No._____

IN THE
SUPREME COURT OF THE UNITED STATES

ISAAC STEVEN SILVERSMITH

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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DATE SENT VIA United States Postal Service: July 18, 2023

QUESTIONS PRESENTED

1. By denying Petitioner's Petition For Certificate of Appealability, did the Ninth Circuit Court of Appeals err in holding that Second-degree Murder, under 8 U.S.C. § 1111(a) is a "crime of violence" under 18 U.S.C. § 924(c)(1)(A)?

PARTIES TO THE PROCEEDING

All parties to the proceedings are listed in the caption. The petitioner is not a corporation.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Isaac Steven Silversmith ("Silversmith"), respectfully requests that this petition for a writ of certiorari be granted, the judgment of the Ninth Circuit Court of Appeals be vacated, and the case be remanded for further proceedings consistent with petitioner's positions asserted herein.

OPINIONS BELOW

The underlying conviction and sentence was entered on December 13, 2013. (Appendix A, hereto)

On August 3, 2020, Silversmith filed an application to the Ninth Circuit Court of Appeals to file a second or successive motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. The Ninth Circuit granted the application on June 10, 2021.

On July 18, 2022, the district court denied relief, and denied a certificate of appealability. (Appendices B and C, hereto)

On August 31, 2022, Silversmith filed, in the Ninth Circuit Court of Appeals, a motion for a certificate of appealability. (Appendix D, hereto) That motion was denied on April 24, 2023. (Appendix E, hereto) No petitions for rehearing or rehearing *en banc* were filed.

JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit denying relief was entered on April 24, 2023. That Court had jurisdiction pursuant to 28 U.S.C. §1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

18 U.S.C. § 924

. . .

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

(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.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

. . .

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(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.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to

display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

18 U.S.C. § 1111

(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 premeditated 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 premeditated 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.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;

Whoever is guilty of murder in the second-degree, shall be imprisoned for any term of years or for life.

(c) For purposes of this section—

(1) the term "assault" has the same meaning as given that term in section 113;

(2) the term "child" means a person who has not attained the age of 18 years and is—

(A) under the perpetrator's care or control; or

(B) at least six years younger than the perpetrator;

(3) the term "child abuse" means intentionally or knowingly causing death or serious bodily injury to a child;

(4) the term "pattern or practice of assault or torture" means assault or torture engaged in on at least two occasions;

(5) the term "serious bodily injury" has the meaning set forth in section 1365; and

(6) the term "torture" means conduct, whether or not committed under the color of law, that otherwise satisfies the definition set forth in section 2340(1).

STATEMENT OF THE CASE

Petitioner, Isaac Steven Silversmith, is challenging his December 13, 2013 conviction for possession of a firearm in relation to or in furtherance of a crime of violence, and aiding and abetting, in violation of 18 U.S.C. §§ 2 and 924(c)(1)(A)(i), in case number 2:12-cr-00371-ROS-1, in the United States District Court for the District of Arizona. The sentencing Court's address is 401 West Washington Street, Phoenix, Arizona 85003.

On February 22, 2012, the Grand Jury approved an indictment against Silversmith alleging, as follows:

a. Count One: First degree murder, in violation of 18 U.S.C. §§ 1111(a) and 1153; and

b. Count Two: discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) and (j) (Doc. 1)[1]

On September 4, 2013, Silversmith pled guilty to the lesser included offense in Count One of the indictment: CIR-second-degree murder, in violation of 18 U.S.C. §§ 1111 and 1153; and the lesser included offense in Count 2 of the indictment: use of firearm during a crime of violence, in violation of 18 U.S.C. § 924(c).

On December 16, 2013, the district court sentenced Silversmith to 235 months in prison on Count 1, and to a consecutive term of 60 months in prison on Count 2. (Docs. 89, 95, 117). (Appendix A, hereto) Silversmith did not appeal his conviction or sentence.

CASE HISTORY

On July 12, 2020, Silversmith filed a *pro se* motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 in the instant case by placing the motion in the prison mailing system. (CV Doc. 1) (Appendix D, hereto) The district court denied that motion with leave to amend (CV Doc. 3), and Silversmith filed an amended *pro se* motion on August 3, 2020. (CV Doc. 5) (Appendix D, hereto) On June 10, 2021, the Ninth Circuit Court of Appeals entered an order appointing counsel to represent Silversmith, and granted

[1] Unless otherwise indicated with a "CV" preceding the docket number, all citations in this document to the docket refer to the record in the related criminal case.

