

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

October 14, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DENNIS GRIEGO,

Defendant - Appellant.

No. 25-2085
(D.C. Nos. 1:16-CR-03868-WJ-JMR-1
& 1:23-CV-00190-WJ-JMR)
(D. N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Before **TYMKOVICH**, **McHUGH**, and **FEDERICO**, Circuit Judges.

Dennis Griego seeks a certificate of appealability (COA) to appeal the district court's order denying his motion under 28 U.S.C. § 2255. Because he has not made "a substantial showing of the denial of a constitutional right," *see* 28 U.S.C. § 2253(c)(2), we deny a COA.

I. Background

In 2018, Griego pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). At sentencing the district court determined he had committed at least three predicate crimes on different occasions that qualified him as an armed career criminal under the Armed Career Criminal Act (ACCA) and imposed the ACCA's mandatory minimum sentence of 15 years' imprisonment. *See* 18 U.S.C.

§ 924(e)(1). Had Griego not qualified as an armed career criminal, he would have faced a maximum statutory sentence of 10 years' imprisonment. § 924(a)(2) (2018).¹ Griego had five prior state convictions at the time of sentencing—two residential burglaries, a commercial burglary, trafficking methamphetamine, and an aggravated battery. Some of these appeared to qualify as ACCA predicates, but the district court did not identify which of the convictions made Griego ACCA eligible. Griego did not appeal.

Several years after Griego's conviction, the Supreme Court issued two relevant opinions: *Wooden v. United States*, 595 U.S. 360 (2022), and *Erlinger v. United States*, 602 U.S. 821 (2024). In *Wooden*, the Court determined that the term "occasion" as used in the ACCA means "essentially an episode or event" and that "multiple crimes may occur on one occasion even if not at the same moment." 595 U.S. at 366. After the *Wooden* opinion issued, Griego filed a § 2255 motion to vacate or correct the ACCA sentence arguing the opinion applied retroactively and that his two same-day burglary offenses were not different occasions to qualify as separate ACCA predicate offenses.

While the motion was pending, the Supreme Court decided *Erlinger*, which held that the ACCA's different-occasions requirement must be alleged in the indictment and proven to a jury beyond a reasonable doubt. 602 U.S. at 835. Griego supplemented his motion arguing that the district court violated his Fifth and Sixth Amendment rights by imposing the ACCA sentence based on a judicial fact-finding, using the preponderance of

¹ Congress has since changed the statutory maximum for 18 U.S.C. § 922(g) convictions to 15 years, but this change does not apply here. See Bipartisan Safer Communities Act, Pub. L. No. 117-159, sec. 12004(c), 136 Stat. 1313, 1329 (2022) (codified at 18 U.S.C. § 924(a)(2), (8)).

the evidence standard, of the uncharged fact of different occasions. He further argued that *Erlinger* applies retroactively on collateral review because it was dictated by the rules in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013). The government responded, arguing that the *Erlinger* claim was procedurally defaulted and that *Erlinger* does not apply retroactively to cases on collateral review.

The district court found that Griego had not procedurally defaulted his *Wooden* or *Erlinger* claims, that Griego's commercial burglary and drug offenses were not ACCA predicate offenses, but that, based on the *Shepard* documents,² the time and distance between the residential burglaries meant they did not occur on the same "occasion," and were thus separate convictions under the ACCA. But the district court also concluded that *Erlinger* did not apply retroactively on collateral review. And so the district court denied Griego's § 2255 motion and denied a COA.

Griego now seeks a COA from us.

II. Discussion

We will issue a COA only if Griego makes a "substantial showing of the denial of a constitutional right." § 2253(c)(2). Because the district court denied Griego's claims on the merits, he must "show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the

² See *Shepard v. United States*, 544 U.S. 13 (2005). *Shepard* documents "include judicial records, plea agreements, and colloquies between a judge and the defendant." *Erlinger*, 602 U.S. at 839.

issues presented were adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citation modified).

