No. _____

In the
SUPREME COURT OF THE UNITED STATES

MARC DUTCH, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

Petition for Writ of Certiorari

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Questions Presented for Review

Given that the Sixth Amendment and *Apprendi* prohibit a sentencing judge from finding facts about a prior conviction, does 18 U.S.C. § 924(e)(1)'s requirement that prior convictions be "committed on occasions different from one another," require such facts to be alleged in the indictment and proved to the jury or admitted by the defendant?

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In the
SUPREME COURT OF THE UNITED STATES

MARC DUTCH, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petition for Writ of Certiorari

Marc Dutch petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in his case.

Opinions Below

The Tenth Circuit issued an unpublished decision to reverse the district court's sentence in *United States v. Marc Dutch*, Case No. 17-2219.[1] Mr. Dutch filed a petition for rehearing en banc which the court denied.[2]

Statement of Jurisdiction

On November 1, 2018, the Tenth Circuit reversed the district court's

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[1] App. 1a-6a (Tenth Circuit Order); App. 7a-22a (transcript of District Court's oral ruling at sentencing). "App." refers to the attached appendix. "Doc." refers to the number of the document on the district court criminal docket sheet in No. 16-CR-01424-MV.

[2] App. 23a.

decision not to impose an enhanced sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1).[3] On December 18, 2018, the circuit court denied Mr. Dutch's petition for rehearing en banc.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). According to this Court's Rules 13.1 and 13.3 and 28 U.S.C. § 2101(c), this petition is timely filed on or before March 18, 2019.

Pertinent Constitutional & Statutory Provisions

U.S. Const. amend. VI:

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

18 U.S.C. § 924(e)(1):

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony ... committed on occasions different from one another, such person shall be ... 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).

Statement of the Case

Mr. Dutch pled guilty to a one-count indictment handed down by a

[3] App. 7a-22a

federal grand jury in the District of New Mexico which charged him with violating 18 U.S.C. § 922(g)(1), possessing a firearm after having been convicted of a felony. The probation office and the government contended Mr. Dutch was subject to the Armed Career Criminal Act (ACCA) based on Mr. Dutch's 2006 convictions for three counts of bank robbery in violation of 18 U.S.C. § 2113(a), and aiding and abetting, in violation of 18 U.S.C. § 2, all charged in one indictment. The government proffered only the indictment, a plea agreement that contained no dates, and the judgment in the 2006 case. Mr. Dutch objected, arguing the ACCA did not apply to him because the government did not prove the bank robberies were committed on different occasions as required by 18 U.S.C. § 924(e)(1).

The district court, exercising jurisdiction under 18 U.S.C. § 3231, determined the government had not proven Mr. Dutch's 2006 convictions were for offenses committed on different occasions. The Government appealed. Exercising jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291, the Tenth Circuit Court reversed.

Reasons for Granting the Writ

Review is necessary to address whether Mr. Dutch's sentence enhancement under the ACCA conflicts with *Apprendi*'s requirement to prove that he had three previous convictions for offenses "committed on occasions different from one another."

Marc Dutch's sentence enhancement under 18 U.S.C. § 924(e)(1)

conflicts with this Court's recent holding in *Mathis v. United States*, __ U.S. __, 136 S.Ct. 2243 (2016). To avoid running afoul of the Sixth Amendment and *Apprendi*,[4] *Mathis* clarified that a federal sentencing judge cannot find facts about a prior conviction and should do no more than "determine what crime, with what elements, the defendant was convicted of." *Mathis*, 136 S.Ct. at 2252. Because determining whether prior convictions were for offenses "committed on occasions different from one another" would require a judge to do more, these factual determinations fall within *Apprendi*, rather than its "prior conviction" exception. 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.") Therefore, per *Apprendi*, these facts must be alleged in the indictment and proved to the jury or admitted by the defendant. Because in this case they were not, Mr. Dutch's 15-year sentence enhancement is unlawful.

In its Order and Judgment, the Tenth Circuit did not discuss *Mathis*' holding, and only cited it to cursorily dismiss Mr. Dutch's contention that the Armed Career Criminal Act (ACCA) enhancement runs afoul of the

[4] *Apprendi v. New Jersey*, 530 U.S. 466 (2000)

Sixth Amendment. The panel relied on cases predating *Mathis* which permitted judicial fact finding for prior offenses occurring on different occasions, but entirely disregarded *Mathis*' subsequent impact. Because this Court's subsequent Sixth Amendment jurisprudence eroded those cases, review of the Tenth Circuit's decision is appropriate.

A. The exception to *Apprendi* for the "fact of a prior conviction" applies to the simple fact *of* a prior conviction not facts *about* a prior conviction.

The Fifth and Sixth Amendments to the U.S. Constitution require any fact that increases the statutory maximum or minimum penalty for a crime to be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. One "narrow" exception allows a sentencing court to find "the fact of a prior conviction." *Apprendi*, 530 U.S. at 490.

To fit within this narrow exception, the prior conviction must have been obtained in proceedings which afforded the right to a jury trial and proof beyond a reasonable doubt. *Apprendi*, 530 U.S. at 488, 496. Significantly, the features of the prior conviction triggering the increased penalty must have been elements of the prior offense—that is, facts the jury had to find beyond a reasonable doubt to sustain the conviction. *See Mathis*, 133 S.Ct. at 2248, 2252 (noting Sixth Amendment concerns). When

utilizing *Apprendi's* exception, the sentencing judge cannot find facts about the prior conviction and is limited to determining "what crime, with what elements, the defendant was convicted of." *Id.* at 2252; *see also Descamps v. United States*, 133 S.Ct. 2276, 2288 (2013) ("the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances").

