No. _____

IN THE

Supreme Court of the United States

JOSHUA RESHI DUDLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), mandates a fifteen-year minimum sentence for defendants who have previously been convicted of certain qualifying offenses "committed on occasions different from one another." This Court has held that, under the Sixth Amendment, a sentencing court identifying a qualifying offense may consider only "what crime, with what elements, the defendant was convicted of." *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016). Mr. Dudley now presents two questions related to the finding that offenses occurred on different occasions:

I. Whether the Sixth Amendment limits a sentencing court, when determining whether a defendant's prior offenses were "committed on occasions different from one another," 18 U.S.C. § 924(e), to consider only matters a jury found or a prior guilty plea necessarily admitted.

II. Whether the Eleventh Circuit misapplied *Shepard v. United States*, 544 U.S. 13 (2005), by holding that sentencing court, when determining whether a defendant's prior offenses were "committed on occasions different from one another," 18 U.S.C. § 924(e), may find that a defendant *implicitly* confirmed uncharged offense dates proffered by a prosecutor during a guilty plea hearing.

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PETITION FOR A WRIT OF CERTIORARI

Joshua Reshi Dudley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The decision of the Eleventh Circuit is reported at 5 F.4th 1249, and reprinted in the Appendix to the Petition ("Pet. App.") 1a. The denial of rehearing is not reported and is reprinted at Pet. App. 59a.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Eleventh Circuit had appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. It affirmed Mr. Dudley's sentence on July 22, 2021, and denied his petition for rehearing *en banc* on September 16, 2021, Pet. App. 59a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Jury Trial Clause of the Sixth Amendment 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 . . . ."

Section 924(e)(1) of United States Code Title 18 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).

INTRODUCTION

The Armed Career Criminal Act mandates a fifteen-year minimum sentence for defendants who have previously been convicted of certain qualifying offenses "committed on occasions different from one another." 18 U.S.C. § 924(e). Because the Act increases a defendant's statutory sentencing range, its application is subject to the Sixth Amendment principle that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Where a defendant's prior conviction resulted from a guilty plea, a sentencing court's determination of an ACCA enhancement is limited to what the plea necessarily admitted; this Court has explained that going further would take a judge past *the fact* of the conviction and into the jury's province. *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016); *Descamps v. United States*, 570 U.S. 254, 267–69 (2013).

Despite this Court's instruction that the Sixth Amendment dictates that courts cannot find facts beyond those found by a jury or necessarily admitted for a guilty plea, courts of appeals are consistently allowing district courts to apply the ACCA

based on their own preponderance-of-the-evidence determination that a defendant's prior convictions were committed on different occasions. The lower courts, including the Eleventh Circuit, instruct sentencing courts to consider so-called *Shepard* documents[1] and identify the "occasions" on which prior crimes were committed. To avoid the Sixth Amendment principles articulated in *Descamps* and *Mathis*, the lower courts have said that those decisions dealt with a sentencing court's inquiry of whether a prior offense qualified as a "violent felony," § 924(e)(2), not the different-occasions inquiry. The lower courts have also held that the factual circumstances underlying a conviction are inseparable from the fact of conviction and, therefore, excluded from *Apprendi* and Sixth Amendment limitations.

The instant case provides this Court with the opportunity to directly address whether judicial factfinding in the different-occasions context presents Sixth Amendment problems. The Court is currently considering the ACCA's different-occasions provision for the first time. *Wooden v. United States*, 141 S. Ct. 1370 (2021). The question there is how "different" prior occasions must be to qualify as predicate convictions for the ACCA. But, during the oral argument, members of this Court questioned whether judicial factfinding in the different-occasions context presents Sixth Amendment problems. This Court is not the first to notice the issue. The dissent below noted conflict between the Eleventh Circuit's different-occasions precedents

[1] These documents include "the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard*, 544 U.S. at 26.

and this Court's ACCA decisions, and cited opinions by other circuit judges who've raised the same concern. Pet. App. 53 n.8 (Newsom, J., concurring in part and dissenting in part). He suggested this Court "might want to clear things up," *id.* at 58a, and this case presents an excellent vehicle. Mr. Dudley objected to the district court's factfinding about the occasion of his prior offenses, and his 215-month sentence necessarily relied on that factfinding.

