No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Rico Lorodge Brown,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Armed Career Criminal Act imposes heightened statutory penalties if a defendant convicted of an offense under 18 U.S.C. § 922(g) has three prior convictions for offenses that were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). The question presented is whether, under the Fifth and Sixth Amendments, this different-occasions element must be charged in the indictment and either admitted as part of a guilty plea or found by a jury beyond a reasonable doubt.

This same question is pending before the Court in *Erlinger v. United States*, No. 23-370 (cert. granted Nov. 2, 2023).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rico Brown respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

DECISIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published at 67 F.4th 200 and reprinted at App. 1-35. The court's order denying rehearing en banc, together with four separate concurring and dissenting opinions, is published at 77 F.4th 301 and reprinted at App. 44-57. The sentencing order of the district court is unpublished and reprinted at App. 37-43.

JURISDICTION

The Court of Appeals entered judgment on May 3, 2023, and denied Brown's petition for en banc rehearing on August 9, 2023. App. 36, 44-57. On October 26, 2023, the Chief Justice extended the time in which to file a petition for writ of certiorari through January 6, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . . .

In relevant part, 18 U.S.C. § 924(e) provides:

> (1) In the case of a person who violates section 922 (g) of this title and has three previous convictions by any court referred to in section 922 (g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . . .

STATEMENT OF THE CASE

This case presents a question on which this Court has already granted certiorari in *Erlinger v. United States*, No. 23-370 (cert. granted Nov. 2, 2023). As a result, the Court should hold this case for disposition pending its decision in *Erlinger* and then grant certiorari, vacate the judgment of the Fourth Circuit, and remand the case for further proceedings in light of *Erlinger*.

1. Based on the sale of a pistol to an undercover officer, a federal grand jury indicted Rico Brown on a single charge of possessing a firearm after a felony conviction in violation of 18 U.S.C. § 922(g)(1). JA 7-8.[1] That offense typically carries a statutory maximum of 10 years under 18 U.S.C. § 924(a)(2). The Armed Career Criminal Act ("ACCA"), however, provides for an enhanced set of penalties—a mandatory minimum of 15 years and a maximum of life in prison—if the defendant has three prior convictions for a "violent felony" or a "serious drug

[1] The citations to "JA" in this brief refer to the Joint Appendix filed in the Court of Appeals.

offense" that were "committed on occasions different from one another." 18 U.S.C. § 924(e).

2. The grand jury indictment did not refer to the ACCA, cite § 924(e), or otherwise assert that Brown was subject to an enhanced statutory penalty. The indictment also did not allege that Brown had any prior "violent felony" convictions or that any such convictions were based on offenses committed on different occasions. JA 7. Brown pled guilty to the offense charged in the indictment without a plea agreement. JA 10-22.

3. Before sentencing, a probation officer completed a presentence investigation report ("PSR"), which asserted that Brown was subject to the ACCA's enhanced penalties based on three prior robbery convictions. JA 59 (PSR at ¶ 22), JA 68 (PSR at ¶ 66). The PSR cited one conviction for common law robbery with a state-court judgment date of October 3, 2013, and two convictions for robbery with a dangerous weapon with a joint judgment date of May 13, 2008. JA 59-62 (PSR at ¶¶ 22, 29, 30, 33). The PSR recited various facts about each offense, including dates, victim names, items stolen, and the means used to commit the robbery. JA 60-62 (PSR at ¶¶ 29, 30, 33). Although the latter two offenses were sentenced on the same day in state court, the facts alleged in the PSR asserted different offense dates. JA 60-61 (PSR at ¶¶ 29-30).

4. Brown objected to application of the ACCA enhancement. He argued that "sentencing him under the ACCA would violate his Fifth and Sixth Amendment rights" because the ACCA's different-occasions element requires

findings that "go well beyond the 'simple fact of a prior conviction.'" JA 49, 52 (quoting *Mathis*, 136 S. Ct. at 2252). In support, he argued that the Fourth Circuit's previous rejection of such a claim in a 2-1 decision—*see United States v. Thompson*, 421 F.3d 278 (4th Cir. 2005)—"can no longer stand" because it "rested on [a] premise" that was later "reject[ed]" by the Supreme Court's intervening decisions in *Descamps v. United States*, 570 U.S. 254 (2013) and *Mathis v. United States*, 579 U.S. 500, 511 (2016). *See* JA 52-53. He also noted that the *Wooden* case, which was pending in the Supreme Court at the time, could be relevant to the issue. JA 25-26.

5. At the sentencing hearing, the district court rejected Brown's constitutional argument. JA 26-27. The court then "adopt[ed] the information in the presentence report" and applied the ACCA's 180-month "statutory mandatory minimum." JA 27. The court imposed the required 180-month sentence while commenting that it "does not like mandatory minimum statutes" and "is not allowed" under such statutes to "impose individualized sentences." JA 34. The district court entered its judgment on May 13, 2021. JA 40. Brown timely filed a notice of appeal. JA 47.

