NO. _____

IN THE

Supreme Court of the United States

QUENTIN L. PERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the judicial determination of crimes "committed on occasions different from one another" under the Armed Career Criminal Act violate the Sixth Amendment right to a trial by jury and the Fifth Amendment right to due process?

2. Is the Armed Career Criminal Act provision regarding determination of crimes "committed on occasions different from one another" void for vagueness?

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Quentin L. Perry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 908 F.3d 1126. The denial of petitioner's petition for rehearing *en banc* is unreported (App., *infra*, 19a). The district court's order denying petitioner's motion is unreported (App., *infra*, 20a-26a).

JURISDICTION

The court of appeals entered judgment in a three-way panel split on November 15, 2018. The court of appeals denied a petition for rehearing *en banc* on February 20, 2019. Five of the eleven judges of the court of appeals voted to grant the petition for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be … deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

U.S. Const. amend. VI.

18 U.S.C. § 924(a)(2) and (e)(1) provide in relevant part:

> Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.
>
> . . . .

> 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

Two predicate crimes unfolded nearly instantaneously, by all accounts, when petitioner robbed a gas station and fired a warning shot at a vigilante who used his vehicle to chase down petitioner. *See* DCD 103 (Sentencing Hr'g Tr.), Gov't Ex. 1, at 12-13; DCD 103, at 31 (government witnesses and counsel recounting events unfolding seriatim).

The Presentence Report ("PSR") described the rapidly unfolding scene thus:

> According to the complaint, the defendant pointed a Colt .357-caliber revolver at the cashier (R.P.) of a gas station in Red Wing, Minnesota; reached into the cash register to take money; and then fled from the gas station on foot. A witness (E.L.) observed the defendant running from the gas station while brandishing the firearm, and E.L. followed the defendant in a vehicle (also occupied by E.L.'s wife, child, and friend). The defendant then discharged a round towards E.L.'s vehicle, and E.L.

> reported hearing a bullet 'zing' over his vehicle and smelling gun powder.

DCD 84 (PSR), at ¶33. *See also* DCD 103, at 9-10 (standby counsel asserting crimes "happening simultaneously, they are happening in the same locations,").

Petitioner represented himself *pro se* at trial and sentencing with standby counsel. He was convicted by a jury as a felon in possession of firearms and ammunition. DCD 84, at ¶¶ 1-2.

The PSR classified petitioner as an armed career criminal. *Id.* at ¶¶ 15, 24. The Armed Career Criminal Act ("ACCA") mandates a minimum fifteen year sentence for felons in possession who possess three predicate convictions "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). Petitioner objected to the PSR's computation of his ACCA classification, arguing the predicate felonies were not "committed on occasions different from one another."

Petitioner took to the podium in a rather extraordinary exchange with the sentencing court to describe the incident leading to his contested ACCA status:

> On the date of July 19, 2004, Freedom Gas Station off of Highway 61 in Red Wing, Minnesota, was in fact robbed with a gun present by the defendant, myself. The defendant made no commands rather purchased several items once the cashier opened the till to give the defendant the change for his purchase, the defendant without word or warning reached over the

counter into the till and took uncertain amount of bills. The defendant then exited the establishment without word or contact.

As the defendant attempted, myself being the defendant, attempted to flee the scene on foot with the large gun still in hand, a civilian approached who tried to prevent myself, the defendant, from escaping. I know that there's a movie theater connected to a mall directly across the parking lot from the station that was robbed by myself. Behind that theater is a wildlife plant nursery and an apartment complex. The distance from the Freedom Station to the plant nursery behind the mall is not greater than one city block.

While still on the lot of the establishment, the defendant, myself, ran away from the car due to grass still connected to the establishment. The civilian attempted to cut me off, the defendant, by blocking the parallel road with the grass field. At this point, with gun still in hand, I raised my arm in the air and let off a single warning shot in the sky. However, E.L., the victim, he was driving a dropped out Mustang with his family with him, and he assumed that the shot went over his head, which is understandable because there are two brick buildings right there that echoed off of each other, so it appeared to the victim

> that I was shooting at him when in fact I shot a single shot into the sky as a warning shot.
>
> At this point, this victim slammed on the brakes and went into reverse. After he went into reverse, I fled down a pavement off of the property of the Freedom Station and down the road towards the nursery. Once I got to the nursery, that was the first opportunity that I had to put the gun in the nursery.
>
> The significance of me elaborating on a 2004 offense, which I was convicted of in March of 2005, is to show the continuance of a single course of conduct in a matter of moments, not minutes or hours. I stole money from the establishment without the intent to harm or exert force on to any of the victims. In fact, I didn't even make contact with anyone at all.

