No. 19-6693

IN THE SUPREME COURT OF THE UNITED STATES

CHRIS RAYVON STARKS, 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).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 775 Fed. Appx. 233.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2019. The petition for a writ of certiorari was filed on November 18, 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 Eastern 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 924(e). Pet. App. 25a. The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Id. at 26a-27a. The court of appeals affirmed. Id. at 1a-4a.

1. In August 2016, law enforcement executed a search warrant at petitioner's home, where they found a loaded firearm. Pet. App. 1a; Presentence Investigation Report (PSR) ¶ 5. 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). Indictment 1. Petitioner pleaded guilty to that offense without a plea agreement. Pet. App. 1a-2a; PSR ¶¶ 2-3.

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 three 2008 Tennessee

convictions for aggravated robbery. PSR ¶ 17. Those three convictions were adjudicated in the same case, but the indictment in that case showed that the charges were based on offense conduct occurring on September 25, 2008; September 28, 2008; and September 30, 2008, respectively, and involving different victims. Ibid.; see PSR ¶ 37. Petitioner objected to sentencing under the ACCA, asserting that the Sixth Amendment prohibited the district court from determining whether his prior convictions were for offenses that were "committed on occasions different from one another," as required by 18 U.S.C. 924(e)(1). Pet. App. 6a-12a; see Am. Objections to PSR 1-8.

The district court overruled petitioner's objection. Pet. App. 23a-24a. The court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release, Id. at 26a-27a.

2. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-3a. Petitioner argued on appeal that the district court was permitted to review judicial records of his prior convictions only to determine the elements of the crimes he committed, rather than to determine the dates and times of those offenses. Id. at 2a. Petitioner also argued that the Sixth Amendment prohibits sentencing courts from conducting the "different occasions" inquiry at all. Id. at 3a. The court of appeals rejected both of petitioner's arguments as foreclosed by circuit precedent, which explained that sentencing judges may,

consistent with the Sixth Amendment, review certain judicial records to determine whether a defendant's prior offenses were committed on different occasions. Id. at 2a-3a (citing United States v. Hennessee, 932 F.3d 437 (6th Cir. 2019), cert. denied, No. 19-5924 (Jan. 13, 2020)). Judge Merritt filed a concurring opinion in which he acknowledged that the issue was controlled by circuit precedent but expressed his view that the ACCA "should be extensively amended or repealed." Id. at 4a.

ARGUMENT

Petitioner renews his contention (Pet. 11-16) that the Sixth Amendment prohibited the district court from determining from judicial records of his prior convictions that his prior offenses were "committed on occasions different from one another," 18 U.S.C. 924(e)(1). The court of appeals' decision 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, including a recent denial of a petition seeking review of the circuit decision on which the decision in this case relied. See Hennessee v. United States, No. 19-5924 (Jan. 13, 2020); see also, e.g., Perry v. United States, 140 S. Ct. 90 (2019) (No. 18-9460); Smallwood v. United States, 137 S. Ct. 51 (2016) (No. 15-9179); Blair v. United States,

574 U.S. 828 (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 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 it 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.

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* Other pending petitions for writs of certiorari present similar questions. See McDaniel v. United States, No. 19-6078 (filed Sept. 24, 2019); Jones v. United States, No. 19-6662 (filed Nov. 14, 2019).

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 includes the 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). Indeed, 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). And it would be anomalous for the Constitution to require a judge to determine whether a prosecution is barred altogether by the Double Jeopardy Clause because the defendant was previously convicted of the "same offence" -- which may entail a determination of the time when the prior offense occurred -- but foreclose that same judge from making such a determination for sentencing purposes. U.S. Const. Amend. V; see Oregon v. Kennedy, 456 U.S. 667, 669-670, 679 (1982).

2. 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, 13), petitioner does not point to any division of authority in the courts of appeals on that issue. To the contrary, petitioner acknowledges (Pet. 13) that the courts of appeals "universally" recognize 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" for purposes of the ACCA. 18 U.S.C. 924(e)(1). See Pet. 13 & n.2; see, e.g., United States v. Blair, 734 F.3d 218, 227-228 (3d Cir. 2013), cert. denied,

574 U.S. 828 (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.

Petitioner more squarely takes issue (Pet. 13-16) with the court of appeals' determination that, in conducting the different-occasions inquiry, a sentencing judge may consider facts other than elements of a prior offense -- such as the date on which the offense occurred -- contained in documents that fall within this Court's decision in Shepard v. United States, 544 U.S. 13 (2005). This Court held in Shepard 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. As petitioner acknowledges (Pet. 13-15 &

nn.3-4), the courts of appeals have uniformly recognized, in accord with the decision below, that such documents may be consulted for non-elemental facts relevant to the different-occasions inquiry.

Petitioner asserts (Pet. 15) that this uniform rule is "unprincipled and unconstitutional." That is incorrect. To the extent that petitioner relies on Descamps and Mathis (Pet. 14-15), for the proposition that sentencing courts conducting the different-occasions inquiry may not consider non-elemental facts contained in Shepard documents, that reliance is misplaced. 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 question of 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). Thus, neither Descamps nor Mathis supports petitioner's position here, under which a district court apparently would have to treat every prior conviction as having occurred on a single occasion, unless the

convictions at issue present the rare circumstance in which the date or time is an element of the offense.

Because facts relevant to the different-occasions inquiry -- including the time, location, or specific victim of the prior offense -- are infrequently elements of the offense, petitioner's proposed rule would prohibit district courts from making the different-occasions determination in many cases. See United States v. Hennessee, 932 F.3d 437, 443 (6th Cir. 2019), cert. denied, No. 19-5924 (Jan. 13, 2020). "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. 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. The Sixth Amendment imposes no such restriction, and petitioner 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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JANUARY 2020