FILED: August 9, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4253
(3:20-cr-00223-KDB-DCK-1)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICO LORODGE BROWN,

Defendant - Appellant.

O R D E R

The court denies the petition for rehearing en banc.

A requested poll of the court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Chief Judge Diaz and Judges Wilkinson, Niemeyer, Agee, Harris, Richardson, Quattlebaum, Rushing, Heytens, and Benjamin voted to deny rehearing en banc. Judges King, Gregory, Wynn, and Thacker voted to grant rehearing en banc.

Entered at the direction of Judge Niemeyer.

For the Court

/s/ Patricia S. Connor, Clerk

Statement of Circuit Judge HEYTENS, in which Chief Judge DIAZ and Judges AGEE, HARRIS, RICHARDSON, RUSHING, and BENJAMIN join, concerning the denial of rehearing en banc:

This appeal raises an important and recurring issue that should be considered by the Supreme Court: Whether the Sixth Amendment permits district courts to decide a defendant's prior offenses were "committed on occasions different from one another" for purposes of the Armed Career Criminal Act. 18 U.S.C. § 924(e)(1). Both parties recognize Rico Brown preserved his argument on this point. And both sides agree this Court's existing precedent—and that of every other court of appeals—is wrong. Cf. *Wooden v. United States*, 142 S. Ct. 1063, 1068 n.3 (2022) (not addressing the Sixth Amendment issue because "Wooden did not raise it"). I nonetheless do not think en banc review is warranted here because I believe this case implicates "an important question of federal law that has not been, but should be, settled by [the Supreme] Court." S. Ct. R. 10(c).

The problem is the uncertain scope of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and how to square the broad language in that opinion with other broad language in more recent decisions. The Supreme Court has instructed that if a decision "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions," we "should follow the case which directly controls" and leave to the Court "the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Anderson Express, Inc.*, 490 U.S. 477, 484 (1989). But *Almendarez-Torres* may not have "direct application" (*id.*) because it involved a different statute (the Immigration and Nationality Act) and a different question (whether the defendant in an illegal reentry prosecution was removed "subsequent

to a conviction for commission of an aggravated felony"). *Almendarez-Torres*, 523 U.S. at 226 (quoting 8 U.S.C. § 1326(b)(2)). Thus, the challenge: Is this issue governed by *Almendarez-Torres*' sweeping statements about "recidivism" and its direct reference to the ACCA, see, *e.g.*, *id.* at 230, or, instead, by a host of later decisions that seemingly claw back nearly all that language? See *United States v. Brown*, 789 F.3d 200, 215–18 (4th Cir. 2023) (Heytens, J., concurring in the judgment) (citing cases).

Given the constitutional rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), I believe a district court may not find a defendant committed previous offenses on different occasions using the framework described in *Wooden*, and then increase the defendant's criminal penalty based on such judicial factfinding. But I recognize reasonable people can disagree (and have disagreed). And because this disagreement stems from deep tension within the Supreme Court's precedent, an inferior court is poorly positioned to resolve it. For that reason—and because the Eighth Circuit's grant of rehearing en banc may provide the Supreme Court a timely opportunity to consider this issue, see *United States v. Stowell*, 2022 WL 16942355 (8th Cir. Nov. 15, 2022) (granting rehearing)—I do not believe en banc review is warranted here. But I hope the Supreme Court will step in to illuminate the path soon.

NIEMEYER, Circuit Judge, with whom Senior Circuit Judge FLOYD joins, concurring in part in Judge HEYTENS' Statement:

As author of the opinion in this case, I wish to express my concurrence in most of what my good colleague Judge Heytens has said in his thoughtful Statement urging the Supreme Court to clarify and settle the question of whether the "different occasions" facts required by 18 U.S.C. § 924(e)(1) should be found by a court or must be found by a jury. I also concur in his reasons for why this issue would not be advanced by our en banc review.

I do have a different approach as to the scope of *Almendarez-Torres*'s continuing vitality in light of subsequent Supreme Court cases, as discussed in *United States v. Brown*, 67 F.4th 200 (4th Cir. 2023), but this difference is the very basis for our urging the Supreme Court to give the courts of appeals guidance in this important matter.

