

IN THE
Supreme Court of the United States

JORGE AVILA TORREZ,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

**APPLICATION FOR EXTENSION OF TIME WITHIN WHICH
TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND
CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

Under Supreme Court Rule 13.5, Jorge Avila Torrez respectfully requests a 60-day extension of time, to and including February 22, 2018, to file a petition for a writ of certiorari in this case. The court of appeals entered its judgment on August 28, 2017 (App. B) and denied a timely filed petition for rehearing on September 25, 2017 (App. C). Without an extension, a petition for certiorari would be due on December 24, 2017. This Court has jurisdiction under 28 U.S.C. §1254(1). Counsel for respondent the United States does not object to this request.

1. A defendant convicted of murder is eligible for a federal death sentence only if the jury finds at least one of the aggravating factors enumerated in the Federal Death Penalty Act (“FDPA”), 18 U.S.C. §3592(c). Op. (App. A) 23. The jury found

Torrez death-eligible on the basis of two such factors: (1) that he had “previously been convicted of a ... State offense ... involving the use or attempted or threatened use of a firearm ... against another person,” 18 U.S.C. §3592(c)(2), and (2) that he had “previously been convicted of 2 or more ... State offenses, ... committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person,” *id.* §3592(c)(4). The government’s sole proof of those aggravators was that Torrez had been convicted in Virginia state court on December 10, 2010 of crimes that occurred on February 10 and 27, 2010. Both those underlying crimes and the Virginia convictions for them occurred after the July 11, 2009 murder for which Torrez was sentenced to death in federal court.

2. Before the Fourth Circuit, in addition to challenging his conviction and sentence on several other grounds, Torrez argued that his Virginia convictions cannot establish the prior-conviction aggravators for two reasons. First, he argued that proof of the prior-conviction aggravators is governed by the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990), and its progeny. Under that approach, Torrez’s Virginia convictions do not establish either of the aggravators in question, because there is no basis to conclude that the elements of the state crimes satisfy the federal definitions. Second, Torrez argued that the prior-conviction aggravators apply only to convictions “previous[.]” to the offense at issue, not to subsequent convictions for post-offense conduct.

3. A divided panel of the Fourth Circuit affirmed Torrez’s conviction and sentence, holding that circuit precedent required it to reject both of Torrez’s arguments concerning the prior-conviction aggravators. Op. 22-39 (post-offense conduct); Op. 39-55

(categorical approach). But two of the panel’s three members expressed strong misgivings about the result they were required to reach. First, Judge Floyd dissented on the ground that this Court’s precedents, including *James v. United States*, 550 U.S. 192 (2007), had abrogated the Fourth Circuit’s precedent on the applicability of the categorical approach. Op. 63-68. Second, Judge Thacker—joined by Judge Floyd—“observe[d] the merit of [Torrez’s] statutory argument” on the question whether the prior-conviction aggravators can be satisfied by post-offense conduct. Op. 38 n.10. “Unbound by [circuit precedent],” Judge Thacker wrote, “one could read the phrase ‘has previously been convicted’ in (c)(2) and (c)(4) as ambiguous and invoke the rule of lenity.” *Id.*

4. Torrez intends to petition for certiorari at least on the two issues discussed above: whether the FDPA’s prior-conviction aggravators are subject to the categorical approach, and whether they can be satisfied by convictions for offenses committed *after* the capital offense.

5. New Supreme Court counsel are representing Torrez pro bono, and those counsel—who first appeared before the Fourth Circuit on the petition for rehearing en banc—require additional time to familiarize themselves with this exceptionally complex case and with the many issues raised before the Fourth Circuit. (The briefs before the Fourth Circuit spanned more than five hundred pages and the joint appendix more than five thousand.) Doing so will enable counsel to prepare a petition for certiorari focused on the issues most appropriate for this Court’s review.

6. This capital case presents issues literally of life-or-death significance for Torrez and other federal capital defendants who are charged with offenses purportedly

rendered death-eligible under the prior-conviction aggravators. Given the importance of the issues and the need for his new counsel to familiarize themselves with the case, Torrez respectfully requests a 60-day extension of time, to and including February 22, 2018, in which to file his petition for certiorari.

Respectfully submitted.



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November 21, 2017