This case also deserves this Court's review because the Eleventh Circuit misapplied *Shepard* in holding that evidence of a defendant's implicit confirmation-by-silence of uncharged offense dates in a prosecutor's factual proffer can support a different-occasions finding. Pet. App. 22a. The dissenting judge below described that holding as "a misreading of *Shepard*" and contrary to the Sixth Amendment limits this Court has repeatedly recognized for judicial factfinding that mandates a sentence enhancement. Pet. App. 44a. This Court should grant review because *Shepard* makes clear that factual admissions in the context of a guilty plea must be confirmed by the defendant to apply the ACCA.

1. Factual Background and Proceedings Below. In May 2018, Mr. Dudley pleaded guilty to count one of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). Five years earlier, in a single-state court hearing, he pleaded guilty to five counts of second-degree assault in the three separate cases. Neither the state-court indictments nor the plea agreements underlying those convictions gave dates or times for the offenses. During the state proceeding, the state-court prosecutor included separate dates for the offenses as part of a factual proffer. But no one asked

Mr. Dudley or his state attorney whether the state prosecutor's proffer was accurate or whether he assented to that proffer.

At Mr. Dudley's federal sentencing and over his objection, the district court relied on a transcript showing the state prosecutor's factual proffer to find that Mr. Dudley committed the prior offenses "on occasions different from one another." § 924(e). The court summed up its ruling by stating:

> I think we have to take our state courts, to a certain degree, as we find them. The defendant was present; it was a court proceeding. This was read in the defendant's presence. It described the different attacks and the dates they occurred against the individuals where he assaulted individuals in the jail. And he, by pleading guilty, acknowledged his responsibility, acknowledged what occurred. The judge would not have taken the plea if there was not a basis in fact.

Pet. App. 74a. With this finding, the district court applied the ACCA enhancement and sentenced Mr. Dudley to 215 months' imprisonment. Without the enhancement, the statutory maximum would have been 120 months' imprisonment. *See* § 924(a)(2).

2. Affirmance by the Eleventh Circuit. Mr. Dudley appealed his sentence, arguing that the district court erred in finding that his prior offenses were committed on different occasions and applying the ACCA enhancement. In a 2-to-1 decision, the court of appeals concluded that the district court did not err. The majority opinion interpreted *Shepard* to hold a district court may review a plea-colloquy transcript and find that a defendant implicitly confirmed the factual basis for his guilty plea. Pet. App. 22a-23a ("where there is evidence of confirmation of the factual basis for the plea by the defendant—be it express or implicit confirmation—a federal sentencing court is permitted to rely on those facts to conduct the different-occasions inquiry").

Although Mr. Dudley said nothing about the state prosecutor's factual proffer in the prior plea proceeding, the Eleventh Circuit majority noted that Mr. Dudley "did not object to" the prosecutor's statements whereas his state attorney did "raise a separate issue concerning . . . jail credit." *Id.* at 21a. From that, the majority held that Mr. Dudley, "under the totality of the circumstances, implicitly agreed with the factual proffer such that the district court could rely on the proffered dates of Dudley's prior Alabama assaults to confirm that the predicate offenses were committed on different occasions from one another." *Id*. at 23a-24a. In so holding, the Court wrote that "[n]either *Descamps* nor *Mathis* is clearly on point as neither case deals with the different-occasions inquiry." *Id.* at 28a.

Judge Newsom dissented from that holding, writing that "under Supreme Court (and [Eleventh Circuit]) precedent an unconfirmed plea colloquy is not a *Shepard*-approved source." *Id*. at 41a (Newsom, J., concurring in part and dissenting in part). He explained that "Dudley was never asked to—and didn't—confirm the factual basis for his plea." Pet. App. 35a. "Given *Shepard*'s demand for 'certainty' and the [Supreme] Court's ensuing focus on the Sixth Amendment limits on judicial factfinding, . . . *Shepard*'s requirement that a defendant 'confirm[]' the factual basis of his plea" demands *express* confirmation, not "a mere failure to object." *Id*. at 47 (quoting *Shepard*, 544 U.S. at 26). He concluded that the majority opinion's new "implicit-assent-by-silence theory" rests on a misreading of *Shepard* and disregards Sixth Amendment limits on judicial factfinding—even about the details of a prior

conviction—recognized by this Court in *Blakely v. Washington*, 542 U.S. 296, 303 (2004), *Apprendi*, *Descamps*, and *Mathis*. Pet. App. 40a, 45a.

