No. 23-7345

IN THE
Supreme Court of the United States

JAMES JOSEPH BRYANT,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether, when applying the categorical approach required by the Armed Career Criminal Act (ACCA), a prior conviction's elements can be determined using current judicial interpretations of the statute of conviction, as the Eleventh Circuit holds, or only interpretations in place at the time of the prior conviction, as the First and Fourth Circuits hold and the Eighth Circuit holds in the Guidelines context.

2. Whether the Constitution requires an indictment, jury trial, and proof beyond a reasonable doubt to find that a defendant's prior convictions were "committed on occasions different from one another," as is necessary to impose an enhanced sentence under ACCA, 18 U.S.C. § 924(e)(1). This same question is pending before the Court in *Erlinger v. United States*, No. 23-370. *See* Petition for Writ of Certiorari at i, *Erlinger v. United States*, No. 23-370; Brief for Petitioner at i, *Erlinger v. United States*, No. 23-370.

RELATED PROCEEDINGS

This case arises from these proceedings:

United States District Court (M.D. Fla.):

United States v. Bryant, No. 6:18-cr-188-PGB-TBS (M.D. Fla. May 30, 2019)

United States Court of Appeals (11th Cir.):

United States v. Bryant, No. 19-12283, 2023 WL 9018411 (11th Cir. Dec. 29, 2023).

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Under Supreme Court Rule 15.8, Petitioner James Bryant files this supplemental brief to advise the Court of two cases decided after he submitted his Petition for Writ of Certiorari: *United States v. Anderson*, 99 F.4th 1106 (7th Cir. Apr. 30, 2024), *petition for panel reh'g filed* (May 28, 2024), and *Brown v. United States*, 602 U.S. ——, 144 S. Ct. 1195 (May 23, 2024). These decisions bolster the need for this Court to review the first question presented: whether a new state-court interpretation of a criminal statute can transform a conviction predating that interpretation into a violent felony under ACCA, 18 U.S.C. § 924(e).

1. In the Petition for Writ of Certiorari, Mr. Bryant argues that to determine whether a prior conviction is an ACCA violent felony, *McNeill v. United States*, 563 U.S. 816 (2011), requires a court to assess the elements of the prior conviction based on the law in place at the time of the conviction, including judicial interpretations of the relevant criminal statute. Petition for Writ of Certiorari at 2–4, 8–16. Thus, Mr. Bryant contends that his 1994 Florida conviction for being a principal to aggravated assault is not an ACCA violent felony because, at the time of the conviction, aggravated assault required only a mens rea of recklessness. *See id.* (discussing, *inter alia*, *LaValley v. State*, 633 So. 2d 1126, 1127–28 (Fla. 5th Dist. Ct. App. 1994); *Kelly v. State*, 552 So. 2d 206, 208 (Fla. 5th Dist. Ct. App. 1989)). And under *Borden v. United States*, a crime that requires only a mens rea of recklessness is not a "violent felony" under ACCA's "elements clause." 593 U.S. 420, 429 (2021); *see* 18 U.S.C. § 924(e)(2)(B)(i).

2. The Eleventh Circuit rejected Mr. Bryant's argument in the decision below. Pet. App. 8a–10a. It concluded that the Florida Supreme Court's 2022 decision in *Somers v. United States*, 355 So. 3d 887, 892–93 (Fla. 2022) ("*Somers I*"), which held that assault under Florida law cannot be accomplished by a reckless act, retroactively controlled the mens rea element of his 1994 conviction. *See* Pet. App. 9a–10a. The Eleventh Circuit reasoned that "'[w]hen the Florida Supreme Court . . . interprets [a] statute, it tells us what that statute always meant,' so prior differing interpretations do not alter whether convictions qualify, even if the conviction occurred while the [old] interpretation was binding." *Id.* (quoting *United States v. Fritts*, 841 F.3d 937, 942–43 (11th Cir. 2016)); *see Somers v. United States*, 66 F.4th 890, 896 (11th Cir. 2023) ("*Somers II*") (holding that Florida aggravated assault is an ACCA violent felony based on *Somers I* and that "Somers cannot rely on earlier decisions of Florida's intermediate courts of appeal to avoid this clear holding."). The Eleventh Circuit summarized: "prior interpretations of the statute, even if binding on the court wherein Bryant was convicted, make no difference." Pet. App. 10a.

