

NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER STOWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

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PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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82 F.4th 607

United States Court of Appeals, Eighth Circuit.

UNITED STATES of America, Plaintiff - Appellee

v.

Christopher STOWELL, Defendant - Appellant

Eighth Circuit Federal Public Defender

Offices, Amicus on Behalf of Appellant(s)

No. 21-2234

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Submitted: April 11, 2023

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Filed: September 22, 2023

### Synopsis

**Background:** Defendant pleaded guilty in the United States District Court for the Western District of Arkansas, P.K. Holmes, III, J., to being a felon in possession of a firearm, and he was sentenced to 180 months in prison pursuant to the Armed Career Criminal Act (ACCA). Defendant appealed.

**Holdings:** On rehearing en banc, the Court of Appeals, Kobes, Circuit Judge, held that:

defendant committed two his prior battery offenses on different occasions, as required for each of two resulting battery convictions to qualify as an ACCA predicate offense, and

any Sixth Amendment error in not having jury decide whether defendant's two prior battery offenses were committed on different occasions was harmless.

Affirmed.

Erickson, Circuit Judge, filed dissenting opinion in which Kelly, Circuit Judge, joined and in which Grasz, Circuit Judge, and Stras, Circuit Judge, joined in part.

**Procedural Posture(s):** Appellate Review; Sentencing or Penalty Phase Motion or Objection.

\*608 Appeal from United States District Court for the Western District of Arkansas - Ft. Smith

### Attorneys and Law Firms

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Before SMITH, Chief Judge, LOKEN, COLLOTON, GRUENDER, BENTON, SHEPHERD, KELLY, ERICKSON, GRASZ, STRAS, and KOBES, Circuit Judges, En Banc.

### Opinion

KOBES, Circuit Judge.

\*609 After Christopher Stowell pleaded guilty to being a felon in possession of a firearm, 18 U.S.C. §§ 922(g)(1), 924(a)(2), the district court<sup>1</sup> designated him an armed career criminal and sentenced him to 180 months in prison. Stowell appealed, arguing that his predicate offenses were not committed on different occasions, a requirement for the armed career criminal sentencing enhancement. 18 U.S.C. § 924(e)(1). Alternatively, Stowell argued that the Sixth Amendment required a jury to find that he committed his predicate offenses on different occasions. Sitting en banc, we affirm Stowell's sentence.

Stowell first challenges the district court's determination that he committed his prior offenses on different occasions, which we review *de novo*. *United States v. Humphrey*, 759 F.3d 909, 911 (8th Cir. 2014).

The Armed Career Criminal Act (ACCA) requires a minimum fifteen-year prison sentence for people who violate 18 U.S.C. § 922(g) and have “three previous convictions ... for a violent felony or a serious drug offense ... committed on occasions different from one another.” 18 U.S.C. § 924(e) (1). In *Wooden v. United States*, the Supreme Court explained how courts should determine whether a defendant's prior convictions were committed on different occasions. 595 U.S. 360, 142 S. Ct. 1063, 1070, 212 L.Ed.2d 187 (2022). It observed that “a range of circumstances may be relevant to identifying episodes of criminal activity,” including timing, proximity, and the character and relationship of the offenses. *Id.* at 1071. The Court also stated that “[i]n many cases, a single factor—especially of time or place—can decisively differentiate occasions.” *Id.*

Stowell's PSR shows a 2004 burglary conviction and two 2006 battery convictions. According to charging documents, the battery offenses involved different victims and occurred on different days, one on or about March 8 and the other on or about March 11. Stowell argues that the 2006 convictions were committed on the same occasion because he was arrested and convicted on the same dates for both offenses. We disagree.