However, if features of the prior convictions triggering the increased sentence are not "the simple fact of a prior conviction," but include circumstances requiring the judge to "explore the manner in which the defendant committed that offense," *Apprendi's* exception does not apply. *Mathis*, 136 S.Ct. at 2252. Under the Constitution, the general rule of *Apprendi* applies, not its exception. *Id.*; *see also Nijhawan v. Holder*, 557 U.S. 29, 40 (2009) (whether prior fraud conviction caused loss to victim exceeding $10,000 is fact about a prior conviction that must, in a criminal case, be proved to jury beyond a reasonable doubt); *cf. Hayes v. United States*, 555 U.S. 415, 426 (2009) (whether prior crime of violence was committed against a victim with a specified domestic relationship to defendant is a fact about a prior conviction that must be proved to jury beyond a reasonable doubt). To permit a judge to make such determinations would permit the judge to go beyond the fact of a prior

conviction, to find facts about that conviction. The Fifth and Sixth Amendments prohibit this. *Mathis*, 133 S.Ct. at 2252; *Nijhawan*, 557 U.S. at 40; *Hayes*, 555 U.S. at 426.

B. The determination whether previous convictions were for offenses "committed on occasions different from one another" requires finding facts *about* prior convictions, not the simple fact *of* a prior conviction.

The ACCA mandates a 15-year mandatory minimum sentence if a defendant is convicted of being a felon in possession after sustaining three previous convictions for a "violent felony" or "serious drug offense," where the offenses were "committed on occasions different from one another." 18 U.S.C. § 924(e). This Court has held that the issue of whether a previous conviction qualifies as a "violent felony" or a "serious drug offense" is a fact which falls within *Apprendi's* narrow exception, reasoning that if the categorical approach is applied properly, the sentencing court determines no more than "what crime, with what elements, the defendant was convicted of." *Mathis*, 136 S.Ct. at 2252.

But this Court has never held that whether previous convictions were for offenses "committed on occasions different from one another" is a fact that falls within the narrow exception. It does not. Whether offenses were committed on different occasions is not a "simple fact of a prior conviction" that a court can determine, using the categorical approach, consistent with

Apprendi. Instead, this secondary determination calls for wide-ranging factual findings about the convictions that will rarely be elements of the prior offense. Therefore, these temporal facts fit within the rule of *Apprendi* rather than its exception. They must be charged in the indictment and proved to a jury beyond a reasonable doubt. The plain language of the statute, the manner in which it has been interpreted, and recent precedent from this Court emphasizing the constitutional underpinnings of the categorical approach, all lead to this conclusion.

1. The plain language of the ACCA shows these facts are subject to the rule of *Apprendi*.

In determining the meaning of a statute, this Court looks first to the text and plain meaning of the statute. *United States v. Temple*, 105 U.S. 97, 99 (1881). Section 924(e)(1) provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court . . . 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. . . .

(emphasis added). Because the statute expressly requires a showing that the offenses have been *committed* in a specific way—on occasions different from one another—the plain language of the statute describes not the fact of a prior conviction, but facts about the prior offenses, facts that are neither susceptible to a categorical analysis nor subject to *Apprendi*'s prior

conviction exception.

The use of the word "committed"—as opposed to convicted—is significant. In *Taylor v. United States*, 495 U.S. 575 (1990), this Court grounded the categorical approach in the specific language of § 924(e)(1). The Court noted that the portion of the statute at issue there "refers to 'a person who . . . has three previous convictions' for—not a person who committed—three previous violent felonies or drug offenses." *Id.* at 600. The statute's reference to a defendant's *convictions* mandated the inquiry be limited to whether the statutory definition of the prior convictions placed the prior convictions categorically within the definitions for violent felony or serious drug offense. *Id.* This Court has returned to this distinction between conviction and commission in determining whether a statute's reference to features of a prior conviction calls for a categorical or a circumstance-specific approach. *See, e.g.*, *Mathis*, 136 S.Ct. at 2252 (convicted means categorical); *Johnson v. United States*, 135 S.Ct. 2551, 2562 (2015) (convicted means categorical); *Descamps*, 133 S.Ct. at 2287-88 (convicted means categorical); *Nijhawan*, 557 U.S. at 37-38 (committed means circumstance-specific); *Hayes*, 555 U.S. at 426 (committed means circumstance-specific).

Here, § 924(e)(1) refers not to convictions for specified categories of

offenses, but to offenses "committed on occasions different from one another." The use of the word committed was intentional and indicates the factfinder may consider not only the elements of the crime of which Mr. Dutch was convicted but his actual conduct. As such, the application of the circumstance-specific approach places the facts at issue squarely within the rule of, rather than the exception to, *Apprendi*. *Nijhawan*, 557 U.S. at 40.

2. Cases that have interpreted the phrase "committed on occasions different from on another" confirm its highly fact-specific nature.

The plain-language, circumstance-specific meaning conveyed by the statute's use of the word "committed" is reinforced by cases interpreting the requirement that offenses be "committed on occasions different from one another." For example, in *United States v. Tisdale*, 921 F.2d 1095 (10th Cir. 1990), decided prior to *Apprendi*, the 10th Circuit Court looked to the specific circumstances of how the defendant committed his previous offenses to determine whether they were committed on occasions different from one another. In *Tisdale*, the Court held three burglary convictions could be counted separately despite the fact they occurred one the same day, inside one shopping mall. This Court held that because the offenses took place inside three separate establishments and

were not committed simultaneously, they constituted "separate and distinct criminal episodes." 953 F.2d at 497-98, 499. *Tisdale* distinguished its outcome from an Eighth Circuit case, *United States v. Petty*, 798 F.2d 1157, *vacated* 481 U.S. 1034, 107 S.Ct. 1968, *on remand*, 828 F.2d 2 (8th Cir. 1987). There, the Court held that Petty's six prior robbery convictions could not be counted separately because the offenses arose out of an incident during which he simultaneously robbed six different people in one location. In yet another case out of the Ninth Circuit, *United States v. McElyea*, 158 F.3d 1016 (9th Cir. 1998), the Court held that two prior burglary convictions could not be counted separately because the offenses were committed against two adjacent establishments in a strip mall, and the second offense was committed by chopping a hole in the wall between them. 158 F.3d at 1018. Because the record did not contain sufficient information about how the offenses were committed—including the amount of time McElyea spent in each store or whether he stayed in one store while his accomplice entered the other—this Court could not say that the burglaries were "separate and distinct criminal episodes." *Id.* at 1021.

