NO. 19-5924

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES HENNESSEE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Michael C. Holley
R. David Baker
Assistant Federal Public Defenders
810 Broadway, Suite 200
Nashville, Tennessee 37203-3805
(615) 736-5047

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

ARGUMENT

The government emphasizes that there is no "division of authority" on the question presented. (Resp. 12.) In this case, that is precisely why this Court should grant review. Despite the unanimity, neither the lower courts nor the government gives a sound explanation for why this challenged sentencing practice is constitutional. The courts and government simply assert that a sentencing judge's finding about whether a defendant committed crimes on different occasions falls within the *Almendarez-Torres* exception for "the fact of a prior conviction," *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), because the committed-on-different-occasions facts are supposedly "ancillary" or "'sufficiently interwoven'" with the fact of the prior conviction. (Resp. 10 (quoting *United States v. Santiago*, 268 F.3d 151, 157 (2d Cir. 2001)).) That assertion rings hollow.

To begin, it does not comport with common sense. The facts needed to decide whether a defendant committed crimes on different occasions are facts that pertain to how and when the defendant acted, like the following: the defendant Bob Jones killed Jim Brown during a fistfight at Dino's Bar at 1212 Main Street, Nashville, Tennessee, at 11:30 p.m. on February 14, 2000. In contrast, "the fact of a prior conviction" is comprised of facts that pertain to what legal liability a court imposed, like the following: the defendant Bob Jones, after being charged with first-degree murder, was convicted by a jury of voluntary manslaughter in Davidson County Criminal Court, Tennessee, on December 14, 2000, and was sentenced to serve ten years. Because these two types of facts are different in nature (with one type oriented towards the defendant's actions and the other towards the legal proceedings), one ordinarily says that the former type of facts—*viz.* facts about the commission of the crime—"lay behind" the conviction, not that they are the same

thing as the conviction. *United States v. Brady*, 988 F.2d 664, 669 (6th Cir. 1993) (en banc) (quoting *United States v. Pedigo*, 879 F.2d 1315, 1318 (6th Cir. 1989)).

This Court's precedent confirms this ordinary understanding. *Nijhawan v. Holder*, 557 U.S. 29 (2009); *United States v. Hayes*, 555 U.S. 415 (2009). For example, in *Nijhawan*, the Court discussed prosecutions for illegal reentry after conviction for an aggravated felony under 8 U.S.C. § 1326. Illegal reentry carries a sentence of up to two years in prison, but if the defendant was previously convicted of an "aggravated felony" it carries a sentence of up to 20 years. 18 U.S.C. §§ 1326(a), (b)(2). Under *Almendarez-Torres*, the fact of the aggravated-felony conviction is generally a sentencing factor that the judge can find at sentencing. *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998). But the statute defines some aggravated felonies by using two components: one being the fact of a prior conviction of a certain type of crime, and the other being the fact that the defendant "committed" the crime in a specific way or under specific circumstances. *Nijhawan*, 557 U.S. at 37-38 (quoting 8 U.S.C. §§ 1101(a)(43)(K)(ii), (P)). This Court recognized that whereas the first part of such aggravated-felony definitions falls within the *Almendarez-Torres* exception, the second part—the part pertaining to how the defendant committed the crime—is "circumstance-specific," falls beyond the bounds of the fact of a prior conviction, and thus would have to be found by a jury (*i.e.*, treated as an element of the instant offense) to "eliminat[e] any constitutional concern." *Id.* at 40. *See also Hayes*, 555 U.S. at 426 (construing the phrase "committed by [a person in a domestic relationship with] the victim" in 18 U.S.C. § 921(a)(33)(A), as a circumstance-specific element of the crime of violating 18 U.S.C. § 922(g)(9), not as a categorical element).

