No. 23-370

In the Supreme Court of the United States

PAUL ERLINGER,
PETITIONER,

v.

UNITED STATES,
RESPONDENT.

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

BRIEF OF FAMM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

FAMM (previously known as Families Against Mandatory Minimums) is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational sentencing policies and to challenge inflexible and excessive penalties imposed by mandatory sentencing laws. Founded in 1991, FAMM currently has over 75,000 members nationwide. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing. FAMM advances its charitable purposes in part through selected amicus filings in important cases.

[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

The application of the mandatory-minimum sentence under the occasions clause of the Armed Career Criminal Act (ACCA) is of paramount importance to FAMM. Hundreds of defendants each year are subject to the penalties mandated by the ACCA enhancement.[2] Those penalties are severe. The average sentence for a defendant convicted of violating 18 U.S.C. § 922(g) who receives the ACCA enhancement is 186 months—more than three times longer than the average sentence (60 months) for non-ACCA defendants convicted of violating the same provision.[3]

In recognition of the destructive toll that mandatory minimums exact on FAMM's members in prison, their loved ones, and their communities, FAMM submits this brief highlighting the troubling and arbitrary consequences of unconstitutional judicial factfinding under the occasions clause. Sentencing courts regularly find facts under the occasions clause by a preponderance of the evidence based on unreliable *Shepard* documents—in clear violation of the Fifth and Sixth Amendments. In doing so, courts are subjecting defendants to mandatory-minimum sentences in cases where a jury, tasked with adjudicating guilt beyond a reasonable doubt, might well reject the enhancement.

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[2] U.S. Sent'g Comm'n, Federal Armed Career Criminals: Prevalence, Pattern, and Pathways 19 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303_ACCA-Report.pdf.

[3] U.S. Sent'g Comm'n, Quick Facts: 18 U.S.C. § 922(g) Firearm Offenses 2 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY22.pdf.

INTRODUCTION AND SUMMARY OF ARGUMENT

For years, courts have imposed 15-year mandatory-minimum sentences under the Armed Career Criminal Act (ACCA) no matter that juries have not found the facts necessary to prove that defendants were convicted for three prior qualifying offenses on "occasions different." 18 U.S.C. §§ 922(g), 924(e)(1). Instead, courts have mined prior charging documents and plea colloquies to make this determination themselves, even though those documents often are incomplete or just plain wrong. This conduct violates defendants' Fifth and Sixth Amendment rights not to be punished except by a unanimous jury of their peers.

The Framers designed the Fifth and Sixth Amendments to ensure that only a democratic body could take away a defendant's liberties. A unanimous jury of twelve, not a lone judge, must find all facts essential to a defendant's punishment. This Court has recognized just one narrow exception to that rule: a sentencing court may find the fact of a prior conviction's existence. In doing so, a court may examine certain documents associated with prior convictions (so-called *Shepard* documents) to identify the legal elements of the at-issue offenses. Importantly, however, sentencing courts may not examine the *facts surrounding* prior offenses—for example, the manner in which the defendant committed the offense. That approach, the Court has warned, breaches defendants' Sixth Amendment rights and unfairly punishes defendants based on aged documents containing factual allegations they had no reason to contest.

Although framed and often referred to as a sentencing enhancement (for a felon-in-possession conviction under 18 U.S.C. §§ 922(g) and 924(a)), it is now well-settled

that the ACCA, because it both increases the maximum punishment and triggers a mandatory minimum, is subject to the constitutional protections of *Apprendi* and *Alleyne*. Accordingly, only a jury can conduct the fact-intensive, multi-factored analysis that answers the question of whether prior offenses took place on "occasions different" under the ACCA. *See Wooden v. United States*, 595 U.S. 360, 369 (2022).

The lower courts' prevailing approach to determinations under the ACCA's occasions clause tramples defendants' Fifth and Sixth Amendment rights. Courts regularly consult *Shepard* documents to probe the facts surrounding prior offenses, such as time and location. In many cases, the "facts" are no more than factual allegations that a defendant had no incentive (or even any opportunity) to dispute. Worse still, in some cases the *Shepard* documents are incomplete or wrong, yet courts fill in the gaps with factual findings made by a preponderance of available information. This Court's precedent squarely prohibits this factfinding use of *Shepard* documents.

Judicial factfinding under the occasions clause by a preponderance of the evidence produces arbitrary and unfair results. Although the outcome in some cases is obvious, others cases are unclear, and judges sometimes reach different conclusions on similar facts. Jury factfinding pursuant to the beyond-a-reasonable-doubt standard will produce fairer, and likely fewer, ACCA enhancements.

Hundreds of defendants each year receive life-altering 15-year mandatory-minimum sentences that dwarf the sentences they would receive without the ACCA enhancement. The Constitution entitles these defendants to

a jury finding that they are career offenders before imposition of the ACCA's harsh mandatory-minimum sentence. The Court should reverse.

