

No. 22- _____

IN THE SUPREME COURT OF THE UNITED STATES

EDGAR BARRERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Application for an Extension of Time
to File a Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**PETITIONER'S APPLICATION TO EXTEND TIME
TO FILE PETITION FOR WRIT OF CERTIORARI**

HEATHER E. WILLIAMS
Federal Defender

PEGGY SASSO*
Assistant Federal Defender
2300 Tulare Street, Suite 330
Fresno, California 93721
(559) 487-5561
Peggy_Sasso@fd.org
*Counsel of Record for Petitioner

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Pursuant to Rule 13.5 of this Court and 28 U.S.C. § 2101(c), Petitioner EDGAR BARRERA requests an extension of time of 59 days in which to file a petition for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit to and including February 17, 2023. The final order denying rehearing en banc by the Ninth Circuit was entered on September 21, 2022, and is attached hereto as Appendix A. Without an extension, Petitioner has until December 20, 2022 to file a petition for certiorari in this Court. This application for an extension is being filed more than 10 days before that deadline.

The decision for which review is sought was issued by the Ninth Circuit on April 27, 2022 and is attached hereto as Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

In support of the application for an extension of time, the undersigned sets forth the following facts:

1. On December 19, 2019, the government charged Petitioner with one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The indictment alleged that Petitioner had three prior convictions in violation of California Penal Code (“CPC”) § 273.5, but did not allege that the crimes had been committed on occasions different from one another.

2. On June 18, 2020, Petitioner pled guilty to one count of violating § 922(g)(1) without a plea agreement. At no time during the plea colloquy was it alleged nor did Petitioner admit that his prior convictions for violating § 273.5 were committed on occasions different from one another.
3. At Petitioner's sentencing hearing, held October 29, 2020, the government argued that Petitioner should be sentenced as an Armed Career Criminal under 18 U.S.C. § 924(e).
4. Petitioner objected because (1) under clearly established California Supreme Court precedent an individual can be convicted of violating CPC § 273.5 without being aware that his use of force could harm another, and thus § 273.5 does not qualify as a violent felony under § 924(e)(2)(B)(i); (2) Petitioner did not admit, nor did a jury find beyond a reasonable doubt, that the conduct underlying his three prior felony convictions was "committed on occasions different from one another," and thus it would violate both the Fifth and Sixth Amendments for the sentencing court to rely on facts that it found in the first instance to impose a sentence in excess of the ten-year statutory maximum authorized by Congress for the offense of conviction; and (3) even if a sentencing judge could rely on non-elemental facts that it found in the first instance to impose a sentence in excess of the statutory maximum, the government failed to prove by a preponderance of the evidence that the

conduct underlying the convictions in fact occurred on occasions different from one another.

5. The sentencing court overruled all of Petitioner's objections and "reluctantly" imposed a sentence of fifteen years, observing that the sentence was "absurd," "unduly harsh," "clearly not called for" and "anything but reasonable," and if it did not believe it was bound to do so "there's zero possibility, zero, that [it] would impose a 180-month sentence in this case."
6. Petitioner appealed to the Ninth Circuit reiterating the same objections that he had made at sentencing.
7. On March 7, 2022 this Court issued *Wooden v. United States* establishing that the inquiry into whether conduct underlying different convictions occurred on occasions different from one another is "multi-factored in nature" such that "a range of circumstances may be relevant to identifying episodes of criminal activity." 142 S. Ct. 1063, 1070-71 (2022). Whether a sentencing judge can make such findings in the first instance was not before this Court in *Wooden*. *Id.* at 1087 n.12 (Gorsuch, J., concurring in the judgment) (observing that this "constitutional question simmers beneath the surface" of *Wooden*). That constitutional question is squarely presented here.
8. Ignoring *Wooden*, on April 27, 2022, the Ninth Circuit held that the district court committed no error and affirmed the sentence imposed.

