No. 20-5279

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM DALE WOODEN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's conviction should be set aside, on plain-error review, based on his assertion that he provided consent to one police officer, but not a second officer, to enter his home.

2. Whether petitioner's enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA) should be set aside, on plain-error review, on the theory that the ACCA's sentencing enhancement based on prior felony convictions for offenses that were "committed on occasions different from one another," 18 U.S.C. 924(e)(1), is unconstitutionally vague.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Tenn.):

United States v. Wooden, No. 15-cr-12 (Feb. 22, 2019)

United States Court of Appeals (6th Cir.):

United States v. Wooden, No. 19-5189 (Dec. 19, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 945 F.3d 498. The opinion and order of the district court is not published in the Federal Supplement but is available at 2015 WL 7459970.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2019. A petition for rehearing was denied on February 26, 2020 (Pet. App. B1). The petition for a writ of certiorari was filed on July 24, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1) (2012). Judgment 1. The district court sentenced him to 188 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A11.

1. In November 2014, police officers in Monroe County, Tennessee sought to track down Ben Harrelson, a fugitive whose vehicle had previously been seen parked outside a residence shared by petitioner and his wife, Janet Harris. Pet. App. A1-A2. A plainclothes officer, Corporal Mason, knocked on the front door of the residence, while a uniformed officer, Deputy Williams, waited by the bottom of the front porch. Id. at A2; 2015 WL 7459970, at *1. When petitioner answered, Mason asked if he could speak to Harris. Pet. App. A2. Petitioner indicated that she was home and that he would go get her. 2015 WL 7459970, at *1. When Mason then asked if he could wait inside to stay warm, petitioner responded, "Yes. That's okay." Pet. App. A2.

As Mason came inside, he saw petitioner pick up a rifle. Pet. App. A2. Mason ordered petitioner to put the gun down; Williams entered the residence; and petitioner complied. Ibid.; 2015 WL 7459970, at *1. Mason knew that petitioner was a felon, so the officers handcuffed him, secured the rifle, and searched him, at

which point they discovered a loaded revolver holstered on petitioner. Pet. App. A2.

Harris then gave the officers consent to search the home. Pet. App. A3. While they did not locate Harrelson, the officers did find another rifle in plain view. Ibid.; 2015 WL 7459970, at *2. At no point did petitioner object to the officers searching his home or to Harris consenting to the search. 2015 WL 7459970, at *2. After being informed of his Miranda rights, petitioner confirmed that the three guns belonged to him. Pet. App. A3.

2. A federal grand jury indicted petitioner on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1) (2012). Pet. App. A3; Indictment 1. Petitioner moved to suppress the evidence discovered during the search of his home, contending that the officers violated the Fourth Amendment by entering his home without a warrant or consent. Pet. App. A3.

The district court referred the motion to a magistrate judge, who held a hearing at which Mason and Williams testified. Suppression Hr'g Tr. 4-47. Although petitioner "proffer[ed]" through counsel that he told Mason to wait at the door, he offered no testimony or evidence to that effect. Id. at 48. His counsel also sought to impeach Mason's testimony that petitioner gave him consent to enter his home. Id. at 49-51.

The magistrate judge recommended denial of the suppression motion. D. Ct. Doc. 22 (Oct. 23, 2015). Observing that the "only

issue pending before the Court" was "whether valid consent was obtained from" petitioner, the magistrate credited Mason's testimony, finding that it provided " 'clear and positive' evidence that consent was given freely and voluntarily." Id. at 12-13. The magistrate also found "the lack of objection to law enforcement's presence while inside the home to be telling" because it "belies [petitioner]'s proffer that consent to come inside the home was withheld and instead corroborates Corporal Mason's testimony that he was given direct consent." Id. at 13-14.

The district court accepted the magistrate's report and recommendation and denied the suppression motion, finding "no reason in the record to question the magistrate judge's determination regarding the credibility of Corporal Mason's testimony." 2015 WL 7459970, at *3. Petitioner's case proceeded to trial, where a jury found him guilty of possessing a firearm as a felon. Pet. App. A3.