The multi-day gap separating the battery offenses strongly supports a finding that Stowell committed them on different occasions. *See id.* (explaining that courts “have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart”); *see, e.g., United States v. Richardson*, 60 F.4th 397, 399 (7th Cir. 2023) (36 hours); *United States v. McCall*, No. 18-15229, 2023 WL 2128304, at \*6 (11th Cir. Feb. 21, 2023) (per curiam) (two days), *petition for cert. filed*, No. 22-7630 (U.S. May 22, 2023); *United States v. Dudley*, No. 22-4037, 2023 WL 2597601, at \*1 (4th Cir. Mar. 22, 2023) (per curiam) (three days). Also, each battery offense involved a different victim, further supporting a finding that the offenses were unrelated. *Cf. \*610 United States v. Bragg*, 44 F.4th 1067, 1079 (8th Cir. 2022) (holding that robberies were committed on different occasions where the defendant robbed two victims two days apart and where different police departments investigated the incidents), *cert. denied*, — U.S. —, 143 S. Ct. 1062, 215 L.Ed.2d 283 (2023). All things considered, the district court did not err when it concluded that Stowell committed his prior offenses on different occasions.

Alternatively, Stowell argues that the Sixth Amendment required a jury to decide whether the offenses were committed

on different occasions. *See Alleyne v. United States*, 570 U.S. 99, 103, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) (noting that “[a]ny fact that, by law, increases the penalty for a crime is an ‘element’ that must be submitted to the jury and found beyond a reasonable doubt”). Whatever our views are on any Sixth Amendment error, we conclude that it was harmless beyond a reasonable doubt. *See United States v. Red Elk*, 426 F.3d 948, 950 (8th Cir. 2005) (reviewing a Sixth Amendment error at sentencing for harmlessness beyond a reasonable doubt).

An error is not harmless if it affects the defendant's “substantial rights.” Fed. R. Crim. P. 52(a). An alleged error does not affect substantial rights if there is no reasonable possibility that it contributed to the sentence. *See Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). 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.

The dissent accuses us of overlooking the other factors in *Wooden's* analysis and asserts that there are conceivable “factual permutations” where the “relationship between [Stowell's] victims” and the “similar or intertwined” nature of his conduct could squeeze two batteries with a “three-day gap” and “different victims” into one occasion. But *Wooden* says that a single factor is often determinative and observes that courts “nearly always treat[ ] offenses as occurring on separate occasions if a person committed them a day or more apart.” 142 S. Ct. at 1071. No 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. *See id.* at 1069. On this record,<sup>2</sup> the Government has shown beyond a reasonable doubt that submitting the “different occasions” issue **\*611** to a jury would not have affected the outcome.

For these reasons, we affirm Stowell's sentence.

ERICKSON, Circuit Judge, with whom KELLY, Circuit Judge, joins, dissenting, and GRASZ, Circuit Judge, and STRAS, Circuit Judge, join in Part B of the dissent.

#### A. Wooden

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.

Simply stated, Wooden does not eliminate the need for a thorough fact-intensive inquiry, nor the requirement that the determination be made based on admissible evidence. Stowell objected to the PSR's determination that he had three qualifying predicate offenses. The district court relied only on the dates of the battery offenses as identified in the PSR, explaining that a review of the criminal history shows the offenses occurred on separate dates. Tellingly, the majority isolates two factors the Supreme Court identified in Wooden and does not address whether the two purported predicate 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.

We have consistently held that when the district court has not decided a fact-intensive issue, remand is appropriate for the district court to consider the issue in the first instance. See, e.g., United States v. Flute, 929 F.3d 584, 590 (8th Cir. 2019) (reinstating indictment against defendant and remanding for the district court to consider the defendant's as-applied due process challenge); United States v. McMillan, 863 F.3d 1053, 1059 (8th Cir. 2017) (remanding for the district court to determine in the first instance whether the defendant's prior conviction qualifies as a “crime of violence” under the residual clause and, if so, consideration of the proposed amendment to the applicable sentencing guideline); United States v. Rodriguez, 834 F.3d 937, 943 (8th Cir. 2016) (determining that even if there is some support for the government's position, remand is appropriate because it is the function of the district court rather than an appellate court to determine the facts); Hohn v. United States, 193 F.3d 921, 924 (8th Cir. 1999) (remanding case to permit the district court in the first instance to engage in a fact-bound analysis of whether the petitioner is factually innocent of carrying

a firearm during or in relation to a drug trafficking offense in light of the Supreme Court's decision in Bailey v. United States, 516 U.S. 137, 143-44, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995)).

