NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DEANGELUS THOMAS,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Armed Career Criminal Act enhances the statutory penalty for a firearms offense under 18 U.S.C. § 922(g)(1) when the offender has three predicate convictions for offenses that were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1).

May a district court judge properly find, by a preponderance of the evidence, the uncharged, non-elemental fact that a person committed three prior offenses "on occasions different from one another," as required by the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), or does the Constitution require that fact to be charged in the indictment and proven to the jury beyond a reasonable doubt?

LIST OF PARTIES

All the parties to the proceeding are listed in the style of the case.

RELATED PROCEEDINGS

United States v. Thomas, No. 21-cr-20078-JPM (W.D. Tenn. 2021)

United States v. Thomas, No. 22-6067, 2023 U.S. App. LEXIS 20577 (6th Cir. Aug. 8, 2023).

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Deangelus Thomas, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The Sixth Circuit opinion is available electronically at United States v. Thomas, No. 22-6067, 2023 U.S. App. LEXIS 20577 (6th Cir. Aug. 8, 2023). It is also submitted herewith in Appendix A.

JURISDICTION

On August 8, a three-judge panel in the Sixth Circuit Court of Appeals entered its opinion in United States v. Thomas, No. 22-6067, 2023 U.S. App. LEXIS 20577 (6th Cir. Aug. 8, 2023). This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

STATUTES, ORDINANCES AND REGULATIONS INVOLVED

1. 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 . . . . U.S. Const. amend. V.

2. 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 . . . . U.S. Const. amend. VI.

3. 18 U.S.C. § 922(g)

It shall be unlawful for any person . . . 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. § 922(g)(1).

4. 18 U.S.C. § 924(a) (2021)

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(a)(2) (2021).

5. 18 U.S.C. § 924(e)

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C, § 924(e)(1).

STATEMENT OF THE CASE

Overview. The Armed Career Criminal Act, 18 U.S.C. § 924(e) ("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." The lower courts have long and uniformly held that this occasions-different requirement is not an element of the ACCA, but instead a fact that the district judge may find at sentencing. As the government now concedes, the law has evolved to reveal that this approach violates the Fifth and Sixth Amendments. See, e.g., Brief Opp'n, Reed v. United States, No. 22-336, at 6-7 (filed Dec. 12, 2022). And this Court's recent decision in Wooden makes clear, the occasions-different test turns on circumstances relating to the commission of the prior offenses and going well beyond their elements, encompassing such non-elemental facts as proximity, timing, intervening events, and course of conduct or common scheme. Wooden v. United States, 142 S. Ct. 1063, 1069-70 (2022). The government has thus far resisted review by this Court to correct the problem, contending that the Court's review would be premature, and the issue should percolate more in the lower courts in the wake of Wooden. See, e.g., Brief Opp'n Daniels v. United States, No. 22-5102, at 4-5 (filed Nov. 21, 2022); Memo Opp'n, Enyinnaya v. United States, No. 22-5857, at 1-2 (filed Dec. 19, 2022); Brief Opp'n, Reed v. United States, No. 22-336, at 7 (filed Dec. 12, 2022). Yet, as in this case, it simultaneously urges lower courts to uphold ACCA sentences known to have been imposed in violation of the defendant's constitutional rights, on the theory the courts are bound by circuit precedent.

At this point, no further percolation is necessary. Every court of appeals to have revisited the question in the wake of Wooden has left its scheme intact. In some cases, the government's concession has contributed to favorable outcomes that elsewhere are unavailable, resulting in

painfully disparate outcomes for similar offenders. That is why the question is of crucial importance, as the ACCA increases the penalty range in firearms cases like this one from a maximum of ten years to a minimum of fifteen years,[1] and increases the average sentence imposed by more than a decade. The issue will persist until this Court definitively resolves it. Only this Court can establish a uniform national rule that corrects the lower courts' errors, and time is of the essence.

