No. _____

IN THE
Supreme Court of the United States

THOMAS JOSEPH BREWER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 22-3452

Thomas Joseph Brewer,

Plaintiff - Appellant,

v.

United States of America,

Respondent - Appellee.

Appeal from United States District Court
for the District of South Dakota - Western

Submitted: October 17, 2023
Filed: January 10, 2024

Before SMITH, Chief Judge, LOKEN and COLLOTON, Circuit Judges.

COLLOTON, Circuit Judge.

Thomas Brewer appeals the denial of his motion to vacate sentence under 28 U.S.C. § 2255. Brewer disputes the lawfulness of his 10-year prison sentence for discharging a firearm during and in relation to a crime of violence. *See* 18 U.S.C. § 924(c)(1)(A)(iii). Brewer shot and killed a man during a quarrel. He was convicted of voluntary manslaughter under 18 U.S.C. § 1112, but he maintains that the firearms

conviction is invalid because voluntary manslaughter is not a "crime of violence." We reject that contention and affirm the judgment.

Brewer pleaded guilty in 2017 to voluntary manslaughter, *see id.* §§ 1112, 1153, and to discharge of a firearm during and in relation to a crime of violence, *see id.* § 924(c)(1)(A)(iii). The district court sentenced him to consecutive terms of 97 months' and 120 months' imprisonment, respectively.

In 2020, Brewer moved to vacate his sentence on the firearms offense. He argued that voluntary manslaughter no longer qualifies as a "crime of violence" under § 924(c).

> [T]he 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.

Id. § 924(c)(3). The district court[1] denied the motion, relying on *McCoy v. United States*, 960 F.3d 487, 490 (8th Cir. 2020).

Manslaughter is "the unlawful killing of a human being without malice." 18 U.S.C. § 1112(a). Voluntary manslaughter means a manslaughter committed "[u]pon a sudden quarrel or heat of passion." *Id.*

[1]The Honorable Lawrence L. Piersol, United States District Judge for the District of South Dakota.

Brewer's argument proceeds in two steps. First, he observes that the Supreme Court declared unconstitutional the residual clause of § 924(c)(3)(B), so voluntary manslaughter cannot be a crime of violence under that provision. *See United States v. Davis*, 139 S. Ct. 2319 (2019). Second, he maintains in light of *Borden v. United States*, 141 S. Ct. 1817 (2021), that voluntary manslaughter does not have as an element the use of physical force against the person of another as required by § 924(c)(3)(A). *Borden* held that an offense with a *mens rea* of ordinary recklessness does not meet the use-of-force criteria.

Voluntary manslaughter, however, requires more than ordinary recklessness; the government must prove that a defendant acted with "a general intent to kill, intent to do serious bodily injury, or with depraved heart recklessness." *McCoy*, 960 F.3d at 489 (quoting *United States v. Serawop*, 410 F.3d 656, 666 (10th Cir. 2005)). Before *Borden*, our decision in *McCoy* held that the *mens rea* of depraved heart recklessness is sufficient, and that voluntary manslaughter is a crime of violence under § 924(c)(3)(A).

Brewer argues that *Borden* supersedes *McCoy*. *Borden* did not address whether an offense committed with depraved heart or extreme recklessness has as an element the use of force against the person of another. *See Borden*, 141 S. Ct. at 1825 n.4 (plurality opinion). On that basis, the district court concluded that *McCoy* is still binding precedent. Brewer responds that even if *Borden* did not address the issue, the decision undermined the reasoning of *McCoy*. *McCoy* reasoned that depraved heart recklessness was a sufficient *mens rea* because this court had ruled in *United States v. Fogg*, 836 F.3d 951 (8th Cir. 2016), that a lesser *mens rea* of ordinary recklessness was sufficient. Brewer argues that because *Borden* abrogated *Fogg*, it is an open question after *Borden* whether *McCoy*'s conclusion about voluntary manslaughter was correct.

