No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ADAM LONGORIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Armed Career Criminal Act (ACCA) imposes a fifteen year mandatory minimum sentence for anyone who violates 18 U.S.C. § 922(g) and has three previous convictions for a "violent felony" or a "serious drug offense," or both, "committed on occasions different from one another." 18 U.S.C. § 924(e). This Court has held that in examining whether a prior conviction is an ACCA predicate, sentencing courts look only to the offense's elements, and not the particular facts of a case. *See Taylor v. United States*, 495 U.S. 575, 600-01 (1990); *Descamps v. United States*, 570 U.S. 254 (2013); *Mathis v. United States*, 136 S. Ct. 2243, 2245 (2016). This Court has never, however, addressed whether the constitutional principles requiring that elemental analysis also apply to the "occasions different from one another" phrase in that sentence. This case presents that question:

Under the ACCA, can a sentencing court rely solely on non-elemental facts to infer that a defendant's temporally overlapping and related offenses were "committed on occasions different from one another"?

TABLE OF CONTENTS

TABLE OF CONTENTS - *continued*

Appendices

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – *continued*

Cases ***Page(s)***

TABLE OF AUTHORITIES – *continued*

TABLE OF AUTHORITIES – *continued*

Secondary Sources ***Page(s)***

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Adam Longoria, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in case number 16-17645, entered on November 1, 2017.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 874 F.3d 1278, and is attached as Appendix A. (App. A).

JURISDICTION

The United States District Court, Middle District of Florida, had jurisdiction over this criminal case under 18 U.S.C. § 3231. Under 28 U.S.C. § 1291, the Court of Appeals for the Eleventh Circuit had jurisdiction to review the final order of the district court.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). *See* Sup. Ct. R. 14.1(e). A petition for rehearing en banc was filed on November 20, 2017, and denied on May 4, 2018. This petition is filed timely. *See* Sup. Ct. R. 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

(2) The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), provides in pertinent part:

> 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).

(3) Section 922(g)(1) of Title 18 provides, as relevant here:

> 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.

Without the ACCA, the statutory maximum penalty for a violation of 18 U.S.C. § 922(g)(1) is 10 years in prison. 18 U.S.C. § 924(a)(2).

STATEMENT OF THE CASE

Petitioner Adam Longoria seeks review of his ACCA sentence, imposed in 2017 based on three counts of conviction from a single federal indictment in 2009.

A. Petitioner's 2009 Federal Criminal Case.

On December 10, 2009, Petitioner pled guilty to two counts of distribution of cocaine, in violation of 21 U.S.C. § 841(a)(1), and participation in the related conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846. Case No.: 8:09-cr-340; Doc. 80; Doc. 228.

A federal conspiracy, under § 846, is an agreement to knowingly commit illegal acts, and the sale of a controlled substance is not an element of that offense. *United States v. Shabani*, 513 U.S. 10, 15-16 (1994) ("In order to establish a violation of 21 U.S.C. § 846, the Government need not prove the commission of any overt acts in furtherance of the conspiracy."). The elements are entering into an agreement, and knowing that the purpose of the agreement is illegal. *United States*

v. Harriston, 329 F.3d 779, 783 (11th Cir. 2003) (stating that to prove federal conspiracy, the "government only has to show, either directly or circumstantially, that a conspiracy existed; that the defendant know of the conspiracy; and that with knowledge, the defendant became a part of the conspiracy."); *see* Eleventh Circuit Pattern Jury Instruction (Criminal) Basic Instructions 9.1A, 9.1B, 9.2. The date is not an element of conspiracy under § 846. *United States v. Pope*, 132 F.3d 684, 688-89 (11th Cir. 1998).

Petitioner was sentenced to three concurrent terms of 37 months' imprisonment for the conspiracy and the two substantive transactions occurring within the temporal span of the conspiracy. *See* 8:09-cr-340, Doc. 154. His 2010 Judgment states that the two distribution counts "ended" on November 24 and December 3, 2008, and the conspiracy count "ended" on December 10, 2008. *Id.*

B. Petitioner's 2016 Federal Criminal Case.

More than six years later, after Petitioner's live-in girlfriend attempted to sell a firearm through the internet, he pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).

Prior to and at sentencing, Petitioner objected to the suggested ACCA enhancement, insisting that the three counts from the 2010 judgment were not "committed on different occasions from one another," and furthermore, given this Court's decisions in *Descamps* and *Mathis*, the district court could not engage in its own fact-finding from his prior proceeding to resolve the different occasions question. PSR at 24-25; Doc. 28 at 3-14.

At sentencing, the district court asked the parties why Petitioner's plea agreement was for one count of 18 U.S.C. § 922(g)(1), which carries a statutory maximum sentence of ten years' imprisonment, and why the ACCA 15-year mandatory minimum sentence had not been discussed

when he pled guilty. Doc. 41 at 16. The government explained when it drafted Petitioner's plea agreement, it did not believe that the three counts from his only prior case (8:09-cr-340) constituted three serious drug offenses committed on different occasions. Doc. 41 at 16-17 ("When I put together the plea agreement, I didn't think that Mr. Longoria was an armed career criminal. I had thought about the conspiracy and I realized that he had pled to two substantive counts, but in my way of thinking the conspiracy sort of subsumed the two substantive counts.").

Petitioner declined the district court's offer for him to withdraw his guilty plea, instead moving forward after the district court provided supplemental colloquy about the ACCA's 15-year mandatory minimum. Doc. 41 at 26. He did, however, reiterate his objection to the ACCA enhancement, arguing that he did not commit three predicate offenses on "occasions different from one another." 18 U.S.C. § 924(e)(1).

After reviewing Petitioner's 2009 plea agreement and change of plea transcript, the district court made the factual finding that Mr. Longoria sold drugs on three separate dates, stating that it was resolving his "different occasions" objection by relying on his assent (when pleading guilty in 2009) to having committed three drug sales on different calendar dates. *See* Doc. 41 at 36-37 ("During the plea colloquy the United States Attorney, looks to be Mr. Miller, recited the factual basis as set forth in the plea agreement, alluding to the November 24, 2008, transaction, the December 3rd transaction, and the December 10th transaction."). Again, upon overruling the Petitioner's objection to the ACCA, the court repeated that "the three transactions separately charged in the indictment constitute three prior convictions for serious drug offenses and that those convictions were committed on occasions different from one another and therefore [Mr. Longoria] is properly classified as an armed career criminal." *Id.* at 37.

Accordingly, the district court sentenced Petitioner to the ACCA's mandatory minimum of

15 years of imprisonment. *Id.* at 48; Doc. 32. Without the ACCA's enhanced penalty, his guideline imprisonment range would be 70 to 87 months. *See* PSR ¶¶ 28, 31-32, 45-47.

C. Petitioner's Appellate Proceedings.

On appeal, Petitioner argued that the federal conspiracy count and the two drug sale counts occurring within the temporal span of the conspiracy did not constitute three offenses committed on "occasions different from one another," and that, upon making the "different occasions" determination, the district court erred by relying on the date of an irrelevant third sale, which was never charged and is not an element of a conspiracy. Further, Petitioner argued that this Court's decisions in *Descamps* and *Mathis* require the conclusion that a sentencing court cannot rely on non-elemental facts of a prior proceeding when sentencing a defendant under the ACCA. Initial Brief of Appellant, *United States v. Longoria*, No. 16-17645 (11th Cir. April 6, 2017).

Without the benefit of oral argument, the Eleventh Circuit affirmed Petitioner's ACCA sentence, holding as a matter of first impression that the federal conspiracy count and the two distribution counts occurring within the timespan of the conspiracy constituted three "separate criminal episodes." Opinion of U.S. Court of Appeals, *United States v. Longoria*, 874 F.3d 1278 (11th Cir. 2017), Appendix A at 9-10 (citing *United States v. Pope*, 132 F.3d 684, 692 (11th Cir. 1998)). Recognizing that the circuit "ha[d] yet to address the resolution of the ACCA's different-occasions inquiry when a substantive drug distribution offense occurs within the span of a conspiracy to distribute that drug," the Panel made its own factual determination—in 2017—that the "end date" of Mr. Longoria's 2008 conspiracy, though not an element of that crime, occurred on a separate date from the two transactions and sufficed to overrule his "different occasions" objection. App. A at 10. Further, the Eleventh Circuit dismissed the district court's repeated reference to "three transactions," when Petitioner had been convicted of two drug sales and one

related conspiracy. *See* App. A at 5 n.9 ("The District Court's language, while imprecise, does not constitute error here. Longoria's sentence was enhanced because his two distribution convictions and on conspiracy conviction constituted the necessary three serious drug offense predicates."). For the different occasions determination, however, it is clear that the district court thought it was addressing three prior drug sales when it was not.[1]

REASONS FOR GRANTING THE PETITION

Petitioner's case presents a critical recurring issue of how a sentencing court can, consistent with the Constitution, make the "occasions different from one another" determination, required for every ACCA sentence applied in the United States. Here, Petitioner's two drug sales were committed within the temporal span of his continuing federal conspiracy. The courts below erred by inferring, based solely on non-elemental facts from a 2009 proceeding, that each of these three offenses from the same judgment "ar[o]se out of a separate and distinct criminal episode." *United States v. Sneed*, 600 F.3d 1326, 1329 (11th Cir. 2010). Without the lower courts' reliance on irrelevant non-elemental facts for the continuous crime of conspiracy, Petitioner's statutory maximum would be 10 years in prison. This Court's reasoning in *Descamps* and *Mathis* cannot be reconciled with the Eleventh Circuit's reliance on non-elemental facts for the "different occasions" determination. This Court should grant review to provide guidance on how to analyze the continuing offense of conspiracy as an "occasion" within the constitutional requirements of the Sixth Amendment. Indeed, Petitioner's three predicate offenses, two substantive drug offenses within the temporal span of a related conspiracy, illustrate the problem with permitting a

[1] On November 20, 2017, Petitioner filed a Petition for Rehearing En Banc. *See* Appendix B. After the mandate was withheld for several months, the Eleventh Circuit eventually denied the Petition for Rehearing En Banc and issued the mandate.

sentencing court to make factual inferences about non-elemental facts from a proceeding in the past.

I. This Court Should Address Whether the Reasoning of *Descamps* and *Mathis* Applies to the ACCA's Different Occasions Clause.

