No. _____

In the Supreme Court of the United States

October Term, 2022

SAMUEL VALENCIA, *PETITIONER*,

V.

UNITED STATES OF AMERICA

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

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QUESTION PRESENTED FOR REVIEW

Do the Fifth and Sixth Amendments of the U.S. Constitution require that facts to prove a defendant's prior convictions were for offenses committed on "occasions different from one another," for purposes of increasing the minimum and maximum sentences under the Armed Career Criminal Act (ACCA), be alleged in the indictment and either proven to a jury beyond a reasonable doubt or admitted to by the defendant, under the principles articulated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013)?

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SAMUEL VALENCIA, Petitioner,

v.

UNITED STATES OF AMERICA

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

Petitioner Samuel Valencia asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 66 F.4th 1032 and attached to this petition as Appendix A. The order denying rehearing is attached to this petition as Appendix B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Court of Appeals entered the judgment in Valencia's case on May 4, 2023 and denied rehearing on June 14, 2023. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment to the U.S. Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI.

FEDERAL STATUTES INVOLVED

Title 18 U.S.C. § 922(a)(8) provides, in pertinent part, "Whoever knowingly violates section (d) or (g) of section 922 shall be … imprisoned for not more than 15 years[.]"

Title 18 U.S.C. § 924(e) provides, in pertinent part, "In the case of a person who violates section 922(g) of this title and has three previous convictions … for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be … imprisoned not less than 15 years[.]"

The entirety of the text of 18 U.S.C. § 924(e) is reproduced in Appendix C.

STATEMENT

This case involves an important constitutional question in the administration of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). The ACCA dramatically increases the minimum and maximum sentences for an offense under 18 U.S.C. § 922(g), if the defendant has three qualifying prior convictions for offenses that were "committed on occasions different from one another." § 924(e). Whether prior convictions were committed on different occasions is a "multi-factored" factual inquiry. *Wooden v. United States*, 142 S. Ct. 1063, 1070 (2022). This Court has consistently held that "any fact that increases the penalty for a crime" beyond the statutory maximum or minimum "must be submitted to the

jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *see Alleyne v. United States*, 570 U.S. 99 (2013). The only exception to this rule is for the "fact of a prior conviction." *Apprendi*, 530 U.S. at 490 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998)).

Valencia argues, as he did in the district court and court of appeals, that the ACCA's different-occasions requirement is a factual inquiry that goes beyond the mere fact of a prior conviction. Accordingly, it must be submitted to the jury and proven beyond a reasonable doubt under the constitutional principles in *Apprendi* and its progeny. The Government agrees and so do many federal judges. But virtually all the courts of appeals to address this issue have found themselves bound by their circuit precedent and this Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998).

In *Wooden*, this Court recognized the constitutional question arising from the ACCA's occasions clause but, because Wooden did not raise it, declined to address it. 142 S. Ct. at 1068 n.3. As Justice Gorsuch opined, "there is little doubt [the Court] will have to do so soon." *Id.* at 1087 n.7 (Gorsuch, J., concurring).

1. In 2021, police officers in Odessa, Texas, searched Valencia's residence and discovered a handgun. Valencia was indicted

for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The indictment did not indicate that Valencia would be sentenced under the ACCA. Valencia pleaded guilty as charged. Valencia's statutory maximum sentence was 10 years' imprisonment, 18 U.S.C. § 924(a)(2) (2021),[1] and his advisory Guidelines range was 70 to 87 months.

The presentence report recommended that Valencia's sentence be enhanced under the ACCA because he had at least three prior violent felony convictions for offenses that were allegedly committed on different occasions. 18 U.S.C. § 924(e). The report identified four prior burglary convictions, three of which were committed in 1987 (two on the same day), and one that was committed in 1994. With the ACCA enhancement, Valencia's statutory range of punishment increased to a minimum of 15 years' imprisonment and a maximum of life imprisonment, § 924(e), and his Guidelines range increased to 188 to 235 months' imprisonment.

