessarily require the targeted use of force, even though that is the standard established in *Borden.*

Conclusion

The Petitioner, Quinton Birdinground, Jr., respectfully requests that the Court grant this petition for certiorari and reverse the judgment of the court of appeals.

Respectfully submitted,

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February 17, 2023