No. 24-5837

IN THE SUPREME COURT OF THE UNITED STATES

RUBEN AGUILERA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

BRENT S. WIBLE
Principal Deputy Assistant
Attorney General

ANDREW C. NOLL
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in denying petitioner a certificate of appealability on his collateral-review claim that he is entitled to reopen his proceedings so that a jury can address the issue of whether his predicate offenses were "committed on occasions different from one another" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(1).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

United States v. Aguilera, No. 21-cr-62 (Aug. 25, 2021)

United States v. Aguilera, No. 22-cv-171 (Oct. 13, 2023)

United States v. Aguilera, No. 21-cr-62 (Oct. 13, 2023)

United States Court of Appeals (5th Cir.):

United States v. Aguilera, No. 21-50767 (Feb. 15, 2022)

United States v. Aguilera, No. 23-50778 (June 6, 2024)

Supreme Court of the United States:

Aguilera v. United States, No. 21-7483 (Apr. 25, 2022)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. D1-D2) is not published in the Federal Reporter but is available at 2024 WL 4602691. The order of the district court (Pet. App. B1-B30) is unreported but is available at 2023 WL 11964295. A prior opinion of the court of appeals (Pet. App. A1-A3) is not published in the Federal Reporter but is available at 2022 WL 458387.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2024. A petition for a writ of certiorari was filed on September

3, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in 2021 in the United States District Court for the Western District of Texas, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924 (2020). Judgment 1. The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed, Pet. App. A1-A3, and this Court denied a petition for a writ of certiorari, 142 S. Ct. 2665.

In 2022, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence. D. Ct. Doc. 47 (Aug. 4, 2022). The district court denied the motion and declined to issue a certificate of appealability. Pet. App. B1-B31. The court of appeals likewise denied a certificate of appealability. Id. at D1-D2.

1. In February 2021, police officers stopped petitioner's vehicle in Midland, Texas after observing petitioner speeding, failing to signal, and making a wide turn. Presentence Investigation Report (PSR) ¶ 3; see D. Ct. Doc. 28 (May 10, 2021). The officers observed that the car smelled of alcohol, an alcoholic beverage was visible in the car, petitioner's eyes were bloodshot and glossy, and petitioner was slurring his speech. PSR ¶ 3. In plain view, the officers also saw a rifle with an attached 30-round magazine and several other magazines. Ibid. Petitioner

refused a field sobriety test and was arrested. PSR ¶ 4. After petitioner's car was impounded, police officers found two more guns and several spent ammunition casings. Ibid.

2. A grand jury in the Western District of Texas returned an indictment charging petitioner with possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924 (2020). D. Ct. Doc. 17 (Mar. 24, 2021). Petitioner pleaded guilty without a plea agreement. D. Ct. Doc. 29 (May 10, 2021); D. Ct. Doc. 31 (May 25, 2021).

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 ¶ 18. 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) (2020).[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 ACCA defines a "violent felony" as, among other things, an offense punishable by more than one year in prison that "is burglary." 18 U.S.C. 924(e)(2)(B)(ii).

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[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(c), 136 Stat. 1329 (18 U.S.C. 924(a)(8) (Supp. IV 2022)).

The Probation Office determined that petitioner had three prior state-law convictions for Texas burglary that qualified as ACCA predicates. PSR ¶ 18; see PSR ¶¶ 26, 34-35. The first conviction resulted from petitioner's 2003 burglary of a vehicle and garage. PSR ¶¶ 24, 26. The second stemmed from a March 15, 2006, burglary of a home during which petitioner stole a driver's license, cell phone, phone charger, and house key. PSR ¶ 34. And the third conviction involved petitioner's burglary of a different home, belonging to a different individual, over six weeks later, on April 28, 2006. PSR ¶ 35.

The Probation Office determined that petitioner's three prior offenses "were committed on different occasions." PSR ¶ 18. Petitioner objected to application of the ACCA on the ground that the two 2006 burglary offenses were committed as "part of a continuing course of conduct," arguing that he had pleaded guilty to and was sentenced for both of those burglaries on the same day. Addendum to PSR 2; D. Ct. Doc. 34-2, at 1-2 (July 23, 2021); see also PSR ¶¶ 34-35; Pet. App. E1-E2. Petitioner also contended that the Sixth Amendment required a jury to find that a defendant's ACCA predicates were committed on different occasions. Addendum to PSR 3; D. Ct. Doc. 34-2, at 2. The district court rejected those arguments, found that petitioner qualified for sentencing under the ACCA, and sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3; Sentencing Tr. 6-8, 11.

