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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 2023**

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**MAXSONY COISSY,**

***Petitioner,***

**v.**

**UNITED STATES OF AMERICA,**

***Respondent.***

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

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether, under the categorical approach as applied to "violent felony" enhancements under the Armed Career Criminal Act and "crime of violence" enhancements under the Guidelines, the elements of a prior state conviction are determined by judicial interpretations in effect at the time of the prior conviction as the First, Fourth, Fifth, Seventh, and Eighth Circuits hold, or instead, whether the elements of that prior state conviction can be determined by a later interpretation by the state's highest court, as the Eleventh Circuit alone holds.

## INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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Maxsony Coissy ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINION BELOW

The Eleventh Circuit's opinion in *United States v. Coissy*, 2024 WL 1853973 (11th Cir. Apr. 29, 2024) (unpublished), following *Somers v. United States*, 66 F.4th 890 (11th Cir. 2023), is included as Appendix A-1 hereto. The opinion in *Somers* is included as Appendix A-2. The district court did not issue a written opinion in this case.

## STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals, *United States v. Coissy*, 2024 WL 1853973 (11th Cir. Apr. 29, 2024), affirming the district court, was issued on April 29, 2024. On July 9, 2024, Justice Thomas extended the due date for the petition by 30 days., until August 27, 2024.

This petition is timely filed pursuant to Supreme Court Rule 13.1.

## STATUTORY PROVISIONS INVOLVED

The Career Offender provision of the U.S. Sentencing Guidelines, U.S.S.G. § 4B1.1, provides, in relevant part:

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

For purposes of U.S.S.G. § 4B1.1, and for U.S.S.G. § 2K2.1, the term "crime of violence" is defined in the "elements clause," U.S.S.G. § 4B1.2(a)(1), to "mean:"

> [A]ny offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another.

Under the "elements clause" of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(i), the term "violent felony" is defined identically, in relevant part, to "mean:"

> [A]ny crime punishable by imprisonment for a term exceeding one year, ... that has as an element the use, attempted use, or threatened us of physical force against the person of another.

Since 1975, Florida Statute § 784.011(1) has defined an "assault" (a second degree misdemeanor) as:

> [A] intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

Since 1975, Florida Statute § 784.021(1) has defined an "aggravated assault" (a third degree felony) as "an assault:"

> (a) With a deadly weapon without intent to kill; or
>
> (b) With an intent to commit a felony.

## INTRODUCTION

This petition presents a circuit split on which interpretation of state law informs the categorical analysis under the definitions of "violent felony" in the ACCA and "crime of violence" in the Guidelines: judicial interpretations in place at the time of the prior conviction or a later interpretation by the state's highest court.

The First, Fourth, Fifth, Seventh, and Eighth Circuits have held, consistent with *McNeill v. United States*, 563 U.S. 816 (2011), that a court must 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.) (applying the elements clause of the ACCA), *reh'g denied*, 869 F.3d 11 (1st Cir. 2017); *United States v. Cornette*, 932 F.3d 204, 213–15 (4th Cir. 2019)(same); *United States v. Anderson*, 99 F.4th 1106, 1110-13 (7th Cir. 2024), *pet. for panel reh'g filed* (7th Cir. May 28, 2024) (same); *United States v. Roblero-Ramirez*, 716 F.3d 1122, 1126–27 (8th Cir. 2013) (applying an enumerated "crime of violence" in the Guidelines); *see also United States v. Vickers*, 967 F.3d 480, 486 (5th Cir. 2020) (applying the elements clause of the ACCA), *cert. granted, vacated, and remanded on other grounds*, 141 S. Ct. 2783 (2021).

The Eleventh Circuit, by contrast—and alone among the circuits—looks to later interpretations by the state's highest court. *See United States v. Fritts*, 841 F.3d 937, 942-43 (11th Cir. 2016) (applying the elements clause of the ACCA); *Somers v. United States*, 66 F.4th 890, 896 (11th Cir. 2023) (same; citing *Fritt*s); Pet. App. 1-A (applying the elements clause of the Guidelines, U.S.S.G. §4B1.2(a); following *Somers*).

Petitioner is a prime example of how these differing approaches can lead to differing, and inequitable, results. When he was convicted of Florida aggravated assault after a jury trial in 2003, several intermediate courts had described the *mens rea* element of that offense in terms of

recklessness. *See Kelly v. State*, 552 So. 2d 206, 208 (Fla. 5th DCA 1989) ("Where, as here, there is no proof of an intentional assault on the victim, that proof may be supplied by proof of conduct equivalent to culpable negligence ... or by proof of willful and reckless disregard for the safety of others."); *LaValley v. State*, 633 So .2d 1126, 1127 (Fla. 5th DCA 1995) (following *Kelly*'s holding that "reckless disregard for the safety of others" could substitute for proof of intentional assault); *Green v. State*, 315 So. 2d 499, 499-500 (Fla. 4th DCA 1975) (although aggravated assault is a crime of intent, holding that where there is "no proof of an intentional assault, proof of intent may be supplied by proof of conduct equivalent to culpable negligence;" citing *Dupree v. State*, 310 So. 2d 396, 398 (Fla. 2d DCA 1975) (holding that only culpable negligence—"conduct of a gross and flagrant character, evincing reckless disregard of human life or the safety of persons"—was required to satisfy the statute)). Since Petitioner's 2003 conviction in Broward County, Florida occurred within Florida's Fourth District Court of Appeals, *Green* governed at the time of that conviction.

