**THE SUPREME COURT OF FLORIDA**

FRED SOMERS,

*Appellant,*

vs. Case No. SC21-1407

UNITED STATES OF AMERICA,

*Appellee.*
_____/

**APPELLANT'S MOTION FOR REHEARING AND CLARIFICATION**

Appellant Fred Somers files this Motion for Rehearing pursuant to Florida Rule of Appellate Procedure 9.330 and in support states the following:

On November 17, 2022, this Honorable Supreme Court of Florida issued its opinion answering a certified question from the Eleventh Circuit Court of Appeals. *Somers v. United States,* No. SC21-1407, 2022 WL 16984702 (Fla. Nov. 17, 2022).

In issuing its opinion the Honorable Court did overlook or misapprehend important points of law and fact.

*i. The Court should rehear the case because it relied on plain definitions of "threat," which do not cover the possibility of a threat "by act."*

After rephrasing the Eleventh Circuit's questions, the Court concluded the statute "prohibits an intentional expression of an intent to use physical force to harm another's person." *Id.* at 12. In arriving at this decision, the Court considered the dictionary definitions of "threat." As noted by the Court, Webster's Dictionary defines a "threat" as "an expression of intention to inflict evil, injury, or damage."

*Id.* at 10 (citing *Webster's Seventh New Collegiate Dictionary* 920 (1972)). A "threat" is also "[a]n expression of an intention to inflict pain, injury, evil, or punishment on a person or thing." *Id.* at 11 (citing *American Heritage Dictionary New College Edition* 1340 (1979)). Both definitions incorporate "expression," but the Court neglected to explore the common understanding of "expression" in its analysis.

"Expression" is commonly defined as communication through words. It is defined as "an act, process, or instance of representing in a medium (*such as words*): UTTERANCE." "Expression." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/expression. Accessed 30 Nov. 2022 (emphasis added). The American Heritage dictionary similarly defines "expression" as "the act of expressing, conveying, or *representing in words*, art, or movement a manifestation." "Expression." *American Heritage Dictionary,* https://www.ahdictionary.com/word/search.html?q=expression. Accessed 30 Nov. 2022 (emphasis added).

The Court's conclusion that Florida assault "cannot be accomplished via a reckless act" was limited to threats *by word*. But a Florida assault can be committed by "word *or act*." Fla. Stat. § 784.011(1). The Court failed to address whether an assault can be committed by a reckless act.

*ii. The Court failed to put "threat" into context by overlooking the plain meaning of "intentional."*

Just like the Court overlooked aspects of the definition of "threat," it failed to put "threat" into context with the plain meaning of "intentional." "Intentional" means "done by intention or design: intended." "Intentional." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/intentional. Accessed 30 Nov. 2022. In other words, volitional, not accidental (the general distinction between criminal and negligent conduct). The Court overlooked that an intentional act may be committed recklessly.

For example, a driver can intentionally run a red light and thereby pose an unlawful threat to do violence to another driver crossing his line of travel. A jury would have the prerogative to find the defendant's driving to be "reckless." The Court should have addressed whether such an intentional, reckless act qualifies as assault under Florida law in order enable the Eleventh Circuit Court of Appeals to resolve a categorical inquiry.

*iii. The Court should not have rephrased the Eleventh Circuit's question.*

The Eleventh Circuit specifically asked the question – does the first element of Florida's assault statute require a specific intent – because it was tasked with making a categorical determination under federal law. In applying the categorical approach, the Eleventh Circuit must consider all variations of an offense, not just

one possible way of committing it. The court looks at all the statutory elements, to determine *"*[i]f any – even the least culpable – of the acts criminalized" entails the requisite level of force. *Borden v. United States,* 141 S. Ct. 1817, 1821 (2021).

The Eleventh Circuit recognized that an intentional act can be committed recklessly (and thereby fail to satisfy the elements clause). If the court thought that was not a possibility, there would have been no reason for the question. The ACCA's elements clause "requires *both* the general *intent* to *volitionally* take the act of using, attempting to use, or threatening to use force *and something more*: that the defendant direct the action at a target, namely another person." *United States v. Somers,* 15 F.4th 1049, 1053 (11th Cir. 2022) (emphasis added).

Decisions from Florida's intermediary courts did not (in the opinion the Eleventh Circuit) definitively resolve whether a Florida assault could be proven by recklessness. *Id.* at 1054-56 (*comparing*, *e.g., Denard v. State,* 30 So. 3d 595, 596 (Fla. 5th DCA 2008) (reversing aggravated assault conviction because evidence did not show defendant had the specific intent to threaten the victim), *with LaValley v. State,* 633 So. 2d 1226, 1228 (Fla. 5th DCA 1994) ("'willful and reckless disregard for the safety of others' could substitute for proof of intentional assault.")).

The Court here did not resolve the perceived conflict because it did not consider whether an intentional act, committed recklessly, could satisfy the first

element of the statute. Instead, the Court collapsed the question thereby eliminating the specific intent inquiry. The Eleventh Circuit asked the "specific intent" question so it could properly apply the *Borden* framework. *See Somers,* 15 F.4th at 1053 (a prior offense falls within the elements clause if it includes "[s]pecific intent to direct action at another[.]" (citing *Borden,* 141 S. Ct. at 1828)). The Court should have answered the question as it was asked by the Eleventh Circuit.

*iv. The Court's decision overlooks prior caselaw and creates confusion about the state of Florida law.*

The Court's finding, that an assault cannot be committed recklessly, brings into doubt many previous opinions on the issue. The Court did not clarify how those prior decisions should be considered in light of its decision. Are those decisions no longer good law? How do we explain their reasonings?

In *White*, the Court reaffirmed a prior definition of an assault as a "wrongful action creating fear of imminent bodily harm, with an apparent present ability to inflict injury." 324 So. 2d 630, 631 (Fla. 1975) (paraphrasing *Motley v. State*, 20 So. 2d 798, 800 (Fla. 1945)). Decisions of some intermediary courts have followed suit. *See, e.g., LaValley, at* 1127, 1127 (reiterating *Kelly's* holding that "'willful and reckless disregard for the safety of others' could substitute for proof of intentional assault on the victim"); *Kelly v. State*, 552 So. 2d 206, 208 (Fla. 5th DCA 1989) ("Where … 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"); *Taylor v. State*, 444 So. 2d 931, 883 (Fla. 1983) (all that is required to prove an aggravated assault is "an intent to commit the act").

Without explicitly recognizing that its decision abrogated those that came before it, the Florida state courts are left in the dark about how to treat the statute going forward. This Court must reconsider its decision and provide the needed clarity both for the Eleventh Circuit and the intermediary Florida courts.

Wherefore, Mr. Somers respectfully requests the Honorable Court rehear and clarify this matter.

Respectfully submitted,
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FEDERAL PUBLIC DEFENDER

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## CERTIFICATE OF COMPLIANCE

I certify that this motion was prepared using Times New Roman, 14-point font, in accordance with Fla. R. App. P. 9.210(a)(2).

## CERTIFICATE OF SERVICE

I certify that on December 1, 2022, I filed the above motion using the Florida Court's E-Filing Portal, which will electronically notify Assistant United States Attorney Jordane Learn.

*/s/ Megan Saillant*
MEGAN SAILLANT
Assistant Federal Public Defender