For nearly thirty years, this Court has explained that "[a]ll that counts" under the ACCA are the elements of a defendant's statute of conviction, and "[d]istinguishing between elements and facts is therefore central to ACCA's operation." *Taylor*, 495 U.S. at 602. The elements of an offense are what the prosecution must prove to sustain a conviction at trial and what a defendant necessarily admits when he pleads guilty. *Richardson v. United States*, 526 U.S. 813, 817 (1999); *McCarthy v. United States*, 394 U.S. 459, 466 (1969). "Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements. . . . They are 'circumstance[s]' or 'event[s]' having no 'legal effect [or] consequence' and need neither be found by a jury nor admitted by a defendant." *Mathis*, 136 S. Ct. at 2251 (citing Black's Law Dictionary 709 (10th ed. 2014)). Since *Taylor*, this Court has repeatedly held that for the ACCA, a sentencing judge may look only to "the elements of the [offense], not to the facts of defendant's conduct." 495 U.S. at 601; *see, e.g.*, *James v. United States,* 550 U.S. 192, 214 (2007) ("[W]e have avoided any inquiry into the underlying facts of [the defendant's] particular offense, and have looked solely to the elements of [burglary] as defined by [state] law."); *Descamps*, 570 U.S. at 261 ("The key [under ACCA] is elements, not facts.").

The justifications for the elements-only inquiry for the first clause of the ACCA include avoiding Sixth Amendment violations and other unfairness to defendants. *Taylor*, 495 U.S. at 600–01; *Descamps*, 570 U.S. at 267–68; *Mathis*, 136 S. Ct. at 2253.

Given the requirement that only a jury may find facts that increase a defendant's mandatory penalty, "a construction of ACCA allowing a sentencing judge to go any further would raise

serious Sixth Amendment Concerns." *Mathis*, 136 S. Ct. at 2252; *see Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (finding an exception to the *Apprendi* rule for judicial fact-finding of the fact of a prior conviction). Indeed, since *Shepard v. United States*, this Court recognizes the constitutional concern, because permitting a sentencing judge to "make a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea . . . raises the concern underlying *Jones* and *Apprendi*: The Sixth and Fourteenth Amendment guarantee a jury standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence." 544 U.S. 13, 26 (2005). In *Descamps*, this Court reiterated that if a sentencing court were to answer the ACCA-predicate question by "try[ing] to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct," there would be friction with the Sixth Amendment's promise that "a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt." 133 S. Ct. at 2288. In *Mathis*, this Court held that "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense . . . He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." 136 S. Ct. at 2252.

In addition to avoiding Sixth Amendment concerns, an elements-based inquiry "avoids unfairness to defendants." *Mathis*, 136 S. Ct. at 2253; *see Taylor*, 495 U.S. at 601. As Justice Kagan explained, "[a]t trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law, to the contrary, he 'may have good reason not to'—or even be precluded from doing so by the court." *Id.* at 2253; *see Descamps*, 570 U.S. at 270-71 ("And during plea hearings, the defendant may not wish to irk the prosecutor or court by

squabbling about superfluous factual allegations. In this case, for example, [the defendant] may have let the prosecutor's statement go by because it was irrelevant to the proceedings. He likely was not thinking about the possibility that his silence could come back to haunt him in an ACCA sentencing 30 years in the future.").

While this Court has addressed the ACCA dozens of times, it has primarily addressed what constitutes a "violent felony," but not how a sentencing court should make the "occasions different from one another" determination in the second clause. 18 U.S.C. § 924(e)(1). The Court has stated that a sentencing court, when determining the nature of a defendant's prior conviction, is "limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 16.

However, this Court has not addressed how the reasoning from *Taylor*, *Mathis*, and *Descamps* applies to a sentencing court's determination of whether a defendant's predicate offenses occurred on different occasions for the ACCA. Yet, every time a sentencing court applies the 15-year mandatory minimum sentence under the ACCA, it must first determine that a defendant's qualifying offenses occurred on "occasions different from one another." 18 U.S.C. § 924(e)(1). Petitioner's question thus affects every ACCA sentence.[2] This Court's guidance is needed.

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[2] While the 2017 statistics are not yet available, the Commission has confirmed that there were still over 300 ACCA sentences imposed in 2017. *See* U.S. Sentencing Comm'n, *Quick Facts: Mandatory Minimum Penalties* 2 (2017). Also, although the total ACCA sentences nationally has somewhat decreased without the residual clause, the percentage of the total originating from the Eleventh Circuit has increased. U.S. Sentencing Comm'n, *Interactive Sourcebook. See* https://isb.ussc.gov/Login. These statistics are based on data found under "All Tables and Figures," in Table 22.

The Court should grant review here because Petitioner's case perfectly illustrates the problem with relying on facts that are not elements of a prior offense: Petitioner's objection to the ACCA sentencing enhancement in 2016 was decided entirely by the district court's interpretation of what he admitted to in a wholly unrelated proceeding in 2009.[3] When Petitioner pled guilty in 2009 to two substantive counts and the related conspiracy count in federal court, there are many reasons why he would not contest any facts that were unnecessary for the court to accept his plea, including: a desire to show his remorse for his conduct, to get credit for his cooperation with law enforcement, and to get a lower sentence from the court. *See Mathis*, 136 S. Ct. at 2253 (explaining that a non-elemental fact may go unchallenged by the defendant in the prior proceeding because "a defendant may have no incentive to contest what does not matter under the law" and may even "have good reason not to" contest those facts at the time.) Also, when Petitioner pled guilty to these three counts, none of the parties considered the temporal or interrelated nature of these counts to be relevant to those proceedings. *See Descamps*, 570 U.S. at 270-71.

II. Relying on Non-Elemental Facts for the Different Occasions Determination Cannot be Reconciled with the Sixth Amendment.

This Court is clearly concerned with a judge finding facts that become the basis of an ACCA 15-year sentence. *See Descamps*, 570 U.S. at 256 ("Under ACCA, the sentencing court's finding of a predicate offense indisputably increases the maximum penalty. Accordingly, that finding would (at the least) raise serious Sixth Amendment concerns if it went beyond merely

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[3] The district court, while noting that it was limiting its analysis to *Shepard*-approved documents, found that Mr. Longoria did not object to the commission of three transactions during his 2009 plea colloquy. *See* Doc. 41 at 16-17, 34, 36-37 ("During the plea colloquy the United States Attorney, looks to be Mr. Miller, recited the factual basis as set forth in the plea agreement, alluding to the November 24, 2008, transaction, the December 3rd transaction, and the December 10th transaction.").

identifying a prior conviction."). Given this Court's precedent and the resulting evidentiary restrictions, most circuits, including the Eleventh Circuit, have limited sentencing courts to the *Shepard*-approved documents as the source of information for the different-occasions determination. *See United States v. King*, 853 F.3d 267, 273–75 (6th Cir. 2017) (limiting sentencing courts to *Shepard*-approved documents and citing in support *United States v. Dantzler*, 771 F.3d 137, 139 (2d Cir. 2014)); *Kirkland v. United States*, 687 F.3d 878, 886 & n.9 (7th Cir. 2012); *United States v. Boykin*, 669 F.3d 467, 472 (4th Cir. 2012); *United States v. Sneed*, 600 F.3d 1326, 1332 (11th Cir. 2010); *Thomas*, 572 F.3d at 950; *United States v. Fuller*, 453 F.3d 274, 279 (5th Cir. 2006); *United States v. Harris*, 447 F.3d 1300, 1305 (10th Cir. 2006); *United States v. Taylor*, 413 F.3d 1146, 1157 (10th Cir. 2005). *But see United States v. Evans*, 738 F.3d 935, 936 (8th Cir. 2014).

Although some courts recognize that the Sixth Amendment is implicated when the determination of whether offenses were committed on different occasions is not limited to the elements of those prior offenses,[4] the circuits have not limited sentencing courts to the elements of the prior offenses to find whether offenses were committed on different occasions.[5] The circuits generally conclude that "for ACCA purposes, district courts may determine both the existence of

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[4] Even before *Descamps* and *Mathis*, some judges were concerned with the constitutionality of permitting a sentencing judge to find facts necessary to establish that a defendant's underlying convictions were committed on occasions different from one another. *See United States v. Thompson*, 421 F.3d 278, 288 (4th Cir. 2005) (Wilkins, J., dissenting) ("I would employ *Apprendi*'s analysis and rule and hold that the facts underlying Thompson's prior convictions, including the dates on which he committed the underlying crimes, do not fit within the 'fact of a prior conviction' exception."); *United States v. Thomas*, 572 F.3d 945, 952-53 (D.C. Cir. 2009) (Ginsburg, J., concurring in part), *cert. denied*, 130 S. Ct. 1725 (2010).

[5] *See, e.g.*, *United States v. Blair*, 734 F.3d 218, 228 (3d Cir. 2013) (affirming an ACCA sentence based on the non-elemental dates in the charging documents).

prior convictions and the factual nature of those convictions, including whether they were committed on different occasions, so long as they limit themselves to *Shepard*-approved documents." *United States v. Weeks*, 711 F.3d 1255, 1259 (11th Cir. 2013).

In recent decisions, the Fourth and Sixth Circuits vacated ACCA sentences because the *Shepard*-approved documents did not establish that the offenses were committed on different occasions, but these circuits did not completely limit sentencing courts to the elements of a prior offense. *See King*, 853 F.3d at 274, 276–79 ("And to the extent that answering the different-occasions question requires a sentencing judge to identify the who, when, and where of the prior offenses, nothing we say here precludes a judge from doing so. We only hold that in identifying those facts, a sentencing judge is constrained to reviewing evidence approved by *Taylor* and *Shepard*"; concluding that the documents in that case did not establish the facts the defendant necessarily admitted in the prior guilty pleas); *United States v. Span*, 789 F.3d 320, 327, 331-32 (4th Cir. 2015) (vacating ACCA sentence because of discrepancies in the *Shepard*-approved documents and thus not reaching constitutional question, but stating: "Our precedent permits a sentencing court's dive into *Shepard*-approved documents to sort out the facts of the underlying predicate conviction, not just its elements. *Descamps* intimates that this analysis exceeds a sentencing court's proper role.").

A. The circuits' "different occasions" tests emphasize successive versus simultaneous criminal acts.

At present, the circuits generally permit a sentencing judge to make a "different occasions" determination based on non-elemental facts of a defendant's prior offense. *See, e.g., United States v. Elliott*, 703 F.3d 378, 383 (7th Cir. 2012) ("[T]his court, like our sister circuits, has construed *Almendarez-Torres* to permit a district court to make a finding for purposes of the ACCA as to whether a defendant committed three or more violent felonies or serious drug offenses on

occasions different from one another."); *United States v. Davis*, 487 F.3d 282, 287 (5th Cir. 2007); *United States v. Michel*, 446 F.3d 1122, 1133 (10th Cir. 2006). But, whether a defendant's prior crimes occurred on occasions different from one another is a question that looks well beyond "the facts of a prior conviction," *Blakely v. Washington*, 542 U.S. 227, 301 (2004), and far beyond the elements essential to that conviction, *see Taylor*, 495 U.S. at 599.

