No. 23-370

In the Supreme Court of the United States

PAUL ERLINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT
SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Constitution requires that a jury find (or the defendant admit) that a defendant's predicate offenses were "committed on occasions different from one another" before the defendant may be sentenced under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 77 F.4th 617. The order of the district court is not published in the Federal Supplement but is available at 2021 WL 2915014.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2023. The petition for a writ of certiorari was filed on October 4, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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.

Section 924(e)(1) of Title 18 of the United States Code 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).

18 U.S.C. 924(e)(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Indiana, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by one year of supervised release. Judgment 2-3. The district court subsequently granted resentencing under 28 U.S.C. 2255, D. Ct. Doc. 81 (July 12, 2021), and reimposed the same sentence, Am. Judgment 2-3; Pet. App. 58a-59a. The court of appeals affirmed. Pet. App. 1a-9a.

1. In 2017, police officers received a report that petitioner, who had previously been convicted of a felony, had weapons and ammunition at his residence. 2018 Presentence Investigation Report (2018 PSR) ¶ 5; Pet. App. 26a. During a subsequent traffic stop, petitioner admitted that multiple firearms were stored at his residence. 2018 PSR ¶ 6. When officers searched the residence, they found a safe containing 16 long guns, four pistols, and ammunition. *Id.* ¶¶ 5, 8.

Petitioner was charged by information with possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. 10a-11a; D. Ct. Doc. 23 (Apr. 20, 2018). Petitioner filed a petition to enter a plea of guilty, D. Ct. Doc. 29 (Apr. 20, 2018), and waived his right to be charged by indictment, D. Ct. Doc. 33 (May 15, 2018).

2. In preparation for petitioner's guilty plea and sentencing, the Probation Office determined that petitioner qualified for an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). 2018 PSR ¶ 20. At the time of petitioner's offense, the default term of imprisonment for possessing a firearm as a felon was zero to ten years. See 18 U.S.C. 924(a)(2) (2012).[1] The ACCA prescribes a penalty of 15 years to life imprisonment if the defendant has at least "three 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). The ACCA defines a "violent felony" as, among other things,

[1] For Section 922(g) offenses committed after June 25, 2022, the default term of imprisonment is zero to 15 years. See Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12004(c), 136 Stat. 1329 (18 U.S.C. 924(a)(8)).

an offense punishable by more than one year in prison that "is burglary." 18 U.S.C. 924(e)(2)(B)(ii).

The Probation Office determined that petitioner had several prior state-law convictions for offenses that qualified as ACCA predicates, including two convictions for Illinois residential burglary, committed in 1990 and 1991, respectively (2018 PSR ¶¶ 35, 42); five convictions for Indiana burglary, all committed in 1991 (*id.* ¶¶ 38-41, 43); and two convictions for Indiana controlled-substance offenses, both committed in 2003 (*id.* ¶¶ 45-46). The Probation Office further determined that "at least three" of those offenses "were committed on different occasions." *Id.* ¶ 20.

After accepting petitioner's guilty plea, D. Ct. Doc. 67, at 15 (July 15, 2020), the district court found that petitioner qualified for sentencing under the ACCA, *id.* at 16-17. The court based its ACCA determination on the Illinois residential burglary offense committed in 1991, one Indiana burglary offense committed in 1991 in Pike County, and the two Indiana controlled-substance offenses committed in 2003. *Ibid.* The court sentenced petitioner to 180 months of imprisonment, to be followed by one year of supervised release. *Id.* at 31-32; Judgment 2-3; Pet. App. 2a.

3. In 2021, the district court vacated petitioner's sentence under 28 U.S.C. 2255 in light of intervening circuit decisions concluding that Illinois residential burglary is not a violent felony under the ACCA, see *United States* v. *Glispie*, 978 F.3d 502, 503 (7th Cir. 2020) (per curiam), and that the relevant Indiana controlled-substance offenses are not serious drug offenses under the ACCA, see *United States* v. *De La Torre*, 940 F.3d 938, 951-952 (7th Cir. 2019). See Pet. App. 2a, 14a, 15a.

The district court observed that the fourth conviction upon which it had relied, Indiana burglary, remained a valid ACCA predicate, D. Ct. Doc. 81, at 4 (citing *United States* v. *Perry*, 862 F.3d 620, 624 (7th Cir. 2017), cert. denied, 138 S. Ct. 1545 (2018)), and further noted that petitioner had several additional convictions for Indiana burglary that the court had not considered when originally sentencing him, *id.* at 5. The court accordingly ordered resentencing, in which "the parties may present evidence and argument regarding whether those [additional Indiana burglary] convictions are valid ACCA predicates and whether the Court should rely on them when it had not done so at his original sentencing hearing." *Ibid.*

In preparation for resentencing, the Probation Office once again determined that petitioner qualified for an ACCA sentence. 2022 Presentence Investigation Report (2022 PSR) ¶ 23. The Probation Office noted that, in addition to the 1991 Indiana burglary committed in Pike County (*id.* ¶ 46), petitioner had four additional convictions for Indiana burglary committed in April 1991 in Dubois County (*id.* ¶¶ 41-44). The Probation Office further determined that "at least three" of those burglary offenses "were committed on different occasions." *Id.* ¶ 23.