These cases illustrate that a Court's interpretation of whether crimes are "committed on occasions different from one another" has been highly

fact-specific. In *McElyea*, the convictions were not for offenses committed on occasions different from one another because they were for burglaries of adjoining stores, whereas the Court in *Tisdale* reached the opposite conclusion where the burglaries occurred at different businesses inside one mall. The *Petty* Court considered additional factors, and held simultaneity affected the analysis. These are not differences based on the "fact of a prior conviction." Rather, they are differences based on facts about the prior offenses. *Apprendi* mandates such facts must be submitted to a jury. *Nijhawan*, 557 U.S. at 40; *Hayes*, 555 U.S. at 426.

The conclusion that these facts are subject to *Apprendi*'s rule is confirmed by this Court's recent decisions in *Mathis* and *Descamps*, which have emphasized the Sixth Amendment underpinnings of *Taylor*'s categorical approach. "The Sixth Amendment contemplates that a jury—not a sentencing court—will find [sentence-enhancing] facts, unanimously and beyond a reasonable doubt." *Descamps*, 133 S.Ct. at 2288. "And the only facts the court can be sure [a prior] jury found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances." *Id*. When utilizing the *Apprendi* exception for the "simple fact of a prior conviction," the federal sentencing judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with

what elements, the defendant was convicted of." *Mathis*,136 S.Ct. at 2252. Because the issue of whether three previous convictions were committed on occasions different from one another will rarely, if ever, be elements of the prior offenses of conviction, these facts are subject to the rule of *Apprendi*, not its exception.

3. The Tenth Circuit's reliance on *Michel* is problematic as it is contrary to intervening precedent from this Court.

In its decision, the Tenth Circuit Court contended that *United States v. Michel*, 446 F.3d 1122 (10th Cir. 2006),[5] permits courts rather than juries to find the sequence of prior offenses, and therefore that this information falls within *Apprendi*'s narrow exception, not its rule. This reading of *Michel* is "contrary" to *Mathis*, 135 S.Ct. at 2252, and *Descamps*, 133 S.Ct. at 2288. *United States v. Brooks*, 751 F.3d 1204, 1209 (10th Cir. 2014) (rule preventing one panel of this court from overruling an earlier panel's decision does not apply when this Court issues an intervening decision that is "contrary to" or "invalidates" previous analysis). Therefore, *Michel* is not controlling.

In *Michel*, this Court held the government was not required to plead

[5] The Court also cites to *United States v. Harris*, 447 F.3d 1300 (10th Cir. 2006), a case that relied on *Michel* to reach an identical holding. Because *Michel* contains the controlling precedent, arguments herein address the fallacies of that case in particular while the analysis extends to its progeny.

and prove beyond a reasonable doubt the sequence of an ACCA defendant's prior burglary convictions. *Michel*, 488 F.3d at 1132-1133. This Court rejected Michel's argument that the date of an offense fell outside *Apprendi*'s prior-conviction exception. *Id.* Rather, this Court held the determination of whether prior convictions "occurred on occasions different from one another" was a factual issue "inherent in the convictions themselves, and thus...not among the kind of facts extraneous to a conviction" requiring a jury finding. *Id.* (quoting *United States v. Thompson*, 421 F.3d 278 (4th Cir. 2005)). This Court held the date on which a defendant committed the offense was part of the "fact of a prior conviction" that could be found by the sentencing judge to increase the statutory maximum term.

Intervening authority from this Court undercuts the extent *Michel* can be read to allow a federal sentencing judge to find offenses underlying previous convictions were "committed on occasions different from one another." In *Mathis*, this Court held the federal sentencing judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Mathis*, 136 S.Ct. at 2252. "Elements" are "the 'constituent parts of a crime's legal definition—the things the 'prosecution must prove to sustain a

conviction.'" *Mathis*, 136 S.Ct. at 2248 (quoting Black's Law Dictionary 634 (10th ed. 2014)). "At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant; and at a plea hearing they are what the defendant necessarily admits when he pleads guilty." *Mathis*, 136 S.Ct. at 2248 (internal citations omitted). "Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements." *Id.*

This Court explained *Apprendi* required this limitation that "only a jury, and a not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction." *Mathis*, 136 S.Ct. at 2252 (citing *Apprendi*, 530 U.S. at 490). It explained *Apprendi*'s requirement "means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed the offense." *Mathis*, 136 S.Ct. at 2252 (citation omitted). "He is prohibited from conducting such an inquiry himself; and so too he is barred from making a disputed determination about 'what the defendant and state judge must have understood to be the factual basis of the prior plea' or 'what the jury in a prior trial must have accepted as the theory of the crime.'" *Mathis*, 136 S.Ct. at 2252 (quoting *Shepard v. United States*, 544 U.S. 13, 25 (2005); *Descamps*, 133 S.Ct. at 2288).

Under *Mathis*, the date of an offense, or whether specific

circumstances of several offenses show they were separate and distinct criminal episodes, are not elements of a prior conviction that the Sixth Amendment permits a sentencing judge to determine. The "committed on occasions different from one another" inquiry does not ask "what crime, with what elements, the defendant was convicted of." *Mathis*, 136 S.Ct. at 2252. It does not describe something "the prosecution must prove to sustain a conviction." *Id.* at 2248. It asks about more than "the simple fact of a prior conviction." *Id.* at 2252. It asks about a "real-world thing," and to resolve the issue the court must "go beyond identifying the crime of conviction to explore the manner in which the defendant committed the offense." *Id.* at 2248, 2252. To the extent *Michel* held otherwise, it cannot be reconciled with *Mathis*.

