No. 22-336

In the Supreme Court of the United States

JASON REED, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
PAUL T. CRANE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Constitution requires the government to indict and a jury to find (or the defendant to admit) that a defendant's predicate offenses were "committed on occasions different from one another" for purposes of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(1).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 39 F.4th 1285.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2022. A petition for rehearing was denied on September 1, 2022 (Pet. App. 33a-34a). The petition for a writ of certiorari was filed on October 6, 2022. 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 District of New Mexico, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924(a)(2) (2012). Judgment 1. He was sentenced to 180 months of

imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-18a.

1. In September 2017, petitioner, a convicted felon, brought a handgun and several rounds of ammunition to an acquaintance's apartment. Pet. App. 2a-3a; 1 C.A. App. 20. Based on that conduct, a federal grand jury returned an indictment charging petitioner with one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). 1 C.A. App. 13. Petitioner subsequently waived the right to an indictment, and the indictment was superseded by an information. See *id.* at 14, 16, 38-40.

Pursuant to a plea agreement, petitioner pleaded guilty to the offense charged. 1 C.A. App. 17-29; see *id.* at 18, 49-50.

2. The default term of imprisonment for possessing a firearm as a felon at the time of petitioner's offense was zero to ten years. 18 U.S.C. 924(a)(2) (2012).[1] But the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), 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).

In this case, in addition to conceding his guilt, 1 C.A. App. 19-21, petitioner acknowledged in his plea agreement "that if the Court determines that [he] qualifies for enhanced punishment under 18 U.S.C. § 924(e) [*i.e.*, the ACCA], the minimum and maximum penalties

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[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, 136 Stat. 1313, 1329 (18 U.S.C. 924(a)(8) (Supp. IV 2022)).

provided by law for this offense is * * * imprisonment for a period of not less than 15 years up to life," 1 C.A. App. 18-19. Petitioner also agreed to waive his "appeal rights." *Id.* at 26 (section title).

Specifically, petitioner waived "the right to appeal [his] conviction(s) and any sentence and fine within or below the applicable advisory guideline range as determined by the Court." 1 C.A. App. 26. Petitioner further "specifically agree[d] not to appeal the Court's resolution of any contested sentencing factor in determining the advisory sentencing guideline range. In other words, the Defendant waives the right to appeal both the Defendant's conviction(s) and the right to appeal any sentence imposed in this case except to appeal the Defendant's sentence to the extent, if any, that the Court may depart or vary upward from the advisory sentencing guideline range as determined by the Court." *Id.* at 26-27.

3. In preparation for sentencing, the Probation Office determined that petitioner qualified for an enhanced sentence under the ACCA. 2 C.A. App. 7, 12. The Probation Office identified as qualifying ACCA predicates petitioner's prior convictions for distributing a mixture and substance containing cocaine base on July 17, 2002, July 18, 2002, and October 14, 2002, all in violation of 21 U.S.C. 841(b)(1)(C). 1 C.A. Supp. App. 1-3; 2 C.A. App. 6-7, 11, 27. It further determined that those offenses were "committed on occasions different from one another." 2 C.A. App. 6. As a result, the Probation Office calculated an advisory Guidelines sentence of 180 months of imprisonment. *Id.* at 20.

After the Probation Office issued its presentence report, petitioner obtained new counsel and sought to withdraw his guilty plea, asserting that his prior

counsel had advised him that he "was unlikely to receive an ACCA enhancement." Pet. App. 5a. After holding an evidentiary hearing, the district court denied petitioner's motion to withdraw his guilty plea, rejecting petitioner's claim that his counsel was constitutionally ineffective and that his guilty plea was, consequently, unknowing or involuntary. *Id.* at 5a-7a.

Petitioner then objected to his classification as an armed career criminal. 1 C.A. App. 123-142; 4 C.A. App. 92-95. Petitioner contended that, under the Fifth and Sixth Amendments, the district court lacked the authority to determine that his predicate offenses were committed on different occasions for purposes of the ACCA. 1 C.A. App. 124-130; Pet. App. 7a; 4 C.A. App. 93 (objecting to the court's "ability at sentencing to make those findings when they should be either submitted to a jury or have them included in the Plea Agreement for [petitioner] to have admitted beyond a reasonable doubt, which did not happen").

The district court overruled petitioner's objections and found that the three predicate offenses were committed on different occasions from each other. Pet. App. 41a-43a; 4 C.A. App. 99-101. The court observed that the three offenses took place on "different dates" ("July 17, 2002; July 18, 2002; and October 14, 2002") and "in three separate locations—in a local restaurant parking lot; the parking lot of a local park; [and] in a local convenience store." Pet. App. 41a-42a; 4 C.A. App. 99-100.

The district court noted that, in the absence of the ACCA enhancement, the advisory Guidelines range was 135 to 168 months. 4 C.A. App. 109. But it observed that, "where a statutorily required minimum sentence is greater than the maximum of the applicable guideline

range, the statutorily required minimum sentence shall be the guideline sentence." *Ibid.* (citing Sentencing Guidelines § 5G1.1(b)). The court therefore found, consistent with the ACCA, that the applicable Guidelines sentence was 180 months of imprisonment. *Ibid.* The court sentenced petitioner to that term, to be followed by five years of supervised release. *Id.* at 109-110.

4. Petitioner appealed, and the court of appeals unanimously affirmed in a published opinion. Pet. App. 1a-18a. Petitioner renewed his contention that the Constitution barred the district court from determining that his ACCA predicates were each committed on different occasions, though he did not challenge the court's substantive finding that his prior offenses were, in fact, committed on different occasions. *Id.* at 16a n.2.