Silversmith leave to file a second amended motion under 28 U.S.C. § 2255, which he filed on September 23, 2021. (CV Doc. 19) (Appendix D, hereto)

In his second amended motion under 28 U.S.C. § 2255, Silversmith adopted all of the facts and arguments in his two *pro se* motions, and argued that under *United States v. Davis,* 139 S.Ct. 2319 (2019), and *Borden v. United States*, 141 S.Ct. 1817 (2021), second-degree murder, under 18 U.S.C. § 1111(a), is not a "crime of violence" for 18 U.S.C. §§ 924(c) sentencing purposes. Silversmith noted that in *Davis,* the Supreme Court held that the "residual clause" in § 924(c)(3) was unconstitutionally vague *Id.* at 2336. Consequently, no predicate "crime of violence", as that phrase is used in § 924(c)(3), could be based solely upon that clause. He further noted that in *Borden*, a plurality of the Supreme Court (Justices Kagan, Breyer, Sotomayor and Gorsuch) concluded that a criminal offense (in that case, reckless aggravated assault under Tennessee law) with a *mens rea* of recklessness does not qualify as a "violent felony" under the ACCA's elements clause. In reaching that conclusion, the plurality focused on the phrase "against another", holding that that phrase, when modifying a volitional action like the "use of force", demands that the perpetrator direct his force at another individual. Reckless conduct, according to the plurality, is not aimed in that prescribed manner. Citing *Leocal v. Ashcroft*[2], the plurality affirmed that when read against the words "use of force", the "against" phrase – the

2 *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

definition's "critical aspect" – suggests a higher degree of intent than (at least) negligence. The plurality also noted that the ordinary meaning of the term "violent felony" – which the elements clause defines – also informs this construction. Citing *Leocal v. Asheroft* and *Johnson v. United States*,[3] the plurality noted that, in those decisions, the Court had construed the terms "violent felony" and "crime of violence" to mark out a narrow category of violent, active crimes that are best understood to involve a purposeful or knowing mental state – a deliberate choice of wreaking harm on another, rather than mere indifference to risk. Citing *Begay v. United States*,[4] the plurality went on note that classifying reckless crimes as "violent felonies" would also conflict with the ACCA's purpose – that is, to address the special danger created when a particular type of offender – a violent criminal – possesses a gun, adding that an offender who has repeatedly committed "purposeful, violent, and aggressive" crimes poses an uncommon danger of using a gun deliberately to harm a victim. The plurality distinguished the holding in *Voisine v. United States*[5] by observing that the relevant statute there was not a "violent felony", but, rather, a misdemeanor crime of domestic violence. It focused not on those convicted of serious felony offenses, but, instead, of garden-variety assault or battery misdemeanors – including acts that one might not characterize as violent in a nondomestic context.

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3 *Johnson v. United States*, 559 U.S. 133 (2010).
4 *Begay v. United States*, 553 U.S. 137 (2008).
5 *Voisine v. United States*, 136 S.Ct. 2272 (2016).

Acknowledging that some states recognize mental states (often called "depraved heart" or "extreme recklessness") between reckless and knowledge, the plurality declined to address whether offenses with those mental states fall within the elements clause. Justice Thomas, concurring in the judgment, concluded that the ACCA's elements clause did not encompass Borden's conviction for reckless aggravated assault. He concluded that a crime that can be committed through mere recklessness does not have as an element the "use of physical force" because that phrase has a well-understood meaning applying only to intentional acts designed to cause harm. Thus, he departed from the plurality by focusing on the "use of force" clause, rather than the "against the person of another" clause, of 18 U.S.C. § 924(e)(2)(i) to reach his decision.

While Silversmith's § 2255 motion was pending, the Ninth Circuit Court of Appeals handed down its decision in *United States v. Begay*, 33 F.4th 1081 (9th Cir. 2022), vacating 934 F.3d 1033 (9th Cir. 2019). There, the *en banc* Court affirmed Randly Irvin Begay's convictions for second-degree murder (18 U.S.C. §§ 1111(a) and 1153), and for discharging a firearm during a crime of violence (18 U.S.C. § 924(c)), vacated the district court's order of mandatory restitution, and remanded, in a case in which a divided three-judge panel had earlier agreed with Begay's argument that second-degree murder can be committed recklessly, and, therefore, does not qualify as a

crime of violence for purposes of § 924(c). Judges Ikuta and Wardlaw issued partial dissents that will be discussed, *infra*.

