No. ____

IN THE

Supreme Court of the United States

RICHARD ALLEN HARRIS, JR.,

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

PETITION FOR A WRIT OF CERTIORARI

HECTOR A. DOPICO
FEDERAL PUBLIC DEFENDER
ANDREW L. ADLER
Counsel of Record
ASHLEY D. KAY
ASS'T FED. PUBLIC DEFENDERS
1 E. Broward Blvd., Ste. 1100
Ft. Lauderdale, FL 33301
(954) 356-7436
Andrew_Adler@fd.org

Counsel for Petitioner

October 15th, 2024

QUESTION PRESENTED

To determine whether a prior state conviction qualifies as a predicate under the Armed Career Criminal Act (ACCA), federal courts apply the categorical approach. Under that approach, federal courts must identify the elements of the state offense. To do so, they must consult state court decisions interpreting the state statute. This case involves the following, recurring scenario: after the defendant's prior state conviction, a state court issues a decision changing the scope of the offense elements in a manner that would affect whether the offense qualifies under ACCA.

The question presented is:

To determine the elements of a prior state conviction for purposes of applying ACCA's categorical approach, should federal courts consult the most recent, authoritative state court decisions (as the Eleventh Circuit holds), or the state court decisions pre-dating the defendant's prior conviction (as several other circuits hold)?

RELATED PROCEEDINGS

The following proceedings are related under this Court's Rule 14.1(b)(iii):

- *United States v. Harris*, No. 22-11533 (11th Cir. June 18, 2024);
- *United States v. Harris*, No. 21-cr-20525 (S.D. Fla. Apr. 22, 2022).

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

U.S. Sentencing Guidelines

Other Authorities

IN THE

Supreme Court of the United States

RICHARD ALLEN HARRIS, JR.,

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Allen Harris, Jr. respectfully seeks a writ of certiorari to review a judgment by the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion is reported at 2024 WL 3042686 and reproduced as Appendix ("App.") A, 1a–7a. The district court did not issue a written opinion.

JURISDICTION

The Eleventh Circuit issued its decision on June 18, 2024. Justice Thomas granted Petitioner's application for an extension of time to file this certiorari petition until October 16, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides in full:

> **(1)** In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of

this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

INTRODUCTION

To determine whether a prior state conviction qualifies as a predicate under the Armed Career Criminal Act (ACCA), federal courts apply the "categorical approach." Under that familiar approach, federal courts must identify the elements of the state offense. To do so, they must consult state court decisions interpreting the statute of conviction. But sometimes a state court will issue a decision that changes the scope of the elements *after* the defendant's prior state conviction. In that scenario, do federal courts consult that latest state court decision, or do they consult the state court decisions that were in effect at the time of the defendant's prior state conviction? The answer can determine whether the prior conviction qualifies under ACCA.

This case illustrates the point. Petitioner was subject to ACCA's 15-year mandatory minimum based on Florida aggravated assault convictions from 2003 and 2015. At those times, some Florida intermediate appellate courts had held that Florida assault could be committed recklessly, and this Court has held that reckless offenses do not qualify under ACCA. However, in 2022, the Florida Supreme Court held for the first time that Florida assault could *not* be committed recklessly. Although that 2022 decision post-dated Petitioner's prior convictions, the Eleventh Circuit relied on it, reasoning that this decision explained what the Florida assault statute had "always meant." As a result, Petitioner was not permitted to rely on any Florida intermediate appellate decisions from the time of his prior state convictions.

No other circuit has adopted the Eleventh Circuit's approach, and several circuits have employed a contrary methodology. The First and Fourth Circuits have

squarely held that federal courts must consult state court decisions pre-dating the defendant's prior state conviction. The Fifth and Eighth Circuits have done so as well (though the former's decision was vacated on other grounds and the latter's arose under the Guidelines). And, most recently, the Seventh Circuit expressly disagreed with the Eleventh Circuit, holding that a Florida aggravated assault conviction pre-dating the Florida Supreme Court's 2022 decision did not qualify under ACCA.

This Court should resolve the circuit conflict. The Court has repeatedly recognized that geography alone should not determine whether defendants are subject to ACCA's harsh penalty. And that is true even where the split is just 1–1. The Court has also repeatedly granted review to resolve circuit splits over ACCA out of the Eleventh Circuit and Florida in particular—ACCA's national epicenter. The Court should adhere to that practice here, especially given that the Eleventh Circuit has adopted an outlier position expansively interpreting ACCA, and it has done so in the context of one the most common ACCA predicates. More broadly, the question presented will also affect whether various state offenses satisfy numerous federal recidivism provisions—from the Sentencing Guidelines to the mandatory-life three-strikes statute—all of which are governed by the same categorical approach.

Finally, the Eleventh Circuit's decision contravenes this Court's ACCA precedent. This Court has made abundantly clear that federal courts must look to the law in effect at the time of the prior state conviction. That precedent controls here. And the Eleventh Circuit's contrary reasoning—that a state supreme court decision tells us what the statute has "always meant"—is contrary to the categorical approach.

STATEMENT

A. Legal Background

1. Where a defendant is convicted of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1), he is ordinarily subject to a statutory *maximum* penalty of 15 years. For defendants like Petitioner who were convicted before June 25, 2022, the statutory maximum is even lower: 10 years. *See* Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313, 1329 § 1204(c) (2022) (codified at 18 U.S.C. § 924(a)(8)). However, as this Court is aware, the Armed Career Criminal Act (ACCA) mandates a *minimum* sentence of 15 years where the defendant has three "previous convictions" for a "violent felony" or a "serious drug offense." 18 U.S.C. § 924(e).

