

No. ____ - ____

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN BATTLE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**APPLICATION FOR EXTENSION OF TIME IN WHICH TO
FILE PETITION FOR WRIT OF CERTIORARI**

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and
Circuit Justice for the Fourth Circuit:

Petitioner, by his attorney, respectfully makes an application pursuant to
Supreme Court Rule 13.5 and Rule 22 to extend the time by 60 days in which to file
a petition for writ of certiorari from the judgment entered by the United States Court
of Appeals for the Fourth Circuit. In support thereof, counsel states the following:

1. On August 8, 2011, Mr. Battle pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). On November 8, 2011, the district court sentenced Mr. Battle to a mandatory minimum term of 15 years imprisonment under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B). The district court declared Mr. Battle an armed career criminal after adopting the presentence report's finding that he had three prior convictions that qualified as either "violent felonies" or "serious drug offenses" under the ACCA. Over Mr. Battle's objection, the court found that Mr. Battle had one Maryland conviction from 1991 for assault with intent to murder that qualified as a "violent felony." Further, the court found that Mr. Battle had two prior convictions from 1998 and 2006 for Maryland possession with intent to distribute cocaine that qualified as "serious drug offenses."

The court's application of the ACCA enhancement subjected Mr. Battle to a Sentencing Guidelines range of 180 to 188 months imprisonment (corresponding to an offense level 30, criminal history category V). The court sentenced Mr. Battle to 180 months imprisonment (15 years). Without an ACCA finding, Mr. Battle's Guidelines range would have been 70 to 87 months imprisonment (corresponding to an offense level 21, criminal history category V), and the statutory maximum would have been 10 years. 18 U.S.C. § 924(a)(2).

2. On June 26, 2015, the Supreme Court issued its decision in *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551 (2015), voiding the residual clause in the “violent felony” definition of the Armed Career Criminal Act (ACCA). Subsequent to that decision, the United States Court of Appeals for the Fourth Circuit authorized Mr. Battle to file a successive petition under 28 U.S.C. § 2255 challenging his ACCA sentence. Mr. Battle then filed a § 2255 petition in the district court arguing that post-*Johnson*, his prior conviction for Maryland assault with intent to murder no longer qualified as a “violent felony” under the ACCA’s remaining force clause (18 U.S.C. § 924(e)(2)(B)(i)); therefore, his ACCA sentence was void. The district court denied the petition but issued a certificate of appealability.

3. Mr. Battle then appealed that decision to the Fourth Circuit. Specifically, he argued that the district court erred in finding that Maryland assault with intent to murder was a “violent felony” because it can be committed by an act of omission (i.e, failing to provide food or medicine), which does not require any physical force – let alone violent physical force necessary to qualify as a “violent felony” under the force clause. But the Fourth Circuit affirmed the district court’s decision upon holding that no realistic probability exists that Maryland assault with intent to kill could be violated by an act of omission because Mr. Battle did not cite to a case in which anyone has actually been prosecuted for Maryland assault with

intent to murder by act of omission. *See United States v. Battle*, 927 F.3d 160, 167 (4th Cir. 2019); Exhibit 1. The Court so held even though Mr. Battle cited to Maryland appellate decisions which make plain that both assault and murder in Maryland can be committed by acts of omission. *Id.*

4. In so doing, the Fourth Circuit applied a realistic probability analysis that conflicts with the precedent of other courts of appeals. Most appellate courts have held that if the plain language of a statute or a state appellate decision interpreting an offense makes clear that an offense can be committed in a manner that does not constitute a “violent felony,” then the offense cannot qualify as such (even if no case exists in which a defendant was actually prosecuted for facts that do not constitute a “violent felony”). *See United States v. Titties*, 852 F.3d 1257, 1275 (10th Cir. 2017); *Salmoran v. Att’y Gen.*, 909 F.3d 73, 82 (3d Cir. 2018); *Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017); *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018); *United States v. McGrattan*, 504 F.3d 608, 614-15 (6th Cir. 2007); *Chavez-Solis v. Lopez*, 803 F.3d 1004, 1010 (9th Cir. 2015); *Ramos v. U.S. Att’y Gen.*, 709 F.3d 1066 (11th Cir. 2013).

However, others appellate courts have held that a defendant can only satisfy the realistic probability test when an actual case exists in which a defendant has actually been prosecuted for conduct that does not satisfy the “violent felony”

definition. *See United States v. Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017) (en banc); *United States v. Redrick*, 841 F.3d 478 (D.C. Cir. 2016). The Fourth Circuit's decision in *Battle* now deepens this split.

5. Mr. Battle plans to file a petition for certiorari on this critical issue. However, undersigned counsel needs more time to adequately prepare the petition. Since the date of the Fourth Circuit's decision in this case, undersigned counsel has been busy with several appellate and district court assignments. In particular, counsel has been handling more than 100 petitions seeking retroactive habeas relief under *Davis v. United States*, ___ U.S. ___, 139 S. Ct. 2319 (2019). Additionally, counsel is currently working on several appeals in the Fourth Circuit. Finally, counsel is responsible for supervising the appellate attorneys in the federal public defender's office in Maryland as well as pro bono attorneys who work with the office on criminal matters.

6. In light of undersigned counsel's workload, he respectfully requests an extension of 60 days, from September 9, 2019 (the current due date) until November 11, 2019, on which to file the petition for writ of certiorari on Mr. Battle's behalf. This case presents an important recurring issue that impacts federal sentencing decisions on a daily basis. Additional time will allow counsel to adequately research this matter and prepare an effective petition for certiorari.

Wherefore, Petitioner prays that this application be granted.

Respectfully submitted,

JAMES WYDA
Federal Public Defender
for the District of Maryland

/s/ Paresh S. Patel
PARESH S. PATEL
Assistant Federal Public Defender
Counsel of Record
Office of the Federal Public Defender
6411 Ivy Lane, Ste. 710
Greenbelt, Maryland
(301) 344-0600
Paresh_Patel@fd.org

August 30, 2019