Complying with the Supreme Court's direction to utilize a holistic approach that goes beyond precise timing of the predicate offenses, as the district court did here, is critically important given the statute contains little guidance and reasonable doubts about its application in individual cases have frequently arisen with courts \*612 utilizing varying approaches. The Wooden Court reiterated the statutory prerequisites for a defendant to qualify as an ACCA offender as “both a three-offense requirement and a three-occasion requirement.” 142 S. Ct. at 1070. This is because the enhanced penalties were intended to “target[ ] a particular subset of offenders,” specifically “those who have repeatedly committed violent crimes.” Id. at 1074 (quotation and citation omitted). The PSR lists three offenses. Whether 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.

“Under our rule of law, punishments should never be products of judicial conjecture about this factor or that one.” Id. at 1087 (Gorsuch, J., concurring). Regardless of what we anticipate the result might be, it is not for an appellate court to decide in the first instance whether Wooden's multi-factored approach alters the district court's initial ACCA determination in Stowell's case—especially on such a limited record with unanswered questions as to a number of relevant considerations. See United States v. Williams, No. 19-2235, 2022 WL 1510779, \*1 (8th Cir. May 13, 2022) (unpublished) (per curiam) (remanding to the district court in light of Wooden for a new factual determination on the issue of whether the defendant had three prior convictions committed on different occasions). Because of the differing factual permutations that can be conceived on this limited record and that remain unresolved until the record is developed, resolution of Stowell's objection to the § 924(e) enhancement is for the sentencing court to decide in the first instance.

## B. Sixth Amendment

The Supreme Court declined to resolve Stowell's other argument of whether the Sixth Amendment requires a jury, rather than a judge, to determine if prior crimes occurred

on a single occasion. Wooden, 142 S. Ct. at 1068 n.3. The majority bypasses this issue too and concludes that because the offenses supposedly occurred days apart and involved different victims, there is no reversible error because no reasonable juror would have found Stowell committed the offenses on the same occasion. Stowell's Sixth Amendment claim implicates an important constitutional issue that we hope the Supreme Court will soon resolve. In the meantime, because the issue is one of "exceptional importance," we think it is properly before the en banc court. See Fed. R. App. P. 35(a)(2) (providing that rehearing en banc may be ordered when a majority of active circuit judges determine "the proceeding involves a question of exceptional importance").

Pre-Wooden, circuit courts, including this Court, routinely rejected a defendant's claim that it was a violation of the Sixth Amendment to permit sentencing judges to determine whether prior convictions were committed on different occasion from one another for purposes of the ACCA. See United States v. Dunn, 76 F.4th 1062, 1068–69 (8th Cir. 2023) (reiterating this Court's existing circuit precedent); United States v. Dudley, 5 F.4th 1249, 1260 (11th Cir. 2021) (collecting cases). After Wooden, the government has agreed with defendants that Wooden alters appellate courts' existing precedent and the different-occasions determination should be made by a jury. See United States v. Erlinger, 77 F.4th 617, 621 (7th Cir. 2023) (recounting the defendant's and government's "insist[ence] that the inquiry in Wooden must be conducted by a jury because it requires proof of non-elemental facts about a defendant's \*613 prior conviction"); United States v. Campbell, 77 F.4th 424, 430 (6th Cir. 2023) (noting the United States "likewise 'agrees that a jury should find (or a defendant should admit) that ACCA predicates were committed on occasions different from one other'"); United States v. Mason, No. 1:21-cr-1062-JDB-1, 2023 WL 3184571, \*1 (W.D. Tenn. May 1, 2023) (stating the government's position, joined by the defendant, is that because "the Sixth Amendment prohibits a sentencing judge from finding 'non-elemental facts' concerning a prior conviction, the occasions-different inquiry must be resolved by a jury or admitted by the defendant"); United States v. Johnson, Case No. 1:20-cr-00060-TWP-TAB, 2023 WL 2954734, \*3 (S.D. Ind. Apr. 14, 2023) (noting the government, relying on Alleyne v. United States, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), argues "the Sixth Amendment requires that a jury make the separate occasion determination"); see also United States v. Brown, 77 F.4th 301, 301 (4th Cir. 2023) (statement

of Heytens, J., joined by Diaz, C.J., Agee, J., Harris, J., Richardson, J., Rushing, J., and Benjamin, J., from the order denying petition for rehearing en banc) ("[B]oth sides agree this Court's existing precedent—and that of every other court of appeals—is wrong.").