Judge Newsom further observed the apparent conflict between circuit precedent allowing judicial factfinding in the different-occasions context and the Sixth Amendment problems with factfinding beyond the fact of a prior conviction to enhance a sentence. *Id.* at 47a-58a. On one hand, the Eleventh Circuit has long held that sentencing courts may mine the records of prior convictions for details of prior offenses. *Id.* at 52a (citing *United States v. Sneed*, 600 F.3d 1326, 1332 (11th Cir. 2010)). On the other, this Court has continued to limit judicial factfinding since *Apprendi* and more recently explained that a court "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id.* (quoting *Mathis*, 136 S. Ct. at 2252). Given those contradictions, Judge Newsom suggested that "the *en banc* Court, or perhaps the Supreme Court, might want to clear things up." *Id.* at 58a.

Mr. Dudley petitioned for *en banc* review, but the Eleventh Circuit summarily denied his petition. *Id.* at 59a.

REASONS FOR GRANTING THE PETITION

The ACCA imposes one of the most severe punishments in federal law, and the lower courts are regularly allowing judicial factfinding in the different-occasions context. Judges are scrutinizing factual details that were not essential to prior convictions, drawing inferences about the relation between offenses, and enhancing statutory penalties based on their findings. Mr. Dudley's case is a prime example.

The courts below studied the transcript of Mr. Dudley's prior state proceeding and concluded that he "implicitly agreed with the factual proffer such that the district court could rely on the proffered dates of Dudley's prior Alabama assaults to confirm that the predicate offenses were committed on different occasions from one another." Pet. App. 22a-23a.

This holding appears to conflict with this Court's mantra that judicial factfinding in the ACCA context violates the Sixth Amendment where it goes beyond matters necessarily admitted by a prior plea. This Court has held that under the Sixth Amendment, "only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction." *Mathis v. United States*, 136 S. Ct. 2243, 2252-57 (2016) (citing *Apprendi*, 530 U.S. at 490). Because the ACCA increases the statutory range of punishment, this Court has specifically recognized the Sixth Amendment problems with allowing sentencing courts to "'make a disputed' determination 'about what the defendant and state judge must have understood as the factual basis of the prior plea.'" *Descamps*, 570 U.S. at 269 (quoting *Shepard*, 544 U.S. at 25 (plurality op.)).

This Court's intervention is needed because Mr. Dudley's case is not an isolated instance of judicial factfinding in the different-occasions context. The lower courts have cordoned off the different-occasions inquiry from other ACCA findings and the Sixth Amendment rules that constrain them. Courts are routinely enhancing sentences after weighing details that have not "been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees," *Jones v.*

United States, 526 U.S. 227, 249 (1999). This practice injects uncertainty into the application of the ACCA, which federal courts apply to hundreds of individuals each year. *See* U.S. Sent'g Comm'n, *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways*, 2021, at 19.[2]

Both questions presented by Mr. Dudley have exceptional importance. The first question will provide needed instruction to the lower courts for whether the ACCA's different-occasions inquiry is limited by the Sixth Amendment to only matters a jury found or a prior guilty plea necessarily admitted. And review of the second question is needed to correct the Eleventh Circuit's application of *Shepard*. Contrary to *Shepard*'s clear concern of certainty when applying the ACCA, the decision below allows sentencing courts to make a disputed finding about what a defendant confirmed during a prior plea hearing.

1. The time has come for this Court to address the Sixth Amendment concerns with judicial factfinding in the different-occasions context.

Despite this Court's "mantra" that judicial factfinding beyond the fact of a prior conviction violates the Sixth Amendment, the lower courts are not limiting the different-occasions inquiry accordingly. *Mathi*s, 136 S. Ct. at 2251. The Eleventh Circuit expressly rejected the import of *Descamps* and *Mathis* by reasoning that "neither case deals with the different-occasions inquiry." Pet. App. 28a. This is not unique to the Eleventh Circuit. Judges recognize the Sixth Amendment problems

[2] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303_ACCA-Report.pdf

with judicial factfinding in the different-occasions context, but conclude "that's just what our case law requires, at least until the Supreme Court, or this court sitting en banc, takes up the issue." *United States v. Perry*, 908 F.3d 1126, 1137 (8th Cir. 2018) (Kelly, J., concurring in part and dissenting in part).

a. **The Sixth Amendment limits the use of judicial factfinding to support an ACCA enhancement**.