In its sentencing memorandum, the government supplied a separate charging document for each of the four Indiana burglary convictions committed in Dubois County, as well as the plea agreement and judgment for those convictions. D. Ct. Doc. 105, Exs. 1-6 (May 5, 2022); see Pet. App. 2a-3a. Those documents provided evidence that each of petitioner's burglaries took place at a different business, and three of the burglaries occurred on different dates: (1) April 4, 1991, at Mazzio's

Pizza; (2) April 8, 1991, at The Great Outdoors, Inc.; (3) April 11, 1991, at Druther's; and (4) April 11, 1991, at Schnitzelbank. D. Ct. Doc. 105, Exs. 1-4; see Pet. App. 3a.

Petitioner objected to ACCA classification. Pet. App. 3a. As relevant here, petitioner contended that under the Sixth Amendment, he could not be sentenced under the ACCA in the absence of a jury finding that at least three of his predicate offenses were committed on different occasions. *Ibid.*; see *id.* at 23a, 37a, 41a-42a, 45a-48a.

The district court rejected petitioner's argument that the Sixth Amendment requires a jury finding beyond a reasonable doubt that the predicate offenses occurred on different occasions in order to trigger the ACCA, concluding that circuit precedent foreclosed that claim. Pet. App. 56a-57a ("I don't believe that [petitioner's] Sixth Amendment rights are violated by me finding that these occurred on separate occasions," but "you have done a tremendous job preserving this issue for appellate review."); see *id.* at 55a. And even though the court declined to count the two April 11th burglaries as separate, it found that petitioner qualified for sentencing under the ACCA because his record included three burglary convictions occurring in different "locations on three different dates." *Id.* at 55a; see *id.* at 55a-56a. Applying the ACCA, the district court again sentenced petitioner to 180 months of imprisonment, to be followed by one year of supervised release. *Id.* at 59a; Am. Judgment 2-3.

4. The court of appeals affirmed. Pet. App. 1a-9a.

On appeal, the government agreed with petitioner that "the Sixth Amendment requires a jury to determine whether predicate offenses were committed on

different occasions." Gov't C.A. Br. 7. The government observed that between the original sentencing and the resentencing, this Court had decided *Wooden* v. *United States*, 595 U.S. 360 (2022), which rejected an elements-based approach to the ACCA's different-occasions inquiry in favor of a "holistic" and "multi-factored" approach under which "a range of circumstances may be relevant to identifying episodes of criminal activity." *Id.* at 365, 369; see Gov't C.A. Br. 7. The government contended, however, that "the error was harmless" in this case "because [petitioner]'s burglaries—committed on different days at different locations—occurred on separate occasions." Gov't C.A. Br. 7.

The court of appeals rejected petitioner's and the government's argument that the Sixth Amendment requires a jury to determine whether a defendant's predicate offenses were committed on separate occasions. Citing decisions that both predated and postdated *Wooden*, the court observed that it had consistently held "that a sentencing judge may make a 'separate occasions' finding when deciding the ACCA enhancement." Pet. App. 6a (citations omitted). The court further observed that "*Wooden* explicitly did not address whether the 'separate occasions' determination must be made by a jury rather than a judge." *Id.* at 7a (citing *Wooden*, 595 U.S. at 365 n.3). And the court noted that "earlier this year," it had "affirmed an ACCA sentence" where the sentencing judge made the "'separate occasions'" finding. *Ibid.*

The court of appeals accordingly concluded that it was "bound by [circuit] precedent." Pet. App. 7a; see *id.* at 7a n.3 ("[T]he parties' position is foreclosed by current precedent."). The court explained that under that precedent, "[t]he government was not required to

prove to a jury beyond a reasonable doubt that [petitioner] committed the Indiana burglaries on separate occasions"; instead, "[t]he government could prove its position to the sentencing judge" by a "preponderance of the evidence." *Id.* at 8a. And the court of appeals agreed with the district court that the government had satisfied its burden under that standard to show that the identified "burglaries were committed on different occasions." *Ibid.*

The court of appeals emphasized that "the felonies took place on three different dates and at three different businesses." Pet. App. 8a. Although petitioner argued that "Indiana's charging documents may not always be accurate or reliable," the court found that "here, the unequivocal nature of the charging documents about the different dates of the offenses charged * * * plus [petitioner]'s guilty plea to each charge, are sufficient to show by a preponderance of the evidence that the offenses were committed on separate occasions." *Id.* at 9a.[2]

SUMMARY OF ARGUMENT

This Court has made clear that the Constitution forecloses judicial determination of a fact that enhances a defendant's sentencing range, except for the fact of a prior conviction. The multifactored inquiry adopted in *Wooden* v. *United States*, 595 U.S. 360 (2022), for finding that predicate offenses occurred on different occasions under the ACCA does not qualify as finding the fact of a prior conviction. The government has thus

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[2] The court of appeals also rejected petitioner's contention that Indiana burglary does not qualify as a "violent felony" under the ACCA. Pet. App. 4a-6a. Petitioner has not challenged that determination here.

acknowledged since *Wooden* that the ACCA's different-occasions requirement must be alleged in an indictment and found by a jury beyond a reasonable doubt.