9. On or about July 20, 2022, while Petitioner’s request for rehearing en banc was pending at the Ninth Circuit, the Solicitor General issued new guidance in light of *Wooden* that appears to recognize that any non-elemental facts necessary to satisfy the requisite multi-factor analysis must be admitted by a defendant or found by a jury beyond a reasonable doubt.
10. On July 26, 2022, Petitioner filed a letter with the Ninth Circuit informing the Court of the Solicitor General’s changed position. In response, the government indicated that it would only share its position if the Court asked it to do so. The Ninth Circuit did not ask the government to do so.
11. In other circuits the government has not been so shy about expressing its changed position.
12. For example, the day before Petitioner filed his letter with the Ninth Circuit, the government affirmatively notified the Fourth Circuit of its changed position. *See*, Letter to the Court with Government’s Supplemental Authority, *United States v. Hadden*, No-19-4151, at 1 (4th Cir. July 25, 2022) (“In light of the multi-factored and ‘holistic’ inquiry required by *Wooden*, 142 S. Ct. at 1070-1071, the Solicitor General has determined that a jury must find, or a defendant must admit, that a defendant’s ACCA predicates were committed on occasions different from one another”).
13. Approximately a week and a half later the government likewise advised the

Eleventh Circuit of its changed position. See Government’s Supplemental Letter Brief, *United States v. McCall*, No. 18-15229, at 6-7 (11th Cir. Aug. 5, 2022) (contending that while “the United States’ current view is that the different-occasions inquiry, as described in *Wooden*, is one for a jury (unless the defendant has admitted to the different occasions), the court was bound by its prior precedent holding otherwise).

14. In October, the government agreed that en banc review was necessary in the Eighth Circuit given the tension with *Wooden* and the court’s precedent permitting sentencing judges to make the necessary factual findings to determine whether conduct was committed on different occasions. See Government’s response to Appellant’s petition rehearing en banc, *United States v. Stowell*, Case No. 21-2234, at 8-9 (8th Cir. Oct. 26, 2022) (“Given the holistic and multi-factored inquiry required by *Wooden*, the determination of whether a defendant’s ACCA predicates were committed on occasions different from one another must, under the Sixth Amendment, be made by a jury or admitted by the defendant.”). The Eighth Circuit granted the parties’ request for rehearing en banc on November 15, 2022.

15. Likewise, in October the government shared its new position with the Seventh Circuit. See Government’s Answering Brief, *United States v. Erlinger*, No. 22-1926, at 10-11 (7th Cir. Oct. 19, 2022) (Following the

“multi-factored” and “holistic” inquiry established by *Wooden* “the United States agrees that a jury must find (or a defendant must admit) that ACCA predicates were committed on different occasions. Although sentencing judges may find the fact of a prior conviction, they are prohibited from finding non-elemental facts about a prior conviction.”). Notably, the government singled out the Ninth Circuit’s decision in Petitioner’s case as among other “post-*Wooden*” decisions the government now “disagrees with” because “ACCA’s different-occasions inquiry required by *Wooden* does not fall within *Almendarez-Torres*’s narrow exception.” *Id.* at 11.

16. The resolution of all of the aforementioned cases—*Hadden*, *McCall*, *Stowell* and *Erlinger*—remains pending.

17. Because of the government’s recent change of position, this is a fast moving area of law, and it makes sense to let the dust settle for a few more months before presenting the issue to this Court. Moreover, counsel needs additional time to make sure she is abreast of the current state of the law so the issues can be properly framed for this Court.

18. In addition, counsel has a particularly heavy case load and administrative responsibilities in an office of eight attorneys that is currently down two attorneys. Among other things, on November 29, 2022, counsel filed a timely petition for writ of certiorari with this Court for two defendants and counsel

has oral argument at the Ninth Circuit on December 8, 2022. As a result, the additional time sought in this application is required. Counsel has never asked for an extension from this Court and does not do so lightly.

19. This application is not being made to unduly delay the proceedings or for any other improper purpose.

Wherefore Petitioner respectfully requests that an order be entered extending his time to petition for certiorari to and including February 17, 2023.

Dated: December 2, 2022

Respectfully submitted,

HEATHER E. WILLIAMS
Federal Defender

PEGGY SASSO
Assistant Federal Defender
Eastern District of California
Counsel of Record for Petitioner
2300 Tulare Street, Suite 330
Fresno, CA 93721
(559) 487-5561
peggy_sasso@fd.org