

No. 24A184

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD ALLEN HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**APPLICATION FOR A FURTHER EXTENSION OF TIME TO FILE A
PETITION FOR A WRIT OF CERTIORARI FROM A JUDGMENT OF THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

**TO THE HON. CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE
UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

Pursuant to Rules 13.5, 22, and 30 of this Court, Petitioner Richard Allen Harris respectfully requests a further 30-day extension of time, up to and including November 15, 2024, within which to file a petition for a writ of certiorari from the judgment of the U.S. Court of Appeals for the Eleventh Circuit. Unless an extension is granted, the deadline for filing the petition for certiorari will remain October 16, 2024. Petitioner is filing this Application at least ten days before the current deadline. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1).

1. Petitioner pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Over his objection, the district court determined

that he was subject to the Armed Career Criminal Act (ACCA), and the district court imposed ACCA’s 15-year mandatory minimum sentence. Petitioner was subject to ACCA based in part on two prior Florida convictions for aggravated assault. Both in the district court and on appeal, Petitioner argued that these convictions did not qualify as ACCA “violent felonies” under this Court’s decision in *Borden v. United States*, 593 U.S. 420 (2021), because they could have been committed with a reckless *mens rea*. The Eleventh Circuit rejected that argument as foreclosed by precedent. App. 4 (citing *Somers v. United States*, 66 F.4th 890 (11th Cir. 2023)).

In *Somers*, the Eleventh Circuit had certified to the Florida Supreme Court questions of state law about the *mens rea* required for Florida assault, a question that had divided the intermediate state appellate courts. *Somers v. United States*, 15 F.4th 1049, 1054–56 (11th Cir. 2021). After the Florida Supreme Court clarified that assault could not be committed recklessly, the Eleventh Circuit held that Florida aggravated assault was a “violent felony.” *Somers*, 66 F.4th at 895–96. In so holding, the Eleventh Circuit declined to look to the state of Florida law from the time of the prior conviction, because “[w]hen the Florida Supreme Court interprets a statute, it tells us what that statute always meant.” *Id.* at 896 (quotation and brackets omitted) (citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994)).

2. No other circuit has adopted the same methodological approach as the Eleventh Circuit. Meanwhile, several other circuits have taken a contrary approach.

a. In *United States v. Faust*, 853 F.3d 39 (1st Cir. 2017), the First Circuit vacated and remanded an ACCA sentence that was predicated in part on a prior

Massachusetts conviction for assault and battery on a police officer. *See id.* at 55–60. In determining whether that offense was indivisible and, in turn, overbroad vis-à-vis the elements clause, the First Circuit declined to rely on a judicial decision post-dating the defendant’s prior conviction or to predict how the state supreme court might resolve the issue. *Id.* at 57–58. Relying heavily on *McNeill v. United States*, 563 U.S. 816 (2011), the First Circuit instead asked “what the law was at the time of his [prior] conviction.” *Id.* at 57 (explaining that this Court in “*McNeill* pointed to its previous ACCA cases, which looked to the versions of state law that were current at the time of the defendant’s convictions, not at the time of the Court’s decision”).

b. In *United States v. Cornette*, 932 F.3d 204 (4th Cir. 2019), the Fourth Circuit adopted the same approach. Citing *McNeill*, the Fourth Circuit asked “whether, at the time of Cornette’s conviction in 1976,” the Georgia burglary statute was overbroad. *Id.* at 213. Holding that it was, the Fourth Circuit found dispositive an intermediate appellate court decision preceding the defendant’s conviction that adopted an overbroad definition of burglary. *Id.* at 214 (“Thus, when Cornette was convicted, Georgia’s definition of burglary criminalized a broader range of conduct than the generic definition of burglary we use for ACCA purposes.”). The Fourth Circuit refused to consider a state supreme court decision to the contrary because it “was not decided until 1977, whereas Cornette was convicted in 1976.” *Id.* “That being so,” the court explained, the intermediate appellate court decision was “the binding interpretation of Georgia law at the time of Cornette’s conviction.” *Id.* In reaching this conclusion, the Fourth Circuit observed that its backward-looking approach

