No. 22-____

IN THE

Supreme Court of the United States

TYLER G. WILLIAMS,

Petitioner,

v.

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 A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

RELATED PROCEEDINGS

United States v. Williams, No. 5:20-cr-00107-1 (E.D. Ky.)

United States v. Williams, 39 F.4th 342 (6th Cir. 2022)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tyler G. Williams respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 39 F.4th 342 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-19a. The order of the court of appeals denying rehearing is unpublished but available at 2022 WL 17409565 and reprinted at Pet. App. 33a. The judgment of the district court is unpublished but reprinted at Pet. App. 20a-32a.

JURISDICTION

The court of appeals issued its decision on July 6, 2022, Pet. App. 1a, and denied rehearing on October 26, 2022, *id.* 33a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment 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." U.S. Const. amend. V.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI.

The relevant statutory provision, Section 924(e) of Title 18 of the U.S. Code, is reproduced in the appendix.

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*, 530 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 *agrees* 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 courts 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 case proves that point: the court of appeals denied petitioner's request to grant rehearing en banc to correct its precedent. This Court should grant review to address the *Apprendi* issue it reserved in *Wooden* and reverse the decision below.

STATEMENT

A. Legal Framework

1. Under the Armed Career Criminal Act of 1984, a defendant convicted of unlawful possession of a firearm, in violation of 18 U.S.C. § 922(g), faces more severe punishment if he has three or more 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). At the time of the offense conduct in this case, a violation of Section 922(g) was punishable by up to ten years imprisonment. *See* former 18 U.S.C. § 924(a)(2); *Wooden v. United States*, 142 S. Ct. 1063, 1068 (2022).[1] But if the individual who violates Section 992(g) has three or more qualifying convictions "committed on occasions different from one another," the ACCA increases his prison term to a minimum of fifteen years and a maximum of life. 18 U.S.C. § 924(e)(1); *Welch v. United States*, 578 U.S. 120, 122 (2016).

In *Wooden*, this Court adopted a multifactor test for assessing whether crimes occurred on different occasions. Rejecting the government's position that "an 'occasion' happens 'at a particular point in time'—the moment 'when [an offense's] elements are

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[1] In the Bipartisan Safer Communities Act, Congress increased the maximum penalty for a violation of Section 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 Section 922(g).

established,'" 142 S. Ct. at 1069—the Court held that the proper test asks whether the prior convictions arose "from a single criminal episode," *id.* at 1067. The Court provided several contextual considerations that bear on that issue. "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." *Id.* at 1071. "Proximity of location is also important," the Court explained: "the further away crimes take place, the less likely they are components of the same criminal event." *Id.* "And the character and relationship of the offenses may make a difference," the Court added: "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.*

Applying that fact-specific inquiry, the Court held that Wooden's ten burglaries occurred "on a single occasion" because they were committed "on a single night, in a single uninterrupted course of conduct," and "all took place at one location," while "[e]ach offense was essentially identical, and all were intertwined with the others." *Id.* The Court added that Wooden's "burglaries were part and parcel of the same scheme, actuated by the same motive, and accomplished by the same means." *Id.*

2. Having adopted this context-specific inquiry into the factual relationship between offenses to assess whether they occurred on a single "occasion," *Wooden* raised a corresponding procedural question: Could the occasions inquiry be resolved by a judge at

sentencing? After all, *Apprendi* recognized only a single exception to its jury-trial-protective holding for sentencing for a single offense: a judge may determine at sentencing, by a preponderance of the evidence, a minimum- or maximum-increasing fact *only* for the "fact of a prior conviction." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Alleyne v. United States*, 570 U.S. 99, 103 (2013) (*Apprendi* applies to facts that require a mandatory minimum); *Almendarez-Torres v. United States*, 523 U.S. 224, 230, 234, 244 (1998) (recidivism exception). Apart from that narrow exception, the right to a jury trial—with the government bearing the burden of proof beyond a reasonable doubt—attaches to such sentence-enhancing facts. *Apprendi* explained why those guarantees apply, notwithstanding a legislature's designation of those facts as matters for sentencing: "If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached." *Apprendi*, 530 U.S. at 484.

