No. 22-_____

IN THE
SUPREME COURT OF THE UNITED STATES

GREGORY ALLEN COOK,

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 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)(1).

May a district court judge properly find, by a preponderance of the evidence, the uncharged, non-elemental fact that a person committed three prior offenses "on occasions different from one another," as required by the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), or does the Constitution require that fact to be charged in the indictment and proven to the jury beyond a reasonable doubt?

PARTIES TO THE PROCEEDINGS

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

RELATED CASES

(1) *United States v. Cook*, No. 1:20-cr-00021, District Court for the Eastern District of Tennessee. Judgment entered January 11, 2022.

(2) *United States v. Cook*, No. 22-5056, U.S. Court of Appeals for the Sixth Circuit. Order affirming judgment entered October 3, 2022.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gregory Cook 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The unpublished opinion of the United States Court of Appeals for the Sixth Circuit affirming the district court's judgment appears at pages 1a to 6a of the appendix to this petition. The judgment of the district court appears at pages 6a to 12a of the appendix.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals'

order affirming the conviction and sentence was entered on October 3, 2022. Pet. App. 1a. On December 16, 2022, this Court granted an application (No. 22A532) to extend time for filing this petition to March 2, 2023.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides:

> No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . .

18 U.S.C. § 922(g) states 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 . . . .

18 U.S.C. § 924(a)(2) (2021) states in relevant part:

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

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).

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 and uniformly 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. As the government now concedes, the law has evolved to reveal that this approach violates the Fifth and Sixth Amendments. As this Court's recent decision in *Wooden* makes clear, the occasions-different test turns on circumstances relating to the *commission* of the prior offenses and going well beyond their elements, encompassing such non-elemental facts as proximity, timing, intervening events, and course of conduct or common scheme. *Wooden v. United States*, 142 S. Ct. 1063, 1069-70 (2022). The government has thus far resisted review by this Court to correct the problem, contending that the issue should percolate more in the wake of *Wooden*. Yet, as in this case, it simultaneously urges lower courts to uphold ACCA sentences known to have been imposed in violation of the defendant's constitutional rights, on the theory the courts are bound by circuit precedent.

This Court should grant certiorari because no further percolation is needed. Every court of appeals to have revisited the question in the wake of this Court's

decision in *Wooden*—the plainest evidence that the current approach is unconstitutional—has left its scheme intact. The government's concession has in some cases contributed to favorable outcomes that elsewhere are unavailable, resulting in intolerably disparate outcomes for similar offenders. Meanwhile, 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,[1] and increases the average sentence imposed by more than a decade.

Even if one or a few of the circuits later hold that the occasions-different fact must be charged and proven to a jury beyond a reasonable doubt, the chances that all the other circuits will immediately follow are slim to none. It is all but certain that, at best, a circuit split will lead to disparate outcomes for years. The issue will persist until this Court definitively resolves it. Only this Court can establish a uniform national rule that corrects the lower courts' errors, and the sooner the better.

Mr. Cook presented this claim in the courts below, including explaining why lower court precedent has been fatally undermined by *Wooden* and with the Sixth Circuit's awareness of government's agreement. Because the Sixth Circuit rejected his challenge based on binding circuit precedent, and given the severe impact of the ACCA on Mr. Cook, this case presents a perfect vehicle in which to resolve the

[1] In the Bipartisan Safer Communities Act, Congress increased the maximum penalty for a violation of § 922(g) to "not more than 15 years" of imprisonment." *See* Pub. L. No. 117-159, div. A, tit. II, § 12004(c), 136 Stat. 1313, 1329 (June 25, 2022), codified at 18 U.S.C. § 924(a)(8). That amendment has no bearing on the constitutional issue in this case. Under the amended penalty scheme, as in the former one, the ACCA significantly enhances both the minimum and the maximum sentence for a violation of § 922(g).

question. His petition for a writ of certiorari should therefore be granted. Alternatively, the petition should be granted and held to be considered when the Court rules on similar cases presenting the same issue.[2]

Proceedings below. In December 2019, law enforcement officers conducted a traffic stop of a car driven by Mr. Cook and recovered a loaded handgun and ammunition. Pet. App. 1a. (PSR at ¶¶ 8-10, R. 51.) With Mr. Cook's consent, officers searched his bedroom and found three more firearms and more ammunition. (PSR ¶ 11.) Mr. Cook was charged in the Eastern District of Tennessee in a one-count indictment with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). (Indictment, R. 1.) He was not charged with having committed any previous offenses on different occasions. On June 14, 2021, he pled guilty as charged, without a plea agreement, admitting nothing but the elements of the § 922(g) offense as charged. (Plea Tr., R. 72, at p. 16.)

