No. _____

In The

Supreme Court of the United States

TIMOTHY TIJWAN DOCTOR

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court may increase a defendant's sentence under the Armed Career Criminal Act (ACCA) by relying on its own finding about non-elemental facts to conclude a defendant's prior offenses were "committed on occasions different from another."

2. If so, whether the federal court may rely solely on the non-elemental dates alleged in the state court charging documents, absent a transcript of the colloquy in which the defendant confirmed the factual basis for the plea, to find the prior offenses were committed on different occasions.

PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS DIRECTLY RELATED TO THIS CASE

United States District Court (M.D. Fla.):

United States v. Timothy Tijwan Doctor, No 3:18-cr-00226-MMH-MCR-1 (March 16, 2020)

United States Court of Appeals (11th Cir.):

United States v. Timothy Tijwan Doctor, No. 20-11092 (December 28, 2020)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Timothy Tijwan Doctor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND ORDERS BELOW

The Eleventh Circuit's opinion dated December 28, 2020 is provided in the petition appendix (Pet. App.) at 1a-7a.

The district court's decision sentencing Mr. Doctor pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), is provided at Pet. App. at 8a-15a.

JURISDICTION

The Eleventh Circuit issued its decision on December 28, 2020. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. Mr. Doctor timely filed this petition pursuant to this Court's Order Regarding Filing Deadlines (Mar. 19, 2020) and Rule 29.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

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

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 922(g) of Title 18 of the U.S. Code provides, in relevant part:

> 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 . . . possess in or affecting commerce, any firearm or ammunition.

Section 924(a)(2) of Title 18 provides:

> Whoever knowingly violates subjection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides in relevant part:

> (1) 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, the sentence of, or grant a probation sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection—
>
> (A) the term "serious drug offense" means –
>
> (i) an offense under the Controlled Substance Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum

> term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which the maximum term of imprisonment of 10 years or more is prescribed by law.

Section 893.13(1)(a), Florida Statutes, makes it unlawful for any person to "sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance."

STATEMENT OF THE CASE

This Court has not yet addressed the ACCA's requirement that a defendant's three prior predicate offenses must be "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). In Mr. Doctor's case, the district court found that his three prior predicate offenses were committed on different occasions by relying solely on the non-elemental dates alleged in the state court charging documents, even where two of the offenses were joined for trial under a state procedural rule that provides that only offenses that are based on the same transaction or are connected acts or transactions in an episodic sense may be joined for trial. See Fla. R. Crim. P. 3.150. The government introduced no plea colloquy or other record establishing whether Mr. Doctor assented to these non-elemental facts in the state proceedings. Mr. Doctor's case thus squarely presents the Sixth Amendment

question whether the district court may increase a defendant's statutory penalties under the ACCA by relying on its own finding about non-elemental facts to conclude that prior offenses were "committed on occasions different from one another." *See Descamps v. United States*, 570 U.S. 254, 270 (2013) (addressing the Sixth Amendment problem presented by the ACCA's "violent felony" provision and deciding that a district court may not "relying on its own finding about a non-elemental fact to increase a defendant's maximum sentence" under the ACCA); *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016) ("[A] judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. . . . He can do no more, consistent with the Sixth Amendment, that determine what crime, with what elements, the defendant was convicted of.").

Mr. Doctor's case further presents the question – which divides the circuits – whether a district court may find that the prior offenses were "committed on occasions different from one another" by relying on allegations in the charging documents alone, without any record "in which the factual basis for the plea was confirmed by the defendant." *Shepard v. United States*, 544 U.S. 13, 26 (2005).

1. In 2018, Mr. Doctor was charged by indictment in the United States District Court for the Middle District of Florida with possessing a firearm as a convicted felon,

in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). Doc. 1.[1] Mr. Doctor entered a plea of guilty without a plea agreement in April 2019. Doc. 21. The indictment did not charge, and Mr. Doctor did not admit at his guilty plea hearing, that his prior offenses were "committed on occasions different from one another" as required by the ACCA, 18 U.S.C. § 924(e)(1).

