**NO. _____**

**IN THE UNITED STATES SUPREME COURT**

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**RONNIE R. LOVELL,**
**Petitioner,**

**v.**

**UNITED STATES OF AMERICA,**
**Respondent.**

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

Can a district court judge determine that an individual's prior offenses occurred "on occasions different," as required by the Armed Career Criminal Act, 18 U.S.C. § 924(e), by a preponderance of the evidence or do the Fifth and Sixth Amendments require this fact to be charged in the indictment and proven to a jury beyond a reasonable doubt?

## PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

## RELATED CASES

There are no related cases.

All relevant opinions below are included in the Appendix filed herewith.

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## JURISDICTIONAL STATEMENT

Ronnie Lovell was sentenced to serve 180 months of imprisonment in 2020 after pleading guilty to being a felon in possession of a firearm pursuant to 18 U.S.C. § 924(e). Mr. Lovell filed a timely notice of appeal from that judgment on November 10, 2020. He appealed that sentence to the United States Court of Appeals for the Sixth Circuit, which affirmed the sentence on February 10, 2023.

This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1). Pursuant to Rule 13.1 of the Supreme Court the time for filing a petition for certiorari review is 90 days from the judgment of the Court of Appeals. Mr. Lovell filed an application for a 60-day extension of time pursuant to Supreme Court Rules 13.5 and 22. That application (No. 22A950) was granted by Justice Kavanaugh and extended the time for filing Mr. Lovell's petition for certiorari through July 10, 2023. Accordingly, this petition is timely filed.

Pursuant to Rule 29.4(a), appropriate service is made to the Solicitor General of the United States and to Assistant United States Attorney Luke A. McLaurin, who appeared in the United States Court of Appeals for the Sixth Circuit on behalf of the United States Attorney's Office, a federal office which is authorized by law to appear before this Court on its own behalf.

## PRAYER FOR RELIEF

Petitioner, Ronnie Lovell, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides:

> No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . .

18 U.S.C. § 922(g) states in relevant part:

> It shall be unlawful for any person –
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ; . . . to . . . possess in or affecting commerce, any firearm or ammunition . . . .

18 U.S.C. § 924(a)(2) (2021) states in relevant part:

> Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 924(e)(1) 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).

## STATEMENT OF THE CASE AND FACTS

Ronnie Lovell was convicted in federal court of being a felon in possession of ammunition. Pet. Appx. at 1a. When he was first sentenced, the district court determined that he qualified for sentencing under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA") due to his six prior convictions for Tennessee aggravated burglary. *Id*. It accordingly sentenced him to ACCA's 15-year (*i.e.*, 180-month) mandatory minimum. *Id.* Mr. Lovell appealed that sentence, and while his appeal was pending, the Sixth Circuit decided *United States v. Stitt*, 860 F.3d 854, 856 & 862 (6th Cir. 2017) (en banc) ("*Stitt I*"), which held that Tennessee aggravated burglary wasn't a violent felony for ACCA purposes. *Id*. at 2a. Based on *Stitt I*, the Sixth Circuit remanded his case for resentencing. *Id*.

But, before the district court imposed a new sentence, this Court reversed *Stitt I*, holding that Tennessee aggravated burglary does qualify as an ACCA violent felony. *Id*. (citing *United States v. Stitt*, 139 S. Ct. 399, 406–07 (2018) ("*Stitt II*")). At his resentencing Mr. Lovell maintained his objection to the ACCA enhancement, arguing that his burglary convictions still failed to qualify as ACCA predicates, albeit based on a different theory than that rejected by this Court in *Stitt II*. *Id*. The district court overruled those objections, and reimposed ACCA's 15-year mandatory minimum. *Id*.

