

No. _____

IN THE
Supreme Court of the United States

ARTHUR LEE ROBINSON

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

DAVID L. BRENGLE
Assistant Federal Public Defender
650 Missouri Ave.
East St. Louis, IL 62201
(618) 482-9050
(618) 482-9057 fax
David_Brengle@fd.org
Counsel for Petitioner

QUESTION PRESENTED

The Armed Career Criminal Act provides an enhanced penalty for felons in possession of a firearm with three prior qualifying convictions, including for violent felonies. A violent felony includes offenses which have “as an element the use, attempted use, or threatened use of physical force against the person of another.” *Borden v. United States*, held “[t]he phrase ‘against another,’ when modifying the ‘use of force,’ demands that the perpetrator direct his action at, or target, another individual,” and does not include offenses requiring a *mens rea* of recklessness. 141 S.Ct. 1816, 1825 (2021).

Where, in 1991, Illinois aggravated discharge of a firearm (Ill.Rev.Stat.1991, ch. 38, par. 24-1.2(a)(2)) required knowingly discharging a firearm, with the knowledge that the discharge is “in the direction of another person,” does that offense qualify as a violent felony under *Borden*, despite that Illinois case law and the plain language of the statute permit the offense to be committed without intending to threaten, target, or injure any individual?

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all parties to the proceeding.

DIRECTLY RELATED PROCEEDINGS

Seventh Circuit Court of Appeals, *United States v. Robinson*, Case No. 21-1622, opinion affirming District Court, issued March 24, 2022, docket no. 27;

United States District Court for the Southern District of Illinois, *United States v. Robinson*, Case No. 17-cr-30041, Amended Judgment and Conviction after remand, issued March 25, 2021, docket no. 88;

Seventh Circuit Court of Appeals, *United States v. Robinson*, Case No. 18-2295, opinion vacating sentencing judgement and remanding to the District Court, issued November 7, 2019, docket no. 50;

United States District Court for the Southern District of Illinois, *United States v. Robinson*, Case No. 17-cr-30041, Judgment and Conviction, issued May 30, 2018, docket no. 55.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Arthur Lee Robinson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

DECISION BELOW

The Seventh Circuit's decision is published at 29 F.4th 370 (7th Cir. Mar. 24, 2022), and appears at Appendix 1 to this Petition.

JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of Illinois originally had jurisdiction pursuant to 18 U.S.C. § 3231, which provides exclusive jurisdiction of offenses against the United States. Petitioner timely appealed the District Court's Amended Judgment of Conviction and Sentence to the United States Court of Appeals for the Seventh Circuit, pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The Seventh Circuit affirmed the judgment on March 24, 2022. Petitioner seeks review of the Seventh Circuit's published opinion affirming Petitioner's conviction and sentence pursuant to 28 U.S.C. § 1254(1). This Petition is filed within 90 days of the Seventh Circuit's opinion affirming the District Court's Amended Judgment.

STATUTORY PROVISIONS INVOLVED

Illinois Aggravated Discharge of a Firearm:

- (a) A person commits aggravated discharge of a firearm when he knowingly:
 - (1) Discharges a firearm at or into a building he knows to be occupied and the firearm is discharged from a place or position outside that building; or
 - (2) Discharges a firearm in the direction of another person or in the direction of a vehicle he knows to be occupied.
- (b) Aggravated discharge of a firearm is a Class 1 felony.

Ill.Rev.Stat.1991, ch. 38, par. 24-1.2(a)(2).

Armed Career Criminal Act:

(1) In the case of a person who violates section 922(g) of this title [felon in possession of a firearm] and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

* * *

(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

...

18 U.S.C. § 924(e).

STATEMENT OF THE CASE

Petitioner seeks this Court's review of the Seventh Circuit's opinion affirming the District Court's amended judgment and sentence after remand, and rejecting Petitioner's argument that *Borden v. United States* prevented his Illinois aggravated discharge of a firearm conviction from being counted as a violent felony, triggering an Armed Career Criminal enhanced sentence.