In his § 2255 motion, Silversmith argued that his § 2255 motion was timely filed. The government disagreed.

MAGISTRATE JUDGE'S RULING

On July 7, 2022, the assigned Magistrate Judge ("MJ") recommended that the district court deny relief, and dismiss the motion with prejudice.

In her brief Report and Recommendation ("R & R"), the MJ summarily concluded that *Begay, supra*, foreclosed relief as to Silversmith's claim. (CV Doc. 28) (Appendix B, hereto)

DISTRICT COURT RULING

On July 18, 2022, the district court, relying on *Begay, supra*, summarily adopted the MJ's R & R, denied relief, and dismissed Silversmith's motion with prejudice. (CV Docs. 29, 30) (Appendix C, hereto)

Neither the MJ nor the district court judge addressed the issue of whether Silversmith's claim was timely.

On August 1, 2022, a timely Notice of Appeal was filed. (Doc. 132)

COURT OF APPEALS RULING

On appeal, the Ninth Circuit Court of Appeals denied relief, holding that Silversmith failed to make a "substantial showing of the denial of a constitutional right" (citing 28 U.S.C. § 2253(c)(2) and *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

REASONS FOR GRANTING THE WRIT

Granting the Writ in this case would allow this Court to correct the error, if any, the Ninth Circuit Court of Appeals made in *Begay*, and in the instant case, in concluding that 18 U.S.C. § 1111 is a "crime of violence" for 18 U.S.C. § 924(c) sentencing purposes, and granting the Writ would provide much needed guidance across the Circuits regarding whether depraved heart murder, and a host of other (otherwise violent) offenses requiring a *mens rea* of something short of intent fall within the force clause of 18 U.S.C. § 924(c)(3)(A).

ARGUMENT

Regarding the merits of Silversmith's claim for relief, to determine whether an offense is a "crime of violence" under the "force clause" (also referred to as the "elements clause") in § 924(c)(3), courts have used an inquiry known as the "categorical" approach. They look to whether the statutory elements of the predicate offense necessarily require the use, attempted use, or threatened use of physical force. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 7-10, (2004) (interpreting the materially identical text in 18 U.S.C. § 16(a)); *United States v. McNeal*, 818 F.3d 141, 151-52 (4th Cir. 2016) (interpreting § 924(c)(3)(A)). This approach is "categorical" because courts consider only the crime as defined, not the particular facts in the case. *See, e.g., United States v. Mathis,* 136 S.Ct. 2243, 2248 (2016); *United States v. Oca,* 655 F.3d 915, 928 (9th Cir. 2011); *McNeal*, 818 F.3d at 152; *United*

States v. McGuire, 706 F.3d 1333, 1336 (11th Cir. 2013). The courts refer to the "force clause" inquiry as the *elements-based* categorical approach, because it begins and ends with the offense's elements. When a statute defines an offense in a way that allows for both violent and nonviolent means of commission, that offense is not "categorically" a crime of violence under the force clause. *Id.* If the statute is indivisible, the analysis ends there, and there can be no conviction under § 924(c). *Valencia v. Lynch*, 798 F.3d 1193, 1196 (9th Cir. 2015). Here, the predicate statute, second-degree murder, under 18 U.S.C. § 1111(a), is indivisible.

In light of the plurality decision in *Borden*, *supra*, and for the reasons set forth in Judge Sandra Ikuta's partial dissent in *Begay*, *supra*, Silversmith posits that *Begay* was wrongly decided, and second-degree murder, under 18 U.S.C. §§ 1111 and 1153, is not, categorically, a crime of violence for purposes of sentencing under 18 U.S.C. § 924(c), and is indivisible. Therefore, Silversmith's § 924(c) conviction must be vacated, and the case remanded for resentencing.

