No. 21-6657

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA RESHI DUDLEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

No. 21-6657

JOSHUA RESHI DUDLEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 7-21) that the court of appeals erred in affirming the district court's determination that he was subject to sentencing under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1). The petition for a writ of certiorari should be denied.

1. Petitioner principally argues (Pet. 7-19) that the Sixth Amendment prohibited the district court from determining that his prior offenses were "committed on occasions different from one another" for purposes of the ACCA, 18 U.S.C. 924(e). The court of appeals correctly rejected that argument. Pet. App. 9a-31a. For

the reasons set forth in the government's brief in opposition to the petition for a writ of certiorari in Walker v. United States, 141 S. Ct. 1084 (2021) (No. 20-5578), a copy of which is being served on petitioner, no further review of that issue is warranted. This Court has repeatedly and recently denied review of the same issue in other cases, see, e.g., Carter v. United States, 142 S. Ct. 783 (2022) (No. 21-5754); Ursery v. United States, 142 S. Ct. 132 (2021) (No. 20-7943); Tijwan v. United States, 141 S. Ct. 1449 (2021) (No. 20-6976); White v. United States, 141 S. Ct. 1121 (2021) (No. 20-6451); Walker v. United States, 141 S. Ct. 1084 (2021) (No. 20-5578); Wainwright v. United States, 141 S. Ct. 924 (2020) (No. 20-6084) -- and should follow the same course here.

2. Petitioner briefly contends that even if the Sixth Amendment permitted the district court to determine whether his crimes were "committed on occasions different from one another," the court misapplied this Court's decision in Shepard v. United States, 544 U.S. 13 (2005), by relying on the transcript of his state-court plea colloquy, which established that petitioner pleaded guilty to three separate indictments charging him with assault during "separate incidents" that occurred on different dates. Pet. 19-21 (citation and emphasis omitted); Pet. App. 4a-5a, 21a. Petitioner contends (Pet. 19) that he did not affirmatively admit those facts but "simply * * * sa[id] nothing

to dispute the prosecutor's factual proffer." The court of appeals correctly rejected that factbound assertion.

Shepard expressly permits courts to rely on the "transcript of [plea] colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant." 544 U.S. at 26. Here, the court of appeals considered the "totality of the circumstances" in petitioner's case and found that petitioner "implicitly agreed with the factual proffer." Pet. App. 23a. Those circumstances included that petitioner did not object to the prosecutor's description of his offenses as occurring on different dates and during "separate incidents," and that defense counsel responded to the prosecutor's question whether he "miss[ed] anything" by stating "that's it" and then raising a distinct issue. Pet. App. 21a-26a & nn.12-14 (brackets in original).

The court of appeals found petitioner's failure to object particularly significant because petitioner had incentives under both the Double Jeopardy Clause and state law to contest the dates of his offenses if they were inaccurate. In particular, two of the indictments charged petitioner "with the same crime -- second degree assault -- against the same victim -- Officer Gandy," and thus would have violated petitioner's double jeopardy rights if they did not reflect separate incidents. Pet. App. 22a n.13. In addition, the court observed that in light of Alabama's habitual felony offender statute, "if there was a way to eliminate one or more of" the separate charges "because they did not arise from

separate incidents, [petitioner] and his counsel certainly had an incentive to object." Ibid. Shepard does not require a particular form of words for a defendant's acceptance of the factual basis for his plea, and it is difficult to see how the state court could have determined that the plea had any factual basis at all if it did not construe petitioner's undifferentiated acquiescence as agreement with the prosecutor's proffer.

Petitioner errs in asserting (Pet. 20) that the decision below is "contrary to other courts' application of Shepard." His primary authority for his assertion is United States v. Moreno, 821 F.3d 223 (2d Cir. 2016), which he cites for the proposition that courts have required adoption of a prosecutor's proffer "in some overt fashion," id. at 229. See Pet. 20. Moreno, however, favorably cites United States v. Taylor, 659 F.3d 339 (4th Cir. 2011), cert. denied, 566 U.S. 915 (2012), which found defense counsel's "state[ment] that [the] defendant had no 'additions or corrections'" sufficient to show acceptance of the prosecutor's proffer. Moreno, 821 F.3d at 229 (quoting Taylor, 659 F.3d at 348). And the decision below explains that the circumstances here present an "even more persuasive" case for adoption of a proffer "than those in Taylor." Pet. App. 25a.

The remaining decisions cited in the petition, and in Moreno, either likewise found that the defendant had adopted the proffer, see United States v. Jimenez-Banegas, 209 Fed. Appx. 384, 390 (5th Cir. 2006), or else involve circumstance-specific determinations.

See United States v. Savage, 542 F.3d 959, 966 (2d Cir. 2008) (declining to rely on factual proffer where defendant "entered an Alford plea" and the "state judge * * * reassure[ed] [him] that the plea would be accepted even though [he] did not 'agree with the facts'"); United States v. Rosa, 507 F.3d 142, 147, 157-158 (2d Cir. 2007) (declining to rely on factual proffer to determine that prior offense involved a gun where defendant "denied that he ever carried a handgun" but judge focused on whether an object "'appeared to be' a gun"). None demonstrates that another court of appeals would have reached a different result in the particular circumstances of this case.

3. Petitioner observes that in Wooden v. United States, No. 20-5279 (argued Oct. 4, 2021), this Court is considering the standard for determining whether crimes were "committed on occasions different from one another" for purposes of the ACCA. Pet. 3 (citation omitted). But petitioner does not himself ask this Court to hold the petition in his case pending its decision in Wooden, and no hold is warranted. Unlike the petitioner in Wooden, who raises only a statutory-interpretation claim, see Pet. Br. at I, Wooden, supra (No. 20-5279), petitioner's first question presented here raises the Sixth Amendment claim discussed above. And the petitioner in Wooden has made no claim akin to petitioner's second question presented. This Court has previously declined to hold petitions for writs of certiorari raising similar Sixth Amendment claims pending the outcome of Wooden, see Carter, supra

(No. 21-5754); Ursery, supra (No. 20-7943), and should do the same in this case.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

FEBRUARY 2022