Mr. Lovell also appealed that sentence, and while his appeal was pending this Court issued its decision in *Wooden v. United States*, 142 S. Ct. 1063 (2022). *See id*. Accordingly, on appeal Mr. Lovell argued remand was required for the district court to apply the now-fact-intensive test laid out in *Wooden*. *Id*. at 2a-6a. Specifically, Mr. Lovell argued that a district court should be given the opportunity to apply the *Wooden* test to his burglary convictions,

because five of the six burglary convictions were included in a single indictment, and because he was arrested only once, after all the burglaries occurred. *Id*. He also noted that he was sentenced on all six on the same day, to a single, concurrent sentence, and that it was not clear from the information in the record that the burglaries occurred either at a significant distance from each other, or on separate dates (as each indictment listed the offense as occurring "on or about" specified dates). *Id*. He also argued that there was not anything in the record that addressed whether the offenses shared a common scheme or purpose, as that factor did not matter when he was sentenced before the district court. *See id*. The Sixth Circuit concluded that the lack of information in the record regarding these factors meant that Mr. Lovell had failed to surmount the hurdles of plain error review, even though at both of his sentencing hearings the district court and the parties were operating under caselaw that was expressly overturned by this Court in *Wooden*. *Id*.

On appeal Mr. Lovell also argued that *Wooden* requires that the government allege in its indictment, and prove beyond a reasonable doubt to a jury, that his prior convictions occurred "on occasions different" in order to be counted as separate convictions for purposes of ACCA. *Id.* at 7a. Specifically, he noted that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a judge may find the "fact of a prior conviction," but all other "fact[s] that increase[] the penalty for a crime beyond the prescribed statutory maximum" must be included in the indictment and proved to a jury beyond a reasonable doubt. Pet. Appx. at 7a (citing *Apprendi*, 530 U.S. at 490). Mr. Lovell then argued that the factual findings necessary to the occasions-different inquiry set forth by this Court in *Wooden* fall under *Apprendi's* general rule, and therefore may be found only by a jury—not by the sentencing judge. *See id.*

The Sixth Circuit rejected this argument as well, explicitly noting that "the Supreme Court hasn't yet addressed this question," and therefore finding itself bound by its own prior caselaw holding that the facts involved in the occasions-different test fall within the *Apprendi* exception for "the fact of a prior conviction." *Id*. It accordingly held that whether prior offenses occurred on different occasions need neither be charged in an indictment nor proven to a jury beyond a reasonable doubt, and it affirmed Mr. Lovell's 15-year mandatory minimum sentence. *Id.*

## REASONS FOR GRANTING THE WRIT

### I. The Sixth Circuit's approach is wrong.

#### A. Under the Fifth and Sixth Amendments, the occasions-different fact must be charged in an indictment and proved to a jury.

ACCA applies to increase the penalty range for a person convicted of violating 18 U.S.C. § 922(g)(1) only if the person previously committed at least three ACCA-qualifying offenses "on occasions different from one another." 18 U.S.C. § 924(e)(1). The Sixth Circuit held thirty years ago that ACCA's occasions-different requirement is not an element, to be charged and found by a jury beyond a reasonable doubt, but is instead a fact that the district judge may find at sentencing by a preponderance of the evidence. Under its initial rule, sentencing judges may analyze all sorts of information that "lay behind" the elements of the conviction, such as the crime's time, place, and victim. *United States v. Brady*, 988 F.2d 664, 670 (6th Cir. 1993) (en banc); *see United States v. Paige*, 634 F.3d 871, 873 (6th Cir. 2011). But the law has evolved to reveal that this approach violates the Fifth and Sixth Amendments.

In a series of constitutional decisions running from *Apprendi* to *Alleyne*, this Court has developed a bedrock rule: The Fifth and Sixth Amendments require any fact that increases the statutory maximum or minimum penalty for a crime to be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Alleyne v. United States*, 570 U.S. 99, 111 (2013). Facts determined at sentencing cannot enhance the statutory sentencing range. *Id.* There is just one exception to this rule which allows a sentencing court to consider "the fact of a prior conviction," and that exception is "narrow." *Apprendi*, 530 U.S. at 490; *Alleyne*, 570 U.S. at 111, n.1; *see Almendarez-Torres v. United States*, 523 U.S. 224, 230, 234, 244 (1998).

To fit within this exception for "the fact of a prior conviction," the features of the prior conviction that trigger the increased penalty must be elements of the prior offense—*i.e.*, facts that the jury must find beyond a reasonable doubt to sustain the conviction. *Mathis v. United States*, 136 S. Ct. 2243, 2248, 2252 (2016). Thus, when acting on *Apprendi*'s narrow exception for the "fact of a prior conviction," the sentencing judge cannot make findings about facts that lay behind that conviction, but rather can determine only "what crime, with what elements, the defendant was convicted of." *Id.* at 2252; *see also Descamps v. United States*, 570 U.S. 254, 269-70 (2013) ("the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances"); *Shepard v. United States*, 544 U.S. 13, 20-21, 26 (2013). If the features of the prior conviction are not "the simple fact of a prior conviction," but rather include circumstances that would let the judge "explore the manner in which the defendant committed that offense," they do not fit within the narrow exception to *Apprendi*. *Mathis*, 136 S. Ct. at 2252.