ARGUMENT

I. The Fifth and Sixth Amendments Require a Jury to Find That a Defendant Committed Offenses on "Occasions Different"

1. The Framers designed the Fifth and Sixth Amendments to ensure that those accused of crimes would have each element of a crime proven beyond a reasonable doubt, by the "unanimous suffrage of twelve … equals and neighbours." *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (quoting 4 William Blackstone, Commentaries on the Laws of England *343 (1769)) (alterations and citations omitted). The Fifth and Sixth Amendments thus require that twelve jurors—not a lone judge—determine "every fact … essential to [a] punishment." *Blakely v. Washington*, 542 U.S. 296, 302 n.5 (2004) (quoting 1 Joel P. Bishop, Criminal Procedure § 81, at 51 (2d ed. 1872)); *see also United States v. Haymond*, 588 U.S. ---, 139 S. Ct. 2369, 2376 (2019) (plurality op.).

Juries must find beyond a reasonable doubt "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490. So too, juries must find "facts increasing the mandatory minimum." *Alleyne v. United States*, 570 U.S. 99, 112 (2013). Under the Fifth and Sixth Amendments, "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it"—whether the fact aggravates the statutory minimum or maximum sentence or both—a jury must find the requisite fact. *Id.* at 114-15; *Apprendi*, 530 U.S. at 476-77.

The Court has acknowledged only one exception to these principles: a sentencing judge may find the "*fact of*

a prior conviction." *Apprendi*, 530 U.S. at 490 (emphasis added); *see also Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998); *Mathis v. United States*, 579 U.S. 500, 522 (2016) (Thomas, J., concurring). That exception, however, is a "narrow" one. *Alleyne*, 570 U.S. at 111 n.1.

In identifying the fact of a prior conviction, a sentencing court must determine whether the prior conviction triggers the sentencing enhancement. In the ACCA context, a court must determine if the defendant has at least three convictions for a "violent felony" or a "serious drug offense" "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). In conducting this inquiry, "courts compare the elements of the crime of conviction with the elements of the 'generic' version of the listed offense." *Mathis*, 579 U.S. at 503. Elements are "constituent parts of a crime's legal definition,"—such as entering a building with intent to commit a crime—what "prosecut[ors] must prove to sustain a conviction," and what a "jury must find beyond a reasonable doubt to convict." *Id.* at 504 (citations and quotations omitted). Elements are distinct from *facts*, which are "real-world things—extraneous to the crime's legal requirements," such as the time or place of the crime. *Id.*

Determining a prior offense's elements is complicated when the at-issue statute "list[s] elements in the alternative, and thereby define[s] multiple crimes," which this Court has coined a "divisible" statute. *Id.* at 505 (quotations omitted). In that specific context, this Court has authorized courts to look at "a limited class of documents" known as *Shepard* documents—"for example, the indictment, jury instructions, or plea agreement and colloquy"—"to determine what crime, with what elements, a defendant was convicted of." *Id.* at 505-06 (citing *Shepard*

v. United States, 544 U.S. 13, 26 (2005)). After using *Shepard* documents to identify the crime of conviction, a court can then compare that crime with the generic offense. *Id.* at 506.

This Court has cautioned repeatedly that courts may use *Shepard* documents only "to determine 'which *element[s]* played a part in the defendant's conviction'" in cases involving the ACCA enhancement. *Id.* at 513 (alteration in original) (quoting *Descamps v. United States*, 570 U.S. 254, 260 (2013)). A court cannot use *Shepard* documents to probe the "means" and "manner" by which a defendant committed a prior offense. *Id.* at 511-12; *see also Descamps*, 570 U.S. at 258.

This Court has offered several rationales for this rule. *See Mathis*, 579 U.S. at 510-12; *Descamps*, 570 U.S. at 267; *see also* Erlinger Br. 39-40; U.S. Br. 16. Two of those rationales inform the inquiry here. First, the Court has explained that any other approach "would raise serious Sixth Amendment concerns." *Mathis*, 579 U.S. at 511; *see also id.* at 522 (Thomas, J., concurring). Because the Sixth Amendment bars judges from finding facts "that increase a maximum penalty, except for the simple fact of a prior conviction," "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense." *Id.* (majority op.). And because the judge cannot conduct that inquiry himself, he likewise cannot make "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." *Id.* (quotations omitted). In short, the Sixth Amendment bars judges from trying "to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct." *Descamps*, 570 U.S. at 269.