This Court has consistently applied that principle to require jury determinations, beyond a reasonable doubt, of facts that increase an individual's sentence above the otherwise-applicable minimum or maximum sentence. *See, e.g.*, *Ring v. Arizona*, 536 U.S. 584 (2002) (imposition of death penalty based on judicial factfinding); *Blakely v. Washington*, 542 U.S. 296

(2004) (mandatory state sentencing guidelines); *United States v. Booker*, 543 U.S. 220 (2005) (mandatory federal sentencing guidelines); *Cunningham v. California*, 549 U.S. 270 (2007) (mandatory state sentencing enhancements); *S. Union Co. v. United States*, 567 U.S. 343 (2012) (imposition of criminal fines based on judicial factfinding). Thus, unless the defendant admits the relevant facts, the judge "exceeds his proper authority" by imposing an enhanced sentence on the basis of facts not found by a jury. *Blakely*, 542 U.S. at 303-04.

B. Proceedings Below

1. In 2004, when petitioner was sixteen years old, he pleaded guilty to one count of first-degree robbery and three counts of second-degree robbery in Fayette County Circuit Court in Kentucky. Pet. App. 2a-3a. All four offenses arose from a single indictment. *Id.* Petitioner committed the robberies with the same two individuals, one of whom was also a minor. *Id.*; DE 39-1 at 3.[2] On January 15, 2004, petitioner and his accomplices robbed a Thorntons gas station; on January 23, they robbed a Thorntons again, possibly the same one; on January 29, they robbed Shoppers Village Liquor; and on March 13, they robbed a BP gas station. Pet. App. 3a. The stores were in the same county. *Id.* 17a. Petitioner pleaded guilty to first-degree robbery for the January 15 offense and second-degree robbery for the others. DE 46 at 8-9.

2. Nearly 17 years later, in 2020, petitioner was indicted in the Eastern District of Kentucky for

[2] "DE" refers to the district-court docket and "COA" refers to the Sixth Circuit docket.

possession of a mixture or substance containing methamphetamine with intent to distribute and being a felon in possession of a firearm. Pet. App. 2a. The indictment did not allege that petitioner should be treated as an armed career criminal or that he had ACCA-qualifying convictions committed on occasions different from one another. DE 1. Petitioner pleaded guilty to both counts. Pet. App. 2a. His plea agreement reserved his right to challenge an ACCA enhancement at sentencing and on appeal. *Id.*; DE 29 at 4-5.

Petitioner's presentence investigation report recommended that he be designated an armed career criminal under the ACCA based on the four robberies from 2004. DE 46 at 7. Petitioner filed an objection to this designation, arguing that "[a]ll counts arose out of the same indictment without an intervening arrest" and that he "was 16 years old at the time of the commission of the offenses but was convicted as an adult." *Id.* at 21. At his sentencing on August 31, 2021, petitioner explained that he objected to treating the three second-degree robberies as ACCA predicates.[3] DE 51 at 44. He acknowledged that Sixth Circuit precedent weighed in favor of triggering the enhancement, but explained that *Wooden v. United States*, 142 S. Ct. 1063 (2022)—which was pending in this Court—had the potential to change that law. *Id.*

The district court applied the ACCA enhancement and sentenced petitioner to 200 months of imprisonment based on a Guidelines range of 188 to 235

[3] Petitioner did not object to treating the first-degree robbery offense as an ACCA predicate. DE 51 at 43.

months. Pet. App. 3a. Without the ACCA enhancement, petitioner would have been subject to a Guidelines range of 100 to 125 months. COA 21 at 4.

3. Petitioner appealed the ACCA enhancement, arguing that (i) the 2004 robberies were not "committed on occasions different from one another," and (ii) Kentucky's second-degree robbery is not a "violent felony" under the ACCA. 18 U.S.C. § 924(e)(1); COA 21 at 6-15. Petitioner also argued that *Wooden*, which was still pending in this Court, "raised issues of the constitutionality of the 'different occasions' clause of the ACCA" because the Sixth Amendment prohibits judges from "increasing a sentence based on judge-made findings about the non-elemental facts of a conviction." COA 21 at 14.