3. A conviction under 18 U.S.C. 922(g)(1) has a default statutory sentencing range of zero to ten years of imprisonment. 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), specifies a statutory sentencing range of 15 years to life, ibid. The ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year * * * 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 Probation Office's presentence report classified petitioner as an armed career criminal under the ACCA, listing 12 prior violent-felony convictions under Georgia law -- a 1989 conviction for aggravated assault, ten 1997 convictions for burglary, and a 2005 conviction for burglary -- and stating that they had been committed on different occasions. Presentence Investigation Report (PSR) ¶¶ 18, 26, 32, 36. Petitioner objected, contending that Georgia aggravated assault and Georgia burglary do not qualify as violent felonies, and that in any event his ten burglary convictions in 1997 were for offenses committed on the same occasion. Sent. Tr. 10-18.

The district court overruled petitioner's burglary-related objections, determining that his 11 prior Georgia convictions for burglary were for violent felonies that were committed on different occasions. Sent. Tr. 34-36. In light of that determination, the court denied as moot petitioner's objection concerning his aggravated-assault conviction without deciding whether the offense qualified as a violent felony. Id. at 37. The court then agreed

with the Probation Office's calculation of an offense level at 33 and a criminal history category of IV, resulting in an advisory Sentencing Guidelines range of 188 to 235 months of imprisonment. Ibid.; see PSR ¶ 69. It sentenced petitioner to 188 months of imprisonment, to be followed by three years of supervised release. Sent. Tr. 43-45.

4. The court of appeals affirmed. Pet. App. A1-A11. It first rejected petitioner's two challenges to the denial of his suppression motion. Id. at A3-A7. In response to petitioner's renewed contention that Mason's testimony concerning consent was not credible, the court upheld the district court's credibility determination as not clearly erroneous. Ibid. And in response to petitioner's contention -- made for the first time on appeal -- that any consent was obtained through deception because Mason was not in uniform, the court of appeals found that "the district court did not err, plainly or otherwise, in failing to equate Mason's conduct with improper deception," as he "merely asked to speak to Harris and then asked if he could come inside, to get out of the cold." Id. at A7.

The court of appeals then rejected petitioner's contention that his ten 1997 burglaries were not "committed on occasions different from one another." 18 U.S.C. 924(e)(1); see Pet. App. A8-A11. In doing so, the court relied on its prior decision in United States v. Hill, 440 F.3d 292 (6th Cir. 2006), which had determined that "two burglary offenses were separate offenses"

when the defendant "committed a burglary, left the location, and then illegally entered and stole from a separate location." Pet. App. A10. The court observed that here, petitioner had pleaded guilty to an indictment charging him with "'entering' ten different mini warehouses." Id. at A9. And the court explained that because petitioner "could not be in two (let alone ten) of them at once," he had "committed ten distinct acts of burglary, as measured by Georgia law," which applies when one "'enters or remains within' a 'building' to commit an offense." Id. at A9-A10 (citation omitted).

ARGUMENT

Petitioner contends (Pet. 5-7) that even if he gave consent to Mason to enter his residence, the entry of Mason's fellow officer violated the Fourth Amendment. He also contends (Pet. 8-10) that the phrase "committed on occasions different from one another" in 18 U.S.C. 924(e)(1) is unconstitutionally vague. Neither of those arguments, however, was pressed or passed upon below. In any event, the court of appeals' decision does not conflict with any decisions of this Court or of other courts of appeals. Pet. App. A1-A11. No further review is warranted.

1. Petitioner contends (Pet. 5-7) that his suppression motion should have been granted because even if he gave consent to Mason to enter his home, he did not provide such consent to Williams. As an initial matter, petitioner did not raise that argument before the magistrate judge, the district court, or the

court of appeals. That alone is a sufficient reason for this Court to deny review. See United States v. Williams, 504 U.S. 36, 41 (1992) (noting this Court's "traditional rule" preluding a grant of certiorari "when 'the question presented was not pressed or passed upon below'") (citation omitted); see also Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 ("[W]e are a court of review, not of first view.").