1. Since *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court has applied a general rule that the Sixth Amendment requires that any fact that increases a defendant's statutory penalty range must be alleged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. That rule does not, however, apply to "the fact of a prior conviction." *Alleyne* v. *United States*, 570 U.S. 99, 111 n.1 (2013). A judge may therefore make such findings as the venue, date, crime, defendant, and other matters necessarily incorporated into a prior conviction. But the exception does not allow for inquiry into the specific offense conduct underlying a conviction.

The ACCA increases the statutory sentencing range for possessing a firearm following a felony conviction if the defendant has "three 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). A sentencing judge may make the threshold determination that a defendant's prior convictions qualify as violent felonies or serious drug offenses. But the Court's ACCA precedents have strictly limited that judicial inquiry to determining the elements of the prior offenses, in large part to avoid Sixth Amendment concerns.

2. Those Sixth Amendment concerns are now unavoidable, however, with respect to ACCA's second determination into whether the defendant's prior qualifying offenses occurred on different occasions. Instead, the Court's recent articulation of the different-occasions standard removes it from a judge's domain. In *Wooden*,

this Court held that the inquiry into whether qualifying prior offenses were committed on "occasions different from one another," 18 U.S.C. 924(e)(1), is "multi-factored in nature," taking into account, *inter alia*, whether (1) the predicate crimes were "committed close in time"; (2) their "[p]roximity of location"; and (3) the "character and relationship of the offenses," *i.e.*, the extent to which the underlying conduct is "intertwined." 595 U.S. at 369. *Wooden*'s inquiry, which looks to the real-world circumstances of the predicate offenses and their relationship to one another, encompasses examination of the specific conduct of a prior offense.

The resulting inquiry cannot plausibly be characterized as limited to the fact of a prior conviction, but instead requires findings by the jury in the felon-in-possession case. It is surpassingly unlikely, for example, that a prior jury has made a finding of whether three prior ACCA predicates were "intertwined." *Wooden* accordingly requires new findings of a sort that the Court's precedents assign to the jury, not the judge, in an ACCA case. Courts of appeals' adherence to pre-*Wooden* precedent holding otherwise is unsustainable; none of the rationales offered for that approach remains viable. And concerns that submission of prior-crimes evidence to the jury may prejudice the defendant can be mitigated through appropriate trial-management procedures, rather than by curtailing a defendant's constitutional rights.

3. Errors in allocating a particular finding to the judge or the jury are, however, subject to harmless-error principles. And circuit decisions illustrate that such errors are usually harmless in the context of the ACCA's different-occasions requirement. The decision

below did not address the government's specific harmlessness contention in this case. Accordingly, the Court should vacate the decision below and remand for further proceedings, including consideration in the first instance of whether the constitutional error here was harmless.

ARGUMENT

Before this Court's decision in *Wooden* v. *United States*, 595 U.S. 360 (2022), the United States took the position that judges could—like the sentencing court here—undertake the different-occasions inquiry under the ACCA. But in light of the standard that *Wooden* adopted for determining whether offenses occurred on different occasions, the government agrees with petitioner that the Sixth Amendment requires a jury to find (or a defendant to admit) that predicate offenses were committed on different occasions before the defendant may be sentenced under the ACCA. The ACCA increases the statutory penalties to which a defendant is exposed, and *Wooden* makes clear that the ACCA's different-occasions inquiry requires consideration of factual circumstances beyond the fact of a prior conviction. This Court should therefore vacate the decision below and remand for further proceedings—including application of harmless-error principles—on petitioner's jury-trial claim.

I. THE CONSTITUTION REQUIRES THAT A JURY FIND, OR A DEFENDANT ADMIT, THAT PREDICATE OFFENSES WERE "COMMITTED ON OCCASIONS DIFFERENT FROM ONE ANOTHER" UNDER THE ACCA

This Court has made clear that factual prerequisites for a statutory sentence enhancement must be found by a jury (or admitted by the defendant), except for the

fact of a prior conviction. While the Court has explained that the exception is broad enough to encompass a judicial inquiry into whether a prior offense qualifies as a "violent felony" or "serious drug offense" under the ACCA, 18 U.S.C. 924(e)(1), its decisions limiting the scope of that judicial inquiry have highlighted the boundaries of the Sixth Amendment. The ACCA's requirement that qualifying offenses were "committed on occasions different from one another," *ibid.*, as defined in *Wooden*, exceeds those boundaries by necessitating a potentially wide-ranging inquiry into the specific conduct underlying the offenses and their relationship to one another. The Sixth Amendment thus requires that a jury conduct that inquiry.

A. Other Than The Fact Of A Prior Conviction, The Fifth And Sixth Amendments Provide A Defendant With The Right To A Jury Finding Beyond A Reasonable Doubt Of A Fact That Increases The Statutory Sentencing Range

Over the past two decades, this Court has invalidated a number of sentencing schemes that allowed a judge to make factual findings that would expand a defendant's statutory sentencing range beyond what the jury's factual findings alone would support. In doing so, however, the Court has recognized a well-established, but limited, exception for the fact of a prior conviction.

1. The Sixth Amendment guarantees the right to a "jury" in "all criminal prosecutions," and the Fifth Amendment entitles criminal defendants to "due process of law." U.S. Const. Amends. V, VI. In a line of decisions beginning with *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court has read those rights in conjunction to hold that, as a general matter, "any fact that increases the penalty for a crime" must "be submitted

to a jury, and proved beyond a reasonable doubt." *Id.* at 490; see *Alleyne* v. *United States*, 570 U.S. 99, 103 (2013).

