No. 23-5606

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL VALENCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Fifth and Sixth Amendments require that an indictment charge, and a jury find (or the defendant admit), that a defendant's predicate offenses were "committed on occasions different from one another" before the defendant may be sentenced under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(1).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

United States v. Valencia, 21-CR-299 (Apr. 11, 2022)

United States Court of Appeals (5th Cir.):

United States v. Valencia, 22-50283 (May 4, 2023)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is reported at 66 F.4th 1032.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 2023. A petition for rehearing en banc was denied on June 14, 2023 (Pet. App. B1). The petition for a writ of certiorari was filed on September 12, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Texas, petitioner was convicted on two counts of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924. Judgment 1. He was sentenced to 235 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A2.

1. In October 2021, police officers obtained a warrant to search petitioner's residence, based on surveillance, informant reports, and other evidence indicating that petitioner was engaged in drug trafficking. Presentence Investigation Report (PSR) ¶¶ 3-6. While executing the warrant, officers saw petitioner running to the bathroom and flushing the toilet in an apparent attempt to destroy evidence. PSR ¶ 6. After securing the scene, officers recovered a loaded 9mm semi-automatic handgun and 100 rounds of 9mm ammunition, as well as crack cocaine and drug paraphernalia. Ibid.

A federal grand jury in the Western District of Texas charged petitioner with one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924. Indictment 1. Petitioner pleaded guilty to that count without a plea agreement. D. Ct. Doc. 24, at 3 (Dec. 9, 2021); D. Ct. Doc. 27, at 1 (Dec. 27, 2021).

2. In preparation for sentencing, the Probation Office determined that petitioner qualified for an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). PSR ¶ 19. At the time of petitioner's offense, the default term of imprisonment for possessing a firearm as a felon was zero to 10 years. See 18 U.S.C. 924(a)(2) (2018).[1] The ACCA prescribes a penalty of 15 years to life imprisonment if the defendant has at least "three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1).

The Probation Office determined that petitioner had four prior Texas convictions for burglary of a habitation that qualified as ACCA predicates: the first committed on July 16, 1987; the second also committed on July 16, 1987; the third committed on November 10, 1987; and the fourth committed on February 1, 1994. PSR ¶¶ 26-28, 30; see PSR ¶ 19, 39. The Probation Office further determined that at least three of those offenses "were committed on different occasions." PSR ¶ 19.

Petitioner objected to his ACCA classification. See D. Ct. Doc. 30-2 (Mar. 23, 2022). Petitioner first contended that his two home burglary offenses committed on the same day in July 1987 were not committed on separate occasions. Id. at 2-3. The

[1] For Section 922(g) offenses committed after June 25, 2022, the default term of imprisonment is zero to 15 years. See Bipartisan Safer Communities Act, Pub. L. No. 117-159, Div. A, Tit. II, § 12004(c), 136 Stat. 1329 (18 U.S.C. 924(a)(8) (Supp. IV 2022)).

Probation Office agreed and stated that it would consider those offenses "joined as one" for purposes of the ACCA. D. Ct. Doc. 30-1, at 1 (Mar. 23, 2022) (PSR Addendum). But the Probation Office noted that "this does not preclude [petitioner] from the ACCA enhancement," given petitioner's two additional violent felonies. Ibid.

Petitioner also contended that, under the Fifth and Sixth Amendments, he could not be sentenced under the ACCA in the absence of an allegation in the indictment, and a jury finding, that his predicate offenses were committed on different occasions. D. Ct. Doc. 30-2, at 4-5 (citing Apprendi v. New Jersey, 530 U.S. 466 (2000), and Alleyne v. United States, 570 U.S. 99 (2013)). The district court overruled petitioner's objection, adopted the findings of the amended presentence report, and found that petitioner qualified for sentencing under the ACCA. Sent. Tr. 5:17-6:23, 9:1-9:4. The court sentenced petitioner to 235 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

3. The court of appeals affirmed in a per curiam opinion. Pet. App. A1-A2.

On appeal, the government agreed with petitioner that "the ACCA's different-occasions requirement is an element that must be charged in the indictment and either admitted by a defendant or found by a jury beyond a reasonable doubt." Gov't C.A. Br. 7 (discussing this Court's articulation of the nature of the

different-occasions inquiry in Wooden v. United States, 595 U.S. 360 (2022)). The government explained, however, that the "error was harmless" in this case because petitioner "does not dispute that he committed the burglaries supporting the ACCA enhancement on three different occasions" and "the [presentence report] confirms it." Id. at 8.