Under the above courts' interpretation of the aggravated assault statute, which permitted conviction by recklessness, Petitioner's 2003 conviction was not a "crime of violence" under *Borden v. United States*, 593 U.S. 420, 429 (2021). But thereafter, in 2022, the Florida Supreme Court interpreted the statute to require more than recklessness, holding that "Florida's assault statute, section 784.011(1), requires not just the general intent to volitionally take the action of threatening to do violence, but also that the actor direct the threat at ... another person." *Somers v. United States*, 355 So. 3d 887, 892–93 (Fla. 2022). Under this later interpretation, Florida aggravated assault is both an ACCA "violent felony," *Somers v. United States*, 66 F.4th 890, 893–95 (11th Cir. 2023), and a "crime of violence" under the Guidelines. Pet. App. A-1 (following *Somers* for crime of violence determination under the Guidelines).

In its 2023 decision in *Somers*, the Eleventh Circuit relied on its prior decision in *Fritts*, 841 F.3d at 942–43, that "[w]hen the Florida Supreme Court ... interprets [a] statute, it tells us what that statute always meant," in concluding that the Florida Supreme Court's 2022 interpretation of the assault statute controlled whether a prior aggravated assault conviction qualified as an ACCA violent felony. And in the decision below, the court followed *Somers* to hold that same 2022 interpretation controlled whether Petitioner was previously convicted of a crime of violence under the Guidelines. Pet. App. A-1. In *Anderson*, rendered thereafter, the Seventh Circuit expressly split from the Eleventh Circuit on the exact predicate at issue here—holding under plain error review that Florida aggravated assault offenses pre-dating *Somers* are not "violent felon[ies]" and that the Florida Supreme Court's decision in *Somers* did not change that result.

Because the Eleventh Circuit's approach directly conflicts with this Court's precedents and the approach of the other circuits, this Court's input is necessary to resolve the circuit split, restore uniformity to the application of the categorical approach for the ACCA's and the Guidelines' identically-worded elements clause provisions, and assure that defendants in different circuits who were previously convicted of identical crimes are not subjected to differing penalties.

## STATEMENT OF THE CASE

Petitioner was convicted after a negotiated guilty plea, of distributing fentanyl and heroin, in violation of 21 U.S.C. § 841(b)(1)(C), as well as being a felon in knowing possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). In the Pre-Sentence Investigation Report (PSR), the probation officer grouped Petitioner's counts, and determined that the § 922(g)(1) count had the highest offense level (32) under U.S.S.G. § 2K2.1. That determination resulted from a starting base offense level of 26 under U.S.S.G. § 2K2.1(a)(1) based on prior

convictions for both a "crime of violence" and a "controlled substance offense" (both terms, as defined in U.S.S.G. § 4B1.2), as well as two specific offense characteristics not relevant here. According to the Probation Officer, the "crime of violence" was a 2003 Florida conviction for aggravated assault and the "controlled substance offense" was a 2017 Florida conviction for possession of heroin with intent to deliver.

Based on these same two priors, the Probation Officer classified Petitioner as a Career Offender pursuant to U.S.S.G. § 4B1.1(a). The Career Offender designation did not affect the already-determined offense level of 32, since the Career Offender offense level was also 32. However, the Career Offender designation *did* raise Petitioner's Criminal History Category from V to VI. With a 3-level reduction for acceptance of responsibility, Petitioner's total offense level was 29. And with an offense level of 29, and Criminal History Category of VI, his recommended advisory Guideline range was 151-188 months imprisonment.

Petitioner objected, *inter alia*, to the classification of his Florida aggravated assault conviction as a "crime of violence"—both for purposes of the base offense level in § 2K2.1, and for the Career Offender designation. While acknowledging the Eleventh Circuit's contrary decisions in *Turner v. Warden Coleman FCI*, 709 F.3d 1328 (11th Cir. 2013) (an ACCA case) and *United States v. Golden*, 854 F.3d 1256 (11th Cir. 2017) (applying *Turner* to the Career Offender guideline), he argued that that an as confirmed by several Florida district court of appeals decisions—including *Kelly v. State*, 552 So. 2d 206, 208 (Fla. 5th DCA 1989) and *LaValley v. State*, 633 So.2d 1126, 1127 (Fla. 5th DCA 1995)—an aggravated assault under Fla. Stat. § 784.021 does not require proof of an intentional act for conviction, and instead, a *mens rea* of "willful and reckless disregard for the safety of others" is sufficient.