The presentence investigation report (PSR) recommended that Mr. Doctor be sentenced under the ACCA based on prior Florida convictions for controlled substance offenses. These prior convictions stem from two separate state court proceedings:

- On September 11, 2006, Mr. Doctor pleaded guilty to two counts of the sale or delivery of cocaine. Case 2006CF11535.
- On November 15, 2012, Mr. Doctor pleaded guilty to, for purposes of this petition, a single count of sale, manufacture, delivery of cocaine within 1000 feet of a church. Case 2012CF7564.

See PSR ¶21. Mr. Doctor objected[2] to the application of the sentencing enhancement under the ACCA, arguing that the government could not establish

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[1] Docket entries from Mr. Doctor's district court proceedings, Case No.: 18-cr-00226-MMH-MCR-1 (M.D. Fla.), are cited herein as "Doc."

[2] Mr. Doctor also objected to the probation office's determination that Mr. Doctor's 1996 conviction for Lewd or Lascivious Act, Section 800.04(3), Florida Statutes (1996) was a prior conviction of a "violent felony" under the ACCA and USSG §4B1.4 and that Mr. Doctor's Florida controlled substance offense convictions were "serious drug offenses" under the ACCA. Doc. 37 at 40-41. In response to the objections, the government took the position that the ACCA sentencing enhancement applied based on "the defendant's three prior convictions for serious drug offenses, not the lewd and lascivious act conviction." Doc. 37 at 42.

that these prior predicate offenses, specifically those in Case 2006CF11535, were "committed on occasions different from one another." PSR at page 23.

In response to Mr. Doctor's objections, the probation office prepared a revised PSR and provided the district court with state court charging documents and judgments as attachments to the PSR.[3] See PSR at pages 25-39. The charging documents do allege dates. The judgments do not record the date of the offenses of conviction.

In his sentencing memorandum filed in advance of the sentencing hearing, Mr. Doctor maintained his objection to Mr. Doctor's classification as an armed career criminal arguing that Mr. Doctor's two convictions for sale of cocaine in Case 2006CF11535 were not proven to have been committed on occasions different from one another based on the charging and judgment documents and therefore could not serve as two separate predicate convictions for the ACCA sentencing enhancement, while acknowledging contrary precedent from the Eleventh Circuit. Doc. 39 at 3-4. Mr. Doctor argued that the offenses in Case 2006CF11535 were charged in the same information and were alleged to have occurred a mere 6 days apart ("on July 6, 2006" and "on July 12, 2006"). Id. Mr. Doctor argued that, under the Rule 3.850 to the Florida Rules of Criminal Procedure, offenses may only be joined in a charging document ("information") when offenses are based on the same transaction or are connected acts or transactions, which rebutted any presumption that the offenses

[3] The government admitted the same documents at the sentencing hearing to contend that the ACCA sentencing enhancement applied. See Docs. 42-1, 42-2, 42-3.

were "committed on occasions different from one another." Id. Finally, Mr. Doctor argued dates alleged in Florida charging documents are not elements of the offense under Florida law and therefore the court could not rely on its own finding of non-elemental facts to sentence Mr. Doctor under the ACCA. Id.

The court held a sentencing hearing on March 16, 2020. Doc. 42. Mr. Doctor renewed his objections. See Doc. 49 at 5, 7-8. The government, in response, admitted the certified judgment and sentence documents and charging documents in Case 2012CF7564 and Case 2006CF11535. Id. at 6-7; see Docs. 42-1, 42-2, 42-3. The government did not introduce any other documents from the state court cases, such as transcripts from plea colloquies or stipulations to factual bases.

The court overruled the defense objection that the United States failed to prove that Mr. Doctor had the three prior predicate convictions necessary to be sentenced as an armed career criminal. Doc. 49. at 8. After finding that Mr. Doctor was an armed career criminal, the district court calculated Mr. Doctor's guideline term of imprisonment to be 180 months, the statutorily required minimum sentence under the ACCA, based on USSG §4B1.4(b) and §5G1.1(b). Doc. 49 at 13. After hearing statements in support of Mr. Doctor, his allocution, and arguments from counsel, the district court sentenced Mr. Doctor to 180 months imprisonment for Count I based on the ACCA. Doc. 49 at 24-26.