After this Court issued its decision in *Wooden*, the Sixth Circuit directed the parties to file supplemental briefs addressing the effect of *Wooden* on the case. COA 33. Petitioner argued, in relevant part, that *Wooden* underscores that "[w]hether multiple offenses arose from a single episode or occurred on different occasions is an issue of fact [that] must be determined by a jury rather than a judge." COA 36 at 3.

The panel affirmed the district court's judgment. Pet. App. 19a. Applying the different-occasions test announced in *Wooden*, it determined that "[g]iven the substantial gap in time between [petitioner's] robbery offenses and some variety in locations, the offenses

were committed on separate occasions under the ACCA."[4] *Id.* 18a.

The panel also noted that petitioner "raises a separate issue that he seemingly did not raise before the district court": "whether his robbery offenses were committed on separate occasions under the ACCA is a jury issue." *Id.* 18a-19a. The panel rejected that argument, applying Sixth Circuit precedent holding that "a sentencing judge may answer the question of whether prior offenses were 'committed on occasions different from one another.'" *Id.* 19a (quoting *United States v. King*, 853 F.3d 267, 274 (6th Cir. 2017)).

4. Petitioner sought rehearing en banc, arguing that *Wooden* "fatally undermines [Sixth Circuit] precedent holding that judges may find" "non-elemental facts of time, place, and victim," not to mention "proximity of locations, similarity of the offenses, common scheme or purpose of the offenses, and the existence of a significant intervening event," all of which *Wooden* made relevant to the occasions inquiry. COA 41 at 13-14. Petitioner informed the court that the government had come to a similar conclusion, changing its legal position in other cases to contend that "[i]n light of [*Wooden*,] . . . a jury should find (or a defendant should admit) that ACCA predicates were committed on occasions different from one another." *Id.* at 14 and Addendum 1a (citing Notification of Changed Legal Position, *United States v. Cook*, No. 22-5056 (6th Cir. Aug. 18, 2022), Dkt. No. 33).

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[4] The panel also held that Kentucky second-degree robbery qualifies as a "violent felony" under the ACCA. Pet. App. 19a. Petitioner does not seek certiorari on this question.

The government did not respond to the merits of petitioner's Sixth Amendment argument, instead arguing that petitioner had "waived" the argument by admitting that "his robbery crimes 'occurred on separate dates and separate locations.'" COA 56 at 2-3. Even if petitioner had not waived the argument, the government contended, "any error would have been harmless," as "[n]o rational jury could have found that [petitioner] committed his robbery crimes on the same occasion because the undisputed records show that the offenses occurred days, weeks, or months apart and at different locations." *Id.* at 3-4.

The Sixth Circuit denied the petition for rehearing en banc. Pet. App. 33a.

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).

In the year since the Court issued *Wooden*, the courts of appeals have by and large bypassed

opportunities to address this question. Instead, like the Sixth Circuit here, many circuits have dismissed the impact of *Wooden* on the *Apprendi* issue and denied en banc review of longstanding circuit precedent holding that a judge may conduct the occasions inquiry. *See infra* at 19-20.

These holdings conflict with this Court's precedents explaining the scope and application of *Apprendi*. The Constitution requires that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *Wooden* leaves no doubt that whether a defendant's prior, qualifying convictions stem from offenses "committed on occasions different from one another" depends on a host of factual determinations—all of which fall outside the fact of prior conviction for the separate predicate offenses. Because the ACCA raises a defendant's sentencing range, *Apprendi*'s principles directly apply to the occasions issue. Indeed, the government agrees with this position. The government recognizes that in light of *Wooden*, the different-occasions issue is for the jury and has so informed this Court. *See* Br. in Opp. at 6-7, *Reed v. United States*, No. 22-336 (U.S. Dec. 12, 2022).

This state of affairs is untenable. The disparity between the position of the United States and the prevailing rule in the circuits has spawned confusion in the district courts. And the likelihood that all of the regional circuits will reconsider and correct their erroneous pre-*Wooden* precedent is vanishingly remote.