On February 23, 2017, Petitioner was charged by indictment with one count of violating 18 U.S.C. § 922(g)(1); *see* 18 U.S.C. § 3231 (giving United States district court's jurisdiction over "all offenses against the laws of the United States"). After pleading guilty, the PSR found Petitioner was an Armed Career Criminal under 18 U.S.C. § 924(e), based on prior convictions for two serious drug offenses and one violent felony; the violent felony was a 1991 Illinois aggravated discharge of a firearm offense. (Doc. 27 ¶ 23). The Probation Office's addendum asserted Petitioner's guilty plea to aggravated discharge of a firearm was for "discharging a firearm in the direction of another person." (Doc. 53, Doc. 27 ¶ 30).

Petitioner's attorney at the time objected the PSR counting aggravated discharge of a firearm as a violent felony, and maintained her objection at the sentencing hearing. (May 30, 2018 Sent. Tr. p. 5-7). The District Court found aggravated discharge of a firearm counted as a violent felony, applied the ACCA, and sentenced Petitioner to 188 months imprisonment. *Id.* at 7-9.

On June 11, 2018, Petitioner's prior Counsel appealed the May 30, 2018 final judgment to the Seventh Circuit Court of Appeals. (Appeal No. 18-2295; Doc. 57). She raised two issues. First, the District Court impermissibly double-counted Petitioner's past convictions by using them both as ACCA predicates and in calculating his guideline range, which the Seventh Circuit rejected. *United States v. Robinson*, 942 F.3d 767, 772 (7th Cir. Nov. 7, 2019). The Seventh Circuit agreed with the second argument, that the District Court erred in removing Petitioner's acceptance of

responsibility reduction. The Seventh Circuit vacated the judgment and remanded for resentencing, with the acceptance points reinstated. *Id.* at 768, 772.

On February 1, 2021, after remand, the District Court conducted a hearing regarding several matters. The District Court asked Petitioner why he was asking for a new attorney, to which Petitioner replied, “Mr. Brengle didn’t want to file my objections for me.” The District Court told him she would not hear any objections: “The only thing that’s going to be done is, I am going to reinstate your 3-point reduction. * * * When we recalculate the guideline range, the range will then be back down to the 180-month mandatory minimum.” (Status hearing tr. p. 4-6).

On March 23, 2021, the District Court held a resentencing hearing, at which she noted “the specific mandate is for resentencing, which essentially involves the recalculating the guidelines to include the reduction for acceptance of responsibility and sentence accordingly.” (Resent. Tr. p. 1-2). The District Court adopted the previously filed presentence investigation report, noting the objections were previously resolved. She noted Petitioner’s guideline range was 135 to 168 months imprisonment, but Petitioner was subject to a statutory minimum sentence of 180 months because of the Armed Career Criminal Act. (Resent. Tr. p. 3-4). Both Government Counsel and Defense Counsel asked for a sentence of the minimum statutory term of 180 months imprisonment. (Resent. Tr. p. 5-7). In imposing 180 months imprisonment, the District Court said the ACCA minimum sentence was too long:

I think it’s important to state for the record that, as is true in most cases where there is a mandatory minimum that applies, I find that, unfortunately, that mandatory minimum runs afoul and in direct conflict with my charge to impose a sentence which is sufficient, but not greater than necessary. Of course, that is based on my discretion and judgment and weighing of the appropriate factors which, of course, are not weighed by Congress when they impose a mandatory minimum. But truthfully, without the mandatory minimum of 180 months, I am not persuaded that 180 months is not greater than necessary. That being said, my hands are tied.

(Resent. Tr. p. 8-9).

On April 1, 2021, Petitioner appealed the amended judgment. In his brief, he argued that after Petitioner was resentenced with his acceptance points reinstated, and before briefs were filed in his appeal, the Supreme Court issued *Borden v. United States*, 141 S.Ct. 1817, 1834 (U.S. June 10, 2021), which held that to qualify as a “violent felony” under the Armed Career Criminal Act’s elements clause, an individual had to knowingly or intentionally use force to target another individual. Petitioner argued his prior conviction for Illinois aggravated discharge of a firearm required the intentional use of force, but did not require that the offender intentionally target the force *against* another. Rather, the force merely had to be “in a direction” where he knew someone was present. *See People v. Tayborn*, 627 N.E.2d 8, 15 (Ill.App.3d 1993) (Distinguishing first degree murder from aggravated discharge, “Defendant’s act of firing a weapon into a building when he knew that Murchinson and his family were inside is distinct from his action of shooting Hatfield, with the intent to kill him.”); *see also Lopez v. Sheriff of Cook Cty.*, 993 F.3d 981, 987 (7th Cir. 2021) (Recognizing Illinois aggravated discharge of a firearm may be committed “without posing a threat of serious harm to another.”). Hence, Petitioner should not have been sentenced as an Armed Career Criminal, and should have been subject to a ten-year statutory maximum, rather than a fifteen-year mandatory minimum term.