Under ACCA, a "violent felony" is a felony that: "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). The definitions in subsection (ii) are not at issue: this case does not involve one of the former enumerated offenses; and this Court invalidated the latter "residual clause" in *(Samuel) Johnson v. United States*, 576 U.S. 591 (2015). Rather, this case involves the definition in subsection (i), also known as the "elements clause."

In *Borden v. United States*, 593 U.S. 420 (2021), the Court held that offenses with a *mens rea* of recklessness do not qualify as "violent felonies" under ACCA's elements clause. The Court explained that reckless offenses do not require the "use of physical force against the person of another." *See id.* at 429–45 (plurality op.); *id.*

at 446–47 (Thomas, J., concurring in the judgment). That particular case involved a prior conviction for aggravated assault under Tennessee law. *Id*. at 424–25.

2. This particular case involves prior convictions for aggravated assault under Florida law. In Florida, "[a]n 'assault' is an 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." Fla. Stat. § 784.011(1). While simple assault is a misdemeanor, Fla. Stat. § 784.011(2), aggravated assault is a felony, Fla. Stat. § 784.021(2). And "[a]n 'aggravated assault' is an assault: (a) With a deadly weapon without intent to kill; or (b) With an intent to commit a felony." Fla. Stat. § 784.021(1).

The Eleventh Circuit has long held that Florida aggravated assault qualifies as a "violent felony" under ACCA's elements clause. That court first reached that conclusion in *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328 (11th Cir. 2013). In *Turner*, however, the court simply relied on the language of Florida's assault statute—without asking how Florida courts had interpreted it. *See id*. at 1338. That was a key oversight because some Florida intermediate appellate courts had held that assault could be committed recklessly. And the Eleventh Circuit had already held that reckless offenses did not satisfy the (identical) elements clause in the Guidelines. *See United States v. Palomino Garcia*, 606 F.3d 1317, 1334–36 (11th Cir. 2010).

Despite that analytical omission, the Eleventh Circuit repeatedly reaffirmed *Turner*'s holding over the next decade. In *United States v. Golden*, 854 F.3d 1256 (11th Cir. 2017), for example, the Eleventh Circuit observed that some Judges on that

court had suggested that *Turner* had been wrongly decided. *Id*. at 1257 (citing *In re Hunt*, 835 F.3d 1277, 1288 (11th Cir. 2016) (Jill Pryor, J., joined by Wilson and Rosenbaum, JJ., concurring)). But applying its prior panel precedent rule, the court explained that, "even if *Turner* is flawed, that does not give us, as a later panel, the authority to disregard it." *Id*. Writing separately, Judge Jill Pryor explained that *Turner* was wrongly decided because Florida intermediate appellate courts had held that aggravated assault could be committed recklessly; and, in the absence of a Florida Supreme Court decision, those opinions controlled. *See id*. at 1258–60 & n.4 (Jill Pryor, J., concurring in result). She therefore urged the Eleventh Circuit to convene en banc and overrule *Turner*. *Id*. at 1260. However, the full court never did so. Rather, it continued to apply *Turner* and uphold sentencing enhancements that were based on prior Florida aggravated assault convictions. *See* App. C (citing cases).

Following this Court's decision in *Borden*, the Eleventh Circuit declined to continue to rely so uncritically on *Turner*. In *Somers v. United States*, 15 F.4th 1049 (11th Cir. 2021), the court acknowledged that Florida intermediate appellate courts had reached different conclusions about whether Florida assault could be committed recklessly. *See id*. at 1054–56. The Eleventh Circuit therefore certified related state-law *mens rea* questions for resolution to the Florida Supreme Court. *Id*. at 1056. In response, the Florida Supreme Court held that the Florida assault statute required a specific intent to threaten violence and therefore "cannot be accomplished via a reckless act." *Somers v. United States*, 335 So.3d 887, 892–93 (Fla. 2022).

Following the Florida Supreme Court's decision, the Eleventh Circuit again held that Florida aggravated assault qualified under ACCA's elements clause. *Somers v. United States*, 66 F.4th 890, 896 (11th Cir. 2023). The court explained that, because the Florida Supreme Court had clarified that a "reckless act will not suffice," "*Borden* poses no problem to Somers's ACCA-enhanced sentence." *Id*. Most importantly here, the court added this reasoning: "'When the Florida Supreme Court interprets a statute, it tell us what that statute always meant.' Somers cannot rely on earlier decisions of Florida's intermediate courts of appeal to avoid this clear holding." *Id*. (cleaned up) (quoting *United States v. Fritts*, 841 F.3d 937, 943 (11th Cir. 2016) and citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994)).

B. Proceedings Below

1. Petitioner pleaded guilty to being a felon in possession of a firearm, in violation of § 922(g)(1). *See* Dist. Ct ECF Nos. 3, 24–25; Dist. Ct. ECF No. 44 at 14.

Although Petitioner would have ordinarily faced a 10-year statutory maximum penalty, the probation officer prepared a pre-sentence investigation report (PSR) and determined that he was subject to ACCA's 15-year mandatory minimum. That determination was based on three prior Florida convictions, two of which were for aggravated assault with a deadly weapon—one occurring in 2003 and the other occurring in 2015. (PSR ¶¶ 22, 30, 51). In addition to triggering the 15-year mandatory minimum, the ACCA designation also enhanced his guideline range from 77–96 months to 180–210 months. (*See* PSR ¶¶ 22–25, 54–55, 102; U.S.S.G. § 4B1.4).

Petitioner objected to the ACCA designation. Dist. Ct. ECF No. 34. As relevant here, he argued that his prior Florida aggravated assault convictions did not qualify as "violent felonies" under this Court's decision in *Borden* because they could be committed recklessly. *See id*. at 3–7. At that point in time, the Eleventh Circuit had certified the *mens rea* question to the Florida Supreme Court, and that court had not yet issued its decision. Although the Florida Supreme Court had not yet resolved the question, Petitioner emphasized that Florida intermediate appellate courts had previously held that it could be committed recklessly. *Id*. at 5–6 (citing authorities).