On December 17, 2020, the district court overruled Petitioner's objections, but granted him a slight downward variance to 132 months imprisonment on the drug counts as a Career Offender, and imposed a term of 120 months concurrent on the § 922(g)(1) count.

On appeal, Petitioner continued to challenge the counting of his Florida aggravated assault conviction as a "crime of violence" for § 2K2.1 and his Career Offender designation. He noted in his brief that this Court had just granted certiorari in *Borden v. United States,* 140 S.Ct. 1262 (2020) (No. 19-5410) to determine whether the elements clause encompasses crimes with a *mens rea* of recklessness.

After the Initial Brief was filed this Court issued its decision in *Borden v. United States*, 593 U.S. 420, 429 (2021) holding that a *mens rea* of recklessness does not satisfy the elements clause. In its Answer Brief to the Eleventh Circuit, the government argued that even though *Turner* "paid short shrift to state intermediate appellate court decisions that opined that recklessness could satisfy the Florida assault statute," the Court was bound—even after *Borden*—to follow *Turner* under the prior panel precedent rule. Moreover, the government argued, *Turner* was decided correctly because (by its terms) intent was an element of Florida's aggravated assault offense, and the recklessness cases Petitioner had relied upon were "outliers."[1]

In his Reply Brief, Petitioner argued that Florida simple assault (and therefore) aggravated assault, was a general intent crime and under the above-cited Florida intermediate appellate court

[1] Notably, the government conceded that on the "available record" before the court, the enumerated offenses clause in U.S.S.G. § 4B1.2(a)(2) was not a possible alternative basis for affirmance. Answer Brief at 22, n. 5. Although the government did not elaborate, as Petitioner pointed out in his Reply Brief at 1, n. 1, the reason was that the government failed to introduce any *Shepard* documents for the 2003 aggravated assault conviction at sentencing. And therefore, the court was required to assume Petitioner was convicted of the least culpable conduct under Fla. Stat. § 784.021,which is simple assault" with intent to commit a felony in violation of Fla. Stat. § 784.021(1)(b) – an offense categorically broader than generic "aggravated assault" as defined in *United States v. Palamino Garcia*, 606 F.3d 1317, 1331-32 (11th Cir. 2010).

decisions, that general intent could be satisfied by recklessness. In addition to the cases he had previously cited, Petitioner also cited *Dupree v. State*, 310 So.2d 396 (Fla. 2d DCA 1975), which held that only culpable negligence was required to satisfy the statute. He noted that in *Borden*, the government had itself cited *Dupree* in identifying Florida as one of five states in which courts had construed a felony assault offense to "encompass recklessness." *See Borden*, U.S. Br., 2020 WL 4455245, at *20 & n.5 (June 8, 2020). Petitioner argued that the court could not reject as "mistaken" or unpersuasive Florida decisions interpreting Florida law. Rather, federal courts were bound by the interpretations of Florida intermediate appellate courts "absent some persuasive indication that the Florida Supreme Court would decide the issue differently," and there was no such indication here. *Coissy*, Reply Brief at 9 (citing *United States v. Vail-Bailon*, 868 F.3d 1293, 1305 (11th Cir. 2017) (en banc)).

Just after the case was fully briefed, in *Somers v. United States*, 15 F.4th 1049 (11th Cir. 2021) (*Somers I*), the Eleventh Circuit considered the argument that a Florida aggravated assault conviction did not qualify as an ACCA "violent felony" after *Borden*, because the Florida intermediate court of appeals—in *LaValley*, *Kelly*, *Dupree*, and *Green v. State*, 315 So.2d 499 (Fla. 4th DCA 1975)—had held Florida aggravated assault could be committed recklessly. The Court acknowledged these decisions, 15 F.4th at 1055-56, but found there to be a "split in Florida authority on the *mens rea* required by the Florida assault statutes." *Id.* Finding that *mens rea* question would control resolution of Somers' case, and the cases of many similarly-situated to him, the Eleventh Circuit certified two questions to the Florida Supreme Court, asking it to resolve what *mens rea* was required violate Florida's assault statute. *Id.* at 1056.

On September 28, 2021, the government filed *Somers I* in a Rule 28(j) letter, arguing that the Florida Supreme Court's decision would likely settle the split in authority in Florida, and "may

resolve the question of whether they satisfy the federal elements clause." On March 4, 2022, the Eleventh Circuit issued a *sua sponte* order holding Petitioner's appeal in abeyance pending the Florida Supreme Court's decision in *Somers*—directing the parties to file supplemental letter briefs after the decision, explaining how it "affects Mr. Coissy's argument that his predicate convictions are not crimes of violence under the Career Offender guideline (section 4B1.1)."