The circuits vary in their approaches to determining whether two offenses occurred on "occasions different from one another." 18 U.S.C. § 924(e)(1). Each approach, however, involves determining whether offenses were continuous or successive, looking to see whether two offenses are "separate and distinct criminal episode[s]" and "crimes that are temporally distinct." *United States v. Sneed*, 600 F.3d 1326, 1329 (11th Cir. 2010); *see Pope*, 132 F.3d at 692 ("[S]o long as predicate crimes are successive rather than simultaneous, they constitute separate criminal episodes for the purposes of the ACCA."). Like the Eleventh, the Seventh Circuit holds that a defendant will be subject to the ACCA where "each of [his] prior convictions arose out of a separate and distinct criminal episode." *Elliott*, 703 F.3d at 383.

Several circuits employ a multifactor test to decide whether a defendant's prior offenses occurred on different under ACCA. The relevant factors include the passage of time between the offenses, and whether the locations and victims were the same or different. *See, e.g.*, *Brown v. United States*, 636 F.3d 674, 675 (2d Cir. 2011) (stating that the relevant considerations "include whether victims of the two crimes were different, whether the crimes were committed at different locations, and whether the crimes were separated by the passage of time."); *United States v. Jones*, 673 F.3d 497, 503 (6th Cir. 2012) (imposing a three factor test wherein a defendant commits offenses on different occasions if: "(1) it is possible to discern the point at which the first offense is completed, and the subsequent point at which the second offense begins; (2) it would have been

possible for the offender to cease his criminal conduct after the first offense . . .; or (3) the offenses are committed in different residences or business locations."); *United States v. Antonie*, 953 F.3d 496, 498 (9th Cir. 1991) (applying a three factor test to conclude that armed robberies, committed forty minutes apart, constituted offenses committed on different occasions for the ACCA). Similarly, the Eighth Circuit considers "at least three factors as important considerations in deciding whether offenses are sufficiently separate and distinct to serve as individual predicate convictions for ACCA enhancement." *United States v. Willoughby*, 653 F.3d 738, 741 (8th Cir. 2011). These are: "(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." *Id.* at 743.

Courts acknowledge that the "task of determining when multiple prior offenses were part of the same criminal episode" is difficult. *United States v. Mann*, 552 F. App'x 464, 466 (6th Cir. 2014); *see United States v. Brady*, 98 F.3d 664, 670 (6th Cir. 1993) (en banc) (determining that two robberies committed on the same night against different victims in separate locations constituted separate occasions for the ACCA). Notably, a critical consideration for the appellate courts has been whether "it is possible to discern the point at which the first offense is completed, and the subsequent point at which the second offense begins." *United States v. Hill*, 440 F.3d 292, 297–98 (6th Cir. 2006). Because of the difficult nature of the "different occasions" determination, the First Circuit employs a case-by-case analysis of predicate offenses. *See United States v. Stearns*, 387 F.3d 104, 108 (1st Cir. 2004) ("The overnight respite precludes any reasonable inference that [defendant] committed the two burglaries as part of a continuous course of conduct, inasmuch as during the time lapse [defendant] had the opportunity affirmatively to decide whether to initiate another criminal episode.").

Critically, each circuit's approach demands a sentencing court find that a defendant committed three "separate and distinct" criminal episodes before applying the severe mandatory sentence of 15 years imprisonment. *Sneed*, 600 F.3d at 1329. To find "separate and distinct" occurrences, the courts decide whether a defendant "had a meaningful opportunity to desist his activity before committing the second offense," or whether they were part of a continuous course of conduct. *Pope*, 132 F.3d at 690.

The "successive rather than simultaneous" analysis of a defendant's prior predicate offenses employed by the circuit courts aligns with Congressional intent to punish repeat criminal offenders. *See United States v. Towne*, 870 F.2d 880, 890–91 (2nd Cir. 1989) (stating that the ACCA is "aimed at career criminals, rather than those who merely commit three punishable acts."); *see United States v. McElyea*, 158 F.3d 1016, 1020 (9th Cir. 1998) ("[T]he ACCA was amended to prevent the application of an enhanced sentence to a defendant who committed simultaneous crimes, regardless of how many convictions resulted from those actions.").[6]

B. Petitioner's case is an ideal vehicle because conspiracy does not fit this approach.

The crime of conspiracy, Petitioner's third qualifying ACCA predicate, simply does not fit these modes of analyzing whether two prior offenses were "committed on occasions different from

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[6] With the ACCA, Congress intended to punish individuals who continued committing crimes after being convicted and serving time in prison. *See* Jenny Osborne, *One Day Criminal Careers: The Armed Career Criminal Act's Different Occasions Provision*, 44 J. Marshall L. Rev. 963, 971-72 (Summer 2011); *see also* Armed Career Criminal Act: Hearing on H.R. 1627 and S. 52 Before the Subcomm. On Crime of the H. Comm. On the Judiciary, 98th Cong. 64 (1984) ("These are people who have demonstrated, by virtue of their definition, that locking them up and letting them go doesn't do any good. They go on again, you lock them up, you let them go, it doesn't do any good, they are back for a third time. At that juncture, we should say, 'That's it; time out; it is all over. We, as responsible people, will never give you the opportunity to do this again.'").

one another." 18 U.S.C. § 924(e)(1). When faced with whether a defendant's three offenses were committed on different occasions, the courts distinguish between simultaneous and successive behavior, and emphasize whether a defendant had a meaningful opportunity to desist unlawful conduct between one and another. *See supra* II(A); *see also Kirkland,* 687 F.3d at 886 & n.9 (considering, for the different occasions ACCA determination, the "nature of the crimes, the identities of the victims, and the locations of the offenses, and whether the perpetrator had the opportunity to cease and desist from his criminal actions at any time"); *see Brown*, 636 F.3d at 675 (examining "whether the victims of the two crimes were different, whether the crimes were committed at different locations, and whether the crimes were separated by the passage of time.").

A conspiracy, however, is a continuous criminal episode, and when combined with drug transactions occurring as part of that conspiracy and within its temporal span, the separateness requirement for felonies "committed on occasions different from one another" cannot be met. 18 U.S.C. § 924(e)(1). Federal conspiracy, under 21 U.S.C. § 846, is an ongoing offense for which the "government only has to show, either directly or circumstantially, that a conspiracy existed; that the defendant know of the conspiracy; and that with knowledge, the defendant became a part of the conspiracy." *Harriston*, 329 F.3d at 783 (citing *United States v. Arnold*, 117 F.3d 1308, 1313 (11th Cir. 1997)). A conspiracy continues "as long as the purposes of the conspiracy have neither been abandoned nor accomplished and the defendant has not made an affirmative showing that the conspiracy has terminated." *United States v. Gonzalez*, 921 F.2d 1530, 1548 (11th Cir. 1991).

Conspiracy does not fit in the different occasions paradigms employed by the appellate courts. For example, the Fourth Circuit defines "occasions" as "those predicate offenses that can be isolated with a beginning and an end—ones that constitute an occurrence unto themselves."

United States v. Thompson, 421 F.3d 278, 284 (4th Cir. 2005). Applying that definition in this case illustrates the problem. Here, the parties agree that Petitioner's substantive drug transactions occurred within the time span of a related conspiracy.[7] Thus, Petitioner's qualifying offenses cannot "be isolated with a beginning and an end." *Id.*

Similarly, when explaining its approach to the different occasions determination, the Eighth Circuit has stated "[d]iscrete criminal episodes, rather than dates of convictions, trigger the [ACCA] enhancement," *United States v. Gray*, 85 F.3d 380, 381 (8th Cir. 1996), and has held that "[a] continuous course of conduct will not trigger the enhancement." *United States v. Willoughby*, 653 F.3d 738, 741 (8th Cir. 2011). Later, when presented with a situation much like Petitioner's, the Eighth Circuit recognized that its precedent "did not involve an underlying conspiracy conviction and a related conviction as the two allegedly qualifying predicate convictions," and conceded that "the ongoing nature and often extended time frames involved with conspiracy offenses make the *Willoughby* factor, 'time lapse between offenses,' a somewhat awkward fit for analysis in the conspiracy context." *United States v. Melbie*, 751 F.3d 586, 589-90 (8th Cir. 2014).

In addition to its continuous nature, the elements of conspiracy make the "different occasions" analysis, by a sentencing court at a later date, challenging. For example, at Petitioner's 2009 change of plea hearing, the district court reviewed what the government would need to prove to a jury for a conviction under § 846: that (1) "two or more persons in some way or manner came to a mutual understanding to try to accomplish a common and unlawful plan;" that Mr. Longoria

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[7] Although the district court incorrectly referenced Petitioner's three "transactions" from the prior federal judgment, the Eleventh Circuit dismissed his claim of error and held that Mr. Longoria's "sentence was enhanced because his two distribution convictions and one conspiracy conviction constituted the necessary three serious drug offense predicates." *Longoria*, 874 F.3d at 1280 n. 9.

(2) "knowing the unlawful purpose of the plan, willfully joined in it;" and (3) "that the object of the unlawful plan was to possess with the intent to distribute 500 grams or more of cocaine as charged." 8:09-cr-340, Doc. 228 at 34-35. In the Eleventh Circuit, "[w]hen the indictment charges a defendant with an ongoing conspiracy, the jury may find that he and his coconspirators reached an agreement at any time within the period charged and that the agreement continued throughout the period or, for example, only for one day. Unless the jury gives a special verdict or the sentencing court makes a determination based on the evidence adduced at trial, it is impossible for us to tell when the relevant conduct occurred." *United States v. Cornog*, 945 F.2d 1504, 1509–10 (11th Cir. 1991). Therefore, because the relevant conduct of a conspiracy is the agreement itself, it is impossible for a sentencing judge at a later date, when deciding whether to impose the ACCA, to fact-find when that defendant made that unlawful agreement without violating the Sixth Amendment. *Id.* at 1510 ("Although we know that the jury found him guilty on this count, we do not know when the conspiracy occurred-it could have been at any time within this period.").