Petitioner also argued the *Borden* opinion, which was not issued until after his resentencing, was an exceptional circumstance warranting consideration on appeal, despite any “law of the case” or related waiver issues, especially where the District Court stated fifteen years was too long.

On March 24, 2022, the Seventh Circuit issued an opinion rejecting Petitioner’s argument, and affirming the District Court’s judgment. The Seventh Circuit acknowledged its discretion to consider matters outside the scope of its mandate which resolved Petitioner’s first

appeal. However, it found it need not decide whether *Borden* warranted the exercise of such discretion, because it concluded Illinois aggravated discharge of a firearm categorically continued to qualify as a violent felony after *Borden*. The Seventh Circuit asserted the fact that the offense requires a defendant to *knowingly* discharge a firearm in a direction where he *knows* another person is located satisfies *Borden*:

The plurality explained that reckless offenses “do not require, as the Act does, the active employment of force against another person.” [Id. at 1834](#) They distinguished “recklessness” from “purpose” and “knowledge,” employing the standard definitions: “A person acts purposefully when he consciously desires a particular result” and “acts knowingly when he is aware that a result is practically certain to follow from his conduct, whatever his affirmative desire.” [Id. at 1823](#) (cleaned up). In contrast, a person acts recklessly “when he consciously disregards a substantial and unjustifiable risk attached to his conduct, in gross deviation from accepted standards.” [Id. at 1824](#) (cleaned up).

Justice Thomas cast the deciding vote. While he agreed with the plurality that reckless offenses do not fit the elements-clause definition found in section (e)(2)(B)(i), he would have found that they do fit within the so-called residual clause found in section (e)(2)(B)(ii) of the Act . . . * * *

Robinson contends that [Borden](#) changed the significance, under the Act, of his 1992 Illinois aggravated-discharge conviction, but we do not see how it could have done so. [Borden](#), as we just said, was about *mens rea*. Yet there is no *mens rea* issue here. The Illinois statute in question had a *mens rea* of knowing in 1991, and it still does today. [Borden](#) is thus irrelevant. A quick look at the statute under which Robinson was charged drives the point home:

A person commits aggravated discharge of a firearm when he *knowingly*:

- (1) Discharges a firearm at or into a building he *knows* to be occupied and the firearm is discharged from a place or position outside that building; or
- (2) Discharges a firearm in the direction of another person or in the direction of a vehicle he *knows* to be occupied.

Ill. Rev. Stat. 1991, ch. 38, Ill. [par. 24-1.2\(a\)\(1\)-\(2\)](#) (emphasis added).

United States v. Robinson, 29 F.4th 370, 375-76 (7th Cir. 2022).

REASONS FOR GRANTING THE PETITION

A. The Seventh Circuit's holding conflicts with Supreme Court precedent. The Seventh Circuit's holding that Illinois aggravated discharge of a firearm satisfied the ACCA's definition of a violent felony conflicts with *Borden*. In *Borden*, this Court resolved a dispute regarding the definition of "violent felony" in ACCA's elements clause, that is, "how different mental states map onto the clause's demand that an offense entail the 'use ... of physical force against the person of another.'" 141 S.Ct. at 1823. *Borden* concluded:

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.

Id. at 1825.

Borden is clear: a *mens rea* of recklessness will not suffice for the use of physical force, and will not suffice for the requirement that the force be directed or targeted at an individual.