Second, the Court has highlighted the fairness concerns inherent in allowing sentencing judges to use *Shepard* documents to find facts. "[A]ged" *Shepard* documents are oftentimes unclear and sometimes "downright wrong." *Id.* at 270. "Statements of 'non-elemental fact' in the records of prior convictions are prone to error precisely because their proof is unnecessary." *Mathis*, 579 U.S. at 512 (quoting *Descamps*, 570 U.S. at 270). "[A] defendant may have no incentive to contest what does not matter under the law," *id.*, "and may have good reason not to," *Descamps*, 570 U.S. at 270. In that case, factual mistakes in the record are "likely to go uncorrected." *Mathis*, 579 U.S. at 512. "Such inaccuracies," this Court observed, "should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence." *Id.*

2. The fact-specific inquiry dictated by this Court in *Wooden* involves factfinding and thus must be conducted by a jury. A defendant qualifies for the ACCA enhancement only if the prior convictions were for offenses "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). This inquiry, by its very nature, is a factual one. Under the Double Jeopardy Clause or a multiplicity analysis, offenses taking place on the same occasion might still be distinct. *See Gamble v. United States*, 587 U.S. ---, 139 S. Ct. 1960, 1965 (2019) ("The language of the Clause ... protects individuals from being twice put in jeopardy for the same offence, not for the same conduct or actions." (quotations and alterations omitted)); *Whalen v. United States*, 445 U.S. 684, 692 (1980) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." (quoting *Blockburger v. United States*,

284 U.S. 299, 304 (1932))). The ACCA demands more: it requires that, as a factual matter, the offenses took place on different occasions.

Unlike the "fact of a prior conviction," *Apprendi*, 530 U.S. at 490, which either exists or not and has already been established via the highest level of due process, whether a defendant's prior offenses happened on "occasions different" is not a clear-cut inquiry. Because "a range of circumstances may be relevant to identifying episodes of criminal activity," the decisionmaker must interpret multiple factors about the predicate offenses, including their closeness in time, proximity of location, and their character and relationship. *Wooden*, 595 U.S. at 369. As one lower court put it, *Wooden* "commands" decisionmakers to "investigate the occasions of a defendant's past criminal conduct"—a highly factual inquiry. *United States v. Williams*, No. 22-60062, 2023 WL 2239020, at *1 (5th Cir. Feb. 23, 2023) (per curiam) (unpub.), *cert denied*, 144 S. Ct. 212 (2023).

This "multi-factored" analysis necessarily requires the decisionmaker to find facts beyond the mere fact of a prior conviction. *Wooden*, 595 U.S. at 369. Whether offenses occurred "close in time" or as part of "an uninterrupted course of conduct," *id.*, is a factual inquiry. Whether offenses occurred in close "[p]roximity of location" is a factual inquiry. *Id.* And whether offenses arose from "similar or intertwined … conduct" or "share a common scheme or purpose" is likewise a factual inquiry. *Id.*

These facts will not typically be elements of the offenses. As the Sixth Circuit has explained, "elemental facts in *Shepard* documents … rarely involve date, time, or location." *United States v. Hennessee*, 932 F.3d 437, 443 (6th Cir. 2019); *see also, e.g.*, *United States v. Perry*, 908 F.3d 1126, 1137 (8th Cir. 2018) (Kelly, J., concurring in part) ("[T]ime, place, and overall substantive continuity

are facts, not legal elements, of the prior offenses."); *United States v. Thompson*, 421 F.3d 278, 293 (4th Cir. 2005) (Wilkins, C.J., dissenting) ("[I]n few, if any, cases is a jury required to find that the offense occurred on a particular date.").

The facts relevant under *Wooden* instead relate to the "manner in which" the offenses were committed. *Mathis*, 579 U.S. at 511. This analysis, as Judge Stras explained before *Wooden*, thus "crosses the line from 'identifying the crime[s] of conviction' into the forbidden territory of 'explor[ing] the manner in which the defendant committed th[e] offense[s].'" *Perry*, 908 F.3d at 1135 (Stras, J., concurring) (alterations in original) (quoting *Mathis*, 579 U.S. at 511).

II. Sentencing Courts Violate the Fifth and Sixth Amendments by Using *Shepard* Documents to Conduct the Separate Occasions Analysis

Recent sentencing practice demonstrates that courts are routinely engaging in unconstitutional and unreliable factfinding under the occasions clause in violation of this Court's precedent and the Fifth and Sixth Amendments. *See* Erlinger Br. 37.

1. Courts openly use *Shepard* documents to find "non-elemental" facts when deciding whether prior convictions occurred on separate occasions and trigger the ACCA. *See, e.g.*, *Williams*, 2023 WL 2239020, at *1; *United States v. Haynes*, No. 19-12335, 2022 WL 3643740, at *5 (11th Cir. Aug. 24, 2022) (per curiam) (unpub.) (citation omitted), *cert denied*, 143 S. Ct. 1009 (2023); *Hennessee*, 932 F.3d at 442; *Levering v. United States*, 890 F.3d 738, 741 (8th Cir. 2018); *United States v. Dantzler*, 771 F.3d 137, 145 (2d Cir. 2014); *but see United States v. Faust*, 853 F.3d 39, 60 (1st Cir. 2017) (cautioning against using *Shepard* documents for non-elemental facts because

they "fail to specify the type of assault and battery at issue").