The 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. The only support in the record for the majority's assertions about when Stowell committed the battery offenses is his PSR and the original charging documents. Neither would be before a jury. See United States v. Wise, 976 F.2d 393, 404 (8th Cir. 1992) (en banc) (recognizing that, even at sentencing, a "presentence report is not evidence and is not a legally sufficient basis for making findings on contested issues of material fact" (citation omitted)); Fed. R. Evid. 801(c), 802 (defining and excluding hearsay evidence); cf. United States v. Taylor, 462 F.3d 1023, 1026 (8th Cir. 2006) (explaining that a police report "contained unreliable double hearsay"). In other words, there is no admissible evidence on which a jury could find the batteries occurred "on occasions different from one another," 18 U.S.C. § 924(e)(1).

The lack of evidence is key for two reasons. One, the different-occasions inquiry is not a legal question but a disputed factual determination that is typically "inherently suitable for a jury's deliberation." United States v. Hines, No. 2:22-CR-00025-1-JRG-CRW, 2023 WL 4053013, \*2 (E.D. Tenn. June 16, 2023). And two, if there is a Sixth Amendment violation, the government bears the burden of proving the error is harmless. See United States v. Red Elk, 426 F.3d 948, 950 (8th Cir. 2005). This would require the government to show that it is "clear beyond a reasonable doubt that a rational jury would have found" the missing element. Neder v. United States, 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). With no admissible evidence in the record, we can have no confidence about what a jury might have found. Cf. United States v. Anderson, 236 F.3d 427, 429–30 (8th Cir. 2001) (holding that an error was harmless because the evidence was so "overwhelming" that "no rational jury could have" failed to find the disputed fact).

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. Post-Wooden, which directs the consideration \*614 of "non-elemental

facts,” it is more plain—and something the government has acknowledged in a number of cases—that a jury finding, or a defendant’s admission, is mandated by the Sixth Amendment. See United States v. Perry, 908 F.3d 1126, 1134 (8th Cir. 2018) (Stras, J., concurring) (“A finding that [Stowell] committed

his past crimes on different occasions exposes him to a longer sentence, so [a] jury should make the finding, not the court.”).

#### All Citations

82 F.4th 607

### Footnotes

- 1 The Honorable P.K. Holmes, III, United States District Judge for the Western District of Arkansas.
- 2 The dissent argues that we cannot conduct a harmlessness analysis because there is no “admissible evidence” in the record about Stowell’s battery offenses. But the dissent acknowledges that the PSR says that he committed his offenses three days apart against different victims. Stowell did not challenge those facts at sentencing. He objected only that the district court could not rely on them because he did not necessarily admit them by pleading guilty to the offenses. By failing to dispute their accuracy, he has admitted them. *See United States v. Pepper*, 747 F.3d 520, 524 (8th Cir. 2014) (holding that the district court could rely on facts in the PSR because the defendant’s objection that he “did not admit the facts” when pleading guilty did “not imply that those facts are untrue”). So we can use them as the factual basis of our harmlessness analysis. *Cf. United States v. Menteer*, 408 F.3d 445, 446–47 (8th Cir. 2005) (per curiam) (holding that there is no Sixth Amendment problem when the district court’s ACCA determination is based on the defendant’s admissions of fact by failing to dispute them in the PSR); *United States v. Halter*, 411 F.3d 949, 951 (8th Cir. 2005) (per curiam) (“By not objecting to the PSR’s statement that the firearm was stolen, Halter admitted that it was stolen, so the two-level enhancement he received on the basis of the stolen nature of the firearm did not violate his Sixth Amendment rights.”).

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No: 21-2234

United States of America

Appellee

v.

Christopher Stowell

Appellant

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Eighth Circuit Federal Public Defender Offices

Amicus on Behalf of Appellant(s)

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Appeal from U.S. District Court for the Western District of Arkansas - Ft. Smith  
(2:20-cr-20019-PKH-1)

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**ORDER**

The petition for en banc rehearing is granted. The petition for panel rehearing is denied as moot. The opinion and judgment dated July 25, 2022 are hereby vacated.