Likewise, in *Descamps*, this Court specifically and forcefully rejected the Ninth Circuit Court's prior approach to the ACCA, which allowed a sentencing court to find facts about a prior conviction that were not elements of the prior offense. *Descamps*, 133 S.Ct. at 2288-2289. Emphasizing the Sixth Amendment underpinnings of the categorical approach, this Court reiterated "that '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved

beyond a reasonable doubt.'" *Id.* at 2288 (quoting *Apprendi*, 530 U.S. at 490). By finding the defendant's prior conviction for burglary under California Penal Code § 459 involved an unlawful entry, even though that was not an element of the offense of conviction, the district "court did just what [this Court] ha[d] said it cannot: rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence." *Descamps*, 133 S.Ct. at 2289.

The only facts the federal sentencing court can be sure a prior jury found are those facts that constitute elements of the prior offense of conviction. *Mathis*, 136 S.Ct. at 2248, 2252; *Descamps*, 133 S.Ct. at 2288. Whether prior offenses were "committed on occasions different from one another," will rarely, if ever, be elements a prior jury will have found unanimously beyond a reasonable doubt. Because these facts are not susceptible to the categorical approach, they are not subject to *Apprendi*'s narrow exception. If there were doubt on this issue, the statute must be interpreted to avoid the constitutional question. *Shepard*, 544 U.S. at 25-26.

C. This Court should reverse the Tenth Circuit's decision to remand for resentencing.

While Mr. Dutch's 2005 indictment refers vaguely to three separate dates of robberies by alleging that they were committed "on or about" a

certain day, the plea failed to specify that Mr. Dutch had three prior convictions for offenses "committed on occasions different from one another." (Doc. 34-1) The 2016 indictment references a singular bank robbery, but provides no other details. (Doc. 2) There is no indication that he ever affirmatively admitted the factors used to increase his sentence at the prior sentencing hearing, and as such, the evidence was insufficient to support the 15-year ACCA sentence. The district court properly exercised restraint as instructed by *Mathis* and *Decamps* and did not go beyond identifying the crime of conviction to explore the manner in which the defendant committed the offense. The judge appropriately refrained from conducting an inquiry about what the defendant and the plea-judge must have understood as the factual basis of the prior plea. *See Shepard*, 544 U.S. at 25-26 (2005) ("The rule of reading statutes to avoid serious risks of unconstitutionality... counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea[.]") To avoid a constitutional infirmity, this Court should reverse the Tenth Circuit's decision.

Conclusion

This Court should grant its writ of certiorari to protect the constitutional principles enshrined in the Sixth Amendment and *Apprendi*. Because determining whether prior offenses were "committed on occasions

different from another" under ACCA is a fact-intensive inquiry, tallying prior offenses should be a task assigned to a properly-instructed jury.

Respectfully submitted,

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DATED: March 12, 2019

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APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

November 1, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

MARC DUTCH,

Defendant - Appellee.

No. 17-2219
(D.C. No. 1:16-CR-01424-MV-1)
(D.N.M)

ORDER AND JUDGMENT*

Before **LUCERO**, **EBEL**, and **PHILLIPS**, Circuit Judges.

The government appeals the sentence of Marc Dutch. It contends the district court erred in refusing to apply the Armed Career Criminal Act ("ACCA"). We agree with the government that the ACCA governs because Dutch's prior crimes were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). Exercising jurisdiction under 18 U.S.C. § 3742(b), we reverse and remand for resentencing.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I

In 2016, Dutch was arrested after fleeing the scene of a traffic accident. Officers discovered a loaded revolver and ammunition in a subsequent search. Dutch pled guilty to being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1), without the benefit of a plea agreement.

Dutch's Presentence Investigation Report recommended that he be subject to the ACCA based on three prior bank robbery convictions. In 2006, Dutch pled guilty to three counts of bank robbery and aiding and abetting in violation of 18 U.S.C. §§ 2113(a) and 2. The government offered the indictment, Dutch's plea agreement, and the judgment from that case. According to the indictment, the bank robberies occurred on or about: (1) November 12, 2005, at First Financial Credit Union, 2700 San Mateo Boulevard NE, Albuquerque, NM; (2) November 25, 2005, at Ironstone Bank, 7300 Jefferson NE, Albuquerque, NM; and (3) November 26, 2005, at Sandia Laboratory Federal Credit Union, 3707 Juan Tabo Blvd., Albuquerque, NM.

The district court concluded that the government had not met its burden to establish the ACCA applied because the record did not indicate whether Dutch's crimes occurred on different occasions or as part of one continuous drug-fueled enterprise. It noted that Dutch's long history of substance abuse and mental illness likely deprived him of a meaningful opportunity to cease his criminal conduct. Dutch was sentenced to 60 months. The government timely appealed.

II

We review the district court's decision whether to apply the ACCA de novo. United States v. Delossantos, 680 F.3d 1217, 1219 (10th Cir. 2012). A defendant is subject to an enhanced sentence under the ACCA if he has three prior violent felony or serious drug offense convictions that were "committed on occasions different from one another." § 924(e)(1). The government must prove by a preponderance of the evidence that prior offenses occurred on different occasions. Delossantos, 680 F.3d at 1219.

