NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER STOWELL,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the U.S. Constitution requires a jury trial and proof beyond a reasonable doubt to find that a defendant's prior convictions were "committed on occasions different from one another," as is necessary to impose an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1).

2. Whether, in light of the multifactor test required by *Wooden v. United States*, 595 U.S. 360 (2022), a court may properly conduct a harmless-error analysis concerning an occasions-clause question based solely on information found in the charging documents from the defendant's prior convictions when there was no admissible evidence in the record from which a jury would have been able to decide the question below, and without considering whether a defendant's prior convictions arose out of a single episode of criminal conduct.

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

LIST OF DIRECTLY RELATED PROCEEDINGS

United States v. Christopher Stowell, No. 2:20-cr20019-PKH, U.S. District Court for the Western District of Arkansas. Judgment entered May 21, 2021.

United States v. Christopher Stowell, No. 21-2234, U.S. Court of Appeals for the Eighth Circuit. En banc rehearing granted November 15, 2022; en banc opinion and judgment entered September 22, 2023.

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OPINION BELOW

On July 25, 2022, a divided panel of the Eighth Circuit Court of Appeals entered its opinion and judgment affirming the enhanced sentence the district court imposed upon Christopher Stowell under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1). *United States v. Stowell*, 40 F.4th 882 (8th Cir. 2022). Petitioner's Appendix ("Pet. App.") 7a-10a. On November 15, 2022, the Eighth Circuit entered an order granting Mr. Stowell's petition for rehearing en banc and vacating the panel's opinion and judgment; the order granting rehearing is unpublished but may be found at 2022 WL 16942355. Pet. App. 6a. On September 22, 2023, the en banc Court of Appeals entered its opinion and judgment affirming Stowell's enhanced sentence. *United States v. Stowell*, 82 F.4th 607 (8th Cir. 2023) (en banc). Pet. App. 1a-5a.

JURISDICTION

The judgment of the en banc court of appeals was entered on September 22, 2023. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner refers this Honorable Court to the following constitutional and statutory provisions:

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

18 U.S.C. § 924(e):

(e)(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) 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).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 941 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

STATEMENT OF THE CASE

1. On October 7, 2020, Christopher Stowell was charged in a one-count indictment being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The indictment that charged Mr. Stowell with this offense did not allege that he would be subject to enhanced sentencing under the ACCA, nor did it identify any of his prior convictions or say that he had three prior convictions for ACCA predicates committed on occasions different from one another. Nonetheless, the presentence investigation report ("PSR") prepared by the U.S. Probation Office classified Stowell as an armed career criminal based on three prior Arkansas state convictions that qualified as ACCA predicates: a 2004 conviction for residential burglary, a 2006 conviction for battery second-degree, and a 2006 conviction for battery first-degree and possession of a firearm by a certain person.

2. Mr. Stowell objected to the ACCA enhancement in objections to the PSR and in his sentencing memorandum, asserting that his June 28, 2006 convictions for second-degree battery and first-degree battery were not committed on different occasions from each other within the meaning of the ACCA; therefore, Stowell argued, these could not be counted as two separate ACCA predicates. The only record evidence of the prior battery convictions was contained in paragraphs 65 and 66 of the PSR purporting to describe those convictions:

> According to the felony information filed in this case, on or about March 8, 2006, Stowell did unlawfully, feloniously and with the purpose of causing physical injury to [Victim 1], cause serious physical injury to [Victim 1], by means of a deadly weapon. . . .

> According to the felony information filed in this case, on or about March 11, 2006, Stowell did unlawfully, feloniously and with the purpose of causing serious physical injury to another person, cause serious physical injury to [Victim 2], by means of a deadly weapon. On that same date, Stowell was found to be in possession of a firearm after having been previously convicted of a felony.

The PSR contains no other information about these convictions, nor does it include the underlying documents pertaining to the convictions or any other evidence.

3. In May 2021, Mr. Stowell appeared before the district court for sentencing. The court rejected Stowell's argument that his March 2006 battery offenses were committed on occasions different from one another. The court concluded these were separate offenses solely because they were committed on separate dates. The court found that the sentencing enhancement under the ACCA was applicable and sentenced Stowell to the mandatory minimum of 180 months imprisonment—five years above the otherwise-applicable 10-year maximum prescribed for the offense of conviction.

