No. 19-5924

IN THE SUPREME COURT OF THE UNITED STATES

JAMES HENNESSEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals permissibly determined that petitioner's prior convictions were for offenses "committed on occasions different from one another." 18 U.S.C. 924(e)(1).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Tenn.):

United States v. Hennessee, No. 17-cr-18 (July 18 2018, as amended Nov. 1, 2019)

United States Court of Appeals (6th Cir.):

United States v. Hennessee, No. 18-5786 (July 30, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 932 F.3d 437.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2019. The petition for a writ of certiorari was filed on September 9, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Tennessee, petitioner was convicted on

one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924 (2012). Judgment 1. The district court sentenced petitioner to 110 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals reversed and remanded for resentencing. Pet. App. 1-26.

1. In August 2016, a police officer encountered petitioner in a park in Pulaski, Tennessee. Pet. App. 2. Petitioner told the officer that he was on state parole, and he consented to a search. Ibid. The officer searched petitioner and nearby objects on the ground. Ibid. The officer arrested petitioner after finding a loaded handgun, methamphetamine, hydrocodone pills, and a digital scale. Ibid.

A federal grand jury charged petitioner with one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924 (2012). Indictment 1. Petitioner pleaded guilty to that offense. Pet. App. 2.

2. Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of possession of a firearm by a felon is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), prescribes a penalty of 15 years to life imprisonment if the defendant has at least "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)(1).

The Probation Office determined that petitioner qualified for an enhanced sentence under the ACCA based on the following prior convictions: (1) a 2006 Tennessee conviction for aggravated robbery; (2) a 2006 Tennessee conviction for attempted aggravated robbery; and (3) a 2015 Alabama conviction for manufacturing a controlled substance, as well as a 2015 Alabama conviction for second degree assault, which the Probation Office grouped together as a single ACCA predicate. Presentence Investigation Report (PSR) ¶¶ 19, 27, 30 & n.2. The two 2015 convictions arose from the same indictment and were based on conduct that occurred on the same day. PSR ¶ 30. The Probation Office counted the two offenses as one ACCA predicate because it could not determine whether they were committed on different occasions. PSR 19 & n.2; Pet. App. 3. The two 2006 offenses also occurred on the same day, but the Probation Office recounted that they involved different victims, Terry Wainwright and Mudhafar Aljashami, occurred at different locations, and took place at different times. PSR ¶ 27.

Petitioner objected to the ACCA designation, asserting that the government could not show that the 2006 offenses were "committed on occasions different from one another," as required by 18 U.S.C. 924(e)(1). Pet. App. 4. In response, the government submitted a transcript of the state plea colloquy in which the

prosecutor described the facts surrounding the two offenses. Id. at 3-4. This Court held in Shepard v. United States, 544 U.S. 13 (2005), that a sentencing court may consider a limited class of documents, including the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented," to determine whether the defendant's prior conviction qualifies as a "violent felony" or "serious drug offense" under the ACCA. Id. at 16.

During the plea colloquy, the prosecutor stated that petitioner and an accomplice first approached Aljashami in the parking lot of his apartment at 960 Edmondson Pike in Davidson County, Tennessee, where petitioner produced a gun and demanded money. D. Ct. Doc. No. 24-3 (Plea Colloquy Tr.) 7; see Pet. App. 3. Because Aljashami had no money, petitioner and his accomplice struck him once or twice and then fled. Plea Colloquy Tr. 7. A "few minutes later," petitioner and his accomplice approached Wainwright as she was pumping gas at a gas station on Smith Springs Road. Ibid.; see Pet. App. 4. They produced a gun, took her wallet, and fled, but were soon stopped by the police. Plea Colloquy Tr. 7-8. At the end of the government's summary, the state court judge asked petitioner if the prosecutor's recitation of the facts was "basically true," and petitioner said "[y]es." Id. at 8; see Pet. App. 4 & n.2.