In short, this Court has established a distinction between "elemental facts" and "non-elemental facts." *Descamps*, 570 U.S. at 270. The former are the facts that either the jury necessarily found or the defendant necessarily admitted to sustain the conviction. The latter are facts that were legally extraneous to the conviction. When a federal sentencing court determines the "fact of a prior conviction," it can consider only "elemental facts"—otherwise it will run afoul of the Sixth Amendment.

In light of the evolving law, and solely to safeguard its rule that a sentencing judge may engage in the factfinding necessary to establish that offenses were committed on different occasions, the Sixth Circuit has devised an accommodation with the *Apprendi* doctrine. Under its current rule, a sentencing judge deciding the different-occasions question is limited to

considering *Shepard* documents but is not limited to *Shepard* elemental evidence. *United States v. Hennessee*, 932 F.3d 437 (6th Cir. 2019) (holding that a sentencing judge may consult *Shepard* documents to discern the non-elemental facts of time, place, and victim of prior Tennessee robbery conviction to find that the defendant had committed two crimes "on occasions different from one another"). In other words, the sentencing judge can consider whatever non-elemental facts happen to appear in the relevant *Shepard* documents, even though the entire point of *Shepard* and its progeny is to limit the sentencing court's consideration to a certain type of evidence, namely, the evidence of elemental facts.

Though it preserves the status quo, this accommodation conflicts with *Mathis* and the Fifth and Sixth Amendments. Under the reasoning of *Mathis* and its underlying Sixth Amendment concern, the only facts a district court may properly—or fairly—discern from the *Shepard* evidence are the elements of the offense. *Mathis*, 136 S. Ct. at 2252 ("A judge 'can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of."). Because "the who, what, when, and where of a conviction" all "pose questions of fact," *Pereida v. Wilkinson*, 141 S. Ct. 754, 765 (2021), the occasions-different question must be charged in the indictment and proven to a jury beyond a reasonable doubt.

**B. This Court's existing precedent confirms that jury factfinding is the constitutional solution.**

Existing Supreme Court precedent confirms that when a sentencing court finds the circumstance-specific, non-elemental facts relevant to the occasions-different inquiry, it violates the Sixth Amendment. The Sixth Circuit's reliance on its pre-*Wooden* precedent ignores the logic of this Court's prior cases, logic that dictates the result Mr. Lovell urges here.

In *United States v. Hayes*, 555 U.S. 415 (2009), this Court addressed the definition of "misdemeanor crime of domestic violence" for purpose of the firearms ban at 18 U.S.C. § 922(g)(9). A person previously convicted of a "misdemeanor crime of domestic violence" may not possess a firearm, and if he does, is subject to conviction and punishment up to 10 years in prison. 18 U.S.C. § 922(g)(9). A "misdemeanor crime of domestic violence" is defined as an offense that is a misdemeanor and "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim," or other specified domestic relationship with the victim. 18 U.S.C. § 921(a)(33)(A). The Court divided the question whether a person was convicted of a "misdemeanor crime of domestic violence" into two distinct components. The first requirement relates to the category of offense: The offense as defined by law must have as an element the use or threatened use of physical force or threatened use of a deadly weapon. *Hayes*, 555 U.S. at 421-22. This legal determination is made by the district court, subject to the ordinary limitations of the categorical approach. *United States v. Castleman*, 572 U.S. 157, 168 (2014).

The second requirement is circumstance-specific: The particular defendant who committed the offense must have been in one of the specified domestic relationships with the victim. *Hayes*, 555 U.S. at 422-23. This fact-based determination, because it is not elemental, is not made by the district court but must be proved by the government to the jury beyond a reasonable doubt (or admitted by the defendant). *Id.* at 426 ("To obtain a conviction in a § 922(g)(9) prosecution, the Government must prove beyond a reasonable doubt that the victim of the predicate offense was the defendant's current or former spouse or was related to the

defendant in another specified way."). This is true even when the relationship between the defendant with the victim is apparent from *Shepard* evidence of the conviction.