Mr. Thomas's case is in a very unique posture compared to other defendants who have raise this issue. The decision in Wooden was issued after Mr. Thomas was found guilty of his § 922(g)(1) offense, but before he was sentenced. He presented this Wooden claim in the courts below, including explaining why lower court precedent has been fatally undermined by Wooden and with the lower courts' awareness of government's agreement. The Sixth Circuit rejected his challenge based on binding circuit precedent, but given the severe impact of the ACCA on Mr. Thomas and the unique circumstances of his case, this case presents a perfect vehicle in which to resolve the question. His petition for a writ of certiorari should therefore be granted. Alternatively, the petition should be granted and held to be considered when the Court rules on similar cases presenting the same issue.[2]

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[1] The Bipartisan Safer Communities Act increased the maximum penalty for a violation of § 922(g) to "not more than 15 years" of imprisonment." See Pub. L. No. 117-159, div. A, tit. II, § 12004(c), 136 Stat. 1313, 1329 (June 25, 2022), codified at 18 U.S.C. § 924(a)(8). That amendment has no bearing on the constitutional issue in this case. Under the amended penalty scheme, as in the former one, the ACCA significantly enhances both the minimum and the maximum sentence for a violation of § 922(g).

[2] E.g., Turner v. United States, No. 23-5226 (filed July 21, 2023); Williams v. United States, No. 23-5085 (filed July 10, 2023); Jackson v. United States, No. 22-7772 (filed June 8, 2023); Hunley v. United States, No. 22-7758 (filed June 8, 2023); McCall v. United States, No. 22-7630 (filed May 22, 2023); Lovell v. United States, No. 23-5081 (filed Apr. 27, 2023); Buford v. United States, No. 22-7660 (filed Apr. 18, 2023).

Proceedings below. Mr. Thomas was found guilty by and jury and convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). See Thomas, 2023 U.S. App. LEXIS 20577, at * 1. He was classified an armed career criminal under the ACCA because he had three prior violent felony convictions. Id. Mr. Thomas objected to this classification after this Court issued its decision in Wooden. Id. He argued that, under Wooden, the district court would violate his Fifth and Sixth Amendment rights if it performed judicial factfinding to determine whether his prior violent felony convictions occurred on different occasions.

The government conceded that "in light of the 'multi-factored' inquiry required by Wooden, . . . the ACCA enhancement should not be applied in the absence of a jury finding (or admission by the defendant) on the occasions-different issue." Id. at *2 The government subsequently requested that a jury be commissioned to make the finding. Id.

The district court overruled Mr. Thomas' objection and denied the government's request, concluding that, under Sixth Circuit precedent, a sentencing judge may answer the question of whether predicate offenses were committed on different occasions. Id. After the district court found that the ACCA enhancement applied to Mr. Thomas, Mr. Thomas received a 432-month custodial sentence. Id. Mr. Thomas appealed. Id.

The Sixth Circuit panel observed that the court had "consistently rejected" Mr. Thomas' argument. Id. at *3 (citing cases). The panel found itself bound by circuit precedent, noting that the Wooden decision would not change that conclusion. Id. The panel reasoned that because Wooden did not make a constitutional challenge to his sentence, the Wooden decision did not disrupt prior binding caselaw. Id. The panel concluded that in the absence of a Supreme Court decision or an en banc ruling in the circuit holding otherwise, it was bound by circuit precedent

holding that a sentencing judge may decide whether predicate offenses were committed on different occasions for ACCA purposes. Id.

Mr. Thomas now seeks review of the question whether a district court may consider non-elemental facts gleaned from Shepard [3] documents to find that ACCA predicates were committed on different occasions, or instead that determination must be charged and proven to the jury beyond a reasonable doubt. He asks that his petition be granted for review or, if the Court grants any of the forthcoming or pending petitions, that his petition be granted and held in abeyance until the Court rules in that case and considered at that time.

[3] Shepard v. United States, 544 U.S. 13 (2013).

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's approach is wrong.

The Sixth Circuit's analysis failed to apply the "holistic" and "multi-factored in nature" test mandated by this Court in Wooden, 142 S. Ct. at 1068-1071. The Sixth Circuit's approach violates the Fifth and Sixth Amendments.