In any event, petitioner's fact-bound claim lacks merit and does not warrant this Court's review. Given his failure to raise the issue in a timely manner, petitioner's claim would at best be reviewed on appeal only for plain error. See Fed. R. Crim. P. 52(b); United States v. Olano, 507 U.S. 725, 731-732 (1993). To establish reversible plain error, petitioner would have to demonstrate (1) error; (2) that is plain or obvious; (3) that affected substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. Olano, 507 U.S. at 732-736; see, e.g., Puckett v. United States, 556 U.S. 129, 135 (2009). Petitioner, however, cannot demonstrate any error, much less a "clear or obvious" error, Puckett, 556 U.S. at 135 -- i.e., an error so obvious under the law as it existed at the time of the relevant district court or appellate proceedings that the courts "were derelict in countenancing it, even absent the defendant's timely assistance in detecting it," United States v. Frady, 456 U.S. 152, 163 (1982).

As the district court explained, petitioner "offered no evidence" at the suppression hearing save for his counsel's "proffer" that he told Mason to wait at the door while he went to get Harris. 2015 WL 7459970, at *3. The court rejected that contention, finding that "Mason's testimony was credible and provided 'clear and positive' evidence that consent was freely given." Id. at *2. It is not plain that the consent to entry was limited to Mason, particularly given the district court's description of Williams's position at the bottom of the porch when Mason asked if he could step inside, id. at *1, where Williams may have been visible to petitioner. And even if petitioner's consent extended only to Mason, the record is unclear as to whether Williams entered the home prior to Mason instructing petitioner to put down the rifle, at which point the exigent-circumstances exception to the warrant requirement could apply. Kentucky v. King, 563 U.S. 452, 460 (2011) (describing exception). At all events, petitioner's failure to provide a record basis for -- or develop -- his current arguments below would preclude relief now.

2. Petitioner separately contends (Pet. 8-10) that the phrase "committed on occasions different from one another" in 18 U.S.C. 924(e)(1) is unconstitutionally vague. As with his new Fourth Amendment argument, petitioner raised a vagueness challenge only in his petition for a writ of certiorari. That alone is a sufficient reason for this Court to deny review. See pp. 7-8, supra. Indeed, this Court recently denied a petition raising the

same issue in a plain-error posture. See Perry v. United States, 140 S. Ct. 90 (2019) (No. 18-9460). It should do so again here.

Petitioner suggests (Pet. 9) that Section 924(e)(1) is similar to 18 U.S.C. 924(c)(3)(B), which this Court held to be unconstitutionally vague in United States v. Davis, 139 S. Ct. 2319 (2019). But unlike Section 924(c)(3)(B), the different-occasions inquiry under Section 924(e)(1) does not task courts with "estimati[ng] * * * the degree of risk posed by a crime's imagined 'ordinary case.'" Id. at 2326. Rather, a sentencing court considers only the defendant's actual prior convictions, as reflect in a limited set of judicial records, see Shepard v. United States, 544 U.S. 13 (2005), and assesses whether they are for crimes committed on different occasions.

In any event, petitioner offers no sound reason for this Court to address this argument in the first instance -- particularly in a case that presents the issue only in a plain-error posture. He does not, for example, point to any division of authority within the courts of appeals on the question; indeed, the courts of appeals have uniformly rejected the argument that Section 924(e)(1) is unconstitutionally vague, see, e.g., United States v. Smith, 703 Fed. Appx. 174, 177-178 (4th Cir. 2017) (per curiam), cert. denied, 138 S. Ct. 697 (2018); United States v. Morris, 821 F.3d 877, 879-881 (7th Cir. 2016); United States v. Jenkins, 770 F.3d 507, 510 (6th Cir. 2014) (Sutton, J.), cert. denied, 135

S. Ct. 1511 (2015); United States v. Michel, 446 F.3d 1122, 1136 (10th Cir. 2006). No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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