This case will be placed on the calendar for oral argument. Counsel will be notified at a later date of the exact date and time of argument.

Counsel shall within ten days submit 30 additional copies of previously filed briefs. Previously filed briefs due on November 28, 2022.

November 15, 2022

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans



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Rehearing en Banc Granted, Vacated by United States v. Stowell, 8th Cir. (Ark.), November 15, 2022

40 F.4th 882

United States Court of Appeals, Eighth Circuit.

UNITED STATES of America, Plaintiff - Appellee

v.

Christopher STOWELL, Defendant - Appellant

No. 21-2234

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Submitted: April 15, 2022

|

Filed: July 25, 2022

**Synopsis**

**Background:** Defendant was convicted, upon plea of guilty, in the United States District Court for the Western District of Arkansas, P. K. Holmes, Chief Judge, of being felon in possession of firearm, and was sentenced under Armed Career Criminal Act (ACCA) to 180 months' imprisonment and five years' supervised release. Defendant appealed.

**Holdings:** The Court of Appeals, Kobes, Circuit Judge, held that:

state-law battery offenses were committed on separate occasions, and thus qualified as predicates under ACCA, and

issue of whether battery offenses were committed separately did not require submission to jury under *Alleyne*.

Affirmed.

Kelly, Circuit Judge, filed dissenting opinion.

**Procedural Posture(s):** Appellate Review; Sentencing or Penalty Phase Motion or Objection; Trial or Guilt Phase Motion or Objection.

**\*883** Appeal from United States District Court for the Western District of Arkansas - Ft. Smith

**Attorneys and Law Firms**

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David A. Harris, Asst. U.S. Atty., Fort Smith, AR (David Clay Fowlkes, Acting U.S. Atty., on the brief), for plaintiff-appellee.

Before LOKEN, KELLY, and KOBES, Circuit Judges.

**Opinion**

KOBES, Circuit Judge.

Christopher Stowell pleaded guilty to being a felon in possession of a firearm, 18 U.S.C. §§ 922(g)(1), 924(a)(2). At sentencing, the district court<sup>1</sup> found that he was an armed career criminal, 18 U.S.C. § 924(e)(1). Stowell appeals, arguing that he is not because two of his predicate offenses were committed on the same occasion. We affirm.

The Presentence Report indicated that Stowell committed three violent state-law felonies that qualify as predicate offenses under the Armed Career Criminal Act: 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. The PSR described the two battery convictions as follows:

**\*884** 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.

Since the State charged both offenses in the same indictment, the convictions were on the same date.

Because of the same conviction date, Stowell argued that he committed the batteries on the same occasion, which

would make them a single ACCA predicate offense. The district court instead relied on the PSR and concluded that he committed the batteries on different occasions, qualifying them as separate ACCA predicate offenses. As a result, the court classified Stowell as an armed career criminal and sentenced him to the statutory minimum of 180 months in prison and five years of supervised release. Stowell appeals.

“The Armed Career Criminal Act provides for a minimum term of fifteen years’ imprisonment for a felon in possession of a firearm, if the defendant has three previous convictions for a ‘violent felony’ or a ‘serious drug offense,’ committed on occasions different from one another.” *United States v. Harris*, 794 F.3d 885, 886 (8th Cir. 2015) (referencing 18 U.S.C. § 924(e)(1)). The issue is whether Stowell’s two 2006 battery convictions were committed on the same occasion. We review whether a prior conviction qualifies as an ACCA predicate offense, including a “different occasions” determination, *de novo*. *United States v. Humphrey*, 759 F.3d 909, 911 (8th Cir. 2014) (quotation omitted).

To decide whether multiple offenses were committed on separate occasions, we use a three-factor analysis, considering: “(1) the time lapse between offenses, (2) the physical distance between their occurrence, and (3) their lack of overall substantive continuity, a factor that is often demonstrated in the violent-felony context by different victims or different aggressions.” *United States v. Willoughby*, 653 F.3d 738, 743 (8th Cir. 2011).<sup>2</sup> These factors suggest that Stowell committed the batteries on different occasions. First, the offenses occurred three days apart, a significant time lapse. *See United States v. Hibbler*, 295 F. Appx 106, 107 (8th Cir. 2008) (per curiam) (holding that defendant’s arson and \*885 terroristic threats convictions—committed four days apart, at different locations, and against different victims—were committed on separate occasions). Second, the offenses lacked any substantive continuity—they were directed at two different, unrelated victims with no indication of a common motivation or plan. *See id.* at 107–08. Under these facts, we conclude that Stowell’s two battery offenses were committed on separate occasions and qualify as separate ACCA predicate offenses.