This court has repeatedly held that predicate offenses occurred on different occasions for the purposes of § 924(e)(1) when the offenses took place at different times or locations. See United States v. Harris, 447 F.3d 1300, 1305 n.2 (10th Cir. 2006) ("Separateness under the ACCA turns on when and where the crimes were committed."); United States v. Michel, 446 F.3d 1122, 1134 (10th Cir. 2006) (enhancement applied because defendant "committed three successive criminal incidents at three separate locations against three different victims"); United States v. Johnson, 130 F.3d 1420, 1431 (10th Cir. 1997) ("[O]ffenses committed at distinct, different times will be treated as separate predicate offenses for purposes of § 924(e)(1)." (quotation omitted)); United States v. Tisdale, 921 F.2d 1095, 1099 (10th Cir. 1990) (considering whether prior offenses were "distinct in time" and "committed at different locations"). In determining the time and place of prior offenses, sentencing courts may consult certain records, including charging documents. See Harris, 447 F.3d at 1305 (citing Shepard v. United States, 544 U.S.

13, 20-21 (2005)). "The time, place, and substance of the prior convictions can ordinarily be ascertained from court records associated with those convictions . . . ." Id. at 1304.

Dutch's prior indictment demonstrates that his three bank robberies occurred at different times and places, and involved different banks. This information satisfies the government's burden of proving by a preponderance of the evidence that the offenses were "committed on occasions different from one another." § 924(e)(1). Although two of the robberies occurred within a day of one another, we have held that even crimes occurring in quick succession qualify as separate. See Michel, 446 F.3d at 1134 (three separate crimes "all occurred within a short period of time"); Tisdale, 921 F.2d at 1099 (defendant's three burglaries at three separate businesses in same shopping mall on same night were separate for the purpose of § 924(e)(1)).

In ruling otherwise, the district court relied heavily on Dutch's argument that his drug use rendered him unable to halt his criminal activities. Dutch is correct that we do sometimes consider whether a defendant had the opportunity to cease his conduct in applying § 924(e)(1). But we do so to help determine whether the offenses were in fact distinct in time, rather than as a separate inquiry into the defendant's state of mind. See Michel, 446 F.3d at 1134 (considering the fact that defendant "had the opportunity after assaulting the first officer simply to flee the scene rather than attempting to rob the convenience store and assaulting the second officer"); Tisdale, 921 F.2d at 1098-99 (noting that "[a]fter the defendant successfully completed burglarizing one business, he was free to leave" (quotation omitted)).

Moreover, Dutch necessarily admitted that he possessed the requisite mens rea as to each independent robbery by pleading guilty to three separate counts. His voluntary intoxication does not mean that he was denied a meaningful opportunity to cease his conduct. See United States v. Taylor, 454 F.3d 1075, 1081 (10th Cir. 2006) (noting that § 2113(a) is a general intent crime); United States v. Williams, 403 F.3d 1188, 1194 (10th Cir. 2005) (voluntary intoxication is not a defense to general intent crimes).

We also reject Dutch's argument that he did not admit to aiding and abetting the bank robberies on different occasions. Regardless of the facts underlying Dutch's aiding and abetting, the government offered proof that Dutch pled guilty to three counts of substantive bank robbery in violation of 18 U.S.C. § 2113(a). And as explained supra, the indictment demonstrates that the three bank robberies occurred on different dates and at different locations.

Dutch raises two alternative issues that are foreclosed by circuit precedent. See United States v. White, 782 F.3d 1118, 1126-27 (10th Cir. 2015) ("One panel of this court cannot overrule the judgment of another panel absent en banc consideration or an intervening Supreme Court decision that is contrary to or invalidates our previous analysis." (quotation omitted)). We have held that judges may find prior offenses occurred on different occasions without violating the Sixth Amendment. Harris, 447 F.3d at 1305; Michel, 446 F.3d at 1132-33. Subsequent decisions addressing how courts may determine the elements of a prior offense, see, e.g., Mathis v. United States, 136 S. Ct. 2243 (2016), have not undermined that holding.

This court has also already held that bank robbery in violation of § 2113(a) is a violent felony. United States v. McCranie, 889 F.3d 677, 677-78 (10th Cir. 2018).

III

We **REVERSE** the district court's conclusion that the ACCA does not apply and **REMAND** with instructions to **VACATE** Dutch's sentence and resentence him consistent with this order and judgment.

Entered for the Court

Carlos F. Lucero
Circuit Judge

Mr. Dutch when he returns to Hobbs once the writ is discharged.

THE DEFENDANT: I'd like to add, too, that the first initial BOP sentence that I served, I went to USP Terre Haute and completed the Challenge Program, which is -- they don't offer the RDAP program in the custody level that I fall in. But they do offer a residential program that was completed. It did help, but when I got out that time, my dad committed suicide, and it threw me into a relapse. Hence, the second prison sentence.

MR. PORI: The only other thing I'm going to add is Mr. Herring, who wrote that letter to the Court, sent some advice for Mr. Dutch, and that advice is: Do every day of your time in custody clean. And that's vitally important for Mr. Dutch. He has the opportunity to use drugs or alcohol in prison, but if he's serious about not having another relapse in him, he needs to do every day of whatever sentence is imposed clean.

MR. KRAEHE: And, Your Honor, I just mentioned -- I just brought that up in order to preserve my objection on that. I think, actually, Mr. Pori may be right as to the concurrent sentence so... But I just wanted to preserve any objection to that. But our position, anyway, Your Honor, is that a guideline sentence is not appropriate in this case if the Armed Career Criminal Act clearly applies, and that a 15-year sentence should be imposed.

THE COURT: Mr. Dutch is before the Court for sentencing in case number 16-CR-1424-001.

Pursuant to Booker, this Court must consider the advisory Sentencing Guidelines, as well as each of the additional factors stated in 18 U.S.C. Section 3553(a), in imposing a reasonable sentence that is sufficient but not greater than necessary to comply with the purposes set forth in Section 3553(a).