In *Nijhawan v. Holder*, 557 U.S. 29 (2009), the Court cited *Hayes* when it tangentially addressed prosecutions for illegal reentry after conviction for an aggravated felony under 8 U.S.C. § 1326. Illegal reentry carries a sentence of up to two years in prison, but if the defendant was previously convicted of an "aggravated felony" it carries a sentence of up to 20 years. 8 U.S.C. § 1326(a), (b)(2). As discussed above, the fact of the prior aggravated felony conviction is generally a sentencing factor that the judge can find at sentencing. *Almendarez-Torres*, 523 U.S. at 226-27. But the statute discussed in *Nijhawan* defines some aggravated felonies by using two components: one being the fact of a prior conviction of a certain type of crime and the other being the fact that the defendant "committed" the prior crime in a specific way or under specific circumstances. *Nijhawan*, 557 U.S. at 37-38 (quoting 8 U.S.C. § 1101(a)(43)(K)(ii), (P)). This Court recognized that while the first part of this hybrid type of aggravated-felony definition falls within the *Almendarez-Torres* exception to *Apprendi*, the second part—the part pertaining to how the defendant committed the crime—is "circumstance-specific," and falls beyond the bounds of the fact of a prior conviction. *Id.* at 40. As a result, that fact would have to be found by a jury in a criminal prosecution (*i.e.*, treated as an element of the instant offense) to "eliminat[e] any constitutional concern." *Id.*

And the government *agreed* with that conclusion. There, the specific fact at issue was whether a person alleged to be removable had previously committed fraud involving loss to victims in excess of $10,000. *Id.* at 32. In response to hypothetical constitutional concerns relating to any later illegal reentry trial, the government "stated in its brief and at oral argument

that the later jury, during the illegal reentry trial, would have to find loss amount beyond a reasonable doubt, eliminating any constitutional concern." *Id.* at 40 (citing *Hayes*).

As with the inquiry in *Hayes* and the potential illegal reentry inquiry in *Nijawan,* the inquiry under ACCA has "two separate statutory conditions." *Wooden*, 142 S. Ct. at 1070: (1) the legal determination that the defendant has three previous convictions for an offense that is categorically a "violent felony" or "serious drug offense," and (2) the factual determination that the defendant "committed" these three offenses "on occasions different from one another." 18 U.S.C. § 924(e). As with the facts pertaining to the defendant's relationship with the victim for purposes of § 922(g)(9), the facts pertaining to how, when, and where the defendant "committed" the ACCA predicate crimes "must be established," and to do so the government must prove them to the jury beyond a reasonable doubt. *Hayes*, 555 U.S. at 426.

### C. *Wooden* lays bare the constitutional violations inherent in the current approach.

If existing Supreme Court precedent does not already do so, this Court's recent decision in *Wooden* plainly reveals the error of *Hennesee*'s rule and the Sixth Circuit's approach. It shows just how contextual and circumstance-specific the occasions-different question really is, far beyond the elements of any offense. At the same time, more than one Justice recognizes the lurking constitutional issues.

In *Wooden*, this Court explained that ACCA has "two separate statutory conditions." 142 S. Ct. 1063, 1070 (2022). The Government must first prove that the defendant "has previously been convicted of three violent felonies" and must then prove that "those three felonies were committed on 'occasions different from one another.'" *Id.* (quoting 18 U.S.C. § 924(e)(1)). Regarding the second condition, it concluded that the term "occasion" as used in

ACCA must be interpreted consistent with its ordinary meaning, *i.e.*, "essentially an episode or event" under which "multiple crimes may occur on one occasion even if not at the same moment." *Id.* at 1069; *id.* at 1070 ("[A]n occasion may . . . encompass a number of non-simultaneous activities; it need not be confined to a single one."); *id.* ("[A]n 'occasion' means an event or episode—which may, in common usage, include temporally discrete offenses.").

