

No. 23-5457

IN THE SUPREME COURT OF THE UNITED STATES

DEANGELUS THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Acting 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 Fifth and Sixth Amendments require that an indictment charge, and a jury find (or the defendant admit), that a defendant's predicate offenses were "committed on occasions different from one another" before the defendant may be sentenced under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(1).

IN THE SUPREME COURT OF THE UNITED STATES

No. 23-5457

DEANGELUS THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is available at 2023 WL 5535124. The order of the district court is not published in the Federal Supplement but is available at 2022 WL 17091875.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2023. The petition for a writ of certiorari was filed on August 22, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted on two counts of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924. Judgment 1. He was sentenced to 432 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-4.

1. In January 2021, petitioner pistol-whipped his girlfriend, Jamie Taylor, striking her in the head and face with a gun. Presentence Investigation Report (PSR) ¶¶ 7, 19-20; Sent. Tr. 9. Petitioner threatened to kill Taylor unless she arranged a meeting with Gary Dent, with whom petitioner believed Taylor was romantically involved. Sent. Tr. 9, 15-16.

Petitioner then forced Taylor to drive to the meeting location while he hid in the back seat of her car; when Dent arrived, petitioner jumped out of the car and fired six rounds from a rifle, striking Dent twice. PSR ¶¶ 7-8; Sent. Tr. 16. Dent was taken to the hospital in critical condition. Sent. Tr. 16. After arresting petitioner, police officers recovered a Sig Sauer pistol loaded with eight rounds of ammunition and a Diamondback 9mm rifle loaded with five rounds of ammunition. PSR ¶ 8.

2. A federal grand jury in the Western District of Tennessee charged petitioner with two counts of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1)

and 924. First Superseding Indictment 1-2. A jury found petitioner guilty on both counts. D. Ct. Doc. 65 (Mar. 31, 2022).

In preparation for sentencing, the Probation Office determined that petitioner qualified for an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). PSR ¶ 26. At the time of petitioner's offense, the default term of imprisonment for possessing a firearm as a felon was zero to ten years. See 18 U.S.C. 924(a)(2) (2018).¹ The ACCA 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).

The Probation Office determined that petitioner had three prior Tennessee convictions for offenses that qualified as ACCA predicates: (1) aggravated robbery, committed on November 15, 2000; (2) aggravated assault, committed on December 7, 2007; and (3) attempted second-degree murder, committed on September 10, 2010. PSR ¶¶ 32-33, 35; see PSR ¶ 26. The Probation Office further determined that those offenses "were committed on different occasions." PSR ¶ 26.

Petitioner objected to his ACCA classification. D. Ct. Doc. 77, at 1 (Aug. 2, 2022). Petitioner contended that, under the

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. 1329 (18 U.S.C. 924(a)(8) (Supp. IV 2022)).

Fifth and Sixth Amendments, he could not be sentenced under the ACCA in the absence of an allegation in the indictment, and a jury finding, that his predicate offenses were committed on different occasions. Id. at 1-3, 7. Based on this Court's recent articulation of the nature of the different-occasions inquiry in Wooden v. United States, 595 U.S. 360 (2022), the government agreed with petitioner and requested that a jury be empaneled to make the different-occasions finding. D. Ct. Doc. 79, at 7-8 (Sept. 16, 2022); D. Ct. Doc. 87, at 1, 5 (Nov. 2, 2022).

The district court refused to adopt that approach, concluding that circuit precedent foreclosed it. D. Ct. Doc. 93, at 8 (Nov. 21, 2022) ("The Sixth Circuit has held, after Wooden, that judges may make the 'occasions different' finding for the purposes of the ACCA."). The court adopted the findings of the presentence report and found that petitioner qualified for sentencing under the ACCA. Sent. Tr. 10-11, 36. The court sentenced petitioner to 432 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1-4. Citing published decisions that both pre-dated and post-dated Wooden, the court noted that it had "consistently rejected" the claim that the ACCA's different-occasions inquiry requires a jury finding (or defendant admission) rather than a judicial determination. Id. at 3-4 (citing United States v. Williams, 39 F.4th 342, 351 (6th Cir. 2022), cert.

denied, 143 S. Ct. 1783 (2023); United States v. Hennessee, 932 F.3d 437, 444 (6th Cir. 2019), cert. denied, 140 S. Ct. 896 (2020); and United States v. Burgin, 388 F.3d 177, 186 (6th Cir. 2004), cert. denied, 544 U.S. 936 (2005)).