KING, Circuit Judge, concurring in the dissent of Judge WYNN from the denial of rehearing en banc, and separately dissenting from the denial of rehearing en banc:

For the reasons so well expressed by my distinguished colleague Judge Wynn, I agree that our Court should have granted rehearing en banc to consider and resolve the important Sixth Amendment issue presented in this appeal. I write separately to emphasize some additional considerations.

As I observed in the not-too-distant past, "[i]t would certainly make our lives easier as judges if we were free to resolve only the easy issues in a case and disregard the hard ones, but, alas, we cannot do so and remain faithful to our constitutional charge to decide cases and controversies as they are presented to us." *See Doe v. Va. Dep't of State Police*, 720 F.3d 212, 214 n.* (4th Cir. 2013) (King, J., dissenting from denial of rehearing en banc). To that end, the Supreme Court has recently stressed that "resolving *hard cases* is part of the judicial job description." *See Dubin v. United States*, 143 S. Ct. 1557, 1573 n.10 (2023) (emphasis added).

Yet in these circumstances, our Court has denied an en banc rehearing, apparently viewing this as being a difficult case in which "the Supreme Court will [soon] step in to illuminate the path" forward. *See* Statement of Circuit Judge Heytens 3. In my view, however, that speculative rationale does not provide a sound basis for denying en banc review. Rather, because this appeal "involves a question of exceptional importance," rehearing en banc was warranted. *See* Fed. R. App. P. 35(a)(2).

That this appeal "involves a question of exceptional importance" is illustrated by the unusual fact that the parties — the defendant and the government — agreed that en

banc review by our Court was warranted. *See* Fed. R. App. P. 35(a)(2). And in that regard, the government's support of an en banc rehearing was with the prior authorization of the Solicitor General of the United States. *See* U.S. Dep't of Just., Justice Manual, § 2-2.122 (2020) (mandating that "[t]he prior authorization of the Solicitor General . . . must be obtained for the filing of a petition for rehearing en banc in a court of appeals").

More broadly, Judge Wynn persuasively explains that en banc review was necessary in this situation to determine whether our 2005 decision in *United States v. Thompson*, 421 F.3d 278 (4th Cir. 2005) — which relies on the Supreme Court's 1998 decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) — conflicts with the Court's more recent decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Descamps v. United States*, 570 U.S. 254 (2013), *Mathis v. United States*, 579 U.S. 500 (2016), and *Wooden v. United States*, 142 S. Ct. 1063 (2022). To be sure, that is precisely the type of question a court of appeals is obliged to assess and resolve, unless and until the Supreme Court says otherwise. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (recognizing that when Supreme Court precedent has "direct application . . . yet appears to rest on reasons rejected in some other line of decisions, [a court of appeals] should *follow the line of cases which directly controls*, leaving to [the Supreme] Court the prerogative of overturning its own decisions" (emphasis added)). And as Judge Wynn observes, that is probably why our colleagues on the Eighth Circuit recently granted en banc rehearing in a similar situation. *See United States v. Stowell*, No. 21-2234, 2022 WL 16942355 (8th Cir. Nov. 15, 2022).

Put simply, this appeal is exceptionally important, and rehearing en banc was warranted pursuant to Rule 35(a)(2). Although this may be a "hard case" that could one day attract the attention of the Supreme Court, that does not mean our Court should have steered clear of en banc review.

* * *

I am honored to confirm that Judge Gregory and Judge Wynn join in this submission.

WYNN, Circuit Judge, with whom Judge KING, Judge GREGORY, and Judge THACKER join, dissenting from the denial of rehearing en banc:

I agree with my colleagues that developments in the Supreme Court over the past two decades cast serious doubt on the continuing viability of *Almendarez-Torres*. And I also agree that the Supreme Court should take up the key question in this case.

But I disagree with my colleagues' conclusion that we must sit on our hands until it does so. Instead, we should rehear this matter en banc and correct the flaws in our *own* precedent.

* * *

The Armed Career Criminal Act provides that a criminal defendant who is convicted of possessing a firearm as a felon, in violation of 18 U.S.C. § 922(g), and who has "three previous convictions . . . for a violent felony or a serious drug offense . . . committed on occasions different from one another," 18 U.S.C. § 924(e)(1), shall be subject to a minimum of 15 years' imprisonment, an enhanced sentence based on the defendant's criminal history.