Stowell nonetheless argues that, because the ACCA raises the statutory minimum sentence, the facts necessary to establish that he is an armed career criminal must be submitted to a jury and found beyond a reasonable doubt. *See Alleyne v. United States*, 570 U.S. 99, 116, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120

S.Ct. 2348, 147 L.Ed.2d 435 (2000) (“Other 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.”). The Supreme Court has held that the sentencing court is limited to the “fact of conviction,” which includes only the elements of the offense, when determining whether a prior generic state offense qualifies as a “violent felony” under the ACCA. *Mathis v. United States*, 579 U.S. 500, 511–12, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016). Stowell argues that this limitation applies to the different occasions analysis as well. If that’s true, then we are left only with the fact that Stowell was convicted of both offenses, because the date of commission is not an element of battery. And because the convictions occurred on the same day, the facts of conviction do not provide enough information to conclude that the offenses were committed on separate occasions.

The problem is that this argument is foreclosed by our precedent. We have held that the different occasions analysis involves “recidivism-related facts” that do not need to be submitted to the jury. *United States v. Harris*, 794 F.3d 885, 887 (8th Cir. 2015); *see also United States v. Faulkner*, 826 F.3d 1139, 1148 n.6 (8th Cir. 2016) (“We can examine the circumstances of these prior offenses instead of just the fact of conviction, as we are not restricted under *Taylor v. United States*, [495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)], or *Shepard v. United States*, [544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)], as to what we can view to determine whether these are separate offenses.”); *United States v. Evans*, 738 F.3d 935, 936 (8th Cir. 2014) (per curiam), *overruled on other grounds by Johnson v. United States*, 576 U.S. 591, 606, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) (“We have previously held the question of whether prior felonies were committed on separate occasions may be resolved by a judge. Moreover, we have rejected similar Sixth Amendment arguments challenging the information the district court considers when determining the specific dates on which the offenses occurred.” (quotation omitted) (cleaned up)).

Though the constitutionality of this practice has been recently questioned, *see Wooden v. United States*, — U.S. —, 142 S.Ct. 1063, 1087 n.7, 212 L.Ed.2d 187 (2022) (Gorsuch, J. concurring); *United States v. Perry*, 908 F.3d 1126, 1136 (8th Cir. 2018) (Stras, J. concurring), it remains the law of our circuit. And nothing in *Wooden* changed this. 142 S.Ct. at 1068 n.3. We are bound by prior panels. *See Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc).

(“It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.” (quotation omitted)). The district court’s use of the PSR to determine the date on which \*886 each offense occurred did not violate the Sixth Amendment. Because the district court correctly determined that Stowell committed three ACCA predicate offenses under our precedent, we affirm.

KELLY, Circuit Judge, dissenting.

While Stowell’s appeal was pending, the United States Supreme Court decided Wooden v. United States, — U.S. —, 142 S. Ct. 1063, 212 L.Ed.2d 187 (2022), which provided lower courts guidance on how to determine whether a defendant has three prior convictions “for a violent felony or a serious drug offense, or both, committed on occasions different from one another” for purposes of § 924(e)(1). I would therefore vacate and remand for resentencing to allow the district court to resolve Stowell’s objection to the § 924(e) enhancement, this time with the benefit of Wooden. See United States v. Williams, No. 19-2235, 2022 WL 1510779, at \*1 (8th Cir. May 13, 2022) (unpublished) (per curiam) (remanding to the district court for a new factual determination on the issue of whether the defendant had three prior convictions committed on different occasions in light of Wooden).

