

CASE NO. \_\_\_\_\_  
SUPREME COURT OF THE UNITED STATES  
October 2022 Term

---

---

DARREN MCDONALD, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Respondent. )

---

---

APPLICATION DIRECTED TO JUSTICE KAVANAUGH FOR ADDITIONAL TIME TO  
FILE PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF  
APPEALS

Submitted on Behalf of Petitioner

Submitted By:

Scott J. Krischke  
Assistant Federal Public Defender  
1010 Market, Suite 200  
St. Louis, MO. 63101  
(314) 241-1255

ATTORNEY FOR PETITIONER

To Justice Brett M. Kavanaugh:

Petitioner Darren McDonald, through his attorney of record, Assistant Federal Public Defender Scott James Krischke, requests an additional 60 days in which to file a petition in this Court seeking certiorari to the Eighth Circuit Court of Appeals, up through September 8, 2023. Petitioner requests this extension under Supreme Court Rule 13.5.

### **JURISDICTION**

Petitioner requests an extension to file a petition for writ of certiorari. Petitioner is preparing to request this Court's review of the judgment issued by the Eighth Circuit Court of Appeals on February 13, 2023, affirming the imposition of a 43-month prison term for unlawful drug possession. The advisory United States Sentencing Guidelines range was inflated based on the District Court's finding that a prior Missouri conviction for exhibiting a firearm in an angry manner constituted a "crime of violence" having as an element the use of force against the person of another as defined in U.S.S.G. § 4B1.2(a)(1). Petitioner preserved an argument that this Court's decision in *Borden v. United States*, 141 S. Ct.1817 (2021), abrogated Eighth Circuit precedent controlling 2009 precedent declaring that, "[i]t goes without saying" that a Missouri offense of exhibiting a firearm in the presence of another in a way that could be objectively viewed to be angry or threatening satisfied the "element of force" clause in Section 924(e)(2)(B)(i).

The Court of Appeals denied Mr. McDonald's timely motion for rehearing on April 11, 2023. Appendix at 4. The deadline for filing a petition for a writ of certiorari in this case is July 10, 2023. Petitioner files this request for additional time at least 10 days before the date the petition is currently due, in compliance with Supreme Court Rule 13.5.

## REASONS FOR APPLICATION FOR EXTENSION

1. Petitioner believes that this case raises a recurrent issue of exceptional importance concerning the construction and application of the “crime of violence” definition which is interpreted identically to the “use of force” clause in the Armed Career Criminal Act, 18 U.S.C. §924(e)(2)(B)(i) that this Court interpreted in *Borden v. United States*, 141 S. Ct. 1817 (2021) to exclude crimes that do not require as an element the use of force targeted to injure other persons. The Eighth Circuit has interpreted *Borden* to invalidate only crimes defined by a *mens rea* of recklessness, Appendix at 2-3. The question has generated conflicting rulings in lower courts, and incongruous results as applied to statutes even within the Eighth Circuit which are not defined to encompass “reckless conduct.”

2. Petitioner’s counsel is an assistant public defender in the Eastern District of Missouri carrying a full load of appointed cases requiring consultation with clients in detention facilities in remote parts of Missouri and other states. Counsel makes this request with no dilatory purpose. Counsel seeks only to ensure proper presentation of the important questions raised in petitioner’s case while also providing effective representation in all cases to which counsel is assigned.

WHEREFORE, petitioner requests leave to file his Petition for Writ of Certiorari, up through and including September 8, 2023.

Respectfully submitted,



SCOTT JAMES KRISCHKE  
Assistant Federal Public Defender  
1010 Market Street, Suite 200  
St. Louis, Missouri 63101  
Telephone: (314) 241-1255  
Fax: (314) 421-3177  
E-mail: [Scott\\_Krischke@fd.org](mailto:Scott_Krischke@fd.org)

ATTORNEY FOR PETITIONER

CASE NO. \_\_\_\_\_  
SUPREME COURT OF THE UNITED STATES  
October 2022 Term

---

---

DARREN MCDONALD, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Respondent. )

---

Appendix to Petitioner’s Motion for More Time to File Petition for a Writ of Certiorari

Contents

1. *United States v. Darren McDonald*, No. 22-1417 (8th Cir., Feb. 16, 2023) . . . . . 1 – 3
  
2. *United States v. Darren McDonald*, No. 22-1417,  
Order denying rehearing (8th Cir., April 11, 2023) . . . . . 4

**United States Court of Appeals**  
**For the Eighth Circuit**

---

No. 22-1417

---

United States of America

*Plaintiff - Appellee*

v.