For a sentencing court deciding whether to apply the ACCA's mandatory 15-year imprisonment, the varying approaches employed by the circuits are ill suited for the predicate offense of conspiracy. Indeed, the continuous nature of conspiracy and its elements make it an "awkward fit for analysis" of the "occasions different from one another" requirement in the ACCA. *Melbie*, 751 F.3d at 589; 18 U.S.C. § 924(e)(1). Moreover, for these very reasons, a sentencing court presented with the question of whether a defendant's prior conspiracy and related substantive offense occurred on two different occasions must conduct extensive fact-finding about a defendant's prior offenses. This Court has expressed repeated concern over the constitutional implications of precisely this type of judicial fact-finding. *See Mathis*, 136 S. Ct. at 2253 (explaining that non-elemental facts may go unchallenged by the defendant in the prior proceeding

because "a defendant may have no incentive to contest what does not matter under the law" and may even "have good reason not to" contest those facts at the time); *see also Descamps*, 570 U.S. at 269 (reiterating that except for 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.") (citing *Apprendi*, 530 U.S. at 490)).

Petitioner's case presents an ideal vehicle for this Court to advise sentencing courts on their "different occasions" determination under the ACCA. 18 U.S.C. § 924(e)(1). One of Petitioner's predicate offenses, conspiracy, is particularly ill suited to the approach employed by the circuits when making this determination. And the nature of Petitioner's three qualifying ACCA predicate offenses demonstrates the extensive fact-finding that is sometimes required for the actual application of ACCA's severe 15-year mandatory sentence, and illustrate exactly the constitutional concerns this Court has expressed about such fact finding and inference making by a sentencing court.

C. The decision below is wrong.

The Eleventh Circuit dismissed Petitioner's argument that the district court had imposed the ACCA based on a prior offense for which he was never charged (a third drug sale), concluding that while the district court's language was "imprecise," Petitioner's sentence "was enhanced because his two distribution convictions and one conspiracy conviction constituted the necessary three serious drug offense predicates." App. A at 5 n. 9. In addition, the Eleventh Circuit recognized that it "ha[d] yet to address the resolution of the ACCA's different-occasions inquiry when a substantive drug distribution offense occurs within the span of a conspiracy to distribute that drug." *Id.* at 7-8.

Recognizing that none of this Court's or its own precedent advised what date within a conspiracy offense was relevant for the ACCA's different occasions determination, the Eleventh

Circuit reviewed the *Shepard*-approved documents and decided—for the first time—that the conspiracy's end date mattered for this analysis. Because, according to Petitioner's 2010 judgment, his conspiracy ended a week after his second transaction, the Eleventh Circuit inferred that he certainly "had the opportunity to desist but chose instead to commit another crime" during the seven days between the second offense and the end date of the conspiracy. App. A. at 9 (citing *United States v. Proch*, 637 F.3d 1262, 1266 (11th Cir. 2011)).

However, that end date is irrelevant to proving or admitting that offense. *See* Eleventh Circuit Pattern Jury Instructions (Criminal) 0100 (2016) (describing conspiracy under 21 U.S.C. § 846 as "an agreement by two or more persons to commit an unlawful act" and listing elements of crime; end date of conspiracy not one of those elements); *see United States v. Williams*, 469 F.3d 963, 967 (11th Cir. 2006) ("The gist of the crime of conspiracy as defined by the statute is the agreement or confederation of the conspirators to commit one or more unlawful acts . . . A conspiracy is not the commission of the crime which it contemplates . . ."). As a result, the Petitioner lacked any reason in 2009 to contest the end date of the conspiracy. *See Mathis*, 136 S. Ct. at 2253 ("[A] defendant may have no incentive to contest what does not matter under the law" and may even "have good reason not to" contest those facts at the time.").

In concluding that Petitioner "had the opportunity to desist but chose instead to commit [a third] crime" after the second sale, the Panel legally erred and revealed a misunderstanding of the continuing offense of conspiracy. To be sure, the Panel went well beyond the elements of the conspiracy conviction to infer the temporal span of a continuing offense, to conclude that Petitioner indeed committed three offenses on "occasions different from one another." 18 U.S.C. § 924(e)(1). In the context of the first clause of the ACCA statute, this Court recently held that violates a defendant's Sixth Amendment rights. *See Mathis*, 136 S. Ct. at 2252 ("[A] judge cannot

go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. . . . He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of."). Petitioner asks this Court to intervene and hold that a sentencing court cannot make that factual determination about an irrelevant non-elemental fact for the second clause of that same statute.

CONCLUSION

For the above reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17645

D.C. Docket No. 8:16-cr-00335-JDW-JSS-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ADAM LONGORIA,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(November 1, 2017)

Before TJOFLAT, MARCUS, and JORDAN, Circuit Judges.

PER CURIAM:

Adam Longoria was convicted of possession of a firearm by a convicted felon[1] and was sentenced to fifteen years in prison under an Armed Career Criminal Act ("ACCA") sentence enhancement.[2] This ACCA sentence enhancement, applicable when a defendant has "three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another,"[3] was based upon three previous serious drug-related convictions: two counts of distribution of cocaine[4] and one count of participation in a conspiracy with intent to distribute cocaine.[5]

Longoria appeals his conviction and sentence on four grounds. Three are squarely foreclosed by our precedent. *See infra* part IV. Longoria's first issue, whether the District Court erred in determining that he had three predicate offenses that occurred on different occasions under the ACCA, is also unavailing. Accordingly, we affirm his conviction and sentence.

I.

In 2009, Longoria was charged with one count of participation in a conspiracy to possess with intent to distribute cocaine, a violation of 21 U.S.C. § 846, and two counts of distribution of cocaine, a violation of 21 U.S.C.

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[1] 18 U.S.C. § 922(g)(1).

[2] *Id.* § 924(e)(1).

[3] *Id.*

[4] 21 U.S.C. § 841(a)(1).

[5] *Id.* § 846.

§ 841(a)(1). The indictment charged that the conspiracy occurred from an "unknown date which was no later than December, 2007, through on or about December 10, 2008." The indictment also charged that the two distribution offenses occurred on November 24, 2008 and December 3, 2008.

Longoria pleaded guilty to each of the three counts. He admitted to the following facts in his plea agreement.[6] Longoria told undercover detectives that his co-defendant, Richard Caraballo, could sell them kilograms of cocaine for $20,000 per kilogram. Undercover detectives contacted Longoria on November 24, 2008, and Longoria arranged a meeting between the detectives and Caraballo. The detectives purchased five and a half grams of cocaine from Caraballo on that date. Longoria and Caraballo met with the detectives again on December 3, 2008, when the detectives purchased thirty-five grams of cocaine. One week later, on December 10, Longoria met with the detectives to verify that they had $20,000 to purchase one kilogram of cocaine from Caraballo before the detectives went to Caraballo's house. Authorities later discovered 1,142 grams of cocaine at Caraballo's house.

Longoria was sentenced to thirty-seven months in prison in April 2010. The judgment stated that the distribution offenses ended on November 24 and

[6] Longoria confirmed that this version of facts was correct at his change-of-plea hearing.

December 3, 2008, and the conspiracy offense ended on December 10, 2008. Longoria was incarcerated and later left prison under supervised release.

In 2016, Longoria was arrested and charged with possession of a firearm by a convicted felon, a violation of 18 U.S.C. § 922(g)(1). Longoria pleaded guilty and admitted the following facts.[7] In March 2015, while on supervised release, Longoria had arranged via Facebook to sell a rifle to an undercover detective for $300. He told the detective that he was a felon and that his wife would carry out the sale.[8] The detective met with the woman, and she exchanged the rifle with him for $300. Longoria called the detective after the sale to explain that he had been afraid to sell the rifle in person because of his past arrest.

The maximum sentence under 18 U.S.C. § 922(g)(1), without a sentence enhancement, is ten years in prison. Longoria's plea agreement noted this maximum. The Probation Office, however, later indicated that Longoria qualified as an armed career criminal under the ACCA and was subject to a fifteen-year statutory *minimum* sentence. After this discovery, the District Court gave Longoria the opportunity to withdraw his plea. He declined. The District Court then examined Longoria's 2009 plea agreement and the transcript of the change-of-plea hearing, and, relying upon the three counts relating to the incidents of November

[7] Longoria also confirmed that this version of facts was correct at his change-of-plea hearing.

[8] The woman who met with the detective to consummate the sale, Crystal Arjona, was actually Longoria's girlfriend.

24, December 3, and December 10, 2008, determined that the "three previous convictions" constituted "serious drug offense[s] . . . committed on occasions different from one another."[9] 18 U.S.C. § 924(e)(1). Consequently, the District Court sentenced Longoria to fifteen years in prison.[10]

Longoria appeals his conviction and sentence on four grounds. First, he claims that the District Court erred by finding that his three predicate offenses occurred on "occasions different from one another" to qualify for a sentence enhancement under the ACCA. Second, he claims the District Court improperly considered "non-elemental facts," the dates of his prior convictions, in determining that they qualified as serious drug offenses that occurred on different occasions under the ACCA. Third, he claims that his sentence enhancement violated his rights under the Fifth and Sixth Amendments to the United States Constitution. Fourth, he raises a new argument that his statute of conviction, 18 U.S.C. § 922(g), is beyond Congress's grant of power under the United States Constitution's Commerce Clause and is therefore unconstitutional.

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[9] Longoria argues that the District Court's use of the words "transaction" and "sale" in reference to the December 10, 2008 incident constitutes error because sale is not an element of conspiracy. The District Court's language, while imprecise, does not constitute error here. Longoria's sentence was enhanced because his two distribution convictions and one conspiracy conviction constituted the necessary three serious drug offense predicates.

[10] Longoria was sentenced to an additional twenty-one months, to run concurrently with the fifteen-year sentence, because this crime was a violation of the terms of his supervised release in the 2009 case.

II.

This Court reviews *de novo* whether prior offenses meet the ACCA's different-occasions requirement. *United States v. Sneed*, 600 F.3d 1326, 1330 n.5 (11th Cir. 2010). We also review *de novo* whether a prior conviction qualifies as a serious drug offense for purposes of the ACCA.[11] *United States v. Braun*, 801 F.3d 1301, 1303 (11th Cir. 2015). Constitutional challenges to sentences are reviewed *de novo*. *United States v. Weeks*, 711 F.3d 1255, 1259 (11th Cir. 2013). Longoria's second constitutional claim, a Commerce Clause challenge to 18 U.S.C. § 922(g), is reviewed for plain error because he raises it for the first time on appeal. *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010). Plain error occurs "if (1) there was error, (2) that was plain, (3) that affected the defendant's substantial rights, and (4) that seriously affected the 'fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (quoting *United States v. Jones*, 289 F.3d 1260, 1265 (11th Cir. 2002)).

III.

