No. 22-7692

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY ALLEN OAKS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

JENNY C. ELLICKSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly denied petitioner a certificate of appealability on his claim that his conviction for aggravated assault, in violation of Tenn. Code Ann. § 39-2-101(b) (Supp. 1986) (repealed 1989), does not qualify as a violent felony under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

ADDITIONAL RELATED PROCEEDING

Supreme Court of the United States:

Oaks v. United States, No. 06-6993 (Nov. 6, 2006)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the Federal Reporter but is available at 2022 WL 16835642. Additional opinions of the court of appeals are not published in the Federal Reporter but are reprinted at 185 F. Appx. 298 and 246 Fed. Appx. 218. The decision and order of the district court (Pet. App. 4-30) is not published in the Federal Supplement but is available at 2019 WL 4060474.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2022. A petition for rehearing was denied on January 18, 2023 (Pet. App. 38). On April 3, 2023, the Chief Justice extended the

time within which to file a petition for a writ of certiorari to and including June 2, 2023. The petition for a writ of certiorari was filed on May 31, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in 2004 in the United States District Court for the Western District of North Carolina, petitioner was convicted of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1); using and carrying a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c) (2000); and possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g). 04-4113 C.A. App. 308 (C.A. App.); 185 Fed. Appx. 298, 299. The district court sentenced petitioner to 384 months of imprisonment, to be followed by five years of supervised release. C.A. App. 309-310; 185 Fed. Appx. at 299. The court of appeals affirmed petitioner's convictions, vacated his sentence, and remanded, 185 Fed. Appx. at 300, and this Court denied a petition for a writ of certiorari, 549 U.S. 1025. On remand, the district court again sentenced petitioner to 384 months of imprisonment, to be followed by five years of supervised release. Pet. App. 33-34. The court of appeals affirmed. 246 Fed. Appx. 218.

In 2016, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence. D. Ct. Doc. 82 (June 6, 2016). The district

court denied the motion and declined to issue a certificate of appealability. Pet. App. 4-30. The court of appeals likewise denied a certificate of appealability. Id. at 1-3.

1. On June 7, 2002, a law-enforcement officer with the United States Forest Service found petitioner and a companion asleep in a car parked in the Pisgah National Forest. C.A. App. 320, ¶ 7. At the officer's request, petitioner emptied his pockets, which contained .22-caliber and .44-caliber bullets, along with approximately $3000 in cash. Id. at 320, ¶ 8.

Petitioner gave the officer permission to search his car, and the officer found two digital scales and an ammunition can containing a white sock with 23.78 grams of cocaine stuffed inside. C.A. App. 320-321, ¶¶ 9-10, 14.

The officer attempted to handcuff petitioner, but petitioner ran away and continued to flee as the officer shouted for him to stop. C.A. App. 320, ¶ 9. The officer called for backup, and a further search of petitioner's car revealed an additional 1.4 grams of cocaine, two loaded revolvers, and a loaded pistol. Id. at 320-321, ¶¶ 10, 14. All three guns had been stolen. Id. at 321, ¶ 14.

Another officer located petitioner about half a mile from the car, at which point petitioner ran back into the woods, shouting that he had a gun. C.A. App. 321, ¶ 11. Petitioner remained at large for the next five months. Id. at 321, ¶ 13. During that

period, he fled from local law-enforcement officers several times. Ibid.

2. In October 2002, a grand jury in the Western District of North Carolina returned an indictment charging petitioner with possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1); using and carrying a firearm during and in relation to that drug-trafficking crime, in violation of 18 U.S.C. 924(c) (2000); and possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g). C.A. App. 10-11. A jury found him guilty on all three counts. 185 Fed. Appx. at 299; C.A. App. 308.

At the time of petitioner's federal crimes, the default term of imprisonment for a Section 922(g) offense was zero to ten years. 18 U.S.C. 924(a)(2) (2000).[1] The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), increased that penalty to a term of 15 years to life for defendants with at least three prior convictions for a "serious drug offense" or a "violent felony." The ACCA defines a "violent felony" to include a crime punishable by more than one year of imprisonment that satisfies one of three alternative definitions: it "has as an element the use, attempted use, or threatened use of physical force against the person of

[1] For Section 922(g) offenses committed after June 25, 2022, the default term of imprisonment is zero to 15 years. See Bipartisan Safer Communities Act, Pub. L. No. 117-159, Div. A, Tit. II, § 12004(c)(2), 136 Stat. 1329 (18 U.S.C. 924(a)(8) (Supp. IV 2022)).

another" (known as the "elements clause"); it "is burglary, arson, or extortion, [or] involves use of explosives" (known as the "enumerated offenses clause"); or it "otherwise involves conduct that presents a serious potential risk of physical injury to another" (known as the "residual clause"). 18 U.S.C. 924(e)(2)(B).

