NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA
Respondent,

v.

ANDRE RENE WILLIAMS
Petitioner.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Constitution permits a sentencing judge to find non-elemental facts by a preponderance of the evidence and then rely on those facts to impose a sentence in excess of the one established by Congress for the only offense charged in the indictment and plead by the defendant, and whether such a finding by lower court amounts to a patent violation of the defendant's constitutional rights under the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees and, therefore, render the ACCA unconstitutional.

TABLE OF CONTENTS

TABLES OF AUTHORITIES

Cases:

Other authorities:

Constitution and statutes:

Miscellaneous:

PETITION FOR WRIT OF CERTIORARI

Petitioner Andre Rene Williams respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is unpublished but available at *United States v. Williams*, No. 22-60062, 2023 WL 2239020 (5th Cir. Feb. 23, 2023).

JURISDICTION

The judgment of the court of appeals was entered on April 11, 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.

The Armed Career Criminal Act ("ACCA"), found at 18 U.S.C. § 924(e), provides in pertinent part:

(1) 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) or 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 . . . .

(2)(B) "the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year. . . that— (i) has as an element the use, attempted use, or threatened use of physical force against the person of another"

STATEMENT

Andre Rene Williams ("Williams") was indicted on October 24, 2018 for four counts of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). C.A. ROA.345-348. Williams entered a plea of "not guilty" at his arraignment hearing. C.A. ROA.350-351. In order to correct language in the indictment, the government later announced that it had instituted a new charge against Williams through an Information that charged Williams with only one count of being a felon in possession of a firearm based only upon the first count of the Indictment. Williams later entered into a plea agreement and pled guilty to the one count Information charge. C.A. ROA.62.

The Information charge against Williams carried with it a maximum sentence of no more than ten (10) years based upon 18 U.S.C. § 924(a)(2) and made no reference to the ACCA, nor did it cite 924(e) or otherwise assert that Williams was subject to an enhanced statutory penalty under the ACCA.

Before sentencing, a probation officer completed a presentence investigation report ("PSR"), which asserted that Williams was subject to ACCA's enhanced penalties based upon his prior criminal history. C.A. ROA.185-86, 193 (PSR at ¶¶ 78-81, 127-28, pp. 15-16, 23).

During the sentencing phase, the government offered a composite document in support of claim that Williams was subject to an ACCA sentence, namely that he had at least three prior convictions for a violent felony that were committed on different occasions. This composite document included a single state court Judgment of Conviction and Sentence Instanter (C.A. ROA.314-16) coupled with certain "prisoner commitment notices," along with the sentencing judgment, to explain what the sentence is, who is being sentenced, and the crime for which they were convicted." C.A. ROA.144, 317-320.

At sentencing, the government clarified that the so-called "prisoner commitment notices" offered also included a description of the various crimes along with a reference to date of the offenses.[1] C.A. ROA.114, 317-320. The Government submitted to the sentencing court that the various convictions contained within the one state court judgment from the Circuit Court of Rankin County, Mississippi were "sufficient to prove that the defendant is - - should be sentenced under 18 United States Code, Section 924(e), and that he has at least three prior convictions for violent felonies." C.A. ROA.146.

Williams objected to being sentenced under the ACCA and to the district court's reliance upon the PSR

[1] The sentencing court judge below noted this as well in that he read the various dates into the record off the "prisoner commitment notices. C.A. ROA.144-146.

and various state court sentencing documents offered by government in support of its argument that he had committed three prior violent felonies on separate occasions. C.A. ROA.117-135, 140-43. Williams argued that the sentence violated his Fifth and Sixth Amendment rights since the ACCA charge wasn't included in the initial four-count Indictment or the subsequent one-count Information charge to which he plead guilty, but even if the charge was properly before the sentencing court, it was prohibited from finding that his prior convictions were committed on separate occasions by reviewing the sentencing material offered by the government. C.A. ROA.117-135, 140-43.