Relying on *Turner* and *Golden*, the government responded that Florida aggravated assault qualified as a "violent felony" under Eleventh Circuit precedent, and *Borden* had not abrogated that circuit precedent. Dist. Ct. ECF No. 35 at 3–5.

At sentencing, Petitioner reiterated his written objections, but the district court overruled them on the ground that, under "the law in this circuit," his prior convictions "do qualify as [ACCA] predicates." Dist. Ct. ECF No. 45 at 3, 10. The court thereafter sentenced him to ACCA's 15-year mandatory minimum. *Id*. at 9; App. 9a.

2. On appeal, Petitioner reiterated his argument that Florida aggravated assault did not qualify under ACCA's elements clause and this Court's decision *Borden*. Again, he emphasized that Florida intermediate appellate court decisions had held that the offense could be committed recklessly. *See* Pet. C.A. Br. 8, 21–27.

The court of appeals affirmed. App. A. The Eleventh Circuit held that Petitioner's Florida aggravated assault convictions qualified under ACCA's elements clause. App. 3a–4a. The court of appeals applied categorical approach, which required

it to identify the "least culpable conduct" encompassed by the elements of the offense. App. 4a. Although Petitioner argued that his Florida aggravated assault convictions could be committed recklessly, the court rejected that argument as "foreclosed by precedent." *Id*. The court explained that it had recently rejected that argument in *Somers v. United States*, 66 F.4th 890, 895–96 (11th Cir. 2023). *Id*. As summarized above, *Somers* reached that conclusion based on the Florida Supreme Court's 2022 decision on certification, holding for the first time that Florida assault could not be committed recklessly. *Somers*, 66 F.4th at 896 ("'When the Florida Supreme Court interprets a statute, it tells us what that statute always meant.' Somers cannot rely on earlier decisions of Florida's intermediate courts of appeal to avoid this clear holding.") (cleaned up) (quoting *Fritts*, 841 F.3d at 943 and citing *Rivers*, 511 U.S. at 312–13)). "Accordingly," and applying *Somers*, the court of appeals concluded that Petitioner's "aggravated assault convictions qualify as ACCA predicates." App. 4a.

REASONS FOR GRANTING THE PETITION

The circuits are divided on the ACCA question presented. Five circuits have issued published opinions holding that federal courts must consult state court decisions pre-dating the defendant's prior state conviction. Only the Eleventh Circuit has held that federal courts must consult a subsequent state court decision. This Court should resolve the conflict. Otherwise, geography alone will determine whether various state convictions will satisfy ACCA and other federal recidivism provisions. This case presents a clean vehicle to resolve the conflict. And the Eleventh Circuit's outlier approach contravenes this Court's precedent and the categorical approach.

I. The circuits are divided on the question presented.

To determine whether a prior conviction satisfies ACCA's elements clause, federal courts apply the "categorical approach"—looking only to the elements of the prior conviction, not the facts. *See, e.g.*, *Mathis v. United States*, 579 U.S. 500, 509–12 (2016). And the elements of a prior state conviction are determined by state law, including decisions by state courts. *See, e.g.*, *Stokeling v. United States*, 586 U.S. 73, 85–86 (2019); *(Curtis) Johnson v. United States*, 559 U.S. 133, 138 (2010). However, the circuits are divided on which state court decisions federal courts should consult.

1. The Eleventh Circuit looks to the most recent, authoritative state court decision—even if that decision came *after* the defendant's prior state conviction.

a. As explained, the Eleventh Circuit in *Somers* rejected the defendant's *Borden* challenge to Florida aggravated assault. The Eleventh Circuit held that Florida aggravated assault satisfied ACCA's elements clause based on the Florida Supreme Court's 2022 decision holding that the offense could not be committed recklessly. *Somers*, 66 F.4th at 895–96. It did not matter to the Eleventh Circuit that the Florida Supreme Court's decision post-dated the defendant's prior conviction. And it did not matter that some earlier decisions of Florida's intermediate courts of appeals had held that recklessness sufficed. *Id*. at 896. That was so, according to the Eleventh Circuit, because "[w]hen the Florida Supreme Court interprets a statute, it tells us what that statute always meant." *Id*. (cleaned up; quotation omitted).

This has been the law in the Eleventh Circuit for nearly a decade. In *Somers*, the Eleventh Circuit quoted its 2016 decision in *Fritts*. There, the Eleventh Circuit

held that a 1997 Florida Supreme Court decision interpreting the elements of Florida robbery "tells us what that statute always meant." 841 F.3d at 943. To support that proposition, *Fritts* (like *Somers*) relied on *River Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994), which employed that reasoning in the context of a federal statute. *Id*. Thus, *Fritts* held that the Florida Supreme Court's decision authoritatively interpreting the Florida robbery statute controlled that ACCA case, even though that decision post-dated the defendant's prior conviction. *Id*. at 938–39.

b. Two Eleventh Circuit Judges have disagreed with that approach.

i. In *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016), another Florida robbery case, the Eleventh Circuit included as dicta the same language that would later appear as part of *Fritts*' holding. *Id*. at 1344; *see id*. at 1346 (Baldock, J., concurring in part and in the judgment) (declining to join that part of the opinion).