By the same token, to eliminate constitutional concerns in the context of the Armed Career Criminal Act (ACCA), the facts pertaining to how the defendant committed prior

crimes—*viz.* the facts showing whether the defendant committed the crimes on separate occasions—would have to be found by a jury beyond a reasonable doubt. This is not altered by the fact that it may be permissible for the judge to decide at sentencing that the defendant was in fact convicted of the crimes and that they qualify as either a "violent felony" or "serious drug offense."

Consistent with common sense and this jurisprudence, the Court should not accept the government's assertion that the committed-on-different-occasions facts are "ancillary" to—and thus somehow necessarily part of—the fact of the prior conviction, such that there is no constitutional concern. Nor should it accept the assertion that those facts are "sufficiently interwoven" with the fact of a prior conviction. "Sufficient" by what measure? To pass constitutional muster, the circumstance-specific facts regarding the commission of the prior crime would be "sufficiently" interwoven only if, in order to incur the prior conviction, a jury necessarily had to find them or the defendant necessarily had to admit them. *Shepard v. United States*, 544 U.S. 13, 20-21, 26 (2005); *Descamps v. United States*, 570 U.S. 254, 269-70 (2013); *Mathis v. United States*, 136 S.Ct. 2243, 2248, 2252 (2016). Absent this, a federal sentencing judge is newly finding the sentence-enhancing facts by a preponderance of the evidence. Only if the facts were elements of the prior conviction would they be sufficiently interwoven to pass muster. As the government admits, this is almost never the case. (Resp. 14.)[1]

The government is correct (Resp. 13) that the *Descamps* and *Mathis* test is directed at a different kind of question than the committed-on-different-occasions question. That is precisely

[1] The fact that the defendant who incurred one conviction is the "same defendant" who incurred a second conviction (Resp. 10) is part of "the fact of a prior conviction" because to recite the fact of the prior conviction—*e.g.*, Bob Jones was convicted of X crime in Y court on Z date—necessarily requires identification of the defendant.

because the committed-on-different-occasions question is largely incompatible with the *Almendarez-Torres* exception, since the former turns on the defendant's actions and surrounding circumstances, whereas the latter turns on the type of liability a court imposed. Yet the government's point about incompatibility does nothing to prove that the challenged sentencing practice is constitutional. That the Armed Career Criminal Act requires an inherently difficult, circumstance-specific determination regarding how a defendant committed prior crimes is no justification for the government to enhance sentences in violation of the Fifth and Sixth Amendments.

In sum, this Court has "repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution a 'sentencing enhancement.'" *United States v. Haymond*, 139 S. Ct. 2369, 2379 (2019) (plurality opinion). The Court should do the same here by addressing this dodge of the Fifth and Sixth Amendments that is now an anachronism of pre-*Apprendi* times.

Finally, the government suggests that Hennessee did not raise this issue below. (Resp. 11-12.) That is not so. Hennessee challenged this unconstitutional sentencing practice and argued that there were two solutions: (1) to overrule precedent and hold that the committed-on-different-occasions fact is an element of the offense (Pet. C.A. Br. 22), or, (2) to hold, within the confines of precedent, that a sentencing judge can make this committed-on-different-occasions finding but must be restricted to elemental facts. Indeed, at oral argument Hennessee went so far as to argue that the former solution—treating the fact as an element—is the "real, consistent solution" to the problem. Oral Arg. Rec. at 17:50 to 18:15. *See United States v. Perry*, 908 F.3d 1126, 1134 (8th Cir. 2018) (Stras, J., concurring) (endorsing this simple and practical solution). The issue, in all of its aspects, is properly before this Court. Moreover, this case presents an

excellent vehicle because the district court ruled in Hennessee's favor, because Chief Judge Cole vigorously dissented in his support, and because Hennessee's sentence was certainly increased by 70 months based on an appellate court's findings of fact.

CONCLUSION

For the foregoing reasons, petitioner James Hennessee respectfully prays that this Court grant certiorari to review the judgment of the Sixth Circuit.

December 20, 2019

s/Michael C. Holley

Michael C. Holley (BPR #021885)
R. David Baker (BPR #014238)
Assistant Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203-3805
(615) 736-5047