DCD 103, at 17-18. Without offering elaboration, the district court found the robbery "distinct" from the warning shot petitioner fired as he fled the scene. DCD 103, at 45-46. The federal district court classified petitioner as an armed career criminal and sentenced him to the ACCA mandatory minimum term of fifteen years. DCD 90 (Sentencing J.)

Petitioner appealed his ACCA classification, among other issues, to the federal appellate court. A sharply divided panel of the United States Court of Appeals for the Eighth Circuit affirmed petitioner's ACCA conviction for predicate crimes "committed on

occasions different from one another," with all three panel judges writing separate opinions. *Perry*, 908 F.3d 1126, 1132 (8th Cir. 2018). Two of the three panel judges agreed the district court judge violated petitioner's Sixth Amendment rights by judicially determining the different-occasions question, but both also described themselves as bound by errant Eighth Circuit precedent.

Judge Stras concurred "reluctantly" and wrote separately to express his concern about the "erosion of the jury-trial right" and "departure from fundamental Sixth Amendment principles," the Eighth Circuit perpetuated in this case by allowing judges rather than juries to decide the different-occasions question. *Id.* at 1134, 1136 (Stras, J., concurring).

Judge Kelly dissented in part and concurred in part only to submit to Eighth Circuit precedent, which she described as flawed:

> I agree with the concurrence that judicial determination of facts that increase the penalty for a crime beyond the prescribed statutory maximum would appear to conflict with Supreme Court precedent. *See Mathis*, 136 S. Ct. at 2252; *Descamps*, 570 U.S. at 268-69; *Alleyne*, 570 U.S. at 103; *Apprendi*, 530 U.S. at 490. But that's just our case law requires, at least until the Supreme Court, or this court sitting en banc, takes up the issue.

Id. at 1137 (Kelly, J., dissenting in part, concurring in part). The Eighth Circuit denied petitioner's petition for rehearing *en banc*. *See id.* Chief Judge Smith,

Judge Kelly, Judge Erickson, Judge Stras, and Judge Kobes voted to grant the petition for rehearing en banc.

REASONS FOR GRANTING THE PETITION

I. A Jury Must Decide The ACCA's "Committed On Occasions Different From One Another" Issue.

A. The Constitution Requires Juries to Find Facts Beyond a Reasonable Doubt Which Increase the Statutory Maximum or Mandatory Minimum.

Where, as here, the facts of a prior conviction must be re-litigated to impose a mandatory minimum sentence which exceeds the statutory maximum otherwise applicable, the Fifth and Sixth Amendments require those facts to be submitted to a jury, adjudicated beyond a reasonable doubt, and governed by due process. *See Mathis v. United States*, 136 S. Ct. 2243, 2252-53 (2016). *See also* U.S. Const. amend. V ("No person shall … be deprived of life, liberty, or property, without due process of law."), amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,").

The ACCA removes an otherwise applicable ten year sentencing ceiling and imposes a fifteen year floor for certain firearms crimes. *See* 18 U.S.C. § 924(a)(2), (e)(1). Of relevance here, the ACCA may be imposed only when three prior crimes of violence are "committed

on occasions different from one another."[1] *See* 18 U.S.C. § 924(e)(1).

The Constitution requires 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." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (reversing state statute allowing for doubling of statutory maximum in absence of jury finding). *See also Alleyne v. United States*, 570 U.S. 99, 103 (2013) (applying *Apprendi* to statutory mandatory minimum).

This Court has urged lower courts to be mindful of the potential Constitutional gravity of judicial factfinding under the guise of applying "sentencing factors" which raise either the sentencing floor or the ceiling, which in fact are elements of the offense. *See Apprendi*, 530 U.S. at 478; *Alleyne*, 570 U.S. at 113-14. The fact bound inquiry necessary to determine the ACCA different-occasions clause is an element of the offense which a jury must determine; it is not a sentencing factor left to the discretion of the district court judge. *See Jones v. U.S.*, 526 U.S. 227, 252 (1999). The district court's factfinding in this case inflated both the floor and ceiling of Mr. Perry's sentence, thereby violating the Constitution.