Some judges have strayed even further, consulting other sources beyond *Shepard* documents. *See, e.g.*, *United States v. Robinson*, 43 F.4th 892, 896 (8th Cir. 2022) ("[A] sentencing court does not violate the Sixth Amendment when it considers information outlining the underlying facts of an offense, such as those outlined in a presentence investigation report"); Sent'g Hr'g Tr. at 29, *United States v. Jackson*, Crim. No. 21-60 (E.D. Ky. Feb. 25, 2022), ECF No. 61 (consulting exhibits attached to government's response to objections to the presentence report).

Sentencing transcripts from district courts across the country demonstrate the pervasiveness of this unconstitutional practice. In one pre-*Wooden* case, *United States v. Haynes*, the sentencing judge noted that *Descamps* "limit[s] [sentencing courts] in reviewing *Shepard*-approved documents only to establish the elements of the prior offenses," but felt "bound" to apply Eleventh Circuit authority permitting use of *Shepard* documents to conduct the "occasions different" analysis. Resent'g Hr'g Tr. at 11-12, *United States v. Haynes*, Crim. Nos. 07-54, 07-73 (M.D. Fla. May 31, 2019), ECF No. 183. The sentencing judge examined charging documents and judgments attached to the presentence report to find that two of Ricky Haynes' prior qualifying convictions involved offenses occurring separately on February 24 and March 9, even though they were charged in the same indictment. *Id.* at 6-12. On that basis, the judge imposed the ACCA's 15-year mandatory-minimum sentence even though he believed "a lesser sentence would be sufficient." *Id.* at 23.

In a post-*Wooden* case, *United States v. Johnson*, Cameron Johnson faced a 15-year mandatory-minimum

sentence if the court found that his prior robbery convictions occurred on separate occasions. Sent'g Hr'g Tr. at 16, *United States v. Johnson*, Crim. No. 20-60 (S.D. Ind. June 29, 2023), ECF No. 135. Probing the charging documents from his state court convictions, the court determined that Johnson had committed qualifying prior crimes of violence (robbery). *Id.* at 11-16. The elemental details did not speak to whether the crimes occurred on separate occasions because the Indiana statute Johnson violated did not require proof of non-elemental facts (like time or place of commission). *See id.*; *see also* Ind. Code Ann. § 35-42-5-1 (enumerating elements). Instead, the district court relied on non-elemental allegations in the indictment concerning the time and location of the robberies to find that the crimes occurred on separate occasions. Sent'g Hr'g Tr. at 16. The court's reliance on these documents yielded a 15-year mandatory minimum.

None of the facts related to timing and location were elements necessarily found by a jury from which a court could find the "fact of a prior conviction." *Apprendi*, 530 U.S. at 490. Those details were nothing more than "amplifying but legally extraneous circumstances." *Descamps*, 570 U.S. at 270. By crossing the line from identifying only the fact of conviction into impermissibly "explor[ing] the manner in which the defendant committed th[e] offense[s]," *Mathis*, 579 U.S. at 511, the district "court did just what [the Supreme Court] ha[s] said it cannot" do, *Descamps*, 570 U.S. at 270.

2. Judges' routine consultation of *Shepard* documents to find non-elemental facts implicates the fairness and reliability concerns this Court flagged in *Descamps* and *Mathis*. Indictments contain mere allegations and are proof of nothing in and of themselves. A defendant has no

incentive to add non-elemental facts into the record or admit to them, leaving *Shepard* documents bare of real evidence of the circumstances surrounding the crimes. *Id.* at 270-71. As a result, *Shepard* documents yield only "a limited record" from which factfinders might find "differing factual permutations." *United States v. Stowell*, 82 F.4th 607, 612 (8th Cir. 2023) (en banc) (Erickson, J., dissenting), *pet. for cert. filed*, No. 23-6340 (Dec. 22, 2023).

The caselaw highlights these concerns. Judges are imposing ACCA's enhancement based on problematic *Shepard* documents—even when the *Shepard* documents are incomplete and incorrect. In one case, *United States v. Harper*, Sherman Harper faced an enhancement based on two prior arson convictions. Resent'g Hr'g Tr. at 16-24, *United States v. Harper*, Crim. No. 15-20182 (W.D. Tenn. Mar. 20, 2020), ECF No. 63. One conviction involved setting fire to a car, the other an apartment. *Id.* at 24. The *Shepard* documents did not include the dates of either offense or the address of the car-related arson. *Id.* at 24-28. The probation officer conceded that there was too much ambiguity in the record to determine that the offenses were separate, *id.* at 26, and the sentencing judge admitted that "[i]t is possible that other fair-minded people … could come out another way," *id.* at 37. Nevertheless, the sentencing judge filled in the blanks left by the incomplete *Shepard* documents and found that the offenses occurred on separate occasions. *Id.* at 34. Subjecting Harper to a 15-year mandatory-minimum sentence on the basis of an incomplete record without jury input was not only unfair—it violated his constitutional rights.