3. The court of appeals affirmed. Pet. App. A1-A3. Although petitioner did not press a Sixth Amendment claim on appeal, see generally 21-50767 Pet. C.A. Br., he renewed his contention that the 2006 predicate convictions "should have counted as one conviction for purposes of determining whether he was an armed career criminal," Pet. App. A2. The court of appeals rejected that contention, explaining that the offenses "occurred on 'occasions different from one another'" and that "[t]he mere fact that [petitioner] was sentenced to two of th[o]se offenses on the same day does not change [that] conclusion." Ibid. (citation omitted).

Shortly thereafter, this Court issued its decision in Wooden v. United States, 595 U.S. 360 (2022), which articulated the standard for determining whether offenses occurred on different occasions under the ACCA. The Court held that the inquiry is "holistic" and "multi-factored," and that "a range of circumstances may be relevant to identifying episodes of criminal activity." Id. at 365, 369. The Court explained:

> Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events. Proximity of location is also important; the further away crimes take place, the less likely they are components of the same criminal event. And the character and relationship of the offenses may make a difference: The more similar or intertwined the conduct giving rise to the offenses -- the more, for example, they share a common scheme or purpose -- the more apt they are to compose one occasion.

Id. at 369. The Court clarified, however, that "[f]or the most part, applying this approach will be straightforward and intuitive," because "[i]n many cases a single factor -- especially of time or place -- can decisively differentiate occasions." Id. at 369-370. The Court observed that, for example, lower courts "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." Id. at 370 (citation and quotation marks omitted).

Petitioner sought a writ of certiorari on other grounds, but did not contend that the court of appeals had erred, under Wooden, in determining that his offenses were committed on different occasions. See Pet. 5-15, Aguilera v. United States, No. 21-7483. This Court denied certiorari. 142 S. Ct. 2665.

4. In 2022, petitioner moved, pro se, to vacate his sentence under 28 U.S.C. 2255. D. Ct. Doc. 47 (Aug. 4, 2022). Among other things, petitioner contended that, after Wooden, the Sixth Amendment required the indictment to charge, and a jury to find, that his ACCA predicates were committed on different occasions. D. Ct. Doc. 51, at 5-6 (Nov. 14, 2022); D. Ct. Doc. 57, at 3-5 (Feb. 3, 2023). In response, the government explained that Wooden did not alter petitioner's status under the ACCA because his three predicate offenses were committed at different times and were not otherwise part of a single criminal episode. D. Ct. Doc. 53, at 4 (Dec. 21, 2022). Although the government acknowledged, in light

of the standard adopted in Wooden for determining whether offenses occurred on different occasions -- that a jury must determine (or a defendant admit) that a defendant's predicate offenses were committed on separate occasions, the government explained that any such rule would not apply retroactively to cases on collateral review. Id. at 3-5.

The district court denied petitioner's motion, adhering to circuit precedent taking the view that the Sixth Amendment did not require a jury to find that predicate offenses were committed on different occasions. Pet. App. B24-B26 (citing, inter alia, United States v. Davis, 487 F.3d 282 (5th Cir. 2007)). The district court also rejected petitioner's argument that his appellate counsel was ineffective for failing to argue on direct appeal that petitioner should be resentenced without the ACCA enhancement because his predicate offenses were not found by a jury, explaining that "Wooden was not decided until after [petitioner's] direct appeal had been decided," so "appellate counsel * * * cannot be said to have been ineffective" for failing to make a Sixth Amendment argument based on Wooden. Id. at B26.

The district court declined to issue a certificate of appealability. Pet. App. B29-B31.

5. The court of appeals likewise denied a certificate of appealability. Pet. App. D1-D2. The court listed petitioner's claims, which included some ineffective-assistance claims as well as a claim that "he should be resentenced without the ACCA

enhancement" following United States v. Wooden, 595 U.S. 360 (2022), and the grant of certiorari in Erlinger v. United States, 144 S. Ct. 419 (2023), "because his prior offenses were not admitted by him or proven to a jury." Id. at D2. And the court explained that petitioner had failed to show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Ibid. (citation omitted).

ARGUMENT

Petitioner contends (Pet. 2-4) that this Court's recent decision in Erlinger v. United States, 602 U.S. 821 (2024), entitles him to reopen his proceedings and have a jury resolve whether his predicate offenses were committed on different occasions. But Erlinger is not retroactively applicable to cases on collateral review. And further review of the court of appeals' determination that petitioner was not entitled to a certificate of appealability is unwarranted because petitioner procedurally defaulted his Sixth Amendment claim and could not establish prejudice in any event. Petitioner does not even attempt to show that any other court of appeals would have resolved his collateral attack differently. The petition for a writ of certiorari should be denied.