The Court has held that "broad sentencing discretion, informed by judicial factfinding" within a statutory range that is based on the findings of the jury "does not violate the Sixth Amendment." *Alleyne*, 570 U.S. at 115-116. But "facts increasing the statutory maximum" or "fact[s] triggering a mandatory minimum"—*i.e.*, "'facts that increase the prescribed range of penalties to which a criminal defendant is exposed'"—generally must be proved to a jury beyond a reasonable doubt or admitted by the defendant. *Id.* at 111-112 (citation omitted).

That general requirement is, however, subject to an important qualifier: In *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), the Court recognized the "narrow exception to this general rule for the fact of a prior conviction." *Alleyne*, 570 U.S. at 111 n.1. As the Court observed in *Almendarez-Torres*, recidivism "is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." 523 U.S. at 243; see *id.* at 230 (describing recidivism to be "as typical a sentencing factor as one might imagine"). And "[c]onsistent with this tradition, the Court said long ago that a State need *not* allege a defendant's prior conviction in the indictment or information that alleges the elements of an underlying crime, even though the conviction was 'necessary to bring the case within the statute.'" *Id.* at 243 (quoting *Graham* v. *West Virginia*, 224 U.S. 616, 624 (1912)).

In light of *Almendarez-Torres*, this Court has consistently recognized in its *Apprendi* line of cases that the fact of a prior conviction need not be charged in an

indictment or proved to a jury beyond a reasonable doubt when it increases the statutory penalty for a crime. See *Apprendi*, 530 U.S. at 490; see, *e.g.*, *United States* v. *Haymond*, 139 S. Ct. 2369, 2377 n.3 (2019) (plurality opinion); *Mathis* v. *United States*, 579 U.S. 500, 511 (2016); *Descamps* v. *United States*, 570 U.S. 254, 269 (2013); *Alleyne*, 570 U.S. at 111 n.1; *Southern Union Co.* v. *United States*, 567 U.S. 343, 358-360 (2012); *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 567 n.3 (2010); *James* v. *United States*, 550 U.S. 192, 214 n.8 (2007), overruled on other grounds by *Johnson* v. *United States*, 576 U.S. 591 (2015); *Cunningham* v. *California*, 549 U.S. 270, 274-275 (2007); *United States* v. *Booker*, 543 U.S. 220, 244 (2005); *Blakely* v. *Washington*, 542 U.S. 296, 301-302 (2004).

2. The "fact of a prior conviction," *Alleyne*, 570 U.S. at 111 n.1, includes facts encapsulated in judicial records that are components of that conviction. Most obviously, the fact of a prior conviction includes the venue where the conviction was entered, the date on which it was entered, and the identity of the convicted person. The Court has also recognized that it may include certain aspects of judicial records such as "charges and instructions," a "bench-trial judge's formal rulings of law and findings of fact," and, "in pleaded cases," the "statement of factual basis for the charge * * * , shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea." *Shepard* v. *United States*, 544 U.S. 13, 20-21 (2005); *id.* at 16; see, *e.g.*, *Mathis*, 579 U.S. at 505; see also *Oregon* v. *Kennedy*, 456 U.S. 667, 669-670, 679 (1982) (allowing judge, rather than a jury, to determine

whether a defendant was previously convicted of the "same offence" under the Double Jeopardy Clause).

At the same time, the Court has made clear that notwithstanding *Almendarez-Torres*'s shorthand references to "recidivism," see, *e.g.*, 523 U.S. at 243, the "fact *of* a prior conviction" does not include every fact related *to* a prior conviction. *Almendarez-Torres* itself addressed an enhancement that looked only to whether a defendant had been deported "subsequent to a conviction for commission of an aggravated felony." *Id.* at 226; see 8 U.S.C. 1326(b)(2). Application of that enhancement requires a determination of the date on which the conviction was entered, the statutory offense of conviction, and the identity of the defendant who was convicted. But, in contrast, the Court has explained that the Sixth Amendment forbids an approach that requires a "court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct" for a prior conviction. *Descamps*, 570 U.S. at 269.

Instead, "[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt." *Descamps*, 570 U.S. at 269. The Court has suggested that the prior-conviction exception can be supported, in part, by the prior conviction having "itself * * * been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones* v. *United States*, 526 U.S. 227, 249 (1999); see *Apprendi*, 530 U.S. 488 (noting that "the certainty that procedural safeguards attached to any 'fact' of prior conviction * * * mitigated the due process and Sixth Amendment concerns"). And the Court has accordingly identified "Sixth Amendment concerns" with judicial findings of

facts when their "proof [was] unnecessary" for the prior conviction. *Mathis*, 579 U.S. at 511-512. Facts that are "mere real-world things—extraneous to the [prior] crime's legal requirements," *id.* at 504, are distinct from the fact of a prior conviction itself.

More specifically, "circumstances or events having no legal effect [or] consequence" need not have been "found by a jury nor admitted by a defendant" to enable the prior conviction. *Mathis*, 579 U.S. at 504 (citation omitted; brackets in original). 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—or even be precluded from doing so by the court." *Id.* at 512 (citation and internal quotation marks omitted). "At trial, extraneous facts and arguments may confuse the jury." *Descamps*, 570 U.S. at 270. "Indeed, the court may prohibit them for that reason." *Ibid.* "And during plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations." *Ibid.* "When that is true," the Court has observed, "a prosecutor's or judge's mistake" on such matters "reflected in the record[] is likely to go uncorrected." *Mathis*, 579 U.S. at 512.