In the meantime, defendants will receive unconstitutionally enhanced sentences and will seek rehearing en banc in court after court. This benefits no one—not defendants, not the lower courts, and not the government. This Court should therefore intervene to avoid years of wasteful litigation, to prevent scores of erroneously imposed ACCA sentences, and to protect critically important constitutional rights.

The Court should resolve the issue in this case. The issue is squarely presented: The court of appeals relied on binding circuit precedent on direct review, in a published, post-*Wooden* opinion, to squarely reject the *Apprendi* claim. The court of appeals then bypassed the opportunity to revisit its erroneous precedent through the en banc process—depriving petitioner of his constitutional right to have a jury decide whether he should be categorized as a lifetime armed career criminal based on actions he took during a three-week span when he was sixteen—and leaving the law in the Sixth Circuit in a continued state of uncertainty.

No need for "percolation" of this straightforward issue can justify delaying its resolution. The government's nationwide concession that *Apprendi* applies confirms the clarity of the correct answer. The petition should be granted, and the decision below reversed.

A. The Decision Below Is Wrong

Apprendi applies here because of a straightforward syllogism. When any fact other than the fact of a prior conviction increases the minimum or maximum sentence for an offense, it must be determined

by a jury beyond a reasonable doubt. The ACCA increases the minimum and maximum sentence when a defendant has three prior convictions from offenses committed on different occasions—and *Wooden* makes clear that the occasions issue turns on facts beyond the bare entry of a prior conviction. Therefore, unless the defendant admits that the ACCA applies, the occasions issue must be included in the indictment and resolved by the jury beyond a reasonable doubt.[5]

1. The ACCA increases the imprisonment range for a violation of 18 U.S.C. § 922(g) by mandating a fifteen-year term and elevating the maximum to life. Even before *Wooden*, multiple judges recognized that the ACCA's "occasions different from one another" requirement turns on facts that cannot be determined by ascertaining the elements of the offense from a prior judgment of conviction, so *Apprendi* requires that this issue be resolved by a jury. *See, e.g.*, *United States v. Perry*, 908 F.3d 1126, 1134 (8th Cir. 2018) (Stras, J., concurring) (court's treatment of different-occasions issue as one for the court "falls in line with

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[5] "In federal prosecutions, such [sentence-enhancing] facts must also be charged in the indictment." *United States v. Cotton*, 535 U.S. 625, 627 (2002). The Department of Justice has determined, in guidance issued to prosecutors on September 29, 2022, that "going forward, where the government seeks imposition of an ACCA sentence, it will charge the pertinent facts in an indictment, and seek either a jury verdict or defendant admission regarding those facts." Gov't Mot. to Withdraw Appeal at 3, *United States v. Brown*, No. 22-2550 (3d Cir. Mar. 12, 2023), Dkt. No. 30. Here, the indictment to which petitioner pleaded guilty did not allege that he had ACCA-qualifying convictions for offenses committed on different occasions. DE 1.

our cases but is a departure from fundamental Sixth Amendment principles"); *United States v. Thompson*, 421 F.3d 278, 294 (4th Cir. 2005) (Wilkins, C.J., dissenting) (employing *Apprendi* analysis to find that facts "about a crime underlying a prior conviction," including dates, are beyond the "fact of a prior conviction" exception); *see also United States v. Dudley*, 5 F. 4th 1249, 1275 (11th Cir. 2021) (Newsom, J., concurring in part and dissenting in part) ("[W]hy doesn't judicial factfinding involving ACCA's different-occasions requirement itself violate the Sixth Amendment? After all, we've described the different-occasions inquiry as a factual one.").

As this Court held in *Wooden*, the proper inquiry for determining whether offenses were committed on occasions different from one another is "multi-factored." 142 S. Ct. at 1070. "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." *Id.* at 1071. Similarly, "[p]roximity of location" matters; "the further away crimes take place, the less likely they are components of the same criminal event." *Id.* And "[t]he 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.* These facts—and the application of *Wooden*'s legal standard to them—raise quintessential matters for jury determination. *See United States v. Gaudin*, 515 U.S. 506, 512 (1995) (jury-trial right embraces both questions of historical fact and "the application-of-legal-standard-to-fact sort of question").