The United States did not object to the Presentence Report, but Mr. Dutch objected to paragraphs 31, 48 and 55 of the report. Paragraph 31 states that Mr. Dutch is an armed career criminal and is subject to an enhanced sentence under 18 U.S.C. 924(e), because each of the three counts of bank robbery he pled guilty to in case number 5-CR-2769-002-JC is a separate crime committed at a different time. Paragraph 48 states details of those three bank robberies. Paragraph 55 of the Presentence Report states that Mr. Dutch is an armed career criminal, and, therefore, the criminal history category shall be the greatest of the criminal history category applicable under Sentencing Guideline Sections 4B1.4(c)(1), (2), or (3), which in this case is V.

The Court overrules Mr. Dutch's objection to paragraph 48 as that paragraph appears to accurately describe the details of the three robberies at issue.

With respect to paragraphs 31 and 55 of the Presentence Investigation Report, the Government bears the burden of proving by a preponderance of the evidence that an enhancement is appropriate. United States v. Johnson, 130 F.3d 1420, 1430, Tenth Circuit 1997.

Furthermore, it bears the burden of proving that prior offenses occurred on different occasions. Shepard v. United States, 544 U.S. 13, 2005. Kirkland v. United States, 687 F.3d 878, 891 to 93, Seventh Circuit, 2012.

If the Government fails to show that the three prior convictions arose out of separate and distinct criminal episodes, then the ACCA enhancement will not apply. United States v. Sneed, 600 F.3d 1326, at 1329 to 32, Eleventh Circuit, 2010.

When, as in this case, the Court must determine whether a prior conviction resulting from a guilty plea is a violent felony for the purpose of the ACCA, the Court is limited to an examination of the language of the conviction, the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant, or to some comparable judicial record of this information. And I'm quoting from United States v. Taylor at 413 F.3d 1146, at 1157, Tenth Circuit, 2005, citing Shepard at 544 U.S. at 24.

Here, with respect to the prior bank robbery convictions, the Indictment charged Mr. Dutch and two co-defendants with ten counts of violation of 18 U.S.C. 2113(a) and Section 2, for bank robberies that occurred on November 12th, 14th, 18th, 21, 22, 25, 26, 28th, 29th and 30th. It contained no language amplifying the alleged conduct or role each defendant played in the robberies.

The plea agreement stated that Mr. Dutch agreed to plead guilty to Counts 1, 6 and 7 -- which were the November 12th, 25th

and 26th robberies -- but provided no detail about his actual role in the robberies. The judgment in the case indicated that Mr. Dutch pled guilty to Counts 1, 6 and 7, but included no further information about the offenses. There is no transcript of the sentencing hearing or plea colloquy, nor does the Sentencing Minute Sheet set out any details of the robberies.

The Court concludes that the Government has failed to meet its burden under Shepard of providing the reliable evidence that the prior offense occurred on occasions different from one another, rather than as part of an ongoing drug-fueled criminal offense.

Moreover, the fundamental aspect of the framework for determining whether prior offenses occurred on separate occasions is whether the Defendant had an opportunity between offenses to cease from the criminal activity. Kirkland 687 F.3d at 891. In United States v. Tisdale, 921 F.2d 1095 at 1098 and 99, Tenth Circuit, 1990, the Tenth Circuit stated that Congress' use of the phrase, quote, "committed on occasions different from one another," end quote, was intended to reach multiple criminal episodes distinct in time.

In United States v. Delossantos, 680 F.3d 1217, a 2012 Tenth Circuit decision, the Tenth Circuit upheld the district court's decision that the defendant's sale of controlled substances on three separate dates were criminal episodes distinct in time, even though the offenses were part of the same course of conduct or

criminal scheme or plan. In doing so, the Court stated: "In between each of the drug offenses, defendant had a meaningful opportunity to cease his illegal conduct." This is at 1220.

In this case, it is clear from the Presentence Investigation Reports in both the bank robbery case and in this case, the evaluation performed by Dr. Marshall, and the letters sent by individuals who know Mr. Dutch, that: One, he has an extraordinarily long history of drug addiction starting at the age of nine, which has been largely untreated. Two, the drugs he is addicted to, methamphetamine and crack cocaine, are extremely difficult to withdraw from. Three, he was not undergoing any kind of treatment for his addiction or substance abuse counseling at the time of the bank robberies. Four, he was using methamphetamine and crack cocaine very heavily at the time of the robberies. Lastly, he was participating in the robberies in order to buy more drugs.

Given these facts, the Court cannot conclude that in between each of these robberies, Mr. Dutch had a meaningful opportunity to cease his conduct.

Finally, as its name suggests, the Armed Career Criminal Act is aimed at identifying and selectively incapacitating criminals who are unresponsive to rehabilitative treatment or deterrence, denying them the opportunity to commit crimes by locking them up for long periods of time. It does this by criminalizing possession of firearms by any felon who has three previous

convictions by any court for a violent felony or serious drug offense, or both, quote, "committed on occasions different from one another," end quote.

Mr. Dutch is a drug addict. When sober, he has been a law-abiding, productive citizen who has excelled in his job, who has been given promotions, who has been able to supervise others. But his addiction has gone largely untreated. And the bank robberies were all committed within an approximately two-week period of time when he was high on drugs. The Court does not believe, based on the facts of this case, that Mr. Dutch is the type recidivist criminal the Act was intended to target.

Accordingly, the Court grants Mr. Dutch's objections to paragraphs 31 and 55 of the Presentence Report and concludes that he is not an armed career criminal under the Armed Career Criminal Act pursuant to 18 U.S.C. 924(e).

Mr. Dutch pled guilty to violation of 18 U.S.C. Section 922(g)(1), felon in possession of a firearm and ammunition.

On January 27th, 2016, Mr. Dutch crashed his vehicle at the intersection of Comanche and Camino De La Sierra in Albuquerque, and then he fled from the scene. Responding officers located him near the scene of the accident and ordered him to remove his hands from his pockets. He was initially noncompliant but ultimately he was taken into custody.