1. A federal prisoner seeking to appeal from the denial of a motion for postconviction relief under Section 2255 must obtain a certificate of appealability. 28 U.S.C. 2253(c)(1)(B). To

obtain a certificate, the prisoner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) -- that is, a "showing that reasonable jurists could debate whether" a constitutional claim "should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)); see Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (same).

Petitioner contends (Pet. 3-4) that the Court's decision in Erlinger -- which issued after the court of appeals denied petitioner's motion for a certificate of appealability -- establishes that the district court erred in rejecting petitioner's claim that a jury should have determined whether his predicate offenses were committed on different occasions. But Erlinger is not retroactively applicable to cases -- like petitioner's -- on collateral review.

The rule announced in Erlinger was "new" because the result "was not dictated by precedent." Chaidez v. United States, 568 U.S. 342, 347 (2013) (citation and emphasis omitted); Edwards v. Vannoy, 593 U.S. 255, 265 (2021) ("[A] rule is new unless, at the time the conviction became final, the rule was already 'apparent to all reasonable jurists.'") (citation omitted). Indeed, prior to Erlinger, the courts of appeals had uniformly held that sentencing courts could properly undertake the different-occasions

inquiry under the ACCA,[2] including those courts that had occasion to address the issue following Wooden.[3]

And as this Court has explained, "[n]ew procedural rules do not apply retroactively on federal collateral review." Edwards, 593 U.S. at 272; see Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion). Applying "constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the

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[2] See, e.g., United States v. Ivery, 427 F.3d 69, 75 (1st Cir. 2005), cert. denied, 546 U.S. 1222 (2006); United States v. Santiago, 268 F.3d 151, 156-157 (2d Cir. 2001), cert. denied, 535 U.S. 1070 (2002); United States v. Blair, 734 F.3d 218, 227-228 (3d Cir. 2013), cert. denied, 574 U.S. 828 (2014); United States v. Thompson, 421 F.3d 278, 284-287 (4th Cir. 2005), cert. denied, 547 U.S. 1005 (2006); United States v. White, 465 F.3d 250, 254 (5th Cir. 2006) (per curiam), cert. denied, 549 U.S. 1188 (2007); United States v. Burgin, 388 F.3d 177, 184-186 (6th Cir. 2004), cert. denied, 544 U.S. 936 (2005); United States v. Morris, 293 F.3d 1010, 1012-1013 (7th Cir.), cert. denied, 537 U.S. 987 (2002); United States v. Evans, 738 F.3d 935, 936-937 (8th Cir. 2014) (per curiam); United States v. Walker, 953 F.3d 577, 580-582 (9th Cir. 2020), cert. denied, 141 S. Ct. 1084 (2021); United States v. Michel, 446 F.3d 1122, 1132-1133 (10th Cir. 2006); United States v. Spears, 443 F.3d 1358, 1361 (11th Cir.) (per curiam), cert. denied, 549 U.S. 916 (2006); United States v. Thomas, 572 F.3d 945, 952 n.4 (D.C. Cir. 2009), cert. denied, 559 U.S. 986 (2010).

[3] United States v. Brown, 67 F.4th 200, 215 (4th Cir. 2023), reh'g denied, 77 F.4th 301 (4th Cir. 2023); United States v. Valencia, 66 F.4th 1032, 1032 (5th Cir. 2023), vacated and remanded, 144 S. Ct. 2710 (2024); United States v. Belcher, 40 F.4th 430, 432 (6th Cir. 2022), cert. denied, 143 S. Ct. 606 (2023); United States v. Erlinger, 77 F.4th 617, 619-622 (7th Cir. 2023); United States v. Robinson, 43 F.4th 892, 896 (8th Cir. 2022); United States v. Barrera, No. 20-10368, 2022 WL 1239052, at *2 (9th Cir. Apr. 27, 2022), cert. denied, 143 S. Ct. 1043 (2023); United States v. Reed, 39 F.4th 1285, 1295-1296 (10th Cir. 2022), cert. denied, 143 S. Ct. 745 (2023); United States v. McCall, No. 18-15229, 2023 WL 2128304, at *7 (11th Cir. Feb. 21, 2023) (per curiam), vacated and remanded, 144 S. Ct. 2705 (2024).

operation of our criminal justice system." Teague, 489 U.S. at 309. Accordingly, the Court has determined, the "costs imposed * * * by retroactive application of new rules of constitutional law on habeas corpus * * * generally far outweigh the benefits of [their] application." Edwards, 593 U.S. at 264 (quoting Sawyer v. Smith, 497 U.S. 227, 242 (1990)).[4]

