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APPENDIX

United States Court of Appeals for the Fifth Circuit

No. 22-50283
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

May 4, 2023

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

SAMUEL VALENCIA,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:21-CR-299-1

Before KING, HIGGINSON, and WILLETT, *Circuit Judges.*

PER CURIAM:

Samuel Valencia pleaded guilty to possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1), and he was sentenced to 235 months' imprisonment. His sentence reflected the district court's imposition of a sentencing enhancement under the Armed Career Criminal Act ("ACCA"), which is triggered when a § 922(g) offender has three prior convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1).

No. 22-50283

Valencia now appeals his sentence, arguing that the ACCA enhancement violated his constitutional rights because the facts establishing that he committed his previous violent felonies on different occasions were not charged in the indictment and either admitted by him or proven to a jury beyond a reasonable doubt. Our review is *de novo*. *United States v. White*, 465 F.3d 250, 254 (5th Cir. 2006).

As both parties acknowledge, our case law forecloses this argument. *See United States v. Davis*, 487 F.3d 282, 287-88 (5th Cir. 2007); *White*, 465 F.3d at 254; *see also United States v. Eddins*, 451 F. App'x 395, 397 (5th Cir. 2011) (rejecting, as foreclosed by *White*, the proposition that ACCA's different-occasions requirement must be alleged in the indictment and either proven beyond a reasonable doubt or admitted by the defendant). This precedent notwithstanding, the parties argue that the Supreme Court's recent decision in *Wooden v. United States* instructs that the ACCA enhancement here was a constitutional error.¹ 142 S. Ct. 1063 (2022). But in *Wooden*, the Court explicitly declined to address the issue that Valencia raises. *Id.* at 1068 n.3.² *Wooden* is therefore "not directly on point" and thus does not "alter the binding nature" of *Davis* and *White*. *United States v. Traxler*, 764 F.3d 486, 489 (5th Cir. 2014).

Valencia's sentence is AFFIRMED.

¹ The Government agrees with Valencia's contention that ACCA's different-occasions requirement must be charged in the indictment and either admitted by the defendant or found by a jury beyond reasonable doubt. But we are not bound by the Government's concessions, *see United States v. Castaneda*, 740 F.3d 169, 171 (5th Cir. 2013), and, here, our rule of orderliness requires us to look past the concession.

² The Court explained that two amici had briefed "another question arising from ACCA's occasions clause: whether the Sixth Amendment requires that a jury, rather than a judge, resolve whether prior crimes occurred on a single occasion." 142 S. Ct. at 1068 n.3. The Court did "not address that issue because [the petitioner] did not raise it." *Id.*

APPENDIX

United States Court of Appeals
for the Fifth Circuit

No. 22-50283

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

SAMUEL VALENCIA,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:21-CR-299-1

ON PETITION FOR REHEARING EN BANC

Before KING, HIGGINSON, and WILLETT, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 44. Firearms (Refs & Annos)

18 U.S.C.A. § 924

§ 924. Penalties

Effective: June 25, 2022

Currentness

(e)(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.