The Probation Office determined that petitioner qualified for sentencing under the ACCA based on his convictions for three prior state offenses, including a conviction for aggravated assault in violation of Tenn. Code Ann. § 39-2-101(b)(1) (Supp. 1986) (repealed 1989), C.A. App. 323, ¶ 36, and the district court imposed an ACCA sentence of 300 months of imprisonment on the Section 922(g) count, Pet. App. 7; C.A. App. 309. The court also sentenced petitioner to a concurrent 240-month term of imprisonment on the drug-trafficking count and to a consecutive 84-month term of imprisonment on the Section 924(c) count, for a total sentence of 384 months of imprisonment, to be followed by a five-year term of supervised release. Pet. App. 7; C.A. App. 309-310.

The court of appeals affirmed petitioner's convictions on direct appeal, but vacated his sentence on the ground that the district court had imposed a brandishing enhancement on the Section 924(c) count without making the necessary factual findings. 185 Fed. Appx. at 300. This Court denied a petition for a writ of certiorari. 549 U.S. 1025. On remand, the district court

reimposed the same sentence, Pet. App. 33-34, and the court of appeals affirmed, 246 Fed. Appx. 218.

3. In 2016, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence, contending that he should not have received an ACCA sentence in light of this Court's intervening decision in Johnson v. United States, 576 U.S. 591 (2015), Pet. App. 8; D. Ct. Doc. 82, at 1-17, which held that the ACCA's residual clause is unconstitutionally vague.

The district court denied the motion, finding (inter alia) that his aggravated-assault conviction qualifies as an ACCA predicate. Pet. App. 4-30. The court observed that his Tennessee statute of conviction required proof that the defendant "[a]ttempt[ed] to cause or cause[d] serious bodily injury to another willfully, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." Id. at 21 (quoting Tenn. Code Ann. § 39-2-101(b)(1) (Supp. 1986) (repealed 1989)); see id. at 22-24. The court viewed a mens rea of recklessness as sufficient to qualify as a violent felony under the ACCA's elements clause, id. at 25-27, but further determined that even if "an offense committed with a mens rea of mere recklessness could not constitute a violent felony," petitioner's Tennessee aggravated-assault offense "would still constitute a predicate offense" because that offense require[d] at least "[a] recklessness 'manifesting extreme indifference to the value of

human life,'" which "is akin more to the concept of actual malice than mere recklessness." Id. at 28-29 (citation omitted).

The district court declined to issue a certificate of appealability. Pet. App. 29-30.

4. The court of appeals likewise denied a certificate of appealability and dismissed petitioner's appeal. Pet. App. 1-3. In a nonprecedential per curiam order, the court found that petitioner's Tennessee aggravated-assault crime could "at minimum * * * be committed with a mens rea of extreme recklessness" and therefore "satisfies the mens rea of a 'violent felony' under 18 U.S.C. § 924(e)." Id. at 2. The court cited its prior decision in United States v. Manley, 52 F.4th 143, 150-151 (4th Cir. 2022), cert. denied, 143 S. Ct. 2436 (2023), which had found that the Virginia offense of murder in aid of racketeering constitutes a "crime of violence" under Section 924(c) because -- while this Court's decision in Borden v. United States, 141 S. Ct. 1817 (2021) (plurality opinion), held that an offense with the mens rea of ordinary recklessness cannot qualify as a "violent felony" under Section 924(e) -- the Virginia offense required a higher showing of "extreme recklessness." 52 F.4th at 150-151.

ARGUMENT

Petitioner contends (Pet. 12-24) that the court of appeals erred in finding that his prior conviction for aggravated assault, in violation of Tenn. Code Ann. § 39-2-101(b) (Supp. 1986)

(repealed 1989), qualifies as a "violent felony" conviction under the ACCA. The court of appeals appropriately denied a certificate of appealability on that issue, and its nonprecedential per curiam order does not conflict with this Court's decision in Borden v. United States, 141 S. Ct. 1817 (2021) (plurality opinion), or the decision of any other court of appeals. No further review is warranted.

1. A federal prisoner seeking to appeal the denial of a motion for postconviction relief under Section 2255 must obtain a certificate of appealability. 28 U.S.C. 2253(c)(1)(B). To obtain a certificate, the prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) -- that is, a "showing that reasonable jurists could debate whether" a constitutional claim "should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)); see Miller-El v. Cockrell, 537 U.S. 322, 3336 (2003) (same).