The district court overruled Williams' objections and went on to make a factual finding that the ACCA elements had been met and therefore Williams was subject to an ACCA sentence based upon a preponderance of the evidence standard. C.A. ROA. 152. Thereafter, Williams was sentenced to a mandatory minimum sentence of 15 years under the ACCA. C.A. ROA.144-47.

Williams timely appealed his sentence to the Fifth Circuit Court of Appeals. After each party filed their respective appellate briefs, Williams' counsel was made aware of fact that the precise argument that the Government advanced before the sentencing court and within its briefing below had been abandoned by the Department of Justice in the wake of this Court's decision in *Wooden v. United States*, 142 S.Ct. 1063 (2022). In other cases, the Government was filing pleadings within which it conceded that a jury, not the district court, should decide the prior offense inquiry demanded by ACCA's Occasions Clause. *See, e.g.*, Brief of Plaintiff-Appellee at 10-11, *United States v. Kerstetter*, No. 22-10253 (5th Cir. Nov. 28, 2022) (agreeing that district court erred by finding that defendant

committed prior offenses on separate occasions); Supplemental Letter Brief of Plaintiff-Appellee at 6, *United States v. McCall*, No. 18-15229-DD (11th Cir. Aug. 5. 2022) ("the United States' current view is that the different occasion inquiry, as described in *Wooden*, is one for a jury (unless the defendant has admitted to the different occasions)"); Supplemental Letter Brief of Plaintiff-Appellee at 1, *United States v. Penn*, 21-12420-GG, 11th Cir. July 26, 2022) (same); Supplemental Letter Brief of Appellee at 1, *United States v. Hadden*, No. 19-4151 (4th Cir. July 25, 2022) (same). Williams made the Fifth Circuit aware of this development through a Rule 28(j) Letter filed February 2, 2023. With this flip by the Department of Justice as a result of the *Wooden* decision, the Government is now taking the same position that Williams has argued throughout the sentencing process below, namely that only a jury can make a determination that the ACCA's Occasions Clause has been satisfied since Williams has not admitted as to the requisite findings to support such an offense.

This Fifth Circuit's Opinion handed down on February 23, 2023 (the "Opinion") affirmed the district court's sentence under the ACCA. In doing so, the Fifth Circuit summarily dismissed Williams' primary argument, through which he claimed that the facts of his prior convictions, to which he had neither been charged nor had he admitted, could not be used against him via an ACCA enhancement unless submitted to a jury. The Fifth Circuit found that this argument had been had been foreclosed by this Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 234, 226-27 (1998), a decision that had been followed by the Fifth Circuit on numerous occasions. The Fifth Circuit's Opinion went on to state that this Court's decision in *Wooden* did not forbid a sentencing court from consulting the record to determine whether an ACCA-

predicate offense occurred on separate occasions. In fact, the Fifth Circuit characterized the *Wooden* decision as commanding "that district courts investigate the occasions of a defendant's past criminal conduct" based upon language within the decision that directed "courts to pursue a 'multi-factored' analysis of a defendant's § 924(e) occasions." Opinion, p. 2. Accordingly, the Fifth Circuit found that the district court's action in looking to various state court charging documents in order to make factual determination that Williams' ACCA-predicate offenses were committed on separate occasions was appropriate and comported with well-established Fifth Circuit precedent. Opinion, p. 2.

REASONS FOR GRANTING THE PETITION

1. Fifth Circuit erred when finding that district court judge could consult the record to obtain non-elemental facts, such as dates, locations and methods of committing the ACCA predicate offenses in order to make factual finding that ACCA's Occasions Clause has been satisfied.