The Eighth Circuit's decision in this case therefore stands in disregard of a long line of this

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[1] "Different-occasions," *see United States v. Perry*, 908 F.3d 1126, 1137 n.4 (8th Cir. 2018) (Kelly, J., dissenting in part, concurring in part) (coining "different-occasions" term in reference to 18 U.S.C. § 924(e)(1) inquiry).

Court's Sixth Amendment jurisprudence, including *Taylor v. United States*, 495 U.S. 575, 601 (1990); *Apprendi*, 530 U.S. at 490; *United States v. Booker*, 543 U.S. 220, 244 (2005); *Descamps v. United States*, 570 U.S. 254, 269 (2013); *Mathis*, 136 S. Ct. at 2252. The judgment below should be reversed, and the constitutional question should be settled by this Court. *See* Sup. Ct. R. 10(c).

B. The Prior Conviction Exception is Narrow.

This Court grants an exception to the *Apprendi* rule for the simple fact of a prior conviction. *Apprendi*, 530 U.S. at 476 (*citing Jones*, 526 U.S. 227); *Almendarez-Torres v. United States*, 523 U.S. 224, 248 (1998). But the scope of that exception is narrow. *Alleyne*, 570 U.S. at 111 n.1 (finding Sixth Amendment violation when judge determined means of firearm possession, increasing mandatory minimum). Indeed, *Alleyne* and *Almendarez-Torres* explicitly left open the issue of when the determination of a prior conviction could violate the Sixth Amendment. *See Alleyne*, 570 U.S. at 111 n.1; *Almendarez-Torres*, 523 U.S. at 248. *Almendarez-Torres* itself rests on shaky ground in the wake of *Apprendi*.

> *Almendarez-Torres* represents at best an exceptional departure from the historic practice that we have described. . . . [I]t is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested.

Apprendi, 530 U.S. at 487-90 (internal citations

omitted).

In the developing case law, "The Supreme Court has all but announced that an expansive view of the prior conviction exception is inconsistent with the Sixth Amendment." *Perry*, 908 F.3d at 1135 (Stras, J., dissenting). *See also Mathis*, 136 S. Ct. at 2259 (Thomas, J., concurring, urging reconsideration of *Almendarez-Torres*); *Shepard v. United States*, 544 U.S. 13, 28 (2005) ("Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez–Torres,* despite the fundamental imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements.") (Thomas, J., concurring in part). Inquiry beyond the *simple fact of a prior conviction* transforms a prior crime into an element of the offense which the government must charge and prove beyond a reasonable doubt.

> A construction of ACCA allowing a sentencing judge to go any further would raise serious Sixth Amendment concerns. This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the *simple fact of a prior conviction*. That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. He is prohibited from conducting such an inquiry himself; and so too he is barred from making a disputed determination about 'what the defendant

> and state judge must have understood as the factual basis of the prior plea' or 'what the jury in a prior trial must have accepted as the theory of the crime.' He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.

Mathis, 136 S. Ct. at 2252 (internal citations omitted) (emphasis added).

The rationale for allowing a prior conviction to be used to extend sentencing ranges is that a "prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones,* 526 U.S. at 249. That rationale does not apply where, as here, the court is no longer looking at the simple fact of a conviction, but rather unearthing and deciding in the first instance facts that were not relevant for the imposition of the underlying conviction, *e.g.*, the time lapse, proximity, and continuity between the back-to-back offenses in this case. *See Descamps*, 570 U.S. at 269; *Perry*, 908 F.3d at 1131. In this case, as in so many others like it, those time, place, and continuity facts were hotly contested at sentencing. Unlike other recidivist statutory clauses, the ACCA different-occasions clause demands a resolution of underlying facts of prior convictions, not legal elements. *Cf. Mathis*, 136 S. Ct. at 2252. Juries, not judges, must determine the existence of facts which impose steeply higher sentences.

This Court discourages recidivist factfinding as potentially unconstitutional under the ACCA.[2] *See Taylor*, 495 U.S. at 600-01 (holding Congress intended sentencing courts avoid "elaborate factfinding process regarding the defendant's prior offenses," and look only to simple facts of prior convictions to avoid "unfairness"). The Court in *Descamps*, 570 U.S. at 267, refused to allow the courts to review *Shepard* documents, *see Shepard*, 544 U.S. at 26, to ascertain factual details in determining whether a prior conviction constituted an ACCA predicate crime when the indivisible elements of the crime flunked the categorical test. To do so, said this Court, would too far extend "judicial factfinding beyond the recognition of a prior conviction." *Descamps*, 570 U.S. at 269.