B. This Court's Precedents Have Carefully Limited A Judge's Authority To Determine Whether Offenses Qualify As ACCA Predicates To Avoid Sixth Amendment Concerns

Such considerations have informed and shaped the Court's precedents in the ACCA context. The ACCA increases the statutory minimum and maximum sentence for a violation of 18 U.S.C. 922(g) if the defendant has at least "three 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). The ACCA thus contains two distinct requirements: first, the defendant must have three prior convictions that each qualify as a "violent felony" or "serious drug offense," and second, those offenses must have been "committed on occasions different from one another." *Ibid*. The first determination—whether a prior conviction qualifies as an ACCA predicate—can be made by a judge, not a jury. See *Mathis*, 579 U.S. at 511-512; *Descamps*, 570 U.S. at 267-270; *Shepard*, 544 U.S. at 13. But the Court has emphasized that allowing a judge to "go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense" would "raise serious Sixth Amendment concerns." *Mathis*, 579 U.S. at 504.

The ACCA's first determination accordingly adheres to a "categorical approach" that looks only to the "elements of the prior conviction," "not the facts of the case." *Shular* v. *United States,* 140 S. Ct. 779, 783-784 (2020). Under that approach, a judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Mathis*, 579 U.S. at 511-512; see *Descamps*, 570 U.S. at 269. "Elements are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction." *Mathis*, 579 U.S. at 504 (citation and internal quotation marks omitted). "At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, * * * and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." *Ibid.* They are thus part and parcel of the fact of a prior conviction; the judgment that the defendant committed the crime necessarily reflects and incorporates them.

In contrast, however, in this Court's very first post-*Apprendi* decision addressing the scope of the ACCA's first determination, a plurality explained that allowing a judge to "make a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of [a] prior plea * * * raises the concern underlying * * * *Apprendi*"—namely, the Sixth Amendment's "guarantee" that a jury find "any disputed fact essential to increase the ceiling of a potential sentence." *Shepard*, 544 U.S. at 25. "While the disputed fact" of, for example, the precise structure that was burglarized "can be described as a fact about a prior conviction," the plurality saw such a fact as "too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to * * * *Apprendi,* to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." *Ibid.*

Echoing those same points, this Court's subsequent ACCA decisions have repeatedly held that, in determining whether a crime qualifies as an ACCA predicate, a sentencing judge must "focus solely" on "the elements of the crime of conviction"—comparing them to the contours of the relevant ACCA category—"while ignoring the particular facts of the case." *Mathis*, 579 U.S. at 504. "[E]ven if the defendant's actual conduct (*i.e.*, the facts of the crime) fits within the" ACCA category—*e.g.*, even if "a sentencing judge knows (or can easily discover) that the defendant carried out a 'real' burglary"—if the elements of the crime of conviction "cover[] any more conduct than the generic offense, then it is not an ACCA 'burglary.'" *Id.* at 504, 510.

The Court has, in particular, rejected an approach under which "sentencing courts * * * would have [had] to expend resources examining (often aged) documents"

relating to a prior conviction "for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial," facts that were "unnecessary to the crime of conviction." *Descamps*, 570 U.S. at 270. The Court has observed that not only will the "meaning of those documents * * * often be uncertain," but "the statements of fact in them may be downright wrong." *Ibid.*

Indeed, the Court has precluded sentencing judges from consulting such records even for the limited purpose of identifying which of the alternative statutory "means" for satisfying an element is reflected by the prior conviction. *Mathis*, 579 U.S. at 507-508 (emphasis added; internal quotation marks omitted). If, for example, a statute spells out various factual ways of committing some component of the offense, such that "a jury need not find (or a defendant admit)" a particular means of commission, a judge in a later ACCA case cannot assume that the jury implicitly made that finding, let alone make the finding itself. *Id.* at 506; see *id.* at 506-508 (precluding such inquiry to determine the nature of the structure that was burglarized); *Descamps*, 570 U.S. at 259 (precluding such inquiry to determine the lawfulness of the entry into the burglarized structure).

C. Because *Wooden* Construed The ACCA's Different-Occasions Determination To Incorporate Examination Of Prior Conduct Not Included In The Fact Of A Prior Conviction, That Determination Must Be Made By A Jury Beyond A Reasonable Doubt

The Court's elements-only approach to the ACCA's first determination (whether the prior convictions qualify as ACCA predicates) stands in stark contrast to *Wooden*'s explication of the ACCA's second determination

—whether the defendant committed at least three qualifying predicate offenses on "occasions different from one another." The different-occasions inquiry under *Wooden* is not cabined to the legal elements of the prior offenses. It instead goes beyond the fact of a prior conviction, and into matters that the jury in the ACCA case must determine.

In *Wooden*, the government advocated an "elements-based" approach to determining whether two offenses occurred on different occasions that would have been consistent with the elements-based categorical approach to the classification of a particular crime as an ACCA predicate—which is a question for a judge. See Gov't Br. at 9, 13, 46, *Wooden*, *supra* (No. 20-5279). The government also observed that a different interpretation would raise Sixth Amendment concerns. See *id.* at 46-47.