The Eleventh Circuit affirmed. Pet. App. 7a. The court of appeals held that the district court could rely on the dates in the state charging document to decide

whether Doctor's prior crimes occurred on different occasions for purposes of the ACCA's sentencing enhancement. *Id.* at 4a.

REASONS FOR GRANTING THE WRIT

I. This Court's review is needed to resolve whether the Sixth Amendment precludes a district court from increasing a defendant's sentence under the ACCA by relying on its own non-elemental fact-finding to conclude a defendant's prior offenses were "committed on occasions different from one another."

For the ACCA sentencing enhancement to apply, the government had the burden of proving that a defendant has three prior predicate convictions for either a "serious drug offense" or a "violent felony" that were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). Here, the district court made this finding by relying solely on the non-elemental dates alleged in the state court charging documents. The government introduced no plea colloquy or other record establishing Mr. Doctor assented to these non-elemental facts in the state court proceedings. The Sixth Amendment question presented by Mr. Doctor's case, and many others, is whether a district court may increase a defendant's sentence under the ACCA by relying on its own finding about non-elemental facts to conclude that prior offenses were committed on different occasions. *Descamps*, 570 U.S. at 270 (limiting district courts to the elements to determine whether a prior offense qualifies as a violent felony under the ACCA); *accord Mathis*, 136 S. Ct. at 2252. Because this question is important and recurring, Mr. Doctor respectfully requests this Court's review.

Review is particularly warranted here because this important and recurring question has led to a circuit conflict. In the decision below, the Eleventh Circuit affirmed the district court's reliance on the non-elemental dates alleged in the charging documents alone, without any record ensuring that Mr. Doctor's convictions in state court were for offenses that actually were committed on the dates alleged in the charging documents. The Sixth Amendment problem arises because the judgments do not state the date of each offense of conviction and no other evidence was admitted demonstrating that Mr. Doctor assented to those dates as part of his plea. Mr. Doctor's position is further bolstered because, under Florida law, the date of the offense is explicitly not an element of the offense and may vary from the alleged date in the charging document.

Moreover, in Mr. Doctor's case, two of the three prior, predicate convictions were for violations of the same statute joined in the same charging document, creating a presumption under state procedural rules that these offenses may not have been "committed on occasions different from one another." Under Fla. R. Crim. Procedure, two or more offenses that are triable in the same court may be charged in the same indictment or information in a separate count for each offense, when the offenses, whether felonies or misdemeanors, or both, are based on the same act or transaction or on two or more connected acts or transactions. Fla. R. Crim. P. 3.150. Florida courts have narrowly interpreted the state's joinder rule. In *Garcia v. State*, the Florida Supreme Court held that the "connected acts or transactions" requirement of Fla. R. Crim. 3.150 means that the acts joined for trial

must be connected "in an episodic sense." 568 So.2d 896, 898 (Fla. 1990) (citations omitted). Thus, based a review of the charging documents in Mr. Doctor's case, the district court had no way of determining that Mr. Doctor's offenses were not part of the same criminal episode.

The law is unsettled as to whether the ACCA's "on occasions different from one another" requirement is simply a temporal requirement or whether there is a criminal-episode exception to the rule. Courts have tried to distinguish whether the "on occasions different from one another" is simply a temporal test (and if so, how much time between offenses) or whether it requires the crimes be separated by substantial effort and reflection, thus stemming from a separate criminal episode. *See United States v. Petty*, 798 F.2d 1157 (8th Cir. 1987), *vacated and remanded*, 481 U.S. 1034 (1987), *reheard on remand*, 828 F.2d 2 (8th Cir. 1987); *United States v. Daye*, 571 F.3d 225, 237 (2d Cir. 2009), *abrogated on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015). While the Eleventh Circuit in this case strictly applied a temporal test masqueraded as an episodic test,[4] other courts have considered not only whether the crimes were committed at different times but whether the defendant committed the crimes against different victims and parties, whether the defendant committed the crimes by going to the effort of traveling from one area to another, and whether the defendant had a realistic opportunity for substantial reflection between offenses. *See United States v. Rideout*, 3 F.3d 32, 34-

[4] Citing *Longoria*, 874 F.3d at 1281, the Eleventh Circuit wrote, "'[S]o long as predicate crimes are successive rather than simultaneous, they constitute separate criminal episodes' for purposes of the enhancement." Pet. App. at 4a.