More recently in *Mathis*, 136 S. Ct. at 2248, the Court held that courts must compare the generic elements of any ACCA crime with the elements, not the facts, of a defendant's potential predicate crime. The Supreme Court reversed the Eighth Circuit for applying the modified categorical approach to determine the facts under which the defendant burgled a place which Iowa defined by alternative locational means. *Id.* at 2250-51. This Court emphasized its ACCA "mantra," *id.* at 2251:

> ACCA refers to predicate offenses in terms not of prior conduct but of prior convictions

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[2] This Court offers three grounds for its fact-phobic approach to the ACCA, all of which underscore the Constitutional infirmities of petitioner's sentence: statutory text and history; Sixth Amendment concerns; and potential unfairness. *See Descamps*, 570 U.S. at 267.

> and the elements of crimes. We have avoided any inquiry into the underlying facts of the defendant's particular offense, and have looked solely to the elements of burglary as defined by state law. We consider only the *elements of the offense*, without inquiring into the specific conduct of this particular offender. And most recently (and tersely) in *Descamps*: The key under ACCA is elements, not facts.

Id. at 2252 (internal citations omitted) (emphasis in original).

Mischaracterizing a fact bound recidivism finding as a mere sentencing factor, as opposed to an element of the crime, has led courts into error:

> Indeed, if all facts having some relationship to recidivism were exempt from the Sixth Amendment, then the leading ACCA cases would not contain the reasoning that they do. In *Mathis*, the fact at issue was whether the location of a previous burglary was a building or a vehicle; in *Descamps*, it was whether the defendant had entered a store legally or illegally. Those facts were no less 'recidivism-related' than whether Perry committed his back-to-back crimes on different occasions. Yet the opinions in both cases emphasized that letting a court find them 'would raise serious Sixth Amendment concerns.'

Perry, 908 F.3d at 1135 (Stras, J., concurring) (internal citations omitted).

In spite of this Court's warnings, federal appellate courts have cast a wary eye upon constitutional objections to the different-occasions issue but have invited this Court to clarify the standard to be utilized. *See, e.g.*, *United States v. Farrad*, 895 F.3d 859, 888 (6th Cir. 2018) (citing circuit's "binding precedent" as basis to reject constitutional argument "until the Supreme Court explicitly overrules it"); *United States v. Dutch*, 753 Fed. Appx. 632, 635 (10th Cir. 2018) (circuit precedent foreclosed Sixth Amendment challenge); *United States v. Weeks*, 711 F.3d 1255, 1259 (11th Cir. 2013) ("*Almendarez-Torres* remains binding until it is overruled by the Supreme Court"); *United States v. Thomas*, 572 F.3d 945, 952 (D.C. Cir. 2009) (Sixth Amendment challenge to different-occasions issue "is more difficult than the court lets on,") (Ginsburg, J., concurring in part); *United States v. Browning,* 436 F.3d 780, 782 (7th Cir. 2006) ("We are not authorized to disregard the Court's decisions even when it is apparent that they are doomed,"); *United States v. Jurbala,* 198 Fed. Appx. 236, 237 (3d Cir. 2006); *United States v. White,* 465 F.3d 250, 254 (5th Cir. 2006) (per curiam); *United States v. Thompson,* 421 F.3d 278, 283 (4th Cir. 2005); *United States v. Santiago,* 268 F.3d 151, 156-57 (2d Cir. 2001). Only a decision from this Court will rectify the Constitutional infirmity of the ACCA's different-occasion question.

Judge Posner asked this Court to confront the ongoing implications of *Booker* in considering the Sixth Amendment challenge to the scope of the prior

conviction exception in the context of the different-occasion clause:

> *Almendarez-Torres* is vulnerable to being overruled not because of *Shepard* but because of *United States v. Booker,* 543 U.S. 220 (2005). *Booker* holds that there is a right to a jury trial and to the reasonable-doubt standard in a sentencing proceeding (that is, the Sixth Amendment is applicable) if the judge's findings dictate an increase in the maximum penalty. *Id.* at 756. Findings made under the Armed Career Criminal Act do that. So if logic rules, those findings too are subject to the Sixth Amendment. . . . The continued authority of *Almendarez-Torres* is not for us to decide.