The panel stated that Wooden “‘didn’t disrupt [the court of appeals’] prior caselaw’” because “Wooden addressed whether a string of burglaries committed at a single storage facility occurred on ‘different occasions,’” rather than a “constitutional challenge” to the ACCA sentence. Pet. App. 3 (citation omitted). “In the absence of a Supreme Court decision or an en banc ruling of [the Sixth Circuit] holding otherwise,” the panel concluded that it was “bound by [circuit] precedent that a sentencing judge may decide whether predicate offenses were committed on different occasions for ACCA purposes.” Id. at 3-4.

DISCUSSION

Petitioner renews his contention (Pet. 9-22) that the Fifth and Sixth Amendments require the government to charge and a jury to find (or a defendant to admit) that predicate offenses were committed on different occasions under the ACCA. As explained at pages 8 to 14 of the government’s brief in Erlinger v. United States, No. 23-370 (petition filed Oct. 4, 2023) (Gov’t Erlinger Br.), filed on the same day as this brief, the government agrees that the circuits’ adherence to pre-Wooden precedent on the question presented is incorrect, yet intractably entrenched. And while Erlinger provides the Court with a suitable vehicle for

resolving the question presented, see Gov't Erlinger Br. at 14-16, this case would provide an adequate alternative if the Court perceives any vehicle problem with Erlinger.²

First, although the decision below is unpublished, the court below has definitively addressed the question presented in other published decisions. See Gov't Erlinger Br. at 10-11. Second, this case arises from a trial, with no relinquishment of petitioner's right to seek a non-ACCA sentence, and petitioner adequately preserved his constitutional objections to his ACCA classification in both lower courts, see D. Ct. Doc. 77, at 1-3, 7; D. Ct. Doc. 85, at 4-5 (Nov. 26, 2022); Pet. C.A. Br. 11-24. The government likewise briefed the issue in the lower courts, agreeing in substance with petitioner, see Gov't C.A. Br. 8-9; D. Ct. Doc. 79, at 7-8; D. Ct. Doc. 87, at 1-2, 5, and both courts below specifically analyzed and resolved the issue, see Pet. App. 3-4; D. Ct. Doc. 93, at 7.

² The government has served petitioner with a copy of its brief in Erlinger. The same question is additionally presented in the petition for a writ of certiorari in Valencia v. United States, No. 23-5606 (filed Sept. 12, 2023), which would also be an adequate alternative vehicle. A similar question is also presented in McCall v. United States, No. 22-7630 (filed May 22, 2023), which the Court appears to be holding pending the disposition of Jackson v. United States, No. 22-6640 (oral argument scheduled for Nov. 27, 2023), and Brown v. United States, No. 22-6389 (oral argument scheduled for Nov. 27, 2023). While the pendency of the Brown/Jackson question in McCall would make it an unsuitable vehicle for further review of the question presented here, if the Court grants certiorari in this case, Valencia, or Erlinger, it should hold the petition in McCall pending its decision on the question presented here and then dispose of McCall as appropriate.

Finally, while the government argued in the court of appeals that the error in this particular case was harmless, and that petitioner would therefore not be entitled to relief even if the question presented were resolved in his favor, Gov't C.A. Br. 11-14, the court did not decide the case on that ground, see Pet. App. 3-4. Nothing would preclude this Court from likewise addressing the merits. And because prejudice will be similarly lacking in many other cases raising the question presented, its absence here does not warrant declining review of a question that the government agrees that the lower courts are currently answering incorrectly in the first instance, thereby denying defendants important rights in cases involving a common criminal charge.

CONCLUSION

The petition for a writ of certiorari should either be granted or held pending this Court's disposition of the petitions for writs of certiorari in Valencia v. United States, No. 23-5606 (filed Sept. 12, 2023) and Erlinger v. United States, No. 23-370 (filed Oct. 4, 2023). Because the court of appeals adopted a position that the government considers incorrect, if this Court grants review, it may wish to consider appointing an amicus to defend the holding of the court of appeals.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

PAUL T. CRANE
Attorney

OCTOBER 2023