35 (2d Cir. 1993). Thus, federal courts are requiring factual determinations beyond the elements of the offense thus implicating the Sixth Amendment.

Mr. Doctor's ACCA sentencing enhancement may have been imposed on only two convictions for offenses "committed on occasions different from one another." Mr. Doctor's case therefore presents the ideal vehicle to resolve this Sixth Amendment question and the application of the ACCA sentencing enhancement where a review of *Shepard*-approved documents and elements of the offenses alone does not clearly establish that the offenses were "committed on occasions different from one another" in both a temporal and episodic sense.

A. This Sixth Amendment question is important and recurring.

As this Court has held, except for 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." *Descamps*, 570 U.S. at 269 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)) (internal quotation marks omitted). To avoid the Sixth Amendment violation of increasing a defendant's sentence under the ACCA based on facts not proven to a jury beyond a reasonable doubt or necessarily admitted by the defendant in pleading guilty, this Court has limited sentencing courts to the elements of the prior offenses. *Descamps*, 570 U.S. at 269-70 (addressing the ACCA's "violent felony" provision); *accord Mathis*, 136 S. Ct. at 2252. For prior convictions resolved at trial, "the only facts the [federal sentencing] court can be sure the jury . . . found [unanimously and beyond a reasonable doubt in the prior proceeding] are those constituting elements

of the offense." *Descamps*, 570 U.S. at 269-70. And, in prior cases resolved by a guilty plea, the defendant "waive[d] his right to a jury determination of only that offense's elements." *Id.* The Court has thus made clear that a sentencing court may only rely on the offense's elements to determine whether a defendant's prior conviction qualifies as a "violent felony" for the ACCA sentencing enhancement.

The Court also made clear that a sentencing court cannot "rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence." *Id.* at 270; *accord Mathis*, 136 S. Ct. at 2252 ("[A] judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. . . . He can do no more consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of."). The determination of whether offenses were "committed on occasions different from one another," whatever that truly means, will necessarily, in cases like Mr. Doctor's, turn on facts such as when, where, and how the offense was committed that are not elements of the prior offense. In Mr. Doctor's case, the only difference in the two charges in Case No. 2006CF11535 were the dates alleged, which are not elements of the charged offenses.[5]

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[5] Dates alleged in Florida charging documents are not elements of the offense. *See Tingley v. State*, 549 So.2d 649, 650 (Fla. 1989) (holding time is not a substantive part of an information and there may be a variance between dates proven at trial and those alleged in the information); *see also Mars v. Mounts*, 895 F.2 1348, 1360 (11th Cir. 1990) (acknowledging following *Tingley* that variances between the dates proven at trial and the dates alleged in the charging document are permitted under Florida law).

The Sixth Amendment concern that this Court sought to resolve in *Descamps* and *Mathis* thus persists when a district court relies on non-elemental facts to find that the prior offenses were "committed on occasions different from one another." This question is important and recurring.[6] Five judges of the Eighth Circuit would have granted rehearing en banc on this question. *See United States v. Perry*, 904 F.3d 1126 (8th Cir. 2018), *reh'g en banc denied*, No. 17-3236 (Feb 20, 2019).[7] Judges of the Fourth, Sixth, Eighth, and D.C. Circuits have written opinions recognizing the importance of this issue.[8] Mr. Doctor, therefore, asks for this Court's review of

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[6] See *Ross v. United States*, No. 20-5404; *West v. United States*, No. 19-8755 (petition for certiorari denied).

[7] The Court denied certiorari in *Perry v. United States*, 140 S. Ct. 90 (2019), after the government asserted (among other grounds) that the petition was untimely filed. See Brief for the United States in Opposition at 9, *Perry v. United States*, No. 18-9460 (July 26, 2019).

