No. 23-370

IN THE

Supreme Court of the United States

PAUL ERLINGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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The government agrees that certiorari should be granted—and that the Constitution requires a jury to find (or the defendant to admit) three qualifying convictions for offenses committed on "occasions different from one another" before the court can impose an enhanced sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). The government's reasons for acquiescing make clear why certiorari is warranted. First, the courts of appeal are answering this constitutional question incorrectly and denying defendants important rights in a common criminal charge. Second, experience has demonstrated that the courts of appeals will not correct course without this Court's intervention. Third, no further percolation of the issue is necessary, and this case is an appropriate vehicle for resolving it. U.S. Br. 6-16.

In fact, this case is an ideal vehicle for resolving this constitutional issue. Petitioner raised and preserved the issue below and his case epitomizes why the Constitution requires a jury to apply the multi-factor, holistic test of *Wooden v. United States* 595 U.S. 360 (2002). Further, the district court imposed an ACCA sentence reluctantly and only because circuit law, it believed, compelled that result. And the procedural logjam in the lower courts, *see* Pet. 25-27, can be broken only through this Court's review. Accordingly, the Court should grant review on the question presented in the petition—whether the Constitution requires a jury trial and proof beyond a reasonable doubt to find the different-occasions issue, Pet. i—and reverse the judgment below.

A. The Government Agrees That The Decision Below Is Incorrect

The government agrees with petitioner on the merits. It acknowledges that the determination whether the prior offenses were committed on different occasions for purposes of ACCA implicates factual questions that raise the statutory maximum and minimum sentences under 18 U.S.C. § 922(g) and § 924(e)(1) and that under the line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that determination must therefore be made by the jury. U.S. Br. 6-9. That acknowledgment is correct and accords with petitioner's position. *See* Pet. 14-18. The conclusion that *Apprendi* principles apply follows ineluctably from this Court's interpretation of the different-occasions requirement in *Wooden v. United States*, 595 U.S. 360 (2002), as requiring a "holistic" and "multi-factor[]" analysis considering "a range of circumstances," such as timing, overall course of conduct, intervening events, proximity of location, and "the character and relationship of the offenses." *Id.* at 369. Combined with the severe statutory consequence of ACCA—raising the mandatory minimum and maximum sentence—this Court's decisions dictate the outcome: a court cannot find these facts without violating the Sixth Amendment. This Court has adopted a "narrow exception" allowing a judge to determine "the fact of a prior conviction." *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (discussing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)). But "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed the offense." *Mathis v. United States*, 579 U.S. 500, 511

(2016). And the different-occasions analysis goes far beyond the simple fact of a prior conviction to reach a wide range of facts involving the circumstances of the offense. *See Wooden*, 595 U.S. at 369. The government agrees with this analysis and acknowledges that the Seventh Circuit's decision in this case is incorrect. *See* U.S. Br. 5, 8-9.

B. The Government Agrees That The Courts Of Appeals Will Not Correct Their Erroneous Holdings On Their Own

The government also agrees that this Court's intervention is necessary to correct the courts of appeals' continued reliance on pre-*Wooden* circuit precedent that is plainly incorrect. U.S. Br. 10-14. That acknowledgement reflects reality: the courts of appeals will not resolve this issue on their own. As petitioner and the government explain, several have declined to reconsider their pre-*Wooden* precedent en banc. *See* Pet. 20-21; U.S. Br. 11-12. The only court to grant en banc on the issue then sidestepped it, by resolving the case on other grounds after expending scarce en banc resources and over the protests of dissenting judges—who now implore this Court to act. *See United States v. Stowell*, 82 F.4th 607, 610 (8th Cir. 2023) (en banc); *id.* at 612 (Erickson, J., dissenting) (the "Sixth Amendment claim implicates an important constitutional issue that we hope the Supreme Court will soon resolve"). And the judges in the Fourth Circuit—both those that recognize the sea change that *Wooden* brought about and those who would adhere to old law—voted against en banc while urging this Court to intervene and "give the courts of appeals guidance in this important matter." *United*

States v. Brown, 77 F.4th 301, 302 (4th Cir. 2023) (Niemeyer, J., concurring in part with statement of Heytens, J., on denial of rehearing en banc); *see also id.* (statement of Heytens, J.) (expressing "hope" that this Court "will step in to illuminate the path soon").

The courts of appeals' approach has caused chaos in the district courts, with defendants receiving inconsistent access to their constitutional rights depending on their location or judge, even within the same district. Pet. 25. As the government acknowledges, further delay will increase the number of constitutionally problematic convictions. U.S. Br. 14. This Court's intervention is necessary to provide the guidance that the courts of appeals plainly need.

C. This Case Is An Ideal Vehicle

The Court should grant the petition in this case because it is an ideal vehicle for review.

Petitioner unquestionably preserved the *Apprendi* issue this Court reserved in *Wooden* in the district court and court of appeals. Pet. App. 1a-2a, 6a-9a, 37a. In a published opinion, the court of appeals opinion cleanly and directly addressed the issue, relying on binding circuit precedent to reject petitioner's argument. Pet. App. 7a-8a. The government agrees that petitioner preserved his constitutional claim, that the court of appeals decided this case on the merits, and that "[n]othing would preclude this Court from likewise addressing the merits." U.S. Br. 15-16. This case thus squarely presents the legal issue that *Wooden* reserved—"whether the Sixth Amendment requires that a jury, rather than a judge, resolve whether prior crimes

occurred on a single occasion," 595 U.S. at 365 n.3—without any complicating procedural or substantive issues.

The issue also matters to the outcome of this case. Petitioner did not admit the critical issue of whether his three-decades-old burglary offenses—all allegedly arising in the same county in the course of a single week when petitioner was eighteen—occurred on different occasions. And a jury, applying the multifactor test of *Wooden* and holding the government to its burden to prove its case beyond a reasonable doubt, could and should find that they did not. Moreover, the sentencing court viewed his 180-month mandatory minimum sentence as "unfortunate" and three times as long as the sentence it would have imposed absent the requirements of the ACCA. Pet. 7-9. The constitutional error in this case thus had a stark effect on petitioner's sentence.*

As Justice Gorsuch wrote in his concurrence in *Wooden*, "[t]he Fifth and Sixth Amendments generally require the government in criminal cases to prove every fact essential to an individual's punishment to a jury beyond a reasonable doubt," and "there is little doubt [the Court] will have to" determine how that constitutional principle applies in this context "soon." 595 U.S. at 397 n.7. This case provides that opportunity—and the government

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* Petitioner disagrees with the government's position in the court of appeals that any error was harmless, *see* U.S. Br. 15-16, as well as the government's position that petitioner's waiver of indictment would excuse the government's failure to properly charge the "on different occasions issue," *id.* at 15 n.5. But those issues are ones for resolution on remand.

agrees that the issue should be resolved this Term. The petition should therefore be granted, as the government suggests. Alternatively, if the Court grants review in one of two other pending cases presenting the issue—*Thomas v. United States*, No. 23-5457, or *Valencia v. United States*, No. 23-5606—the petition here should be held pending the disposition of that case.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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