Under the ACCA, a defendant found guilty of possession of a firearm by a convicted felon pursuant to 18 U.S.C. § 922(g) is subject to a mandatory minimum

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[11] Appellee argues that part of this argument is unpreserved and thus should be reviewed only for plain error. But the arguments below relating to this issue are messily interwoven and at least some appear to have been properly preserved. Here, under a *de novo* review standard, we affirm on this issue. Therefore, we would also affirm under a plain error standard and need not reach the question of which standard of review should apply to each issue and sub-issue in this argument.

sentence of fifteen years' imprisonment if he has three prior convictions for a violent felony or serious drug offense "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). To determine the nature of a prior conviction, a court "is generally limited to examining the statutory definition [of the offense of the prior conviction], charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. United States*, 544 U.S. 13, 16, 125 S. Ct. 1254, 1257 (2005). The existence of both "prior convictions and the factual nature of those convictions, including whether they were committed on different occasions," may be determined by district courts "so long as they limit themselves to *Shepard*-approved documents." *Weeks*, 711 F.3d at 1259.

To qualify under § 924(e)(1), prior convictions must have arisen from "separate and distinct criminal episode[s]" and be for "crimes that are temporally distinct." *Sneed*, 600 F.3d at 1329 (quotations omitted). When evaluating whether crimes were committed on different occasions, we have held that "so long as predicate crimes are successive rather than simultaneous, they constitute separate criminal episodes for purposes of the ACCA." *United States v. Pope*, 132 F.3d 684, 692 (11th Cir. 1998).

This Court has yet to address the resolution of the ACCA's different-occasions inquiry when a substantive drug distribution offense occurs within the

span of a conspiracy to distribute that drug.[12] We have, however, addressed an analogous issue under a similar statutory scheme. In *United States v. Rice*, 43 F.3d 601 (11th Cir. 1995), we affirmed a sentence enhancement under 21 U.S.C. § 841(b)(1)(A) for substantive drug offenses that overlapped with a conspiracy. We held that crimes which "occur on different occasions or are otherwise distinct in time" may be used as predicate offenses, and we determined that acts constituting substantive drug offenses and conspiracies which are "separate in time and locale and . . . requir[e] separate planning and execution" are sufficiently unrelated for § 841(b)(1)(A) enhancement purposes. *Id.* at 608. We later determined a substantive drug offense that occurred within a conspiracy was sufficiently unrelated under this statute, even if it "may have resulted from criminal conduct in furtherance of one overall conspiracy." *United States v. Hansley*, 54 F.3d 709, 717 (11th Cir. 1995).

The present substantive-conspiracy different-occasions question under the ACCA has been answered elsewhere. The Eighth Circuit addressed it in *United States v. Melbie*, 751 F.3d 586 (8th Cir. 2014). In *Melbie*, the Eighth Circuit concluded that a possession offense that occurred "during the period of the

[12] Although this Court has not spoken directly to this issue to date, it has been argued here before. In *United States v. Bargeron*, 435 F. App'x 892 (11th Cir. 2011) (per curiam), we avoided the question of whether one federal drug conspiracy offense and two Florida drug trafficking offenses satisfied the different-occasions inquiry by determining that "even if the district court erred by concluding that Bargeron's conspiracy conviction qualified as a third predicate ACCA conviction, any such error was harmless" because the necessary three predicate convictions existed in that case with or without the conspiracy. *Id.* at 894.

conspiracy and was related to the object of the conspiracy" was a "discrete episode in a series of events." *Id.* at 587. As such, the possession offense and conspiracy offense occurred on different occasions for ACCA purposes. *Id.*

We agree with the Eighth Circuit in *Melbie*, and with our rationale under a similar statute in *Rice* and *Hansley*, that a drug conspiracy and a substantive drug offense occurring within its span may have been "committed on occasions different from one another" under the ACCA. Here, the facts of Longoria's case make this determination simple. Longoria's three predicate crimes are temporally distinct. His two distribution offenses occurred at clear and obvious points in time separated by nine days—November 24, 2008 and December 3, 2008—and were discrete episodes in the series of events constituting his participation in the drug conspiracy.

The conspiracy offense is no less clearly defined for ACCA purposes. The District Court consulted *Shepard*-approved documents to determine the conspiracy concluded December 10, 2008, a full week after Longoria's second distribution offense. There is no question that Longoria "had the opportunity to desist but chose instead to commit another crime" during the seven days between selling thirty-five grams of cocaine and consummating his conspiracy to sell one kilogram of cocaine. *United States v. Proch*, 637 F.3d 1262, 1266 (11th Cir. 2011). Because Longoria's predicate crimes were "successive rather than simultaneous,"

they constitute "separate criminal episodes" under the ACCA. *Pope*, 132 F.3d at 692. Accordingly, the District Court did not err in determining that Longoria's two convictions for distribution of cocaine and one conviction for participation in a conspiracy with intent to distribute cocaine qualified as predicate offenses for a sentence enhancement under the ACCA.

IV.

Longoria's three remaining arguments—that the District Court erred in looking at the dates of his prior convictions because they were "non-elemental facts," that his sentence enhancement violates his Fifth and Sixth Amendment rights, and that his statute of conviction is unconstitutional—are directly foreclosed by Eleventh Circuit and Supreme Court precedent. As such, they require little discussion.

A.

Longoria argues that the District Court should not have looked at "non-elemental facts," the dates of his prior convictions, in *Shepard*-approved documents when deciding whether his predicate offenses were committed on different occasions. This argument is directly foreclosed by our precedent. We held directly to the contrary in *United States v. Weeks*, 711 F.3d 1255 (11th Cir. 2013). In *Weeks*, we explained that "for ACCA purposes, district courts may determine both the existence of prior convictions and the factual nature of those

convictions, *including whether they were committed on different occasions*, so long as they limit themselves to *Shepard*-approved documents." *Id.* at 1259 (emphasis added). That is precisely what occurred here. Because Longoria's claim is in direct opposition to *Weeks*, it must fail.

B.

Longoria's claim that his Fifth and Sixth Amendment rights were violated by the District Court determining his convictions occurred on different occasions is unavailing due to Eleventh Circuit and Supreme Court precedent. We held in *Weeks* that district courts are permitted to determine "the factual nature" of the convictions, "including whether they were committed on different occasions." *Id.* The Supreme Court, meanwhile, has held that "a penalty provision, which simply authorizes a court to increase the sentence for a recidivist," need not be alleged by the government in its indictment. *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27, 118 S. Ct. 1219, 1222 (1998) (interpreting 8 U.S.C. § 1326). Longoria's arguments on this point cannot succeed.

C.

Longoria's Commerce Clause challenge to § 922(g) is without merit. We have clearly held that § 922(g) is constitutional under the Commerce Clause. *United States v. McAllister*, 77 F.3d 387, 391 (11th Cir. 1996) ("We hold that § 922(g)(1) is not an unconstitutional exercise of Congress's power under the

Commerce Clause . . . ."). Therefore, his argument is foreclosed at this stage. *See Sneed*, 600 F.3d at 1332 (describing "the strength" of this Court's prior precedent rule). Longoria has not shown the District Court committed error, let alone plain error, on this issue.

V.

The District Court did not err in determining that Longoria had three ACCA predicate convictions that were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). Longoria's guilty plea to three serious drug offenses relating to the events of November 24, December 3, and December 10, 2008—all separated by one week or more—constituted sufficient temporal distinctness under the ACCA. All of Longoria's remaining arguments also fail. Accordingly, we affirm the District Court's judgment and uphold Longoria's conviction and sentence.

AFFIRMED.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-17645-GG

UNITED STATES OF AMERICA,

Appellee/Respondent,

v.
ADAM LONGORIA,

Appellant/Petitioner.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

PETITION FOR REHEARING *EN BANC*

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Appeal No. 16-17645-GG

United States of America v. Adam Longoria

CERTIFICATE OF INTERESTED PERSONS

The persons listed below have an interest in the outcome of this case:

Bentley, III, A. Lee

Bloom, Aliza Hochman

Cakmis, Rosemary

Elm, Donna L.

Hale, Shauna S.

Honeywell, The Honorable Charlene

Longoria, Adam

Nate, Adam J.

Nebesky, Suzanne C.

Porcelli, The Honorable Anthony E.

Rhodes, David P.

Skuthan, James T.

Sneed, The Honorable Julie S.

Whittemore, The Honorable James D.

No publicly traded company has an interest in the outcome of this appeal.

STATEMENT OF COUNSEL

I express a belief, based on reasoned and studied professional judgment, that the Panel decision is contrary to the following decisions of this Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

United States v. Pope, 132 F.3d 684, 692 (11th Cir. 1998);

United States v. Sneed, 600 F.3d 1326, 1329 (11th Cir. 2010);

which hold that predicate crimes must be "successive rather than simultaneous" and must arise out of "separate and distinct criminal episode[s]" in order to constitute separate predicates for the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e).

I also express a belief, based on reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance:

Whether two prior counts of distribution of cocaine, (violations of 21 U.S.C. § 841(a)(1)), occurring within the timespan of a related conspiracy count, (a violation of 21 U.S.C. § 846), constitute three serious drug offenses that were "committed on different occasions from one another." 18 U.S.C. § 924(e).

/s/ Aliza Hochman Bloom
Aliza Hochman Bloom
Counsel for Petitioner

TABLE OF CONTENTS

Contents **Page**

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

TABLE OF AUTHORITIES - *continued*

Cases **Page(s)**

Rules

STATEMENT OF THE ISSUE FOR *EN BANC* CONSIDERATION

The Panel affirmed Adam Longoria's sentence imposed under the ACCA, holding as a matter of first impression that his two federal distribution offenses occurring within a related federal conspiracy count constituted three "separate criminal episodes." Addendum A at 9-10 (citing *Pope*, 132 F.3d at 692). While recognizing that this Court "ha[d] yet to address the resolution of the ACCA's different-occasions inquiry when a substantive drug distribution offense occurs within the span of a conspiracy to distribute that drug," the Panel held, without the benefit of oral argument, that the end date of Mr. Longoria's conspiracy count sufficed to resolve his "different occasions" objection. In creating new law, the Panel relied upon rationale from a different statutory scheme.

Most critically, given 21 U.S.C. § 846 is a continuing offense and the two sales at issue are overt acts of that charged conspiracy, the Panel's decision is contrary to this Court's precedent, requiring that each predicate offense for the ACCA "arose out of a separate and distinct criminal episode" and be "successive rather than simultaneous." *Sneed*, 600 F.3d at 1329; *Pope*, 132 F.3d at 692. Accordingly, Mr. Longoria respectfully requests seeks further review and, at a minimum, asks this Court to afford parties the benefit of oral argument before creating new precedent.