The new rule announced in Erlinger is procedural. In Erlinger, the Court held that the Constitution requires a jury to find beyond a reasonable doubt (or the defendant to admit) that at least three of a defendant's predicate offenses under the ACCA were "committed on occasions different from one another." 602 U.S. at 835. In other words, Erlinger "altered the range of permissible methods for determining * * * essential facts bearing on punishment." Schriro v. Summerlin, 542 U.S. 348, 353 (2004). Unlike a substantive rule, which "alters the range of conduct or the class of persons that the law punishes," the Sixth Amendment holding announced in Erlinger thus "regulate[s] only the manner of determining the defendant's culpability," ibid. -- it does not prohibit the government from punishing any particular conduct or persons. And because Erlinger did not alter the facts that warrant enhanced punishment under the ACCA, but only the manner in which

[4] The Court previously reserved the possibility that certain "watershed rules of criminal procedure" might apply retroactively. Teague, 489 U.S. at 311 (plurality opinion). In Edwards, however, the Court explained that "[t]he watershed exception is moribund" and "must be regarded as retaining no vitality." 593 U.S. at 272 (citation and internal quotation marks omitted).

those facts much be charged and proved, that decision "is properly classified as procedural," ibid., and subject to Teague's general principle of non-retroactivity. Erlinger thus provides no basis to reverse the court of appeals' determination that petitioner was not entitled to a certificate of appealability.

Although petitioner asserts that his petition "does not raise retroactivity as a claim at this time," Pet. 4 n.**, he elsewhere acknowledges that "he must address retroactivity" because his case is on collateral review, Pet. 4. Petitioner suggests (Pet. 4) that the Fifth Circuit's holding in United States v. Kelley, 40 F.4th 250 (2022), that this Court's decision in Rehaif v. United States, 588 U.S. 225 (2019) -- which held that conviction of unlawful firearm possession under 18 U.S.C. 922(g) and 924(a)(2) requires "must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it," id. at 227 -- applies retroactively to cases on collateral review supports his contention that Erlinger also applies retroactively to cases on collateral review. But as the government explained in Kelley, the Supreme Court in Rehaif "narrow[ed] the 'class of persons that the law punishes' under Sections 922(g) and 924(a)," and so Rehaif "can be retroactively applied on collateral review." Gov't Br. 15, Kelley, supra (No. 20-30436) (filed Dec. 17. 2021) (quoting Welch v. United States, 578 U.S. 120, 131 (2016)); see Kelley, 40 F.4th at 252 ("[N]ew [Supreme Court] decisions interpreting federal statutes that substantively define

criminal offenses automatically apply retroactively"; "[t]he Rehaif decision did just that.") (citation omitted). By contrast, as just explained, the rule announced in Erlinger is procedural.

2. In any event, because petitioner procedurally defaulted his Sixth Amendment claim by failing to raise it on direct appeal, see pp. 4-5, supra, he could not obtain relief on that claim unless he demonstrated "cause" for his failure to preserve the claim and "actual prejudice" from the alleged constitutional violation, Bousley v. United States, 523 U.S. 614, 621-622 (1998). Petitioner cannot make either showing, nor can he establish that reasonable jurists could debate the correctness of that conclusion. The court of appeals correctly denied a certificate of appealability, and that factbound determination does not warrant this Court's review. See Sup. Ct. R. 10.

a. This Court has explained that "cause" for failure to raise a claim may exist where a claim "[wa]s so novel that its legal basis [wa]s not reasonably available to counsel," such that counsel could not have been acting based on "strategic motives of any sort" by failing to raise the claim. Reed v. Ross, 468 U.S. 1, 15-16 (1984). "[T]he question is not whether subsequent legal developments have made counsel's task [in raising a particular claim] easier, but whether at the time of the default the claim was 'available' at all." Smith v. Murray, 477 U.S. 527, 537 (1986). To answer that question, this Court has considered whether, at the time of the default, other litigants were raising

similar claims; if such claims were repeatedly raised, then "it simply is not open to argument that the legal basis of the claim petitioner now presses on federal habeas was unavailable to counsel at the time." Ibid.; see Bousley, 523 U.S. at 622-623 (rejecting a novelty-based "cause" argument in part because the "Federal Reporters were replete with cases" considering the purportedly "novel" claim "at the time" petitioner should have raised it).