A. The historical context underlying the Fifth and Sixth Amendments.

A historical understanding of the relevant provisions in the Fifth and Sixth Amendments provides the appropriate starting point for analysis. See Alleyne v. United States, 570 U.S. 99, 124-25 (2013) (Roberts, J., dissenting) ("In a steady stream of cases decided over the last 15 years, this Court has sought to identify the historical understanding of the Sixth Amendment jury trial right and determine how that understanding applies to modern sentencing practice."); see also, e.g., Apprendi v. New Jersey, 530 U.S. 466, 476-83 (2000) (discussing founding era authorities to inform the discussion of the Sixth Amendment right to jury trial); United States v. Haymond, 139 S. Ct. 2369, 2375-77 (2019) (same).

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. Constitutional "due process" requires the government to prove guilt of a criminal charge beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 362-64 (1970); see also Jones v. United States, 526 U.S. 227, 243 n.6 (1999).

The Sixth Amendment provides that "[i]n 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 Sixth Amendment right to jury trial is steeped in history. In 18th century England and during the American Colonial era, there was recurring "competition . . . between judge and jury over the real

significance of their respective roles." Jones, 526 U.S. at 245. "[T]o guard against a spirit of oppression and tyranny on the part of the rulers, and 'as the great bulwark of civil and political liberties,' trial by jury [was] understood to require that 'the truth of every accusation . . . .be confirmed by the unanimous suffrage of twelve of equals and neighbours.' " Apprendi, 530 U.S. at 477 (internal citations and bracketed language omitted). But Crown and Parliament took "[c]ountervailing measures to diminish the juries' power." Jones, 526 U.S. at 245. The Parliamentary measures included barring the right to jury trial when defining new statutory offenses or requiring trial by judicial officers including revenue commissioners and justices of the peace. Id. at 246.

The Framers were keenly aware of this tension between judge and jury. The need to protect the jury's preeminent role would "likely have been very much to the fore in the Framers' conception of the jury right." Id. at 244. As the Supreme Court recently explained in Haymond, the Framers understood the right to trial by jury as the "heart and lungs" of our democracy where it was paramount that the *people* retained authority over all judicial functions:

> Together with the right to vote, those who wrote our Constitution considered the right to trial by jury "the heart and lungs, the mainspring and the center wheel" of our liberties, without which "the body must die; the watch must run down; the government must become arbitrary." Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977). Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions.

Haymond, 139 S. Ct. at 2375.

Twelve-member juries during the founding era controlled the key aspects of criminal punishment. See Apprendi, 530 U.S. at 478-83 (discussing the jury's role in defining punishment during the founding era); Alleyne, 570 U.S. at 107-11 (same); Haymond, 139 S. Ct. at 2376-77 (same). During the founding era, "[a]s a general rule, criminal proceedings were submitted to a

jury after being initiated by an indictment containing 'all the facts and circumstances which constitute the offence and . . . *the judgment which should be given* . . .' " Apprendi, 530 U.S. at 478 (quoting J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862) (emphasis added in Apprendi)). What this meant, in practice, is that if a jury found a person guilty of an offense the judge merely pronounced the judgment that was already specified in the indictment. See id. "For much of our history . . . crimes tended to carry with them specific sanctions, and 'once the facts of the offense were determined by the jury, the judge was meant simply to impose the prescribed sentence.'" Haymond, 139 S. Ct. at 2376 (quoting Alleyne, 570 U.S. at 108). During our nation's founding era, a jury was therefore required to "find beyond a reasonable doubt every fact 'which the law makes essential to a punishment' that a judge might later seek to impose." Id. (emphasis added). "Even when judges did enjoy discretion to adjust a sentence based on judge-found aggravating or mitigating facts, they could not 'swell the penalty above what the law had provided for the acts charged' and found by the jury." Id. (quoting Apprendi, 530 U.S. at 519).