COURSE OF PROCEEDINGS

On December 10, 2009, Mr. Longoria pled guilty to two counts of distribution of cocaine, in violation of 21 U.S.C. § 841(a)(1), and one count of participation in the related conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846. Case No.: 8:09-cr-340, Doc. 74 (2009 Plea agreement); Doc. 80; Doc. 228 (2009 Change of Plea Hearing).

On September 28, 2016, Mr. Longoria pled guilty to being a felon in possession of one or more firearms, in violation of 18 U.S.C. § 922(g)(1), which carries a statutory maximum sentence of 10 years' imprisonment. Doc. 44 at 28-29; Doc. 23; *see* 18 U.S.C. § 924(a)(2). When drafting his plea agreement, the government did not think Mr. Longoria had three ACCA predicates because it did not believe the three counts from his only prior conviction were committed on different occasions. *See* Doc. 41 at 16-17 ("When I put together the plea agreement, I didn't think that Mr. Longoria was an armed career criminal. I had thought about the conspiracy and I realized that he had pled to two substantive counts, but in my way of thinking the conspiracy sort of subsumed the two substantive counts.").

However, prior to sentencing, however, Probation recommended that Mr. Longoria be enhanced pursuant to the ACCA based upon the April 12, 2010 judgment. *See* PSR Doc. 26, ¶ 29. Prior to and during sentencing, Mr. Longoria

objected to the ACCA enhancement, maintaining that the three predicate counts were not "committed on different occasions from one another." 18 U.S.C. § 924(e); *see* PSR at 24. At sentencing, the district court advised Mr. Longoria regarding the ACCA's mandatory 15 year sentence, and he reiterated his "different occasions" objection. Doc. 41 at 26.

The district court reviewed Mr. Longoria's 2009 plea agreement and change-of-plea transcript, and found that he had assented (in 2009) to having committed drug sales on three dates. *See* Doc. 41 at 34 ("looking at the facts as laid out in the plea agreement from the 2009 case, we have three different acts."); *see id.* at 36-37 ("During the plea colloquy the United States Attorney . . . recited the factual basis as set forth in the plea agreement, alluding to the November 24, 2008, transaction, the December 3rd transaction, and the December 10th transaction."). The district court stated that "the three transactions separately charged in the indictment constitute three prior convictions for serious drug offenses and that those convictions were committed on occasions different from one another and therefore [Mr. Longoria] is properly classified as an armed career criminal." *Id.* at 37.

On appeal, Mr. Longoria argued that the district court erred in overruling his "different occasions" objection to the ACCA enhancement for several reasons. First, the Supreme Court's decisions *Descamps v. United States,* 133 S. Ct. 2276 (2013) and *Mathis v. United States*, 136 S. Ct. 2243 (2016) lead to the inevitable

conclusion that, despite this Court's decision in *United States v. Weeks*, 711 F.3d 1255 (11th Cir. 2013), a sentencing court cannot rely upon non-elemental facts of a prior proceeding when sentencing a defendant under the ACCA. *See* Initial Brief at 20-25; Reply Br. at 7-12. Second, in this case, the district court's reliance on non-elemental facts did not even resolve Mr. Longoria's "different occasions" objection, because the district court relied on an uncharged third sale which is not relevant to the conspiracy count. Initial Br. at 25-35; *see United States v. Williams*, 469 F.3d 963, 967 (11th Cir. 2006) ("A conspiracy is not the commission of the crime which it contemplates.").

The Panel affirmed Mr. Longoria's ACCA sentence in a published opinion, without holding oral argument. Without the ACCA's mandatory minimum, Mr. Longoria's guideline range would be 70 to 87 months' imprisonment. PSR ¶¶ 28, 45-47.

ARGUMENTS AND AUTHORITIES[1]

As a preliminary matter, the Panel dismissed the district court's repeated reliance on Mr. Longoria's three drug "transactions" on different dates in order to resolve his different-occasions objection. *See* Addendum at 5 n.9 ("The District Court's language, while imprecise, does not constitute error here. Longoria's sentence was enhanced because his two distribution convictions and one conspiracy conviction constituted the necessary three serious drug offense predicates."). The record is unambiguous that despite Mr. Longoria's counts of conviction—two sales and a conspiracy—the district court repeatedly relied on Mr. Longoria having committed three drug "transactions" in order to resolve his objection to the ACCA. *See* Doc. 41 at 31, 34, 35, 36-37.

Assuming that the district court was permitted to consider non-elemental facts in resolving the different-occasions objection, and was merely "imprecise"

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[1] By filing this Petition, Mr. Longoria does not waive any challenges he made to the ACCA sentence. *See* Initial Br. at 20-25, 35-39; Reply Br. at 7-12. Indeed, Mr. Longoria maintains that the Supreme Court's decisions in *Descamps v. United States*, 133 S. Ct. 2276 (2013) and *Mathis v. United States*, 136 S. Ct. 2243 (2016) necessitate the conclusion that a sentencing court cannot rely upon non-elemental facts from prior convictions when sentencing a defendant pursuant to the ACCA. *See id.*; *See also United States v. Sneed*, 600 F.3d 1326, 1329-30 (11th Cir. 2010) ("there is simply no distinction left between the scope of permissible evidence that can be used to determine if the prior convictions are violent felonies or serious drug offenses or if they were committed on different occasions under § 924(e)(1)."). Indeed the district court's reliance on non-elemental facts was particularly troubling in Mr. Longoria's case, where he had no incentive at his 2009 change-of-plea hearing to object to particular facts when he was pleading guilty to three related counts of conviction. *See Mathis*, 136 S. Ct. at 2253.

when relying upon a third sale, the Panel's decision still conflicts with this Court's precedent. Mr. Longoria's two sales are acts subsumed within one overarching conspiracy, and the three predicates did not each "ar[i]se out of a separate and distinct criminal episode" as required by this Court to impose the ACCA's 15-year mandatory sentence. *Sneed*, 600 F.3d at 1329; *Pope*, 132 F.3d at 692.

The Panel recognized that this Court "has yet to address the resolution of the ACCA's different-occasions inquiry when a substantive drug distribution offense occurs within the span of a conspiracy to distribute that drug." Addendum at 7-8. Nevertheless, without oral argument, the Panel concluded that because the conspiracy ended a week after Mr. Longoria's second distribution offense, he "had the opportunity to desist but chose instead to commit another crime" during that week. *Id.*at 9 (citing *United States v. Proch*, 637 F.3d 1262, 1266 (11th Cir. 2011)). This Panel's decision creates new law contrary to this Court's precedent.

I. The Panel's Reliance on a Different Statutory Scheme and *United States v. Melbie*, 751 F.3d 586 (8th Cir. 2014) Does Not Resolve Mr. Longoria's ACCA Objection.

The Panel reliance on *United States v. Rice*, 43 F.3d 601 (11th Cir. 1995) and *United States v. Hansley*, 54 F.3d 709 (11th Cir. 1995), and the Eighth Circuit's opinion in *Melbie* to hold that "a drug conspiracy and a substantive drug offense occurring within its span may have been 'committed on occasions different from one another' under the ACCA" is unpersuasive. Addendum at 8.

First, Mr. Longoria does not argue that two drug distribution counts and a conspiracy count can never be three "serious drug offenses" under ACCA. *See* Initial Br. at 20-35; Reply Br. at 7-16. He contends the here, the district court, by relying on the non-elemental fact of a third sale for which he was neither charged nor convicted, failed to resolve his "different occasions" objection. *Id.* Also, given that conspiracy is a continuing offense and Mr. Longoria's two distribution counts were acts in furtherance of that conspiracy, these three particular predicates did not each "ar[i]se out of a separate and distinct criminal episode." *Sneed*, 600 F.3d at 1329.

In *Rice* and *Hansley*, defendants challenged life sentence enhancements under 21 U.S.C. § 841(b)(1)(A), arguing that their substantive acts and related conspiracies were too similar to count separately. *See Rice*, 43 F.3d at 606-08; *Hansley*, 54 F.3d at 717. This Court held that "convictions which occur on different occasions or are otherwise distinct in time may be considered separate offenses under section 841(b)(1)(A)." *Rice*, 43 F.3d at 608.[2] For the purposes of 21 § 841(b)(1)(A), this Court reviews a defendant's offenses to determine whether they are sufficiently distinct to count as different predicates. This Court performs a similar analysis to determine whether predicate offenses occurred on "occasions

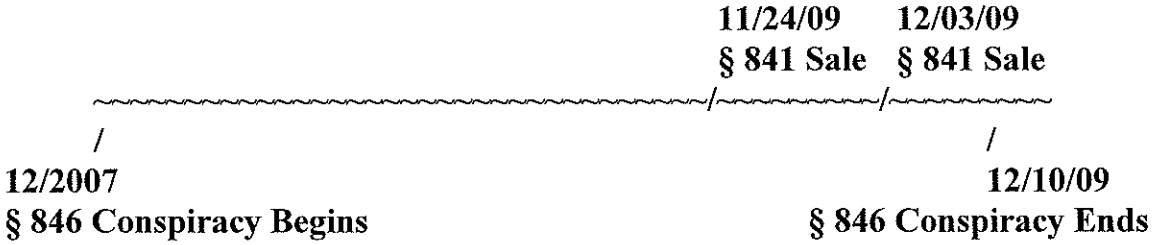
[2] The Court concluded that the separate acts for which defendant was convicted, whether or not part of a large conspiracy, could count as separate offenses under § 841(b)(1)(A) because they were "separate in time and locale and were acts requiring separate planning and execution." *Rice*, 43 F.3d at 608.

different from one another" for the ACCA. 18 U.S.C. § 924(e). Notably, the factual analysis permitted in *Rice* and *Hansley* predates the well-known limitations that have since been placed on a court's examination of a defendant's prior convictions. *See Shepard v. United States*, 544 U.S. 13, 16 (2005); *Weeks*, 711 F.3d at 1260 ("district courts may determine the factual nature of prior convictions, including whether they were committed on different occasions, so long as they limit themselves to *Shepard*-approved sources."). Most importantly, however, that this Court conducts a "separate offense" analysis under § 841(b)(1)(A) is not responsive to Mr. Longoria's ACCA objection.

Similarly, the Panel's reliance on *Melbie* does not resolve Mr. Longoria's objection. *See* Addendum at 8-9. In *Melbie*, the defendant argued that his Iowa state possession conviction was sufficiently related to the conduct of his separate federal conspiracy count such that they should not constitute two qualifying ACCA predicates. 751 F.3d at 588. The Eighth Circuit explained that the state possession offense was a "punctuated event" within a yearlong federal conspiracy, and concluded that these convictions were committed on different occasions. *Id.* at 590; *see* § 924(e)(1). *Melbie* does not address Mr. Longoria's situation, wherein he pled guilty in one federal proceeding to a drug conspiracy counts and two acts within that conspiracy. *See* Initial Br. at 33 n. 12.