The Probation Office prepared a presentence report in which it calculated Mr. Cook's sentencing range. Under the U.S. Sentencing Guidelines, the base offense level for his conviction under § 922(g)(1) is 14. *See* U.S.S.G. § 2K2.1(a)(6). Two levels were added because the offense involved three to seven firearms. (PSR ¶ 21, R. 51.) Because Mr. Cook has no prior convictions that qualify as "controlled substance offenses" or "crimes of violence" under the Guidelines (burglaries don't count because

[2] *E.g., Williams v. United States*, No. 22A648 (forthcoming) (due Mar. 25, 2023); *Atkinson v. United States*, No. 22-6867 (filed Feb. 23, 2023); *Barrera v. United States*, No. 22-6843 (filed Feb. 17, 2023); *Haynes v. United States*, No. 22-6682 (filed Jan. 30, 2023).

they do not involve violence in the ordinary case), his offense level would have remained at 16, which with three levels off for pleading guilty would have resulted in a total offense level of 13. U.S.S.G. § 3E1.1(b). But according to the PSR, Mr. Cook has six prior Tennessee convictions for burglary: four burglaries of various businesses and a high school, all occurring during a two-week span in 1993, nearly thirty years earlier when he was just 18 years old and for three of which he was sentenced on the same day, (PSR ¶¶ 34, 35, 36, 37); one burglary of a church, in 1996, (*id.* ¶ 38); and one burglary of a cabin and outbuilding on a farm, in 2003 (*id.* ¶ 43).[3]

The first five of the burglary convictions were too old to count under the Guidelines' criminal history rules, so did not increase his criminal history score—a result reflecting the U.S. Sentencing Commission's empirical research showing that old convictions do not add anything to the power of the criminal history rules to predict risk of recidivism.[4] Nevertheless, because there is no similar decay factor incorporated in the Armed Career Criminal Act, 18 U.S.C. § 924(e), the PSR deemed these old burglary convictions to be "violent felonies" "committed on occasions different from one another," and increased his base offense by 17 levels—to offense

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[3] None of these burglaries appears to have involved the use of a firearm or actual violence. According to the PSR, Mr. Cook stole things like baseball bats and clothing from an athletic apparel store, and branded Coca-Cola glasses and other advertising merchandise from the farm property. (PSR ¶¶ 35, 43.)

[4] *See* U.S. Sent'g Comm'n, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* 5-7 (2004), at https://www.ussc.gov/research/research-publications/comparison-federal-sentencing-guidelines-criminal-history-category-and-us-parole-commission-salient. When a conviction is too old to count under these rules, it is because counting it would not increase the predictive power of the Guidelines' criminal history rules.

level 33—pursuant to § 4B1.4. (PSR ¶ 27.) This conclusion increased the statutory maximum of ten years, 18 U.S.C. § 924(a)(2) (2021), to a minimum of 15 years under the ACCA. With 3 levels off for acceptance of responsibility, and in criminal history category VI, Mr. Cook's ACCA guideline range was calculated to be 151 months to 188 months. (*Id.* ¶ 79.) U.S.S.G. ch. 5, pt. A (Sentencing Table). Due to the ACCA's 15-year mandatory minimum, however, the bottom of his range became 180 months, for a final range of 180 to 188 months. (PSR ¶ 79.)

For comparison, had the PSR not counted the burglary convictions as at least three ACCA predicates committed on different occasions, Mr. Cook's advisory guideline range would have been just 30 to 37 months. U.S.S.G. ch. 5, pt. A (Sentencing Table) (OL 13/CHC V). The ACCA enhancement for these prior burglary offenses thus increased his range—and the sentence he otherwise would likely have received—by a massive 12 years.

Before sentencing, Mr. Cook objected to the ACCA designation. He argued that as he was charged under § 922(g), the district court could not constitutionally make the factfinding required to conclude the prior burglaries were committed on different occasions, even if limited to information appearing in *Shepard* documents—a finding of fact that district courts are currently permitted to do in the Sixth Circuit. (Def.'s Objection to PSR, R. 54.) Rather, he argued, the occasions-different fact is an element of the enhanced ACCA offense that, in this criminal context, must be proved to the jury beyond a reasonable doubt (or admitted by the defendant). He pointed in support to the similar circumstance-specific facts at issue in *Nijhawan v. Holder*, 557 U.S. 29

(2009) (fact that alien's predicate fraud offense was one "in which the loss to the victim exceeded $ 10,000"), and at issue in *United States v. Hayes*, 555 U.S. 415 (2009) (fact that predicate misdemeanor crime was committed by a person in a specified domestic relationship with the victim)—both of which this Court has recognized as facts beyond the elements of the prior convictions themselves. (Def.'s Objection to PSR, R. 54.) Mr. Cook acknowledged that Sixth Circuit precedent foreclosed his argument (though without addressing *Nijhawan* or *Hayes*), so raised it to preserve it.

The government in response relied on that precedent, *United States v. Hennessee*, 932 F.3d 437 (6th Cir. 2019), which holds that a district court may find the circumstance-specific fact that offenses were committed on different occasions by a preponderance of the evidence (though limited to considering information contained in the *Shepard* documents), and provided the court with *Shepard* documents pertaining to the burglaries. (Gov't Response, R. 58.)

Mr. Cook was sentenced on January 7, 2022. At sentencing, Mr. Cook still did not admit that the prior burglaries were committed on different occasions. (Sent'g Tr., R. 71, at pp. 3-4.) Nevertheless, the district court overruled Mr. Cook's objection, relying on circuit precedent. (*Id.* at p. 5.) The court sentenced him to the ACCA minimum sentence of 180 months, to be followed by five years of supervised release. Pet. App. 7a-8a.

The Sixth Circuit affirmed. Pet. App. 4a. It relied on its post-*Wooden* published decision in *United States v. Williams*, 39 F.4th 342, 351 (6th Cir. 2022), in which it reaffirmed its holding that "'consistent with *Apprendi [v. New Jersey*, 530 U.S. 466

(2000)], a sentencing judge may answer the question of whether prior offenses were committed on occasions different from one another.'" *United States v. Williams*, 39 F.4th 342, 351 (6th Cir. 2022) (alteration in original) (citation omitted) (quoting *United States v. King*, 853 F.3d 267, 274 (6th Cir. 2017), and citing *Hennessee*, 932 F.3d at 444; *United States v. Burgin*, 388 F.3d 177, 186 (6th Cir. 2004)). Pet. App. 2a-3a. The lower court denied that *Wooden* fatally undermines that authority, despite. the government's concession that it does. Pet. App. 3a-4a. *See* Notification of Changed Legal Position, *United States v. Cook*, No. 22-5056 (6th Cir. Aug. 18, 2022). A few weeks later, the Sixth Circuit denied rehearing en banc in *Williams*, after ordering and receiving a response from the government. *See* Order Denying Rehearing En Banc, *United States v. Williams*, 2022 WL 17409565 (6th Cir. Oct. 26, 2022) (No. 21-5856).

Mr. Cook 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 beyond a reasonable doubt. He asks that his petition be granted for review or, if the Court grants the forthcoming petition in *Williams v. United States*, No. 22A648 (due Mar. 25, 2023), or in some other pending case, 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 Sixth Circuit's approach is wrong.

A. Under the Fifth and Sixth Amendments, the occasions-different fact must be charged in an indictment and proved by a jury.

The 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. 18 U.S.C. § 924(e)(1). The Sixth Circuit held thirty years ago that the ACCA's occasions-different requirement is not an element of the ACCA, to be charged and found by a jury beyond a reasonable doubt, but is instead a fact that the district judge may find at sentencing by a preponderance of the evidence. Under its initial rule, sentencing judges may analyze all sorts of information that "lay behind" the elements of the conviction, such as the crime's time, place, and victim. *United States v. Brady*, 988 F.2d 664, 670 (6th Cir. 1993) (en banc); *see United States v. Paige*, 634 F.3d 871, 873 (6th Cir. 2011). But the law has evolved to reveal that this approach violates the Fifth and Sixth Amendments.

In a series of constitutional decisions running from *Apprendi* to *Alleyne*, the Supreme Court has developed a 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 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; *see Almendarez-Torres v. United States*, 523 U.S. 224, 230, 234, 244 (1998).

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 short, 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.

In light of the evolving law, and solely to safeguard its rule that a sentencing judge may engage in the factfinding necessary to establish that offenses were committed on different occasions, the Sixth Circuit has devised an accommodation with the *Apprendi* doctrine. Under its current rule, a sentencing judge deciding the different-occasions question is limited to considering *Shepard* documents, but is not limited to *Shepard* elemental evidence. *United States v. Hennessee*, 932 F.3d 437 (6th Cir. 2019) (holding that a sentencing judge may consult *Shepard* documents to discern the non-elemental facts of time place and victim of prior Tennessee robbery conviction to find that the defendant had committed two crimes "on occasions different from one another"). In other words, the sentencing judge can consider whatever non-elemental facts happen to appear in the relevant *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.

Though it preserves the status quo, this accommodation conflicts with *Mathis* and the Fifth and Sixth Amendments. Under the reasoning of *Mathis* and its underlying Sixth Amendment concern, the only facts a district court may properly—or fairly—discern from the *Shepard* evidence are the elements of the offense. *Mathis*, 136 S. Ct. at 2252 ("A judge 'can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.").

Because "the who, what, when, and where of a conviction" all "pose questions of fact," *Pereida v. Wilkinson*, 141 S. Ct. 754, 765 (2021), the occasions-different question must be charged in the indictment and proved to a jury beyond a reasonable doubt.

B. This Court's existing precedent confirms that jury factfinding is the constitutional solution.

Existing Supreme Court precedent confirms that when a sentencing court finds the circumstance-specific, non-elemental facts relevant to the occasions-different inquiry, it violates the Sixth Amendment. The Sixth Circuit summarily dismissed these decisions as irrelevant because they did not specifically address the ACCA. Pet. App. 3a. But this ignores their logic, which dictates the result Mr. Cook urges here.

In *United States v. Hayes*, 555 U.S. 415 (2009), the Supreme Court addressed the definition of "misdemeanor crime of domestic violence" for purpose of the firearms ban at 18 U.S.C. § 922(g)(9). A person previously convicted of a "misdemeanor crime of domestic violence" may not possess a firearm, and if he does, is subject to conviction and punishment up to 10 years in prison. 18 U.S.C. § 922(g)(9). A "misdemeanor crime of domestic violence" is defined as an offense that is a misdemeanor and "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim," or other specified domestic relationship with the victim. 18 U.S.C. § 921(a)(33)(A). The Court divided the question whether a person was convicted of a "misdemeanor crime of domestic violence" into two distinct components. The first requirement relates to the category of offense: The offense as defined by law must have as an element the use or threatened use of physical force or threatened use of a deadly

weapon. *Hayes*, 555 U.S. at 421-22. This legal determination is made by the district court, subject to the ordinary limitations of the categorical approach. *United States v. Castleman*, 572 U.S. 157, 168 (2014).

The second requirement is circumstance-specific: The particular defendant who committed the offense must have been in one of the specified domestic relationships with the victim. *Hayes*, 555 U.S. at 422-23. This fact-based determination, because it is not elemental, is not made by the district court but must be proved by the government to the jury beyond a reasonable doubt (or admitted by the defendant). *Id.* at 426 ("To obtain a conviction in a § 922(g)(9) prosecution, the Government must prove beyond a reasonable doubt that the victim of the predicate offense was the defendant's current or former spouse or was related to the defendant in another specified way."). This is true even when the relationship between the defendant with the victim is apparent from *Shepard* evidence of the conviction.

In *Nijhawan v. Holder*, 557 U.S. 29 (2009), the Court cited *Hayes* when it tangentially addressed prosecutions for illegal reentry after conviction for an aggravated felony under 8 U.S.C. § 1326. Illegal reentry carries a sentence of up to two years in prison, but if the defendant was previously convicted of an "aggravated felony" it carries a sentence of up to 20 years. 8 U.S.C. § 1326(a), (b)(2). As discussed above, the fact of the prior aggravated felony conviction is generally a sentencing factor that the judge can find at sentencing. *Almendarez-Torres*, 523 U.S. at 226-27. But the statute discussed in *Nijhawan* defines some aggravated felonies by using two components: one being the fact of a prior conviction of a certain type of crime and the

other being the fact that the defendant "committed" the prior crime in a specific way or under specific circumstances. *Nijhawan*, 557 U.S. at 37-38 (quoting 8 U.S.C. § 1101(a)(43)(K)(ii), (P)). The Supreme Court recognized that while the first part of this hybrid type of aggravated-felony definition falls within the *Almendarez-Torres* exception, the second part—the part pertaining to how the defendant committed the crime—is "circumstance-specific," and falls beyond the bounds of the fact of a prior conviction. *Id.* at 40. As a result, that fact would have to be found by a jury in a criminal prosecution (i.e., treated as an element of the instant offense) to "eliminat[e] any constitutional concern." *Id.*

And the government *agreed* with that conclusion. There, the specific fact at issue was whether a person alleged to be removable had previously committed fraud involving loss to victims exceeds $10,000. *Id.* at 32. In response to hypothetical constitutional concerns relating to any later illegal reentry trial, the government "stated in its brief and at oral argument that the later jury, during the illegal reentry trial, would have to find loss amount beyond a reasonable doubt, eliminating any constitutional concern." *Id.* at 40 (citing *Hayes*).

As with the inquiry in *Hayes* and the potential illegal reentry inquiry in *Nijawan,* the inquiry under the ACCA has "two separate statutory conditions." *Wooden*, 142 S. Ct. at 1070: (1) the legal determination that the defendant has three previous convictions for an offense that is categorically a "violent felony" or "serious drug offense," and (2) the factual determination that the defendant "committed" these three offenses "on occasions different from one another." 18 U.S.C. § 924(e). As with

the facts pertaining to the defendant's relationship with the victim for purposes of § 922(g)(9), the facts pertaining to how, when, and where the defendant "committed" the ACCA predicate crimes "must be established," and to do so the government must prove them to the jury beyond a reasonable doubt. *Hayes*, 555 U.S. at 426.

C. *Wooden* lays bare the constitutional violations inherent in the current approach.

If existing Supreme Court precedent does not already do so, this Court's recent decision in *Wooden* plainly reveals the error of *Hennesee*'s rule and the Sixth Circuit's approach. It shows just how contextual and circumstance-specific the occasions-different question really is, far beyond the elements of any offense. At the same time, more than one Justice recognizes the lurking constitutional issues.

In *Wooden*, this Court explained that the Armed Career Criminal Act has "two separate statutory conditions." 142 S. Ct. 1063, 1070 (2022). The Government must first prove that the defendant "has previously been convicted of three violent felonies" and must then prove that "those three felonies were committed on 'occasions different from one another.'" *Id.* (quoting 18 U.S.C. § 924(e)(1)). Regarding the second condition, it concluded that the term "occasion" as used in the ACCA must be interpreted consistent with its ordinary meaning, *i.e.*, "essentially an episode or event" under which "multiple crimes may occur on one occasion even if not at the same moment." *Id.* at 1069; *id.* at 1070 ("[A]n occasion may . . . encompass a number of non-simultaneous activities; it need not be confined to a single one."); *id.* ("[A]n 'occasion' means an event or episode—which may, in common usage, include temporally discrete offenses.").

Of special relevance here is the range of information that conceivably goes into the factual determination that offenses were committed on different occasions, and the circumstance specific and contextual nature of the inquiry. These circumstances include the timing, location, character, and relationship of the offenses, with no one circumstance necessarily predominating. Offenses committed "close in time, in an uninterrupted course of conduct, will often count as part of one occasion." *Id.* at 1071. But offenses "separated by substantial gaps in time or significant intervening events" often may not. *Id.* "Proximity of location is also important; the further away crimes take place, the less likely they are components of the same criminal event." *Id.* Also, "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.*

Though it was easy in Wooden's case to conclude that his ten burglaries were committed on a single occasion, the Court cautioned that in harder cases the question should be answered while keeping in mind the history and purpose of the ACCA. The ACCA is intended to target repeat violent offenders, "those who commit a large number of fairly serious crimes as their means of livelihood [and so] are especially likely to inflict grave harm when in possession of a firearm." *Id.* at 1074 (internal quotation marks omitted); *id.* ("[T]he statute targets a particular subset of offenders—those who have repeatedly committed violent crimes." *Id.* (internal quotation marks omitted).

The Court did not address or decide the Sixth Amendment issue in *Wooden*, because it was not raised, *see id.* at 1068 n.3, but Justices Gorsuch and Sotomayor recognized that "[a] constitutional question simmers beneath the surface of today's case," and that there "is little doubt" that the Court will have to consider the constitutional question "soon." *Id.* at 1087 n.12 (Gorsuch, J. & Sotomayor, J., concurring in part and in the judgment). As they noted, judges in at least three circuits have already seriously questioned whether the "occasions different" inquiry, when done by judges, is constitutional. *See United States v. Dudley*, 5 F.4th 1249, 1273-78 (11th Cir. 2021) (Newsom, J., concurring in part and dissenting in part); *United States v. Perry*, 908 F.3d 1126, 1134-36 (8th Cir. 2018) (Stras, J., concurring); *United States v. Thompson*, 421 F.3d 278, 287-95 (4th Cir. 2005) (Wilkins, C.J., dissenting).

Indeed, after scrutinizing the circuit courts' current approach in light of *Wooden*'s expansive interpretation of the term "occasion" in this context, the Department of Justice now *agrees* that a jury, not a judge, must find that offenses were committed on different occasions before the person may be sentenced under the ACCA, and has been notifying courts of its changed position, including the court below in this case. *See* U.S. Brief in Opposition to Cert. Pet. at 6-7, *Reed v. United States*, No. 22-36 (Dec. 12, 2022) ("[T]he government now acknowledges, given the nature of the different-occasions inquiry articulated in *Wooden*, that the Constitution requires a jury to find (or a defendant to admit) that the defendant's ACCA predicates

were committed on occasions different from one another."); Notification of Changed Legal Position, *United States v. Cook*, No. 22-5056 (6th Cir. Aug. 18, 2022).

II. The lower courts are united in error.

The Sixth Circuit is not alone in its erroneous approach before *Wooden* or in its adherence to that approach after *Wooden*. Before *Wooden*, every court of appeals to address the issue held that *Apprendi*'s rule did not apply to the "occasions" question because that question fell within the exception outlined by *Almendarez-Torres*. *See United States v. Santiago*, 268 F.3d 151, 156-57 (2d Cir. 2001); *United States v. Jurbala*, 198 F. App'x 236, 237 (3d Cir. 2006); *Thompson*, 421 F.3d at 285; *United States v. Tatum*, 165 F. App'x 367, 368 (5th Cir. 2006); *Burgin*, 388 F.3d at 183; *United States v. Morris*, 293 F.3d 1010, 1012-13 (7th Cir. 2002); *United States v. Wilson*, 406 F.3d 1074, 1075 (8th Cir. 2005), *abrogated on other grounds by United States v. Miller*, 305 F. App'x 302, 303 (8th Cir. 2008); *United States v. Walker,* 953 F.3d 577, 580 (9th Cir. 2020); *United States v. Michel*, 446 F.3d at 1122, 1132-33 (10th Cir. 2006); *United States v. Longoria*, 874 F.3d 1278, 1283 (11th Cir. 2017); *cf. United States v. Stearns*, 387 F.3d 104, 106, 109 (1st Cir. 2004) (affirming district court's finding that two of defendant's prior offenses were committed on different "occasions"). In these courts' view, the ACCA's "'different occasions' requirement falls safely within the range of facts traditionally found by judges at sentencing" because "the separateness" of prior convictions cannot "be distinguished from the mere fact of their existence." *Santiago*, 268 F.3d at 156-57. As a result, these courts hold "that

Apprendi does not require different fact-finders and different burdens of proof for [ACCA]'s various requirements." *Id.*

After *Wooden*, and despite the government's agreement that the current approach is wrong, lower courts insist nothing has changed. The Sixth Circuit denied rehearing en banc in *Williams*, its post-*Wooden* decision that adheres to prior precedent after ordering the government to respond. The Tenth Circuit denied rehearing en banc of its post-*Wooden* decision that adheres to prior precedent. *See United States v. Reed*, 39 F.4th 1285 (10th Cir. 2022) (No. 21-2073), *pet. for rh'g denied* (Sept. 1, 2022), *pet. for cert. denied*, No. 22-336 (filed Oct. 6, 2022). The Ninth and Eleventh Circuits have likewise denied rehearing of unpublished decisions adhering to prior precedent. *United States v. Barrera*, No. 20-10368, 2022 WL 1239052, at *2 (9th Cir. Apr. 27, 2022), *pet. for rh'g denied*, 2022 WL 1239052 (9th Cir. Sept. 21, 2022), *pet. for cert. pending*, No. 22-6843 (filed Feb. 17, 2023); *United States v. Haynes*, No. 19-12335, 2022 WL 3643740, at *5 (11th Cir. Aug. 24, 2022), *pet. for rh'g denied* (Nov. 1, 2022), *pet. for cert. pending*, No. 22-6682 (filed Jan. 30, 2023). The Fourth Circuit adhered to its pre-*Wooden* precedent in *United States v. Daniels*, 2022 WL 1135102 (4th Cir. Apr. 18, 2022), *pet. for cert. denied*, *Daniels v. United States*, No. 22-5102 (filed July 11, 2022).[5]

Nearly a full year has passed since *Wooden* was decided, during which hundreds of people have been subjected to the enhanced ACCA sentence across the

[5] On March 10, 2023, a panel of the Fourth Circuit will hear oral argument in a case raising this issue. *United States v. Rico Brown*, 4th Cir. No. 21-4253.

country, but only the Eighth Circuit has agreed to revisit the question en banc. In *United States v. Stowell*, 40 F.4th 882 (8th Cir. 2022), a divided panel of the Eighth Circuit concluded it was bound by circuit precedent to conclude that the occasions different element involves "recidivism-related facts" that do not need to be submitted to the jury. *Stowell*, 40 F.4th at 885 (quoting *United States v. Harris,* 794 F.3d 885, 887 (8th Cir. 2015)). Judge Kelly dissented, explaining that she would have vacated and remanded for resentencing to allow the district court to consider the question in the first instance, with the benefit of *Wooden*. *Id.* at 886-87. The Eighth Circuit has since granted Stowell's petition for rehearing en banc, with oral argument scheduled for April 11, 2023. *Stowell*, No. 21-2234, 2022 WL 16942355 (8th Cir. Nov. 15, 2022)

Even if one or a few courts eventually change course in light of *Wooden*, the circuit split generated would endure, as the chances that all the rest of the circuits will follow suit are virtually nonexistent. Further percolation will not only fail to further develop the arguments, given the government's agreement, but it also perversely permits the government to urge adherence to circuit precedent to ensure unconstitutional sentencing, as it did in this case. If some few courts in the resulting incoherent vacuum do not view themselves bound by precedent in the wake of *Wooden*, the result is intolerably different treatment in the lower courts. *Compare* Pet. App. 2a-3a (relying on its published decision in *Williams*, 39 F.4th at 351, to reject Mr. Cook's constitutional arguments and affirm his ACCA sentence following *Wooden*), with Govt. Br. Opp. at 7, *Reed v. United States*, No. 22-236 (citing *United States v. Man*, No. 21- 10241, 2022 WL 17260489 (9th Cir. Nov. 29, 2022) (assuming,

without deciding, constitutional error occurred in light of government post-*Wooden* concession and remanding where error was not harmless). Amid differing approaches, scores of defendants each year will be subject to an unconstitutional system due solely to the jurisdiction they happen to be in. For Mr. Cook, at stake here are constitutional rights that, if not reviewed now, may be forever lost to him.

Only this Court can correct the lower courts' insistent error, resolve the government's incoherent stance, and establish a consistent national rule that accords with the Fifth and Sixth Amendments.

III. This case presents the perfect vehicle to resolve this extremely important question.

This is an excellent vehicle to decide the question presented. Mr. Cook's case perfectly illustrates the ACCA's severity, as it increased his guideline range from 30 to 37 months to 180 to 188 months. *See supra* at 7. The legal issue is cleanly presented. It was raised in the district court and in the court of appeals. The court of appeals rejected Mr. Cook's constitutional arguments on the merits, relying on a published post-*Wooden* decision in which the court of appeals ultimately denied rehearing en banc with full awareness that, after *Wooden*, the United States agrees with petitioner that the occasions-different question if for the jury. *See supra* at 8-9.

The question presented is outcome determinative for Mr. Cook. If he is entitled to a grand jury indictment and jury determination beyond a reasonable doubt on whether his prior offenses were committed on occasions different from one another, the ACCA enhancement cannot apply. Petitioner was never charged under ACCA. And he never admitted the relevant issue—that his prior burglaries were committed

different occasions. Despite his objections, the judge determined by a preponderance of the evidence that his prior convictions were committed on different occasions and imposed an enhanced ACCA sentence. This error requires reversal.

The prejudice to Mr. Cook is underscored by the real likelihood that the proceedings would have gone a different way had he been aware of the government's true burden regarding the ACCA enhancement and had he been properly indicted. Under those circumstances, Mr. Cook may well have insisted on going to trial, which would not have been an irrational choice. Due to the ACCA's 15-year mandatory minimum, he lost almost all of benefit of pleading guilty. (*See* PSR ¶ 79 (showing that his ACCA guideline range after pleading guilty would have been 151 to 188 months, but was truncated at the bottom to 180 to 188 months due to the mandatory minimum).) In fact, due to its effect on sentences, the ACCA has more of an impact on the decision to plead guilty or go to trial than any other mandatory minimum. The trial rate for all federal offenders is 2.7%, and the trial rate for all offenders subject to any mandatory minimum is 5.2%. *See* U.S. Sent'g Comm'n, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* 37 (2018). In contrast, the trial rate for offenders subject to the ACCA is 13.5%—five times the trial rate for all federal offenders generally. *Id.* As this Court recognizes, even "a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years." *Lee v. United States*, 137 S. Ct. 1958, 1966-67 (2017).

Indeed, had Mr. Cook insisted on going to trial, there is a good chance that the government would have dropped the ACCA's occasions-different charge from the indictment or agreed to a sentence significantly below the ACCA's 15-year mandatory minimum. All of Mr. Cook's prior burglaries were non-violent; none involved firearms; and several occurred when he was just 18 years old—nearly thirty years earlier. *See supra* at 6. Five of the six total burglary convictions were so old that they did not even count under the Guidelines' criminal history rules (because such old convictions do not add anything to the power of the criminal history rules to predict risk of recidivism). *See supra* at 6-7. About burglaries in particular, the U.S. Sentencing Commission has reported that the categorical use of burglaries as "violent felony" predicates for ACCA purposes is contradicted by vast empirical evidence about actual burglaries, and as a result has recommended that Congress remove burglary from the ACCA's coverage, just as the Commission removed burglary of a dwelling from the career offender guideline's coverage. U.S. Sent'g Comm'n, *Report to the Congress: Career Offender Sentencing Enhancements* 53-55 (2016).

In other contexts, when prosecutors have discretion to forego a mandatory minimum for an eligible offender, they frequently elect to forego it. *See, e.g.*, U.S. Sent'g Comm'n, *Application and Impact of 21 U.S.C. § 851*, at 18-19 (2018) (showing that prosecutors elect not to seek enhanced mandatory minimum drug sentences under 21 U.S.C. § 841(b) in the majority of eligible cases). There are plenty of reasons in Mr. Cook's case why a prosecutor might forego charging the enhanced ACCA offense and its corresponding 15-year mandatory minimum.

Finally, this issue is exceptionally important 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 (2022) (showing that 260 offenders were sentenced under the ACCA in fiscal year 2021). The effect is generally severe. In fiscal year 2021, for example, the average increase in the sentence imposed was 126 months longer than for those sentenced without the ACCA—over a decade longer. *Quick Facts* 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 and "discerning" non-elemental facts. Now is the time for this Court to step in and correct this ongoing error. This is the case for doing so.

CONCLUSION

The petition for a writ of certiorari should be granted.

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