The district court sustained petitioner's objection to the ACCA enhancement. Pet. App. 33-37. The court hypothesized that, notwithstanding the plea colloquy, the two different victims listed in the indictment "could have been standing together." Id. at 35. The court discounted petitioner's admission during the plea colloquy in response to the prosecutor's recitation of the facts, which identified different times and locations for the offenses. Id. at 34-35. In the court's view, because the times and locations were not "elements of the offense[s]," petitioner's agreement about them could not "be used to establish that [his offenses occurred] on different occasions." Ibid. (citing Mathis v. United States, 136 S. Ct. 2243 (2016)).

The district court sentenced petitioner to a non-ACCA term of 110 months of imprisonment, to be followed by three years of supervised release. Pet. App. 51; see Judgment 2-3.

3. The court of appeals vacated petitioner's sentence and remanded to the district court with instructions to resentence petitioner under the ACCA. Pet. App. 1-12.

The court of appeals first determined that the district court had erred in refusing to consider petitioner's admissions in his state plea colloquy. Pet. App. 6-9. The court recognized that in Descamps v. United States, 570 U.S. 254 (2013), and Mathis, this Court permitted reference to so-called "Shepard documents" as part of the determination of whether a prior conviction was a predicate

for an ACCA enhancement insofar as those documents bear on the elements, rather than the factual manner of commission, of the prior offense. Pet. App. 8. It explained, however, that "because facts relevant to the different-occasions inquiry, such as the time and location of the prior offense, are most often not elements of the offense, a proceeding to answer the different-occasions question may well be more extensive than one to answer the ACCA-predicate question." Ibid. (quoting United States v. King, 853 F.3d 267, 273 (6th Cir. 2017)). It observed that prohibiting sentencing courts conducting the different-occasions analysis from considering non-elemental facts in Shepard-approved documents would "hamstr[i]ng" those courts and "would not make sense." Ibid. And it observed that an approach to the different-occasions inquiry which limits sentencing courts to considering Shepard-approved documents, but does not "import[] an elemental-facts-only limitation into the different-occasions analysis," would align circuit law "with the approach adopted by the Second, Fourth, Fifth, Seventh, Tenth, Eleventh, and D.C. Circuits." Id. at 6-7 (citing cases).

The court of appeals then determined that petitioner's two 2006 Tennessee offenses were committed on occasions different from one another. The court applied the "well-established" test it had adopted in United States v. Paige, 634 F.3d 871, 873 (6th Cir.),

cert. denied, 565 U.S. 863 (2011), under which "two offenses are committed 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, and withdraw without committing the second offense; or (3) the offenses are committed in different residences or business locations.

Pet. App. 9 (citations and internal quotation marks omitted). Although petitioner's prior convictions needed to satisfy only one of the three Paige prongs, the court of appeals determined that the facts contained in the state plea colloquy met all three. Id. at 9-11. The offenses occurred at least twenty minutes apart; petitioner could have ceased his criminal conduct after attempting to rob Aljashami; and the offenses occurred at different locations. Ibid.

Chief Judge Cole dissented. Pet. App. 13-26. He would have held that "sentencing courts conducting the different-occasions analysis can look to Shepard documents and consider facts therein that are 'necessary' to the conviction in determining whether the offenses were committed on different occasions, but sentencing courts cannot consider any non-elemental facts in applying the ACCA enhancement." Id. at 17. Judge Cole acknowledged that his proposed rule would be contrary to that adopted by every circuit to have considered the issue. Id. at 19.

4. On remand, the district court resentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release. Am. Judgment 2-3.

ARGUMENT

Petitioner contends (Pet. 7-10) that the court of appeals erred in looking to his admissions about the timing and locations of prior offenses for which he was convicted to determine whether they were "committed on occasions different from one another." 18 U.S.C. 924(e)(1). Further review of that contention is not warranted. The decision below is correct and does not conflict with any decision of this Court or another court of appeals. This Court has repeatedly denied petitions for writs of certiorari presenting related questions. See, e.g., Perry v. United States, No. 18-9460 (Oct. 7, 2019); Smallwood v. United States, 137 S. Ct. 51 (2016) (No. 15-9179); Blair v. United States, 135 S. Ct. 49 (2014) (No. 13-9210); Brady v. United States, 566 U.S. 923 (2012) (No. 11-6881). The same result is warranted here.

1. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a * * * trial[] by an impartial jury." U.S. Const. Amend. VI. "This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt," or be admitted by the defendant. Alleyne v. United States, 570 U.S. 99, 104 (2013) (plurality opinion). In a line of

decisions beginning with Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court has held that facts -- other than the fact of a prior conviction -- that increase the applicable minimum or maximum sentence that may be imposed on the defendant are elements of the defendant's offense "and must be submitted to the jury and found beyond a reasonable doubt." Alleyne, 570 U.S. at 108 (plurality opinion); see id. at 123-124 (Breyer, J., concurring in part and concurring in the judgment).

In Almendarez-Torres v. United States, 523 U.S. 224 (1998), this Court held that a defendant's prior conviction may be used as the basis for enhanced penalties without transforming the fact of the prior conviction into an element of the offense that must be alleged in the indictment and proved to the jury beyond a reasonable doubt. Id. at 239-247. Consistent with Almendarez-Torres, the Court's holding in Apprendi is cabined to penalty-enhancing facts "[o]ther than the fact of a prior conviction." Apprendi, 530 U.S. at 490. And this Court has repeatedly confirmed that the rule announced in Apprendi does not apply to "the simple fact of a prior conviction." Mathis v. United States, 136 S. Ct. 2243, 2252 (2016); see United States v. Haymond, 139 S. Ct. 2369, 2377 n.3 (2019); Descamps v. United States, 570 U.S. 254, 269 (2013); Alleyne, 570 U.S. at 111 n.1; Southern Union Co. v. United States, 567 U.S. 343, 346 (2012); Carachuri-Rosendo v. Holder, 560 U.S. 563, 567 n.3 (2010); James v. United States, 550 U.S.

192, 214 n.8 (2007), overruled on other grounds by Johnson v. United States, 135 S. Ct. 2551 (2015); Cunningham v. California, 549 U.S. 270, 274-275 (2007); United States v. Booker, 543 U.S. 220, 244 (2005); Blakely v. Washington, 542 U.S. 296, 301-302 (2004).

A sentencing court's authority under Almendarez-Torres to determine the fact of a conviction, without offending the Sixth Amendment, necessarily extends to the ancillary determination of when a defendant's prior offenses occurred, and whether two of them occurred on the same or separate occasions. That determination is "sufficiently interwoven" with the fact of the conviction that "Apprendi does not require different fact-finders and different burdens of proof for Section 924(e)'s various requirements." United States v. Santiago, 268 F.3d 151, 157 (2d Cir. 2001), cert. denied, 535 U.S. 1070 (2002). Moreover, whether two offenses occurred on separate occasions "is not a fact which is different in kind from the types of facts already left to the sentencing judge by Almendarez-Torres," such as the fact that "the defendant being sentenced is the same defendant who previously was convicted of those prior offenses." Id. at 156 (emphasis omitted).

As petitioner acknowledges (Pet. 7-8), the courts of appeals have uniformly recognized that the Sixth Amendment does not foreclose Congress from assigning to sentencing judges the task of

determining whether a defendant has committed three or more predicate felonies "on occasions different from one another" under the ACCA. 18 U.S.C. 924(e)(1). See, e.g., United States v. Blair, 734 F.3d 218, 227-228 (3d Cir. 2013), cert. denied, 135 S. Ct. 49 (2014); United States v. Thomas, 572 F.3d 945, 952 n.4 (D.C. Cir. 2009), cert. denied, 559 U.S. 986 (2010); United States v. White, 465 F.3d 250, 254 (5th Cir. 2006) (per curiam), cert. denied, 549 U.S. 1188 (2007); United States v. Michel, 446 F.3d 1122, 1132-1133 (10th Cir. 2006); United States v. Spears, 443 F.3d 1358, 1361 (11th Cir.) (per curiam), cert. denied, 549 U.S. 916 (2006); United States v. Thompson, 421 F.3d 278, 284-287 (4th Cir. 2005), cert. denied, 547 U.S. 1005 (2006); United States v. Burgin, 388 F.3d 177, 184-186 (6th Cir. 2004), cert. denied, 544 U.S. 936 (2005); United States v. Morris, 293 F.3d 1010, 1012-1013 (7th Cir.), cert. denied, 537 U.S. 987 (2002); Santiago, 268 F.3d at 156-157.