Second-degree murder, under 18 U.S.C. § 1111 and 1153, can be committed through recklessness. The elements of second-degree murder are that the defendant (1) "unlawfully kill[ed] a human being" (2) "with malice aforethought." 18 U.S.C. § 1111(a); Ninth Circuit Model Criminal Jury Instruction 8.108. "[M]alice aforethought covers four different kinds of mental states: (1) intent to kill; (2) intent to do serious bodily injury; (3) depraved

heart (i.e., reckless indifference); and (4) intent to commit a felony." *See United States v. Pineda-Doval,* 614 F.3d 1019, 1038 (9th Cir. 2010). As such, second-degree murder may be committed recklessly—with a depraved heart mental state — and need not be committed willfully or intentionally. *See United States v. Houser,* 130 F.3d 867, 871-72 (9th Cir. 1997) ("Malice aforethought does not require an element of willfulness if the existence of that malice is inferred from the fact that defendant acted recklessly with extreme disregard for human life."). It is, arguably, of no consequence that the recklessness required for second-degree murder must be "extreme" and goes beyond ordinary recklessness. In *United States v. Gomez-Leon*, 545 F. 3d 777 (9th Cir. 2008), the Ninth Circuit opined that, in order to constitute a crime of violence, "the underlying offense must require proof of an intentional use of force or a substantial risk that force will be *intentionally* used during its commission" *Id.* at 787." "[O]ur precedent seems squarely to place crimes motivated by intent on a pedestal, while pushing off other very dangerous and violent conduct that, because not intentional does not qualify as a 'crime of violence.'" *Covarrubias v. Holder*, 632 F. 3rd 1049, 1053 (9th Cir. 2011). Second-degree murder also does not involve a "substantial risk that force will be *intentionally* used during its commission." *See Gomez-Leon*, 545 F.3d at 787. In *Covarrubias*, the Ninth Circuit held that a California offense prohibiting the malicious and willful discharge of a firearm at an inhabited dwelling was not a "crime of violence" because it could be committed

recklessly, not just intentionally. *Covarrubias*, 632 F.3d at 1053 – 55. Although the Ninth Circuit conducted its analysis under § 16(b), because the BIA rested its decision on subsection (b), *id.* at 1052, the analysis regarding intent bears upon either subsection of § 16, and by analogy, 18 U.S.C. § 924(c)(3)(A). *See*, e.g., *Gomez-Leon, 545 F.3d at 787* (requiring intentional use of force for a crime of violence under either subsection of § 16); *United States v. Benally*, 843 F. 3d 350, 354 (9th Cir. 2016). In contrast to crimes like burglary that can be committed only intentionally, "with a crime committed recklessly, it is unlikely that the reckless actor will, in response to external events, form an intent to use force in furtherance of his crime." *Covarrubias*, 632 F.3rd at 1055. "Classic examples of second-degree murder include shooting a gun into a room that the defendant knows to be occupied, a game of Russian roulette, and driving a car at very high speeds along a crowded main street…" *United States v. Pineda-Doval*, 614 F.3d 1019, 1039 (9th Cir. 2010). The risk that a crime could escalate to the use of intentional force is, arguably, no more substantial for a defendant who recklessly kills than it is for a defendant who recklessly shoots at a house.

The majority in *Begay* held that second-degree murder required the *mens rea* of malice aforethought, and extreme indifference toward human life, and, therefore, was necessarily oppositional. *Begay*, 33 F.4th at 1093. In her partial dissent in *Begay*, Judge Ikuta correctly noted that under *Borden*, "[t]he phrase 'against another', when modifying the 'use of force', demands

that the perpetrator direct his action at, or target, another individual," citing *Borden* at 141 S.Ct. at 1825, and, thus, concluded that second-degree murder, under § 1111(a), does not qualify as a crime of violence because it does *not* necessarily include the element of targeting, and, therefore, is not an act *against another*, as required under 18 U.S.C. § 924(c)(3)(A). *Id.* at 1102. Judge Ikuta correctly noted that "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," and that targeting was not necessary. *Id.* at 1102. Judge Wardlaw joined Judge Ikuta in that regard in his partial dissent from the majority.