3. The Seventh Circuit in *Anderson* repudiated the Eleventh Circuit's approach. It held, under plain error review, that a 2001 Florida aggravated assault conviction is not an ACCA violent felony and that the Florida Supreme Court's decision in *Somers I* did not transform it into one. 99 F.4th at 1109, 1110–13.

The court started with the premise that "we look to the law at the time of the offense to determine whether a crime is a violent felony under ACCA." *Anderson*, 99 F.4th at 1111 (citing *McNeill*, 563 U.S. at 820). It thus agreed that "the relevant

inquiry is whether the law *at the time of his conviction* was broader than the corresponding federal law." *Id.* at 1110. "And at the time of Anderson's conviction in 2001," the court noted, "Florida courts were split on the breadth of the assault statute. Some appellate courts had held that assault could be committed recklessly . . . while others had reached the opposition conclusion . . . ." *Id.* at 1110–11 (citations omitted).

Anderson rejected the Eleventh Circuit's reasoning that the Florida Supreme Court's decision in *Somers I* "'tells us what the statute always meant.'" *Id.* at 1112 (quoting *Somers II*, 66 F.4th at 896). "[T]he Eleventh Circuit did not address Florida's approach to statutory interpretation." *Id.* In Florida, the court observed, any decision of the Florida Supreme Court disagreeing with a statutory interpretation previously rendered by an intermediate appeals court constitutes a "change[]" in the law, which does not apply retroactively unless it satisfies a three-part retroactivity test. *Id.* at 1111 (citing Florida case law). "Because the Florida Supreme Court decision in *Somers* [*I*] disagrees with the statutory construct put forth in *LaValley* and *Kelly*, it ostensibly constitutes a 'change' in the law." *Id.* And because the Florida Supreme Court "said nothing at all about retroactivity," the court reasoned that "*Somers* [*I*] does not announce a retroactive change in the law." *Id.*

"With no ruling from the state's highest court on the law at the time of Anderson's conviction," the Seventh Circuit "turn[ed] to the Florida appellate courts to determine the law of the state." *Id.* (citing *United States v. Cornette*, 932 F.3d 204, 214 (4th Cir. 2019)). Given the "interdistrict conflict at the time of Anderson's conviction," the court found the "realistic probability test" to be an apt tool. *Id.* at

1111–12. Under that test, the court "ask[ed] whether there is a 'realistic probability, not a theoretical possibility, that the [s]tate would apply its statute to conduct that falls outside the generic definition of the crime.'" *Id.* at 1112 (quoting *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). Because Anderson had "identif[ied] Florida appellate court decisions ruling that assault could be committed recklessly," the court found he had shown "a realistic probability that courts would punish conduct that included recklessness." *Id.* *Anderson* concluded,

> Because Florida appellate cases using the recklessness standard were good law at the time of Anderson's conviction in 2001, a defendant faced a realistic probability that a trial court would have relied on them to convict him of aggravated assault when that defendant had only a reckless state of mind. Given that realistic probability, the government may not rely on the 2001 Florida conviction as an ACCA predicate.

Id. at 1112–13.

4. *Anderson* directly conflicts with the Eleventh Circuit's decision below and in *Somers II*, 66 F.4th 890. *Anderson*'s reasoning repudiates the flawed approach used by the Eleventh Circuit to find that Mr. Bryant's 1994 aggravated assault conviction is an ACCA violent felony. The jurisdiction in which Mr. Bryant was convicted squarely held, at the time of his conviction, that aggravated assault could be committed recklessly. *LaValley*, 633 So. 2d at 1127–28; *Kelly*, 552 So. 2d at 208. Because *LaValley* and *Kelly* were good law (and binding) at the time, Mr. Bryant's aggravated assault conviction is not a violent felony. *See Borden*, 593 U.S. at 429. Under *McNeill*—and basic notions of fairness—the Florida Supreme Court's 2022 decision in *Somers I* could not retroactively change the mens rea element of Mr. Bryant's 1994 conviction and transform it into an ACCA violent felony.