To the extent that the petition for a writ of certiorari could be read to challenge the constitutional authority of judges to conduct the different-occasions inquiry at all (see Pet. ii, 10), such a challenge is not properly before the Court. In the court of appeals, petitioner described the question whether "the different-occasions question is governed by the Apprendi rule" -- i.e., whether it must be decided by the jury beyond a reasonable doubt -- as a "red herring" and "a question different from the one

presented here." Pet. C.A. Br. 26-27. The court of appeals therefore did not specifically address that issue. See Pet. App. 5-9; see also, e.g., United States v. Williams, 504 U.S. 36, 41 (1992) (noting this Court's "traditional rule," which "precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below'") (citation omitted).

In any event, petitioner does not point to any division of authority in the courts of appeals on the question whether sentencing courts may conduct the different-occasions analysis. To the contrary, petitioner acknowledges (Pet. 7) that the courts of appeals "universally" recognize that Apprendi permits a sentencing court to determine whether two prior offenses occurred on different occasions, just as the sentencing court may determine that the prior convictions were for offenses committed by the same defendant. See pp. 10-11, supra.

2. Petitioner more squarely takes issue (Pet. 7-10) with the court of appeals' determination that in conducting the different-occasions inquiry, a sentencing judge may consider statements of fact in documents that fall within this Court's decision in Shepard v. United States, 544 U.S. 13, 16 (2005), such as the plea colloquy at issue here, that are not themselves elements of the offense. As all three members of the panel below observed (Pet. App. 6, 19), and as petitioner agrees (Pet. 8-9),

the courts of appeals have uniformly recognized that such consideration is permissible. See Pet. App. 6 (citing authority).

Petitioner asserts (Pet. 9) that this universal rule is "unprincipled and unconstitutional." That is incorrect. Petitioner relies on Descamps and Mathis (ibid.), but those cases concerned the modified categorical approach sometimes used to determine whether a prior conviction qualifies as a "violent felony" under 18 U.S.C. 924(e)(2)(B), not whether two or more such felonies were "committed on occasions different from one another" under 18 U.S.C. 924(e)(1). Unlike the "violent felony" determination, the different-occasions requirement of Section 924(e)(1) does not involve any form of categorical comparison between a prior crime of conviction and a generic federal offense. Instead, it focuses on the factual question whether prior offenses were "committed on" different occasions. Compare 18 U.S.C. 924(e)(1), with 18 U.S.C. 924(e)(2)(B) (defining "violent felony" based on generic federal offenses and elements); see also Mathis, 136 S. Ct. at 2252 (suggesting that statutes using the word "committed" may permit sentencing judges to look at the facts of prior crimes). Thus, neither Descamps nor Mathis supports petitioner's position here, under which a district court would apparently have to treat every prior conviction as having occurred on a single occasion, unless the offenses at issue present the

"rare[]" case in which the "date, time, or location" is an element of the offense. Pet. App. 8.

As the court of appeals here explained, "'because facts relevant to the different-occasions inquiry, such as the time and location of the prior offense, are most often not elements of the offense,'" district courts would be "hamstrung * * * in making most different-occasions determinations if [they] were only allowed to look to elemental facts in Shepard documents." Pet. App. 8. "Such a restriction would not make sense," and would "render violent-felony convictions adjudged together by the same court inseparable in the different-occasions context." Ibid.; see id. at 8-9. Nor is it clear how, under petitioner's proposal, courts could even rely on different dates of judgment (which is not an offense element) as a basis for determining that offenses were committed on different occasions. Petitioner disclaimed a constitutional restriction of that nature below, see pp. 11-12, supra, and he provides no sound reason why Congress would have chosen to impose it in drafting the ACCA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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