Browning, 436 F.3d at 781-82 (noting Justice Thomas's repeated exhortations to overrule *Almendarez-Torres* on Sixth Amendment grounds).

C. *Shepard* Documents May Not Be Used to Find Facts Under the ACCA.

Time and again, this Court has rejected lower courts' factfinding excursions under the ACCA and other statutes which enlarge imprisonment terms. *See Taylor*, 495 U.S. at 602. The lesson from these cases is that facts regarding the who, what, when, where, and how of a prior conviction far exceed the scope of a "narrow" prior conviction finding. *See Mathis*, 136 S. Ct. at 2252; *Descamps*, 570 U.S. at 269. Therefore, the practice of using *Shepard* documents to engage in factfinding to resolve the different-occasions analysis

also violates the Constitution and this Court's mantra to avoid factfinding under the ACCA. *Mathis*, 136 S. Ct. at 2251. Yet courts in the Eighth Circuit and around the country continue to unearth decades-old documents to resolve the different-occasions matter under the ACCA. *See, e.g., United States v. Holston*, 735 Fed. Appx. 222, 223-24 (8th Cir. 2018) (per curiam) (allowing broad review of documents beyond *Shepard* to find facts under ACCA).

"'Re-purposing' *Taylor* and *Shepard* to justify judicial fact-finding, … turns those decisions on their heads." *Perry*, 908 F.3d at 1136 (Stras, J., concurring). The very purpose of a *Shepard* inquiry is to avoid making ACCA determinations based on the specific facts of any crime. This Court has never endorsed, and indeed has repudiated their use to determine actual facts. *See Mathis*, 136 S. Ct. at 2253-54. A *Shepard* review allows a district court to review limited documents to determine the actual offense of conviction when a statute defines more than one offense; it is "not an excuse for allowing courts to dig through the record to find facts." *Perry*, 908 F.3d at 1136 (Stras, J., concurring). Moreover, "in this case, as in most cases, properly used *Shepard* documents would not assist the district court in its different-occasions determination, because time, place, and overall substantive continuity are facts, not legal elements, of the prior offenses." *Id.* at 1137 (Kelly, J., dissenting in part, concurring in part). No longer should this Court allow a *Shepard* review to be used to determine facts, including facts never adjudicated in any forum, under the ACCA.

As interpreted by the Eighth Circuit, the ACCA demands a fact-intensive analysis of the second-by-second details of a prior conviction. The Constitution demands that such factfinding be determined by a jury beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970) ("We explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

II. This Court Should Adopt the Single Operative Episode Test.

Mr. Perry respectfully requests this Court adopt the single criminal episode test to guide juries in factfinding. For example in *United States v. Graves*, 60 F.3d 1183, 1187 (6th Cir. 1995), the court found a single course of conduct where the defendant burgled a house, hid in the woods, and then threatened a pursuing officer with a gun before fleeing. The court determined there was but one operative episode because the defendant had not safely escaped, allowed significant time to lapse, or departed the general vicinity of the original crime. *Id.* *See also United States v. Murphy*, 107 F.3d 1199, 1210 (6th Cir. 1997) (merging two robberies in different locations in rapid succession; number of victims not dispositive under *Petty*); *United States v. Sweeting*, 933 F.2d 962, 967 (11th Cir. 1991), (merging seven separate crimes arising out of defendant's burglary of one home, invasion of another, and attempted escape from police).

As in *Graves*, *Murphy*, and *Sweeting*, Mr. Perry never left the general vicinity of the original robbery,

ceased his course of conduct, or expeditiously escaped before the second crime occurred. In adopting a single criminal episode standard, this Court could fashion a more coherent standard while allowing juries to avoid the mistakes of *United States v. Petty*, 798 F.2d 1157 (8th Cir. 1986) ("*Petty I*"), *cert. granted*, *judgment vacated*, 481 U.S. 1034, *reversed on remand*, 828 F.2d 2 (8th Cir. 1987) ("*Petty II*").

A. The ACCA's Plain Language, Purpose, and History Support a Single Operative Episode Test.

The single operative episode test is consistent with guidance all three branches of government issued regarding the ACCA's plain language, intent, and history. By contrast, the Eighth Circuit's decision limits *Petty II* to its facts. This Court's intervention is needed to pronounce the proper Constitutional standard.

Ironically, the failure to recognize the distinction between criminals who cycle through the revolving door of the penitentiary versus those who commit multiple crimes in just one day led the Eighth Circuit to its first error, subsequently corrected by this Court, over three decades ago in undertaking the different-occasions analysis in *Petty I*.