The Fifth Circuit has misinterpreted the *Wooden* decision and consequently, erred when finding that *Wooden* authorized the district court to consult the record to obtain non-elemental facts, such as dates, locations and methods of committing the ACCA-predicate offenses, in order to satisfy the ACCA's Occasion Clause by a preponderance of the evidence where defendant was not indicted for an ACCA charge nor did he admit the same within his plea. Like other circuit court rulings in the aftermath of *Wooden*, the Fifth Circuit held that Williams' argument that the sentencing court may not consult the record to obtain

non-elemental facts to determine whether the Occasions Clause has been satisfied is foreclosed by this Court's previous ruling in *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998) and that this Court once again declined an invitation to revisit *Almendarez-Torres* within *Wooden*. Opinion, p. 2. To the contrary, while *Wooden* did not address the viability of *Almendarez-Torres*, even after two *amici curiae* briefed the question, it was only "because Wooden did not raise it." *Wooden*, 142 S.Ct. at 1068, n. 3. Justice Gorsuch was more to the point within his concurring opinion, stating within footnote that "a constitutional question simmers beneath the surface of today's case." He goes on to note that "[b]ecause Mr. Wooden did not raise a constitutional challenge to his sentence, the Court does not consider the propriety of this practice. But there is little doubt we will have to do so soon. [citations omitted]." *Id.* at 1087, n.7. Through this Petition, Williams now presents that precise constitutional challenge to this Court for determination. Williams has raised the Fifth and Sixth Amendment arguments related to the ACCA enhancement both at sentencing and on appeal to the Fifth Circuit. He now raises it a final time before this Court.

2. Confusion presented by this issue is even more prevalent now as the rulings by the various circuit courts post-*Wooden* are contrary to arguments being presented by both the criminal defendants and the Department of Justice.

This issue is even more pressing now that the rulings by the various circuit courts are contrary to arguments being presented by both the criminal defendants and the Department of Justice. The circuit courts addressing this issue across the country in the wake of *Wooden* continues to hold fast to prior precedent based upon *Almendarez-Torres* in holding that the sentencing

judge is allowed to consult the so-called *Shepard* documents[2] to obtain non-elemental facts, such as dates, locations and methods of committing the ACCA-predicate offenses, in order to satisfy the ACCA's Occasion Clause by a preponderance of the evidence. *See, e.g.*, *United States v. Brown*, 67 F.4th 200, 215 (4th Cir. 2023) (requirement, for mandatory minimum sentence under ACCA, that defendant committed three prior violent felony or serious drug offenses on different occasions, need not, under Fifth and Sixth Amendments, be alleged in the indictment and found by a jury, or admitted by the defendant in his plea, even though the fact that the prior offenses were committed on different occasions increases the penalty for defendant's firearm possession offense; noting that court of appeals remain bound by *Almendarez-Torres*); *United States v. Gallimore*, 2023 WL 4219411, *6 (10th Cir. June 28, 2023) (finding that precedent preceding Wooden continues to foreclose defendant's argument that a jury must decide whether his prior convictions qualify as separate occasions under the ACCA); *United States v. Cogdill*, 2023 WL 4030069, *3 (6th Cir. June 15, 2023) (affirming district court's sentencing of defendant to ACCA mandatory-minimum sentence based upon judicial finding that Occasions Clause had been satisfied; noting that *Wooden* declined to address whether Sixth Amendment requires a jury, rather than a judge, to resolve fact question as to whether ACCA predicate offenses occurred on a single occasion). They do so despite fact that both the criminal defendants sentenced under the ACCA, like Williams here, and the government find themselves in the unique position of both readily acknowledging that in the aftermath of *Wooden* the government must now plead and prove to a jury (or a defendant must admit) that a defendant's ACCA

[2] *Shepard v. United States*, 544 U.S. 13, 25-26 (2005).

predicates were committed on occasions different from one another. *See, e.g.,* Government's Motion to Withdraw Appeal **[Dkt. 30]**, at pp. 2-3, *United States v. Brown*, No. 22-2550, (3rd Cir. March 12, 2023) ("in light of the 'multi-factored' and 'holistic' inquiry now required by Wooden [citation omitted], the government's view is that it must now plead and prove to a jury (or a defendant must admit) that a defendant's ACCA predicates were committed on occasions different from one another"); Brief of Plaintiff-Appellee at 10-11, *United States v. Kerstetter*, No. 22-10253, (5th Cir. Nov. 28, 2022) (agreeing that district court erred by finding that defendant committed prior offenses on separate occasions); Supplemental Letter Brief of Plaintiff-Appellee at 6, *United States v. McCall*, No. 18-15229-DD, (11th Cir. Aug. 5, 2022) ("the United States' current view is that the different occasions inquiry, as described in *Wooden*, is one for a jury (unless the defendant has admitted to the different occasions").