Officers found a .22 caliber revolver and ammunition, as well as methamphetamine, on his person. Mr. Dutch appeared to be

intoxicated on an unknown substance. He was transported to the Foothills Substation to complete a DWI investigation. At the substation, he was read the New Mexico Implied Consent Advisory and refused to subject himself to a breath or blood test. Officers verified Mr. Dutch was on active probation and parole with the New Mexico Probation and Parole Department, and an arrest and hold was issued. Mr. Dutch was charged with aggravated DWI; leaving the scene of an accident; probation and parole violation; possession of methamphetamine; and felon in possession of a firearm.

ATF officers subsequently test fired the firearm, which functioned as designed, and determined that the firearm and ammunition traveled in/or affected foreign commerce. They confirmed fingerprint impressions matched with Mr. Dutch's previous felony convictions. The firearm was not reported stolen.

Mr. Dutch committed the instant offense subsequent to his convictions for the following felony convictions: Aggravated assault with a deadly weapon, Bernalillo County District Court, Albuquerque, New Mexico, Case No. D-202-CR-2004-04358; bank robbery, three counts: U.S. District Court, District of New Mexico, Case No. 1:05-CR-2769-002; conspiracy to commit robbery, Bernalillo County District Court, Albuquerque, New Mexico, Case No. D-202-CR-2010-03474; embezzlement of a motor vehicle and burglary (automobile), Bernalillo County District Court, D-202-CR-2013-01126. Mr. Dutch was a prohibited person from

possessing a firearm.

The offense level in this case is 21, and the criminal history category is V. The guideline imprisonment range is, therefore, 70 to 87 months.

In addition to the advisory Sentencing Guidelines, this Court also considers other factors set forth in Section 3553(a). This section requires the Court to consider the nature and circumstances of the offense, and the history and characteristics of Mr. Dutch. It also requires the Court to impose a sentence that complies with the purposes of sentencing, which include retribution, deterrence, incapacitation and rehabilitation. In satisfying these purposes, the Court is obligated to consider each of the factors outlined in Section 3553(a). This Court has done so.

As for the history and characteristics of Mr. Dutch, he had a tumultuous and troubled childhood. His father, Mark Anthony Dutch, was an alcoholic and drank heavily. Mr. Dutch recalls that, at an early age, his older brother was caught taking a beer out of the refrigerator. As punishment, their father made both boys drink several beers. Mr. Dutch became sick and vomited. Mr. Dutch's father would physically abuse his mother, Joanne Ownbey, when he was drinking. His parents divorced in '94, and she relocated from Albuquerque to Danville, Illinois, and remarried.

After that, his mother became an alcoholic and his father

began to use crack cocaine. Mr. Dutch bounced around between Danville and Albuquerque. While in Albuquerque, he obtained a paper route and gave the money he made from it to his father to support his crack cocaine addiction. Mr. Dutch did not use crack cocaine but began smoking marijuana and drinking alcohol during this time period. When he was 14, he dropped out of school and bought a car with money his grandmother had given him and drove from Danville to Albuquerque. He eventually obtained his GED and briefly attended Central New Mexico Community College. He has vocational training in carpentry.

He's never married. He has no children. His father committed suicide in 2010. He has an older brother, Jason Dutch, who lives in Texas; a stepbrother and two stepsisters; and a younger paternal half sister, Symphony Bassett, who lives in Albuquerque. He no longer maintains close relationships with his siblings.

Mr. Dutch has attempted suicide at least twice in the past. He reports suffering from post traumatic stress disorder as a result of being involved in a prison riot while he was an inmate in Terre Haute, Indiana, during his previous federal incarceration.

Mr. Dutch has a long history of substance abuse. He began drinking alcohol at the age of 8, using marijuana at the age of 9 or 10, and using crack cocaine when he was about 15. He began using methamphetamine when he was 17, and continued until his

arrest for this offense. He was clean from illegal substances from January 2015 to January 2016, but relapsed after that. Mr. Dutch also has a history of gambling addiction, and it has been a contributing factor to his relapse and use of methamphetamine before the instant offense.

With respect to the need for the sentence imposed to reflect the seriousness of the offense, the offense in this case was serious. Mr. Dutch, by his offense conduct, put the public and the law enforcement officers at risk of injury or death. The Court notes, however, that Mr. Dutch admitted and accepted his responsibility for his actions.

With respect to deterrence, the Court believes that a combination of an appropriate period of imprisonment, combined with proper drug and mental health treatment, should help Mr. Dutch avoid future criminal behavior.

With respect to public safety, as the Court noted, Mr. Dutch endangered the safety and lives of the public and the police officers.

With respect to providing the Defendant with needed treatment, Mr. Dutch has a serious drug addiction and suffers from mental illness. He is desperately in need of treatment for his addiction -- both during his time in prison and after his release -- and for mental health treatment to address the very difficult issues of his youth.

Although Mr. Dutch has an extensive criminal history, most of

it appears to have been related to his serious drug addiction, compounded by his mental illness.

Considering the factors set forth in 18 U.S.C. 3553(a), including his very difficult and painful childhood, his drug addiction and his mental illness, the Court finds that a downward variance is appropriate in this case. Such a sentence would reflect the seriousness of the behavior of the offense, while recognizing that Mr. Dutch's drug abuse has greatly contributed to his criminal behavior.

As to the charge in the Indictment in 16-CR-1424, Mr. Dutch is committed to the custody of the Bureau of Prisons for a term of 60 months.

The Court recommends that Mr. Dutch participate in the Bureau of Prisons 500 hour drug and alcohol program.

The Court also orders that this run concurrently with state D-202-CR-2013-01126, and designates a state facility as the primary custodian for the sentence in this case.