The Court rejected the government's approach in favor of a "holistic" and "multi-factored" inquiry. *Wooden*, 595 U.S. at 365-366, 369. The Court emphasized that "a range of circumstances" relating to the conduct underlying the prior offense "may be relevant to identifying episodes of criminal activity." *Id.* at 369. More specifically, the Court instructed that

> [o]ffenses 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. Proximity of location is also important; the further away crimes take place, the less likely they are components of the same criminal event. And the character and relationship of the offenses may make a difference: The more similar or intertwined the con-

> duct 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.

Ibid.

In adopting that approach, the Court declined to address "whether the Sixth Amendment requires that a jury, rather than a judge, resolve whether prior crimes occurred on a single occasion," because the petitioner had "not raise[d]" the issue. *Wooden*, 595 U.S. at 365 n.3; see *id.* at 397 n.7 (Gorsuch, J., concurring in the judgment) (observing that a "constitutional question simmers beneath the surface of today's case" because "only judges found the facts relevant to Mr. Wooden's punishment under the Occasions Clause"). But now that the issue is squarely raised, it is clear that the holistic and multifactored different-occasions determination defies characterization as merely "the fact of a prior conviction," *Alleyne*, 570 U.S. at 111 n.1. The Sixth Amendment therefore precludes a judge from making that determination.

Wooden's approach requires factual findings well beyond what can plausibly be characterized as the "fact of a prior conviction." See *Wooden*, 595 U.S. at 369; *Apprendi*, 530 U.S. at 476-489. It does not simply require a sentencing court to "determine what crime, with what elements, the defendant was convicted of." *Mathis*, 579 U.S. at 512. Instead, it requires a determination of a prior offense's relationship to other prior offenses, taking account of a wide "range of circumstances" that "may be relevant." *Wooden*, 595 U.S. at 369. It is therefore subject to the general *Apprendi* rule, which requires that it be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt.

Applying *Wooden*'s approach to the circumstances of *Wooden* itself, for example, the Court observed that the defendant's "crimes all took place at one location, a one-building storage facility with one address"; that "[e]ach offense was essentially identical"; that "[t]he burglaries were part and parcel of the same scheme, actuated by the same motive, and accomplished by the same means"; and that "each burglary in some sense facilitated the next, as Wooden moved from unit to unit to unit, all in a row." 595 U.S. at 370-371; see *id.* at 370 (noting that "a continuous stream of closely related criminal acts at one location" represents "a single occasion"). Such real-world facts underlying a defendant's prior convictions—and those convictions' relationship to one another—will rarely, if ever, be reflected in the elements of any one of the predicate crimes, or otherwise incorporated into the prior convictions themselves.

Instead, the questions that *Wooden* makes relevant—(1) whether the crimes were "committed close in time" (*i.e.*, "in an uninterrupted course of conduct" or "separated by substantial gaps in time or significant intervening events"); (2) their "[p]roximity of location" ("the further away crimes take place, the less likely they are components of the same criminal event"); and (3) their "character and relationship" (how "intertwined" they are in respect to, for instance, their "scheme or purpose"), 595 U.S. at 369—concern the precise way in which the defendant committed his crime. *Apprendi*, however, "means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense"; he is "prohibited from conducting such an inquiry himself[,] and so too he is barred from making a disputed determination about 'what the defendant and state judge must have understood as the factual

basis of the prior plea' or 'what the jury in a prior trial must have accepted as the theory of the crime.'" *Mathis*, 579 U.S. at 511 (citation omitted).

Yet an inquiry into "the theory of the crime," "the manner in which the defendant committed that offense," and the "factual basis" for the predicate convictions is precisely what *Wooden* contemplates. Indeed, the *Wooden* inquiry is even more fact-intensive, as it contemplates an examination not only of the factual basis for each predicate offense but also the facts relevant to "the relationship" between those offenses. 595 U.S. at 366. A judge cannot, consistent with *Apprendi*, usurp the jury's role and make that new determination himself.

D. After *Wooden*, The Courts Of Appeals' Rationales For Allowing Sentencing Courts To Undertake The Different-Occasions Inquiry Are No Longer Viable

Before *Wooden*, the courts of appeals had uniformly held that sentencing courts could undertake the different-occasions inquiry under the ACCA.[3] Every court of appeals to address the issue since *Wooden* has—like the

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[3] See, *e.g.*, *United States* v. *Ivery*, 427 F.3d 69, 75 (1st Cir. 2005), cert. denied, 546 U.S. 1222 (2006); *United States* v. *Santiago*, 268 F.3d 151, 156-157 (2d Cir. 2001), cert. denied, 535 U.S. 1070 (2002); *United States* v. *Blair*, 734 F.3d 218, 227-228 (3d Cir. 2013), cert. denied, 574 U.S. 828 (2014); *United States* v. *Thompson*, 421 F.3d 278, 284-287 (4th Cir. 2005), cert. denied, 547 U.S. 1005 (2006); *United States* v. *White*, 465 F.3d 250, 254 (5th Cir. 2006) (per curiam), cert. denied, 549 U.S. 1188 (2007); *United States* v. *Burgin*, 388 F.3d 177, 184-186 (6th Cir. 2004), cert. denied, 544 U.S. 936 (2005); *United States* v. *Elliott*, 703 F.3d 378, 382 (7th Cir. 2012), cert. denied, 569 U.S. 982 (2013); *United States* v. *Evans*, 738 F.3d 935, 936-937 (8th Cir. 2014) (per curiam); *United States* v. *Walker*, 953 F.3d 577, 580-582 (9th Cir. 2020), cert. denied, 141 S. Ct. 1084 (2021); *United States* v. *Michel*, 446 F.3d 1122, 1132-1133 (10th Cir.