Assuming for the sake of analysis that we should address the question anew, we reaffirm after *Borden* that voluntary manslaughter has as an element the use of force against the person of another. This court held in *Janis v. United States*, 73 F.4th 628 (8th Cir. 2023), that second-degree murder is a crime of violence. In reaching that decision, we concluded that a *mens rea* of "depraved heart" or "extreme recklessness" is sufficient to establish a use of force against the person of another. *Id.* at 632-33. Extreme recklessness falls between knowledge and ordinary recklessness on a spectrum of mental states; it requires that a perpetrator act with extreme disregard for human life. *Serawop*, 410 F.3d at 666. Extreme recklessness in a criminal case "is considered a form of intentional conduct because it 'includes an element of deliberateness—a *conscious* acceptance of a known, serious risk.'" *Id.* at 663 n.4 (quoting *Archuleta v. McShan*, 897 F.2d 495, 499 (10th Cir. 1990)); *cf. Wakaksan v. United States*, 367 F.2d 639, 645 (8th Cir. 1966) ("Voluntary manslaughter is an unlawful, intentional killing committed without malice aforethought, while in a sudden heat of passion due to adequate provocation.").

In considering whether an offender convicted of second-degree murder necessarily uses force against another, *Janis* deemed it sufficient after *Borden* that extreme recklessness approaches the definition of knowledge: "Because the risk from extreme-reckless conduct is so high, the harmful result nears 'practical certainty' that force will be applied to another person." 73 F.4th at 634. Other circuits likewise have concluded that a *mens rea* of depraved heart or extreme recklessness is sufficient to establish a use of force against another. *United States v. Begay*, 33 F.4th 1081, 1094 (9th Cir. 2022) (en banc); *United States v. Manley*, 52 F.4th 143, 150-51 (4th Cir. 2022); *United States v. Harrison*, 54 F.4th 884, 890 (6th Cir. 2022). Although these decisions involved murder rather than manslaughter, the distinction is immaterial: "voluntary manslaughter functions more like a partial defense to murder, describing conduct undertaken intentionally but in the 'heat of passion.'" *United States v. Steward*, 880 F.3d 983, 987 (8th Cir. 2018). The offense of voluntary manslaughter may reflect mitigation due to heat of passion, but it requires

the same heightened *mens rea* that applies in a case of second-degree murder. *Accord United States v. Draper*, 84 F.4th 797, 800 (9th Cir. 2023).

Brewer also invokes a decision of this court, *United States v. Lung'aho*, 72 F.4th 845 (8th Cir. 2023), holding that arson under 18 U.S.C. § 844(f)(1) is not a crime of violence. *Lung'aho* construed the element of acting "maliciously" to mean that an arsonist could be convicted based on a "willful disregard of a likelihood of harm." *Id.* at 848-49. This *mens rea* was held insufficient to show a use of physical force against the property of another. *Id.* at 851. In *Janis*, however, this court concluded that second-degree murder, if committed with a mental state of depraved heart or extreme recklessness, requires "more risk and culpability" than arson. 73 F.4th at 632 (quoting *Lung'aho*, 72 F.4th at 850). Hence, on a "sliding scale of probabilities," *id.* at 634 (quoting *Lung'aho*, 72 F.4th at 849), this court's decisions place extreme recklessness and offenses like murder and voluntary manslaughter further along the culpability spectrum than "willful disregard of a likelihood of harm" and the offense of arson. *Janis*, not *Lung'aho*, is the apposite precedent here.[2]

The judgment of the district court is affirmed.

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[2]Citing *United States v. Flute*, 929 F.3d 584 (8th Cir. 2019), Brewer argues that a pregnant woman who uses deadly force against an unborn child could be convicted of voluntary manslaughter without using force against the person of another. If the voluntary manslaughter statute were to reach that far, *cf. Janis*, 73 F.4th at 636, then the victim would be a child born alive. We are aware of no authority suggesting that a defendant could be convicted of voluntary manslaughter in that situation without using force against the born-alive child who dies, even if a culpable act were taken before the time of birth. *Cf. United States v. Castleman*, 572 U.S. 157, 171 (2014). We again reject the argument. *See McCoy*, 960 F.3d at 490.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

THOMAS JOSEPH BREWER, Petitioner vs. UNITED STATES OF AMERICA, Respondent	5:20-cv-5042 MEMORANDUM AND ORDER

Pending before the Court is a 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence filed by Thomas Brewer (Doc. 1) and the Government's responsive Motion to Dismiss (Doc. 11). For the reasons set forth below, the Court grants the Government's motion.