Darren M. McDonald

*Defendant - Appellant*

---

Appeal from United States District Court  
for the Eastern District of Missouri

---

Submitted: November 14, 2022

Filed: February 16, 2023

[Unpublished]

---

Before COLLOTON, SHEPHERD, and GRASZ, Circuit Judges.

---

PER CURIAM.

Darren M. McDonald pled guilty to unlawfully possessing methamphetamine and fentanyl with the intent to distribute, 21 U.S.C. § 841(a), and unlawfully

possessing a firearm as a convicted felon, 18 U.S.C. § 922(g)(1). The district court<sup>1</sup> sentenced McDonald to 43 months of imprisonment.

McDonald appeals, arguing the district court miscalculated the United States Sentencing Guidelines (“Guidelines”) range from which it based its sentence. McDonald specifically contends the district court wrongly determined his base offense level by concluding his past conviction under Missouri Revised Statute § 571.030.1(4) was a “crime of violence” for purposes of the Guidelines.

Section 571.030.1(4) makes it a crime to “knowingly . . . [e]xhibit[], in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner . . . .” McDonald maintains that because a person could be convicted for violating this Missouri statute without intending to injure or threaten another person, it does not have “as an element the use, attempted use, or threatened use of physical force” as necessary to be considered a crime of violence as defined by U.S.S.G. § 4B1.2(a)(1). Our precedent has long held otherwise. *See United States v. Pulliam*, 566 F.3d 784, 787–88 (8th Cir. 2009) (holding Mo. Rev. Stat. § 571.030.1(4) is a “violent felony” for purposes of the Armed Career Criminal Act); *United States v. Hudson*, 851 F.3d 807, 808–10 (8th Cir. 2017) (holding the same Missouri offense is a “crime of violence” as defined by § 4B1.2 of the Guidelines).

In *Pulliam*, we explained “displaying an operational weapon before another in an angry or threatening manner qualifies as threatened use of physical force against another person.” 566 F.3d at 788. Under this same rationale, we later held a conviction under this Missouri statute qualified as a crime of violence for purposes of the Guidelines. *See Hudson*, 851 F.3d at 808–10. McDonald argues *Pulliam* and *Hudson* no longer control in light of the Supreme Court’s plurality opinion in *Borden v. United States*, 141 S. Ct. 1817, 1833 (2021) (plurality opinion). According to McDonald, *Borden* established that the “use of force” definition excludes state

---

<sup>1</sup>The Honorable Rodney W. Sippel, then Chief Judge, now United States District Judge for the Eastern District of Missouri.

crimes defined by the creation of risks of injury not requiring an intentional design to cause harm to another person. We previously rejected a similar characterization of the case, explaining that “[w]hen the plurality and concurring opinions are read together, . . . *Borden* holds only that the force clause categorically excludes offenses that can be committed recklessly.” *United States v. Larry*, 51 F.4th 290, 292 (8th Cir. 2022). Because Mo. Rev. Stat. § 571.030.1(4) “plainly requires that the crime be committed with knowledge[,] . . . *Borden*’s holding . . . does not affect our circuit precedent[.]” *Id.* We are bound to follow this precedent and thus affirm the judgment of the district court. *See id.*

---

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No: 22-1417

United States of America

Appellee

v.

Darren M. McDonald

Appellant

---

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis  
(4:20-cr-00527-RWS-1)

---

**ORDER**

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

Judge Gruender did not participate in the consideration or decision of this matter.

April 11, 2023

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

---

/s/ Michael E. Gans