Writing separately, Judge Martin acknowledged that it was "generally true that when a court interprets a statute it tells us what the statute has always meant." *Id*. at 1351 n.5 (Martin, J., concurring in the judgment). But, she added, that principle did not apply in the ACCA context because "our interest is not about divining the true meaning of [the Florida statute]. Rather, our interest is in understanding what conduct could have resulted in Mr. Seabrooks's 1997 convictions under the statute, even if Florida courts were misinterpreting the statute at that time." *Id*. And, to do so, she explained that this Court's decision in *McNeill v. United States*, 563 U.S. 816 (2011) required federal courts to look to judicial decisions in effect at the time of the

defendant's prior conviction. *Id*. at 1351. She added that those judicial decisions showed how people "in the real world" were being prosecuted at that time. *Id*.

ii. A few years later, the Eleventh Circuit applied *Fritts* in *Welch v. United States*, 958 F.3d 1093, 1098 (11th Cir. 2020). Writing separately, Judge Rosenbaum lodged the same criticism as Judge Martin, opining that *Fritts* "went too far" by declining to "look[ ] to the state of the law as it actually existed in Florida's district courts when Fritts had been convicted." *Id*. at 1100 (Rosenbaum, J., concurring). She acknowledged that "the Florida Supreme Court has the final say in interpreting Florida's statutes" and may "nullif[y] any lower [Florida] court precedent" that existed. *Id*. "But," she added, "that does not mean that those decisions never happened, or that individuals were not convicted of robbery in those districts having used less force than" what the Florida Supreme Court "eventually required." *Id*. The *Fritts* approach, she explained, leads to "absurd results" and "torpedoes the rationale of the categorical approach." *Id*. at 1100–01. She concluded: "*Fritts*'s blind allegiance to an interpretation of the Florida robbery statute that was not, as a matter of fact, uniformly applied before the Florida Supreme Court issued [its decision] creates the very real possibility that it will keep defendants in prison for extended sentences based entirely on a legal fiction. That makes no sense. We live in the real world. And in the real world, whatever the Florida Supreme Court decided in 1997 that the Florida robbery statute 'always' meant cannot change the fact that, before [that decision], at least some of Florida's intermediate courts of appeals applied the Florida robbery statute to cover" conduct that would not satisfy ACCA. *Id*. at 1101–02.

iii. Despite the compelling critiques by Judges Martin and Rosenbaum, they did not carry the day. As explained, the Eleventh Circuit in *Somers* most recently reaffirmed and applied *Fritts*' reasoning in the context of Florida aggravated assault.

2. No other circuit has adopted the same methodological approach as the Eleventh Circuit. Meanwhile, several other circuits have taken a contrary approach.

a. In published opinions, the First and Fourth Circuits have both adopted the backward-looking approach favored by Judges Martin and Rosenbaum.

i. In *United States v. Faust*, 853 F.3d 39 (1st Cir. 2017), the First Circuit vacated and remanded an ACCA sentence that was predicated in part on a prior Massachusetts conviction for assault and battery on a police officer. *See id*. at 55–60. In determining whether that offense was overbroad vis-à-vis ACCA's elements clause, the First Circuit declined to rely on a state court decision post-dating the defendant's prior conviction or to predict how the state supreme court might resolve the issue in the future. *Id*. at 57–58. Relying heavily on this Court's decision in *McNeill*, the First Circuit instead asked "what the law was at the time of his [prior] conviction." *Id*. at 57; *see id*. (explaining that this Court in "*McNeill* pointed to its previous ACCA cases, which looked to the versions of state law that were current at the time of the defendant's convictions, not at the time of the Court's decision").

ii. In *United States v. Cornette*, 932 F.3d 204 (4th Cir. 2019), the Fourth Circuit adopted the same approach. Also citing *McNeill*, the Fourth Circuit asked "whether, at the time of Cornette's conviction in 1976," the Georgia burglary statute was overbroad. *Id*. at 213. Holding that it was, the Fourth Circuit found dispositive

an intermediate appellate court decision pre-dating the defendant's conviction that adopted an overbroad definition of burglary. *Id.* at 214 ("Thus, when Cornette was convicted, Georgia's definition of burglary criminalized a broader range of conduct than the generic definition of burglary we use for ACCA purposes."). The Fourth Circuit refused to consider a state supreme court decision to the contrary because it "was not decided until 1977, whereas Cornette was convicted in 1976." *Id.* "That being so," the court explained, the intermediate appellate court decision was "the binding interpretation of Georgia law at the time of Cornette's conviction." *Id.* In reaching this conclusion, the Fourth Circuit observed that its backward-looking approach "comports with other circuits that have considered the question," citing the First Circuit's decision in *Faust* and the Eighth Circuit decision discussed below. *Id.* at 215.

b. Two more circuits have adopted the same backward-looking approach.

i. In *United States v. Vickers*, 967 F.3d 480 (5th Cir. 2020), the Fifth Circuit held that the defendant's prior Texas conviction for felony murder qualified under ACCA's elements clause. Although the defendant relied on a state court decision holding that the offense could be committed negligently, the Fifth Circuit deemed that decision "inapplicable here because it was decided in 2007, more than 20 years after Vickers' conviction." *Id.* at 486. Relying on this Court's decision in *McNeill*, the Fifth Circuit would "consider only the state law as it existed at the time of Vickers' 1982 murder conviction." *Id.* Thus, the Fifth Circuit relied instead on a 1977 judicial decision, which occurred before the 2007 state court decision and which established that felony murder required a mental statute or recklessness or higher.