1. Background

In 2017, Petitioner pleaded guilty to Voluntary Manslaughter, 18 U.S.C. §§1112, 1153, and to discharge of a firearm during a crime of violence, 18 U.S.C. § 924(c)(1)(A)(iii). He was sentenced to consecutive terms of 97 months for the manslaughter and 120 months for the firearms offense. His terms of supervised release are three and five years, respectively, to be served concurrently. His appeal to the Eighth Circuit was dismissed on December 15, 2017.

Mr. Brewer's offense occurred when a quarrel erupted between Shawn Stevens and Brewer, during which Brewer shot and killed Stevens. Either Brewer pointed his gun at Stevens and fired, or, as Brewer stated in accepting responsibility, (Doc. 65), he pointed the gun at the ground and the bullet ricocheted, hitting Stevens. In any event, at the time he pulled out his weapon, Brewer was aware Stevens was in the vicinity as they stood close to each other during the argument. Subsequently, Brewer was charged with Murder in violation of 18 U.S.C. §§ 1111, 1153, and pleaded guilty to Voluntary Manslaughter.

In 2020, Brewer filed a motion to reduce sentence, citing *United States v. Davis,* ___U.S.__,139 S.Ct. 2319 (2019). *Davis* addressed the provision of 18 U.S.C. § 924(c)(3), defining the parameters of a "crime of violence." The Court analyzed § 924(c)(3)(B), known as the "residual clause" and deemed it unconstitutionally vague. As a result, convictions under § 924(c) for use of a firearm during a crime of violence are constitutional only if they fit within § 924(c)(3)(A), variously referred to as the "force" clause, e.g., *Boose v. United States,* 739 F.3d 1185, 1186 (8th Cir. 2014); *McCoy v. United States*, 960 F.3d 487, 488, (8th Cir. 2020), cert. denied, 141 S.Ct. 2819 (6/21/21), or the "elements" clause, e.g., *Borden v. United States*, ___U.S. ___, 141 S.Ct. 1817 (2021); *United States v. Begay*, 33 F.4th 1081, 1090 (9th Cir. 2022) (en banc). Brewer argues his offense does not fall within that definition, and thus presents a question of law for resolution by the Court.

During the course of this litigation, the Government requested that the case be held in abeyance (Doc. 4) pending the Supreme Court's decision in *Borden*, 141 S.Ct. 1817 (2021). The case was held in abeyance and subsequently reassigned to this court.

II. Discussion

a. Standard of Review

In accordance with 28 U.S.C. § 2255, "[a] prisoner in custody under sentence ... claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence ... or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." Id. § 2255(a). See *Raymond v. United States*, 933 F.3d 988, 991 (8th Cir. 2019) (§ 2255 may provide relief for jurisdictional error, constitutional error, or error of law)).

The Government has moved to dismiss. (Doc. 11). The standard governing dismissal of a motion was set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) as follows: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). See *Spagna v. Phi*

Kappa Psi, Inc., 30 F.4th 710, 715 (8th Cir. 2022) (dismissal proper where factual allegations failed to state a plausible claim for relief and amounted to only a possibility that relief was warranted)).

b. Retroactivity of *Davis* in § 2255 proceeding

In the context of a proceeding under 28 U.S.C. § 2255, questions of procedural default and retroactivity are pertinent. The Eighth Circuit addressed these questions in *United States v. Jones*, ___ F.4th ___, 2022 WL 2431595 (8th Cir. 7/5/2022). Jones pleaded guilty to conspiracy to commit Hobbs Act robbery and brandishing a firearm during a crime of violence for offenses committed in 2005. He petitioned for relief after *Davis* held the residual clause of 18 U.S.C. § 924(c) was unconstitutionally vague. *Id.*, *1. In addressing his claim, the court first considered whether there was "cause" for petitioner's failure to raise that claim in his case. *Id.*, *2 (citing *Bousley v. United States*, 523 U.S. 614, 622 (1998)). The court found that, given the state of the law at the time, Jones did not have "a reasonable basis upon which to challenge his guilty plea." *Id.* He established "prejudice" because the offenses of conviction no longer supported the enhancement of sentence. *Id.* (citing *United States v. Frady*, 456 U.S. 152, 170 (1982)). The court also determined that *Davis* is retroactive under the formulation set forth in *Teague v. Lane*, 489 U.S. 288 (1989), because it changes "the substantive reach of § 924(c)." *Id.* (quoting *Welch v. United States*, 578 U.S. 120, 129, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016)). Accord, *United States v. Reece*,

938 F.3d 630, 634-35 (5th Cir. 2019); *United States v. Bowen*, 936 F.3d 1091, 1100-01 (10th Cir. 2019).

III. Analysis

As noted above, petitioner was sentenced to 120 months to be served consecutively to the underlying term of 97 months based on his plea of guilty to voluntary manslaughter. The 120-month mandatory consecutive sentence is required pursuant to 18 U.S.C. § 924(c)(1)(A) which reads as follows:

> 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—
> ... **(iii)** if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

The term "crime of violence" is described at 18 U.S.C. § 924(c)(3) as follows:

> 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.