In 2005, this Court addressed the question presented in this case: whether the Sixth Amendment requires a jury to find that a defendant's prior convictions were "committed on occasions different from one another," or whether that fact may be found by the sentencing judge. *United States v. Thompson*, 421 F.3d 278 (4th Cir. 2005). We held that the Sixth Amendment permits a judge to make that determination. *Id.*

In reaching that conclusion, we relied heavily on the Supreme Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). There, the Supreme Court held

that a different statute that authorized a court to increase the sentence based on a defendant's prior conviction did *not* require the Government to charge the earlier conviction as an element in the indictment. *Id.* at 226–27. The Court explained that, although an indictment must set forth each element of the charged crime, it need *not* set forth those factors that are relevant only to sentencing—factors which are, ordinarily, for Congress to determine. *Id.* at 228.

To ascertain whether it was faced with an element or a mere sentencing factor, the Court looked to the intent of Congress: "Did it intend the factor that the statute mentions . . . to help define a separate crime? Or did it intend the presence of an earlier conviction as a sentencing factor, a factor that a sentencing court might use to increase punishment?" *Id.* This distinction—element or sentencing factor—matters because an element must be submitted to a jury (or admitted by the defendant), whereas a sentencing factor may be determined by a sentencing judge. *See Mathis v. United States*, 579 U.S. 500, 504 (2016); *Apprendi v. New Jersey*, 530 U.S. 466, 485–86 (2000).

Noting that recidivism was a "traditional" basis "for a sentencing court's increasing an offender's sentence," *Almendarez-Torres*, 523 U.S. at 243, the Supreme Court rejected petitioner's invocation of the constitutional-avoidance canon. It explained that the Court did not have grave doubts as to whether Congress could authorize courts "to impose longer sentences upon recidivists who commit a particular crime." *Id.* at 238.

Just two years later—still before this Court decided *Thompson*—the Supreme Court narrowed its earlier holding. In *Apprendi v. New Jersey*, the Court held that, "[o]ther than *the fact* of a prior conviction, *any* fact that increases the penalty for a crime beyond the

prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphases added). Recognizing that this holding was in tension with its conclusion just two years earlier in *Almendarez-Torres*, the Court acknowledged that it was "arguable that *Almendarez-Torres* was incorrectly decided," *id.* at 489, but declined to revisit *Almendarez-Torres* since no party contested its validity.

Instead, the *Apprendi* Court took pains to emphasize that the conclusion in *Almendarez-Torres* "turned heavily" upon the fact that the increased sentence was based on "the prior commission of a serious crime." *Id.* at 488 (quoting *Almendarez-Torres*, 523 U.S. at 230). And the Sixth Amendment concerns that would otherwise have been implicated by permitting a judge to determine the fact of a prior crime were mitigated, in part, by the fact that the prior convictions had all "been entered pursuant to proceedings with substantial procedural safeguards of their own." *Id.* Thus, the Court came to recognize *Almendarez-Torres* as "a narrow exception" to *Apprendi*'s general rule. *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013).

In *Thompson*, this Court relied on that exception. Recognizing that *Almendarez-Torres* represented a carveout from *Apprendi*'s rule for the "fact of a prior conviction," the Court concluded that a prior conviction cannot "be reduced to nothing more than that the defendant was at some prior time convicted of some crime." *Thompson*, 421 F.3d at 282. We concluded that although that "bare fact is certainly at the nucleus of the conviction," that nucleus "also contains other operative facts, such as the statute which was violated," "the date of the conviction," and, relevant here, "the fact that [the prior crimes] were separate episodes." *Id.* at 282, 286.

But subsequent developments have raised doubts as to whether our treatment of *Almendarez-Torres* was correct, even at the time that we decided *Thompson*. Notably, the Supreme Court has since clarified that the *Apprendi* rule applies not only to facts which increase the statutory *maximum*, but also to those that raise a mandatory *minimum* sentence dictated by statute. *Alleyne*, 570 U.S. at 103. The resulting rule is that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Id.*

And the Supreme Court has since relied on the broadest version of the *Apprendi* rule time and time again. *See, e.g.*, *Descamps v. United States*, 570 U.S. 254, 269 (2013) (quoting the *Apprendi* holding and explaining that, because "[u]nder ACCA, the court's finding of a predicate offense indisputably increases the maximum penalty," that finding "would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction"); *Mathis*, 579 U.S. at 511 ("[O]nly a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction."); *Hurst v. Florida*, 577 U.S. 92, 97–98 (2016) (reiterating the *Apprendi* holding and collecting cases in which the Supreme Court has applied that rule).