Of special relevance here is the range of information that conceivably goes into the factual determination that offenses were committed on different occasions, and the circumstance specific and contextual nature of that inquiry. These circumstances include the timing, location, character, and relationship of the offenses, with no one circumstance necessarily predominating. Offenses committed "close in time, in an uninterrupted course of conduct, will often count as part of one occasion." *Id.* at 1071. But offenses "separated by substantial gaps in time or significant intervening events" often may not. *Id.* "Proximity of location is also important; the further away crimes take place, the less likely they are components of the same criminal event." *Id.* Also, "the character and relationship of the offenses may make a difference: The more similar or intertwined the conduct giving rise to the offenses—the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion." *Id.*

Though it was easy in Wooden's case to conclude that his ten burglaries were committed on a single occasion, the Court cautioned that in harder cases the question should be answered while keeping in mind the history and purpose of ACCA. It is intended to target repeat violent offenders, "those who commit a large number of fairly serious crimes as their means of livelihood [and so] are especially likely to inflict grave harm when in possession of a firearm." *Id.* at 1074 (internal quotation marks omitted); *id.* ("[T]he statute targets a particular

subset of offenders—those who have repeatedly committed violent crimes." *Id.* (internal quotation marks omitted).

The Court did not address or decide the Sixth Amendment issue in *Wooden*, because it was not raised, *see id.* at 1068 n.3, but Justices Gorsuch and Sotomayor recognized that "[a] constitutional question simmers beneath the surface of today's case," and that there "is little doubt" that the Court will have to consider the constitutional question "soon." *Id.* at 1087 n.12 (Gorsuch, J. & Sotomayor, J., concurring in part and in the judgment). As they noted, judges in at least three circuits have already seriously questioned whether the "occasions different" inquiry, when done by judges, is constitutional. *See United States v. Dudley*, 5 F.4th 1249, 1273-78 (11th Cir. 2021) (Newsom, J., concurring in part and dissenting in part); *United States v. Perry*, 908 F.3d 1126, 1134-36 (8th Cir. 2018) (Stras, J., concurring); *United States v. Thompson*, 421 F.3d 278, 287-95 (4th Cir. 2005) (Wilkins, C.J., dissenting).

Indeed, after scrutinizing the circuit courts' current approach in light of *Wooden*'s expansive interpretation of the term "occasion" in this context, the Department of Justice now *agrees* that a jury, not a judge, must find that offenses were committed on different occasions before the person may be sentenced under the ACCA, and has been notifying courts of its changed position, including the court below in this case. *See* U.S. Brief in Opposition to Cert. Pet. at 6-7, *Reed v. United States*, No. 22-36 (Dec. 12, 2022) ("[T]he government now acknowledges, given the nature of the different-occasions inquiry articulated in *Wooden*, that the Constitution requires a jury to find (or a defendant to admit) that the defendant's ACCA predicates were committed on occasions different from one another.").

**II. The lower courts are united in error.**

The Sixth Circuit is not alone in its erroneous approach before *Wooden* or in its adherence to that approach after *Wooden*. Before *Wooden*, every court of appeals to address the issue held that *Apprendi*'s rule did not apply to the "occasions" question because that question fell within the exception outlined by *Almendarez-Torres*. *See United States v. Santiago*, 268 F.3d 151, 156-57 (2d Cir. 2001); *United States v. Jurbala*, 198 F. App'x 236, 237 (3d Cir. 2006); *Thompson*, 421 F.3d at 285; *United States v. Tatum*, 165 F. App'x 367, 368 (5th Cir. 2006); *United States v. Burgin*, 388 F.3d 177, 183 (6th Cir. 2004); *United States v. Morris*, 293 F.3d 1010, 1012-13 (7th Cir. 2002); *United States v. Wilson*, 406 F.3d 1074, 1075 (8th Cir. 2005), *abrogated on other grounds by United States v. Miller*, 305 F. App'x 302, 303 (8th Cir. 2008); *United States v. Walker,* 953 F.3d 577, 580 (9th Cir. 2020); *United States v. Michel*, 446 F.3d at 1122, 1132-33 (10th Cir. 2006); *United States v. Longoria*, 874 F.3d 1278, 1283 (11th Cir. 2017); *cf. United States v. Stearns*, 387 F.3d 104, 106, 109 (1st Cir. 2004) (affirming district court's finding that two of defendant's prior offenses were committed on different "occasions"). In these courts' view, ACCA's "'different occasions' requirement falls safely within the range of facts traditionally found by judges at sentencing" because "the separateness" of prior convictions cannot "be distinguished from the mere fact of their existence." *Santiago*, 268 F.3d at 156-57. As a result, these courts hold "that *Apprendi* does not require different fact-finders and different burdens of proof for [ACCA]'s various requirements." *Id.*