2. Valencia objected to the ACCA enhancement. He argued that the burglary offenses were not committed on occasions differ-

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[1] After Valencia was sentenced, the maximum term of imprisonment for an offense under 18 U.S.C. § 922(g) increased from 10 years to 15 years' imprisonment. *See* 18 U.S.C. § 924(a)(8); Pub.L. 117-159, Div. A, Title II, § 12004(c), June 25, 2022, 136 Stat. 1329.

ent from one another. Valencia also argued that the ACCA enhancement should not apply because the facts to determine whether his prior convictions were for offenses "committed on occasions different from one another" were not alleged in the indictment and either proven to a jury beyond a reasonable doubt or admitted to by him, citing *Apprendi* and *Alleyne*. The district court overruled the objection, applied the ACCA enhancement, and sentenced Valencia to 235 months' imprisonment. Valencia appealed.

3. On appeal to the Fifth Circuit Court of Appeals, Valencia, citing *Wooden v. United States*, 142 S. Ct. 1063 (2022) argued that the district court erred in applying the ACCA enhancement because the facts allegedly supporting the different-occasions requirement were not alleged in the indictment and either proven to a jury beyond a reasonable doubt or admitted to by him. The Government conceded error, agreeing that the Constitution required these facts be alleged in the indictment and proven to a jury beyond a reasonable doubt. The Government claimed, however, that the error was harmless.

The Fifth Circuit held that Valencia's argument was foreclosed by circuit precedent. *United States v. Valencia*, 66 F.4th 1032 (5th Cir. 2023) (per curiam); App. A. And, because the Supreme Court had declined to address this issue in *Wooden*, that opinion did not

alter the binding nature of the circuit precedent. *Id.* at 1032–33; App. A. Valencia petitioned for rehearing en banc, which the Fifth Circuit denied. App. B.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to resolve whether the Constitution requires facts that prior convictions were for offenses "committed on occasions different from one another" be alleged in the indictment and proven to a jury beyond a reasonable doubt, to support an enhanced ACCA sentence.

Justices Gorsuch and Sotomayor recognized in *Wooden* that "[a] constitutional question simmers beneath the surface" of the Court's decision. *Wooden v. United States*, 142 S. Ct. 1063, 1087 n.7 (2022) (Gorsuch, J., joined by Justice Sotomayor, concurring). The constitutional question concerns the administration of the Armed Career Criminal Act's (ACCA), which increases the prescribed minimum and maximum sentences for criminal defendants convicted under 18 U.S.C. § 922(g), who have three qualifying prior convictions. In *Wooden*, this Court held that the ACCA's requirement that the prior convictions be for offenses "committed on occasions different from one another" involved a "multi-factored" factual inquiry. *Id.* at 1070–71. This Court has consistently held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum or minimum must be alleged in the indictment and either proved to a jury beyond a reasonable doubt or admitted to by the defendant. *Alleyne v. United States*, 570 U.S. 99, 103 (2013); *United States v. Cotton*, 535 U.S. 625, 627 (2002); *Apprendi*, 530 U.S. at 490. The *Wooden* Court did not reach the

question whether this constitutional principle applied to the ACCA's "occasions-different" inquiry, however, because the defendant "did not raise it." *Wooden*, 142 S. Ct. at 1068 n.3. But, as Justice Gorsuch noted, "there is little doubt that [the Court] will have to do so soon." *Id.* at 1087 n.7 (Gorsuch, J., concurring). This Court now should address the question left unanswered in *Wooden*.

This Court's precedent dictates the resolution of the question presented.