4. Mr. Stowell appealed his sentence to the Eighth Circuit Court of Appeals. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which gives it jurisdiction over all final decisions of the district courts of the United States. The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. In a published opinion, a divided panel of the Eighth Circuit affirmed the district court's decision to sentence Mr. Stowell as an armed career criminal under the ACCA. *United States v. Stowell*, 40 F.4th 882 (8th Cir. 2022); Pet. App. 7a-10a. As Stowell had argued to the district court, he argued on appeal to the Eighth Circuit that two of his predicate offenses were committed on the same occasion and should

accordingly have been counted only as a single predicate. Stowell also argued that the application of a sentencing enhancement under the ACCA violated his Fifth and Sixth Amendment rights because its requirements—i.e., three prior qualifying convictions for offenses that were "committed on occasions different from one another"—were not charged in the indictment and proved to a jury beyond a reasonable doubt (or admitted by the defendant in a guilty plea). The panel rejected both arguments.

5. Shortly before the case was submitted to the panel, this Court issued its opinion in *Wooden v. United States*, 142 S. Ct. 1063 (2022), resolving a circuit conflict over the meaning of the "occasions clause." The Court adopted a holistic and multifactored factual approach to the resolution of that question. The Court also noted, but did not decide, "another question arising from ACCA's occasions clause: whether the Sixth Amendment requires that a jury, rather than a judge, resolve whether prior crimes occurred on a single occasion." *Id.* at 1068 n.3.

The Eighth Circuit panel majority applied its pre-*Wooden* case law for resolving issues under the occasions clause, opining that *Wooden* generally did not supplant the 3-factor test it had been utilizing. The panel also rejected Mr. Stowell's argument that the issue of whether his prior offenses were committed on different occasions was an issue that must be determined by a jury, finding the argument to be foreclosed by precedent that treated "recidivism-related facts" as falling outside the jury-trial and reasonable-doubt requirements. The panel noted, however, that the constitutionality of this practice has recently been questioned.

Judge Kelly filed a dissenting opinion in which she concluded that *Wooden* had settled a circuit split and established the proper analysis that must be undertaken to determine whether ACCA predicates were committed on different occasions. Because the district court only considered the fact that the PSR indicated Stowell's battery offenses were committed on different dates, Judge Kelly would have remanded to the district court to allow it to conduct the new "fact-intensive inquiry" prescribed by *Wooden* in the first instance.

6. Mr. Stowell petitioned for rehearing en banc on the question whether the sentencing court had violated his Fifth and Sixth Amendment rights by imposing an ACCA sentence based on its own determination that his prior battery convictions were committed on occasions different from one another. The petition argued that in light of the *Wooden* decision, the different-occasions issue is fact-intensive and cannot be resolved based on the fact of prior conviction alone. Accordingly, under a line of Supreme Court cases (including *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Alleyne v. United States*, 570 U.S. 99 (2013); *Descamps v. United States*, 570 U.S. 254 (2013); and *Mathis v. United States*, 579 U.S. 500 (2016)), the factual question of whether prior offenses were committed on different occasions was for the jury to resolve. The Government, having recently changed its own position on the question in light of *Wooden*, agreed that en banc review of that issue was warranted and that "the Sixth Amendment requires that the ACCA's different occasions determination be made by a jury or admitted by the defendant." On November 15, 2022, the Eighth Circuit

granted rehearing en banc and vacated the panel opinion and judgment dated July 25, 2022. Pet. App. 6a.

7. After ordering additional briefing and holding en banc oral argument, the Eighth Circuit issued its opinion declining to address the constitutional issue both Mr. Stowell and the Government asked it to address. Pet. App. 1a-5a. The majority simply sidestepped the Sixth Amendment issue by finding that any error made by the sentencing court was harmless beyond a reasonable doubt. *United States v. Stowell*, 82 F.4th 607, 610 (8th Cir. 2023) (en banc) ("Simply put, no reasonable juror could find that Stowell committed his offenses on the same occasion, considering they occurred days apart and involved different victims.").