Id. at 486–87. Because the Fifth Circuit's precedent at the time provided that recklessness sufficed for the elements clause, this Court later issued a GVR in *Vickers* in light of the decision in *Borden*. 141 S. Ct. 2783 (2021) (mem). Thus, while the Fifth Circuit's decision was vacated, it was vacated on other grounds. And there is no reason to believe that the Fifth Circuit would not continue to follow *Vickers*' approach.

ii. In *United States v. Roblero-Ramirez*, 716 F.3d 1122 (8th Cir. 2013), the Eighth Circuit adopted the same approach to hold that the defendant's 2006 Nebraska manslaughter conviction did not qualify as a "crime of violence" under the Sentencing Guidelines. The Eighth Circuit explained that, from 1994 until 2011, Nebraska courts did not require an intent to kill. *Id*. at 1126–27. As a result, the Eighth Circuit could not "conclude Roblero–Ramirez's Nebraska manslaughter conviction, as interpreted by the Nebraska Supreme Court at the time," qualified under the Guidelines. *Id*. at 1127. Although the Nebraska Supreme Court later reinstated an intent requirement, which likely would have qualified under the Guidelines, the Eighth Circuit declined to consider that state supreme court decision because its "interpretation was not Nebraska law when Roblero-Ramirez was convicted in 2006." *Id*. There is no reason to believe that the Eighth Circuit would not follow this same backwards-looking approach in the ACCA context as well.

c. Finally, there is the Seventh Circuit's most recent decision in *United States v. Anderson*, 99 F.4th 1106 (7th Cir. 2024). As explained below, the Seventh Circuit employed a somewhat different rationale than the four circuits above. But it

expressly disagreed with the Eleventh Circuit's holding in *Somers* and squarely held that Florida aggravated assault does not qualify under ACCA's elements clause.

Applying plain-error review, the Seventh Circuit expressly disagreed with the Eleventh Circuit's reasoning in *Somer*s that "the Florida Supreme Court's decision in *Somers* 'tells us what the statute always meant.'" *Id*. at 1112. That was so, the Seventh Circuit explained, because "the Eleventh Circuit did not address Florida's approach to statutory interpretation." *Id*. at 1112. And, under that state-law approach, the Florida Supreme Court's decision in *Somers* did "not announce a retroactive change in the law." *Id*. at 1111. As a result, the Seventh Circuit looked to earlier Florida intermediate appellate court decisions holding that Florida assault could be committed recklessly. *Id*. at 1111–12. And it concluded that Florida aggravated assault did not qualify as a "violent felony" under ACCA. *Id*. at 1112–13. This decision creates a direct conflict with the Eleventh Circuit's decision in *Somers*.

The Seventh Circuit's decision is not yet final. That decision was issued on April 30, 2024. On May 28, 2024, the government petitioned for panel rehearing, arguing that the panel had misapplied the plain-error standard of review. In doing so, the government acknowledged that the panel had created a circuit split with the Eleventh Circuit. *See Anderson*, ECF No. 53 at 1 (7th Cir. No. 21-1325) (May 28, 2024) (panel opinion "stakes out an apparent circuit conflict"); *id*. at 9 (noting the "majority's decision to split with a sister circuit"); *id*. at 11–12 (noting the "disagreement among the circuits") (quotation omitted). The defendant responded to the government's petition on June 12, 2024. At this time, the panel has not ruled on

the government's petition. However, the reasons below establish that this Court's review is warranted regardless of how the Seventh Circuit resolves that petition.

II. The question presented warrants review.

1. This Court should grant certiorari to resolve the circuit conflict above on the ACCA question presented. In light of that conflict, geography alone now determines whether federal firearm defendants will face ACCA's 15-year mandatory minimum penalty. This Court has never allowed the arbitrariness of geography to determine whether people are subject to ACCA's harsh penalty. This explains why ACCA cases have become a fixture of the Court's docket. Indeed, resolving circuit splits over ACCA has become an annual event. *See, e.g.*, *Delligatti v. United States*, 2024 WL 2805741 (U.S. No. 23-825) (cert. granted June 3, 2024); *Brown v. United States*, 602 U.S. 101 (2024); *Wooden v. United States*, 595 U.S. 360, 365 & nn.1–2 (2022); *Borden v. United States*, 593 U.S. 420, 425 & nn.1–2 (2021); *Shular v. United States*, 589 U.S. 154, 160 (2020); *Quarles v. United States*, 587 U.S. 645, 649 (2019); *Stokeling v. United States*, 586 U.S. 73 (2019); *United States v. Stitt*, 586 U.S. 27, 31 (2018). In light of the untenable sentencing disparities, the government itself has previously acquiesced to certiorari when faced with circuit splits over ACCA. *See, e.g.*, *Delligatti*, Br. for U.S. 8, 16–18, 2024 WL 1956647 (U.S. No. 23-825) (May 1, 2024); *Jackson v. United States*, Br. for U.S. 9, 11–13 (U.S. No. 22-6640) (Mar. 24, 2023); *Shular*, Br. for U.S. 5–6, 10–14, 2019 WL 4750019 (U.S. No. 18-6662) (Feb. 13, 2019).

Moreover, the Court has granted review to resolve ACCA circuit conflicts that are shallower than the conflict here. For example, the Court has previously granted

review in two ACCA cases—both out of the Eleventh Circuit and Florida—where the circuit conflict was just 1–1. *See Shular*, 589 U.S. at 760 (resolving split between the Ninth and Eleventh Circuits); *Stokeling*, U.S. Br. in Opp. 14, 16–17, 2017 WL 8686119 (No. 17-5554) (Dec. 13. 2017) (arguing—unsuccessfully—that an admitted 1–1 split between the Ninth and Eleventh Circuits was too "shallow" to warrant review). And, beyond ACCA, it is not uncommon for the Court to grant review in federal criminal cases to resolve 1–1 circuit conflicts. *See, e.g.*, *Greer v. United States*, 593 U.S. 503, 507 (2021); *Nichols v. United States*, 578 U.S. 104, 108 (2016).