In Petitioner's case, the Seventh Circuit held that knowingly directing force "in the direction of another person," satisfies the Armed Career Criminal Act's "use of physical force against the person of another." This holding is contrary to *Borden*. Illinois aggravated discharge of a firearm categorically does not require that an offender intentionally direct or target his use of force against another person. Rather, Illinois courts construe the offense as requiring the intentional use of force—not against another—but in a manner that recklessly disregards the safety of individuals in the vicinity. As recounted in Petitioner's Appeal brief:

The Illinois Court highlighted this distinction in *People v. Tayborn*, 627 N.E.2d 8 (Ill.App.3d 1993): "A person commits first degree murder if, in performing the acts which cause death, '(1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another.' * * * Defendant's act of firing a weapon into a building when he knew that Murchinson and his family were inside is distinct from his action of shooting Hatfield, with the intent to kill him." *Id.* at 15 (citation omitted). Similarly, as stated in *People v. Banks*, 632 N.E.2d 257, 263 (Ill.App. 1st

1994): “Aggravated battery with a firearm . . . is committed when a person ‘knowingly causes any injury to another by means of the discharging of a firearm.’ * * * In contrast, aggravated discharge of a firearm . . . is committed when a person knowingly ‘[d]ischarges a firearm in the direction of another person.’” *Id.* at 263 (citations omitted); *see also Lopez v. Sheriff of Cook Cty.*, 993 F.3d 981, 987 (7th Cir. 2021) (recognizing a person can be found guilty of Illinois aggravated discharge of a firearm “without posing a threat of serious harm to another.”).

(Petitioner (Appellant) Brief p. 12).

Petitioner’s (Appellant’s) Reply brief cited additional precedent establishing Illinois aggravated discharge of a firearm categorically does not require directing force at or targeting another person. In *People v. Ellis*, 929 N.E.2d 1245, 1248–49 (2010), the Illinois court said, “We find that the threat of serious harm is not an inherent element of the offense of aggravated discharge of a firearm, which only requires that a defendant fire in the direction of a person or occupied car.”) (citation omitted).

Petitioner also cited *People v. Williams*, 688 N.E.2d 320 (IL.App. (2nd) 1997), where a defendant charged with aggravated discharge of a firearm testified he closed his eyes and fired a gun over the heads of individuals in order to scare the victim away. He asked for a reckless discharge instruction. The Illinois appellate court explained in either case, discharging the firearm was a reckless act:

In this case, the counts of the indictment charging the defendant with aggravated discharge of a firearm stated, in pertinent part, that the “defendant[] knowingly discharged a pistol in the direction of” the victim. The offense of reckless conduct is defined as follows:

“A person who causes bodily harm to or endangers the bodily safety of an individual by any means, commits reckless conduct if he performs recklessly the acts which cause the harm or endanger safety, whether they otherwise are lawful or unlawful.” 720 ILCS 5/12—5(a) (West 1994).

* * *

The act of discharging a pistol in the direction of an individual is a reckless act that would, if nothing else, endanger the safety of an individual. The only change to the instant indictment that would be necessary in order to establish

the offense of reckless conduct would be to replace the mental state of knowledge with the less culpable mental state of recklessness. Therefore, we conclude that the indictment in this case does describe the foundation of the offense of reckless conduct.

People v. Williams, 688 N.E.2d 320, 324–25 (1997) (citations omitted).

The *Williams* court found the defendant’s conduct could constitute aggravated discharge of a firearm, despite no evidence the defendant intentionally directed his force at another person: “[w]hether the defendant’s firing the gun in the air, over the heads of the men with his eyes closed, constitutes firing the gun in the direction of another person is a factual question to be resolved by the finder of fact.” *Id.* Although there was some evidence the *Williams* defendant fired the gun “to scare the victim away,” neither the Illinois aggravated discharge statute, which does not address threats, nor the *Williams* opinion, indicates that fact was significant in determining whether the defendant’s conduct satisfied the elements of the statute. The statute explicitly only covers firing the gun in the direction of another, regardless of why the shooter decided to do so. (Petitioner’s (Appellant’s) Reply Brief p. 5-7).

The Illinois appellate court in *People v. Baar*, 2019 WL 8164403 (IL App (1st) 2019), relied on *Williams*’ holding that aggravated discharge of a firearm requires intentional discharge of a firearm in a reckless manner, in that intentionally firing a gun in the direction of another person endangers that person’s safety. As that court explained:

the State alleged that defendant “knowingly discharged a firearm in the direction of another person, to wit: Mark Anderson.” See *id.* § 5/24-1.2(a)(2). So the indictment expressly alleged the discharge of a firearm. It did not expressly allege that the discharge was reckless, in that it put Anderson in danger of probable bodily harm. But “the act of discharging a pistol in the direction of an individual is a reckless act that would, if nothing else, endanger the safety of an individual.” *People v. Williams*, 293 Ill. App. 3d 276, 281 (1997).