Griego requests a COA on two issues. First, he contends the district court erred by finding his residential burglaries occurred on different occasions based on the information in the *Shepard* documents. This issue cannot support a COA because it does not involve the denial of a constitutional right. *See* § 2253(c)(2). Second, Griego contends the district court erred in concluding *Erlinger* announced a new rule and thus does not apply retroactively on collateral review. Because Griego’s conviction became final before the Court decided *Erlinger*, whether he can benefit from that decision depends on whether it announced a new rule. New constitutional rules of criminal procedure generally will not apply to cases that became final before the rules are announced. *Welch v. United States*, 578 U.S. 120, 128 (2016).

Teague v. Lane, 489 U.S. 288 (1989), governs whether a rule announced in a Supreme Court case is new. “In general, . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.” *Teague*, 489 U.S. at 301 (plurality opinion). In other words, “a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.” *Id.* This standard sets a high bar: A “rule is new unless, at the time the conviction became final, the rule was already ‘apparent to all reasonable jurists.’” *Edwards v. Vannoy*, 593 U.S. 255, 265 (2021) (quoting *Lambrrix v. Singletary*, 520 U.S. 518, 528 (1997)).

The reasonable jurist standard is objective, *Stringer v. Black*, 503 U.S. 222, 237 (1992), so the mere existence of disagreement among judges does not establish that a rule is new, *Chaidez v. United States*, 568 U.S. 342, 353 n.11 (2013). Even so, the views of actual judges inform our understanding of how a hypothetical reasonable jurist would decide an issue. As relevant evidence, therefore, we consider the dissenting opinions of Supreme Court Justices, *Beard v. Banks*, 542 U.S. 406, 415–16 (2004), and contrary lower-court authority, *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

Griego argues that *Erlinger* did not announce a new rule because it was dictated by the holdings in *Apprendi* and *Alleyne*. In *Apprendi*, the Court held that “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. And *Alleyne* decided that “any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury.” 570 U.S. at 103. To reach its decision in *Erlinger*, the Court relied on *Apprendi* and *Alleyne* and explained that *Erlinger*’s rule followed from the principles articulated in those cases.

But the question is not whether *Erlinger* follows from *Apprendi* and *Alleyne*; it is whether those cases *dictated* its outcome. And, to answer that question, we must decide whether *Erlinger*’s rule was already apparent to all reasonable jurists when Griego’s conviction was finalized in 2018. *Edwards*, 593 U.S. at 265. We believe it was not, and we are convinced no reasonable jurist could debate the point. Three considerations guide our conclusion.

First, the Court held in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that judges may “undertake the job of finding the fact of a prior conviction” during sentencing. *Erlinger*, 602 U.S. at 837. Since then, the Court has described *Almendarez-Torres* as an exception to the “guarantee that a unanimous jury ordinarily must find beyond a reasonable doubt any fact that increases a defendant’s exposure to punishment.” *Id.* at 836. Lower courts relied on that exception for decades, as a carveout to the general rules announced by *Apprendi* and *Alleyne*, to hold that judges could make the different-occasions finding at sentencing. Indeed, our court did so twice in the years after *Apprendi* and once after *Alleyne*. See *United States v. Michel*, 446 F.3d 1122, 1133 (10th Cir. 2006); *United States v. Reed*, 39 F.4th 1285, 1295 (10th Cir. 2022). While our court’s rulings are not dispositive of the reasonable-jurist inquiry, they do suggest that *some* reasonable jurists pre-*Erlinger* might have concluded that the exception permitted judges to find whether a defendant’s prior crimes occurred on different occasions.

