No. 22-6578

IN THE SUPREME COURT OF THE UNITED STATES

DERRICK TYRONE MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH 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. 22-6578

DERRICK TYRONE MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

1. Petitioner contends (Pet. 8-11) that his sentence is invalid on the theory that his predicate offenses were not "committed on occasions different from one another" for purposes of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1). Petitioner suggests that this Court summarily grant, vacate, and remand in light of its decision in Wooden v. United States, 142 S. Ct. 1063 (2022). That suggestion is unsound.

This Court decided Wooden before petitioner filed his opening brief in the court of appeals. In that brief, petitioner challenged his ACCA classification on (inter alia) the ground that

the record failed to demonstrate that his four prior convictions for burglary of a habitation, in violation of Texas Penal Code § 30.02(a) (2011 & 2012), occurred on different occasions. Pet. C.A. Br. 11-15; see Presentence Investigation Report ¶¶ 43-46. Petitioner acknowledged that state court records showed "offenses committed on different days and involving different victims," but he argued that this was "not the end of the inquiry" under this Court's then-recent decision in Wooden. Pet. C.A. Br. 15. Petitioner also contended that his conviction was invalid because the sentencing judge, rather than a jury, had decided the separate-occasions issue, and that he was entitled to a non-ACCA sentence as a result. Id. at 11-15; see id. at 25 (seeking vacatur of conviction and sentencing, without the ACCA enhancement, under 18 U.S.C. 924(a)(2)).

In response, the government filed a motion for summary affirmance. See Gov't C.A. Mot. for Summ. Affirmance 1-6. With respect to the different-occasions argument, the government observed that state-court records "show that [petitioner's] four burglaries occurred more than a day apart -- and at least once several months apart -- from each other." Id. at 4 n.1. The government stated that Wooden "puts [petitioner's] argument to rest," ibid., because the Court there observed that courts adopting the approach the Court endorsed "have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart, or at a significant distance." Wooden,

142 S. Ct. at 1071. Petitioner did not oppose summary affirmance. See Gov't C.A. Mot. for Summ. Affirmance 7. Nor did he file a reply brief.

In failing to raise the issue in the district court, and then acquiescing to summary affirmance, petitioner forfeited his claim that this Court's decision in Wooden renders his ACCA classification invalid. In any event, this Court's decision in Wooden predated the court of appeals briefing, and the briefing accordingly presented the potential implications of Wooden -- including its implication that juries should make the separate-occasions determination, see Br. in Opp. at 6-7, Reed v. United States (No. 22-336) (agreeing that Wooden has that effect), cert. denied, Jan. 23, 2023. The court of appeals' entry of a summary affirmance thus demonstrates that a remand in light of Wooden would not change the outcome.

The Court therefore should deny the petition, rather than remanding the case. Cf. Lawrence v. Chater, 516 U.S. 163, 173-174 (1996) (per curiam) (recognizing the Court's power to grant, vacate, and remand in light of "intervening developments," but cautioning that the power "should be exercised sparingly," out of "[r]espect for lower courts" and for "the public interest in finality of judgments").

2. Petitioner also contends (Pet. 11-26) that the court of appeals erred in determining that his four prior convictions for burglary of a habitation, in violation of Texas Penal Code

§ 30.02(a) (2011 & 2012), constitute convictions for "burglary" under the ACCA, 18 U.S.C. 924(e)(2)(B)(ii). For the reasons explained in the government's brief in opposition to the petition for a writ of certiorari in Herrold v. United States, 141 S. Ct. 273 (2020) (No. 19-7731), that contention lacks merit and does not warrant this Court's review. See Gov't Br. in Opp. at 11-16, Herrold, supra (No. 19-7731).[1] This Court has recently and repeatedly denied petitions for writs of certiorari raising the same question regarding Section 30.02(a). See, e.g., Stinger v. United States, 142 S. Ct. 2845 (2022) (No. 21-7907); Bell v. United States, 142 S. Ct. 2662 (2022) (No. 21-7451); Penny v. United States, 142 S. Ct. 1689 (2022) (No. 21-7333); McCall v. United States, 142 S. Ct. 597 (2021) (No. 21-5501); Adams v. United States, 142 S. Ct. 147 (2021) (No. 20-8082); Smith v. United States, 141 S. Ct. 2525 (2021) (No. 20-6773); Lister v. United States, 141 S. Ct. 1727 (2021) (No. 20-7242); Webb v. United States, 141 S. Ct. 1448 (2021) (No. 20-6979); Wallace v. United States, 141 S. Ct. 910 (2020) (No. 20-5588); Herrold v. United States, supra (No. 19-7731). The same result is warranted here.[2]

---

[1] The government has served petitioner with a copy of the government's brief in opposition in Herrold, which is also available on this Court's online docket.

[2] The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

MARCH 2023