Sentencing courts also have imposed ACCA enhancements where *Shepard* documents contained plainly *incorrect* information. In *Hennessee*, the Sixth Circuit reversed the district court, which had determined it could

not review non-elemental facts in *Shepard* documents for the occasions analysis, and instructed the district court to apply the ACCA enhancement. 932 F.3d at 439. The circuit court inspected those *Shepard* documents and concluded that James Hennessee had three prior convictions for separate offenses. *Id.* Hennessee attempted to rob one victim in his apartment and another victim at a gas station less than an hour later. *Id.* at 444-45. The *Shepard* documents contained a number of problems. *See id.* at 452 (Cole, J., dissenting). The indictment and plea colloquy contained different victims' names and addresses of the burglarized apartment. *Id.* During the original plea colloquy, even the prosecutor seemed unclear about where the second robbery occurred. *Id.* at 453. The prosecutor gave, at best, a "muddled" "recitation of the facts," at times "representing that the offenses took place 'just a few minutes apart' or perhaps twenty minutes apart … or maybe fifty minutes apart." *Id.* And Hennessee never admitted to the prosecutor's "disjointed" presentation of facts, instead acknowledging only that the recitation was "basically true." *Id.* at 452.

Other examples abound. Citing Sixth Circuit precedent that the date of an offense is "so basic as to be implicit in the fact of a prior conviction," one court imposed the enhancement on Demetrius Robinson despite portions of the charging documents listing two predicate offenses as happening in the wrong year and one occurring on the wrong date. Order at 3-4, 11-13, *United States v. Robinson*, Crim. No. 21-20096 (W.D. Tenn. Mar. 15, 2023), ECF No. 76. To circumvent the mistakes, the court (as apparently is "regular[]" practice) "cross-reference[d] different *Shepard*-approved documents to cure [the] errors [and] ambiguities." *Id.* at 10. Such deduction by a judge by a preponderance of the evidence rather than by a jury beyond a reasonable doubt is constitutionally improper.

Other sentencing judges have grappled with the issue of inconsistencies within and insufficiencies of *Shepard* documents and therefore declined to impose an ACCA enhancement. *See, e.g.*, *United States v. Wright*, Crim. No. 19-94, 2023 WL 8242719, at *1-2 (S.D. Miss. Nov. 28, 2023) (observing inconsistencies in *Shepard* documents); Order at 1-3, *United States v. Anderson*, Crim. No. 19-20440 (E.D. Mich. 2023), ECF No. 80 (granting motion not to impose ACCA enhancement because government provided insufficient *Shepard* documentation and because government decided not to pursue the enhancement).

In *Wright*, for example, the indictments for the predicate offenses listed burglaries allegedly occurring on January 12 and January 16, 2012. 2023 WL 8242719, at *1. But authorities arrested Darius Wright on January 13, and he did not post bond. *Id.* Accordingly, (as the court and defense pointed out) it was impossible for him to have committed a second burglary on January 16 as alleged in the indictment. *Id.* Further, the *Shepard* documents lacked any definitive detail about when the burglaries happened. Resent'g Hr'g Tr. at 19-21, 27-28, *United States v. Wright*, Crim. No. 19-94 (S.D. Miss. July 11, 2023), ECF No. 101. Wright faced a substantial increase in his sentence if the court concluded his offenses occurred on separate occasions—from an advisory Guidelines range of 41 to 51 months to a mandatory 15-year minimum sentence (with an advisory range of 180 to 188 months). *Id.* at 29. The court appropriately admitted it was "without knowledge [of] when the second burglary actually occurred" and refused to impose the ACCA enhancement. *Wright*, 2023 WL 8242719, at *1-2.

These cases illustrate why *Shepard* documents may reliably prove "the fact of a prior conviction," *Apprendi*, 530 U.S. at 490, but do not reliably establish the facts

about whether those prior convictions were for offenses on occasions separate from one another. "*Shepard* documents … serve a specific and narrow function; they are not an excuse for allowing courts to dig through the record to find facts. To the contrary, properly used, they do not support fact-finding at all." *Hennessee*, 932 F.3d at 451 (Cole, J., dissenting) (alterations in original) (quoting *Perry*, 908 F.3d at 1135-36 (Stras, J., concurring)). A single judge's use of *Shepard* documents to punish defendants on a preponderance-of-the-evidence standard epitomizes the arbitrary punishment that caused the Framers to enshrine the Fifth and Sixth Amendments.