In *Somers v. United States*, 355 So. 3d 887, 892-93 (Fla. 2022) (*Somers II*), the Florida Supreme Court held that Florida aggravated assault cannot be committed by "a reckless act," and that "at least knowing conduct" was required. *Id.* at 892-93. The decision did not mention any of the pre-existing Florida intermediate appellate court decisions that had expressly held to the contrary. Petitioner thereafter moved to extend the stay until after the Eleventh Circuit rendered its own decision in light of *Somers II*, and the stay continued.

Thereafter, in *Somers v. United States*, 66 F.4th 890 (11th Cir. 2023) (*Somers III*), the Eleventh Circuit held that the Florida Supreme Court's 2022 interpretation of the Florida aggravated assault statute retroactively controlled the *mens rea* element of Somers' 1994 conviction. *Id.* at 895-86. It reasoned:

> "When the Florida Supreme Court ... interprets [a] statute, it tells us what that statute always meant." *United States v. Fritts*, 841 F.3d 937, 943 (11th Cir. 2016); *see also Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 [] (1993). Somers cannot rely on earlier decisions of Florida's intermediate courts of appeal to avoid this clear holding.

*Id.* at 896.

On May 11, 2023, Petitioner filed a supplemental letter brief acknowledging that *Somers III*'s "finding that the Florida Supreme Court's determination that Florida aggravated assault cannot be committed recklessly" resolved his appellate challenge to the district court's "crime of violence" enhancement, since *Somers III* made clear that his 2003 conviction "is a qualifying 'crime of violence' for the Career Offender enhancement in this Circuit after *Borden*."

On April 29, 2024, the Eleventh Circuit affirmed Petitioner's sentence, holding that *Somers III* resolved his challenge to his Florida aggravated assault conviction as a "crime of violence." *United States v. Coissy*, 2024 WL 1853973, at *1 (11th Cir. Apr. 29, 2024).

## REASON FOR GRANTING THE WRIT

**The circuits are divided on whether, under the categorical approach as applied to "violent felony" enhancements under the Armed Career Criminal Act and "crime of violence" enhancements under the Guidelines, the elements of a prior state conviction are determined by judicial interpretations in effect at the time of the prior conviction as the First, Fourth, Fifth, Seventh, and Eighth Circuits hold, or instead, whether the elements of that prior state conviction can be determined by a later interpretation by the state's highest court, as the Eleventh Circuit alone holds.**

This Court's review is needed to resolve a circuit split about whether the categorical approach for identifying qualifying "violent felonies" under the ACCA, 18 U.S.C. §924(e)(2)(B), or "crimes of violence" under the U.S. Sentencing Guidelines, incorporates judicial interpretations of state law in effect at the time of (i) the prior conviction or (ii) the federal criminal proceedings. On one side of the conflict, the First, Fourth, Fifth, Seventh, and Eighth Circuits look to judicial interpretations in place at the time of the prior conviction. On the other side, the Eleventh Circuit looks to current interpretations of state law.

### A. The circuits are intractably divided

It is well-settled that the categorical approach determines whether a prior conviction is a "violent felony" under the ACCA or a "crime of violence" under the Guidelines. The purpose of the categorical approach is to discern "what a jury 'necessarily found' to convict a defendant (or what he necessarily admitted)," and "elements alone fit that bill." *Mathis v. United States*, 579 U.S. 500, 515 (2016) (citations omitted). "Under that by-now-familiar method ... the facts of a given case are irrelevant." *Borden v. United States*, 593 U.S. 420, 424 (2021). "The focus is instead on whether the elements of the statute of conviction meet the federal standard," which—for the

ACCA and Guidelines' identically-worded elements clause—"means asking whether a state offense necessarily involves the defendant's 'use, attempted use, or threatened use of physical force against the person of another.'" *Id.* (quoting 18 U.S.C. § 924(e)(2)(B)(i)). In this context, "the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010). And "[t]he phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual," which excludes "offenses criminalizing reckless conduct." *Borden*, 593 U.S. at 429 (plurality opinion); *see also id.* at 446 (Thomas, J., concurring) (agreeing that reckless crimes do not meet the elements clause based on the meaning of "use of physical force").

This Court held in *McNeill v. United States*, 563 U.S. 816 (2011) that in determining whether a prior state drug offense was punishable by 10 years or more in prison so as to qualify as an ACCA "serious drug offense," "the 'maximum term of imprisonment' ... is the maximum sentence applicable to his offense when he was convicted of it." 563 U.S. at 817-18. That was so, the Court explained, because "[t]he plain text of ACCA requires a federal sentencing court to consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense," and "[t]he only way to answer this backward-looking question is to consult the law that applied at the time of that conviction." *Id.* at 820. Because the "ACCA is concerned with convictions that have already occurred," whether a prior conviction is an ACCA predicate "can only be answered by reference to the law under which the defendant was convicted." *Id.* The Court, importantly, drew support for this approach from "the adjacent definition of 'violent felony,'" which, despite using the present tense, called on the Court to "turn[ ] to the version of state law that the defendant was actually convicted of violating." *Id.* at 821 (discussing *Taylor v.*