2. The exception to the rule articulated in *Apprendi* for the fact of a prior conviction does not apply to the occasions inquiry. Again, multiple judges have recognized this point. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), this Court held that a court (rather than a jury) may find the *fact* of a prior conviction. *Id.* at 226. But this exception is a limited one: It reaches only the fact of the conviction itself—and the elements of the offense of conviction. *See Mathis v. United States*, 579 U.S. 500, 511-12 (2016). A judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id.* (citing *Apprendi*, 530 U.S. at 490). "[A] judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed the offense." *Id.* at 511 (citing *Shepard v. United States*, 544 U.S. 13, 25 (2005)). "[A]llowing a sentencing judge to go any further would raise serious Sixth Amendment concerns." *Id.*

A determination of the fact and elements of a prior conviction does not suffice to make the occasions determination under *Wooden*. The fact of multiple prior convictions says nothing about whether they arose "from a single criminal episode." 142 S. Ct. at 1067. The entry of a conviction does not show whether the offenses were committed in one uninterrupted course of conduct, nor the extent of the gaps in time between them, nor the proximity of the locations at which the offenses occurred, nor whether they share a common scheme or purpose. *See id.* at 1071. Indeed, the entry of a conviction does not even determine the date on which an underlying offense was committed. As a

result, the occasions issue cannot fall within the exception articulated by *Almendarez-Torres* because resolving that issue requires determining far more than the fact of a prior conviction.

3. Some courts—including the Sixth Circuit—sought to solve this invasion of the jury's domain by confining courts determining the ACCA's occasions issue to the documents identified in *Shepard*, 544 U.S. 13, *see*, *e.g.*, *United States v. Hennessee*, 932 F.3d 437, 442-43 (6th Cir. 2019), but that approach fails, *see id.* at 450-52 (Cole, C.J., dissenting) (finding that reasoning "constitutionally problematic"). *Shepard* documents comprise conviction records such as the charging instrument, guilty-plea transcript, or jury instructions; the court may review this narrow set of documents only to determine which of the alternative elements within a divisible statute necessarily served as the basis for the prior conviction. *Descamps v. United States*, 570 U.S. 254, 262-63 (2013). As *Descamps* confirmed, *Shepard* documents cannot be used "to determine what the defendant and state judge must have understood as the factual basis of the prior plea." *Id.* (internal quotation marks omitted). *Mathis* reaffirmed this holding, explaining that it is unfair to defendants to rely on "'non-elemental fact[s]' in the records of prior convictions," as these purported facts "are prone to error precisely because their proof is unnecessary." 579 U.S. at 512 (quoting *Descamps*, 570 U.S. at 270); *id.* ("[A] defendant may have no incentive to contest what does not matter under the law; to the contrary, he may have good reason not to" (internal quotation marks omitted)). "Such inaccuracies should not come back to haunt the defendant many

years down the road by triggering a lengthy mandatory sentence." *Id.*

Shepard documents thus cannot be used to establish the facts underlying a prior conviction. "[T]he who, what, when, and where of a conviction" all "pose questions of fact." *Pereida v. Wilkinson*, 141 S. Ct. 754, 765 (2021). None of them is embraced by the fact of the conviction itself, and none is admitted through a guilty plea. It follows that they cannot be used by a sentencing court to resolve the "occasions different from one another" inquiry. Not even the date or location of an offense is an element that can be discerned from the *Shepard* documents consistent with *Apprendi*, *Descamps*, and *Mathis*—much less the exact time between the offenses, their geographic proximity, or how similar they are in nature. The ineluctable conclusion is that such issues are matters for jury determination beyond a reasonable doubt.

B. The Courts Of Appeals Will Not Correct Course Without This Court's Intervention

Both before and after *Wooden*, the courts of appeals have incorrectly held that a judge (rather than a jury) may answer the ACCA's occasions question.