III. Jury Factfinding under the Occasions Clause Would Produce More Reliable ACCA Enhancements

1. Judicial factfinding by a preponderance of the evidence produces arbitrary results based on shoddy or incomplete evidence—an intolerable result when the consequence is a mandatory 15-year minimum sentence. As Justice Gorsuch noted in *Wooden*, before *Wooden* "lower courts [had] struggled with the Occasions Clause, reaching contradictory judgments on similar facts." 595 U.S. at 384 (Gorsuch, J., concurring in judgment). The same is unfortunately still true in some courts after *Wooden*. "Some individuals face mandatory 15-year prison terms while other similarly situated persons do not—with the results depending on little more than how much weight this or that judge chooses to assign this or that factor." *Id.* at 385.

This situation is the direct result of judicial factfinding by a preponderance of the evidence. When judges need only find facts by a preponderance of the available information under a multi-factored balancing approach using unreliable documents, judges may well reach different results on similar facts. When 12-person juries must

make the required finding beyond a reasonable doubt, by contrast, outcomes will be fairer. This is particularly true because the jurors will only receive information that is admissible under the Federal Rules of Evidence and that is subject to cross-examination. Neither protection necessarily applies at a sentencing hearing before a single judge.

To be sure, in many cases arising under the occasions clause, the factual determination of whether prior offenses occurred on the same occasion is "straightforward and intuitive." *Id.* at 369 (majority op.); *see, e.g.*, *United States v. Gamez*, 77 F.4th 594, 598 (7th Cir. 2023) (concluding any constitutional error harmless because no reasonable jury could find offenses in 2009, 2011, and 2016 were part of the same occasion). But "hard cases" exist, *Wooden*, 595 U.S. at 370, and "[m]any ambiguous cases are sure to arise," *id.* at 388 (Gorsuch, J., concurring in judgment); *see, e.g.*, *Stowell*, 82 F.4th at 611 (Erickson, J., dissenting) ("[R]easonable factfinders employing the 'multifactored' balancing test laid out by the *Wooden* Court could reach a different conclusion when all the facts are before the sentencing court."). Ambiguity permeates the *Wooden* analysis.

Temporal distinction. This Court suggested that *Wooden*'s first factor—temporal distinctions—would be outcome-determinative in many cases. *See Wooden*, 595 U.S. at 369-70 (majority op.). Results from judges and juries demonstrate otherwise. Some courts continue to find that crimes committed on the same day represent separate "occasions." Sent'g Hr'g Tr. at 29, *United States v. Jackson*, Crim. No. 21-60 (E.D. Ky. Feb. 25, 2022), ECF No. 61. But other courts have concluded the opposite—that crimes on the same day were part of the same "occasion." *See, e.g.*, *Franklin v. United States*, Crim. No. 10-

55, 2023 WL 2466355, at *10 (M.D. Tenn. Mar. 10, 2023) (predicate offenses charged in separate indictments were the same occasion because they took place on same day); *United States v. Ellis*, No. 20-4057, 2022 WL 2128835, at *1 (4th Cir. June 14, 2022) (per curiam) (unpub.).

The cases do not necessarily get easier when prior offenses occurred on different days. Many courts appear to treat the varying dates of commission as dispositive. *See e.g.*, *Haynes*, 2022 WL 3643740, at *5 ("Haynes's indictment and the written judgment stated that he committed the drug offenses on or about February 24, 2000, and on or about March 9, 2000. Those records proved that Haynes's two drug offenses were committed on occasions different from one another." (citations omitted)); *United States v. Williams*, 39 F.4th 342, 350 (6th Cir. 2022) (concluding that four robberies occurring between January 15 and March 13 were separate occasions), *cert. denied*, 143 S. Ct. 1783 (2023); *United States v. Ellison*, 71 F.4th 1111, 1114 (8th Cir. 2023) (holding that drug felonies "that were separated by at least a week" were separate occasions); *United States v. Peyton*, Crim. No. 18-6, 2023 WL 3971378, at *2 (E.D. Ky. June 13, 2023) (similar).

But other courts, and a jury, have come out the other way. In *United States v. Pennington*, the court granted the parties' request for a bifurcated trial, allowing the jury to decide whether Darius Pennington's prior convictions were separate occasions. Jury Instr. at 1, *United States v. Pennington*, Crim. No. 19-455 (N.D. Ga. Sept. 20, 2022), ECF No. 172. Pennington committed the at-issue controlled substance offenses four-and-a-half months apart; nevertheless, the jury found that the crimes were part of the same occasion. Verdict at 1, *United States v. Pennington*, Crim. No. 19-455 (N.D. Ga.

Sept. 20, 2022), ECF No. 173. The jury verdict there belies the notion that temporal distinctions of a day, a week, a few weeks, or even a few months always make for easy cases. *See also Harper v. United States*, Crim. No. 15-20182, 2022 WL 2318505, at *1 (W.D. Tenn. June 28, 2022) (holding that the ACCA enhancement did not apply even though offenses were apparently committed on "separate days" because there was "significant ambiguity in the documents" and the offenses happened in the "same general location and were actuated by the same motive").