*United States*, 495 U.S. 575 (1990), and *James v. United States*, 550 U.S. 192 (2007)). "Having repeatedly looked to the historical statute of conviction in the context of violent felonies," the Court "s[aw] no reason to interpret 'serious drug offense[s]' in the adjacent section of the same statute any differently." *Id.* at 822. The Court added that "absurd results ... would follow from consulting current state law to define a previous offense." *Id.* For example, "a prior conviction could 'disappear' entirely for ACCA purposes if a State reformulated the offense between the defendant's state conviction and federal sentencing," *id.*, which "cannot be correct," *id.* at 823. Thus, the Court "conclude[d] that a federal sentencing court must determine whether 'an offense under State law' is a 'serious drug offense' by consulting the 'maximum term of imprisonment' applicable to a defendant's previous drug offense at the time of the defendant's state conviction for that offense." *Id.* at 825.

And notably, in the Eleventh Circuit, this same "backward-looking" approach applies to the "controlled substance offense" determination under the Guidelines' Career Offender provision in U.S.S.G. § 4B1.2. *See United States v. Dubois*, 94 F.4th 1284, 1298-1300 (11th Cir. 2024) (holding, prior to *Brown v. United States*, 144 S.Ct. 1195 (U.S. May 23, 2024), that although the circuit courts of appeals were split on the time-of-state-conviction vs. time-of-federal-sentencing approach for the "controlled substance offense" question under § 4B1.2, this Court's decision in *McNeill* supported the "backward looking" time-of-state-conviction approach; noting that the same "four reasons that led the Supreme Court in *McNeill* to adopt a time-of-state-conviction approach under the Armed Career Criminal Act apply readily to our interpretation of the Sentencing Guidelines;" in particular, "just as the phrase "previous conviction" in the [ACCA] requires a backward-looking approach in defining "controlled substance offense" under [ACCA], the phrase 'subsequent to sustaining one felony conviction' in the guidelines requires a backward-

looking approach in defining 'controlled substance' under the guidelines"). Strangely, and entirely inconsistently, the Eleventh Circuit does *not* apply the same backward-looking approach to the equally-counting "crime of violence" determination within the same Guideline provision.

In line with *McNeill*'s teaching and reasoning that all of these related "previous conviction" determinations are "backward-looking," 563 U.S. at 820, the First and Fourth Circuits hold that only judicial interpretations of state law that were in place at the time of the prior conviction can inform the categorical approach analysis. *Faust*, 853 F.3d at 57 (concluding that *McNeill* supported the defendant's argument that, in determining whether his prior Massachusetts conviction for assault and battery on a police officer was an ACCA violent felony, the court had to consider the elements of the offense according to judicial interpretations in place at the time of the prior conviction); *Cornette*, 932 F.3d at 213 ("Utilizing the categorical approach, we move to whether, at the time of Cornette's conviction in 1976, the definition of burglary in the Georgia burglary statute criminalized more conduct than ACCA generic burglary."); *id.* at 214–15 (declining to consider 1977 and 1980 Georgia Supreme Court decisions interpreting the burglary statute because they did not inform the elements of the crime at the time the defendant was convicted of burglary; looking instead to intermediate appellate court decisions in place in 1976; noting that this approach comported with how other circuits, namely the First and Eighth, "have considered the question").

In the decision referenced in *Cornette*, the Eighth Circuit had indeed used the same backwards-looking approach in the context of determining whether a prior conviction was a "crime of violence" under the Sentencing Guidelines. *Roblero-Ramirez*, 716 F.3d at 1126–27 (in deciding whether the defendant's prior Nebraska conviction for sudden-quarrel manslaughter was a "crime of violence" under U.S.S.G. § 2L1.2(b)(1)(A)(ii), looking to the highest state-court case law in place at the time of the prior conviction, not a later Nebraska Supreme Court decision that

manslaughter required intent because "[t]hat interpretation was not Nebraska law when Roblero-Ramirez was convicted").

Consistent with these three circuits' uniform approach, although its decision was later vacated on other grounds, the Fifth Circuit similarly rejected a defendant's reliance on a state court interpretation of the Texas felony murder statute that post-dated his murder conviction, reasoning that in applying the categorical approach to the ACCA's elements clause, *McNeill* required it to "apply the state court interpretation [of the felony murder statute] at the time of Vickers's conviction." *Vickers*, 967 F.3d at 486.

Most recently, the Seventh Circuit likewise expressly followed *McNeill*, holding under plain error review that a 2001 Florida aggravated assault conviction—the exact predicate at issue here—was not an ACCA violent felony and that the Florida Supreme Court's decision in *Somers II* did not transform it into one. 99 F.4th at 1109, 1110–13. For the reasons further detailed *infra*, Part B.3, *Anderson* expressly and directly conflicts with the Eleventh Circuit's decision below and in *Somers III*, 66 F.4th 890.