court below—adhered to prior precedent permitting judicial determination of the different-occasions inquiry.[4] In doing so, they have principally relied on *Almendarez-Torres*. See, *e.g.*, *United States* v. *Elliott*, 703 F.3d 378, 382 (7th Cir. 2012), cert. denied, 569 U.S. 982 (2013) (explaining that the Seventh Circuit had "construed *Almendarez-Torres* to permit a district court to make a finding for purposes of the ACCA as to whether a defendant committed three or more violent felonies or serious drug offenses on occasions different from one another"). But given the nature of the inquiry adopted in *Wooden*, none of the rationales for allowing a judicial finding remains viable.

In certain courts of appeals' view, the different-occasions inquiry is "sufficiently interwoven with the facts of the prior crimes that *Apprendi* does not require" a jury

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2006); *United States* v. *Spears*, 443 F.3d 1358, 1361 (11th Cir.) (per curiam), cert. denied, 549 U.S. 916 (2006); *United States* v. *Thomas*, 572 F.3d 945, 952 n.4 (D.C. Cir. 2009), cert. denied, 559 U.S. 986 (2010).

[4] See *United States* v. *Brown*, 67 F.4th 200, 215 (4th Cir.), reh'g en banc denied, 77 F.4th 301 (2023); *United States* v. *Valencia*, 66 F.4th 1032, 1032 (5th Cir. 2023) (per curiam), petition for cert. pending, No. 23- 5606 (filed Sept. 12, 2023); *United States* v. *Belcher*, 40 F.4th 430, 432 (6th Cir. 2022), cert. denied, 143 S. Ct. 606 (2023); *United States* v. *Robinson*, 43 F.4th 892, 896 (8th Cir. 2022); *United States* v. *Barrera*, No. 20-10368, 2022 WL 1239052, at *2 (9th Cir. Apr. 27, 2022), cert. denied, 143 S. Ct. 1043 (2023); *United States* v. *Reed*, 39 F.4th 1285, 1295-1296 (10th Cir. 2022), cert. denied, 143 S. Ct. 745 (2023); *United States* v. *McCall*, No. 18-15229, 2023 WL 2128304, at *7 (11th Cir. Feb. 21, 2023) (per curiam), petition for cert. pending, No. 22-7630 (filed May 22, 2023); see also *United States* v. *Stowell*, 82 F.4th 607, 610 (8th Cir. 2023) (en banc) (resolving the case on harmless-error grounds after agreeing to reconsider the question presented en banc), petition for cert. pending, No. 23-6340 (filed Dec. 20, 2023).

to decide the question. *United States* v. *Santiago*, 268 F.3d 151, 156-157 (2d Cir. 2001), cert. denied, 535 U.S. 1070 (2002); see, *e.g.*, *United States* v. *Thompson*, 421 F.3d 278, 285 (4th Cir. 2005) (concluding that "[t]he data necessary to determine the 'separateness' of the occasions is inherent in the fact of the prior convictions"), cert. denied, 547 U.S. 1005 (2006); *United States* v. *Burgin*, 388 F.3d 177, 186 (6th Cir. 2004) (describing the different occasions-inquiry as "intimately related" to "the exception in *Apprendi* for a prior conviction"), cert. denied, 544 U.S. 936 (2005). Some courts of appeals have also suggested that because judges can permissibly determine whether an offense qualifies as a "violent felony" or "serious drug offense" under the ACCA, "*Apprendi* does not require different fact-finders and different burdens of proof for [the ACCA's] various requirements." *Santiago*, 268 F.3d at 156-157; accord, *e.g.*, *United States* v. *Brown*, 67 F.4th 200, 207 (4th Cir.), reh'g en banc denied, 77 F.4th 301 (2023).

But as just explained, see pp. 20-23, *supra*, *Wooden*'s holistic inquiry into the circumstances of each predicate offense and the relationship among them will often go beyond "the fact of [the] earlier conviction[s]," *Almendarez-Torres*, 523 U.S. at 226, and is not analogous to the judicially determinable issue of whether a prior offense's elements qualify it as a "violent felony" or "serious drug offense." *Wooden* instead held that a wide range of factual circumstances can be relevant to the different-occasions inquiry—circumstances that will often be "extraneous" to the convictions themselves, *Mathis*, 579 U.S. at 504. And because the factual determinations required by *Wooden* fall outside *Almendarez-Torres*'s exception to the *Apprendi* rule, they must be alleged in

the indictment and made by a jury beyond a reasonable doubt.