In *Apprendi*, this Court held that, under the Sixth Amendment, "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." 530 U.S. at 490. "In federal prosecutions," under the Fifth Amendment, "such facts must also be charged in the indictment." *Cotton*, 535 U.S. at 632 (citing *Jones v. United States*, 526 U.S. 277, 243 n.6 (1999)). Later, in *Alleyne*, this Court applied *Apprendi's* rule to mandatory minimum sentences, holding that any fact that produces a higher sentencing range—not just a sentence above the mandatory maximum—must be alleged in the indictment and proven to a jury beyond a reasonable doubt. 570 U.S. at 110–11, 114–16.

The only exception to this general rule—and it is a "narrow" one—is for the "fact" of a prior conviction. *Apprendi*, 530 U.S. at

490 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998)); *see also Alleyne*, 570 U.S. at 111 n.1. In recognizing this exception, this Court stressed that a prior conviction "must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones*, 526 U.S. at 249; *Apprendi*, 530 U.S. at 496 (a prior conviction will have been "entered in a proceeding in which the defendant had the right to require the prosecutor to prove guilt beyond a reasonable doubt"). Accordingly, a judge is limited to considering only the elements of the prior offense of conviction, not the manner in which it was committed or "non-elemental facts." *Mathis v. United States*, 579 U.S. 500, 511–12 (2016).

This Court has repeatedly applied the *Apprendi* rule to the ACCA. The ACCA increases a defendant's punishment for a violation of 18 U.S.C. § 922(g) from zero to 15 years' imprisonment to a mandatory minimum 15 years' imprisonment and a maximum of life. *Compare* 18 U.S.C. § 924(a)(8)[2] *with* 18 U.S.C. § 924(e)(1). For the increases to apply, the defendant must have three qualifying

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[2] At the time of Valencia's sentencing, the maximum term of imprisonment for an offense under 18 U.S.C. § 922(g) was 10 years' imprisonment. *See* 18 U.S.C. § 924(a)(2) (2021).

prior convictions—for a "violent felony" or a "serious drug offense"—that were "committed on occasions different from one another." 18 U.S.C. § 924(e). This involves two separate determinations: (1) whether the prior convictions are violent felonies or serious drug offenses; and (2) whether the prior offenses were committed on different occasions. *Wooden*, 142 S. Ct. at 1070.

For first determining whether a prior conviction is a "violent felony" or a "serious drug offense," this Court has made clear that the judge may consider only "elements" not "non-elemental facts." *Descamps v. United States*, 570 U.S. 254, 261 (2013) (citing *Taylor v. United States*, 495 U.S. 575 (1990)). A judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Mathis*, 579 U.S. at 511–12. The judge may not go beyond identifying a prior conviction to "explore the manner in which the defendant committed that offense." *Descamps*, 570 U.S. at 261 (citing *Shepard v. United States*, 544 U.S. 13, 25 (2005)).

But the second determination for the ACCA, whether the prior convictions were for offenses committed on different occasions, requires "explor[ing] the manner in which the defendant committed" the offenses. *Descamps*, 570 U.S. at 261. That is because the question is not whether the *convictions* occurred on separate occasions

but whether the *offenses* were committed on separate occasions. *See United States v. Hayes*, 555 U.S. 415, 421 (2009) (concluding that the phrase "an offense … committed" required sentencer to consider non-elemental facts); *Nijhawan v. Holder*, 557 U.S. 29, 37 (2009) (interpreting immigration statute to require a "circumstance-specific,' not a "categorical" interpretation").

This Court has instructed that the different-occasions inquiry requires a "holistic" and "multi-factored" inquiry. *Wooden*, 142 S. Ct. at 1067, 1070–71. This exploration considers the time the offenses took place, any intervening events, the proximity of the locations, and "the character and relationship of the offenses"—such as a "common scheme or purpose." *Id.* at 1071. In *Wooden*, this Court elaborated on some of those factors, including: 1) how close in time the offenses were committed—"Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events"; 2) the locations of the offenses and their proximity to each other—"the further away crimes take place, the less likely they are components of the same criminal event"; 3) whether the offenses share a common scheme or purpose— "[t]he more similar or intertwined the conduct giving

rise to the offenses … the more apt they are to compose one occasion." *Id.* at 1071. This factual inquiry, which goes beyond "the simple fact of a prior conviction," *Mathis*, 579 U.S. at 511, does not come within the narrow exception to the *Apprendi* rule.