Courts have clarified that the term "violent felony" in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924 (c)(2)(B)(i), and "crime of violence," 18 U.S.C. §16(a) and § 924(c)(3), are equivalent. *Borden*, 141 S.Ct. at 1824, 1830; *Begay*, 33 F.4th at 1086. The import is that cases interpreting either term are applicable for both, which is helpful when navigating pertinent authority. See also *United States v. Lopez-Castillo*, 24 F.4th 1216, 1219 n. 2 (8th Cir. 2021) (terms "violent felony" under ACCA and "crime of violence" under Federal Sentencing Guidelines are "interchangeable").

Following the decision in *Davis* declaring § 924(c)(3)(B) unconstitutionally vague, individuals such as Petitioner Brewer requested § 2255 review of their sentences. The argument in many of the cases, including Petitioner's, is that because the so-called "residual clause" of subsection (B) can no longer serve as the basis for the 10-year mandatory sentence required by § 924(c)(3), only the "force clause" of subsection (A) is available for that purpose. Petitioner further argues that his crime of conviction is not a "crime of violence" because Voluntary Manslaughter does not include as an element the use of force against another. This is so, according to Petitioner, because "reckless" conduct can result in a conviction under 18 U.S.C. § 1112, and *Borden* forecloses that as a possible basis for finding a "crime of violence." The issue this Court must decide is whether Voluntary Manslaughter characterized by extreme recklessness or depraved heart recklessness constitutes a

crime of violence. The Supreme Court, Eighth Circuit, and other courts have laid considerable groundwork for resolving the question.

Interpretation of the term "crime of violence" was addressed by the Court in in *United States v. Taylor*, ___ U.S. ____, 142 S.Ct. 2015, 2020 (2022). The issue was whether an attempted robbery in violation of the Hobbs Act constitutes a crime of violence under 18 U.S.C. § 924(c)(3)(A) and the Court determined it does not. *Id.* For purposes of the discussion at hand, the Court reinforced that to analyze whether an offense counts as a crime of violence the Court uses the categorical approach, meaning it examines the elements of the crime rather than the particular facts of the defendant's crime. *Id.* (citing Borden *v. United States*, 593 U.S. ——, ——, 141 S.Ct. 1817, 210 L.Ed.2d 63 (2021); *Davis*, 588 U.S., at ___, 139 S.Ct., at 2328; *Leocal v. Ashcroft*, 543 U.S. 1, 7, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004)). As the Court stated: "Congress tasked the courts with a much more straightforward job: Look at the elements of the underlying crime and ask whether they require the government to prove the use, attempted use, or threatened use of force." 142 S.Ct., at 2025.

With respect to *Davis* and its impact, the follow-up case was *Borden v. United States*, 141 S.Ct. 1817 (2021), which offered some clarification of the reach of 18 U.S.C. § 924(c)(3)(A). In *Borden,* the Court addressed the provision of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), which provides for a mandatory

minimum 15-year sentence for individuals with prior convictions of three or more violent felonies. 141 S.Ct., at 1821. At issue in *Borden* was the petitioner's prior state conviction for a reckless aggravated assault. *Id.,* at 1822. The Court highlighted the distinction between the purposeful or knowing state of mind as opposed to the reckless or negligent state of mind in the context of the use of force against another's person or property. *Id.*, at 1823. See generally *Leocal*, 543 U.S., at 10 (negligent conduct is not within the phrase "use of force against" another). But see *Voisine v. United States*, 579 U.S. 686, 692, 136 S.Ct. 2272, 2278, 195 L.Ed.2d 736 (2016) (reckless domestic assault is a crime of violence because it requires the use of physical force against another in certain domestic relationships).The *Borden* plurality was persuaded that "the use of force against another" requires that "the perpetrator direct his action at, or target, another individual," and concluded that "reckless conduct is not aimed in that prescribed manner." 141 S.Ct., at 1825. As a result, the reckless aggravated assault at issue did not count as a crime of violence for § 924(e). *Id.* It is noteworthy that in reaching its conclusion the plurality expressly stated that *Borden* did not resolve whether the state of mind of extreme recklessness or depraved heart would fall within the elements clause of 18 U.S.C. § 924(c)(3)(A). *Id.,* at 1825 n. 4. The concurring opinion in *Borden* emphasized that the "use" of physical force against another does not exist with reckless conduct. *Id.*, at 1835 (Thomas, J., concurring). As was the case with the plurality, however, the