Citing decisions that pre-dated Wooden, the court of appeals observed that its "case law foreclose[d]" petitioner's claim that "the facts establishing that he committed his previous violent felonies on different occasions" must be "charged in the indictment and either admitted by him or proven to a jury beyond a reasonable doubt." Id. at A2 (citing United States v. Davis, 487 F.3d 282, 287-288 (5th Cir. 2007) and United States v. White, 465 F.3d 250, 254 (5th Cir. 2006), per curiam, cert. denied, 549 U.S. 1188 (2007)). The court also observed that Wooden "explicitly declined to address the issue that [petitioner] raises." Ibid. (citing Wooden, 595 U.S. at 365 n.3). And the court stated that because Wooden is "not directly on point," it "does not alter the binding nature of" pre-Wooden circuit precedent. Ibid. (citation and internal quotation marks omitted).

DISCUSSION

Petitioner renews his contention (Pet. 7-18) that the Fifth and Sixth Amendments require the government to charge and a jury to find (or a defendant to admit) that predicate offenses were committed on different occasions under the ACCA. As explained at

pages 8 to 14 of the government's brief in Erlinger v. United States, No. 23-370 (petition filed Oct. 4, 2023) (Gov't Erlinger Br.), filed on the same day as this brief, the government agrees that the circuits' adherence to pre-Wooden precedent on the question presented is incorrect, yet intractably entrenched. And while Erlinger provides the Court with a suitable vehicle for resolving the question presented, see Gov't Erlinger Br. at 14-16, this case would provide an adequate alternative if the Court perceives any vehicle problem with Erlinger.[2]

First, the decision below is published and definitively addresses the question presented. See pp. 4-5, supra. Second, although this case does not involve a trial, petitioner's plea did not include a knowing waiver of a right to have a jury, rather than the district court, make the separate-occasions determination necessary to impose an ACCA sentence, and petitioner adequately preserved his Sixth Amendment objection to his ACCA classification

[2] The government has served petitioner with a copy of its brief in Erlinger. The same question is additionally presented in the petition for a writ of certiorari in Thomas v. United States, No. 23-5547 (filed Aug. 22, 2023), which would also be an adequate alternative vehicle. A similar question is also presented in McCall v. United States, No. 22-7630 (filed May 22, 2023), which the Court appears to be holding pending the disposition of Jackson v. United States, No. 22-6640 (oral argument scheduled for Nov. 27, 2023), and Brown v. United States, No. 22-6389 (oral argument scheduled for Nov. 27, 2023). While the pendency of the Brown/Jackson question in McCall would make it an unsuitable vehicle for further review of the question presented here, if the Court grants certiorari in this case, Thomas, or Erlinger, it should hold the petition in McCall pending its decision on the question presented here and then dispose of McCall as appropriate.

in both lower courts.[3] See D. Ct. Doc. 30-2, at 4-5; Sent. Tr. 4:16-25; Pet. C.A. Br. 10-15. The government likewise briefed the issue, agreeing in substance with petitioner in the court of appeals, Gov't C.A. Br. 5-7, and both courts below specifically addressed the issue, Pet. App. A2; Sent. Tr. 5:21-6:17.

Finally, while the government argued in the court of appeals that the error in this particular case was harmless, and that petitioner would therefore not be entitled to relief even if the question presented were resolved in his favor, Gov't C.A. Br. 8-11, the court did not decide the case on that ground, see Pet. App. A2. Nothing would preclude this Court from likewise addressing the merits. And because prejudice will be similarly lacking in many other cases raising the question presented, its absence here does not warrant declining review of a question that the government agrees that the lower courts are currently answering

[3] Although petitioner additionally contends that the omission of an element rendered his indictment defective, he relinquished that issue by pleading guilty. See, e.g., Class v. United States, 138 S. Ct. 798, 804-805 (2018) (describing preclusive effects of guilty plea); United States v. Moore, 954 F.3d 1322, 1354-1357 (11th Cir. 2020) (explaining that guilty plea waives non-jurisdictional defects in indictment such as omission of an element, and citing cases); cf. Fed. R. Crim. P. 12(b)(3)(B), (c) (requiring indictment defects to be raised in pretrial motions, and permitting courts to disregard untimely claims). But given that the indictment requirement has tracked the jury-trial requirement in this context, see, e.g., United States v. Cotton, 535 U.S. 625, 627 (2002), a decision on the jury-trial issue -- as presented in Erlinger, and as incorporated into the questions presented here and in Thomas -- should suffice to decide the indictment issue as well.

incorrectly in the first instance, thereby denying defendants important rights in cases involving a common criminal charge.

CONCLUSION

The petition for a writ of certiorari should either be granted or held pending this Court's disposition of the petitions for writs of certiorari in Thomas v. United States, No. 23-5457 (filed Aug. 22, 2023) and Erlinger v. United States, No. 23-370 (filed Oct. 4, 2023). Because the court of appeals adopted a position that the government considers incorrect, if this Court grants review, it may wish to consider appointing an amicus to defend the holding of the court of appeals.

Respectfully submitted.

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