3. Department of Justice now agree with defendants that *Wooden* requires ACCA offense must now be charged in indictment and found by a jury or admitted by defendant, yet circuit courts continue to hold otherwise.

It is time to for this Court to finally address *Almendarez-Torres*. In *Apprendi*, the Court definitively held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (citing *Jones v. United States*, 526 U.S. 227, 243, n.6 (1999). Moreover, where a fact triggers a mandatory minimum sentence that increases the range of sentences to which a criminal defendant is exposed, that fact produces a new penalty

and constitutes an ingredient of the offense, which must then be charged in the indictment, submitted to a jury, and proven by the government beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99 (2013).

This Court initially called *Almendarez-Torres* "an exception to the *Apprendi* line of cases for judicial factfinding that concerns a defendant's prior convictions." *Shepard*, 544 U.S., at 27. However, this Court has since openly suggested that it was wrongly decided. In *Apprendi v. New Jersey*, 530 U.S. 466, 489 (2000), this Court noted that "it [was] arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested," but declined to revisit the decision as an unnecessary and unraised issue. Later in *Shepard*, the majority counseled against relying upon *Almendarez-Torres* to authorize a judge to resolve a dispute about a prior conviction. The Court noted that "[t]he rule of reading statutes to avoid serious risks of unconstitutionality [citations omitted] therefore counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea, ..." 544 U.S. at 25-26.

In his concurring opinion in *Shepard*, Justice Thomas was more pointed in his rejection of *Almendarez-Torres* as precedent, stating:

> *Almendarez-Torres*, like *Taylor*, has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. [Citations omitted]. The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres'* continued viability. Innumerable criminal

> defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental "imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond a reasonable doubt requirements." *Harris v. United States*, 536 U.S. 545, 581-582 (2002) (THOMAS, J., dissenting).

544 U.S. at 27-28 (THOMAS, J., concurring). After these cases, the continued "viability" of *Almendarez-Torres* can be characterized as being in serious doubt.

And even during oral argument within *Wooden*, the Sixth Amendment concerns created by *Almendarez-Torres* kept creeping into the argument even though Wooden didn't assert the question within his appeal. Justice Barrett suggested during the early portion of oral argument that the "fact-laden" assessment regarding the Occasion Clause "provokes a Sixth Amendment problem." Wooden Oral Argument transcript, pp. 16-17. Justice Thomas raised similar concerns about there being a Sixth Amendment problem with sentencing judges making factual findings as to the Occasion Clause within the ACCA. *Id.* at 31-32, 39. There was even discussion here about the Sixth Amendment issue being defense counsel's "next case." Id. at 32.

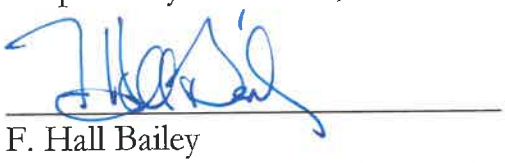
CONCLUSION

The constitutional question as to whether this Court's prior decisions have narrowed or overruled Almendarez-Torres continue to linger in both district and circuit courts below. Until this Court directly addresses the Sixth Amendment problems presented by Almendarez-Torres and its progeny, these lower

courts will continue to work within the conflicting principles set forth within *Apprendi* and *Almendarez-Torres*. As the Fourth Circuit recently stated: "the Supreme Court's decisions in *Descamps*, *Mathis*, and *Wooden* have not narrowed or overruled *Almendarez-Torres*. And if they have done so by implication, the Supreme Court must say so, not a court of appeals". *United States v. Brown*, 67 F.4th at 201. It is time for that "next case" discussed during oral argument in *Wooden* so that this Court can directly address this longstanding constitutional question that has been simmering for too long. The petition for writ of certiorari should be granted.