2. Resolving ACCA splits out of the Eleventh Circuit, and out of Florida in particular, is especially important because it is the national epicenter for ACCA. According to the most recent national data from the Commission, the Eleventh Circuit accounted for nearly a quarter (24.4%) of all ACCA cases. And the three federal districts in Florida accounted for 14.8% of all such cases—with the Middle and Southern Districts of Florida in the top five. U.S. Sentencing Comm'n, Federal Armed Career Criminals: Prevalence, Patterns, and Pathways 21 (Mar. 2021).[1] Given that the Eleventh Circuit and Florida account for such a large swath of ACCA cases, it is important to resolve circuit splits where the Eleventh Circuit has taken a side in the debate, especially where it adopts a outlier view expansively applying ACCA.

Reflecting Florida's ACCA-heavy docket, this Court has previously granted review in cases involving Florida offenses that are commonly invoked as predicates.

---

[1] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303_ACCA-Report.pdf.

See, e.g., *Brown*, 602 U.S. at 109–10 (Florida distribution of cocaine); *Shular*, 589 U.S. at 159 (same); *Stokeling*, 586 U.S. at 76–77 (Florida robbery); *(Curtis) Johnson v. United States*, 559 U.S. 133, 135–36 (2010) (Florida simple battery); *James v. United States*, 550 U.S. 192, 195 (2007) (Florida attempted burglary). Granting review here would continue that practice because Florida aggravated assault is one of the most commonly invoked ACCA predicates. After all, Florida is a state with over 20 million people. And between 50,000–1000,000 aggravated assaults per year have been reported in Florida going back to 1980. *See* Fla. Dep't of Law Enforcement, Uniform Crime Reports, Annual Reports, Offense Data, Aggravated Assault: Firearm Type and Rate for Florida, 1971–2020 (last visited Oct. 11, 2024).[2] That is a lot of potential Florida aggravated assault offenses available for later use as ACCA predicates.

It is therefore unsurprising that, over the past decade, there have been dozens of cases where the Eleventh Circuit has upheld the imposition of an enhanced sentence based in part on a prior Florida conviction for aggravated assault. *See* App. C (citing 67 cases). And those reported appellate cases are significantly under-inclusive given that the Eleventh Circuit adversely resolved that issue in *Turner* (2013) and routinely applied that precedential holding for the next decade. As a result, there have been countless criminal defendants who have been subject to sentencing enhancements based on prior Florida aggravated assault convictions, but who nonetheless have not objected or appealed in light of adverse circuit precedent.

[2] https://www.fdle.state.fl.us/CJAB/UCR/Annual-Reports/UCR-Offense-Data.

Nor is that dynamic limited to Florida. Florida has one of the most transient populations in the country. That means people who commit aggravated assault in Florida do not necessarily remain in Florida. This explains why federal courts from every corner of the country have considered whether Florida aggravated assault qualified as a "violent felony" or "crime of violence." *See, e.g.*, *United States v. Stewart*, 711 F. App'x 810, 811–12 (8th Cir. 2018); *United States v. Pittro*, 646 F. App'x 481, 482–85 (6th Cir. 2016); *United States v. Alonzo-Garcia*, 542 F. App'x 412, 414–17 (5th Cir. 2013); *United States v. Koenig*, 410 F. App'x 971, 973 (7th Cir. 2010); *United States v. Fields*, 2023 WL 309051, at *4 (S.D. Miss. 2023); *Matthews v. United States*, 2019 WL 2578632, at *2–3 (D.S.C. 2019); *United States v. Donnelly*, 2017 WL 1370706, at *1–2 (D. Nev. 2017), *rev'd on other grounds* 710 F. App'x 335 (9th Cir. 2018); *United States v. Murdock*, 2016 WL 910153, at *4 (D. Me. 2016). In that regard, the Seventh Circuit's recent decision in *Anderson* is anomalous only because it broke with (rather than followed) the home-circuit precedent from the Eleventh Circuit.

3. But the question presented is by no means limited to Florida aggravated assault. Far from it: the question presented will matter whenever a decisional change in state law (post-dating a defendant's prior conviction) affects whether that offense satisfies ACCA's definitions. As the cases summarized above reflect, there is no limit to the universe of offenses this could affect. *See, e.g.*, *Cornette*, 932 F.3d at 213–15 (Georgia burglary); *Faust*, 853 F.3d at 56–58 (Massachusetts assault and battery).

Moreover, the question presented will apply far beyond just ACCA. Indeed, it will apply equally to any federal recidivism provision requiring a federal court to

apply the categorical approach and ascertain the least culpable conduct under state law. Even limiting the universe to elements clauses alone, there are several such provisions in federal law. As explained above, the Sentencing Guidelines have an identical elements clause that defines whether an offense is a "crime of violence" for purposes of the career-offender enhancement, U.S.S.G. § 4B1.2(a)(1)—a provision subjecting offenders to "particularly severe punishment," *Buford v. United States*, 532 U.S. 59, 61 (2001). Commonly applied enhancements in the firearm and immigration Guidelines have the same elements clause too. *See* U.S.S.G. §§ 2K2.1(a), (b)(5)(C)(i) & cmt. n.1; U.S.S.G. §§ 2L1.2(b)(2)(E), (3)(E) & cmt. n.2; *see also Roblero-Ramirez*, 716 F.3d at 1123, 1126–27 (addressing Nebraska manslaughter under § 2L1.2).

Beyond the Guidelines, an identical elements clause defines the term "serious violent felony" in the federal three-strikes statute, which mandates a life sentence for certain recidivists. 18 U.S.C. § 3559(c)(2)(F)(ii). After the First Step Act of 2018, that same definition from § 3559 is now incorporated into enhanced mandatory minimum penalties under the primary federal drug statute. 21 U.S.C. §§ 802(58)(A), 841(b)(1)(A)–(B). And similarly-worded elements clauses are now the only remaining "crime of violence" definitions in both 18 U.S.C. § 16(a) and 18 U.S.C. § 924(c)(3)(A) after this Court struck down their "residual clause" counterparts in *Sessions v. Dimaya*, 584 U.S. 148 (2018) and *United States v. Davis*, 588 U.S. 445 (2019).

