No. 22-5102

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IN THE SUPREME COURT OF THE UNITED STATES

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NATHANIEL LOUIS DANIELS, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the Sixth Amendment requires that a jury find (or the defendant admit) that a defendant's predicate offenses were "committed on occasions different from one another" for purposes of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(1).

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is available at 2022 WL 1135102.

## JURISDICTION

The judgment of the court of appeals was entered on April 18, 2022. The petition for a writ of certiorari was filed on July 11, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of North Carolina, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924. Pet. App. 2. He was sentenced to 188 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-4.

1. In January 2019, police officers discovered petitioner sitting in the driver's seat of a parked, recently stolen Jeep. Presentence Investigation Report (PSR) ¶ 6; C.A. App. 33-34. The officers noticed that petitioner had a handgun in the waistband of his pants. PSR ¶ 6; C.A. App. 34. Petitioner was placed under arrest, and during a search incident to that arrest, the officers recovered two magazines fitting the handgun, 25 rounds of ammunition, a digital scale, a marijuana grinder, and crack cocaine. Ibid.

A federal grand jury charged petitioner with one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924. Indictment 1. Petitioner pleaded guilty to that count without a plea agreement. C.A. App. 30, 32-33; Judgment 1.

2. In preparation for sentencing, the Probation Office determined that petitioner qualified for an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C.

924(e). PSR ¶ 59. The default term of imprisonment for his offense of possessing a firearm as a felon at the time of that offense was zero to ten years. 18 U.S.C. 924(a)(2) (2018).[1] The ACCA, however, prescribes a penalty of 15 years to life imprisonment if the defendant has at least "three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1).

Here, the Probation Office determined that petitioner had three prior North Carolina convictions for offenses that qualified as ACCA predicates: (1) burglary on April 15, 1996; (2) robbery with a dangerous weapon on April 20, 1996; and (3) breaking and entering on May 8, 1996. PSR ¶¶ 18-20; see PSR ¶ 59. The Probation Office further determined that those offenses "were committed on different occasions." PSR ¶ 59.

Petitioner objected to his ACCA classification. See C.A. App. 42, 77. The district court overruled that objection, id. at 42, adopted the findings of the presentence report, id. at 78, and sentenced petitioner to 188 months of imprisonment, Judgment 2.

3. The court of appeals summarily affirmed in an unpublished, per curiam opinion. Pet. App. 1-4. The court of appeals upheld the district court's ruling that petitioner's

[1] For Section 922(g) offenses committed after June 25, 2022, the default term of imprisonment is zero to 15 years. See Bipartisan Safer Communities Act, Pub. L. No. 117-159, Div. A, Title II, § 12004, 136 Stat. 1313, 1329 (18 U.S.C. 924(a)(8)).

predicate offenses took place on different occasions. Id. at 3. And it rejected petitioner's contention that the different-occasions inquiry requires a jury finding, or defendant admission, rather than a judicial determination. Ibid.

The court of appeals concluded that petitioner's contention was foreclosed by its prior decision in United States v. Thompson, 421 F.3d 278 (4th Cir. 2005), cert. denied, 547 U.S. 1005 (2006). Pet. App. 3. The panel observed that this Court's recent decision interpreting the ACCA's occasions clause, Wooden v. United States, 142 S. Ct. 1063 (2022), had "declined to address this issue." Pet. App. 3; see Wooden, 142 S. Ct. at 1068 n.3. "Thus," the panel reasoned, "we are bound by Thompson." Pet. App. 3.

ARGUMENT

Petitioner renews his contention (Pet. 4-6) that the Sixth Amendment requires a jury to find (or a defendant to admit) that predicate offenses were committed on different occasions under the ACCA. In light of this Court's recent articulation of the standard for determining whether offenses occurred on different occasions in Wooden v. United States, 142 S. Ct. 1063 (2022), the government agrees that the different-occasions inquiry requires a finding of fact by a jury or an admission by the defendant. The issue is important and frequently recurring and may eventually warrant this Court's review in an appropriate case. But lower courts have not

yet had adequate time to react to Wooden, and this case would in any event be an unsuitable vehicle for further review.[2]

1. The Sixth Amendment guarantees the right to a "jury" "[i]n all criminal prosecutions," and the Fifth Amendment entitles criminal defendants to "due process of law." U.S. Const. amends. V, VI. This Court has read those rights in conjunction to require that, as a general matter, "[j]uries must find any facts that increase either the statutory maximum or minimum" beyond a reasonable doubt. Alleyne v. United States, 570 U.S. 99, 113 n.2 (2013).

In Almendarez-Torres v. United States, 523 U.S. 224 (1998), the Court recognized a "narrow exception to this general rule for the fact of a prior conviction." Alleyne, 570 U.S. at 111 n.1. Accordingly, this Court has repeatedly confirmed that "the fact of a prior conviction" does not need to be submitted to a jury and proven beyond a reasonable doubt, even when it increases the penalty for a crime beyond the statutory maximum or minimum that would otherwise apply. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); see, e.g., United States v. Haymond, 139 S. Ct. 2369, 2377 n.3 (2019) (plurality opinion); Mathis v. United States, 579 U.S. 500, 511 (2016); Descamps v. United States, 570 U.S. 254, 269 (2013); Alleyne, 570 U.S. at 111 n.1; Southern Union Co. v. United States, 567 U.S. 343, 358-360 (2012); Carachuri-Rosendo v. Holder,

[2] A similar question is also presented in Reed v. United States, No. 22-336 (filed Oct. 6, 2022), and Enyinnaya v. United States, No. 22-5857 (filed Oct. 14, 2022).

560 U.S. 563, 567 n.3 (2010); James v. United States, 550 U.S. 192, 214 n.8 (2007), overruled on other grounds by Johnson v. United States, 576 U.S. 591 (2015); Cunningham v. California, 549 U.S. 270, 274-275 (2007); United States v. Booker, 543 U.S. 220, 244 (2005); Blakely v. Washington, 542 U.S. 296, 301-302 (2004).

2. The ACCA increases both the statutory minimum and maximum sentence for a violation of 18 U.S.C. 922(g) if the defendant has at least "three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1); see pp. 2-3, supra. The determination of whether a prior conviction qualifies as an ACCA predicate involves a "categorical approach" that focuses on "the elements of the crime" underlying that conviction. Mathis, 579 U.S. at 504. And this Court has permitted a sentencing judge to make that determination, which may include consultation of certain formal documents associated with the prior conviction. See id. at 511; Shepard v. United States, 544 U.S. 13, 16 (2005).

In Wooden, this Court considered the proper test for determining whether prior convictions were committed on different occasions for purposes of the ACCA. See 142 S. Ct. at 1068. The government advocated an elements-based approach to determining whether two offenses occurred on different occasions, which it viewed as consistent with judicial determination of a defendant's ACCA qualification. See Gov't Br. 46, Wooden, supra (No. 20-

5279); see also, e.g., Br. in Opp. at 5-11, Walker v. United States, 141 S. Ct. 1084 (2021) (No. 20-5578).

The decision in Wooden, however, rejected the government's elements-based approach to the different-occasions inquiry. Wooden, 142 S. Ct. at 1069. The Court held instead that the inquiry is "holistic" and "multi-factored," and that "a range of circumstances may be relevant to identifying episodes of criminal activity." Id. at 1068, 1070-1071. The Court explained that:

> Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events. Proximity of location is also important; the further away crimes take place, the less likely they are components of the same criminal event. And the character and relationship of the offenses may make a difference: The more similar or intertwined the conduct giving rise to the offenses -- the more, for example, they share a common scheme or purpose -- the more apt they are to compose one occasion.

Id. at 1071.

In light of the holistic and multi-factored standard adopted in Wooden, the government now acknowledges that the Sixth Amendment requires a jury to find (or a defendant to admit) that ACCA predicates were committed on occasions different from one another. See Gov't Br. 47, Wooden, supra (No. 20-5279) (observing that "a Sixth Amendment claim * * * would potentially become more viable if this Court were to adopt [a fact-intensive] approach"). The different-occasions inquiry, as explicated by Wooden, goes beyond the "simple fact of a prior conviction," Mathis, 579 U.S. at 511, and instead requires consideration of factual circumstances

surrounding a defendant's prior convictions, which will rarely be reflected in the elements of the crime and may not even be contained in the documents that a sentencing judge is permitted to consult. Thus, under this Court's precedents, such facts must be found by a jury or admitted by the defendant. See, e.g., ibid. (observing that "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense"); Descamps, 570 U.S. at 270 (holding that a district court cannot "rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence").

3. Prior to Wooden, the courts of appeals had uniformly held that sentencing courts could undertake the different-occasions inquiry under the ACCA. See, e.g., United States v. Ivery, 427 F.3d 69, 75 (1st Cir. 2005), cert. denied, 546 U.S. 1222 (2006); United States v. Santiago, 268 F.3d 151, 156-157 (2d Cir. 2001), cert. denied, 535 U.S. 1070 (2002); United States v. Blair, 734 F.3d 218, 227-228 (3d Cir. 2013), cert. denied, 135 S. Ct. 49 (2014); United States v. Thompson, 421 F.3d 278, 284-287 (4th Cir. 2005), cert. denied, 547 U.S. 1005 (2006); United States v. White, 465 F.3d 250, 254 (5th Cir. 2006) (per curiam), cert. denied, 549 U.S. 1188 (2007); United States v. Burgin, 388 F.3d 177, 184-186 (6th Cir. 2004), cert. denied, 544 U.S. 936 (2005); United States v. Morris, 293 F.3d 1010, 1012-1013 (7th Cir.), cert. denied, 537 U.S. 987 (2002); United States v. Evans, 738 F.3d 935, 936-937 (8th Cir. 2014) (per curiam); United States v. Walker, 953

F.3d 577, 580-582 (9th Cir. 2020), cert. denied, 141 S. Ct. 1084 (2021); United States v. Michel, 446 F.3d 1122, 1132-1133 (10th Cir. 2006); United States v. Spears, 443 F.3d 1358, 1361 (11th Cir.) (per curiam), cert. denied, 549 U.S. 916 (2006); United States v. Thomas, 572 F.3d 945, 952 n.4 (D.C. Cir. 2009), cert. denied, 559 U.S. 986 (2010).

The decision in Wooden expressly declined to address "whether the Sixth Amendment requires that a jury, rather than a judge, resolve whether prior crimes occurred on a single occasion," because the petitioner in that case "did not raise" the issue. 142 S. Ct. at 1068 n.3; see also id. at 1087 n.7 (Gorsuch, J., concurring in the judgment) (observing that "[a] constitutional question simmers beneath the surface of today's case," because "only judges found the facts relevant to Mr. Wooden's punishment under the Occasions Clause"). As a result, the court of appeals in this case deemed itself "bound" by its pre-Wooden precedent, which permits a judge to resolve the occasions inquiry. See Pet. App. 3 ("The Court declined to address this issue in Wooden. Thus, we are bound by Thompson.") (citation omitted); see Thompson, 421 F.3d at 286 ("Whether the burglaries occurred on different occasions * * * is not among the kind of facts extraneous to a conviction that [this Court's precedent] requires a jury to find.").

The Ninth and Eleventh Circuits likewise have non-precedential decisions that adhere to prior precedent permitting

judicial determination of the separate-occasions inquiry. See United States v. Barrera, No. 20-10368, 2022 WL 1239052, at *2 (9th Cir. Apr. 27, 2022); United States v. Haynes, No. 19-12335, 2022 WL 3643740, at *5 (11th Cir. Aug. 24, 2022) (per curiam). The Sixth and Tenth Circuits have published opinions that likewise do so. See United States v. Belcher, 40 F.4th 430, 432 (6th Cir. 2022), petition for cert. pending No. 22-6072 (filed Nov. 14, 2022); United States v. Reed, 39 F.4th 1285, 1295-1296 (10th Cir. 2022), petition for cert. pending No. 22-336 (filed Oct. 6, 2022).

The Eighth Circuit, however, has -- with the government's acquiescence -- recently granted en banc review on the issue. See 11/15/22 Order, United States v. Stowell, No. 21-2234 (8th Cir.). Other courts of appeals have denied en banc review, but several have done so without calling for a response from the government, and other cases have not been suitable vehicles for further review. See 10/26/22 Order, United States v. Williams, No. 21-5856 (6th Cir.) (government response); 9/21/22 Order, Barrera, supra, No. 20-10368 (9th Cir.) (no government response); 9/1/22 Order, Reed, supra, No. 21-2073 (10th Cir.) (same). And if the Eighth Circuit changes course in light of Wooden, other circuits may follow suit.

4. The question presented is important. The frequency with which the issue has arisen in the appellate courts in the five months since Wooden is illustrative of the substantial number of cases that it affects. At present, the government is attempting to comply with its view of the Sixth Amendment's application,

notwithstanding circuit precedent, through such measures as requesting advisory sentencing juries. But district courts have often rejected the government's proposals, reasoning that circuit law does not require them. If that state of affairs persists, this Court's review may well be warranted. Review in this Court only months after Wooden, however, would be premature.

In addition, this case would not be a suitable vehicle for such review, for several reasons. First, the decision below is unpublished, and therefore does not represent the circuit's definitive, let alone final, word on the matter. Second, this case arises not from a trial, but instead from a guilty plea. And although petitioner generally objected at sentencing to his ACCA classification, it appears that he did not specifically object on the basis of the Sixth Amendment or request a sentencing jury. See D. Ct. Doc. 59 (Jan. 15, 2021). Thus, although the government did not raise a forfeiture objection on appeal, the issue at a minimum lacks the sort of case-specific development that would be beneficial to this Court's consideration.

Finally, whether or not the claim was preserved, any error was harmless, and petitioner would therefore not be entitled to relief even if the question presented were resolved in his favor. Petitioner has not disputed, in either his briefing in the court of appeals or his petition in this Court, that his predicate offenses occurred over the course of multiple weeks, on April 15, 1996, April 20, 1996, and May 8, 1996. See Pet. 3; Pet. C.A. Br.

4. And in Wooden, the Court observed that "[i]n many cases, a single factor -- especially of time or place -- can decisively differentiate occasions," and that courts "have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart." 142 S. Ct. at 1071. Because prejudice will be similarly lacking in most other cases as well, the presence of that issue would not in itself warrant declining review of a question that the government agrees that the lower courts are currently answering incorrectly and that has important implications for the procedures to be followed on a common criminal charge. But it is an additional reason why further review is not warranted in this particular case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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