In *Petty I*, the Eighth Circuit affirmed the ACCA conviction of a criminal who committed six armed robberies on the same day in a New York restaurant. *Petty I*, 798 F.2d at 1160. However, the United States Solicitor General confessed error in his petition for a writ of certiorari, and "noted that the legislative history

strongly supports the conclusion that the statute was intended to reach multiple criminal episodes that were distinct in time, not multiple felony convictions arising out of a single criminal episode." *Petty II*, 828 F.2d at 3. This Court remanded, and the Eighth Circuit reversed and remanded for resentencing without imposing the ACCA. *Id.*

On both sides of the aisle, Congress expressed displeasure with the Eighth Circuit's decision in *Petty I*. In 1988, Congress amended the ACCA in direct response to *Petty I*. Then-Senator Joseph Biden commented:

> Section 7056 clarifies the armed career criminal statute, 18 U.S.C. 924(e), by inserting language describing the requisite type of prior convictions that trigger the law's mandatory minimum sentencing provisions. Presently, section 924(e) provides that a person found in possession of a firearm shall be sentenced to a mandatory minimum prison term of not less than fifteen years if such person 'has three previous convictions . . . for a violent felony or a serious drug offense' (as those terms are defined in the law). Recently, a court of appeals held that the 'three previous convictions' requirement was met by a conviction on six counts for armed robbery in New York State in which the defendant was convicted for having robbed six different people at a restaurant at the same time. *United States v. Petty*, 798 F.2d 1157 (8th Cir. 1986).

On petition for a writ of certiorari, the Solicitor General on behalf of the United States confessed error, pointing out that, while the armed career criminal statute lacked descriptive language found in other similar federal statutes to the effect that the convictions be for 'offenses committed on occasions different from one another,' *see* 18 U.S.C. 3575(e)(1), 21 U.S.C. 849(e)(1), the legislative history nevertheless made clear that a similar interpretation was intended here. The Supreme Court reversed and remanded the case to the court of appeals for consideration of the Solicitor General's views. __ U.S. __ (No. 86-6263) (May 4, 1987).

The proposed amendment clarifies the armed career criminal statute to reflect the Solicitor General's construction and to bring the statute in conformity with the other enhanced penalty provisions cited above. Under the amendment, the three previous convictions would have to be for offenses 'committed [on] occasions different from one another.' Thus, a single multi-count conviction could still qualify where the counts related to crimes committed on different occasions, but a robbery of multiple victims simultaneously (as in *Petty*) would count as only one conviction. This interpretation plainly expresses that concept of what is meant by a 'career criminal,' that is, a

> person who over the course of time commits three or more of the enumerated kinds of felonies and is convicted therefor. It is appropriate to clarify the statute in this regard, both to avoid future litigation and to insure that its rigorous sentencing provisions apply only as intended in cases meriting such strict punishment.

134 Cong. Rec. S17,370 (daily ed. Nov. 10, 1988) (statement of Sen. Joseph Biden).

Senator Arlen Specter warned that the ACCA was promulgated to punish habitual offenders. *See Armed Career Criminal Act: Hearing on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 98th Cong. 12-13 (1984) (statement of Sen. Arlen Specter).

At a Congressional hearing, then-Assistant Attorney General Stephen Trott, now Judge Trott, testified as to the ACCA's intended targets:

> These are people who have demonstrated, by virtue of their definition, that *locking them up and letting them go* doesn't do any good. They go on again, you *lock them up*, you let them go, it doesn't do any good, they are back for a third time. At that juncture, we should say, 'That's it; time out; it is all over. We, as responsible people, will never give you the opportunity to do this again.'

See id. at 64 (statement of Stephen Trott, Assistant Att'y Gen. of the United States) (emphasis added).

Trott made clear the statutory intent was to focus on individuals who continued committing crimes after being convicted and serving time in prison with an intervening conviction, *i.e.*, criminals who made a *career* of crime.

Even the original ACCA was "very narrowly aimed at the hard core of career criminals with long records for robbery and burglary offenses who now have 'graduated' to the point of dangerousness and recklessness that they are using firearms to commit further robberies and burglaries," according to the Senate Report. *See generally* S. Rep. No. 97-585, at 62-63 (1982).