Judge Erickson authored a dissenting opinion, which was joined in full by Judge Kelly and joined in part by Judge Grasz and Judge Stras.[1] *Id.* at 611 (Erickson, J., dissenting). Judge Erickson and Judge Kelly believe that

> the majority's brief recitation of the import of the Supreme Court's decision in *Wooden* rushes past the substance of the guidance provided to lower courts when determining whether predicate offenses were committed on different occasions. The majority views this as an easy case with a foregone conclusion dictated by the PSR and charging documents—which on their face merely show a three-day gap between the battery offenses and identify two different victims—but reasonable factfinders employing the "multi-factored" balancing test laid out by the *Wooden* Court could reach a different conclusion when all the facts are before the sentencing court.

Id. They complained that

> the majority isolates two factors the Supreme Court identified in *Wooden* and does not address whether the two purported predicate

[1] The dissent is divided into parts A. and B.; Judge Kelly joins Judge Erickson as to both parts, while Judge Grasz and Judge Stras join only in part B.

> offenses at issue might have been part of an episode of criminal activity. There is no attention given to the short timeframe in which the offenses were committed, any possible relationship between the victims, and/or the "similar or intertwined" nature of the conduct—all relevant considerations the Supreme Court directed lower courts to examine.

Id. Ultimately, "[w]hether the offenses satisfy the three-occasion requirement must be determined based on admissible evidence, a developed factual record, and application of *Wooden*'s 'multi-factor' balancing test. The district court's cursory decision, and the majority's analysis, fails to satisfy these requirements." *Id.* at 611-12.

In part B. of the dissent, the four dissenting judges note that "[t]he problem with the majority's approach here is that it sidesteps the important constitutional question and reaches a conclusion by assuming facts the jury would have no way of knowing." *Id.* at 613. The dissent points out that there was no admissible evidence in the record on which a jury could have found that Mr. Stowell's battery offenses occurred on different occasions. *Id.* Because there was no admissible evidence in the record bearing on this question, it is not possible to say with confidence what a jury might have found. *Id.* "With the issue squarely before us and no admissible evidence in the record to shed light on what a jury might have found, it seems to us there is no way to avoid resolving the question of whether letting judges make the different-occasions determination violates the Sixth Amendment." *Id.* Finding the answer to be even "more plain" in light of *Wooden*, the dissent stated its belief that either a jury finding or a defendant's admission is mandated by the Sixth Amendment. *Id.* at 613-14.

REASONS FOR GRANTING THE PETITION

1. This Court has already granted certiorari on the first question presented by this case.

This case first presents the same question as another case in which this Court recently granted certiorari—*Erlinger v. United States*, 77 F.4th 617 (7th Cir. 2023), *cert. granted*, 2023 WL 8007339 (U.S. Nov. 20, 2023) (No. 23-370). Again, that question is whether the Constitution requires a jury trial and proof beyond a reasonable doubt to find that a defendant's prior convictions were for offenses "committed on occasions different from one another," as is necessary to impose an enhanced sentence under the ACCA. As in *Erlinger*, the question has been properly preserved both in the district court and in the court of appeals below, and it is now ripe for decision by this Court. Because the first question presented here is identical to the one the Court has decided to consider in *Erlinger*, Mr. Stowell suggests that it would be appropriate to also grant his petition for review and consolidate the cases for decision, or alternatively to hold his petition in abeyance pending resolution of *Erlinger*.

2. This Court should address the second question presented to ensure that its recent *Wooden* decision is being properly applied in the lower courts.

If this Court decides the answer to the first question presented here is that a jury must decide whether ACCA predicates were committed on different occasions and that this fact must be charged in the indictment, Mr. Stowell first submits that he should simply be resentenced without the ACCA enhancement because his indictment contained no such charge. If the Court should determine that a harmless-

error analysis may be applied to Stowell's situation, remand would still be required for such analysis to occur at the district court level based on the requirements of *Wooden*. As pointed out by the dissent in the Eighth Circuit's en banc opinion in this case, the majority ignored most of the considerations set forth in *Wooden* and hastily decided that no reasonable juror could have found that Mr. Stowell's battery offenses were committed on different occasions, despite the lack of any admissible evidence in the record upon which a jury would be able to make such a decision. *Stowell*, 82 F.4th at 611-12 (Erickson, J., dissenting). The only evidence below bearing on the different-occasions issue is the PSR's recitation of the charging instruments from the prior state proceedings. The facts asserted in those documents are insufficient to carry the Government's burden of proof on the different-occasions issue beyond a reasonable doubt. Not only is the record undeveloped on the underlying facts, but the non-elemental facts from prior-conviction records that the PSR cited "are prone to error precisely because their proof is unnecessary" to conviction, thus making reliance on such non-elemental facts a source of "unfairness to defendants" when they "trigger[ ] a lengthy mandatory sentence." *Mathis*, 579 U.S. at 512. It is not even clear that such records would be admissible evidence that could be considered by a jury. The record thus contains no reliable basis for conducting the multi-factor analysis that *Wooden* requires, let alone enough to carry the Government's burden to show harmlessness.

