

No. 22A_____

In the
Supreme Court of the United States

RICKIE FOY,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

To the Honorable Amy Coney Barrett, Associate Justice of the Supreme Court and Circuit Justice for the Seventh Circuit:

1. Pursuant to Supreme Court Rules 13.5, 22, and 30, Applicant Rickie Foy respectfully requests a 60-day extension of time, up to and including Thursday, March 2, 2023, to file a petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, seeking review of that

court's decision in *United States v. Foy*, 50 F.4th 616 (7th Cir. 2022). The Seventh Circuit issued its decision on October 3, 2022. *See id.* That opinion is attached as Appendix A. The jurisdiction of this court will be invoked under 28 U.S.C. § 1254(1), and the time to file a petition for a writ of certiorari will otherwise expire on Sunday, January 1, 2023. This Application is timely because it has been filed on December 5, 2022, more than ten days prior to the date on which the time for filing the petition is set to expire.

2. In June 2020, police arrested three individuals in the parking lot of a Chicago Aldi store. A silent surveillance video showed a group of about a dozen people, over a mere eight minutes, variously looking at or swinging a hammer, crowbar, or rod at a standalone automatic teller machine (ATM). The police showed up before the ATM was opened, and no money was stolen. Applicant Rickie Foy was one of those arrested, initially for property damage under state law. His case was referred to the United States Attorney, who charged Mr. Foy under 18 U.S.C. § 371 with conspiring to commit an offense against the United States—namely, conspiracy to commit bank theft in violation of 18 U.S.C. § 2113(b). Section 2113(b) establishes two “distinct offenses” concerning bank theft that are differentiated only by their dollar amount. *Carter v. United States*, 530 U.S. 255, 272–73 (2000). The first

sentence makes it a felony for a person to take or carry away from a bank, with intent to steal, any property or money exceeding \$1,000. 18 U.S.C. § 2113(b). The second sentence makes it a misdemeanor for a person to take or carry away, with intent to steal, less than \$1,000. *Id.*

During Mr. Foy's a three-hour bench trial conducted over Zoom, the government put forth no evidence that anyone present at the ATM knew each other, showed up together, planned anything, or even exchanged words. The government presented no witness who was present before the arrest. It also presented no evidence that any defendant intended to steal more than \$1,000. *See App., infra, XXa* ("There is no dispute that the record is bereft of evidence that Foy specifically intended to steal more than \$1,000."). In light of that failure of proof on a critical element—which was necessary to show that Mr. Foy conspired to commit any felony offense—Mr. Foy moved for judgment of acquittal under Federal Rules of Criminal Procedure 29. The district court denied Mr. Foy's Rule 29 motion and found him guilty of violating Section 371. The court also denied Foy's Rule 33 motion for a new trial.

The court of appeals affirmed. Mr. Foy renewed his objection that, in order to satisfy the mens rea element of felony bank-theft conspiracy, the government had been required to prove that he intended to steal more than

\$1,000, not merely that he intended to steal *some* amount of money. But the court of appeals disagreed, reasoning that the government had been required to show only “that Foy and his co-conspirators intended to steal money, not that they specifically intended to steal more than \$1,000.” App., *infra*, 10a.

3. Mr. Foy’s forthcoming petition for a writ of certiorari will present an important statutory-interpretation question concerning the intent that the government must prove to convict a defendant of conspiring against the United States in violation of 18 U.S.C. § 371 and of bank theft in violation of 18 U.S.C. § 2113(b). The court of appeals’ conclusion that Section 2113(b) does not require the government to prove the defendant’s intent to steal more than \$1,000 conflicts with the basic principle that, with rare exceptions, a person must “know the facts that make his conduct fit the definition of the offense.” *Elonis v. United States*, 575 U.S. 723, 735 (2015) (quoting *Staples v. United States*, 511 U.S. 600, 608 n.3 (1994)). This Court held in *Carter* that the dollar-valuation requirement in Section 2113(b) is an element of the offense. *See* 530 U.S. at 272–73. But the court of appeals’ statutory analysis is inconsistent with this Court’s “longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding ‘each of the statutory elements that criminalize otherwise innocent

conduct.” *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)).

The court of appeals’ decision is exceptionally important because it sets a low bar in the Seventh Circuit the government to prove intent in a criminal-conspiracy case where the underlying offense was not completed. Additional time is needed to assess other courts’ of appeals approach to the same issue, and to prepare a petition for a writ of certiorari that will enable this Court to fully consider the important implications of the question presented.

4. Mr. Foy has good cause of an extension of time to seek a writ of certiorari. Counsel for Mr. Foy was appointed by the court of appeals to handle his appeal pursuant to the Criminal Justice Act (CJA). Mr. Foy recently decided to pursue a petition for a writ of certiorari, necessitating additional research and analysis of this case.

Counsel Skilton also has other responsibilities that make additional time necessary to research and prepare a petition that will best assist this Court in evaluating this case. He has been appointed under the CJA to represent the defendant in *United States v. Batio*, No. 21-3195 (7th Cir.), and has an opening merits brief due on December 19, 2022. He has also been appointed under the

CJA on appeal in *Bell v. Hepp*, No. 21-2819 (7th Cir.), where the opening brief is likewise due on December 19, 2022.

5. On November 30, 2022, Assistant United States Attorney Ramon Villalpando, who was counsel for the United States at trial and on appeal, indicated that he has no objection to this extension request.

WHEREFORE, Applicant respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari for 60 days, to and including March 2, 2023.

Dated: December 5, 2022

Respectfully submitted,



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