As Justice Gorsuch hypothesized in *Wooden*, offenses occurring at different times may still be part of "intertwined … conduct." 595 U.S. at 386 (Gorsuch, J., concurring in judgment) (alteration in original); *see also, e.g.*, *Stowell*, 82 F.4th at 611-13 (Erickson, J., dissenting) (pointing out that majority "did not address" the possibility that the crimes on different dates might be "part of an episode of criminal activity" with "intertwined" victims and conduct under *Wooden*). In other words, how to assess temporal proximity is not always easy.

Location. Courts also have disagreed about the second *Wooden* factor—whether crimes committed at different locations reflect separate occasions. *Compare, e.g.*, *United States v. Harrell*, Crim. No. 19-701, 2023 WL 3604931, at *2 (D. Minn. May 23, 2023) (differences between crimes in an apartment and a nearby alley a few days apart leads to "no doubt that the crimes" were separate occasions), *with Harper*, 2022 WL 2318505, at *1 (same occasion where crimes committed in "same general location"). What constitutes a separate location is not always clear. *See, e.g.*, *id.*; *Williams*, 39 F.4th at 350-51 (noting lack of clarity in charging documents about where some prior crimes took place, yet concluding separate occasions based on temporal distinctions and some variance

in location); *Wooden*, 595 U.S. at 386 (Gorsuch, J., concurring in judgment) (asking whether assault inside bar and another outside the bar occur "at one location").

Balancing the *Wooden* factors. Cumulatively, balancing the *Wooden* factors, including the "character and relationship of the offenses," *id.* at 369 (majority op.), has led to complicated close calls. *See, e.g.*, Erlinger Br. 20-21. Scenarios arise where some factors, like time, point to a single criminal episode, whereas others like location or scheme, point to the opposite conclusion. *See, e.g.*, *Williams*, 39 F.4th at 350 (concluding four robberies on separate days committed by same individuals in same Kentucky county "do not share a common scheme in the same way as *Wooden*" because they were not done "in the exact same manner'); *Ellis*, 2022 WL 2128835, at *1 (deciding crimes committed on same day as part of the same apparent scheme were single occasion despite multiple locations); *United States v. Hynson*, Crim. No. 05-576, 2022 WL 1591972, at *3 n.4 (E.D. Pa. May 19, 2022) (government conceding that two state convictions for manslaughter and assault "arose from the same incident and arrest" on the same day and were part of the same occasion); *United States v. Michel*, 446 F.3d 1122, 1134 (10th Cir. 2006) (concluding separate occasions where "three successive criminal incidents [took place] at three separate locations against three different victims … within a short period of time"); *Wooden*, 595 U.S. at 385 (Gorsuch, J., concurring in judgment) (noting that "factors" oftentimes "point[] in different directions").

In sum, under *Wooden*'s multifactored approach, judges reach vastly different outcomes on similar facts. That is not to say that one set of judges is right and another wrong; individual judges deciding the separate occasions question by a preponderance of the evidence

might reasonably disagree. But that explains why juries, tasked with deciding guilt unanimously beyond a reasonable doubt, must hold the responsibility of interpreting indeterminate factual records to decide these thorny factual questions. Judges making separate occasions decisions without a full view of the evidence not only can get it wrong, but unconstitutionally take away defendants' liberties by imposing harsh mandatory-minimum sentences upon a lower evidentiary standard than a jury must constitutionally apply.

2. These concerns weigh heavy here given the undeniable impact of the ACCA's mandatory-minimum sentences on individuals and their families. According to recent Sentencing Commission data, the average sentence for a defendant convicted of violating 18 U.S.C. § 922(g), as penalized under § 924(a)(8), who was not subject to the ACCA enhancement (§ 924(e)(1)), was 60 months. That average ballooned threefold to 186 months for ACCA defendants.[4] The human costs of these judicial determinations cannot be forgotten. A few examples merit discussion.

In the *Haynes* case discussed above, *see supra* p. 11, a judge decided that Ricky Haynes' prior drug crimes, separated by less than two weeks, triggered the separate occasions clause. The ACCA enhancement increased the relevant sentence from a pre-enhancement Guidelines range of 57-71 months to a mandatory minimum of fifteen years. Resent'g Hr'g Tr. at 4, 22, *United States v. Haynes*, Crim. Nos. 07-54, 7-73 (M.D. Fl. May 31, 2019), ECF No. 185. The judge called Haynes "a relatively small-time local drug dealer" with "nothing remarkable

[4] Quick Facts, *supra* note 3, at 2.

about [his] conduct other than … ke[eping] the 9-millimeter handgun and ammunition … for the protection of his family." *Id.* at 20. The judge noted that two of Haynes's previous convictions "were not considered serious by the state court" and resulted in short sentences. *Id.* at 21. And, as noted above, the judge observed that "a lesser sentence would be sufficient" but for "the mandatory sentencing requirements." *Id.* at 23, 29.