Any finding of "a fact *about* a prior conviction," as opposed to the simple fact *of* a prior conviction, "is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to … *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." *Shepard*, 544 U.S. at 25. Because the different-occasions inquiry involves non-elemental facts about the prior convictions, the jury—not the judge—must make that determination. *Mathis*, 579 U.S. at 511 ("only a jury, not a judge, may find facts that increase the maximum [and minimum] penalty").

Many federal judges, both before and after *Wooden*, have recognized that the "occasions different from one another" requirement turns on facts beyond the elements of conviction. *See, e.g., United States v. Thompson*, 421 F.3d 278, 294 (4th Cir. 2005) (Wilkins, J., dissenting) (employing *Apprendi* analysis to find that facts "about a crime underlying a prior conviction," including dates, are beyond the "fact of a prior conviction" exception); *United States v. Perry*, 908 F.3d 1126, 1134 (8th Cir. 2018) (Stras, J., concurring)

(treatment of different-occasions issue as one for the court "is a departure from fundamental Sixth Amendment principles"); *United States v. Dudley*, 5 F.4th 1249, 1273–78 (11th Cir. 2021) (Newsom, J., concurring) (judicial factfinding of the different-occasions issue violates the Sixth Amendment). *See, e.g., United States v. Brown*, 67 F.4th 200, 215–18 (4th Cir. 2023) (Heytens, J., concurring) (noting that the Fourth Circuit has continued to reject the dictates of the Sixth Amendment); *United States v. Barrera*, 2022 WL 1239052, *3 (9th Cir. 2022) (Feinerman, J., concurring) (suggesting that, "[g]iven the apparent conflict between circuit law and Supreme Court precedent, this case may be an appropriate candidate for further review" either by the en banc court or the Supreme Court), *cert. denied*, 143 S. Ct. 1043 (2023).

Only this Court can resolve this constitutional question.

The courts of appeals cannot resolve the constitutional issue. Before *Wooden*, courts of appeals that addressed the issue held that *Apprendi*'s rule did not apply to the occasions-different question because it fell within the *Almendarez-Torres* exception. *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); *United States v. Thompson*, 421 F.3d 278, 285 (4th Cir. 2005); *United States v. Stone*, 306 F.3d 241, 243 (5th Cir. 2002); *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); *United States v. Walker*, 953 F.3d 577, 580 (9th Cir. 2020); *United States v. Michel*, 446 F.3d 112, 1132–33 (11th Cir. 2017).

Since this Court's decision in *Wooden*, criminal defendants have been raising this issue in federal courts nationwide. And the Government has been conceding constitutional error, as it did here, Government-Appellee's Brief, *United States v. Valencia*, No. 22-50283, 2023 WL 143970 at *5–7 (5th Cir. Jan. 3, 2023), and has been attempting to comply with the Sixth Amendment. *See* Letter of Appellant United States Under Fed. R. App. P. 28(j), *United States v. Heard*, No. 22-1380 (8th Cir. Oct. 5, 2022); Government-Respondent's Brief in Opposition at 4-8, 10-11, *United States v. Daniels*, No. 22-5102 (U.S. Nov. 21, 2022); Government's Motion to Withdraw Appeal, *United States v. Brown*, No. 22-2550 (3d Cir. Mar. 12, 2023).

