No. 19-6693

IN THE
SUPREME COURT OF THE UNITED STATES

CHRIS RAYVON STARKS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

ARGUMENT

The government emphasizes that there is no "division of authority" in the courts of appeals on the question presented. BIO at 7. But this unanimity is precisely why review is necessary. The lower courts have boxed themselves into the status quo, while judges within circuits continue to express doubts about the constitutionality of their approach to the different-occasions inquiry. *United States v. Hennessee*, 932 F.3d 437, 446-55 (6th Cir. 2019) (Cole, C.J., dissenting); *United States v. Perry*, 908 F.3d 1126, 1134 (8th Cir. 2018) (Stras, J., concurring), *cert. denied*, 140 S. Ct. 90 (Oct. 7, 2019); *id.* at 1137 (Kelly, J., concurring); *see also, e.g.*, *United States v. Weeks*, 711 F.3d 1255, 1260 (11th Cir. 2013) (requiring clear statement from this Court before it will reconsider its different-occasions precedent); *United States v. Thomas*, 572 F.3d 945, 952 (D.C. Cir. 2009) (Ginsburg, J., concurring in part) ("The question whether the sentencing judge may rely solely upon an indictment to determine the date of a prior offense without running afoul of the Sixth Amendment . . . is more difficult than the court lets on."); *United States v. Browning*, 436 F.3d 780, 782 (7th Cir. 2006) ("[I]f logic rules, [findings made under the ACCA] are subject to the Sixth Amendment," but "[w]e are not authorized to disregard the Court's decisions even when it is apparent that they are doomed."). In the court below, Judge Merritt added yet another voice of doubt, (Pet. App. 4a), agreeing with the dissenting judge in *Hennessee*.

Regardless, the absence of a circuit conflict is no obstacle to review when, as here, there is no hope that the lower courts will correct themselves. In *Rehaif v.*

United States, 139 S. Ct. 2191 (2019), for example, this Court granted review when "every circuit to consider the question has determined that a conviction under Section 922(g) requires proof that the defendant knowingly possessed a firearm, but not proof that he knew his own status." Gov't Br. in Opposition at 5-6, *Rehaif*, 139 S. Ct. 2191 (2019). The Court then reversed as mistaken the collective view of the circuits. *Rehaif*, 139 S. Ct. at 2200.

As in *Rehaif*, the unanimity here reflects a collective mistake. Neither the courts nor the government have ever given a sound explanation for why the Constitution allows a district court to make a non-elemental factual finding—by a preponderance of the evidence—about how and when a defendant committed prior convictions when that finding increases the statutory maximum from ten years to life and requires a statutory minimum sentence of fifteen years. *Compare* 18 U.S.C. § 924(a)(2) *with id.* § 924(e). They simply assert that a sentencing judge's finding that 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 different-occasions facts are supposedly "'sufficiently interwoven'" with the fact of the prior conviction. BIO at 10 (quoting *United States v. Santiago*, 268 F.3d 151, 157 (2d Cir. 2001)). That assertion rings hollow.

To begin, it is contrary to common sense. The facts needed to decide whether a defendant committed crimes on different occasions are not akin to the fact of *who* was convicted of those crimes. BIO at 7. They go far beyond the identity of the defendant, instead pertaining to how, when, and where the defendant acted. For example, one

might describe a defendant's actions as follows: The defendant Jim Jones killed Bob Brown during a fistfight at The Pickle Factory at 1000 Main Street, Greeneville, Tennessee, at 11:30 p.m. on February 14, 2000. In contrast, if Jim Jones were convicted for these actions, "the fact of a prior conviction" would be comprised of facts that pertain to the legal process and its consequences: The defendant Jim Jones, after being charged with first-degree murder, was convicted by a jury of voluntary manslaughter in Greene County Criminal Court, Tennessee, on December 14, 2000, and was sentenced to serve ten years in prison. Because these two types of facts are different in nature (with the former type oriented towards the defendant's actions and the latter towards the legal proceedings), one ordinarily says that the facts about the defendant's actions "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. For example, in *Nijhawan v. Holder*, 557 U.S. 29 (2009), the Court addressed 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. 8 U.S.C. § 1326(a), (b)(2). Under *Almendarez-Torres*, the fact of the prior 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 prior 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 while 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," and falls beyond the bounds of the fact of a prior conviction. *Id.* at 40. As a result, that fact 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.*