While the Supreme Court has repeatedly applied the *Apprendi* rule in various circumstances, it has not confronted the pressing question that we answered in *Thompson*: does the Sixth Amendment require a jury, rather than a judge, to determine whether a defendant's prior crimes occurred on "occasions different from one another"?

As evidenced by the majority opinion and persuasive dissent in *Thompson*, reasonable minds could reach different conclusions as to whether the Supreme Court meant

precisely what it said in *Apprendi*: that, "[o]ther than the fact of a prior conviction, *any* fact that increases the penalty for a crime" beyond the statutory range must be submitted to a jury. *Apprendi*, 530 U.S. at 490 (emphasis added). But "a good rule of thumb for reading [Supreme Court] decisions is that what they say and what they mean are one and the same." *Mathis*, 579 U.S. at 514. And the *fact* of a prior *conviction* plainly does not encompass the *date* of a prior *offense*—which the jury may not even have been required to find in convicting the defendant of the prior crime.

If there were any lingering doubt after *Apprendi*, *Alleyne*, *Descamps*, and *Mathis*, none remains after *Wooden v. United States*, 142 S. Ct. 1063 (2022). That's because *Wooden* confirmed that the separate-occasions question is deeply fact-bound. It requires a "multi-factored" analysis examining the timing, proximity, character, and relationship of the past offenses. *Id.* at 1070–71. After *Wooden*, it strains credulity to say that the "simple fact of a prior conviction," *Mathis*, 579 U.S. at 511, encompasses all of those other, not-so-simple facts.

These subsequent developments have further eroded any foundation on which *Thompson* once stood. And though the panel in this case correctly concluded that it was not itself at liberty to overrule *Thompson*, *see McMellon v. United States*, 387 F.3d 329, 332–33 (4th Cir. 2004) (en banc) (noting that a panel will not overrule a decision by another panel), this Court sitting en banc can—and should.

But today, this Court chooses to avoid confronting the question of whether individuals may be serving lengthy terms of imprisonment under sentences that were determined in violation of the Sixth Amendment to the Constitution. And, it chooses to do

so in the face of agreement by both parties that en banc review is warranted here because the Sixth Amendment requires that a jury find, or a defendant admit, that prior convictions were for offenses occurring on occasions different from one another. *See* Pet. for Reh'g En Banc at 9–10; Resp. to Appellant's Pet. for Reh'g En Banc at 1.

I note with great respect that the Supreme Court has instructed that if one of its decisions "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions," the lower courts "should follow the case which directly controls" until the Supreme Court itself overrules the earlier case. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). But as the separate opinion by Judge Heytens correctly points out, it is not clear that *Almendarez-Torres* does, in fact, have "direct application" in this case; it involved a different statute and a different factual determination by the sentencing court. And more importantly, *we* are certainly free to overrule prior decisions of *this* Court that, with the benefit of hindsight, appear to have been wrongly decided.

That much was recently recognized by the Eighth Circuit when it took up this mantle to address its own precedent in *United States v. Stowell*, No. 21-2234, 2022 WL 16942355 (8th Cir. Nov. 15, 2022) (granting rehearing en banc in an analogous case in that circuit). And, as Brown points out, the Government has urged the Supreme Court to wait for lower courts to weigh in before taking up this issue. *See* Pet. for Reh'g En Banc at 1 (noting that, although "the Solicitor General has conceded that this 'issue is important and frequently recurring,'" it has "urged the Supreme Court to delay review because 'lower courts have

not yet had adequate time to react to *Wooden*.'" (quoting Br. for the United States in Opp'n, *Reed v. United States*, No. 22-336, at 6 (Dec. 12, 2022)).

But alas, today's choice to duck this issue and wait for potential action by the Supreme Court means the courts and panels in this circuit must continue to apply strikingly questionable precedent, entirely at the expense of rights conferred under the Sixth Amendment.

* * *

At the end of the day, while I agree with my good colleagues that the Supreme Court should take up its own precedent involving this vital question, we shouldn't wait for it to do so. We should take up our own precedent, established by *Thompson*, and determine whether it runs afoul of the Constitution. That's our duty as judges.