We thus held in *Williams* that reckless conduct was a lesser-included offense of aggravated discharge. *Id.* The element of endangerment—required by reckless conduct and reckless discharge alike—was reasonably inferred from the allegation of a gunshot fired in the direction of another person. The only

difference between the charged and uncharged offenses was the mental state—the more culpable mental state of knowledge, as required for aggravated discharge, was replaced by the less culpable mental state of recklessness, as required for reckless conduct. *Id.*; see 720 ILCS 5/2-9 (West 2014) * * * The factual allegations underlying the aggravated-discharge count against defendant are identical to those in *Williams*, and the only difference is whether the discharge was knowing or reckless. For the same reasons that reckless conduct was a lesser-included offense of aggravated discharge in *Williams*, reckless discharge is a lesser-included offense of that charged crime here.

Id. at *5-6.

Based on this case law and the plain language, Illinois aggravated discharge could also be committed by a hunter attempting to make his kill, despite knowing other hunters are in the direction of his prey, or by someone practicing at a firing range, who knows another individual has unwisely wandered downrange near the target, but continues shooting anyway. All of these scenarios require the intentional use of force, but do not require the intentional targeting of that force against the person of another.

A categorical approach applies in determining whether an offense necessarily involves a “use, attempted use, or threatened use of physical force against the person of another.” *Borden*, 141 S.Ct. at 1822. Under that approach, “If any—even the least culpable—of the acts criminalized do not entail that kind of force, the statute of conviction does not categorically match the federal standard, and so cannot serve as an ACCA predicate.” *Id.* (citation omitted). Under this approach, the holding that Illinois aggravated discharge qualifies as a violent felony under the element’s clause, despite that it may be violated without intending to direct force at or target an individual, conflicts with *Borden*. See *Borden*, 141 S. Ct. at 1838 (Kavanaugh, J. *dissenting*) (Complaining reckless homicide stemming from a defendant “firing gunshots at the neighbor's house to scare him . . . [without having intended] to kill the neighbor or known to a practical certainty that he would do so,” would not be a violent felony under *Borden*’s holding).

B Correcting the Seventh Circuit’s holding is important for Petitioner and other defendants. In *Borden*, this Court recognized that when the Armed Career Criminal Act is applied, “[t]he increase in penalty is severe: A 10-year maximum sentence turns into a 15-year minimum one . . . And because that is so, the scope of the statute is closely confined.” 141 S.Ct. at 1822. In addition, “[t]he 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—the kind of offenders who, when armed, could well ‘use [the] gun deliberately to harm a victim.’” *Id.* at 1825 (citation omitted).

The Seventh Circuit’s opinion in this case allows for this severe penalty increase to be applied based on an offense that does not meet the closely confined criteria established in *Borden*. In addition, the increase was applied based on Petitioner’s prior conviction for Illinois aggravated discharge of a firearm, despite that this offense lacks the requirement that the defendant intended to use force against anyone, and thus does not signal Petitioner is the type of person likely to use a gun to harm a victim—in other words, he is not the type of person the Armed Career Criminal Act is designed to punish.

The Seventh Circuit’s opinion manifestly misunderstands this Court’s holding in *Borden*. Although the Seventh Circuit’s opinion is too recent to have been relied upon by other Circuits, it is certain to result in over-punishing defendants with prior Illinois aggravated discharge convictions in the Seventh Circuit, and risks leading to out-of-circuit courts similarly misconstruing *Borden*. Thus, the error warrants this Court’s attention.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Dated: June 16, 2022

Respectfully submitted,

/s/ David L. Brengle

David L. Brengle

Counsel of Record

Assistant Federal Public Defender

Southern District of Illinois

650 Missouri Ave

E St. Louis, IL 62201

(618) 482-9050

(618) 482-9057 (fax)

David_Brengle@fd.org

Counsel for Petitioner