The court of appeals correctly determined that petitioner was not entitled to a certificate of appealability on his claim that his prior Tennessee aggravated-assault conviction does not qualify as a "violent felony" under the ACCA elements clause. In seeking a certificate of appealability, petitioner asserted that his

aggravated-assault offense could not qualify because it could be committed with a mens rea of "extreme recklessness," rather than purpose or knowledge. Pet. C.A. Br. 20. But that contention could not support the issuance of a certificate of appealability because the court of appeals had already rejected the contention that an offense with the mens rea of "extreme recklessness" cannot qualify as a "crime of violence" under Section 924(c) or a "violent felony" under Section 924(e). Pet. App. 2 (citing United States v. Manley, 52 F.4th 143, 150-151 (4th Cir. 2022), cert. denied, 143 S. Ct. 236 (2023)). And every other court of appeals to consider the issue has reached the same result. See Janis v. United States, 73 F.4th 628, 634 (8th Cir. 2023); United States v. Kepler, 74 F.4th 1292, 1303-1305 (10th Cir. 2023); United States v. Harrison, 54 F.4th 884, 890 (6th Cir. 2022); United States v. Begay, 33 F.4th 1081, 1093 (9th Cir.) (en banc), cert. denied, 143 S. Ct. 340 (2022); Alvarado-Linares v. United States, 44 F.4th 1334, 1344 (11th Cir. 2022); United States v. Griffin, 946 F.3d 759, 761-762 (5th Cir.) (per curiam), cert. denied, 141 S. Ct. 306 (2020); United States v. Báez-Martínez, 950 F.3d 119, 125-127 (1st Cir. 2020), cert. denied, 141 S. Ct. 2805 (2021).

2. Petitioner nonetheless contends (Pet. 19-24) that the court of appeals erred because its decision conflicts with Borden, which held that an offense is not a "violent felony" under the ACCA's elements clause if it can be committed with a mens rea of

ordinary recklessness, see 141 S. Ct. at 1825 (plurality opinion). That contention is incorrect. As petitioner acknowledges (Pet. 5), Borden expressly left open the question of whether an offense may qualify as a "violent felony" under the elements clause where it can be committed with a mens rea "between recklessness and knowledge," "often called 'depraved heart' or 'extreme recklessness.'" 141 S. Ct. at 1825 (n.4) (plurality opinion). And, as the consensus in the courts of appeals recognizes, conduct committed with the mens rea of "extreme recklessness" can qualify as a "violent felony" under the ACCA elements clause.

In Borden, this Court considered a different Tennessee aggravated-assault offense -- reckless aggravated assault, in violation of Tenn. Code Ann. § 39-13-102(a)(2) (2003) -- and determined that when an offense involves a reckless use of force, it does not satisfy the elements clause because that clause requires the force to be used "'against another.'" 141 S. Ct. at 1825 (plurality opinion); id. at 1835 (Thomas, J., concurring in the judgment). The plurality explained that to use force "against another," the perpetrator must "direct his action at, or target, another individual." Id. at 1825. And the Court determined that a perpetrator's conduct is not "opposed or directed at another" when he acts with a mens rea of ordinary recklessness, id. at 1827, because recklessness may involve a person's "simple 'failure to perceive' the possible consequences of his behavior." Id. at 1824

(quoting Model Penal Code § 2.02(2)(d) (1985)). The perpetrator's "fault" may therefore simply be "pay[ing] insufficient attention to the potential application of force," rather than "consciously deploy[ing]" force against another in the way the ACCA elements clause requires. Id. at 1827.

Unlike ordinary reckless conduct, however, conduct committed with the "heightened" mens rea of extreme recklessness necessarily involves the sort of "conscious[] deploy[ment]" of force against another that the ACCA's elements clause contemplates. When a defendant acts with extreme indifference, he acts recklessly in "'circumstances manifesting * * * indifference to the value of human life.'" Báez-Martínez, 950 F.3d at 126 (quoting Model Penal Code § 2.02(2)(c) (1985); Model Penal Code § 210.2(1)(b) (1980)). And when a defendant acts with "'extreme indifference to the value of human life,'" rather than with ordinary recklessness, he "must be aware that there are potential victims" of his conduct, and "there is a much higher probability -- a practical certainty -- that injury to another will result." Id. at 127.