Notably, the Eleventh Circuit is the only circuit in the country to approach this issue differently, and find a subsequent state supreme court decision retroactively determines the elements of a prior conviction for federal enhancement purposes. In fact, since the 2016 decision in *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), the Eleventh Circuit has held that the categorical approach incorporates judicial interpretations of state law that post-date a prior conviction. *Id.* at 942-43 (consulting a 1997 Florida Supreme Court decision to determine whether the defendant's 1989 Florida armed robbery conviction was a violent felony under ACCA's elements clause); *see also United States v. Stokeling*, 684 F. App'x 870, 872–76 (11th Cir. 2017) (Martin, J., concurring) (while it made no difference for Stokeling, arguing that *Fritts*'s

consideration of a judicial interpretation of the robbery statute that post-dated a defendant's prior conviction violated *McNeill,* 563 U.S. 816).

In *Fritts*, the Eleventh Circuit concluded that a defendant's 1989 Florida conviction for armed robbery was an ACCA violent felony based on a 1997 Florida Supreme Court decision, *Robinson v. State,* 692 So. 2d 883 (Fla. 1997), which held that Florida robbery did not include taking property by sudden snatching. *Fritts*, 841 F.3d at 942–43. The Eleventh Circuit reasoned that "[w]hen the Florida Supreme Court in *Robinson* interpret[ed] the robbery statute, it tells us what that statute always meant." *Id.* at 943 (citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 & n.12 (1994)).

In the decision below, the Eleventh Circuit applied the same rationale to Petitioner, concluding that his 2003 conviction for Florida aggravated assault was a "crime of violence" under the Guideline definition in § 4B1.2(a) based on the Florida Supreme Court's 2022 decision in *Somers*, 355 So. 3d 887. *See* Pet. App.A-1. But notably, when Petitioner was convicted by a jury of aggravated assault in 2002, that occurred in a jurisdiction that described the *mens rea* element in terms of recklessness. *See Green v. State*, 315 So. 2d at 499-400 (Fla. 4th_DCA 1975) (citing *DuPree v. State*, 310 So. 2d 396, 398 (Fla. 2d Dist. Ct. App. 1975)); *see* Br. for U.S., *Borden v. United States*, No. 19-5410, 2020 WL 4455245, at *20 & n.5 (citing *Dupree*, 310 So. 2d at 398, for the proposition that Florida aggravated assault encompasses reckless conduct).

And three decades later, the Florida Supreme Court contradicted *Green* and *Dupree* (and *Kelly* and *LaValley*) in *Somers II,* by holding that assault under Florida Statutes § 784.011(1)—which underlies aggravated assault—"require[s] that the intentional threat to do violence be directed at or targeted towards another individual ... and therefore cannot be accomplished via a reckless act." 355 So. 2d at 892. In *Somers III*, citing *Fritts*, the Eleventh Circuit then reasoned:

"'When 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 interpretation was binding." Pet. App. A-2 (quoting *Fritts*, 841 F.3d at 942–43). And in the decision below, the Eleventh Circuit concluded that the 2022 decision in *Somers II*—not *Green* or *Dupree* (or *Kelly* or *LaValley*)—controlled whether Petitioner's 2003 aggravated assault conviction was a "crime of violence."

**B. The Eleventh Circuit's approach is wrong**

The Eleventh Circuit's approach is wrong for multiple reasons.

**1. The Eleventh Circuit's approach is inconsistent with *Mathis*, *McNeill*, and their progeny.** As the Court explained in *Mathis v. United States*, 579 U.S. 500 (2016), the purpose of the categorical approach is to discern "what a jury 'necessarily found' to convict a defendant (or what he necessarily admitted)." *Id.* at 515 (citations omitted). By relying on a judicial interpretation of state law that post-dates the prior conviction, the Eleventh Circuit's approach subverts that purpose. Relying on a subsequent judicial interpretation of the statute of conviction—which here modified the *mens rea* element of aggravated assault in Florida—distorts what a defendant like Petitioner was necessarily convicted of. The only way to determine what Petitioner necessarily was convicted of by his 2003 jury is to consult the elements of the crime as understood in 2003. Measured by that rubric, Petitioner necessarily admitted to having only a *mens rea* of recklessness, because that was the least culpable conduct at that time as per the Florida 4th DCA, and at least two other DCAs at the time. And, as a matter of law, a crime with a *mens rea* of recklessness does not meet the elements clause under *Borden*. No later judicial interpretation can transform it into one.

