

App. No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GREGORY ALLEN COOK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE
PETITION FOR A WRIT OF CERTIORARI**

To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Petitioner, Gregory Allen Cook, by his counsel, respectfully requests pursuant to Supreme Court Rule 13.5 and Rule 22 that the time for a petition for writ of certiorari in this matter be extended for 60 days to and including March 2, 2023. The United States Court of Appeals for the Sixth Circuit issued its judgment and opinion affirming Mr. Cook's sentence on October 3, 2022 (*see* Appendix). Mr. Cook's time to petition for writ of certiorari in this Court would therefore expire on January 2, 2023, absent an extension. Mr. Cook files this application at least ten days before that date, and supports his request as follows:

1. Mr. Cook was sentenced to a mandatory minimum term of fifteen years in prison under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (“ACCA”), for his conviction of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). This is an appeal of the district court’s imposition of the ACCA’s mandatory minimum sentence, which was based on the district judge’s finding of fact, by a preponderance of the evidence and over Mr. Cook’s objection, that he had been previously convicted of three burglaries committed “on occasions different from one another.” 18 U.S.C. 924(e)(1).

2. Good cause supports granting an extension of time. The lower court issued its judgment the day after undersigned counsel suffered an unexpected death in her immediate family, which necessitated out-of-state travel for an extended period. In addition, in the time since the lower court issued its judgment, undersigned counsel has been responsible for a large number of briefs and other filings, as well as serving as faculty at a national training event. Despite due diligence on the part of counsel, the press of these and other responsibilities past and upcoming has left insufficient time in which to prepare the petition.

Mr. Cook therefore asks this Court to extend the time to file a petition for a writ of certiorari in this appeal 60 days to and including March 2, 2023.

Respectfully submitted,

/s/ Jennifer Niles Coffin
Jennifer Niles Coffin
Assistant Federal Defender
Federal Defender Services of
Eastern Tennessee, Inc.

800 South Gay St., Suite 2400
Knoxville, Tennessee 37929
(865) 637-7979
jennifer_coffin@fd.org

Dated: December 13, 2022

APPENDIX

Decision of the Court of Appeals, *United States v. Gregory Allen Cook*,
6th Cir. Case No. 22-5056 (Oct. 3, 2022)1a

No. 22-5056, *United States v. Cook*

(6th Cir. 2017). So the Presentence Report recommended that the district court sentence Cook to the fifteen-year minimum sentence required by the ACCA for having three prior convictions for a violent felony. 18 U.S.C. § 924(e)(1). Over Cook’s objection to the enhancement, the district court sentenced Cook to the ACCA mandatory minimum. Cook now appeals his ACCA-enhanced sentence.

II.

The ACCA imposes a mandatory minimum fifteen-year sentence for a person who “violates section 922(g) of this title and has three previous convictions . . . for a violent felony . . . committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). “This requires two separate inquiries: (1) whether prior convictions qualify as ACCA-predicates, and (2) whether such offenses were committed on different occasions.” *United States v. Hennessee*, 932 F.3d 437, 441 (6th Cir. 2019). Cook challenges only the latter inquiry on appeal. We review de novo the district court’s conclusion that Cook’s prior convictions occurred on different occasions. *United States v. Southers*, 866 F.3d 364, 369 (6th Cir. 2019).

Cook argues that “[t]he district court violated [his] rights under the Fifth and Sixth Amendments when it found, by a preponderance of evidence and based on information contained in state court records, that he committed three prior offenses ‘on occasions different from one another.’” Appellant Br. at 11 (quoting 18 U.S.C. § 924(e)(1)). According to Cook, such facts “should have been charged in the indictment and found by a jury beyond a reasonable doubt.” *Id.* at 12.

Cook acknowledges, however, that circuit precedent forecloses this argument. “[T]his court has already held 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

No. 22-5056, *United States v. Cook*

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)); *see also Hennessee*, 932 F.3d at 444; *United States v. Burgin*, 388 F.3d 177, 186 (6th Cir. 2004).

Cook attempts to sidestep this precedent by arguing that those cases either came before or overlooked two Supreme Court cases that make clear that the different-occasions question is for the jury: *United States v. Hayes*, 555 U.S. 415 (2009), and *Nijhawan v. Holder*, 557 U.S. 29 (2009). *See Ne. Ohio Coal. for the Homeless v. Husted*, 831 F.3d 686, 720 (6th Cir. 2016) (A panel may overrule a prior binding precedent if the “precedent overlooked earlier Supreme Court authority.”). Neither case, however, involved the ACCA or the different-occasions requirement. They give us no authority to revisit our binding precedent.

The Supreme Court’s recent opinion in *Wooden v. United States*, 142 S. Ct. 1063 (2022) doesn’t alter this conclusion. In *Wooden*, the Supreme Court addressed whether burglarizing ten adjoining units in a single storage facility by burrowing through the walls constituted ten different occasions for purposes of the ACCA. *Id.* at 1067. Based on the facts of the case and the ordinary meaning of “occasions,” the Court concluded that they didn’t. *Id.* at 1074. But the defendant in *Wooden* raised no constitutional challenge to his sentence. *See id.* at 1087 n.7 (Gorsuch, J., concurring in the judgment). So *Wooden* didn’t disrupt our prior caselaw.

Cook also suggests that the winds are shifting on this issue, noting that two Justices of the Supreme Court and several circuit judges have questioned whether allowing a judge to find the different-occasions requirement by a preponderance might violate a defendant’s Fifth and Sixth Amendment rights. *See id.*; *see also 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

No. 22-5056, *United States v. Cook*

1126, 1134–36 (8th Cir. 2018) (Stras, J., concurring); *United States v. Thompson*, 421 F.3d 278, 291–95 (4th Cir. 2005) (Wilkins, C.J., dissenting). And in a post-briefing letter, the government informed us that it has changed its own thinking on this question; it now believes “that a jury should find (or a defendant should admit) that [the] ACCA predicates were committed on occasions different from one another.” App. R. 33. Nonetheless, the government asks us to affirm Cook’s sentence on the ground that this court’s binding precedent forecloses that argument. The government is right. The Supreme Court has not answered this question, so we must follow our precedent. *See Salmi v. Sec’y of Health & Hum. Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). The district court therefore didn’t err by applying the ACCA enhancement.

* * *

We AFFIRM.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-5056

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GREGORY ALLEN COOK,

Defendant - Appellant.



Before: GUY, WHITE, and LARSEN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Tennessee at Chattanooga.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the sentence imposed on Gregory Cook by the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

A handwritten signature in cursive script, appearing to read "Deborah S. Hunt".

Deborah S. Hunt, Clerk