I agree that Wooden did not alter the prevailing law of our circuit that the Sixth Amendment permits reliance on judge-found facts, including facts set forth in a PSR, to determine whether a defendant has three predicate convictions that were committed on separate occasions. That much remains the same. But Wooden did alter the approach courts in this circuit must use when assessing whether predicate offenses were committed on different occasions. Wooden resolved a split of authority between circuits—including the Eighth—that found the ACCA occasions clause satisfied “whenever crimes take place at different moments in time,” and those that undertook “a more holistic inquiry.” 142 S. Ct. at 1068 & nn.1–2 (abrogating United States v. Abbott, 794 F.3d 896, 898 (8th Cir. 2015) (per curiam), which applied the rule that “to prove that two offenses are sufficiently separate and distinct for ACCA purposes, it is *sufficient* (although, not necessary) to show that some time elapsed between the two prospective predicate offenses” (quotation omitted)). The Supreme Court adopted the latter view, holding that the “occasions” requirement is multi-factored in nature, taking into account the timing of offenses, as well as the proximity

of the locations, and the character and relationship of the offenses. Id. at 1071.

Here, in determining whether Stowell had three prior convictions committed on separate occasions, the district court relied only on the dates of the offenses as identified in the PSR, explaining that although “[t]he judgment and dates of conviction are the same date ... , if you go back and look at the criminal history ... you’ll see that the [offenses] were separate offenses. They occurred on separate dates.” Presumably relying on cases like Abbott, the district court then found that Stowell qualified as an armed career criminal under 18 U.S.C. § 924(e) without addressing any other factors.

The district court’s ACCA analysis in Stowell’s case mirrors the district court’s analysis of the occasions clause in United States v. Williams. In Williams’s case, as in this one, the district court relied on the PSR to find that the prior offenses were committed on different dates, without discussing any other factors. Williams appealed, and we affirmed. United States v. Williams, 976 F.3d 781, 787 (8th Cir. 2020), vacated, — U.S. —, 142 S. Ct. 1439, 212 L.Ed.2d 536 (2022). But Williams sought certiorari, and the Supreme Court vacated the judgment of this court and remanded “for further consideration in light of \_ \*887 Wooden v. United States,” Williams, 2022 WL 1510779, at \*1, and this court then remanded to the district court for a new factual determination of whether Williams had three prior convictions committed on different occasions, id.

In my view, Stowell’s case should be treated the same way. The district courts in both cases applied the same pre-Wooden approach, failing to engage in a multi-factored inquiry or consider the “range of circumstances [that] may be relevant to identifying episodes of criminal activity.” Wooden, 142 S. Ct. at 1071. Wooden did recognize that “[i]n many cases, a single factor—especially of time or place—can decisively differentiate occasions.” Id. But that possibility does not eliminate the need for a fact-intensive inquiry. Nor does it mean that a sentencing court need not consider any factors other than “time or place.” Maybe the task on remand will be “straightforward and intuitive,” id., but neither party had the opportunity to make their argument under a Wooden analysis. Regardless of what we anticipate the result may or may not be, it is not for this court to decide whether Wooden’s multi-factored approach will alter the result in Stowell’s case. That is a question for the sentencing court to decide in the first instance. I respectfully dissent.

**All Citations**

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**Footnotes**

- 1 The Honorable P.K. Holmes, III, United States District Judge for the Western District of Arkansas.
- 2 We have repeatedly designated crimes that occurred a few minutes apart and in close physical proximity as being committed on separate occasions. See *United States v. Perry*, 908 F.3d 1126, 1131–32 (8th Cir. 2018) (holding that defendant, who robbed a gas station clerk at gunpoint, ran outside, and then shot at a bystander who tried to pursue him, committed offenses on separate occasions). In closer cases, the test may be called into question by the Supreme Court's decision in *Wooden v. United States*, — U.S. —, 142 S.Ct. 1063, 1069, 212 L.Ed.2d 187 (2022) (holding that, under the ordinary meaning of “occasion,” an offender who broke into ten conjoined storage units committed all ten burglaries on the same occasion). But *Wooden* didn't supplant our three-factor test. In fact, the Court specifically noted that time, proximity, and the character of or relationship between offenses may be relevant. *Id.* at 1070–71. And, the offenses here did not occur close enough in time to implicate *Wooden*. See *id.* at 1071 (“In many cases, a single factor—especially of time or place—can decisively differentiate occasions.”).

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