[8] *See United States v. Thompson*, 421 F.3d 278, 292-93 (4th Cir. 2005) (Wilkins, J., dissenting) ("Here, the majority holds that the date on which a prior crime was committed is a 'fact of a prior conviction,' but in my view it is a fact '*about* a prior conviction,' or, more precisely, a fact about an offense underlying a prior conviction. This distinction is not merely a matter of semantics. Although a defendant is entitled to a jury trial on the question of whether he committed a particular crime, in few, if any cases is a jury required to find that the offense occurred on a particular date. Thus, the protections that the Supreme Court identified as critical to the distinctiveness of the 'fact of a prior conviction' are not customarily afforded a defendant with regard to the date that a crime was committed.") (citations and footnotes omitted); *United States v. Hennessee*, 932 F.3d 437, 449 (6th Cir. 2019) (Cole, J., dissenting) ("I would find that sentencing courts conducting the different-occasions analysis can look to *Shepard* documents and consider facts therein that are 'necessary' to the conviction in determining whether the offenses were committed on different occasions, but sentencing courts cannot consider any non-elemental facts in applying the ACCA enhancement."), *cert. denied*, 140 S. Ct. 896 (2020); *Perry*, 908 F.3d at 1134 (Stras, J., concurring) ("The court's approach in addressing Perry's past crimes, and in particular whether he committed them 'on occasions different from one another,' falls in line with our cases but is a departure

his case, which will provide clarity across the federal courts regarding this issue that has significant impact on a large number of defendants in federal district courts.[9]

B. This important and recurring question has led to a circuit conflict.

In the decision below, the Eleventh Circuit affirmed the district court's reliance on the non-elemental dates alleged in the charging documents alone, without any record ensuring that Mr. Doctor's convictions rested on those dates in state court or were otherwise "committed on occasions different from one another," whatever that truly means. Pet. App. 4a-5a (following its published decision in *United States v. Longoria*, 874 F.3d 1278, 1281 (11th Cir. 2017)). The Eleventh Circuit's decision accords with other circuits' decisions similarly permitting a district court to rely on the alleged dates in the charging documents alone to find

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from fundamental Sixth Amendment principles. I join the court's opinion because it is a faithful application of existing circuit precedent, but I write separately to express my concerns about what is, in my view, an erosion of the jury-trial right."); *United States v. Thomas*, 572 F.3d 945, 952-53 (D.C. Cir. 2009) (Ginsburg, J., concurring in part) ("The question whether the sentencing judge may rely solely upon an indictment to determine the date of a prior offense without running afoul of the Sixth Amendment or of the teaching of *Shepard* . . . is more difficult than the court lets on.").

[9] Mr. Doctor was originally arrested and charged by state authorities. See PSR ¶55. He was later indicted in the Middle District of Florida presumably for the enhanced penalties under the ACCA. He went from facing a 3 year mandatory minimum under state law to a 15 year mandatory minimum under the ACCA. See Section 775.087, Florida Statutes (imposing three year mandatory minimum prison sentence for actual possession of firearm by a convicted felon).

that the offenses were committed on different occasions.[10] These decisions, however, are in conflict with other circuits' decisions rejecting reliance on the charging documents alone, demonstrating the need for this Court's review.

The Sixth Circuit, for example, has issued a series of decisions grappling with this issue. In *United States v. King*, 853 F.3d 267, 269 (6th Cir. 2017), the government sought to rely on the times and locations in the bill of particulars to establish that the prior offenses were committed on different occasions. The Sixth Circuit, however, rejected this argument. The court of appeals concluded that the times and locations are not elements of the prior offenses, and therefore the defendant had not necessarily admitted them in pleading guilty. *Id.* at 276. Moreover, because the government had not introduced any plea agreements or plea colloquy, the government had not established what the defendant had admitted in state court. *Id.* The Sixth Circuit read this Court's decisions to require a determination of what the defendant necessarily admitted in pleading guilty—a

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[10] *See, e.g., United States v. Blair*, 734 F.3d 218, 228 (3d Cir. 2013) ("Although the dates charged were not elements of the offenses, the charging documents nonetheless contained factual matter that was sufficient for the District Court to conclude that Blair's 1991 convictions were for at least three robberies that occurred on separate occasions."); *Thomas*, 572 F.3d at 951 ("The Government presented the indictments from the two drug offense prosecutions, each of which set out the date of the particular charged offense of conviction: April 17, 1991 for distributing cocaine and September 18, 1991 for attempted PWID. These charging indictments sufficed under *Taylor* and *Shepard* to establish the dates the two previous drug offenses were committed-and thus 'necessarily' establish the offenses were committed on occasions different from one another.") (referencing *Taylor v. United States*, 495 U.S. 575 (1990)).