The upshot is that the question presented has the potential to affect whether various prior convictions qualify under numerous federal recidivism provisions. Resolving the ACCA question will therefore provide useful guidance across the board.

III. This case is an ideal vehicle.

This case presents a clean procedural vehicle to resolve the question presented.

1. To begin, there can be no dispute that Petitioner properly preserved his argument in the courts below. In his written PSR objection in the district court, he argued that his prior Florida aggravated assault convictions did not satisfy ACCA's elements clause under this Court's decision in *Borden* because they could have been committed recklessly. Dist. Ct. ECF No. 34 at 3–7. He reiterated that argument at sentencing. Dist. Ct. ECF No. 45 at 3, 10. And then again on appeal. Pet. C.A. Br. 8, 21–27. Accordingly, the Eleventh Circuit expressly reviewed his argument *de novo*. App. 3a. Because Petitioner preserved his argument, there is no risk that plain-error review would obstruct this Court's ability to decide the question presented.

Similarly, because this case arises on direct appeal rather than collateral review under 28 U.S.C. § 2255, there are no procedural impediments to review. And because this case arises under ACCA rather than the Guidelines, the Commission could not resolve the split. *See Braxton v. United States*, 500 U.S. 344, 347–49 (1991).

2. The lower courts, moreover, rejected Petitioner's argument based solely on circuit precedent. The district court cited "the law in this circuit" holding that his prior convictions "do qualify as [ACCA] predicates." Dist. Ct. ECF No. 45 at 3. And the Eleventh Circuit likewise held that Petitioner's argument was "foreclosed by precedent." App. 4a. Specifically, the court of appeals applied its recent decision in *Somers*, which held that Florida aggravated assault qualified under ACCA's elements clause notwithstanding *Borden*. *Id.* (citing *Somers*, 66 F.4th at 895–96). As explained

above, *Somers* reached that conclusion because, although some Florida intermediate appellate courts had previously held that Florida aggravated assault could be committed recklessly, the Florida Supreme Court had recently held that it could not.

3. The question presented is otherwise dispositive here. Neither the district court nor the Eleventh Circuit identified any alternative ground to uphold the ACCA enhancement. Indeed, the probation officer identified only three possible ACCA predicates, and two of the three were prior convictions for Florida aggravated assault. (PSR ¶ 22). Moreover, the Eleventh Circuit observed that "[t]he parties here agree that Florida aggravated assault qualifies as a violent felony only if it satisfies the elements clause." App. 3a–4a. That was so because ACCA does not enumerate assault as a predicate offense, and this Court has invalidated ACCA's residual clause.

In addition to being case dispositive, the question presented will have a major practical effect on Petitioner's liberty. Were he to prevail in this Court, he would face a statutory maximum sentence of 10 years rather than a mandatory minimum sentence of 15 years. And his guideline range would be even lower: 77–96 months. *See supra*, at 8. Even the *high*-end of that guideline range is *seven years* lower than the 15-year mandatory minimum that he received under ACCA. Thus, the question presented is not only dispositive but has major consequences for Petitioner himself.

IV. The decision below is wrong.

The Eleventh Circuit's outlier approach conflicts with this Court's precedent.

1. In *McNeill v. United States*, 563 U.S. 816 (2011), the Court interpreted ACCA's definition of a "serious drug offense" in § 924(e)(2)(A)(ii). Under that

definition, a state drug offense qualifies if, *inter alia*, "a maximum term of imprisonment of ten years or more is prescribed by law" for the offense. In that case, the maximum term of imprisonment was ten years at the time of the defendant's prior state conviction, but the state later reduced the maximum term of imprisonment to less than ten years. *Id*. at 818. This Court held that the relevant maximum term of imprisonment under ACCA "is the maximum sentence applicable to his offense when he was convicted of it." *Id*. at 817–18; *see id*. at 825 (restating this holding).

The Court reasoned that "[t]he plain text of ACCA" required that result because it was concerned with determining whether a "previous conviction" was for a serious drug offense. *Id*. at 820 (brackets omitted). 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*. The Court explained that it had already done this in an earlier ACCA case involving the same "serious drug offense" definition, where it had looked to the "version of state law . . . that [the defendant] was convicted of violating." *Id*. (citing *United States v. Rodriquez*, 553 U.S. 377, 380–81 (2008)). The Court added that, although ACCA's definition used the present tense ("is prescribed by law"), that did not overcome "the fact that ACCA is concerned with convictions that have already occurred." *Id*. Thus, whether a conviction qualifies as an ACCA predicate "can only be answered by reference to the law under which the defendant was convicted." *Id*.

McNeill continued that its conclusion was supported by the Court's "violent felony" precedents too. The Court observed that, to ascertain the elements in *Taylor v. United States*, 495 U.S. 575 (1990), it "turned to the version of state law that the

defendant was actually convicted of violating," even though there had been a "subsequent change in state law." *Id*. at 821 (citing *Taylor*, 495 U.S. at 578 n.1, 602). And the Court likewise observed that, in *James v. United States*, 550 U.S. 192 (2007), it "looked to the versions" of state law "that were in effect 'at the time of James' 1993 state conviction.'" *Id*. at 821 (citing *James*, 550 U.S. at 197) (brackets omitted). "Having repeatedly looked to the historical statute of conviction in the context of violent felonies," the Court saw "no need to interpret 'serious drug offenses' in the adjacent section of the same statute any differently." *Id*. at 822 (brackets omitted).