The Court in *Apprendi* established that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. 466, 490 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998). *Almendarez-Torres*'s exception for the fact of a prior conviction is a limited one: it reaches only the fact of the conviction itself and the elements of the offense of conviction. Subsequent decisions have emphasized that it is "a narrow exception," *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013), with a narrow justification: "[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense, . . . 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. Those safeguards are the reason a judge may find the fact of conviction even though this Court "[r]eally . . . has never doubted that the who, what, when, and where of a conviction—and the very existence of a conviction in the first place—pose questions of fact." *Pereida v. Wilkinson*, 141 S. Ct. 754, 765 (2021). But "extraneous facts" in old court records have not been established through the same safeguards. *See Descamps*, 570 U.S. at 270.

This Court's more recent decisions in *Descamps* and *Mathis* have specifically applied the Sixth Amendment limits on judicial factfinding—and the narrow scope of the prior-conviction exception—in the ACCA context. In *Descamps*, the Court reversed a decision affirming the ACCA enhancement because the sentencing court had conducted factfinding beyond the essential elements of a prior offense to determine that it was a violent felony. 570 U.S. at 259, 277-78. The Court explained that "[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find [facts about the defendant's conduct], unanimously and beyond a reasonable doubt." *Descamps*, 570 U.S. at 269. In *Mathis*, the Court again noted the Sixth Amendment problems with sentencing courts conducting factfinding for application of the ACCA and reiterated that a judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." 136 S. Ct. at 2252.

In these decisions, the Court wrestled with a persistent question about *Almendarez-Torres*'s prior-conviction exception: What does the fact of a prior conviction contain? The Court has made clear that "the fact" includes more than the bare outcome (the judgment of conviction) and extends to matters like "which . . . offense [a defendant] was convicted of," *Descamps*, 570 U.S. at 262 (citing *Shepard*, 544 U.S. at 26), and what punishment the conviction authorized, *United States v. Rodriquez*, 553 U.S. 377, 380 (2008). But this Court has also emphasized the Sixth Amendment problems with "allowing a sentencing court to 'make 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." *Descamps*, 570 U.S. at 269 (citing *Shepard*, 544 U.S. at 25 (plurality opinion), 28 (Thomas, J., concurring in part and concurring in the judgment)). The Court has followed a "simple" principle: "a sentencing judge may look only to 'the elements of the [offense], not to the facts of [the] defendant's conduct.'" *Mathis*, 136 S. Ct. at 2251–52 (quoting *United States v. Taylor*, 495 U.S. 575, 601 (1990)).

This principle prevents *Almendarez-Torres*'s narrow exception from being stretched "beyond merely identifying a prior conviction." *Descamps*, 570 U.S. at 269, and confines the exception to its justification by applying it only where the jury right already has been provided. *See Jones*, 526 U.S. at 249. "'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.'" *Mathis*, 136 S. Ct. at 2248 (quoting *Elements of Crime*, *Black's Law Dictionary* (10th ed. 2014)). As such, they are the only aspects of a prior conviction that would have been accorded a jury right: "At a trial, [elements] are what the jury must find beyond a reasonable doubt to convict the defendant; and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." *Id.* (citations omitted). By restricting ACCA determinations to elements, the Court's precedents ensure that judicial factfinding to support the enhancement only involves matters essential to the fact of a prior conviction.

b. The lower courts are routinely allowing judicial factfinding in the different-occasions context.

Despite the Sixth Amendment teachings from this Court, the courts of appeals permit ACCA different-occasions inquiries that explore and weigh details pulled from the records of prior convictions. Like the Eleventh Circuit below, the lower courts acknowledge the Sixth Amendment problems with judicial factfinding when determining whether a prior offense qualifies as a violent felony, but deny that different-occasions findings raise the same issues. Several members of this Court, however, expressed concerns during the *Wooden* oral argument that the parties' proposed applications of the different-occasion provision allowed for factfinding that would present Sixth Amendment problems. *See* Oral Argument tr. at 15-16, 31-32, 39, 72, *Wooden v. United States*, No. 20-5279. The time has come for the Court to squarely address whether the Sixth Amendment limits a district court in the different-occasions context to consider only matters a jury found or a prior guilty plea necessarily admitted.