“comports with other circuits that have considered the question,” citing the First Circuit’s decision in *Faust* and the Eighth Circuit decision discussed below. *Id.* at 215.

c. The Fifth and Eighth Circuits have also employed the same backwards-looking approach. The Fifth Circuit’s decision was vacated by this Court on other grounds. *See United States v. Vickers*, 967 F.3d 480, 486–87 (5th Cir. 2020), *cert. granted, judgment vacated, and remanded*, 141 S. Ct. 2783 (2021). And the Eighth Circuit’s decision arose in the context of the Sentencing Guidelines rather than ACCA. *See United States v. Roblero-Ramirez*, 716 F.3d 1122, 1126–27 (8th Cir. 2013).

d. Most importantly for purposes of this Application, however, is the Seventh Circuit’s recent decision in *United States v. Anderson*, 99 F.4th 1106 (7th Cir. 2024). Applying plain-error review, and addressing Florida aggravated assault in particular, the Seventh Circuit expressly disagreed with the Eleventh Circuit’s reasoning in *Somers* that “the Florida Supreme Court’s decision in *Somers* ‘tells us what the statute always meant.’” *Id.* at 1112. That was so, the Seventh Circuit explained, because “the Eleventh Circuit did not address Florida’s approach to statutory interpretation.” *Id.* at 1112. And, under that state-law approach, the Florida Supreme Court’s decision in *Somers* did “not announce a retroactive change in the law.” *Id.* at 1111. As a result, the Seventh Circuit looked to the earlier Florida intermediate appellate court decisions holding that Florida assault could be committed recklessly. *Id.* 1111–12. And it concluded that Florida aggravated assault did not qualify as a “violent felony” under ACCA. *Id.* at 1112–13. This decision thus creates a direct conflict of authority with the Eleventh Circuit’s decision in *Somers*.

3. Petitioner respectfully seeks a further 30-day extension for two reasons.

a. First, the Seventh Circuit’s decision in *Anderson* is not yet final. That decision was issued on April 30, 2024. On May 28, 2024, the government petitioned for panel rehearing, arguing that the panel had misapplied the plain-error standard of review. In doing so, the government acknowledged that the panel had created a circuit split with the Eleventh Circuit. *See Anderson*, ECF No. 53 at 1 (7th Cir. No. 21-1325) (May 28, 2024) (panel opinion “stakes out an apparent circuit conflict”); *id.* at 9 (noting the “majority’s decision to split with a sister circuit”); *id.* at 11–12 (noting the “disagreement among the circuits”) (quotation omitted). Pursuant to the panel’s request, the defendant responded to the government’s petition on June 12, 2024. At this time, the panel has not ruled on the government’s petition for panel rehearing.

Because the Seventh Circuit’s decision in *Anderson* creates a direct conflict with the Eleventh Circuit’s decision in *Somers* (the precedent applied below), this Court would be highly likely to grant certiorari if the Seventh Circuit denies the government’s rehearing petition or otherwise reinstates its bottom-line conclusion. The government’s petition has now been pending for nearly four months. Thus, a ruling on the petition could be imminent. As a result, Petitioner requests a final 30-day extension to see if the Seventh Circuit resolves the government’s petition.

b. Second, undersigned counsel seeks additional time due to the press of other business, including motions for sentence reductions in the district court and various briefs in the Eleventh Circuit (*e.g.*, *United States v. Schmitz*, No. 24-11157; *United States v. Schreck*, No. 24-11951; *United States v. Brian Bocage*, No. 24-12275,

and *United States v. Fabiano Santos-Segatto* No. 24-12456). Counsel thus believes that additional time is important to ensure the effective representation of Petitioner. No party will be prejudiced by the granting of a further 30-day extension of time.

* * *

Accordingly, Petitioner respectfully requests that an order be entered further extending his time to file a petition for a writ of certiorari by 30 days—extending the current deadline from October 16, 2024, to November 15, 2024.

Respectfully submitted,

HECTOR A. DOPICO
Federal Public Defender

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