The Court recommends that Mr. -- the Court orders that Mr. Dutch be placed on supervised release for a term of three years as to the charge in the Indictment.

Mr. Dutch must comply with the mandatory and standard conditions of supervised release. He must also comply with the following special conditions:

You must reside in a residential re-entry center for a period of up to six months and must follow the rules and regulations of

the center.

You must participate in an inpatient substance abuse treatment program to be followed by an outpatient substance abuse treatment program when you are released. Your probation officer will supervise your participation in the program such as the provider, location, modality, et cetera. You may be required to pay for a portion of the cost of the program. So we're talking inpatient when you are released, followed by outpatient to be completed while you are living at a residential halfway house.

You must participate -- oh. You must participate in an AA or NA -- and, I'm sorry, I forgot to include that as a condition for Ms. Sarracino, and since you're still here, Ms. Sarracino, I do strongly believe in AA program as well. I've had many successes. So I am going to want to include that as a condition for Ms. Sarracino as well. That is, 90 days of participation in AA. I want that signed, so that I know that you're going.

Getting back to you, I do want you to participate in either AA or NA. I'll leave that up to you depending on which program you find. You must obtain a sponsor for the program and follow the rules and regulations of the program. Your probation officer's going to supervise your participation in the program.

You're going to have to submit to substance abuse testing to determine if you've used a prohibited substance. As you know, testing will include urine testing, the wearing of a sweat patch, a remote alcohol testing system, an alcohol monitoring technology

program, and/or any form of prohibited substance screening or testing. You can't obstruct or tamper with the testing methods and you could be required to pay for a portion of the cost of the testing.

You must not use or possess alcohol.

You must not knowingly purchase, possess, distribute, administer or otherwise use any psychoactive substance such as synthetic marijuana or bath salts that impair your physical or mental functioning, whether or not intended for human consumption.

You must not possess, sell, offer for sale, transport, cause to be transported, cause to affect interstate commerce, import or export any drug paraphernalia as defined in 21 U.S.C. Section 863(d).

You must submit to a search of your person, property, residence, vehicle, papers, computers, other electronic communications or office under your control. The probation officer may conduct a search but only when reasonable suspicion exists, always in a reasonable manner, and at a reasonable time, and it is for the purpose of detecting drugs, drug paraphernalia, and any other illegal contraband. You must let people with whom you live know that you are subject to this search condition.

I want you to be working or going to school, but you have to be doing something. So if you're not employed, then you must participate in an educational or vocational program.

Obviously, no gambling. And that includes lotteries, online

wagering, sports betting, et cetera. You're not going to be allowed to enter any casino or other establishment where gambling is the primary purpose. This includes horse race tracks, off-track betting establishments.

You must participate in a gambling addiction program and follow the rules and regulations of that program. Your probation officer will supervise that as well.

I also want you to participate in a mental health treatment program and follow the rules and regulations of that program, and your probation officer will also supervise your participation.

I want you to take mental health medications that are prescribed by your physician, and you're going to be required to take whatever is prescribed. That doesn't mean that if it's not -- if it's causing bad side effects you have to take it. That means that I want you to report bad side effects to your doctor, so that you can take something that is working for you and something that is helping you.

There will not be a fine, Mr. Dutch, based on your lack of financial resources.

There is a mandatory assessment of $100, which is payable to the United States District Court Clerk's office.

I will recommend the Granville, Illinois, facility, which is closest to your family, so that you may have some family support.

I like the idea of you going back to work with your family. The letters that I received were very impressive. They were from

people that know you and people that aren't writing nice things just because you are a family member. They are written by people for whom you have established yourself as someone that can be reliable, that has a strong work ethic and has proven yourself.

I have great faith in you. I believe that you can do this. And I believe that the resources that our national probation offices have are just what you need. You have the personal characteristics to do this, and I have great faith that you will. I'm just sorry I won't get to work with you, because I know we will transfer your jurisdiction, so that you can finally go home. I'm very glad that you have a family farm, because I know that it will succeed with you at its helm.

THE DEFENDANT: Thank you.

THE COURT: You've got 14 days to appeal the final sentence of this Court, and you can appeal *in forma pauperis* if you're unable to pay for the cost of an appeal. Mr. Pori will be happy to assist you with that.

Don't give up, Mr. Dutch. I know that you will do well.

MR. PORI: Your Honor, can I make one correction to the record? I think the Court's -- in calculating the offense level outside of the Armed Career Criminal Act, the Court said it was an offense level of 21 and a criminal history --

THE COURT: Yes.

MR. PORI: I think, though, it's an offense of 28, minus 3 for acceptance, is 25, because it was a 24 plus 4 for possessing

the firearm in connection with another offense. And I just want the record to reflect that even if the offense level was 25, I presume and will not speak for the Court, that the Court would still depart for the reasons set forth in the judgment. And I'm referring to paragraphs 26 and -- 25 and 26 of the Presentence Report.

THE COURT: Okay. Let's see. It appears that you're correct.

Did you have something, Mr. Kraehe?

MR. KRAEHE: Your Honor, I believe I probably have done enough to preserve error on appeal on the ACCA question, but I did want to object to the sentencing and to the judgment of the Court as to the applicability of the ACCA just for purposes of preserving appeal.

THE COURT: Yes, I think you have. Thank you very much.

All right. I think that's it.

MR. PORI: Your Honor, thank you very much. May we be excused?

THE COURT: Yes. Thank you.

(Court in recess at 1:08 p.m.)

FILED
United States Court of Appeals
Tenth Circuit

December 18, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

MARC DUTCH,

Defendant - Appellee.

No. 17-2219

ORDER

Before **LUCERO**, **EBEL**, and **PHILLIPS**, Circuit Judges.

This matter is before the court on Appellant's petition for rehearing en banc.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition for rehearing en banc is denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk