No. __-_____

IN THE
SUPREME COURT OF THE UNITED STATES

STANLEY JACKSON, III,

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Constitution requires an indictment, jury trial, and proof beyond a reasonable doubt to find a defendant's prior convictions were "committed on occasions different from one another," as is necessary to impose an enhanced penalty under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1).

2. 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.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Stanley Jackson, III, 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The Sixth Circuit's Opinion in this matter was unpublished, though available at 2023 U.S.App. LEXIS 5763 (6th Cir. 2023), and appears at pages 2a to 6a of the appendix to this petition. The district court's Judgment appears at Pet. App. 7a-13a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals issued its decision on March 10, 2023. This petition is timely filed pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

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

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

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

This case involves a pressing constitutional question in the administration of the Armed Career Criminal Act (ACCA). The ACCA requires a minimum sentence of fifteen years imprisonment – and a maximum of life – for a defendant convicted of unlawful possession of a firearm *if* the defendant has three qualifying prior convictions "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). This Court has held that "any fact," "[o]ther than the fact of a prior conviction, . . . that increases the penalty for a crime beyond the prescribed statutory maximum" – or increases the mandatory minimum – "must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 560 U.S. 466, 490 (2000); *see Alleyne v. United States*, 570 U.S. 99 (2013) (applying *Apprendi* to mandatory minimums). In *Wooden v. United States*, 142 S. Ct. 1063 (2022), this Court held that the ACCA's "on occasions different from one another" inquiry turns

on whether prior crimes arose from the "same criminal episode" – and that question turns on a "multi-factored" inquiry that considers time, place, intervening events, and "the character and relationship of the offenses." *Id*. at 1067, 1070-71. Those considerations fall outside the "fact of a prior conviction" and thus squarely implicate the jury-trial right. Yet in this case, the court of appeals refused to reconsider its pre-*Wooden* precedent treating the "occasions" inquiry as a matter for the judge at sentencing – thus depriving petitioner of the indictment and jury determination beyond a reasonable doubt to which he is entitled.

Wooden reserved whether *Apprendi*'s principles apply to the occasions issue because the parties did not raise it. 142 S. Ct. at 1068 n.3. The time to resolve that question has arrived. The government has agreed in other cases that in light of *Wooden*'s interpretation of "occasions," the jury-trial right applies to that determination. Yet, as in this case, many courts of appeals refuse to revisit their pre-*Wooden* precedent holding that a jury need not resolve the ACCA's occasions question. This issue will persist until this Court definitively resolves it – and the need for this Court's intervention is all the more essential because ACCA defendants face unjustified years in prison while the lower courts refuse to accord them their constitutional rights.

Only this Court can establish a uniform national rule that corrects the lower courts' errors. Before *Wooden*, all of the court of appeals that addressed the issue adopted the erroneous view that the occasions issue fell into the narrow exception to *Apprendi* permitting a court to find the fact of a prior conviction at sentencing.

Until told otherwise, many district courts will follow that precedent. And the odds of *all* of the courts of appeals going *en banc* to overturn their erroneous pre-*Wooden* precedent approach zero. This Court should grant review to address the *Apprendi* issue it reserved in *Wooden* and reverse the decision below.

Moreover, 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 enhancements 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 Sixth Circuit, instruction 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 v. United States*, 570 U.S. 254 (2013) and *Mathis v. United States*, 579 U.S. 500 (2016), 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 "occasions different" inquiry. The lower courts have also held that the factual circumstances underlying a conviction are inseparable from the fact of convictions and, therefore, excluded from *Apprendi* and Sixth Amendment limitations.

[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 v. United States*, 544 U.S. 13, 26 (2005).

The instant case provides this Court with the opportunity to directly address whether judicial factfinding in the "occasions different" context presents Sixth Amendment problems. During oral argument in *Wooden*, members of this Court questioned whether judicial factfinding in the "occasions different" context presents Sixth Amendment problems. The time is ripe to address that question, and this case presents an excellent vehicle. Mr. Jackson objected to the district court's factfinding about the occasion of his prior offenses (described as a "robbery spree"), and his own 225-month sentence necessarily relied on that factfinding.

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

On September 16, 2021, Stanley Jackson, III, pled guilty to violating 18 U.S.C. § 922(g)(1) and other charges, pursuant to a plea agreement that explicitly preserved his right to challenge on appeal any determination under 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4 (Armed Career Criminal). In the course of that plea, Mr. Jackson specifically did not agree that his 1998 robberies occurred on "occasions different" from one another. Furthermore, his indictment alleged that Mr. Jackson possessed firearms "knowing he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year," but was silent as to what offenses might qualify as predicates under the Armed Career Criminal Act and that they occurred on "occasions different" from one another.

The Presentence Report averred Mr. Jackson qualified for ACCA enhanced penalties based in part on robbery convictions. In 1998, under a single case

number, Mr. Jackson had been charged with two counts of Complicity to Commit Robbery in the First Degree and three counts of Robbery in the First Degree, in violation of Kentucky law. The Presentence Report described the crimes as a "robbery spree" in which Mr. Jackson and his co-defendants robbed "six stores in a seven-day span." Per the Presentence Report, the robberies occurred in 1998:

July 19 – "Super America" and "Shell Foodmart"

July 21 – "Family Dollar Store"

July 24 – "Bryan Avenue Liquor Store" and "Electro Services"

July 25 – "Chevron"

Mr. Jackson objected that these counts each qualified as separate predicate offenses committed "on occasions different from one another." This was in February 2022. The offenses "occurred in succession to one another with no intervening arrest(s)" and were charged in a single indictment. They were part of a "robbery spree." Mr. Jackson noted this Court had taken up the issue in *Wooden* and had heard oral argument on October 4, 2021. "Because this issue is currently being litigated before the Supreme Court, Mr. Jackson seeks to preserve the issue as to the determination that he is the to be sentenced as an Armed Career Criminal."

The government responded to Mr. Jackson's objections using the criteria set out in *United States v. Hill*, 440 F.3d 292, 297-98 (6th Cir. 2006), and *United States v. Jones*, 673 F.3d 497 (6th Cir. 2012): 1) "it is possible to discern the point at which the first offense is completed, and the subsequent point at which the second offense begins;" 2) "it would be possible for the offender to cease his criminal

conduct after the first offense, and withdraw without committing the second offense;" and 3) "the offenses are committed in different residences or business locations." Under *United States v. Southers*, 866 F.3d 364, 369 (6th Cir. 2017), offenses that met any one of these three factors are separate offenses.

The government attached to its response paperwork from these prior convictions. It claimed the Indictments and Judgments were approved *Shepard* documents, and that "non-elemental facts contained within *Shepard* documents" can be considered for purposes of the "different-occasions analysis." The government argued that the documents showed the robberies mostly occurred on different dates and thus were "not the result of a crime spree occurring on a single date."

The government argued that each robbery ended when the defendant left the premises, and the next began when a different premises was entered. The different names of businesses robbed indicated "different business locations."

However, the Judgment the government submitted notes that the jury's verdict is as such:

AS TO COUNT 1:

(b) We the jury find the Defendant guilty under Instruction No. 3...

AS TO COUNT 2:

(b) We the jury find the Defendant guilty under Instruction No. 5...

and so on, always referring to the instruction for each count given to the jury. The jury instructions are not included in the documents submitted by the government.

The district court ruled each offense was committed on occasions different from one another. "While two were committed on the same date, they were still committed on different occasions." It ruled it could make such a finding based on the documents submitted, because under *United States v. Hennessee*, 932 F.3d 437 (6th Cir. 2019), it was not limited to *Shepard*-approved documents. It noted the documents indicated the robberies occurred at different locations. It determined "from the addresses[2] and from the locations" that it was possible for Mr. Jackson to "cease his course of conduct after one offense had been committed." It sentenced Mr. Jackson to serve 225 months in prison, followed by 8 years of supervised release.

On appeal, Mr. Jackson argued that the district court erred when it looked to non-element information in *Shepard* documents to establish that Mr. Jackson's 1998 robberies occurred on "occasions different" from one another, as required of Armed Career Criminal Act predicate offenses. Such use of *Shepard* documents violates the restrictions set out in *Shepard* and reiterated in *Mathis*. *Shepard v. United States*, 544 U.S. 13 (2005); *Mathis v. United States*, 136 S. Ct. 2243 (2016). Furthermore, because facts increasing the statutory maximum or minimum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt (or admitted by the defendant), the district court erred

[2] Physical addresses – e.g. street addresses – do not appear anywhere in the documents submitted by the government. (Gov't Resp. Ex. 4, R. 48-4, Page ID# 173-193).

when it alone ruled that Mr. Jackson's 1998 robberies occurred on "occasions different" from one another.

The Sixth Circuit disagreed and affirmed. It cited its decisions that have held "facts governing the occasions-different inquiry are included in 'the fact of a prior conviction,'" and so "come within the *Apprendi* exception." Pet. App. 5a (citing *United States v. Burgin*, 388 F.3d 177, 186 (6th Cir. 2004); *United States v. Williams*, 39 F.4th 342, 351 (6th Cir. 2022) (*pet for cert. denied*, No. 22-947, (filed Mar. 27, 2023)); *United States v. Belcher*, 40 F.4th 430, 432 (6th Cir. 2022); *United States v. Lovell*, No. 20-6287, 2023 WL 18795630, at *3 (6th Cir. Feb. 10, 2023)). The Sixth Circuit did not address petitioner's argument that the "occasions different" question needed to be alleged in the indictment and proved to a jury or admitted by the defendant.

REASONS FOR GRANTING THE PETITION

As Justice Gorsuch recognized in *Wooden*, "[a] constitutional question simmers beneath the surface" of the Court's decision. *Wooden v. United States*, 142 S. Ct. 1063, 1087 n.7 (2022) (Gorsuch, J., joined by Justice Sotomayor, concurring). Having construed the ACCA's occasions clause to turn on multiple facts not contained in prior judgments of conviction, the question arises whether a judge, rather than a jury, may make the necessary determinations under "only a preponderance of the evidence standard." *Id.* The Court declined to reach that issue in *Wooden* because the defendant "did not raise it." *Id.* at 1068 n.3. But as Justice

Gorsuch noted, "there is little doubt that [the Court] will have to do so soon." *Id.* at 1087 n.7 (Gorsuch, J., concurring). That time is now.

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.

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. *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.").

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) (unpublished); *Thompson*, 421 F.3d at 285; *United States v. Tatum*, 165 F. App'x 367, 368 (5th Cir. 2006) (unpublished); *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); *United States v. Brown*, 67 F.4th 200 (4th Cir. 2023).

More than a year has passed since *Wooden* was decided, during which time hundreds of people have been subjected to the enhanced ACCA sentence across the 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 completed but no decision yet. *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. 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. Jackson, 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. The Sixth Circuit's summary affirmance provides this Court with a tidy, clean record on which to base a ruling. The legal issue is cleanly presented.

The question presented is outcome-determinative for Mr. Jackson. 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. Mr. Jackson was never charged under ACCA. And he never admitted the relevant issue – that his prior offenses were committed on 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.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,999 words, excluding those portions omitted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in 12-point Century Schoolbook type, which is a proportionally spaced typeface.