Furthermore, the Eighth Circuit majority incorrectly concluded that Mr. Stowell admitted the dates on which his batteries occurred and the identities of the

victims by failing to challenge these facts at sentencing. Based on the wording of the PSR, Stowell admitted only that the felony information that charged him in each of those prior proceedings contained allegations to this effect. Both pertinent PSR paragraphs begin: "*According to the felony information filed in this case*," (emphasis added), and then proceed to allege specific dates, victims, and criminal acts. Stowell's admission that the PSR accurately reflected the content of the charging documents from his prior state cases is not equivalent to an admission that those charging documents accurately reflected reality.

Although the Eighth Circuit majority below summarily concluded that "[n]o matter how similar or related Stowell's attacks were, no 'ordinary person' would say that someone battered two people three days apart on one occasion." *Stowell*, 82 F.4th at 610. Mr. Stowell suggests that the majority has failed to consider the crucial question of whether his prior battery convictions could have arisen out of a single "criminal episode"—or else that the majority has taken too narrow a view of what could possibly constitute a "criminal episode" under *Wooden*. For example, if a defendant goes on a drug-fueled, multi-day crime spree, a jury could reasonably conclude that multiple different offenses should still be considered a single occasion under *Wooden*. Similarly, if a defendant is a member of a gang and is involved in multiple altercations with members of a rival gang over a short period of time in connection to an ongoing dispute between the two gangs, that could likewise be considered by a reasonable jury to be part of a single criminal episode.

Courts undertake a similar analysis when determining whether to permit introduction of evidence of "other acts" by a defendant that are not directly related to the charged offense. If such "other acts" are "inextricably intertwined" with the charged offense, or the other acts and the charged offense conduct are part of a "single criminal episode," or the other acts are "necessary preliminaries" to the crime charged, then the other-act evidence is considered intrinsic evidence that is properly admissible and that does not implicate Federal Rule of Evidence 404(b). *See, e.g.*, *United States v. Rice*, 607 F.3d 133, 141 (5th Cir. 2010). In *Rice*, the court found that the defendant's four unsuccessful robbery attempts over the course of a number of hours involving a number of unrelated persons at a number of unrelated locations[2] were part of a "unified criminal episode" with the carjacking for which he was charged; evidence of these attempted crimes was accordingly found to be intrinsic and, therefore, admissible. *Id.* If a disjointed collection of criminal activities like that can be found to constitute a single criminal episode to be used against a defendant in an evidentiary context, similar activities should receive similar treatment to aid a defendant in the sentence-enhancement context.

This Court should act to correct the Court of Appeals' failure to properly apply *Wooden*. Such action is obviously important for Mr. Stowell, but will also clarify to the lower courts that the *Wooden* test should be applied (whether by the court itself

[2] "Specifically, the Government introduced evidence that the [defendant and his co-conspirators] (1) attempted to rob a woman who had just won a prize playing bingo; (2) tried to rob a pizza delivery man; (3) attempted to rob an elderly couple Rice spotted at a grocery store; and (4) sought to rob a convenience store." *Rice*, 607 F.3d at 141.

or by a jury, depending on the Court's answer to the first question presented herein) in analyzing every occasions-clause question, and that a key part of this test is consideration of whether prior offenses could have been committed in a single criminal episode. It is critical that this Court ensure that the lower courts are consistently and properly applying *Wooden* in cases where the ACCA may be applied.

CONCLUSION

For all of the foregoing reasons, Petitioner Christopher Stowell respectfully requests that this Court grant the petition for a writ of certiorari and accept this case for review or, in the alternative, that it hold this petition in abeyance until it renders its decision in *Erlinger v. United States*, Docket No. 23-370.

DATED: this 20th day of December, 2023.

Respectfully submitted,

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