6. On appeal, Brown renewed his constitutional argument. After initially defending *Thompson* in its response brief, the government filed a Rule 28(j) letter informing the Court that, upon further review of *Wooden*, it had changed its position on the merits:

> In light of the "multi-factored" and "holistic" inquiry required by *Wooden*, 142 S. Ct. at 1070-71, the Solicitor General has determined that a jury must find, or a defendant must admit, that a defendant's

> predicates under the Armed Career Criminal Act were committed on occasions different from one another.

See Fourth Cir. Dkt. 31 (filed July 26, 2022). The government thus conceded that Brown was correct on the merits of the constitutional issue, but it argued that the error was harmless.

7. The panel majority concluded that, due to the panel-precedent rule, it was not "required to accede to the parties' view of such an important issue." App. 8. Because *Thompson* had addressed the constitutional issue in 2005, the panel majority explained that "the precise question" was "the relatively narrow one of whether our precedent . . . is no longer binding in light of intervening Supreme Court decisions." App. 8. The majority concluded that the Supreme Court's decision in *Almendarez-Torres* should be read as permitting a sentencing judge to find any "facts that support a recidivism enhancement." App. 3. And while the majority acknowledged that intervening Supreme Court decisions "arguably create some tension" with that reading of *Almendarez-Torres* (App. 22), it suggested that only the Supreme Court can resolve that tension: "unless and until the Supreme Court expressly overturns or narrows *Almendarez-Torres*, we conclude that our precedent in *Thompson* remains good law." App. 29. The panel declined to address the government's harmless-error argument.

8. Judge Heytens wrote a concurrence, which agreed that the panel-precedent rule required the panel to follow *Thompson*. But he disagreed with the panel's reading of *Almendarez-Torres*. In his view, that decision "is not directly on

point because it involved a different statute . . . and a different question." App. 32. And, perhaps more importantly, he explained that this Court "should be guided by the Supreme Court's repeated counsel" that *Almendarez-Torres* provides only a "'narrow exception' to *Apprendi*'s general rule." App. 33.

Judge Heytens made clear that, if not for *Thompson*, he would agree that the ACCA's different-occasions requirement is subject to the *Apprendi* rule. In his view, the Court should heed the Supreme Court's "repeated counsel" that the *Almendarez-Torres* exception "applies *only* to the fact of a prior conviction." App. 32 (cleaned up; emphasis added by Judge Heytens). With that understanding of *Almendarez-Torres*, Judge Heytens provided a straightforward analysis of the issue:

> But as both the statutory text and *Wooden* make clear, determining whether Brown's previous offenses were committed "on occasions different from one another," 18 U.S.C. § 924(e)(1), requires going far beyond the limited fact of his convictions. I see no reason why it is any more constitutionally permissible for a court "to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct" when the question shifts from whether that conduct was "violent" to whether it happened on different "occasions."

App. 33 (quoting *Descamps*, 570 U.S. at 269). Nonetheless, based on *Thompson* and the "high standard" of the panel-precedent rule, he concluded that "the choice to revisit this issue belongs to the en banc Court rather than this panel." App. 34-35.

9. Brown filed a petition seeking en banc review. The Fourth Circuit denied that petition by a vote of 10 to 4. Nonetheless, eleven judges signed opinions signaling agreement with Brown's constitutional argument on the merits. *See* 77 F.4th 301, 302 (Aug. 9, 2023) ("I believe a district court may not find a defendant

committed previous offenses on different occasions") (Heytens, J., joined by six others); *id.* at 303-07 (Wynn, J., joined by three others). Seven of those judges voted against en banc rehearing because they believed that the substantive issue would best be addressed by the Supreme Court. *See id.* at 302 (Heytens, J., joined by six others) ("I hope the Supreme Court will step in to illuminate the path soon."). In addition, six other judges signed opinions urging this Court to grant review. *See id.* at 302 (Niemeyer, J., joined by Senior Judge Floyd) ("urging the Supreme Court to give the courts of appeals guidance in this important matter"); *id.* at 303 (Wynn, J., joined by three additional judges) ("agree[ing] that the Supreme Court should take up the key question in this case").

REASONS FOR GRANTING THE WRIT

The court of appeals held that the Fifth and Sixth Amendments do not require prosecutors to allege the ACCA's different-occasions element in an indictment or to prove that element to a jury beyond a reasonable doubt. Although a majority of the en banc court of appeals signaled agreement with Brown's constitutional arguments on the merits, the Court denied en banc review and opted, instead, to urge this Court to resolve the constitutional issue.

This Court granted certiorari to resolve that issue in *Erlinger v. United States*, No. 23-370 (cert. granted Nov. 2, 2023). Accordingly, this Court's disposition of *Erlinger* will determine the constitutionality of Brown's sentence. The Court

should hold this petition pending its decision in *Erlinger* and then dispose of the petition as appropriate in light of that decision.[2]

CONCLUSION

For the foregoing reasons, this Court should hold this case for disposition pending its decision in *Erlinger* and then grant certiorari, vacate the judgment of the Fourth Circuit, and remand the case for further proceedings in light of *Erlinger*.

Respectfully submitted,

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[2] This Court is already holding several petitions presenting the same issue. *See*, *e.g.*, *Thomas v. United States*, No. 23-5457 (filed Aug. 22, 2023); *Valencia v. United States*, No. 23-5606 (filed Sept. 12, 2023).