No. 22-5857

IN THE
# Supreme Court of the United States

BANGO BENJAMIN ENYINNAYA,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

## REPLY TO UNITED STATES MEMORANDUM IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## REPLY TO GOVERNMENT MEMORANDUM

## ARGUMENT

1. The United States does not respond to Mr. Enyinnaya's arguments that the Fourth Circuit's classification of North Carolina Breaking or Entering as a categorical ACCA violent felony is (1) wrong, (2) important, (3) frequently recurring, and (4) squarely presented and preserved by his district court and appellate briefing. Thus, he relies on the arguments made in his petition and asks this Court to grant a writ of certiorari on those grounds.

2. Mr. Enyinnaya also argued that this Court should grant certiorari because Mr. Enyinnaya did not admit—and a jury did not find—that the predicate convictions at issue were "committed on occasions different from one another" as required by ACCA. 18 U.S.C. § 924(e)(1). The United States opposes granting certiorari on those grounds. But the United States does not allege that ACCA does not require a defendant to admit or a jury to make the occasions different

determination. Nor does the United States contend that the issue is not important or that it does not occur frequently. Instead, the United States asks this Court to deny review because, it claims, Mr. Enyinnaya waived this issue by not raising it in the Fourth Circuit and that any remand would be for plain error.

This Court should reject the government's contentions and grant certiorari on this ground.

First, granting certiorari would aid judicial efficiency. If this Court does eventually address this issue and hold that the Sixth Amendment requires a defendant to admit or a jury to find that the defendant's ACCA predicates occurred on occasions different, then Mr. Enyinnaya will likely have grounds to collaterally attack his sentence on those grounds via a petition under 28 U.S.C. § 2255. Adjudicating such a petition will expend more judicial resources than remanding this case to the Fourth Circuit and allowing it to resolve the issue as part of Mr. Enyinnaya's direct appeal.

Second, Mr. Enyinnaya did not waive his right to raise this issue. The Fourth Circuit issued the opinion in this case On February 9, 2022, exactly one month before this Court decided *Wooden.* And the United States did not change its position on this question in light of *Wooden* until July of 2022. Notice, *United States v. Brown*, 4th Cir. No. 21-4253, D.E. 31; *see also* Notice, *United States v. Hadden*, 4th Cir. No. 19-4151, D.E. 57. Thus, the government's reliance on *Rent-A-Center, W., Inc. v. Jackson,* is misplaced. 561 U.S. 63 (2010). There, the litigant attempted to rely on authority from this Court that issued a year and a half before the Ninth

Circuit issued its decision. *Id.* at 75-76 & n.5. And he did not raise it until briefing in this Court. *Id.* Here, the decision and concession on which Mr. Enyinnaya relies post-date the Fourth Circuit's decision and he raises it in the petition for certiorari, not in merits briefing. He did not waive this issue. Certainly, at a minimum, the Fourth Circuit can address in its discretion any claims of waiver in the Fourth Circuit that the government chooses to make based on briefing in that Court. It is not a question appropriate for this Court at this time.[1]

Third, Mr. Enyinnaya agrees that any review in the Fourth Circuit would be for plain error. But that procedural posture does not mean that this Court should deny review. The question of harmlessness central to plain-error review is a fact-intensive inquiry that is not appropriate for this Court and can and should be addressed by the Fourth Circuit in the first instance. The relevant *Shepard*[2] documents are not even in the record in this case. Any necessary decision about harmlessness can and should be made by the Fourth Circuit with access to those documents and with this Court's post-opinion guidance. It should have no relevance to the question of whether this Court should grant review in the first place.

3. Finally, if this Court decides to not grant review at this time on the question of whether North Carolina Breaking or Entering is an ACCA violent felony but it

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[1] The United States attempts to avoid this conclusion by noting that *Wooden* pre-dated Mr. Enyinnaya's petition for rehearing en banc. That is the wrong question to ask. As both parties acknowledge, the Fourth Circuit panel opinion did not address this question, so a petition for en banc rehearing on this question would not have been appropriate. *See* Fed. Rule. App. P. 35(a). There was no there there for the Fourth Circuit to rehear.

[2] *Shepard v. United States*, 544 U.S. 13 (2005).

does decide to grant review in another case on the occasions different question, then Mr. Enyinnaya requests that this Court hold this petition for resolution of that petition and a possible summary remand to the Fourth Circuit based on that case.

## CONCLUSION

For the foregoing reasons and the reasons given in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 6, 2023