Where courts of appeals have confronted arguments that the Sixth Amendment principles from *Shepard*, *Descamps*, and *Mathis* undermine their different-occasions precedents to the point of abrogation, they have uniformly concluded that this Court has not spoken clearly enough. In *United States v. Dantzler*, 771 F.3d 137 (2d Cir. 2014), the Second Circuit accepted that *Shepard*'s source limitations apply to different-occasions determinations but nevertheless allowed the sentencing judge to base those determinations on non-essential details in *Shepard* sources. *Compare Dantzler*, 771 F.3d at 143 (holding that *Shepard*'s "reasoning . . .

applies with equal force to the [different-occasions] analysis . . . [because] 'the *Shepard* Court was apparently concerned about the prospect of a sentencing court making any factual finding not necessarily implied by the prior conviction—irrespective of how clearly the factual finding was established'" (quoting *United States v. Rosa*, 507 F.3d 142, 153 (2d Cir. 2007))), *with id.* at 144 ("we read *Apprendi* as leaving to the judge, consistent with due process, the task of finding not only the mere fact of previous convictions but other related issues," including different occasions (quoting *United States v. Santiago*, 268 F.3d 151, 156 (2d Cir. 2001))). The Fourth Circuit surmised that ""[t]he question of whether a defendant's predicate convictions were committed on different occasions under the ACCA more likely involves an altogether separate assessment outside of the strictures of the *Descamps* rationale." *United States v. Span*, 789 F.3d 320, 331-32 (4th Cir. 2015). And the Ninth Circuit in *United States v. Walker* observed that "[t]o the extent that *Mathis* expresses broader disfavor of factual determinations by sentencing judges, it is not clear whether and how this disfavor extends beyond determining that a given state-law crime is an ACCA predicate." 953 F.3d 577, 581 (9th Cir. 2020).

Other judges, however, have seen a clear contradiction between those holdings and the Sixth Amendment rationales for this Court's ACCA decisions. In *United States v. Perry*, Judge Stras felt bound by panel precedent, but wrote a concurring opinion observing that "[t]he 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., concurring). He suggested that the Sixth

Amendment principles in this Court's ACCA precedents have not been applied in the different-occasions context because "[s]ometimes courts just continue along the same well-trodden path even in the face of clear signs to turn around." 908 F.3d at 1135 (Stras, J., concurring). Other circuit judges have shared Judge Stras's view. *See United States v. Hennessee*, 932 F.3d 437, 446-47 (6th Cir. 2019) (Cole, J., dissenting) ("consider[ing] non-elemental facts such as times, locations, and victims in *Shepard* documents when conducting the different-occasions analysis . . . contradicts the Supreme Court's application of *Taylor* and *Shepard*" (internal quotations omitted)); *Perry*, 908 F.3d at 1137 (Kelly, J., concurring in part and dissenting in part) ("[J]udicial determination of [ACCA different occasions] would appear to conflict with Supreme Court precedent."); *United States v. Thompson*, 421 F.3d 278, 288–89 (4th Cir. 2005) (Wilkins, J., dissenting) ("the ACCA sentence violated Thompson's Fifth and Sixth Amendment rights [because] the underlying facts justifying the different occasions determination were [not] subsumed by the fact of Thompson's prior convictions" (cleaned up)); *United States v. Thomas*, 572 F.3d 945, 952-53 (D.C. Cir. 2009) (Ginsburg, J., concurring in part) ("[T]he defendant is entitled to a jury finding for any 'fact about a prior conviction.' . . . [A]s far as this record shows, neither Thomas's plea to one offense nor the jury's judgment of conviction on the other entailed a finding as to whether the offense occurred on the date charged." (quoting *Shepard*, 544 U.S. at 25 (plurality op.))).

Regarding *Shepard*-approved sources as the only limitation on different-occasions inquiries, the lower courts look both more broadly (in the kinds of details

they draw from those sources) and more deeply (in the ways they parse the details) into these documents than this Court's precedents permit for any other ACCA finding. On review, courts of appeals are then affirming application of the ACCA even though, by any measure, they are "making . . . disputed determination[s] 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.'" *Mathis*, 136 S. Ct. at 2252 (quoting *Shepard*, 544 U.S. at 25 (plurality opinion); *Descamps*, 570 U.S. at 269).

Beyond Mr. Dudley's case, several cases across the circuits demonstrate the detailed factfinding lower courts are conducting. In *United States v. Proch*, 637 F.3d 1262 (11th Cir. 2011), the Eleventh Circuit affirmed a district court's finding that "two burglary offenses committed on the same day at separate addresses on the same street" constituted different occasions. 637 F.3d at 1265–66. After "tak[ing] judicial notice of a map of Fort Walton Beach, Florida," the Court concluded that "logic dictates" the defendant did not enter the second premises merely "to escape detection" by police, but rather "had the opportunity to desist but chose instead to commit another crime." *id.* at 1265–66 & n.1. (distinguishing *United States v. Sweeting*, 933 F.2d 962 (11th Cir. 1991)). In *Hennessee*, the Sixth Circuit held that a district court "erred in confining itself to only elemental facts within *Shepard*-approved documents when conducting its different-occasions analysis," and reversed the lower court's finding that the government had not proved different occasions. 932 F.3d at 444–45. The Sixth Circuit wrote that "*Descamps*'s and *Mathis*'s elements-means distinction

or elemental-facts restriction" was not "import[ed] . . . [in]to our different-occasions analysis," so "a sentencing judge may 'identify the who, when, and where of the prior offenses' in its different-occasions analysis but is constrained to 'the evidentiary sources and information approved by the Supreme Court in *Taylor* and *Shepard*.'" *Id.* at 442 (citing *United States v. King*, 853 F.3d 267, 274–75 (6th Cir. 2017)). And, in *Perry*, the Eighth Circuit affirmed a finding that a robbery and assault on the same day were committed on different occasions after reviewing the offense details in the federal presentence report. 908 F.3d at 1132 n.2. From those details, the court found that "[t]he time lapse between Perry's crimes was not long, but they were far from simultaneous," and that "[b]efore the . . . assault, Perry left the station and ran some distance away" but "did not get far." *Id.*

In each of these cases, judges scrutinized details that were "irrelevant to the [prior] crime charged" to do "just what [this Court has] said [a judge] cannot: rely on [her] own finding about a non-elemental fact to increase a defendant's maximum sentence." *Descamps*, 570 U.S. at 270. Courts usually acknowledge they are doing this, but deny that it conflicts with this Court's ACCA decisions because those decisions do not directly address different-occasions findings. The Court should directly address the matter.

c. **Determining the Sixth Amendment's application to the ACCA's different-occasion inquiry is exceptionally important, and this case is an excellent vehicle.**

Issues about the application of the ACCA retain exceptional important because the ACCA imposes one of the most severe punishments in federal law, converting a

firearms-possession offense punishable by a maximum of ten years into a mandatory-minimum term of fifteen years, with a potential sentence of life. Here, Mr. Dudley pleaded to a single count of violating 18 U.S.C. § 922(g)(1), and the ACCA enhanced his maximum imprisonment from 10 years to Life. And Mr. Dudley is not alone; each year district courts are applying the ACCA enhancement to hundreds of individuals. *See* U.S. Sent'g Comm'n, *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways*, 2021, at 19.[3]

Of these hundreds of cases, Mr. Dudley's case is an excellent vehicle for the Court to take up the matter of different-occasions factfinding because his challenge to that finding was squarely presented at sentencing and throughout the appeal. Prior to his sentencing, he argued that the transcript of his prior plea hearing did not establish different occasions for his offenses. He alerted the district court to fact that he never confirmed or acknowledged any time period for the offenses.

The district court's factfinding from that state-court transcript personifies problems this Court anticipated with a federal sentencing court's factfinding. *Descamps*, 570 U.S. at 270-711; *Mathis*, 136 S. Ct. at 2253. *Descamps* and *Mathis* recognized a defendant's lack of motivation to speak up during a plea hearing to dispute a detail that "does not matter under the law," *Mathis*, 136 S. Ct. at 2253. The Court observed in *Descamps* that a defendant "may have good reason not to" risk "irk[ing] the prosecutor or court by squabbling about superfluous factual allegations."

[3] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303_ACCA-Report.pdf

570 U.S. at 270. That is evidenced here. Prior to his hearing, Mr. Dudley and the State had already worked out a deal whereby he would plead guilty to certain counts in exchange for a particular sentence. As he stood before the state court on December 31, 2013, he risked derailing his deal by raising any superfluous or extraneous issues. The district court's later reliance on "legally extraneous statements found in the old record" is what this Court warned against. *Descamps*, 570 U.S. at 271; *see also Mathis*, 136 S. Ct. at 2253.

2. **The Eleventh Circuit has misread *Shepard* to hold that a defendant's failure to dispute uncharged offense dates proffered by a prosecutor during a guilty plea hearing establishes that prior offenses were "committed on occasions different from one another," 18 U.S.C. § 924(e).**

Apart from the application of *Descamps* and *Mathis* to different-occasions inquiry, the Eleventh Circuit's decision contravenes *Shepard* by holding that a defendant may confirm a proffered "factual basis for the plea," *Shepard*, 544 U.S. at 26, and thereby establish that prior convictions were committed on different occasions, simply by saying nothing to dispute the prosecutor's factual proffer. Pet. App. 3a, 22a-23a. This misapplies *Shepard* because this Court made clear that factual admissions during a prior plea hearing must be confirmed by the defendant to serve as a basis for the ACCA enhancement. This requirement for certainty avoids judicial factfinding about disputed matters and the potential for arbitrary results when increasing the statutory range of imprisonment.

The Eleventh Circuit's allowance of "implicit confirmation" to support a different-occasions finding cannot be squared with this Court's "demand for

certainty," *Shepard*, 544 U.S. at 21. *Shepard* expressly rejected the notion that lower courts could consider sources of information beyond those that it delineated—even when the information contained in them is "uncontradicted" and "internally consistent." *Id*. at 23–24 n.4. This Court necessarily required confirmation by the defendant because the guilty plea itself would not confirm non-elemental facts. Allowing a federal sentencing court to review a transcript of a plea hearing for indications of a defendant's implicit confirmation of the timing of an offense is precisely the type of evidence-weighing that the Court sought to avoid.

The Eleventh Circuit's decision is contrary to other courts' application of *Shepard*. As noted by the Second Circuit in *United States v. Moreno*, 821 F.3d 223 (2d Cir. 2016), "courts have considered statements made during a plea colloquy by someone other than the defendant in applying the modified categorical approach *only when the defendant adopted the statements in some overt fashion*." 821 F.3d 229 (emphasis added) (citing *United States v. Savage*, 542 F.3d 959, 966 (2d Cir. 2008). (government may not rely on prosecutor's factual assertions during a plea colloquy where defendant did not endorse them); *Rosa*, 507 F.3d at 158-59 (defendant's silence did not "assent" to judge's characterization of offense); *United States v. Taylor*, 659 F.3d 339, 348 (4th Cir. 2011) (facts set forth by the prosecutor could be used in applying the modified categorical approach where, after the prosecutor's recitation, defense counsel stated that defendant had no "additions or corrections"); *United States v. Jimenez–Banegas*, 209 F. App'x 384, 390 (5th Cir. 2006) (finding that defendant assented to the prosecutor's version of events by explicitly confirming

portions thereof and not objecting to the rest). As the Court explained in *Mathis*, it is unfair to defendants to rely on "'non-elemental fact[s]' in the records of prior convictions," because these purported facts "are prone to error precisely because their proof is unnecessary." 136 S. Ct. at 2253. "Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence." *Id*. Without a requirement for clear confirmation of non-elemental details, like the uncharged offense dates in Mr. Dudley's case, this can occur.

This Court's intervention is needed because the Eleventh Circuit's new theory of "implicit-assent-by-silence" will create arbitrary results. *See* Pet. App. at 43a, 45a-46a n.3 (Newsom, J., dissenting in part). The Eleventh Circuit's decision now requires sentencing courts "to make case-by-case judgment calls about whether cold state-court records show *closely enough* that a defendant *basically* confirmed the prosecutor's account." *Id.* at 46 n.3. This is a clear misreading of *Shepard*, requiring this Court's intervention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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