Before *Wooden*, courts of appeals that addressed 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); *United States v. Thompson*, 421 F.3d 278, 285 (4th Cir. 2005); *United States v. Tatum*, 165 F. App'x 367, 368 (5th Cir. 2006); *United*

States v. Burgin, 388 F.3d 177, 183 (6th Cir. 2004); *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 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 determination that two of defendant's prior offenses were committed on separate "occasions"). In these courts' view, Section "924(e)'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 Section 924(e)'s various requirements." *Id.*

After this Court issued its decision in *Wooden*, nine courts of appeals have considered the *Apprendi* issue—and each has continued to apply its pre-*Wooden* precedent, with at least four denying petitions to reconsider that precedent en banc. *See* Pet. App. 18a-19a, 33a; *United States v. Golden*, 2023 WL 2446899, at *4 (3d Cir. Mar. 10, 2023); *United States v. Hatley*, 2023 WL 2366704, at *5 (7th Cir. Mar. 6, 2023); *United States v. Williams,* 2023 WL 2239020, at *1 (5th Cir. Feb. 23, 2023) (per curiam); *United States v. Barrera*, 2022 WL 1239052, at *2 (9th Cir. Apr. 27, 2022), *pet. for reh'g denied*, No. 20-10368 (9th

Cir. Sept. 21, 2022, *cert. denied*, 2023 WL 2563436 (U.S. Mar. 20, 2023)[6]; *United States v. Daniels*, 2022 WL 1135102, at *1 (4th Cir. Apr. 18, 2022) (per curiam), *cert. denied*, 143 S. Ct. 749 (2023); *United States v. Reed*, 39 F.4th 1285, 1295 (10th Cir. 2022), *pet. for reh'g denied*, No. 21-2073 (10th Cir. Sept. 1, 2022), *cert. denied*, 143 S. Ct. 745 (2023); *United States v. Haynes*, 2022 WL 3643740, at *5 (11th Cir. Aug. 24, 2022) (per curiam), *pet. for reh'g denied*, No. 19-12335 (11th Cir. Nov. 1, 2023), *cert. denied,* 2023 WL 2357369 (U.S. Mar. 6, 2023); *United States v. Stowell*, 40 F.4th 882, 885 (8th Cir. 2022), *pet. for reh'g granted*, 2022 WL 16942355 (8th Cir. Nov. 15, 2022). To date, only one court of appeals has granted rehearing en banc. *See Stowell*, 2022 WL 16942355 (to be argued April 11, 2023).

Nothing suggests that *all* the courts of appeals will reverse their pre-*Wooden* precedent, let alone anytime soon. Nor would allowing the issue to percolate provide this Court with helpful analysis. To the contrary, courts of appeals seem to be relying on each other in refusing to reconsider their precedent post-*Wooden*. *See Hatley*, 2023 WL 2366704, at *5 ("[I]n *Wooden*'s wake, other circuits have continued to recognize the propriety of sentencing judges making

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[6] In *United States v. Man*, the government "concede[d] that following *Wooden* . . . , a jury must find, or a defendant must admit, that a defendant's ACCA predicate offenses were committed on different occasions," and the Ninth Circuit "assume[d], without holding, that an *Apprendi* error occurred." 2022 WL 17260489, at *1 (9th Cir. Nov. 29, 2022) (mem.). *Man* thus does not change binding Ninth Circuit precedent that a "district court does not commit an *Apprendi* error by differentiating the occasions on which ACCA violent felonies were committed." *Id.*

this finding."). The constitutional issue here is straightforward and, as the government has elsewhere conceded, *see supra* at 10, 14 n.5, resolved by the application of settled *Apprendi* principles to the ACCA's occasions clause as interpreted in *Wooden*. Delaying resolution of this high-stakes question will only increase the number of defendants who receive unconstitutionally enhanced sentences. Only this Court's intervention can correct the lower courts' error and establish a consistent national rule that accords with the Fifth and Sixth Amendments.