In the *Johnson* case also discussed above, *see supra* pp. 11-12, Cameron Johnson robbed an individual of sneakers, a backpack, and a cellphone. Sent'g Mem. at 10, *United States v. Johnson*, Crim. No. 20-60 (S.D. Ind. June 22, 2023), ECF No. 120. Five minutes later, he traveled about half a mile away, where he stole two dollars from a woman's bag. *Id.* Johnson pleaded guilty to two robbery offenses. *Id.* Fifteen years later, police officers stopped Johnson for parking too far from a curb and, during the stop, discovered that he illegally possessed a firearm as a former felon. *Id.* at 1.

At sentencing, a judge concluded that Johnson's robbery offenses occurred on separate occasions, despite happening uninterrupted, minutes apart, in the same general location, and prompted by the same motive. Sent'g Hr'g Tr. at 11, *United States v. Johnson*, Crim. No. 20-60 (S.D. Ind. June 29, 2023), ECF No. 135. The judge lamented that he "unfortunately" had to apply the ACCA enhancement. *Id.* at 14. Because one single judge concluded that Johnson's offenses were separate, he will languish the next fifteen years in prison. And his five children, who were rendered homeless without the benefit of his income, will grow up without a father's presence during their entire childhoods. Sentencing Mem. at 14, ECF No. 120.

In Louisiana, a seventeen-year-old named Keith James committed robberies with his friend Ernest Dunn. The first occurred on April 4, and the next several took place within forty-five minutes of each other starting around 11:20 p.m. on April 12 and ending at about 12:05 a.m. on April 13. *United States v. James*, Crim. No. 17-207, 2023 WL 2785569, *1, *4 (E.D. La. Apr. 5, 2023); Suppl. Mem. at 1, *United States v. James*, Crim. No. 17-207 (E.D. La. Mar. 23, 2023), ECF No. 79. James and Dunn both pleaded guilty, received the same sentences, were released on parole, and were later indicted for being felons in possession of a firearm. Suppl. Mem. at 1-2, ECF No. 79.

James pleaded guilty before *Wooden*. *See id.* at 4. The district court relied on *Shepard* documents with "only basic information about the charges, with the only relevant information being the date and the nature of the offenses" for the separate occasions analysis, applied the ACCA 15-year mandatory-minimum enhancement, and sentenced James to over a fifteen-year term. *James*, 2023 WL 2785569, at *1-2, 4. Dunn, on the other hand, pleaded guilty post-*Wooden*, after the U.S. Attorney's Office conceded that a jury, not a judge, should make the separate occasions determination. Suppl. Mem. at 3, ECF No. 79. Dunn avoided the ACCA enhancement, receiving only 42 months, because "the Government conceded that the application of the ACCA enhancement would be legal error" unless a jury decided whether the crimes had occurred on separate occasions. *Id.* at 4.

These real-life examples illustrate several points. First, these cases turn on extraordinarily narrow margins. Many of these cases are far from obvious, depending solely on the decisionmaking of one judge. Second, these

cases demonstrate the very real implications of what happens when a judge bases a decision on unreliable documents, premised on facts that were never proven beyond a reasonable doubt, and that are now subject to only a preponderance-of-the-evidence standard. A jury, required to make the "occasions different" finding unanimously and beyond a reasonable doubt, based on admissible evidence that is subject to cross-examination, could very well reach a different outcome.

For these reasons, the weighty, fact-intensive decision that a defendant is a career criminal who deserves a 15-year mandatory-minimum sentence belongs to a jury, not a judge. This is not to say that courts are powerless to punish recidivist conduct. Protecting a defendant's Fifth and Sixth Amendment rights does not mean that recidivists must stroll away with light punishments. Even if a jury decided that a defendant's offenses occurred on the same occasion, a judge may nonetheless account for a defendant's criminal history at sentencing. *See Stokeling v. United States*, 586 U.S. ---, 139 S. Ct. 544, 559 (2019) (Sotomayor, J., dissenting); *see also* 18 U.S.C. § 3553(a)(1) (instructing courts to consider "the history and characteristics of the defendant" among other factors); *see also* U.S.S.G. § 4A1.1, intro. comment (emphasizing that "[a] defendant's record of past criminal conduct is directly relevant" to sentencing and stating that "the likelihood of recidivism and future criminal behavior must be considered"). The wide range of available penalties in federal criminal cases, administered in the discretion of a federal judge, will ensure a just and sufficient punishment in any case. In cases where a jury rejects the ACCA enhancement, a judge might reasonably conclude that a greater sentence is nevertheless appropriate as long as it falls within the non-enhanced statutory range.

Respecting constitutional rights never contradicts the congressional mandate that each sentence be "sufficient, but not greater than necessary" to achieve all of the varied purposes of punishment. 18 U.S.C. § 3553(a). And protecting defendants' constitutional rights is of particularly acute importance when a 15-year mandatory-minimum sentence hangs in the balance.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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