Some courts have noted that submitting the different-occasions question to the jury would risk "significant prejudice" to the defendant by forcing him to educate the jury about his past crimes to avoid a sentence enhancement in the current prosecution. *Santiago*, 268 F.3d at 156 (citation omitted); see, *e.g.*, *Brown*, 67 F.4th at 214 ("On a more practical level, and one implicating fundamental fairness, if recidivism were to be understood as an element of an aggravated offense, the result would be that any defendant who exercised his right to a jury trial could face having certain portions of his criminal history dragged in front of the jury tasked with deciding whether he has committed the instant offense."). But this Court has never suggested that a defendant's Sixth Amendment jury trial right can be curtailed based on concerns about prejudice to the defendant. And in any event, district courts have a variety of tools at their disposal to minimize potential prejudice.

In prosecutions for violations of Section 922(g), the government is already required to prove that the defendant had a prior felony conviction of which he was aware. See *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019). In those prosecutions, defendants often stipulate to the existence of prior qualifying convictions rather than have details of those offenses aired before the jury. This Court held in *Old Chief* v. *United States*, 519 U.S. 172 (1997), that the government is required to accept a stipulation to the existence of a prior conviction. *Id.* at 174-175. A defendant's offer to stipulate that at least three of his ACCA predicates were committed on different occasions could be handled in like fashion. Defendants who have little to gain by contesting whether they committed the relevant

predicate offenses on different occasions will presumably stipulate to that fact. But under this Court's precedents, that calculus belongs to the defendant.

District courts may also issue cautionary or limiting instructions to the jury about the proper use of prior-conviction evidence in order to mitigate the risk of unfair prejudice. See, *e.g.*, *Richardson* v. *Marsh*, 481 U.S. 200, 207 (1987) (noting that "evidence of the defendant's prior criminal convictions could be introduced for the purpose of sentence enhancement, so long as the jury was instructed it could not be used for purposes of determining guilt"). And in appropriate cases, district courts can also consider whether to bifurcate a trial, such that the jury would first consider the elements of the Section 922(g) violation itself (and any other charged counts) and then, if it reached a guilty verdict on the Section 922(g) offense, consider whether the defendant's prior convictions arose from offenses committed on occasions different from one another. See, *e.g.*, *United States* v. *Hines*, No. 22-CR-25, 2023 WL 4053013, at *2 (E.D. Tenn. June 16, 2023) (stating that it "will hold a bifurcated trial at which the jury, if necessary, will decide whether [the defendant] committed his prior offenses on occasions different from one another").

II. THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE VACATED AND THE CASE REMANDED FOR FURTHER PROCEEDINGS, INCLUDING APPLICATION OF HARMLESS-ERROR PRINCIPLES

This Court has held that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error," which would "[r]equir[e] automatic reversal." *Washington* v. *Recuenco*, 548 U.S. 212, 218, 222 (2006). Instead, errors

"infring[ing] upon the jury's factfinding role" are "subject to harmless-error analysis." *Neder* v. *United States*, 527 U.S. 1, 18 (1999) (holding that failure to submit an element of the offense to the jury may be harmless error). That rule applies with full force to the factfinding error here. Indeed, the harmless-error inquiry will often be quite straightforward, as *Wooden* recognized that "[i]n many cases, a single factor—especially of time or place—can decisively differentiate occasions." 595 U.S. at 369-370; *id.* at 370 (noting that "[c]ourts * * * have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart, or at a 'significant distance'") (citation omitted).

Court of appeals decisions addressing the harmless-error issue illustrate that, in most cases, any failure to submit the different-occasions question to the jury will be harmless. See, *e.g.*, *United States* v. *Stowell*, 82 F.4th 607, 610 (8th Cir. 2023) (en banc) ("Whatever our views are on any Sixth Amendment error, we conclude that it was harmless beyond a reasonable doubt" because "no 'ordinary person' would say that someone battered two people three days apart on one occasion."), petition for cert. pending, No. 23-6340 (filed Dec. 20, 2023); *United States* v. *Golden*, No. 21-2618, 2023 WL 2446899, at *4 (3d Cir. Mar. 10, 2023) (holding that "any error in failing to submit the *Wooden* issue to a jury * * * was harmless because the record makes clear beyond a reasonable doubt that a rational jury would have concluded that Golden's offenses were committed on different 'occasions'"); *United States* v. *Rodriguez*, No. 21-2544, 2022 WL 17883607, at *2 (7th Cir. Dec. 23, 2022) (holding that "the record would necessarily convince a reasonable jury that Rodriguez had committed

his prior offenses on different occasions," rendering any alleged error harmless).

Here, the government contended that the error was likewise harmless. Gov't C.A. Br. 7. The court of appeals, however, did not address the government's harmless-error contention. Instead, the court affirmed petitioner's ACCA sentence based solely on its conclusion that "current precedent" "foreclosed" petitioner's claim that the government was "required to prove to a jury beyond a reasonable doubt that [petitioner] committed the Indiana burglaries on separate occasions." Pet. App. 7a n.5, 8a. Thus, in accord with its typical practice, this Court should vacate the judgment below and remand for the court of appeals to consider the harmlessness question in the first instance. See, *e.g.*, *Ruan* v. *United States*, 597 U.S. 450, 467 (2022) (leaving "any harmlessness questions for the courts to address on remand"); *Maslenjak* v. *United States*, 582 U.S. 335, 352-353 (2017) ("In keeping with our usual practice, we leave that dispute [over harmlessness] for resolution on remand."); *McFadden* v. *United States*, 576 U.S. 186, 197 (2015) ("Because the Court of Appeals did not address [harmlessness], we remand for that court to consider it in the first instance.").

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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JANUARY 2024