For example, a defendant acts with extreme recklessness if he "'shoot[s] a gun into a room that [he] knows to be occupied,'" because in those circumstances, "he acted not only recklessly, but with reckless indifference to human life." Báez-Martínez, 950 F.3d at 126. In contrast, a defendant acts only with ordinary recklessness if he "recklessly shoots a gun in the woods while

hunting," because "the probability that death w[ill] result was much lower." Ibid. Extreme recklessness, unlike ordinary recklessness, therefore "requires a quantum of risk that is very high and also requires that the nature of the risk concern injury to others." Begay, 33 F.4th at 1081.

Extreme recklessness requires a "higher degree of intent," Borden, 141 S. Ct. at 1827 (plurality opinion) (citation omitted), and culpability than mere negligence or recklessness. In Borden, the plurality observed that the "context and purpose" of the ACCA's elements clause reinforce the conclusion that conduct that is merely reckless does not qualify because the "kinds of crimes" that may be committed with a mens rea of ordinary recklessness are "the too-common stuff of ordinary offenders," rather than the more culpable conduct of the violent felons that Congress intended the ACCA to cover. Id. at 1830-1831. The same cannot be said of crimes committed with the mens rea of extreme recklessness, because "reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.'" Tison v. Arizona, 481 U.S. 137, 157 (1987) (holding that "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state"). Extreme recklessness is therefore "closer in culpability to 'knowledge'" -- a mens rea that Borden

recognized was covered by the elements clause -- "than it is to 'recklessness.'" Manley, 52 F.4th at 150.

In an effort to demonstrate that the court of appeals' decision conflicts with Borden, petitioner cites (Pet. 8-9) several Tennessee cases involving drunk drivers convicted under Tenn. Code Ann. § 39-2-101(b) (Supp. 1986) (repealed 1989). To the extent that petitioner claims those Tennessee decisions demonstrate that the now-repealed Tennessee statute under which he was convicted reaches "ordinary reckless and drunk driving" (Pet. 15), that statute-specific claim does not warrant this Court's review. In any event, the facts of those cases show otherwise. In State v. Braden, 867 S.W.2d 750 (Tenn. Crim. App. 1993), for example, the defendant was drinking his fourth beer of the evening while driving 90 to 110 miles per hour and racing with a friend; he swerved into the left lane to pass his friend's car in a "blind curve," "aware that there were businesses at the end of the curve"; and he lost control of his car, killing two children in another car. Id. at 753-756. And in the other three cases petitioner cites that address the relevant Tennessee aggravated-assault statute, the defendant was driving drunk, crossed into oncoming traffic, and crashed into another car.[2] The decisions on which

[2] See State v. Bullington, 702 S.W.2d 580, 581-582 (Tenn. Crim. App. 1985) (defendant with 0.24 blood-alcohol level maneuvered across a highway median and had multiple cars swerve out of his way before the defendant's head-on collision); State v. Cravens, No. 86-33, 1986 WL 12478, at *1 (Tenn. Crim. App. Nov. 7,

petitioner relies indicate that only such extreme cases were prosecuted under the heightened mens rea requirement of the statute at issue here, rather than the simple recklessness standard of the statute at issue in Borden.

To the extent that petitioner contends (Pet. 23-24) that the elements clause categorically excludes any offense that a defendant can commit with conduct that involves "drunk or reckless driving," no matter the degree of recklessness, that contention lacks merit. The Borden plurality declined to construe the elements clause definition to cover a reckless "commuter who, late to work, decides to run a red light, and hits a pedestrian whom he did not see," because that conduct "is not opposed to or directed at another." 141 S. Ct. at 1827. But the plurality recognized that the elements clause covers both a person who "drives his car straight at a reviled neighbor, desiring to hit him," and a getaway driver who "sees a pedestrian in his path but plows ahead anyway, knowing the car will run him over." 141 S. Ct. at 1826-1827.

1986) (defendant with 0.15 blood-alcohol level crossed into oncoming traffic on a highway); State v. Primeaux, No. 4, 1988 WL 3912, at *1 (Tenn. Crim. App., Feb. 24, 1988) (defendant with 0.183 blood-alcohol level drove onto the shoulder and then veered across the road into oncoming traffic at a speed of 70 miles per hour). Petitioner mistakenly classifies (Pet. 9) State v. Martin, No. 01-C-01-9609-CC-393, 1998 WL 74351 (Tenn. Crim. App. Feb. 23, 1998), as involving a prosecution under Section 39-2-101(b)(1). That case in fact involved a different Tennessee aggravated-assault offense, aggravated assault as a result of the operation of a motor vehicle, in violation Section 39-13-101(a)(1) and (2). 1998 WL 74351, at *4.