5. *Anderson* deepens the circuit split on whether, under ACCA's categorical approach, a prior conviction's elements can be determined by reference to a judicial interpretation of a criminal statute that post-dates the prior conviction. As noted in the Petition for Writ of Certiorari, the First and Fourth Circuits hold that ACCA requires a court to look only to judicial interpretations of state law in effect at the time of the prior conviction. *United States v. Faust*, 853 F.3d 39, 57 (1st Cir.), *rehearing denied*, 869 F.3d 11 (1st Cir. 2017); *Cornette*, 932 F.3d at 213–15; *see also United States v. Vickers*, 967 F.3d 480, 486 (5th Cir. 2020), *cert. granted, vacated, and remanded on other grounds*, 141 S. Ct. 2783 (2021). The Eighth Circuit holds the same in the Sentencing Guidelines context. *United States v. Roblero-Ramirez*, 716 F.3d 1122, 1126–27 (8th Cir. 2013). Those circuits are correct.

While *Anderson*'s analytical path differed slightly from these other circuits, it reached the same basic conclusion: ACCA's "backward-looking" approach means that the elements of a past conviction must be determined according to the law in effect at the time of the prior conviction, including judicial interpretations. *Anderson*, 99 F.4th at 1111, 1112–13.

6. The Court's recent decision in *Brown v. United States* reinforces that ACCA calls for "a 'backward-looking' examination . . . of 'previous convictions.'" 144 S. Ct. at 1204 (quoting *McNeill*, 563 U.S. at 820). This "requires sentencing courts to examine the law as it was when the defendant violated it, even if that law was subsequently amended." *Id.* (citing *McNeill*, 563 U.S. at 820–22). Thus, the Court held that "a state crime constitutes a 'serious drug offense' if it involved a drug that

was on the federal schedules when the defendant possessed or trafficked in it but was later removed." *Id.* at 1201.

The Court relied on *McNeill* throughout the opinion to support that conclusion. It recalled how in *McNeill*, the Court "looked back to 'the law under which the defendant was convicted' and concluded that a subsequent statutory amendment reducing the maximum penalty below the 10-year threshold [to qualify as a serious drug offense] did not matter." *Id.* at 1204 (quoting *McNeill*, 563 U.S. at 820). That "'backward-looking' approach support[ed]" looking to the federal drug schedules in effect at the time of the prior state offense. *Id.* "ACCA is a recidivist statute that gauges what a defendant's 'history of criminal activity' says about his or her 'culpability and dangerousness.'" *Id.* (quoting *McNeill*, 563 U.S. at 823). Because "[a] defendant's 'history of criminal activity' does not 'cease to exist' merely because the crime was later redefined," the Court reasoned that it "makes sense to ask . . . whether a prior offense met ACCA's definition of seriousness—and thus suggested future danger—at the time it was committed." *Id.* at 1205 (quoting *McNeill*, 563 U.S. at 823). Conversely, the Court noted, the addition of a substance to the federal schedules does not *transform* a previously nonqualifying offense into an ACCA predicate. *See id.* at 1210. In rejecting Brown's argument that ACCA's present-tense language requires courts to consult the federal drug schedules in effect during sentencing, the Court explained: "Because 'ACCA is concerned with convictions that have already occurred,' . . . it requires a historical inquiry into the state law at the time of that prior offense." *Id.* at 1208–09 (quoting *McNeill*, 563 U.S. at 820).

7. *Brown*'s explanation for why ACCA requires a "backward-looking" examination of past convictions supports Mr. Bryant's Petition. Just as "[a] defendant's 'history of criminal activity' does not 'cease to exist' merely because the crime was later redefined," *id.* at 1205, a defendant's history of criminal activity does not expand merely because a crime was judicially redefined after the fact. And just as a change in the federal drug schedules cannot transform a nonqualifying offense into a "serious drug offense," *see id.* at 1210, a change in judicial interpretation cannot transform a nonqualifying conviction into a "violent felony." "Because 'ACCA is concerned with convictions that have already occurred,' . . . it requires a historical inquiry into the state law *at the time of that prior offense*." *Id.* at 1208–09 (emphasis added) (quoting *McNeill*, 563 U.S. at 820). Here, that means Mr. Bryant's 1994 principal-to-aggravated-assault conviction is not a violent felony.

Conclusion

In light of the above, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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