In a similar vein, the Third Circuit Court of Appeals, in *United States v. Mayo*, 901 F.3d 218 (3rd. Cir. 2018), held that Pennsylvania's aggravated assault statute is not a "violent felony" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii). There, the aggravated assault statute in issue was 18 Pa. Cons. Stat. 2702(a)(1), which prohibits "attempting to cause serious bodily injury to another, or caus[ing] such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life [.]" There, the Court held that, as Pennsylvania interprets Section 2702(a)(1), it does not necessarily involve the element of physical force against another person required by the Supreme

Court's interpretation of the ACCA, and, therefore, it is not categorically a "violent felony" under the ACCA.

The same logic could be applied to 18 U.S.C. § 1111(a) (second-degree murder). Second-degree murder can be committed through extreme recklessness (i.e., with malice aforethought), arguably without the use of violent force against another. *Mayo* appears to stand in stark contrast to the Ninth Circuit's holding in *Begay*, *supra*. In *Begay*, the Court held that it is the extreme disregard for human life that elevates mere recklessness to malice aforethought (extreme recklessness). Clearly, the language in the statute addressed in *Mayo*, to wit: "under circumstances manifesting extreme indifference to the value of human life", would appear to require a *mens rea* of "depraved heart" or "malice aforethought", supporting the notion that nothing short of intentional conduct qualifies as a "violent felony" under the ACCA, and, by analogy, a "crime of violence" under § 924(c).

While *Borden* did not directly address the question of whether depraved heart murder falls within the force clause of 18 U.S.C. § 924(c)(3)(A), *see id.* at 1825 n.4, its reasoning makes clear that an offense which does not require proof that the perpetrator "direct[ed] his action at, or target[ed] another individual" does not fall within the force clause, because such an offense does not involve the use of force "against another". *Id.* at 1825.

And while *Borden* specifically addressed the force clause of the ACCA, it would appear to have applicability to the similarly-worded provisions of 18 U.S.C. § 924(c)(3)(A). The ACCA provides sentence enhancements for felons who commit crimes with firearms if they are convicted of certain crimes three or more times. The qualifying prior felonies must be either "violent felonies" or "serious drug offenses". 18 U.S.C. § 924(e)(2). Section 924(e)(2)(B) provides the definition of a "violent felony":

> **(B)** the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;

Thus, the only difference between the language of 18 U.S.C. § 924(c)(3)(A) and 18 U.S.C. 924(e)(2)(B)(i) is that under the former, the use of force against either the person *or* property of another can constitute a "crime of violence", a distinction seemingly unimportant under *Borden*. *See Davis*, 139 S. Ct. at 2325 (stating the two statutes "bear more than a passing resemblance" to each other).

Under 28 U.S.C. § 2255, a petitioner is entitled to relief if, *inter alia*, the judgement violates the Constitution or laws of the United States, the court lacked jurisdiction to enter judgement, or the sentence exceeded the maximum allowed by law. Because second-degree murder under 18 U.S.C. § 1111(a) does not qualify as a crime of violence under either § 924(c)(3)(A) or § 924(c)(3)(B) (in light of *Davis* and *Borden),* Silversmith's § 924(c) conviction is unconstitutional, and must be vacated.

Even assuming, *arguendo*, that depraved heart murder could qualify as a crime of violence if, *as a practical matter*, defendants were charged under that statute only when the defendant's conduct was directed at, or targeted, another individual, such is not the case. For depraved heart murder cases not requiring targeting, *see*, *e.g.*, *United States v. Fleming*, 739 F.2d 945 (4th Cir. 1984); *United States v. Merritt*, 961 F.3d 1105 (5th Cir. 2020); *United States v. Sheffey*, 57 F.3d 1419 (6th Cir. 1995); *Pineda-Doval*, *supra*.

CONCLUSION

In light of this Court's decision in *Borden*, the district court arguably erred in ruling that second-degree murder under 18 U.S.C. § 1111(a) is a crime of violence for sentencing purposes under 18 U.S.C. § 924(c). Moreover, the Ninth Circuit's decision in *Begay* was wrongly decided. Therefore, Silversmith's sentence under § 924(c) is unconstitutional. Silversmith has made a substantial showing of the denial of a constitutional right. 28 U.S.C. 2253(c)(2).

For the foregoing reasons, this Court should grant this petition for writ of certiorari, reverse the decision of the Ninth Circuit Court of Appeals, and remand the case with instructions to vacate Silversmith's § 924(c) conviction and sentence.

RESPECTFULLY SUBMITTED this 18th day of July, 2023, by

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Attorney for Petitioner/Appellant