concurrence did not address whether "depraved heart" reckless conduct would constitute a crime of violence.

Because *Borden* did not address the status of "depraved heart" reckless conduct as a crime of violence, lower courts have grappled with the issue. For example, in *Begay*, the Ninth Circuit *en banc* determined that a killing under circumstances evidencing extreme indifference to the value of human life is a crime of violence for purposes of § 924 (c)(3). 33 F.4th at 1093, 1096. Begay was convicted of murder, and while he claimed his act was in the heat of passion, the trial court rejected the argument. *Id.* at 1088. Like Petitioner Brewer, Begay argued his crime did not qualify as a crime of violence, but the court disagreed. The court stated the definition of criminal homicide is murder when "it is committed recklessly under circumstances manifesting extreme indifference to the value of human life." *Id.* at 1094 (quoting Model Penal Code § 210.2(1)(b)). In upholding defendant's murder conviction, the court concluded that when a person "actively employs physical force" and does not act with ordinary recklessness but with "recklessness that rises to the level of extreme disregard for human life," the crime qualifies as a crime of violence. *Id.* at 1093.

What has the impact of *Borden* been in the Eighth Circuit? In resolving the issue in *Borden*, the Supreme Court rejected the holding of *Fogg v. United States*, 836 F.3d 951, 956 (8th Cir. 2016), in which the Eighth Circuit had determined that

the offense of attempted drive by shooting under Minnesota law amounted to a violent felony for purposes of ACCA. 141 S.Ct. at 1823 n.1. The court had determined that a state of mind of recklessness was sufficient to render the prior conviction one for a crime of violence, and that holding was contrary to *Borden*. See *United States v. Hoxworth*, 11 F.4th 693, 695 (8th Cir. 2021) (recognizing that *Borden* abrogated *Fogg*).

Fogg was not the sole authority from the Eighth Circuit on the topic, however. In *McCoy*, the court addressed whether Voluntary Manslaughter, 18 U.S.C. § 1112, is a crime of violence. 960 F.3d 487. If so, the mandatory sentencing provisions of § 924(c) come into play if the defendant has used a firearm to commit the crime. The petitioner argued that because Voluntary Manslaughter has recklessness as an element, the offense does not amount to a crime of violence. *Id.* at 489. The court responded, "Voluntary manslaughter occurs when a defendant acts upon a sudden quarrel or heat of passion, and with a mental state constituting 'a general intent to kill, intent to do serious bodily injury, or with depraved heart recklessness.'" *Id.* (quoting *United States v. Serawop*, 410 F.3d 656, 666 (10th Cir. 2005); *see United States v. Steward*, 880 F.3d 983, 987-88 (8th Cir. 2018); 2 Wayne R. LaFave, *Substantive Criminal Law* § 15.2(a) (3d ed. 2017)). *Serawop* summarized the pertinent mental state needed to convict of Voluntary Manslaughter as follows: "the defendant acted, while in the heat of

passion or upon a sudden quarrel, with a mental state that would otherwise constitute second degree murder—either a general intent to kill, intent to do serious bodily injury, or with depraved heart recklessness." 410 F.3d at 666. Focusing on manslaughter of this nature, the *McCoy* court determined Voluntary Manslaughter is a crime of violence. 960 F.3d at 490. The court distinguished other manslaughter cases, such as those involving drunk driving, and rejected the notion that they altered the mental state requirement for Voluntary Manslaughter under 18 U.S.C. § 1112. *Id.* *McCoy* also distinguished *United States v. Flute*, 929 F.3d 584 (8th Cir. 2019), in which it had held that prenatal conduct could give rise to a prosecution for involuntary manslaughter, 18 U.S.C. § 1112. The court emphasized that *Flute* had applied the "modified categorical approach" to recognize two levels of manslaughter with different elements and therefore did not address whether the discrete offense of Voluntary Manslaughter is a crime of violence. *McCoy* at 489-90 (quoting *Mathis v. United States*, ___ U.S. ____, 136 S.Ct. 2243, 2249, 195 L.Ed.2d 604 (2016)). Thus, under Eighth Circuit precedent, for purposes of the enhanced penalty under § 924(c)(3)(A), Voluntary Manslaughter is a crime of violence. *Id.*