McNeill and the ACCA precedents cited there establish that, to ascertain the elements and statutory maximum of a prior state offense, ACCA requires courts to consult state law in effect at the time of the prior conviction. The Court recently reaffirmed—and extended—that understanding in *Brown v. United States*, 602 U.S. 101 (2024). *Brown* held that the reference to a "controlled substance" in ACCA's "serious drug offense" definition referred to substances that were controlled at the time of the prior state conviction, not at the time of the later federal firearm offense or sentencing. To reach that conclusion, the Court repeatedly relied on *McNeill*'s "'backward-looking' examination." *Id*. at 111 (quoting *McNeill*, 563 U.S. at 820); *see id*. ("as we explained in *McNeill*, ACCA requires sentencing courts to examine the law as it was when the defendant violated it, even if that law is subsequently amended"); *id*. at 114–15 (explaining that *McNeill* rejected the argument that a "subsequent change in state law" could effectively "erase the earlier conviction")

(quotation omitted); *id*. at 119–20 (explaining that *McNeill* "held that [ACCA] requires a historical inquiry into the state law at the time of that prior offense").

The Eleventh Circuit's approach is irreconcilable with this Court's precedent. Rather than consult state law in effect at the time of the defendant's prior state conviction, the Eleventh Circuit consults the most recent, authoritative state court decision interpreting the elements of the offense—even where that decision post-dates the defendant's prior state conviction. In this case, for example, the Eleventh Circuit relied on the Florida Supreme Court's 2022 decision in *Somers* to ascertain the elements of Florida aggravated assault, even though that decision long post-dated Petitioner's 2003 and 2015 assault convictions. *See* App. 2a, 4a (applying *Somers*); *Somers* 66 F.4th at 895–96 ("The Florida Supreme Court has told us unambiguously that assault under Florida law . . . cannot be committed recklessly.").

2. Instead of relying on this Court's ACCA precedent, the Eleventh Circuit relied on *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994). *Rivers* is inapposite.

In *Rivers*, this Court articulated the following proposition of federal statutory interpretation: "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." 511 U.S. at 312. In other words: "when this Court construes a statute, it is explaining its understanding of what the statute has meant

continuously since the date when it became law." *Id*. at 313 n.12. However, this proposition does not apply in the context of this case for two, independent reasons.

First, *Rivers* involved a federal statute, whereas this case involves a state statute. And while this Court is the final arbiter of federal statutes, "state courts [are] the final arbiters of state law in our federal system." *United States v. Taylor*, 596 U.S. 845, 859 (2022). It follows that, "because we are dealing with a Florida statute, we must apply Florida's rules of statutory construction," including its rules about when judicial decisions interpreting Florida statutes apply retroactively. *Anderson*, 99 F.4th at 1111. However, as the Seventh Circuit explained in *Anderson*, "the Eleventh Circuit did not address Florida's approach to statutory interpretation." *Id*.

In that regard, Florida does *not* follow *Rivers*' federal rule. Instead, "the Florida Supreme Court held that all decisions of th[at] Court disagreeing with a statutory construct previously rendered by a district court constitute 'changes' in the applicable law from the law at the time of conviction," and such "court-initiated 'changes' in the law do not apply retroactively unless the court states that the change satisfies a three-part test." *Id*. (quoting *Florida v. Barnum*, 921 So.2d 513, 528 (Fla. 2005)). Because the Florida Supreme Court's decision in *Somers* did not satisfy that state-law, three-part test, it did "not announce a retroactive change in the law." *Id*.

Second, even if Florida did follow the *Rivers* rule, that rule still would not apply here. The Eleventh Circuit reasoned that, although the Florida Supreme Court issued its *Somers* decision about Florida assault in 2022, that decision "tells us what that statute always meant." *Somers*, 66 F.4th at 896 (cleaned up). The problem with this

reasoning is that courts in the ACCA context are not tasked with determining what the state statute *theoretically* meant when the defendant was convicted. Rather, they are tasked with determining the least culpable conduct that *actually* could have been prosecuted under the state statute when the defendant was convicted. *See, e.g.*, *Borden*, 593 U.S. at 441–42 (plurality op.) (citing *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013)); *(Curtis) Johnson*, 559 U.S. at 137. The Eleventh Circuit itself recognized in this case that ascertaining the "least culpable conduct" is part of the categorical approach that federal courts must apply in the ACCA context. App. 4a.

Under the Eleventh Circuit's approach, however, it would not matter if the defendant actually could have been—or even if he in fact was—prosecuted for conduct that did not satisfy ACCA's federal definitions. "This outcome torpedoes the rationale of the categorical approach." *Welch*, 958 F.3d at 1101 (Rosenbaum, J., concurring). Indeed, it "creates the very real possibility that it will keep defendants in prison for extended sentences based entirely on a legal fiction. That makes no sense. We live in the real world. And in the real world, whatever the Florida Supreme Court decided" in 2022 that the Florida assault had "'always' meant cannot change the fact that, before [that decision], at least some of Florida's intermediate courts of appeals applied the Florida [assault] statute to cover" reckless conduct. *Id*. at 1102.

Here, the Eleventh Circuit erroneously made no effort to ascertain the state of Florida law—as it actually existed on the ground—at the time of Petitioner's prior Florida aggravated assault convictions. Thus, the decision below should be vacated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HECTOR A. DOPICO
FEDERAL PUBLIC DEFENDER

/s/ Andrew L. Adler
ANDREW L. ADLER
Counsel of Record
ASHLEY D. KAY
ASS'T FED. PUBLIC DEFENDERS
1 E. Broward Blvd., Ste. 1100
Ft. Lauderdale, FL 33301
(954) 356-7436
Andrew_Adler@fd.org