Here, petitioner has never even attempted -- in this Court or the courts below -- to demonstrate cause for failing to press a Sixth Amendment claim on direct appeal. See Pet. 2-4; Pet. C.A. Br. 8-9.[5] Nor could he successfully do so, as other litigants in courts across the country had raised that precise claim. See pp. 9-10 & nn. 2-3. And petitioner himself had previously raised a Sixth Amendment claim during the sentencing proceedings,

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[5] Although not framed as an argument for "cause" to excuse his procedural default, in the district court, petitioner contended that counsel in his direct appeal had rendered ineffective assistance by failing to raise a Sixth Amendment claim. D. Ct. Doc. 51, at 5-6; D. Ct. Doc. 57, at 3-4. As the court of appeals observed, petitioner "d[id] not reprise [that claim]" in his motion for a certificate of appealability and "therefore abandon[ed]" that claim. Pet. App. D2. And in any event, because then-controlling Fifth Circuit precedent foreclosed petitioner's Sixth Amendment claim, appellate counsel did not render ineffective assistance. Snider v. United States, 908 F.3d 183, 192 (6th Cir. 2018) (counsel did not render ineffective assistance where he "could have reasonably concluded" at the time that "a challenge would be unsuccessful"), cert. denied, 139 S. Ct. 1573 (2019); accord, e.g., Spaziano v. Singletary, 36 F.3d 1028, 1039 (11th Cir. 1994) ("[R]easonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop.") (citations omitted), cert. denied, 513 U.S. 1115 (1995).

demonstrating that he was well aware of the availability of that claim yet failed to renew it on appeal. See pp. 4-5, supra. One obvious reason appellate counsel may have abandoned that claim on direct appeal -- and declined to press in the petition for certiorari any claim that petitioner's predicate offenses were not committed on different occasions, even though this Court had already decided Wooden -- is that any error would have been harmless. See Washington v. Recuenco, 548 U.S. 212, 218, 222 (2006) ("Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error" and does not "[r]equir[e] automatic reversal"); see also Neder v. United States, 527 U.S. 1, 18 (1999) (errors "infring[ing] upon the jury's factfinding role" are "subject to harmless-error analysis"). Over one month separated petitioner's two 2006 burglaries and petitioner identified no evidence suggesting that those burglaries were part of a single criminal episode. See pp. 16-17, infra.

b. Petitioner also cannot demonstrate prejudice resulting from the Sixth Amendment error. To overcome a procedural default, a defendant must show "actual prejudice" from the alleged error. United States v. Frady, 456 U.S. 152, 168 (1982). That standard requires a defendant to prove "not merely that the errors at * * * trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id. at 170; see

Murray v. Carrier, 477 U.S. 478, 494 (1986). It imposes "a significantly higher hurdle" than would exist had the defendant preserved his claim for review on direct appeal. Frady, 456 U.S. at 166; see Murray, 477 U.S. at 493-494 (explaining that "[t]he showing of prejudice" necessary to excuse a procedural default also is "significantly greater" than that required for an unpreserved claim reviewed for plain error).

Petitioner cannot make that showing here. He contends (Pet. 1) that two of the predicate burglaries -- the burglaries he committed on March 15, 2006, and April 28, 2006 -- occurred "in temporal and physical proximity." But those offenses involved unrelated victims, were separately indicted, and took place approximately six weeks apart. See PSR ¶¶ 34-35; Pet. App. E01-E02; D. Ct. Doc. 34-4, at 5-12. And it is irrelevant that the convictions and sentences on those offenses were entered on the same day. See United States v. Butler, 122 F.4th 584, 589 (5th Cir. Dec. 9, 2024) ("[T]he ACCA's 'occasions' inquiry looks at when the underlying offenses were committed, not when the subsequent convictions were entered").

Accordingly, the failure to submit the different-occasions question to the jury caused no prejudice to petitioner. Cf. Wooden, 595 U.S. at 370 (observing that "[i]n many cases, a single factor -- especially of time or place -- can decisively differentiate occasions," and that courts "have nearly always treated offenses as occurring on separate occasions if a person

committed them a day or more apart"); United States v. Stowell, 82 F.4th 607, 609 (8th Cir. 2023) (en banc) (finding any error harmless where battery offenses were separated by a "multi-day gap" and each "involved a different victim," even though the defendant "was arrested and convicted on the same dates for both offenses"), cert. denied, 144 S. Ct. 2717 (2024). Nor, for that matter, did it have a "substantial and injurious effect or influence" on the outcome of the proceedings, Brecht v. Abrahamson, 507 U.S. 619, 637 (1993), as to warrant collateral relief, even if petitioner had preserved his Sixth Amendment claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

BRENT S. WIBLE
Principal Deputy Assistant
Attorney General

ANDREW C. NOLL
Attorney

JANUARY 2025