C. The Question Presented Is Critically Important

Answering the question presented is vital to protecting the Fifth Amendment right to indictment by a grand jury, the due-process right to proof beyond a reasonable doubt, and the Sixth Amendment jury-trial right. That question also has sweeping practical importance for criminal sentencing across the country.

1. "The jury is a central foundation of our justice system and our democracy." *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 210 (2017). "The jury is a tangible implementation of the principle that the law comes from the people." *Id.* The Framers adopted it because the jury serves as a "necessary check on governmental power," *id.*, an important "protection against arbitrary rule," *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968), and the "bulwark" between the individual and the state, Joseph Story, Commentaries on the Constitution of the United States (1833) 764-65 (Lonang Inst. ed., 2005). Similarly, grand juries afford "basic protection" to an individual by "limit[ing] his jeopardy to offenses charged by a group of his fellow citizens

acting independently of either prosecuting attorney or judge" and thereby "protecting the citizen against unfounded accusation." *Stirone v. United States*, 361 U.S. 212, 218 & n.3 (1960).

The Sixth Amendment "right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure" and "meant to ensure [the people's] control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). And the interlinked protection of the right to have the government prove its case beyond a reasonable doubt guards against error in a system that prizes the presumption of innocence. *See Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *In re Winship*, 397 U.S. 358, 363-64 (1970). Defendants who are deprived of these constitutional rights risk unjustified deprivations of liberty and unwarranted stigma.

2. The question presented has sweeping practical importance. During the ten-year period between October 2009 and September 2019, courts imposed 4,480 ACCA sentences. U.S. Sent'g Comm'n, Federal Armed Career Criminals: Prevalence, Patterns, and Pathways, 18-19 & n.44 (Mar. 2021). Defendants who were subject to the ACCA's fifteen-year mandatory minimum penalty at sentencing received an average sentence of 206 months in fiscal year 2019, *id.* at 6, 7, 26, representing a 70 percent increase in the median sentence over the maximum ten-year sentence that a defendant would face without an ACCA enhancement.

Such dramatic increases in individual sentences heighten the stakes in this case. Entrusting to a judge alone the determination of the underlying

issues undermines the credibility and perceived fairness of the criminal justice system. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980) ("[J]ustice must satisfy the appearance of justice." (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). And excluding juries from these momentous decisions undermines public confidence in the law. As this Court has noted, "[j]ury service preserves the democratic element of the law." *Powers v. Ohio*, 499 U.S. 400, 407 (1991). Maintaining the connection between criminal judgments and community participation affords yet another reason for this Court to resolve this issue.

3. The significance of these procedural protections is highlighted by the first known jury consideration of the ACCA occasions question. In *United States v. Pennington*, the jury found defendant Darius Pennington guilty of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). 1:19-CR-455-WMR (N.D. Ga. Sept. 20, 2022), Dkt. No. 171. Yet the jury—not the judge—was permitted to consider whether the government carried its burden beyond a reasonable doubt in establishing that the three ACCA predicate offenses, which occurred months and years apart and in two different counties, were committed "on occasions different from one another." *Id.*, Dkt. No. 172 (Sept. 20, 2022). In a verdict rendered the same day as the verdict on the underlying offenses, the jury determined that the government had not carried its burden, thereby reducing Mr. Pennington's sentencing range from fifteen-years-to-life to zero-to-ten years. *Id.*, Dkt. No. 173 (Sept. 20, 2022).

The jury's consideration of the ACCA occasions issue has profound practical and constitutional

importance not only for Mr. Pennington's and petitioner's sentences, but also for the credibility and integrity of the criminal justice system more broadly. Yet without this Court's intervention, those benefits will accrue only if district courts exercise discretion to move beyond (or defy) circuit law, while the courts of appeals, case by case, decide whether to reconsider their precedents—with several already refusing to do so. The unsettled state of the law has serious and immediate adverse effects on the administration of justice. Only this Court can provide a definitive national solution to this critical issue.