determination that could not be made from the charging document alone. The Sixth Circuit explained:

> The Government implies that, in limiting a court applying the ACCA to what King necessarily admitted, we apply *Shepard*'s restrictions too strictly. It stresses that in *Shepard*, the Supreme Court stated that courts making the ACCA-predicate determination may consider "the terms of the charging document" (which, says the Government, includes bills of particulars).
>
> The Government is correct about what *Shepard* said. *See* 544 U.S. at 26, 125 S. Ct. 1254. But to hold that a court answering the different-occasions question can consider anything that might be classified as a charging document would be to unmoor *Shepard*'s reference to "charging documents" from its reasoning. The list of approved documents was compiled with a focus on what the defendant "necessarily" admitted in pleading guilty—not the other way around.

Id. at 276-77 (emphasis added).

The Sixth Circuit has since issued other published decisions limiting *King*. *See United States v. Southers*, 866 F.3d 364, 369-70 (6th Cir. 2017) (affirming reliance on state court indictments alleging offenses occurred in different locations); *cf. Hennessee*, 932 F.3d at 444 & n.4 (holding that a district court may rely on non-elemental facts from the *Shepard* documents, and relying on the plea colloquy to affirm). The Sixth Circuit in *King*, however, was correct to recognize the problem of relying on non-elemental allegations in the charging documents alone, without any assurance that the defendant's convictions rested on those non-elemental facts in the prior proceedings. Indeed, the Sixth Circuit is not alone in rejecting the reliance on the charging documents without a plea colloquy or other record establishing the basis for the conviction in the prior proceeding. *See, e.g., United States v. Fuller*, 453 F.3d 274, 279 (5th Cir. 2006) (concluding, because state law permitted a guilty plea

as an accomplice and no plea colloquy had been submitted, "we cannot determine as a matter of law that the burglaries occurred on different occasions" based "on the indictments alone").

Mr. Doctor's case is an ideal vehicle to resolve the Sixth Amendment issue presented herein. Mr. Doctor's prior convictions stem from his pleas of guilty to three Florida drug offenses across two separate, distinct state court cases. In 2006, Mr. Doctor pleaded guilty to two sale or deliver of cocaine offenses in the same case. The charged were offenses in Case 2006CF11535 were identical but for the dates alleged—July 6, 2006 and July 12, 2006. The alleged dates in the charging document fall well within the range of variances permitted by the Florida Supreme Court. *See Tingley*, 549 So. 2d at 649, 651 (affirming at least three-month variance). The government did not introduce any plea colloquy or other record "in which the factual basis for the plea was confirmed by the defendant." *Shepard*, 544 U.S. at 26. Accordingly, the government did not establish that these convictions rested on offenses that were committed on different occasions. *See Johnson v. United States*, 559 U.S. 133, 136-37 (2010). And without both of these convictions each qualifying as a prior predicate conviction, Mr. Doctor was ineligible to be sentenced under the ACCA.

The Sixth Amendment problem that this Court sought to resolve in *Descamps* and *Mathis* thus persists here. Because the alleged dates are not elements, Mr. Doctor did not necessarily admit these non-elemental dates when he entered his guilty pleas in 2006. *See Descamps*, 570 U.S. at 260-62, 269-71. The most that can

be determined from the *Shepard* documents admitted at Mr. Doctor's sentencing is that Mr. Doctor has two prior convictions for ACCA purposes, making him ineligible for the ACCA's increased penalties. *See Johnson*, 559 U.S. at 136-37.

Mr. Doctor requests this Court's review to resolve the important Sixth Amendment questions whether a district court may rely on non-elemental facts to find that prior offenses were committed on different occasions and, if so, may it rely on the non-elemental facts alleged in the charging documents alone. Resolution of this issue in Mr. Doctor's case would be outcome-determinative. Absent the reliance on non-elemental facts taken from the charging documents, his statutory maximum would be 10 years in prison. 18 U.S.C. § 924(a)(2). Mr. Doctor therefore seeks this Court's review.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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