After *Wooden*, and despite the government's agreement that the current approach is wrong, lower courts insist nothing has changed. The Sixth Circuit denied rehearing en banc in *Williams*, its post-*Wooden* decision that adheres to prior precedent after ordering the

government to respond. The Tenth Circuit denied rehearing en banc of its post-*Wooden* decision that adheres to prior precedent. *See United States v. Reed*, 39 F.4th 1285 (10th Cir. 2022) (No. 21-2073), *pet. for rh'g denied* (Sept. 1, 2022), *pet. for cert. denied*, No. 22-336 (filed Oct. 6, 2022). The Ninth and Eleventh Circuits have likewise denied rehearing of unpublished decisions adhering to prior precedent. *United States v. Barrera*, No. 20-10368, 2022 WL 1239052, at *2 (9th Cir. Apr. 27, 2022), *pet. for rh'g denied*, 2022 WL 1239052 (9th Cir. Sept. 21, 2022), *pet. for cert. denied*, No. 22-6843 (filed Feb. 17, 2023); *United States v. Haynes*, No. 19-12335, 2022 WL 3643740, at *5 (11th Cir. Aug. 24, 2022), *pet. for rh'g denied* (Nov. 1, 2022), *pet. for cert. denied*, No. 22-6682 (filed Jan. 30, 2023). The Fourth Circuit adhered to its pre-*Wooden* precedent in *United States v. Daniels*, 2022 WL 1135102 (4th Cir. Apr. 18, 2022), *pet. for cert. denied*, *Daniels v. United States*, No. 22-5102 (filed July 11, 2022).

More than a year has passed since *Wooden* was decided, during which hundreds, perhaps into the thousands, of people have been subjected to an enhanced ACCA sentence across the country, but the Eighth Circuit has agreed to revisit the question en banc. In *United States v. Stowell*, 40 F.4th 882 (8th Cir. 2022), a divided panel of the Eighth Circuit concluded it was bound by circuit precedent to conclude that the occasions different element involves "recidivism-related facts" that do not need to be submitted to the jury. *Stowell*, 40 F.4th at 885 (quoting *United States v. Harris,* 794 F.3d 885, 887 (8th Cir. 2015)). Judge Kelly dissented, explaining that she would have vacated and remanded for resentencing to allow the district court to consider the question in the first instance, with the benefit of *Wooden*. *Id.* at 886-87. The Eighth Circuit has since granted Stowell's petition for rehearing en banc, with oral

argument occurring on April 11, 2023. *Stowell*, No. 21-2234, 2022 WL 16942355 (8th Cir. Nov. 15, 2022). The en banc opinion has not yet been released.

Even if one or a few courts eventually change course in light of *Wooden*, the circuit split generated would endure, as the chances that all the rest of the circuits will follow suit are virtually nonexistent. Further percolation will not only fail to further develop the arguments, given the government's agreement, but it also perversely permits the government to urge adherence to circuit precedent to ensure unconstitutional sentencing, as it did in this case. If some few courts in the resulting incoherent vacuum do not view themselves bound by precedent in the wake of *Wooden*, the result is intolerably different treatment in the lower courts. *Compare* Pet. Appx. 7a (relying on its prior precedent to reject Mr. Lovell's constitutional arguments and affirm his ACCA sentence following *Wooden*), with Govt. Br. Opp. at 7, *Reed v. United States*, No. 22-236 (citing *United States v. Man*, No. 21- 10241, 2022 WL 17260489 (9th Cir. Nov. 29, 2022) (assuming, without deciding, constitutional error occurred in light of government's post-*Wooden* concession and remanding where error was not harmless). Amid differing approaches, scores of defendants each year will be subject to an unconstitutional system due solely to the jurisdiction they happen to be in. For Mr. Lovell, at stake here are constitutional rights that, if not reviewed now, may be forever lost to him.

Only this Court can correct the lower courts' insistent error, resolve the government's incoherent stance, and establish a consistent national rule that accords with the Fifth and Sixth Amendments.

## CONCLUSION

In consideration of the foregoing, Mr. Ronnie Lovell submits that the petition for certiorari should be granted.

Respectfully submitted,

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