United States v. Hayes, 555 U.S. 415 (2009), is another example. There, the Court addressed the definition of "misdemeanor crime of domestic violence" for purpose of the firearms ban at 18 U.S.C. § 922(g)(9). A person previously convicted of a "misdemeanor crime of domestic violence" may not possess a firearm, and if he does, is subject to conviction and punishment up to 10 years in prison. 18 U.S.C. § 922(g)(9). A "misdemeanor crime of domestic violence" is defined as an offense that is a misdemeanor and "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim," or other specified domestic relationship with the victim. 18 U.S.C. § 921(a)(33)(A). This Court divided the question whether a person was convicted of a "misdemeanor crime of domestic violence" into two distinct components. The first requirement relates to the category of offense: The offense as defined by law must have as an element the use or threatened use of physical force

or threatened use of a deadly weapon. *Hayes*, 555 U.S. at 421-22. This legal determination is made by the district court, subject to the ordinary limitations of the categorical approach. *United States v. Castleman*, 572 U.S. 157, 168 (2014).

The second requirement is circumstance-specific: The particular defendant who committed the offense must have been in one of the specified domestic relationships with the victim. *Hayes*, 555 U.S. at 422-23. This fact-based determination, because it is not elemental, is not made by the district court but must be proved by the government to the jury beyond a reasonable doubt (or admitted by the defendant). *Id.* at 426 ("To obtain a conviction in a § 922(g)(9) prosecution, the Government must prove beyond a reasonable doubt that the victim of the predicate offense was the defendant's current or former spouse or was related to the defendant in another specified way."). This is true even when the relationship between the defendant with the victim is apparent from *Shepard* evidence of the conviction.

As with the inquiry in *Hayes*, the inquiry under the ACCA has two distinct components: the legal determination that the defendant has three previous convictions for an offense that is categorically a "violent felony" or "serious drug offense," and the factual determination that the defendant "committed" these three offenses "on occasions different from one another." 18 U.S.C. § 924(e). As with the facts pertaining to the defendant's relationship with the victim for purposes of § 922(g)(9), the facts pertaining to how, when, and where the defendant "committed" the ACCA predicate crimes "must be established," and to do so the government must prove them to the jury beyond a reasonable doubt. *Hayes*, 555 U.S. at 426.

The government does not attempt to explain why *Hayes* does not answer the question here, as Mr. Starks suggests. Pet. at 13. Consistent with common sense and this Court's jurisprudence, the Court should not accept the government's assertion that the fact of the prior conviction "necessarily includes" the facts pertaining to how, when, and where the defendant committed the offenses, and their relationship to each other. BIO at 6. Nor should it accept the assertion that those facts are "sufficiently interwoven" with the fact of a prior conviction. *Id.* 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. BIO at 10.[1]

The government is correct, (BIO at 9), that the *Descamps* and *Mathis* test is directed at the method district courts must use to determine the elements of a predicate offense of conviction, while the question here is whether district courts may

[1] The fact that the defendant who incurred one conviction is the "same defendant" who incurred a second conviction, (BIO at 7), is part of "the fact of a prior conviction" because to recite the fact of the prior conviction—*e.g.,* Jim Jones was convicted of X crime in Y court on Z date—necessarily requires identification of the defendant.

use that method (or any method) to go *beyond* those elements to make the different-occasions determination. To the extent the government suggests that *Descamps* and *Mathis* cannot control because it would mean district courts would have to treat "every prior conviction as having occurred on a single occasion," except in the rare case where the elements establish different occasions, (BIO at 9-10), this only proves that the different-occasions question is incompatible with the *Almendarez-Torres* exception.

In any event, the government's point about the distinct purpose of the *Mathis* test does nothing to prove that the lower courts' approach to the different-occasions inquiry is constitutional. That the ACCA requires a circumstance-specific determination regarding how, when, and where a defendant committed prior crimes is no justification for the government to enhance sentences in violation of the Fifth and Sixth Amendments. If limiting district courts to finding only elemental facts contained in *Shepard* documents would too severely restrict the ACCA, the solution is simple: The government must prove to a jury beyond a reasonable doubt that the defendant committed the crimes on different occasions. This is the rule that Mr. Starks proposes should the Court reject the elements-only approach as unworkable. Pet. at ii, 13, 16.

Finally, the denial of the petition in *Hennessee* does not mean this petition should likewise be denied. BIO at 4. The question whether judges may constitutionally rummage through the record of a prior conviction to "discern" that a defendant committed three offenses on different occasions is important, recurring,

and will not resolve itself. In this case, as in many ACCA cases, the judge's factfinding resulted a sentence enhancement of over a decade. The government cannot contest that Mr. Starks preserved this argument below, or that this is an excellent vehicle. (Pet. at 16-17.) The Court should take this opportunity to finally put to rest an unconstitutional approach to factfinding that is an anachronism of pre-*Apprendi* times.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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