II. The Panel's Decision Is Contrary to This Court's Precedent, Which Requires ACCA Predicates To Be "Successive Rather Than Simultaneous" and Constitute "Separate Criminal Episodes."

The following chart is helpful to show the three offenses that the Panel concluded were sufficient for the ACCA's 15 year mandatory sentence:



Recognizing that Mr. Longoria's situation presents a question of first impression for this Court, the Panel reviewed his 2009 plea colloquy and concluded that because his participation in the conspiracy continued for a week after the second sale, "There is no question that Longoria 'had the opportunity to desist but chose instead to commit another crime.'" Addendum at 9 (citing *Proch*, 637 F.3d at 1266). The Panel thus concludes these three predicates are "separate criminal episodes" under the ACCA. *Id.* at 10 (citing *Pope*, 132 F.3d at 692). The Panel's decision is incorrect and contrary to this Court's precedent.

For the purposes of this Petition, Mr. Longoria sets aside the problematic constitutional implications of relying on the conspiracy's end date, a non-elemental

fact, in order to resolve the ACCA objection.[3] *See* Initial Br. at 26-35; Reply Br. at 7-12. In any event, however, the Panel's statement that Mr. Longoria "chose instead to commit another crime" following the second sale but prior to the conclusion of the conspiracy is legally incorrect. A conspiracy, pursuant to 21 U.S.C. § 846, is defined as the agreement between parties, and this Court repeatedly holds that the "gist of the crime of conspiracy as defined by the statute is the agreement or confederation of the conspirators to commit one or more unlawful acts." *Williams*, 469 F.3d at 967; *see* Eleventh Circuit Pattern Jury Instructions (Criminal) 0100 (2016); *see* Initial Br. at 28-29, 32-35. Accordingly, it is inaccurate that Mr. Longoria committed "another crime" between the sale on December 3, 2009 and end of his participation in the conspiracy on December 10, 2009. Addendum at 9.

Finally, the Panel's decision is contrary to this Court's requirement that prior offenses must have been "successive rather than simultaneous" to qualify for the

[3] To be sure, the end date of a conspiracy is not critical to proving or admitting that offense. *See* Eleventh Circuit Pattern Jury Instructions (Criminal) 0100 (2016) (listing elements of 21 U.S.C. § 846 is defined as the agreement between parties); *see United States v. Williams*, 469 F.3d 963, 967 (11th Cir. 2006) ("The gist of the crime of conspiracy as defined by the statute is the agreement or confederation of the conspirators to commit one or more unlawful acts . . . A conspiracy is not the commission of the crime which it contemplates . . . "). Here, Mr. Longoria lacked any reason to pay attention or contest the end date of the conspiracy count in 2009. *See Mathis*, 136 S. Ct. at 2253 ("a defendant may have no incentive to contest what does not matter under the law" and may even "have good reason not to" contest those facts at the time.").

ACCA. *Pope*, 132 F.3d at 692. This Court requires that each of a defendant's ACCA predicates "ar[i]se out of a separate and distinct criminal episode," *Sneed*, 600 F.3d at 1329, and be "successive rather than simultaneous." *Pope*, 132 F.3d at 692. Mr. Longoria's prior offenses do not meet these requirements.

Conspiracy, by its nature, is one continuous crime involving several transactions. *See United States v. Terzado-Madruga*, 897 F.2d 1099, 1124 (11th Cir. 1990). In one indictment, Mr. Longoria was charged with conspiring with, among, others, Mr. Carballo, to distribute cocaine from December 2007 through December 10, 2009, and also that he and Mr. Carballo, on two dates within that conspiracy, jointly committed two overt acts, namely the sale of cocaine. *See* 8:09-cr-340, Doc. 1. The two sales are overt acts committed simultaneously with the charged conspiracy. Mr. Longoria was *not* convicted of any offense occurring on December 10, 2009. He was convicted of a continuing conspiracy beginning in December 2007 and ending on December 10, 2009. *Id.* at Doc. 154; *see United States v. Harriston*, 329 F.3d 779, 783 (11th Cir. 2003).

This Court's requirement that an individual commit three successive criminal episodes before being subject to the ACCA's 15-year penalty is concordant with Congress' intent to punish career criminals. *See United States v. Towne*, 870 F.2d 880, 890-91 (2nd Cir. 1989) (ACCA is "aimed at career criminals, rather than those who merely commit three punishable acts."); *see*

United States v. McElyea, 158 F.3d 1016, 1020 (9th Cir. 1998) ("the ACCA was amended to prevent the application of an enhanced sentence to a defendant who committed simultaneous crimes, regardless of how many convictions resulted from those actions."). Clearly, the ACCA was not intended to apply in Mr. Longoria's case, whereby he pled guilty on one day to a federal conspiracy and two temporally subsumed distribution counts:

> [Armed career criminals are] people who have demonstrated, by virtue of their definition, that locking them up and letting them go doesn't do any good. They go on again, you lock them up, you let them go, it doesn't do any good, they are back for a third time. At that juncture we should say, 'That's it; time out; it is all over. We, as responsible people, will never give you the opportunity to do this again.'

McElyea, 158 F.3d at 1020 (citing ACCA, Hearing Before the Subcomm. On Crime of the House Comm. On the Judiciary, 98th Cong., 2d Sess. at 64 (1984)). In light of the nature of a federal conspiracy, a continuing offense defined by the agreement between parties, there is simply no evidence that after the second sale, Mr. Longoria "had a meaningful opportunity to desist his activity before committing the second offense." *Pope*, 132 F.3d at 690; *see* Addendum at 9.

In concluding that Mr. Longoria "had the opportunity to desist but chose instead to commit [a third] crime" after the second sale, *see* Addendum at 9, the Panel legally erred and revealed a misunderstanding of the continuing offense of conspiracy. Mr. Longoria's participation in a federal conspiracy was a continuing

offense which temporally subsumed his two related sales, overt acts within that offense. The Panel erred in concluding that these three counts each "ar[o]se out of a separate and distinct criminal episode," and therefore Petitioner respectfully maintains that the ACCA enhancement should not be applied. *Sneed*, 600 F.3d at 1329,

CONCLUSION

The Panel erred in concluding that Mr. Longoria's three counts constituted three serious drug offenses that were "committed on different occasions from one another." 18 U.S.C. § 924(e). The published opinion creates new law determining that the end date is a relevant point for determining whether a conspiracy offense is distinct from related distribution counts. Moreover, the decision is contrary to this Court's precedent, which requires that ACCA predicates be "successive rather than simultaneous" and constitute "separate and distinct criminal episode[s]." *Sneed*, 600 F.3d at 1329; *Pope*, 132 F.3d at 692. Accordingly, Mr. Longoria respectfully requests that this Court grant his petition for rehearing *en banc*, or, in the alternative, withdraw the Panel's opinion and schedule oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Excluding the portions identified in Fed. R. App. P. 32(f), this petition contains 3,104 words.

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2017, the foregoing was filed using the Court's Electronic Case Filing system, which will serve notification on Michelle Thresher Taylor, Assistant United States Attorney.

/s/ Aliza Hochman Bloom
Aliza Hochman Bloom
Assistant Federal Defender

ADDENDUM

"A"

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17645

D.C. Docket No. 8:16-cr-00335-JDW-JSS-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ADAM LONGORIA,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(November 1, 2017)

Before TJOFLAT, MARCUS, and JORDAN, Circuit Judges.

PER CURIAM:

Adam Longoria was convicted of possession of a firearm by a convicted felon[1] and was sentenced to fifteen years in prison under an Armed Career Criminal Act ("ACCA") sentence enhancement.[2] This ACCA sentence enhancement, applicable when a defendant has "three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another,"[3] was based upon three previous serious drug-related convictions: two counts of distribution of cocaine[4] and one count of participation in a conspiracy with intent to distribute cocaine.[5]

Longoria appeals his conviction and sentence on four grounds. Three are squarely foreclosed by our precedent. *See infra* part IV. Longoria's first issue, whether the District Court erred in determining that he had three predicate offenses that occurred on different occasions under the ACCA, is also unavailing. Accordingly, we affirm his conviction and sentence.

I.

In 2009, Longoria was charged with one count of participation in a conspiracy to possess with intent to distribute cocaine, a violation of 21 U.S.C. § 846, and two counts of distribution of cocaine, a violation of 21 U.S.C.

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[1] 18 U.S.C. § 922(g)(1).

[2] *Id.* § 924(e)(1).

[3] *Id.*

[4] 21 U.S.C. § 841(a)(1).

[5] *Id.* § 846.

§ 841(a)(1). The indictment charged that the conspiracy occurred from an "unknown date which was no later than December, 2007, through on or about December 10, 2008." The indictment also charged that the two distribution offenses occurred on November 24, 2008 and December 3, 2008.

Longoria pleaded guilty to each of the three counts. He admitted to the following facts in his plea agreement.[6] Longoria told undercover detectives that his co-defendant, Richard Caraballo, could sell them kilograms of cocaine for $20,000 per kilogram. Undercover detectives contacted Longoria on November 24, 2008, and Longoria arranged a meeting between the detectives and Caraballo. The detectives purchased five and a half grams of cocaine from Caraballo on that date. Longoria and Caraballo met with the detectives again on December 3, 2008, when the detectives purchased thirty-five grams of cocaine. One week later, on December 10, Longoria met with the detectives to verify that they had $20,000 to purchase one kilogram of cocaine from Caraballo before the detectives went to Caraballo's house. Authorities later discovered 1,142 grams of cocaine at Caraballo's house.

Longoria was sentenced to thirty-seven months in prison in April 2010. The judgment stated that the distribution offenses ended on November 24 and

[6] Longoria confirmed that this version of facts was correct at his change-of-plea hearing.

December 3, 2008, and the conspiracy offense ended on December 10, 2008. Longoria was incarcerated and later left prison under supervised release.

In 2016, Longoria was arrested and charged with possession of a firearm by a convicted felon, a violation of 18 U.S.C. § 922(g)(1). Longoria pleaded guilty and admitted the following facts.[7] In March 2015, while on supervised release, Longoria had arranged via Facebook to sell a rifle to an undercover detective for $300. He told the detective that he was a felon and that his wife would carry out the sale.[8] The detective met with the woman, and she exchanged the rifle with him for $300. Longoria called the detective after the sale to explain that he had been afraid to sell the rifle in person because of his past arrest.