This Court has endeavored to bring modern sentencing practices in line with the Constitution as it was understood in the founding era. See, e.g., Haymond, 139 S. Ct. at 2376 (observing that the "Constitution's guarantees cannot mean less today than they did the day they were adopted"). "Consistent with common-law and early American practice, Apprendi concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." Alleyne, 570 U.S. at 111 (citing Apprendi, 530 U.S. at 490). In Alleyne, this Court further held that any "[f]acts that increase the mandatory minimum sentence are . . . elements and must be submitted to the jury and found beyond a reasonable doubt." Alleyne, 570 U.S. at 108. As Justice Scalia explained in his concurring opinion in Apprendi, the Sixth Amendment "has no intelligible content unless it means that all the facts which must exist in order

to subject the defendant to a legally prescribed punishment must be found by the jury." Apprendi, 530 U.S. at 499 (Scalia, J., concurring) (emphasis in original). "The Constitution seeks to safeguard the people's control over the business of judicial punishments by ensuring that any accusation triggering a new and additional punishment is proved to the satisfaction of a jury beyond a reasonable doubt." Haymond, 139 S. Ct. at 2380 (emphasis added).

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

The 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 the 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, 530 U.S. at 490; Alleyne, 570 U.S. at 111. 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, 544 U.S. at 20-21, 26. 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 Apprendi's narrow exception. 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 to 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. See 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.

C. 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, which dictate the result Mr. Thomas urges here.

For instance, in United States v. Hayes, 555 U.S. 415 (2009), the Court addressed the definition of "misdemeanor crime of domestic violence" for purpose of the firearms ban at 18 U.S.C. § 922(g)(9). That statute provides that 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 a 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, 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 like 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 exceeds $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 the ACCA has "two separate statutory conditions." Wooden, 142 S. Ct. at 1070. They are: (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.

D. Wooden lays bare the constitutional violations inherent in the current approach.

If existing Supreme Court precedent does not already do so, this Court's 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. at 1070. 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 the 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, this 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." (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 Brief Opp'n, Reed v. United States, No. 22-336, at 6-7 (filed 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 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, the 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. See United States v. Williams, 39 F.4th 342 (6th Cir.), pet. rehr'g denied, No. 21-5856, 2022 WL 17409565 (6th Cir. 2022). 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. rehr'g denied (Sept. 1, 2022), cert. pet. denied, 143 S. Ct. 745 (2023). The Ninth and Eleventh Circuits have likewise denied rehearing of unpublished decisions adhering to prior precedent. United States v. Hamlin, No. 20-10368, 2022 WL 1239052, at *2 (9th Cir. Apr. 27, 2022), pet. rehr'g denied, 2022 WL 1239052 (9th Cir. Sept. 21, 2022), cert. pet. denied, 143 S. Ct. 1043 (2023); United States v. Haynes, No. 19-12335, 2022 WL 3643740, at *5 (11th Cir. Aug. 24, 2022), pet. rehr'g denied, (Nov. 1, 2022), cert. pet. denied, 143 S. Ct. 1009 (2023). The Eighth and Fifth Circuits have also denied rehearing of their post-Wooden decision that adhere to their prior precedent. See United States v. Buford, 54 F. 4th 1006, 1069 (8th Cir. 2022), pet. rehr'g denied, No. 21-1050, 2023 WL 1809810 (8th Cir. Dec. 13, 2022), pet. cert. filed, No. 22-7660 (filed Feb. 8, 2023); United States v. Williams, No. 22-60062, 2023 WL 2239020, at *1 (5th Cir. Feb. 23, 2023), pet. rehr'g denied, (Apr. 11, 2023), pet. cert. filed, No. 23-5085 (filed July 10, 2023). The Fourth Circuit adhered to its pre-Wooden precedent in United States v. Daniels, No. 21-4171, 2022 WL 1135102 (4th Cir. Apr. 18, 2022), cert. pet. denied, 143 S. Ct. 749 (2023).

Over a year has passed since Wooden was decided, during which hundreds of people have been subjected to the enhanced ACCA sentence across the country, but only 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). As of the date of filing this Petition, the en banc opinion has not yet been released.

Yet if one or only 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 would 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. 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. Thomas, 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

For all of the foregoing reasons, Petitioner respectfully prays that this Court will grant certiorari to review the judgment of the Sixth Circuit in his case.

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Respectfully submitted,

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