

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

WALLACE THORNTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF
THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT
JUSTICE FOR THE ELEVENTH CIRCUIT

Pursuant to Supreme Court Rules 13.5, 22, and 30.3, Wallace Thornton respectfully requests a 30-day extension of time, to and including January 17, 2019, within which to file a petition for a writ of certiorari from the judgment of the

United States Court of Appeals for the Eleventh Circuit. Mr. Thornton has not previously sought an extension of time from this Court.

Mr. Thornton is filing this Application at least ten days before the filing date, which is December 18, 2018. *See S. Ct. R. 13.5.* The jurisdiction of this Court will be invoked under 28 U.S.C. §1254(1).

Mr. Thornton was charged in 2007 with possession of a gun by a convicted felon, in violation of 18 U.S.C. §§922(g)(1) and 924(e). The three predicate felonies were a sale of cocaine and two aggravated battery convictions. Mr. Thornton subsequently pled guilty and received an armed career criminal sentence of 204 months. He did not appeal his sentence.

On June 7, 2016, Mr. Thornton filed a motion to vacate his sentence under 28 U.S.C. §2255 based on *Samuel Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015). In that motion, he argued that aggravated battery was not a violent felony because it could be committed by a non-consensual and non-violent “touching,” which did not involve the use, attempted use, or threatened use of physical force against the person of another, as defined by *Curtis Johnson v. United States*, 559 U.S. 133 (2010). He also argued that aggravated battery with a deadly weapon was not a violent felony either because there was no requirement in the Florida statute that the weapon ever touch the victim.

He conceded that *Turner v. Warden Coleman FCI*, 709 F.3d 1328 (11th Cir. 2013), held that an aggravated battery conviction qualified as an ACCA predicate, but argued in that case, the Eleventh Circuit did not conduct the type of strict

element-by-element comparison and overbreadth analysis required by this Court’s decisions since *Turner*, such as *Descamps v. United States*, 570 U.S. 254 (2013) and *Moncrieffe v. Holder*, 569 U.S. 184 (2013).

The magistrate judge entered a Report and Recommendation, recommending that Mr. Thornton’s §2255 motion be denied, based on the Eleventh Circuit’s *Turner* decision. The district judge entered an Order adopting the Report and Recommendation and denying Mr. Thornton’s motion to vacate. A certificate of appealability was issued as to the following question: “Whether movant’s conviction for aggravated battery, pursuant to Fla. Stat. §784.045(1)(a), is a violent felony under the Armed Career Criminal Act?”

Mr. Thornton appealed the denial of his motion to vacate. On September 19, 2018, the Eleventh Circuit Court of Appeals affirmed the denial of the §2255 motion, finding that Mr. Thornton’s argument was “foreclosed by our binding precedent,” citing *Turner*, 709 F.3d at 1341. A copy of the opinion is attached as Exhibit A hereto.

Mr. Thornton intends to file a petition for writ of certiorari to this Court, arguing that the indivisibility of the “touch or strike” language in the Florida aggravated battery statute requires that all aggravated battery must be assumed to have been committed by a non-violent touching. In addition, he will argue, based on circuit splits, that the use of a deadly weapon and the causation of harm elements in the statute do not necessitate the use of violent force.

However, undersigned counsel will not have sufficient time to prepare a petition for writ of certiorari on those issues by December 18, 2018 because she was out of the office from November 16, 2018 until November 29, 2018, and will be again, from December 3, 2018 until December 10, 2018. Counsel filed a Reply Brief in *United States v. Jon Kyle French*, Case No. 18-11312-CC, on November 14, 2018, and is currently working on the Initial Brief in *United States v. Daria Ershova*, Case No. 18-12338-DD, which is due on January 7, 2019.

There will be no prejudice to any party from the grant of a 30-day extension.

Since the time within which to file a petition for writ of certiorari in this case will expire on December 18, 2018, unless extended, Mr. Thornton requests that an order be entered, extending his time to file a petition for writ of certiorari by 30 days, to and including January 17, 2019.

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