Second, *Erlinger* displaced the rule in *every* federal appeals court that hears criminal cases. *Erlinger*, 602 U.S. at 856 (Kavanaugh, J., dissenting) (collecting cases). In other words, before *Erlinger*, the circuit courts unanimously allowed judges to make the ACCA separate-occasions determination. While “conflicting authority in state or lower federal courts[] does not establish that a rule is new,” it is nevertheless relevant. *Chaidez*, 568 U.S. at 353 n.11. In fact, the *Chaidez* Court held that *Padilla v. Kentucky*, 559 U.S. 356 (2010), announced a new rule in part because it overturned the “longstanding and unanimous position of the federal [appeals] courts.” *Chaidez*, 568 U.S. at 353 n.11 (quoting *Padilla*, 559 U.S. at 375–76 (Alito, J., concurring in

judgment)). In so doing, it recognized that the separate opinions in *Padilla* “were onto something when they described the line the Court was crossing.” *Id.* So while the mere existence of conflicting authority is unlikely to establish that a rule is new, a unanimous and longstanding view of the lower courts is different in kind. *See id.* *Erlinger* is therefore far closer to *Padilla*—which *Chaidez* held had announced a new rule—than to cases where lower courts are merely split on an issue.

Third, *Erlinger* was decided over a three-Justice dissent that twice described the majority opinion as creating a new rule of constitutional law. *See Erlinger*, 602 U.S. at 858–59 nn.2–3 (Kavanaugh, J., dissenting). As with conflicting authority, the “mere existence of a dissent” does not establish that a rule is new. *Chaidez*, 568 U.S. at 353 n.11 (citation modified). That is so because “[d]issents have been known to exaggerate the novelty of majority opinions.” *Id.* But “the concurring or dissenting views of other Justices in the case” still inform our analysis. *United States v. Chang Hong*, 671 F.3d 1147, 1154 (10th Cir. 2011). And the principal dissent in *Erlinger* provides some evidence against Griego’s position. Indeed, we have treated a similar dissent—*i.e.*, one that also explicitly identified a rule as new—as “dispositive” evidence of a new rule. *United States v. Christensen*, 456 F.3d 1205, 1208 (10th Cir. 2006) (“We deem it wise to presume that an opinion by a Justice of the United States Supreme Court constitutes a reasonable, good-faith interpretation of existing precedents.” (citation modified)). And we think it significant that the majority did not dispel the dissent’s clearly stated opinion about the rule’s novelty.

Any one of these considerations in isolation would likely leave some doubt about whether *Erlinger* announced a new rule. But, together, they compel the conclusion that it did. The lower courts long interpreted *Almendarez-Torres* as leaving open an exception that *Erlinger* closed. They did so for over two decades after *Apprendi* and eleven years after *Alleyne*. And not just a few, but all the lower courts took that view. The dissenting Justices in *Erlinger* recognized these factors and expressed their belief that *Erlinger*'s rule was new. All this evidence places the reasonable-jurist inquiry's outcome beyond doubt. *Erlinger*'s rule was not readily apparent to all reasonable jurists, so *Apprendi* and *Alleyne* did not dictate it. It was, therefore, a new rule.

Griego counters that the *Erlinger* majority described the case "as nearly on all fours with *Apprendi* and *Alleyne* as any [it] might imagine." 602 U.S. at 835. That is not nothing, but it is also not enough. Again, the question is not whether a rule follows from earlier cases but whether it is dictated by them. The majority's statement that *Erlinger* is "nearly on all fours" with the earlier cases indicates the former without clearly establishing the latter. *Id.* (emphasis added); see *Butler v. McKellar*, 494 U.S. 407, 415 (1990) ("[T]he fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' under *Teague*."). Whatever the statement might convey, it does not overcome the strong combination of factors that indicate *Erlinger* broke new ground.

Considering all the evidence, we are confident that no reasonable jurist could debate the district court's conclusion that *Erlinger* announced a new rule.³

III. Conclusion

We deny Griego's application for a COA and dismiss this matter.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge

³ Griego does not argue that an exception to the bar against retroactivity of a new rules applies, so we do not address that issue.