When a driver consumes alcohol and drives "recklessly under circumstances manifesting extreme indifference to the value of human life," Pet. App. 21 (quoting Tenn. Code Ann. § 39-2-101(b)(1) (Supp. 1986) (repealed 1989)), his conduct is far more similar to that of the getaway driver whose knowing conduct is covered by the elements clause, than the commuter whose reckless conduct is not covered because a defendant "certainly must be aware that there are potential victims before he can act with indifference toward them." Begay, 33 F.4th at 1095 (quoting Báez-Martínez, 950 F.3d at 127).

3. Petitioner errs in asserting (Pet. 12-15) that the courts of appeals disagree about whether the elements clause of the ACCA covers offenses with a minimum mental state of extreme recklessness.

As petitioner acknowledges (Pet. 12), the decision below accords with decisions from the Fifth and Sixth Circuits. See Griffin, 946 F.3d at 761-762 (5th Cir.) (finding that Mississippi aggravated assault satisfies the elements clause because "[t]he offense conduct must be committed 'purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life'") (quoting Miss. Code Ann. § 97-3-7(2)(a) (1997)); Harrison, 54 F.4th at 890 (6th Cir.) (finding that complicity to commit murder, in violation of Ky. Rev. Stat § 507.020, categorically requires the "use of physical force"

within the meaning of 18 U.S.C. 3559(c)(2)(F)(ii) because "at the very least it requires wantonness under 'circumstances manifesting * * * indifference to human life'") (quoting Ky. Rev. Stat. § 507.020). And since the filing of the petition in this case, the Eighth and Tenth Circuits have also issued opinions that align with the decision below.[3] See Janis, 73 F.4th at 634 (8th Cir.) ("Because the risk from extreme-reckless conduct is so high, the harmful result nears 'practical certainty' that force will be applied to another person.") (citation omitted); Kepler, 74 F.4th at 1303-1305 (10th Cir.) (holding that "[d]epraved heart recklessness" requires the use of physical force against the person of another).

Petitioner also recognizes (Pet. 13-14) that the First, Ninth, and Eleventh Circuits have construed the elements clause in the ACCA or the similarly worded "crime of violence" definition in 18 U.S.C. 924(c)(3) to cover murder offenses that can be committed with extreme recklessness. See Báez-Martínez, 950 F.3d at 127 (1st Cir.); Begay, 33 F.4th at 1095 (9th Cir.); Alvarado-Linares,

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[3] The Eighth Circuit recently concluded in United States v. Lung'aho, 72 F.4th 845 (2023), that the elements clause does not cover an arson offense that can be committed "maliciously," i.e., with at least "a 'willful disregard of [a] likelihood' of harm." Id. at 848-850 (citation omitted; brackets in original). As the Eighth Circuit subsequently observed in Janis v. United States, that mental state requires less "'risk and culpability'" than extreme recklessness, 73 F.4th 628 at 632, and Lung'aho thus does not undermine Janis's recognition that a mens rea of extreme recklessness is sufficient under the ACCA's elements clause, see 73 F.4th at 634.

44 F.4th at 1344 (11th Cir.). And petitioner is mistaken in his assertion (Pet. 13-14) that those circuits have limited their decisions in a way that establishes that non-murder offenses committed with the mens rea of extreme recklessness are not covered by the ACCA elements clause. None of those circuits has expressly considered whether extreme recklessness offenses other than murder are also covered, and the reasoning of their decisions suggests that they would be. See Báez-Martínez, 950 F.3d at 127 (1st Cir.) (reasoning that a defendant who uses force with "'extreme indifference to the value of human life'" can "fairly be said to have actively employed force (i.e., 'use[d]' force) 'against the person of another'") (citation omitted); Begay, 33 F.4th at 1095 (9th Cir.) (same); Alvarado-Linares, 44 F.4th at 1344 (11th Cir.) (reaffirming pre-Borden determination that the application of physical force "with 'malice aforethought'" necessarily "entails the use of physical force against the person of another, satisfying Section 924(c)'s element's clause") (citation omitted).

Petitioner has therefore failed to identify any case in which a court of appeals has rejected the contention that the elements clause covers offenses committed with extreme recklessness. Furthermore, when the First and Ninth Circuits determined that murder offenses with a mental state of extreme recklessness are covered, both circuits specifically recognized that those murder offenses could be committed by extremely reckless drunk drivers.

See Báez-Martínez, 950 F.3d at 126; Begay, 33 F.4th at 1106. And the Eleventh Circuit did not hold otherwise. Accordingly, petitioner has not shown that any circuit would necessarily disagree with the decision below, particularly given that it is in the posture of a denial of a certificate of appealability. See pp. 8-9, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

JENNY C. ELLICKSON
Attorney

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