The government contended that, under the terms of the waiver of appellate rights in petitioner's plea agreement, he was precluded from challenging his sentence on appeal unless the district court had departed or varied upward "from the advisory sentencing guideline range as determined by th[at] Court." Pet. App. 13a. And it observed that the district court had sentenced petitioner consistently with the advisory Guidelines sentence. *Ibid.* Petitioner responded that he was not attacking the sentence itself, but rather the district court's authority to conduct factfinding. *Ibid.* Deeming "each party's reading * * * equally plausible," the court of appeals declined to apply the appeal waiver. *Ibid.*

The court of appeals then rejected petitioner's contention that the ACCA's different-occasions inquiry requires a jury finding, or defendant admission, rather than a judicial determination. Pet. App. 14a-16a. Although the court acknowledged that petitioner's

"argument is not without some force," it concluded that "our precedent forecloses such an argument." *Id.* at 14a (citing *United States* v. *Michel*, 446 F.3d 1122, 1132-1133 (10th Cir. 2006)). The court of appeals noted that this Court, addressing the different-occasions inquiry in *Wooden* v. *United States*, 142 S. Ct. 1063 (2022), had declined to reach the issue. Pet. App. 15a-16a. "Absent en banc reconsideration or a superseding contrary decision by the Supreme Court," the court of appeals explained, "we are bound by the precedent of prior panels." *Id.* at 15a.

5. Petitioner moved for rehearing en banc, which the court of appeals denied without calling for a response by the government. Pet. App. 33a-34a.

ARGUMENT

Petitioner contends (Pet. 15-19) that the Constitution requires the government to indict, and a jury to find (or a defendant to admit), that a defendant's predicate offenses were committed on different occasions under the ACCA. In light of this Court's recent articulation of the standard for determining whether offenses occurred on different occasions in *Wooden* v. *United States*, 142 S. Ct. 1063 (2022), the government agrees that the different-occasions inquiry requires a finding of fact by a jury or an admission by the defendant. The issue is important and frequently recurring and may eventually warrant this Court's review in an appropriate case. But lower courts have not yet had adequate time to react to *Wooden*, and this case would be an unsuitable vehicle for further review.

1. As explained in the government's brief in opposition in *Daniels* v. *United States*, No. 22-5102 (filed July 11, 2022), the government now acknowledges, given the nature of the different-occasions inquiry articulated in

Wooden, that the Constitution requires a jury to find (or a defendant to admit) that the defendant's ACCA predicates were committed on occasions different from one another. Br. in Opp. at 5-8, *Daniels*, *supra* (No. 22-5102).[2] And, in the government's view, the question presented is important, recurring, and may eventually warrant this Court's review. *Id.* at 8-11. But for the reasons explained there, review in this Court only months after *Wooden* would be premature. *Ibid.*

Indeed, since the government filed its brief in *Daniels*, the Ninth Circuit has vacated and remanded a defendant's ACCA sentence after "assum[ing], without holding, that an * * * error occurred" based on the government's "conce[ssion] that following [*Wooden*] a jury must find, or a defendant must admit, that a defendant's ACCA predicate offenses were committed on different occasions." *United States* v. *Man*, No. 21-10241, 2022 WL 17260489, at *1 (Nov. 29, 2022). *Man* illustrates that the question presented is actively percolating in the lower courts.

Moreover, the Eighth Circuit has—with the government's acquiescence—recently granted en banc review on the issue. See *United States* v. *Stowell*, No. 21-2234, 2022 WL 16942355 (Nov. 15, 2022). Although rehearing was denied in this case, the court of appeals did not call for a response from the government. And even if the court below was aware of the government's current position, despite not requesting briefing on it, the court may decide to rehear the matter en banc if other courts of appeals address the issue and agree with the government.

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[2] We have served petitioner with a copy of the government's brief in opposition in *Daniels*. A similar question is also presented in *Enyinnaya* v. *United States*, No. 22-5857 (filed Oct. 14, 2022).

2. To the extent that petitioner challenges the sufficiency of his indictment (Pet. i, 15 n.5), he waived the indictment requirement in the district court and elected to proceed by information. See p. 2, *supra*. In addition, although the government would not challenge the court of appeals' contrary view if this Court were to grant certiorari, in the government's view, petitioner's appeal was barred in relevant part by his waiver of appellate rights in his plea agreement. See Gov't C.A. Br. 28-35; see also *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995) ("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.").

Furthermore, the error in this particular case was harmless, and petitioner would therefore not be entitled to relief even if the question presented were resolved in his favor. Petitioner did not challenge the substance of the district court's different-occasions determination in the court of appeals, see Pet. App. 16a n.2, and that determination was correct, given that petitioner's predicate offenses took place on "different dates" and at "three separate locations." *Id.* at 41a-42a (noting that the offenses occurred on "July 17, 2002; July 18, 2002; and October 14, 2002," "in a local restaurant parking lot; the parking lot of a local park; [and] in a local convenience store"). In *Wooden*, the Court observed that "[i]n many cases, a single factor—especially of time or place—can decisively differentiate occasions," and that courts "have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart." 142 S. Ct. at 1071.

Because prejudice will be similarly lacking in many other cases raising the question presented, the harmlessness of the error alone would not warrant declining

review—particularly given that the courts of appeals have uniformly erred in resolving that question, which has important implications for the procedures to be followed on a common criminal charge. But the harmlessness of the error here is nevertheless an additional reason why further review is not appropriate in this particular case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
PAUL T. CRANE
Attorney

DECEMBER 2022