But even beyond *Mathis*, the text of the enhancement provision here at issue, as confirmed by this Court's decision in *McNeill*, requires a court to "consult the law that applied at the time of [the prior] conviction." 563 U.S. at 820. For any enhancement provision that is based on past convictions, determining whether a prior conviction is a predicate "can only be answered by reference to the law under which the defendant was convicted." *Id.* Thus, not only for the ACCA but for *both types* of Career Offender predicates as well—not simply "controlled substance offenses," but also for "crimes of violence"—courts must "turn[] to the version of state law that the defendant was actually convicted of violating" to decide whether a prior conviction qualifies for enhancement. *Id.* at 821 (discussing *Taylor v. United States*, 495 U.S. 575 (1990), and *James v. United States*, 550 U.S. 192 (2007)). Looking to current interpretations would yield "absurd results." *McNeill*, 563 U.S. at 822.

That *McNeill*'s backward-looking approach indeed governs which prior state convictions qualify for federal enhancement was confirmed just last term in *Brown v. United States*, 144 S. Ct. 1195 (2024). *See id*. at 1204 (emphasizing the elements clause inquiry in the ACCA requires backward-looking analysis of law at time of prior offense). Relying on *McNeill* throughout the opinion, the Court reiterated in *Brown* that the ACCA requires "a *historical inquiry into the state law at the time of that prior offense*." 144 S. Ct. at 1208 (emphasis added). *Brown* confirms that—just like a later change in law cannot "erase" a qualifying predicate conviction—a later change in law also cannot transform a non-qualifying offense into an ACCA or Career Offender predicate. The Eleventh Circuit's reliance on a 2022 Florida Supreme Court decision—issued two decades after Petitioner's predicate conviction—contradicts the directive in *McNeill*, applied to the "controlled substance offense" definition in the Guidelines by *Dubois*, and further confirmed by *Brown* regarding the necessary backward-looking, historical analysis for all of these provisions.

Finally, it makes no sense whatsoever for the "controlled substance offense" determination for § 4B1.2 to be backward-looking in the Eleventh Circuit (as per *Dubois*), but for the "crime of violence" determination *under that same provision* to be controlled by a post-conviction state Supreme Court decision that changed the *mens rea* element of the offense of conviction decades beforehand. The Court should so hold here.

**2. The Eleventh Circuit has misapplied *Rivers* since *Fritts*.** Petitioner does not dispute that this Court's interpretation of a *federal* statute represents what the statute always meant. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994). But *Rivers* was a § 1983 case, not a case involving federal recidivist sentencing enhancement under the ACCA or the Guidelines. And *Rivers* could not have preempted this Court's later-announced rules specific to the federal recidivist sentencing enhancements. Nor, for the reasons articulated by the Seventh Circuit in *Anderso*n, could it have preempted state-specific rules on whether and when a decision of the state's highest court has retroactive application.

**3. The Seventh Circuit, in direct conflict with the Eleventh, has correctly heeded not only this Court's precedent in *McNeill*, but also Florida's state-specific rules on when a decision of its highest court has retroactive application.** As noted *supra*, in determining whether prior state convictions qualify as ACCA predicates, at least four other circuits—the First in *Faust*, the Fourth in *Cornette*, the Fifth in *Vickers*, and the Seventh in *Anderson*—have expressly relied on *McNeill*, in considering judicial interpretations at the time of the prior conviction rather than later decisions, even if those later interpretations were by the state's highest court. And although the Eighth Circuit did not specifically reference *McNeill* in *Roblero-Ramirez*, its reasoning in applying a "crime of violence" enhancement under § 2L1.2 of the Guidelines is consistent with *McNeill*'s approach, and was specifically cited with approval by the Fourth Circuit in *Cornette*.

Notably, in *Anderson*, the Seventh Circuit expressly split from the Eleventh Circuit on the exact predicate at issue here—holding under plain error review that Florida aggravated assault offenses pre-dating *Somers II* are not "violent felon[ies]" and that *Somers II* did not change that result. 99 F.4th at 110-13. The Seventh Circuit started with the same bedrock principle from *McNeill* applied by the other circuits: that courts must "look to the law at the time of the offense to determine whether a crime is a violent felony under ACCA." 99 F.4th at 1111 (citing *McNeill*, 563 U.S. at 820). Thus, *Anderson* explained, "the relevant inquiry is whether the law at the time of his conviction was broader than the corresponding federal law." *Id.* at 1110.

So the Seventh Circuit closely examined Florida law at the time of Anderson's conviction in 2001. At that time, the Seventh Circuit 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). And, at that point in its analysis, the Seventh Circuit expressly rejected the Eleventh Circuit's reasoning in *Somers III* that *Somers II* "'tells us what the statute always meant.'" *Id.* at 1112 (quoting *Somers III*, 66 F.4th at 896). Instead, the Seventh Circuit rightly followed Florida's own approach to statutory interpretation which it noted the Eleventh Circuit had erroneously ignored.