This the 10th day of July, 2023.

Respectfully submitted,



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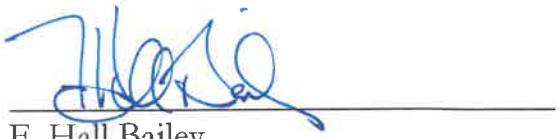
CERTIFICATE OF SERVICE

I hereby certify that I have this day served via U.S. mail, postage prepaid, the above and foregoing Petition for Writ of Certiorari to the following:

Elizabeth B. Prelogar Esq.
Solicitor General for the United States
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

This the 10th day of July, 2023.



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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 23, 2023
Lyle W. Cayce
Clerk

No. 22-60062
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ANDRE RENE WILLIAMS,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:19-CR-121-1

Before JONES, HAYNES, and OLDHAM, *Circuit Judges*.

PER CURIAM:*

Andre Rene Williams pleaded guilty to a single count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g). Williams claims the district court erred in sentencing him to a mandatory minimum

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

term of 180 months' imprisonment, as required by the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). We affirm.

Williams' primary argument is that the facts of his prior convictions, which he did not admit in his plea, cannot be used against him via an ACCA enhancement unless submitted to a jury. This argument is foreclosed by Supreme Court precedent. *See Almendarez-Torres v. United States*, 523 U.S. 224, 226–27 (1998). The Supreme Court has repeatedly declined invitations to revisit *Almendarez-Torres*. *See Apprendi v. New Jersey*, 530 U.S. 466, 488–90 (2000); *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013); *James v. United States*, 550 U.S. 192, 214 n.8 (2007).

Wooden v. United States, 142 S. Ct. 1063 (2022), is not to the contrary. Williams reads it to forbid district courts from consulting the record to determine whether ACCA-predicate offenses occurred on separate occasions, as § 924(e) requires. But in reality, *Wooden* commands that district courts investigate the occasions of a defendant's past criminal conduct. *See Wooden*, 142 S. Ct. at 1070–71 (directing courts to pursue a "multi-factored" analysis of a defendant's § 924(e) occasions). The district court's analysis in this case comported with *Wooden* and our precedent. *See United States v. Stone,* 306 F.3d 241, 243 n.3 (5th Cir. 2002); *United States v. White*, 465 F.3d 250, 254 (5th. Cir. 2006) (per curiam).

In the alternative, Williams argues that the district court impermissibly relied on the Pre-Sentence Report (PSR), among other documents, to substantiate its ACCA-related conclusions. ***See, e.g.*, Blue. Br. 54–55.** True, precedent limits the types of documents that district courts may consult to determine which offenses are ACCA predicates. *See Shephard v. United States*, 544 U.S. 13, 16 (2005) (indicating courts may examine "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which

the defendant assented."); *United States v. Garza-Lopez*, 410 F.3d 268, 274 (5th Cir. 2005) (holding PSR alone cannot support enhancements that increase a defendant's statutory maximum). But here, the district court did not rely on the PSR alone. It also relied on "the exhibits that have been produced by the government in this case." ROA.152. That renders any error harmless, because the government's exhibits contained acceptable documentation clearly establishing Williams' ACCA predicates, including the relevant state-court charging documents and Williams' plea to those charges. *See Shephard*, 544 U.S. at 16.

AFFIRMED.

United States Court of Appeals for the Fifth Circuit

No. 22-60062
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ANDRE RENE WILLIAMS,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:19-CR-121-1

Before JONES, HAYNES, and OLDHAM, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

United States Court of Appeals for the Fifth Circuit

No. 22-60062

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ANDRE RENE WILLIAMS,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:19-CR-121-1

ON PETITION FOR REHEARING EN BANC

Before JONES, HAYNES, and OLDHAM, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.