The Eighth Circuit's current standard does not even require an intervening arrest, which arguably would give the defendant notice he is about to be subject to a fifteen year mandatory minimum sentence, and it prompts rule of lenity concerns. This standard does not comport with the text of the ACCA, specifically amended in response to prior error from the Eighth Circuit on precisely the same issue of how to count predicate crimes.

III. The ACCA Is Void For Vagueness.

Alternatively, the ACCA is a "drafting failure" and should be declared void for vagueness. *See Sykes v. United States*, 564 U.S. 1, 28 (2011) (Scalia, J., dissenting as to ACCA's residual clause), *overruled by Johnson v. United States*, 135 U.S. 2551, 2563 (2015). The federal courts have wrestled mightily with the meaning of the different-occasions clause, a "context-specific balancing test that we still struggle to put into

words," *Perry*, 908 F.3d at 1134 (Stras, J., concurring).

This case bears the same hallmarks of vagueness this Court found so troubling in *Johnson*. The different-occasions clause neither offers a legitimate standard nor discourages arbitrary enforcement. *See Johnson*, 135 S. Ct. at 2557-58. No less than the residual clause struck down as Constitutionally infirm in *Johnson*, "repeated attempts and repeated failures to craft a principled and objective standard," *id.* at 2558, out of the different-occasions clause, "confirm its hopeless indeterminacy." *Id.*

The only "standard" that has withstood the test of time is that the virtually simultaneous robbery of six people in a restaurant does not involve crimes "committed on occasions different from one another." *Petty II*, 828 F.2d at 3. This "Delphic … clause," *see Sykes*, 564 U.S. at 28 (Scalia, J., dissenting), and its convoluted history demonstrate "the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction." *Johnson*, 135 S. Ct. at 2562; *see also Perry*, 908 F.3d at 1137 n.4 (Kelly, J., dissenting in part, concurring in part, describing "difficulty of performing the different-occasions analysis").

Leading jurists around the country have questioned the inability to define a different-occasions standard:

> Courts have, unfortunately, moved alarmingly close to the original Eighth Circuit position announced in *Petty*. Seemingly, the courts have allowed a

> defendant to be subject to the ACCA in every situation except where there is a true "simultaneous" criminal episode. In coming back to the original *Petty* rationale, the courts have made the holding in *Petty* so narrow that it now exists only as a nebulous concept. *Petty*, as it relates to temporal concepts, remains good law only where a fortuitous defendant commits his crimes at the same precise time. Any lapse at all, even if for a minimal amount of time, will hurtle the defendant into the clutches of the ACCA. Regrettably, courts, including this court today, have done this despite legislative history relating to both the current and previous ACCA statutes, the Solicitor General's comments in *Petty*, and the underlying meaning in *Petty* to the contrary. The federal judiciary has come full circle.

United States v. Brady, 988 F.2d 664, 674 (6th Cir. 1993) (Jones, J., dissenting) (*en banc*) (internal citations omitted).

The circuits are split on the interpretation of the different-occasions test. The interpretation of seven words in the ACCA has led to widely disparate results for factually similar crimes. *Cf. United States v. Hudspeth*, 42 F.3d 1015, 1021 (7th Cir. 1994) (applying ACCA for three burglaries committed by chopping through mall walls because defendant had made "a career out of criminal activity," in thirty-six minutes) *with United States v. McElyea*, 158 F.3d 1016, 1021

(9th Cir. 1998) (refusing to apply ACCA for two burglaries committed by chopping through mall walls in single night spree because defendant did "not meet the profile of a career criminal envisioned by Congress"; describing circuit split). "Invoking so shapeless a provision to condemn someone to prison for fifteen years to life does not comport with the Constitution's guarantee of due process." *Johnson*, 135 S. Ct. at 2560.

The ACCA has proven a minefield of problems over the last decade requiring the recurrent attention of this Court to decipher "one royal mess." Transcript of Oral Argument at 26, *United States v. Stitt*, 139 S. Ct. 399 (2018) No. 17-765 (Alito, J.). Vague statutory language renders impossible the courts' responsibility to consistently adjudicate the different-occasions clause.

The ACCA offers a narrow gate through which prior convictions may pass traveling a straight path, carefully delineated in Supreme Court precedent. The broad way followed by the Eighth Circuit and its sister circuits, bound by aged and errant circuit precedent now repudiated by this Court, transgresses the Constitution. This Court alone possesses the power to order a nationwide constitutional correction of course.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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