4. The need for this Court's intervention is confirmed by the significant number of ACCA cases that the Court regularly agrees to review. Besides *Wooden*, this Court has in recent years addressed questions concerning the mens rea necessary to satisfy the ACCA's elements clause, *Borden v. United States*, 141 S. Ct. 1817 (2021); the methodology for determining when a state offense qualifies as a "serious drug offense," *Shular v. United States*, 140 S. Ct. 779 (2020); aspects of generic burglary, *Quarles v. United States*, 139 S. Ct. 1872 (2019); when robbery qualifies under the elements clause, *Stokeling v. United States*, 139 S. Ct. 544 (2019); another generic-burglary case, *United States v. Stitt*, 139 S. Ct. 399 (2018); and the procedural questions implicated in *Mathis*, *Descamps,* and *Shepard*. The constitutional issue in this case cuts across *all* ACCA cases. If this Court's intervention is warranted to resolve discrete circuit splits that reflect subcategories of ACCA cases, it is equally warranted to settle a recurring issue that affects all of them.

D. This Is A Suitable Vehicle To Address The Question Presented

The Court should resolve the question presented in this case. The legal issue is cleanly presented in a published opinion, and the court of appeals denied rehearing en banc. *See* Pet. App. 33a. And it did so with full awareness that, after *Wooden*, the United States *agrees* with petitioner that the occasions issue is for the jury. *See supra* at 10, 14 n.5.

The question presented is also outcome-determinative. If petitioner 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, he cannot be subjected to the ACCA enhancement. Petitioner was never charged under the ACCA. He never admitted the relevant issue—that his prior robberies arose on different occasions—and under a correct understanding of the law as articulated in *Wooden*, they did not.[7] Despite petitioner's objection, the judge determined by a preponderance of the evidence that his prior convictions were committed on different occasions and

[7] The government argued in its response to the petition for rehearing en banc that petitioner "admitt[ed] the relevant facts in district court," thus waiving his claim that he was entitled to indictment and jury consideration of those facts. COA 56 at 2. But petitioner merely admitted that the robberies "occurred on separate dates and [at] separate locations." DE 35 at 1. Under *Wooden*, these facts are not dispositive of the occasions inquiry and no waiver occurred. 142 S. Ct. at 1070-71; *see* DE 35 at 1-2 ("preserv[ing]" objection, pending *Wooden*, that "predicate offenses were committed on occasions different from one another" under the ACCA).

imposed an enhanced ACCA sentence. Pet. App. 16a-19a.

Because he was sentenced before this Court issued *Wooden*, petitioner did not raise the jury-trial issue until his appellate briefing. *See supra* at 9-10. Nevertheless, the Sixth Circuit did not find that the argument was forfeited or apply plain-error review. Rather, the panel squarely addressed the issue on the merits by applying pre-*Wooden* Sixth Circuit precedent holding that "a sentencing judge may answer the question of whether prior offenses were 'committed on occasions different from one another.'" Pet. App. 19a (quoting *United States v. King*, 853 F.3d 267, 274 (6th Cir. 2017)).

That was error. This Court should grant certiorari to correct it, leaving—as is its usual practice—any question of harmless error to the court of appeals on remand. *See Neder v. United States*, 527 U.S. 1, 25 (1999). The government's claim below that the error here was harmless is incorrect.[8] But more importantly, it is also beside the point. As the government has acknowledged, an assertion of harmlessness

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[8] The district court failed to account for important factors under *Wooden* that a rational jury could rely on to find for petitioner. While the court acknowledged that the robberies were "similar" because they were committed by "[t]he same three individuals . . . in Fayette County, Kentucky," it concluded—citing no evidence, much less any elemental facts—that the robberies did "not share a common scheme." Pet. App. 17a. But as this Court acknowledged in *Wooden*, "a range of circumstances may be relevant" to that question, including "the character and relationship of the offenses." 142 S. Ct. at 1071. Whether the requisite relationship existed is not clear beyond a reasonable doubt. *Neder*, 527 U.S. at 17.

"would not warrant declining review—particularly given that the courts of appeals have uniformly erred in resolving that question, which has important implications for the procedures to be followed on a common criminal charge." Br. in Opp. at 8-9, *Reed v. United States*, No. 22-336 (U.S. Dec. 12, 2022).

CONCLUSION

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

Respectfully submitted.

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