

IN THE SUPREME COURT OF THE UNITED STATES

No. 23-370

PAUL ERLINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION OF RESPONDENT FOR DIVIDED ARGUMENT

Pursuant to Rules 21 and 28.4 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves for divided argument in this case. The United States requests that petitioner and the United States each be allotted 15 minutes of argument time and that the appointed amicus curiae be allotted 30 minutes of argument time. Counsel for petitioner consents to that request.

1. This case presents the question whether the Constitution requires that 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 (ACCA), 18 U.S.C. 924(e)(1). Following a guilty plea, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 180 months of imprisonment, pursuant to the ACCA, after determining that his record included three burglary convictions that had been committed on different occasions. Am. Judgment 2-3; Pet. App. 55a-59a.

On appeal, the government agreed with petitioner that, in light of this Court's recent articulation of the different-occasions inquiry in Wooden v. United States, 595 U.S. 360 (2022), the Constitution requires a jury to determine whether predicate offenses were committed on different occasions under the ACCA. The court of appeals nonetheless affirmed, explaining that it was bound by circuit precedent holding that a sentencing judge can determine whether a defendant's predicate offenses were committed on different occasions. Pet. App. 6a-7a & n.3.

Petitioner filed a petition for a writ of certiorari. The government acquiesced in certiorari, agreeing that this Court's intervention is necessary to ensure that the courts of appeals correctly recognize defendants' constitutional rights in this context. The Court granted the petition and invited an amicus curiae to brief and argue the case in support of the judgment below.

2. Before this Court's decision in Wooden, the United States took the position that sentencing judges could undertake the different-occasions inquiry under the ACCA. But in light of the standard that Wooden adopted for determining whether offenses occurred on different occasions, the government agrees with petitioner that the Constitution requires a jury to find (or a defendant to admit) that predicate offenses were committed on different occasions before the defendant may be sentenced under the ACCA. The United States has accordingly filed a brief as respondent supporting petitioner.

The United States has a substantial interest in this Court's resolution of the question presented, which is important to the administration of federal sentencing law. The government also has a substantial interest in the Constitution's application to federal sentencing more generally. The government is a party to this case and to every case in which the question presented arises. Division of argument will therefore materially assist the Court in its consideration of this case.

The government has presented argument in prior federal criminal cases in which the Court appointed an amicus to defend the judgment below. See, e.g., Holguin-Hernandez v. United States, 140 S. Ct. 762 (2020); Beckles v. United States, 137 S. Ct. 886 (2017); Welch v. United States, 136 S. Ct. 1257 (2016); Dorsey v. United States, 567 U.S. 260 (2012); Tapia v. United States, 564

U.S. 319 (2011); Pepper v. United States, 562 U.S. 476 (2011). The government respectfully submits that the same course is warranted here.

For the foregoing reasons, the government requests that the Court grant the motion for divided argument.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

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