This Court concludes that the holding in *McCoy* was not altered by *Borden*, and therefore Voluntary Manslaughter remains a crime of violence for the purposes of § 924(c)(3). See also Eighth Circuit Model Criminal Jury Instruction

6.18.1112A-Voluntary Manslaughter (requiring instruction that the defendant "voluntarily, intentionally, and unlawfully" killed the victim while in the heat of passion).

The Court also notes that the issue identical to Brewer's was resolved by the court in *United States v. Thompson*, 2022 WL 138524 (D. Minn. 2022). Thompson had pleaded guilty to Voluntary Manslaughter, 18 U.S.C. §§ 1112, 1153, after having been charged with Murder in violation of 18 U.S.C. § 1111. The offense arose during an argument over a drug deal which resulted in the defendant shooting and killing the victim. *Id.* *1. The court found that Voluntary Manslaughter is a crime of violence, rejecting the argument that because "recklessness" is the state of mind required for Voluntary Manslaughter, *Borden* precludes categorizing it as a crime of violence for purposes of § 924(c)(3). *Id.* *3. Rather, the court stated, the "predicate offense at issue has a minimum *mens rea* of depraved heart recklessness, which is consistently distinguished from ordinary recklessness and is regarded as involving a heightened recklessness that approaches knowledge." *Id.* (citing *United States v. Baez-Martinez*, 950 F.3d 119, 126-27 (1st Cir. 2020) cert. denied, 141 S. Ct. 2805 (June 21, 2021) rehearing denied, (August 23, 2021)(prior conviction for depraved heart murder was crime of violence under ACCA)). This court agrees with the reasoning in *Thompson*.

An additional recent case which sheds light on Petitioner's Motion is *Janis v. United States*, 2022 WL 1500691 (D.S.D. 2022), where the court determined that depraved heart murder qualifies as a crime of violence. The court acknowledged that *Borden* precludes mere recklessness as an adequate mental state for a crime of violence under § 924 (c)(3). *Id* *3. The offense of murder, however, requires a "higher mental state" than mere recklessness, including "extreme recklessness" or "depraved heart" or a "wanton disregard for human life." *Id.* The court equated the mental state needed for murder and voluntary manslaughter, *id.* at *5, meaning a mens rea for Voluntary Manslaughter higher than recklessness – such as extreme recklessness, depraved heart, or analogous terms—is sufficient to establish the mens rea required for a crime of violence. *Id.* The court added that, to satisfy the concerns of the *Borden* concurrence, there must be physical force accompanying the required mental state. In the court's view, the "willful act devoid of concern for human life is only satisfied through the *intentional use* of physical force," such as the fatal shooting in the case before the court. *Id.* This Court agrees that a mens rea for Voluntary Manslaughter higher than recklessness – such as extreme recklessness, depraved heart, or analogous terms—is sufficient to establish the mens rea required for a crime of violence. When coupled with the intentional killing required for Voluntary Manslaughter, the resulting conduct amounts to a crime of violence.

CONCLUSION

The elements of Voluntary Manslaughter are an intentional killing in the heat of passion with a state of mind more culpable than ordinary recklessness, such as depraved heart or extreme recklessness. Therefore, Voluntary Manslaughter is a crime of violence under 18 U.S.C. § 924(c)(3)(A). Petitioner has not demonstrated that he is entitled to relief from the sentence imposed as a result of his commission of a crime of violence.

Accordingly, IT IS ORDERED that

Petitioner's motion to vacate his sentence pursuant to 28 U.S.C. § 2255 is denied.

Dated this 13th day of September, 2022.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
MATTHEW W. THELEN, CLERK

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-3452

Thomas Joseph Brewer

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of South Dakota - Western
(5:20-cv-05042-LLP)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 01, 2024

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans