No. 19-_____

IN THE
SUPREME COURT OF THE UNITED STATES

CHRIS RAYVON STARKS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Armed Career Criminal Act ["ACCA"] enhances the statutory penalty for a firearms offense under 18 U.S.C. § 922(g)(1) when the offender has three predicate convictions for offenses that were "committed on occasions different from one another." 18 U.S.C. § 924(e).

Is the fact that the defendant committed three predicate offenses "on occasions different from one another" an element of the ACCA for the jury to decide, or is it instead a fact that the sentencing judge may find based on non-elemental information gleaned from the records of the prior convictions?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Chris Rayvon Starks*, No. 4:17-cr-8, District Court for the Eastern District of Tennessee. Judgment entered March 7, 2018.

(2) *United States v. Starks*, No. 18-5309, U.S. Court of Appeals for the Sixth Circuit. Opinion and judgment affirming sentence entered August 20, 2019.

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Petitioner Chris Rayvon Starks respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Sixth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit appears at pages 1a to 4a of the appendix to this petition, and is available at 775 F. App'x 233 (6th Cir. 2019). The judgment of the district court appears at pages 25a to 31a of the appendix, along with the portion of the transcript of the sentencing hearing in which the district court addressed and denied Mr. Starks' objection to the

sentencing enhancement at issue, at pages 5a to 24a of the appendix to this petition.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals' judgment affirming the conviction and sentence was entered on August 20, 2019. Pet. App. 1a. This petition is timely filed under Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial[] by . . . jury[.]

18 U.S.C. § 922(g) provides:

> It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[]
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(e)(1) provides:

> 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, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(2)(B) provides:

> As used in this subsection-- (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . .

Tenn. Code Ann. § 39-13-402(a) provides:

> (a) Aggravated robbery is robbery as defined in § 39-13-401:
>
> (1) Accomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon; or
>
> (2) Where the victim suffers serious bodily injury.

STATEMENT OF THE CASE

Overview. The Armed Career Criminal Act, 18 U.S.C. § 924(e) ["ACCA"] applies to increase the penalty range for a person convicted of violating 18 U.S.C. § 922(g)(1) only if the person previously committed at least three ACCA-qualifying offenses "on occasions different from one another." The lower courts have long held that this occasions-different requirement is not an element of the ACCA, but instead a fact that the district judge may find at sentencing. The law has evolved to reveal that this approach violates the Sixth Amendment, but the lower courts' uniform response to the problem does not solve it. They allow district judges to make the

occasions-different finding based on non-elemental facts gleaned from certain approved documents from the records of the ACCA predicates—a procedure that still violates the Sixth Amendment. The courts have adhered to this unprincipled approach due to expedience and inertia.

This Court should grant certiorari because the lower courts have uniformly established a sentencing practice that violates the Sixth Amendment. The question is of crucial importance, as the ACCA increases the penalty range in firearms cases like this one from a maximum of ten years to a minimum of fifteen years, and increases the average sentence imposed by more than a decade. Because Mr. Starks preserved this issue in the court below, and the Sixth Circuit rejected his challenge based on binding circuit precedent, this case presents an excellent vehicle in which to resolve the question. His petition for a writ of certiorari should therefore be granted for review. Alternatively, the petition should be granted and held to be considered when the Court rules on similar cases presenting the same issue.[1]

The *Apprendi* doctrine. In a series of constitutional decisions running from *Apprendi* to *Alleyne*, this Court has developed this bedrock rule: The Fifth and Sixth Amendments require any fact that increases the statutory maximum or minimum penalty for a crime to be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Alleyne v. United States*, 570 U.S. 99, 111 (2013). Facts determined at sentencing cannot

[1] *See, e.g.*, *Hennessee v. United States*, No. 19-5924. The Court asked the Solicitor General for a response to Hennessee's petition, which is currently due December 6, 2019.

enhance the statutory sentencing range. *Id.* There is just one exception to this rule which allows a sentencing court to consider "the fact of a prior conviction," and that exception is "narrow." *Apprendi*, 530 U.S. at 490; *Alleyne*, 570 U.S. at 111, n.1.

To fit within this exception for "the fact of a prior conviction," the features of the prior conviction that trigger the increased penalty must be *elements* of the prior offense—*i.e.,* facts that the jury must find beyond a reasonable doubt to sustain the conviction. *Mathis v. United States*, 136 S. Ct. 2243, 2248, 2252 (2016). Thus, when acting on *Apprendi*'s narrow exception for the "fact of a prior conviction," the sentencing judge cannot make findings about facts that lay behind that conviction, but rather can determine only "what crime, with what elements, the defendant was convicted of." *Id.* at 2252; *see also Descamps v. United States*, 570 U.S. 254, 269-70 (2013) ("the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances"); *Shepard v. United States*, 544 U.S. 13, 20-21, 26 (2013). If the features of the prior conviction are not "the simple fact of a prior conviction," but rather include circumstances that would let the judge "explore the manner in which the defendant committed that offense," they do not fit within the narrow exception to *Apprendi*. *Mathis*, 136 S.Ct. at 2252.

In a word, this Court has established a distinction between "elemental facts" and "non-elemental facts." *Descamps,* 570 U.S. at 270. The former are the facts that either the jury necessarily found or the defendant necessarily admitted to sustain the conviction. The latter are facts that were legally extraneous to the conviction. When

a federal sentencing court determines the "fact of a prior conviction," it can consider only "elemental facts"—otherwise it will run afoul of the Sixth Amendment.

Mr. Starks' sentence enhancement. In 2016, Chris Rayvon Starks was found in possession of a firearm. Pet. App. 1a. He was charged in federal court with possessing that firearm as a convicted felon in violation of 18 U.S.C. § 922(g). Pet. App. 2a. His maximum sentence would be ten years in prison unless he qualified for a sentence enhancement under the ACCA, in which case his minimum sentence would be fifteen years. 18 U.S.C. § 924(a)(2); *id.* § 924(e)(1). The ACCA provides for such an enhancement when the offender has three prior convictions for certain violent or drug offenses that the defendant "committed on occasions different from one another." *Id.* § 924(e)(1).

Mr. Starks' indictment did not allege he had committed three ACCA predicate offenses on occasions different from one another. He pled to the charged offense without making any such admission, and he proceeded to sentencing.

Prior to sentencing, the Probation Office prepared a presentence report in which it averred that the ACCA applied to Mr. Starks. Pet. App. 2a. The Probation Office reported that Mr. Starks had three prior convictions for Tennessee aggravated robbery. *Id.* Tennessee's robbery statute has two elements: (1) taking goods from a person; (2) by forcible means, violence, or putting the person in fear. Tenn. Code Ann. § 39-13-401; *State v. Henderson*, 620 S.W.2d 484, 486 (Tenn. 1981). A robbery becomes an aggravated robbery if it is "accomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly

weapon,; or where the victim suffers serious bodily injury." Tenn. Code Ann. § 39-13-402(a).

Mr. Starks objected to the ACCA classification, arguing that the court could not determine from the elements of the prior robbery convictions—which do not include the time or place of the offense—that he committed them on different occasions. He argued that this is so even under the recent Sixth Circuit precedent limiting the occasions-different inquiry to the state record documents evidencing the offense of conviction approved in *Shepard v. United States*, 544 U.S. 13, 26 (2005). *See United States v. King,* 853 F.3d 267 (6th Cir. 2017); *United States v. Southers*, 866 F.3d 364, 369 (6th Cir. 2017). This is because *Shepard* documents, as this Court made clear in *Mathis v. United States*, 136 S. Ct. 2243 (6th Cir. 2016), can reveal only the elements of the prior conviction—nothing more. In the absence of the ACCA enhancement and its fifteen-year mandatory minimum, Mr. Starks' advisory guideline range would be just 37 to 46 months. Pet. App. 6a.

The district court overruled the objection. It ruled that Sixth Circuit precedent permitted it to look at the indictments and judgments of the prior robbery convictions to determine that the offenses were committed at different times, and from those documents it could make that determination. Pet. App. 23a-24a. It reasoned that if it were to read *King* the way Mr. Starks urged it should be read (as limiting the use of *Shepard* documents to determine only the elements of the prior offenses), then "there really would not be much left of" the ACCA. Pet. App. 23a. It sentenced Mr. Starks to the mandatory minimum of 180 months' imprisonment. Pet. App. 24a, 26a.

While his appeal was pending, the Sixth Circuit decided *United States v. Hennessee*, 932 F.3d 437 (6th Cir. 2019). In that case, a different district judge had ruled that in light of the *Apprendi* doctrine and the Sixth Circuit's holding in *King*, it could consider *Shepard* evidence only to determine elemental facts when making the different-occasions inquiry. *Id.* at 441. Because time, place and victim are not elements of Tennessee aggravated robbery, it could not find that the defendant had committed two crimes "on occasions different from one another," and could not impose the ACCA sentence enhancement. *Id.*

The Sixth Circuit reversed in a split decision. The majority explained that the district court had misperceived the *Shepard* limit announced in *King*. *Id.* at 442-44. It clarified its rule as follows:

In light of the *Apprendi* doctrine, a sentencing court making a different-occasions determination can consider *only* documents listed in *Taylor* or *Shepard* as valid sources of evidence; those document are the indictment, jury instructions, plea agreement, plea colloquy, and judgment pertaining to the prior conviction (commonly referred to as "*Shepard* documents"). *Id.* at 442-43.

Yet, a sentencing court can consider the *Shepard* documents to glean not just elemental facts but also "non-elemental facts." *Id.* at 442, 444 (permitting "consideration of non-elemental facts contained within *Shepard* documents"). In short, under the majority's holding, a sentencing court can enhance a defendant's sentence based on its consideration of whatever facts the pertinent *Shepard* documents happen to contain, including non-elemental facts.

The majority identified no principle to support its position that courts may consider non-elemental facts when the *Apprendi* doctrine limits the consideration of "the fact of a prior conviction" to that conviction's elemental facts. And why limit the sentencing court's consideration to *Shepard* documents if not in order to limit its consideration to the conviction's elemental facts? The only reason the majority gave for approving reliance on non-elemental facts in *Shepard* documents was expedience: "A sentencing judge would be hamstrung . . . in making most different-occasions determinations if he or she were only allowed to look to elemental facts in *Shepard* documents which rarely involve date, time, or location." *Id.* at 443.

Chief Judge Cole dissented. He wrote at length to show that the majority's decision is unprincipled. *Id.* at 446-55 (Cole, C.J., dissenting). Citing this Court's precedent stretching from *Taylor* to *Apprendi* to *Mathis*, he showed that, when a sentencing court is determining "the fact of a prior conviction" for purposes of applying the ACCA enhancement, the court is restricted to "consideration of certain types of *evidence,* not certain types of *documents*." *Id.* at 449 (Cole, C.J., dissenting) (emphasis in original). And the evidence to which a court is restricted is the evidence of "elemental facts"—indeed, that restriction is the point of the *Apprendi* doctrine. *Id.* at 449-50 (Cole, C.J., dissenting).

Chief Judge Cole also noted that, like the district judge there, other judges have recently recognized that the *Apprendi* doctrine simply cannot be squared with a rule that allows sentencing judges to consider so-called "*Shepard* documents" to make prior-conviction-related determinations based on non-elemental facts that

those documents happen to contain. *Id.* at 450-51 (Cole, C.J., dissenting); *see United States v. Perry*, 908 F.3d 1126, 1134 (8th Cir. 2018) (Stras, J., concurring); *id.* at 1137 (Kelly, J., concurring).

Neither the majority nor the dissent in *Hennessee* commented on Hennessee's proposal to overrule precedent and hold that the different-occasions requirement must be deemed an element to be decided by a jury, not something determined by a sentencing court. Such a correction to longstanding precedent has been championed by Judge Stras in the Eighth Circuit as the simple and correct solution to the problem:

> Simple facts and simple law should lead to a simple conclusion. A finding that [the defendant] Perry committed his past crimes on different occasions exposes him to a longer sentence, so the jury should make the finding, not the court. To be sure, the Supreme Court has carved out an exception allowing district courts to find "the fact of a prior conviction." . . . But the exception is "narrow," . . . and permits the court to "do no more . . . than determine what crime, with what elements, the defendant was convicted of."

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

Soon after the *Hennessee* panel issued its published decision, the Sixth Circuit affirmed Mr. Starks' sentence in a three-page, two-judge *per curiam* opinion. Pet. App. 1a-3a. It summarily rejected Mr. Starks' argument that the court could consider *Shepard* documents only to determine the elements of his prior Tennessee robbery convictions, viewing itself bound by *Hennessee*. Pet. App. 2a. And it rejected Mr. Starks' alternative argument that the different-occasions inquiry is an element of the ACCA that must be proven beyond a reasonable doubt to the jury or admitted by the defendant, again viewing itself bound by precedent. Pet. App. 3a. Judge Merritt concurred in the judgment only. In his view, "Chief Judge Cole issued a persuasive

dissent in *Hennessee* with which I agree and would follow if not bound by the majority in *Hennessee*." Pet. App. 4a.

Mr. Starks now seeks review of the question whether a district court may consider non-elemental facts gleaned from *Shepard* documents to find that ACCA predicates were committed on different occasions, or instead that determination is an element of the ACCA that must be charged and proven to the jury or admitted by the defendant. He asks that his petition be granted for review or, if the Court grants the petition in *Hennessee v. United States*, No. 19-5924, that his petition be granted and held in abeyance until the Court rules in that case and considered at that time.

REASONS FOR GRANTING THE PETITION

I. The lower courts have uniformly established a sentencing practice that violates the Sixth Amendment.

The courts of appeals have painted themselves into a corner that only this Court can get them out of. Adhering to their early rule that the occasions-different inquiry is one for the judge, not the jury, they allow district court judges to examine documents from the records of ACCA predicate convictions to discern that the defendant committed them on different occasions. The judges are not limited to considering only the elements of these prior convictions—which is the only purpose for which a court is ordinarily allowed to examine a prior record in the ACCA context—but may consider non-elemental facts such as time and place. This practice violates the Sixth Amendment.

Congress has enacted several criminal laws that identify facts that will trigger

a longer term of imprisonment. *See, e.g., Alleyne,* 570 U.S. at 104 (fact that firearm was brandished); *United States v. O'Brien*, 560 U.S. 218 (2010) (fact of the type of firearm). The *Apprendi* doctrine allows the courts to handle such sentence-enhancing facts in just one of two ways: (1) treat the fact as an element that must be found by a jury; or, (2) treat the fact as part of "the fact of a prior conviction" and let the sentencing court find the fact as long as the court bases its finding on previously determined "elemental facts," *i.e.,* facts that were necessarily determined to authorize the prior conviction. *Apprendi*, 530 U.S. at 490; *Shepard*, 544 U.S. at 20-21, 26; *Alleyne*, 570 U.S. at 111, n.1; *Descamps*, 570 U.S. at 269-70; *Mathis*, 136 S. Ct. at 2248, 2252. In the latter approach, restricting the inquiry to elemental facts is necessary because otherwise the sentencing court would be making new factual determinations beyond the "fact of the prior conviction," running afoul of the Sixth Amendment.

Congress enacted the ACCA before *Apprendi*. The ACCA triggers a longer sentence if the defendant previously "committed" three predicate offenses "on occasions different from one another." 18 U.S.C. § 924(e)(1). Had the courts foreseen *Apprendi*, they would have recognized that there were only the two, aforementioned legitimate ways to handle the ACCA's committed-on-different-occasions requirement: (1) treat it as an element of the instant federal offense; or (2) treat it as part of the "fact of the prior conviction," subject to findings based only on elemental facts. And, as we know now, treating it as an element would have been consistent with the ACCA's use of the word "committed," as Congress has used that term in other

contexts to mean the defendant's circumstance-specific conduct that must be charged and proved to the jury or admitted by the defendant. *See United States v. Hayes*, 555 U.S. 415, 426 (2009) (construing the phrase "committed by [a person in a domestic relationship with] the victim" in 18 U.S.C. § 921(a)(33)(A), as a circumstance-specific element of the federal offense of being a person previously convicted of a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9), not as a categorical element of the definition of "misdemeanor crime of domestic violence").

But courts evidently did not foresee *Apprendi*. They universally did the following.

1. They assumed that the different-occasions requirement was *not* an element of the offense, but instead treated it as a sentencing factor to be found by the sentencing judge.[2]

2. They directed sentencing judges to apply a test that usually turned on an analysis of non-elemental facts, such as the crime's time, place and victim.[3]

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[2] *United States v. Anderson*, 921 F.2d 335 (1st Cir. 1990); *United States v. Mitchell*, 932 F.2d 1027 (2d Cir. 1991); *United States v. Schoolcraft,* 879 F.2d 64 (3d Cir. 1989); *United States v. Mason*, 954 F.2d 219 (4th Cir. 1992); *United States v. Herbert*, 860 F.2d 620 (5th Cir. 1988); *United States v. Hayes*, 951 F.2d 707 (6th Cir. 1991); *United States v. Schieman*, 894 F.2d 909 (7th Cir. 1990); *United States v. Rush*, 840 F.2d 580 (8th Cir. 1988); *United States v. Wicks*, 833 F.2d 192 (9th Cir. 1987); *United States v. Bolton*, 905 F.2d 319 (10th Cir. 1990); *United States v. Greene*, 810 F.2d 999 (11th Cir. 1986).

[3] *United States v. Riddle,* 47 F.3d 460, 462 (1st Cir. 1995); *United States v. Rideout*, 3 F.3d 32, 35 (2d Cir. 1993); *United States v. Schoolcraft,* 879 F.2d 64, 73 (3d Cir. 1989); *United States v. Letterlough,* 63 F.3d 332, 335 (4th Cir. 1995); *United States v. Washington,* 898 F.2d 439, 441-42 (5th Cir. 1990); *United States v. Brady*, 988 F.2d 664, 670 (6th Cir. 1993) (en banc); *United States v. Schieman,* 894 F.2d 909 (7th Cir. 1990); *United States v. Hammell*, 3 F.3d 1187, 1191 (8th Cir. 1993); *United States v.*

Accordingly, for decades federal sentencing courts have considered non-elemental facts to decide whether a defendant committed the pertinent prior offenses on occasions different from one another. Even after *Apprendi* issued, courts declined to reverse course. Rather, they chose to hold explicitly that the different-occasions requirement is *not* an element of the offense. *United States v. Burgin*, 388 F.3d 177, 185-86 (6th Cir. 2004); *United States v. Santiago*, 268 F.3d 151, 157 (2d Cir. 2001); *United States v. Morris*, 293 F.3d 1010, 1012 (7th Cir. 2002); *United States v. Campbell*, 270 F.3d 702, 708 (8th Cir. 2001).

As the *Apprendi* doctrine developed—ultimately through *Shepard, Descamps,* and *Mathis*—this Court made it clear that, when a sentencing court is acting pursuant to the prior-conviction exception to *Apprendi* it can only consider elemental facts inhering to that prior conviction. *Shepard*, 544 U.S. at 20-21, 26; *Descamps*, 570 U.S. at 269-70; *Mathis*, 136 S. Ct. at 2248, 2252. And this Court's cases indicated that those elemental facts are typically found in certain documents—indictment, jury instructions, plea agreement, plea colloquy, and judgment—which came to be known as *Shepard* documents. *Id.*

In light of these developments, the lower courts have uniformly devised an unprincipled accommodation with the *Apprendi* doctrine. Like the Sixth Circuit here, the circuit courts have held that a sentencing judge deciding the different-occasions

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Wicks, 833 F.2d 192, 193 (9th Cir. 1987); *United States v. Tisdale*, 921 F.2d 1095, 1099 (10th Cir. 1990); *United States v. Pope*, 132 F.3d 684, 692 (11th Cir. 1998).

question *is limited* to *Shepard* documents, yet *is not limited* to *Shepard* evidence.[4] In other words, they have decided that the sentencing judge can consider whatever non-elemental facts happen to be contained in *Shepard* documents, even though the entire point of *Shepard* and its progeny is to limit the sentencing court's consideration to a certain type of evidence, namely, the evidence of elemental facts.

This accommodation is both unprincipled and unconstitutional. Yet, the lower courts have cemented themselves into this intolerable corner for two reaons. They are stuck there first due to expedience. They have long held that the different-occasions requirement must be treated not as an element but rather as a sentencing factor for the judge to decide. And long ago they created a test for finding this putative sentencing factor that typically requires the judge to consider non-elemental facts (*i.e.,* the crime's time, place and victim). Therefore, to avoid severely restricting the ACCA, the courts must continue to let sentencing judges consider non-elemental facts. That is, due to decisions that the appellate courts made long ago, the consequences are simply too great for the courts—like the majority in *Hennessee* and the district court below—to admit that it is unprincipled and unconstitutional to allow a sentencing judge to consider non-elemental facts as long as they appear in so-called *Shepard* documents.

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[4] *Hennessee*, 932 F.3d at 442-44; *United States v. Bordeaux*, 886 F.3d 189, 196 (2d Cir. 2018); *United States v. Span*, 789 F.3d 320, 326 (4th Cir. 2015); *Kirkland v. United States*, 687 F.3d 878, 883 (7th Cir. 2012); *United States v. Sneed,* 600 F.3d 1326, 1333 (11th Cir. 2010); *United States v. Thomas*, 572 F.3d 945, 950 (D.C. Cir. 2009); *United States v. Fuller*, 453 F.3d 274 (5th Cir. 2006); *United States v. Taylor*, 413 F.3d 1146, 1157-58 (10th Cir. 2005).

The second reason they are stuck in this corner is inertia. As Judge Stras has explained, "[i]nertia may be part of the explanation" since [s]ometimes courts just continue along the same well-trodden path even in the face of clear signs to turn around." *Perry*, 908 F.3d at 1134.

Because the courts of appeals are uniformly entrenched in their error, Mr. Starks urges this Court to grant certiorari and decide whether the different-occasions requirement must be treated as an element of the offense or instead must be determined only by reference to elemental facts necessarily established by the offense of conviction.

II. This case presents an excellent vehicle to resolve this important question.

This question is of exeptional importance and is recurring. Each year, hundreds of federal defendants are sentenced under the ACCA. *See* U.S. Sent'g Comm'n, *Quick Facts – Felon in Possession of a Firearm* 1 (2019) (showing that 288 offenders were sentenced under the ACCA in fiscal year 2018). The effect is severe. The ACCA increase the minimum penalty by at least five years, with the average increase in the sentence imposed being 127 months longer than for those sentenced without the ACCA—over a decade longer. *Id.* at 2. In many if not all instances, a district judge found the fact that the predicate offenses were committed on different occasions by rummaging through the record of the prior conviction.

This is an excellent vehicle to decide the question presented. Mr. Starks' case perfectly reflects the ACCA's severity, as it increased his guideline range from 46 to 57 months to a flat 180 months, the statutory minimum. Pet. App. 6a, 24a. He

objected at sentencing to the district court's factfinding, laying out exactly why the court could not consider non-elemental facts to determine whether he committed the prior offenses on different occasions, but the district court believed it was was bound by circuit precedent to deny his objection. Pet. App. 6a-16a, 22a-23a. Mr. Starks pursued his challenge on appeal, which the panel rejected as foreclosed by Sixth Circuit precedent. Pet. App. 2a-3a. In that precedent, Chief Judge Cole laid out in extensive detail the problems with the lower courts' approach.

The question is important; it has been thoroughly addressed by the court below; and this case presents an ideal vehicle to consider it.

CONCLUSION

The petition for a writ of certiorari should be granted.

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