Nine courts of appeals have considered this issue after *Wooden*. Eight of those appellate courts continue to apply their pre-*Wooden* precedent, with at least four denying petitions to reconsider that precedent en banc. *United States v. Golden*, 2023 WL 2446899, *4 (3d Cir. Mar. 10, 2023); *Brown*, 67 F.4th at 215 (4th Cir. 2023), *pet.*

for reh'g denied, 77 F.4th 301 (2023); *United States v. Valencia*, 66 F.4th 1032, 1032 (5th Cir. 2023) (per curiam), *pet. for reh'g denied*, No. 22-50283 (June 14, 2023) (App. B); *United States v. Belcher*, 40 F.4th 430, 432 (6th Cir. 2022), *pet. for reh'g denied*, 2022 WL 10219852 (2022); *United States v. Erlinger*, 77 F.4th 617, 621–23 (7th Cir. 2023); *Barrera*, 2022 WL 1239052, at *2 (9th Cir. 2022); *United States v. Williams*, 39 F.4th 342, 351 (10th Cir. 2022), *pet. for reh'g denied*, 2022 WL 17409565 (2022), *cert. denied*, 143 S. Ct. 745 (2023); *United States v. Haynes*, 2022 WL 3643740, *5 (11th Cir. Aug. 24, 2022) (per curiam), *cert. denied*, 143 S. Ct. 1009 (2023). Only one court of appeals, after a panel found itself bound by circuit precedent, granted rehearing en banc. *United States v. Stowell*, 40 F.4th 882 (8th Cir. 2022), *vacated and reh'g en banc granted by* 2022 WL 16942355 (Nov. 15, 2022) (oral argument held April 11, 2023).

But this important constitutional issue will continue to clog the federal courts until this Court resolves it. Many individuals, including Valencia, are charged every day with offenses under 18 U.S.C. § 922(g), and many are sentenced by judges under the ACCA. Almost 4,500 defendants received ACCA sentences during the ten-year period from October 2009 to September 2019. U.S. Sent'g Comm'n, Federal Armed Career Criminals: Prevalence,

Patterns, and Pathways 19, 28 (2021).[3] And the ACCA dramatically increases their sentences. According to U.S. Sentencing Commission statistics for fiscal year 2022, the average sentence for defendants convicted of § 922(g) and sentenced without the ACCA was 60 months' imprisonment. U.S. Sent'g Comm'n, Quick Facts—Felon in Possession of a Firearm (FY 2022), at 2.[4] For those sentenced under the ACCA, however, the average sentence was 186 months' imprisonment. *Id.* It is untenable that defendants continue to face lengthy, unconstitutional sentences. Only this Court can resolve the important constitutional issue left unresolved by *Wooden*, and it should grant certiorari to do so.

This is a suitable vehicle to address the question presented.

The Court should resolve the question presented in this case. The legal error is clearly presented. Valencia raised the different occasions constitutional issue in the district court and in the court of appeals. The Government conceded error. The Fifth Circuit Court of Appeals rejected the argument in a published opinion and denied rehearing en banc. *See* App. A & B.

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[3] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/2021030_ACCA_Report.pdf.

[4] Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY22.pdf.

The question presented is outcome determinative. If Valencia is entitled to a grand-jury indictment and jury determination beyond a reasonable doubt on whether his prior offenses were committed on occasions different from one another, he cannot be sentenced under the ACCA. He was never charged under the ACCA and he never admitted that his prior offenses were committed on occasions different from one another. Despite Valencia's objection, the judge determined by a preponderance of the evidence that his prior offenses were committed on occasions different from one another and imposed an enhanced ACCA sentence. That was error. The Government's claim below that the error was harmless here is incorrect. But it is also beside the point. As the Government has acknowledged, an assertion of harmlessness "would not warrant declining review—particularly given that the courts of appeals have uniformly erred in resolving that question, which has important implications for the procedures to be followed on a common criminal charge." Brief for United States in Opposition at 8–9, *Reed v. United States*, No. 22-336 (U.S. Dec. 12, 2022). This Court should grant certiorari in Valencia's case.

CONCLUSION

FOR THESE REASONS, this Court should grant certiorari in this case.

Respectfully submitted.

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