Under Florida's approach to statutory interpretation, the Seventh Circuit explained, Florida Supreme Court decisions "disagreeing with a statutory construct previously rendered by a district court constitute 'changes' in the applicable law from the law at the time of the conviction," and "do not apply retroactively unless the court states that the change satisfies a three-part test enunciated in *Witt v. Florida*, 387 So. 2d 922, 926 (Fla. 1980)." *Id.* (quoting *Florida v. Barnum*, 921 So. 2d 513, 528 (Fla. 2005)). Because *Somers II* disagreed with the statutory construction from some of Florida's intermediate appellate courts, the Seventh Circuit reasoned, *Somers II* constituted a

"change" in the law that was not retroactive, because the Florida Supreme Court did not state that it was, as *Barnum* requires. 99 F.4th at 1111.

The Seventh Circuit noted with significance that the Eleventh Circuit's *Somers III* decision (followed by the panel below) "did not address Florida's approach to statutory interpretation," or recognize that the Florida Supreme Court did not state that its new rule applied retroactively. *Id.* at 1111-12. Applying Florida's own rules of statutory construction which hold "decisions of the district courts of appeals represent the law of Florida unless and until they are overruled by [the Florida Supreme Court]," *id.* at 1112 (citation omitted), *Anderson* rightly looked to the state of the law in the district courts of appeals at the time of the defendant's prior conviction. And because "Florida appellate cases using the recklessness standard were good law at the time of Anderson's conviction in 2001," the Seventh Circuit determined the decisions of the intermediate appellate courts created a "realistic probability" that Anderson could have been convicted for reckless conduct. Accordingly, it precluded the government from relying on that conviction as an ACCA predicate. *Id.*

Although the Seventh Circuit's analysis in *Anderson* differed slightly from that of the First, Fourth, Fifth, and Eighth Circuits, it reached the same basic conclusion: because the ACCA requires a backward-looking approach, the elements of a past conviction must be determined according to law in effect at the time of that conviction, including judicial interpretations. *Id.* at 1111, 1112–13. Only the Eleventh Circuit has held—contrary to the principles underlying the categorical approach and the backward-looking analysis as applied in *McNeill* and just confirmed in *Brown*—that judicial interpretations in place at the time of the prior conviction are erased by subsequent state court decisions interpreting the statute differently.

*Anderson* rightly repudiated the flawed approach used by the Eleventh Circuit to find Petitioner's 2003 aggravated assault conviction is a "crime of violence" under the Guidelines. The jurisdiction in which Petitioner was convicted in a 2003 jury trial squarely held, at the time of his conviction, that aggravated assault could be committed recklessly. *Green*, 315 So. 2d at 499-500. Because *Green* was good law (and binding) at the time, Petitioner's aggravated assault conviction is not a qualifying "crime of violence." *See Borden*, 593 U.S. at 429. Under *McNeill*—and basic notions of fairness—the Florida Supreme Court's 2022 decision in *Somers II* could not retroactively change the *mens rea* element of Petitioner's 2003 conviction and transform it into a "crime of violence" for purposes of the Career Offender and § 2K2.1 enhancements.

**C. The question presented is important, recurring, and far-reaching.**

As should be clear from the 5-1 circuit conflict on similar recidivist enhancement questions under the ACCA and the Guidelines, the question raised here is important, recurring, and far-reaching. Because of that conflict, geography alone now determines whether federal defendants convicted not only of federal firearm offenses, but of federal reentry, drug, and other offenses that qualify for enhancement based upon prior "crimes of violence" under the Guidelines, will face those enhanced penalties. This Court has never allowed the arbitrariness of geography to determine whether someone is subject to the ACCA's harsh penalty, and it should not allow the arbitrariness of geography to determine whether the Guideline Career Offender and other "crime of violence" enhancements are warranted either. Petitioner would have received a much lower sentence if he had been sentenced in the First, Fourth, Fifth, Seventh, or Eighth Circuits. That inequity should not be allowed.

**D. This case is an excellent vehicle to resolve the circuit conflict.**

The question raised here cleanly implicates the 5-1 circuit split. It was preserved in the district court, pressed and passed on by the court of appeals, and is case-dispositive of Petitioner's Career Offender and § 2K2.1 enhancements, just as it would be for an ACCA enhancement. Finally, there are no side issues under the Guidelines as to a possible alternative path to the enhancement via the enumerated offenses clause, for the reason the government conceded in its brief.

As such, the Court should resolve the general circuit conflict as to the categorical approach, and the specific circuit conflict as to whether this particular Florida prior meets the elements clause, by granting certiorari in this case. And, for the reasons identified by this Court in *Mathis* and *McNeill*, and by the First, Fourth, Fifth, Seventh and Eighth Circuits in the above-cited decisions—the Court should hold that Petitioner's 2003 Florida aggravated assault conviction did not "have as an element, the use, attempted use, or threatened use of physical force against the person of another" and should not have been used for enhancement.

## CONCLUSION

The petition for writ of certiorari should be granted, and the circuit conflict resolved in this case.

Respectfully submitted,

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