The maximum sentence under 18 U.S.C. § 922(g)(1), without a sentence enhancement, is ten years in prison. Longoria's plea agreement noted this maximum. The Probation Office, however, later indicated that Longoria qualified as an armed career criminal under the ACCA and was subject to a fifteen-year statutory *minimum* sentence. After this discovery, the District Court gave Longoria the opportunity to withdraw his plea. He declined. The District Court then examined Longoria's 2009 plea agreement and the transcript of the change-of-plea hearing, and, relying upon the three counts relating to the incidents of November

[7] Longoria also confirmed that this version of facts was correct at his change-of-plea hearing.

[8] The woman who met with the detective to consummate the sale, Crystal Arjona, was actually Longoria's girlfriend.

24, December 3, and December 10, 2008, determined that the "three previous convictions" constituted "serious drug offense[s] . . . committed on occasions different from one another."[9] 18 U.S.C. § 924(e)(1). Consequently, the District Court sentenced Longoria to fifteen years in prison.[10]

Longoria appeals his conviction and sentence on four grounds. First, he claims that the District Court erred by finding that his three predicate offenses occurred on "occasions different from one another" to qualify for a sentence enhancement under the ACCA. Second, he claims the District Court improperly considered "non-elemental facts," the dates of his prior convictions, in determining that they qualified as serious drug offenses that occurred on different occasions under the ACCA. Third, he claims that his sentence enhancement violated his rights under the Fifth and Sixth Amendments to the United States Constitution. Fourth, he raises a new argument that his statute of conviction, 18 U.S.C. § 922(g), is beyond Congress's grant of power under the United States Constitution's Commerce Clause and is therefore unconstitutional.

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[9] Longoria argues that the District Court's use of the words "transaction" and "sale" in reference to the December 10, 2008 incident constitutes error because sale is not an element of conspiracy. The District Court's language, while imprecise, does not constitute error here. Longoria's sentence was enhanced because his two distribution convictions and one conspiracy conviction constituted the necessary three serious drug offense predicates.

[10] Longoria was sentenced to an additional twenty-one months, to run concurrently with the fifteen-year sentence, because this crime was a violation of the terms of his supervised release in the 2009 case.

II.

This Court reviews *de novo* whether prior offenses meet the ACCA's different-occasions requirement. *United States v. Sneed*, 600 F.3d 1326, 1330 n.5 (11th Cir. 2010). We also review *de novo* whether a prior conviction qualifies as a serious drug offense for purposes of the ACCA.[11] *United States v. Braun*, 801 F.3d 1301, 1303 (11th Cir. 2015). Constitutional challenges to sentences are reviewed *de novo*. *United States v. Weeks*, 711 F.3d 1255, 1259 (11th Cir. 2013). Longoria's second constitutional claim, a Commerce Clause challenge to 18 U.S.C. § 922(g), is reviewed for plain error because he raises it for the first time on appeal. *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010). Plain error occurs "if (1) there was error, (2) that was plain, (3) that affected the defendant's substantial rights, and (4) that seriously affected the 'fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (quoting *United States v. Jones*, 289 F.3d 1260, 1265 (11th Cir. 2002)).

III.

Under the ACCA, a defendant found guilty of possession of a firearm by a convicted felon pursuant to 18 U.S.C. § 922(g) is subject to a mandatory minimum

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[11] Appellee argues that part of this argument is unpreserved and thus should be reviewed only for plain error. But the arguments below relating to this issue are messily interwoven and at least some appear to have been properly preserved. Here, under a *de novo* review standard, we affirm on this issue. Therefore, we would also affirm under a plain error standard and need not reach the question of which standard of review should apply to each issue and sub-issue in this argument.

sentence of fifteen years' imprisonment if he has three prior convictions for a violent felony or serious drug offense "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). To determine the nature of a prior conviction, a court "is generally limited to examining the statutory definition [of the offense of the prior conviction], charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. United States*, 544 U.S. 13, 16, 125 S. Ct. 1254, 1257 (2005). The existence of both "prior convictions and the factual nature of those convictions, including whether they were committed on different occasions," may be determined by district courts "so long as they limit themselves to *Shepard*-approved documents." *Weeks*, 711 F.3d at 1259.

To qualify under § 924(e)(1), prior convictions must have arisen from "separate and distinct criminal episode[s]" and be for "crimes that are temporally distinct." *Sneed*, 600 F.3d at 1329 (quotations omitted). When evaluating whether crimes were committed on different occasions, we have held that "so long as predicate crimes are successive rather than simultaneous, they constitute separate criminal episodes for purposes of the ACCA." *United States v. Pope*, 132 F.3d 684, 692 (11th Cir. 1998).

This Court has yet to address the resolution of the ACCA's different-occasions inquiry when a substantive drug distribution offense occurs within the

span of a conspiracy to distribute that drug.[12] We have, however, addressed an analogous issue under a similar statutory scheme. In *United States v. Rice*, 43 F.3d 601 (11th Cir. 1995), we affirmed a sentence enhancement under 21 U.S.C. § 841(b)(1)(A) for substantive drug offenses that overlapped with a conspiracy. We held that crimes which "occur on different occasions or are otherwise distinct in time" may be used as predicate offenses, and we determined that acts constituting substantive drug offenses and conspiracies which are "separate in time and locale and . . . requir[e] separate planning and execution" are sufficiently unrelated for § 841(b)(1)(A) enhancement purposes. *Id.* at 608. We later determined a substantive drug offense that occurred within a conspiracy was sufficiently unrelated under this statute, even if it "may have resulted from criminal conduct in furtherance of one overall conspiracy." *United States v. Hansley*, 54 F.3d 709, 717 (11th Cir. 1995).

The present substantive-conspiracy different-occasions question under the ACCA has been answered elsewhere. The Eighth Circuit addressed it in *United States v. Melbie*, 751 F.3d 586 (8th Cir. 2014). In *Melbie*, the Eighth Circuit concluded that a possession offense that occurred "during the period of the

[12] Although this Court has not spoken directly to this issue to date, it has been argued here before. In *United States v. Bargeron*, 435 F. App'x 892 (11th Cir. 2011) (per curiam), we avoided the question of whether one federal drug conspiracy offense and two Florida drug trafficking offenses satisfied the different-occasions inquiry by determining that "even if the district court erred by concluding that Bargeron's conspiracy conviction qualified as a third predicate ACCA conviction, any such error was harmless" because the necessary three predicate convictions existed in that case with or without the conspiracy. *Id.* at 894.

conspiracy and was related to the object of the conspiracy" was a "discrete episode in a series of events." *Id.* at 587. As such, the possession offense and conspiracy offense occurred on different occasions for ACCA purposes. *Id.*

We agree with the Eighth Circuit in *Melbie*, and with our rationale under a similar statute in *Rice* and *Hansley*, that a drug conspiracy and a substantive drug offense occurring within its span may have been "committed on occasions different from one another" under the ACCA. Here, the facts of Longoria's case make this determination simple. Longoria's three predicate crimes are temporally distinct. His two distribution offenses occurred at clear and obvious points in time separated by nine days—November 24, 2008 and December 3, 2008—and were discrete episodes in the series of events constituting his participation in the drug conspiracy.

The conspiracy offense is no less clearly defined for ACCA purposes. The District Court consulted *Shepard*-approved documents to determine the conspiracy concluded December 10, 2008, a full week after Longoria's second distribution offense. There is no question that Longoria "had the opportunity to desist but chose instead to commit another crime" during the seven days between selling thirty-five grams of cocaine and consummating his conspiracy to sell one kilogram of cocaine. *United States v. Proch*, 637 F.3d 1262, 1266 (11th Cir. 2011). Because Longoria's predicate crimes were "successive rather than simultaneous,"

they constitute "separate criminal episodes" under the ACCA. *Pope*, 132 F.3d at 692. Accordingly, the District Court did not err in determining that Longoria's two convictions for distribution of cocaine and one conviction for participation in a conspiracy with intent to distribute cocaine qualified as predicate offenses for a sentence enhancement under the ACCA.

IV.

Longoria's three remaining arguments—that the District Court erred in looking at the dates of his prior convictions because they were "non-elemental facts," that his sentence enhancement violates his Fifth and Sixth Amendment rights, and that his statute of conviction is unconstitutional—are directly foreclosed by Eleventh Circuit and Supreme Court precedent. As such, they require little discussion.

A.

Longoria argues that the District Court should not have looked at "non-elemental facts," the dates of his prior convictions, in *Shepard*-approved documents when deciding whether his predicate offenses were committed on different occasions. This argument is directly foreclosed by our precedent. We held directly to the contrary in *United States v. Weeks*, 711 F.3d 1255 (11th Cir. 2013). In *Weeks*, we explained that "for ACCA purposes, district courts may determine both the existence of prior convictions and the factual nature of those

convictions, *including whether they were committed on different occasions*, so long as they limit themselves to *Shepard*-approved documents." *Id.* at 1259 (emphasis added). That is precisely what occurred here. Because Longoria's claim is in direct opposition to *Weeks*, it must fail.

B.

Longoria's claim that his Fifth and Sixth Amendment rights were violated by the District Court determining his convictions occurred on different occasions is unavailing due to Eleventh Circuit and Supreme Court precedent. We held in *Weeks* that district courts are permitted to determine "the factual nature" of the convictions, "including whether they were committed on different occasions." *Id.* The Supreme Court, meanwhile, has held that "a penalty provision, which simply authorizes a court to increase the sentence for a recidivist," need not be alleged by the government in its indictment. *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27, 118 S. Ct. 1219, 1222 (1998) (interpreting 8 U.S.C. § 1326). Longoria's arguments on this point cannot succeed.

C.

Longoria's Commerce Clause challenge to § 922(g) is without merit. We have clearly held that § 922(g) is constitutional under the Commerce Clause. *United States v. McAllister*, 77 F.3d 387, 391 (11th Cir. 1996) ("We hold that § 922(g)(1) is not an unconstitutional exercise of Congress's power under the

Commerce Clause . . . ."). Therefore, his argument is foreclosed at this stage. *See Sneed*, 600 F.3d at 1332 (describing "the strength" of this Court's prior precedent rule). Longoria has not shown the District Court committed error, let alone plain error, on this issue.

V.

The District Court did not err in determining that Longoria had three ACCA predicate convictions that were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). Longoria's guilty plea to three serious drug offenses relating to the events of November 24, December 3, and December 10, 2008—all separated by one week or more—constituted sufficient temporal distinctness under the ACCA. All of Longoria's remaining arguments also fail. Accordingly, we affirm the District Court's judgment and uphold Longoria's conviction and sentence.

AFFIRMED.