NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LEVI WEST,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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

QUESTIONS PRESENTED

The Armed Career Criminal Act enhances the statutory penalty for a firearms offense when the offender has three predicate convictions for crimes that were "committed on occasions different from one another."

(1) Is this different-occasions requirement an element for the jury to decide, or is it instead something that the sentencing judge can decide?

(2) If the latter, can the sentencing judge consider whatever evidence happens to be contained in certain conviction records? Or, to comport with the *Apprendi* doctrine, must the judge limit consideration to facts that previously either the jury necessarily found or the defendant necessarily admitted?

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PRAYER

Petitioner Levi West prays that a writ of certiorari issue to review the judgment entered by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's published opinion in petitioner's case is attached in the Appendix.

JURISDICTION

The Court of Appeals entered its judgment on January 16, 2020. Adjusted for the Covid-19 filing extension, this petition is filed within 90 days of that judgment as required by Supreme Court Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial[] by . . . jury[.]."

The Armed Career Criminal Act provides:

> 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 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[.]

18 U.S.C. § 924(e)(1).

BACKGROUND

The *Apprendi* doctrine is central to this case. Levi West will first state the basics of that doctrine and will second explain how he received a statutory sentence enhancement under the Armed Career Criminal Act (ACCA).

A. The *Apprendi* doctrine

In a series of constitutional decisions running from *Apprendi* to *Alleyne*, this Court has developed this bedrock rule: The Fifth and Sixth Amendments 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 proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Alleyne v. United States*, 570 U.S. 99, 111(2013). Facts determined at sentencing cannot enhance the statutory sentencing range. *Id.* There is just one exception to this rule which allows a sentencing court to consider "the fact of a prior conviction," and that exception is "narrow." *Apprendi*, 530 U.S. at 490; *Alleyne*, 570 U.S. at 111, n.1.

To fit within this exception for "the fact of a prior conviction," the features of the prior conviction that trigger the increased penalty must have been *elements* of the prior offense—*i.e.*, facts that the jury had to find beyond a reasonable doubt to sustain the conviction. *Mathis v. United States*, 136 S.Ct. 2243, 2248, 2252 (2016). Thus, when acting on *Apprendi*'s narrow exception for the "fact of a prior conviction," the sentencing judge cannot make findings about facts that lay behind that conviction, but rather can determine only "what crime, with what elements, the defendant was convicted of." *Id.* at 2252; *see also Descamps v. United States*, 570 U.S. 254, 269-70 (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"); *Shepard v. United States*, 544 U.S. 13, 20-21, 26 (2013). If the features of the prior conviction are not "the simple fact of a prior conviction," but rather include circumstances

that would let the judge "explore the manner in which the defendant committed that offense," they do not fit within the narrow exception to *Apprendi*. *Mathis*, 136 S.Ct. at 2252.

In a word, this Court has established a distinction between "elemental facts" and "non-elemental facts." *Descamps,* 570 U.S. at 270. The former are the facts that either the jury necessarily found or the defendant necessarily admitted to sustain the conviction; in contrast, the latter are facts that were legally extraneous to the conviction. When a federal sentencing court determines the "fact of a prior conviction," it can consider only "elemental facts"—otherwise it will run afoul of the Sixth Amendment.

B. West's sentence enhancement

In February 2018, police arrested Levi West and found him in possession of a firearm and body armor. (Presentence Report (PSR), R.41, PageID # 130-31.) After being duly charged, West pled guilty to two crimes: (1) violating 18 U.S.C. § 922(g) by possessing a firearm as a felon; and, (2) violating 18 U.S.C. § 931(a) by possessing body armor as a person previously convicted of a crime of violence.

(*Id.* PageID # 130.) The body-armor crime carried a statutory maximum penalty of three years. 18 U.S.C. § 924(a)(7).

The statutory penalty range for the gun crime, however, depended on whether West qualified for an enhancement under the Armed Career Criminal Act (ACCA). If West did qualify, his range would be 15 years to life; if he did not qualify, his range would be 0 to 10 years. 18 U.S.C. § 924(a)(2), (e). To qualify for an ACCA enhancement, West would need to have three or more prior convictions for either a "serious drug offense" or "violent felony" committed on separate occasions. 18 U.S.C. § 924(e)(1).

Prior to sentencing, the Presentence Report opined that three of West's prior convictions should count as separate ACCA predicates, namely:

- A February 13, 2013 conviction for Tennessee aggravated burglary;
- A February 13, 2013 conviction for Tennessee robbery; and,
- A July 14, 2017 conviction for Tennessee aggravated assault.

(PSR, R.41, PageID # 133.)

West argued, *inter alia*, that the government could not prove that his aggravated-burglary and robbery convictions arose from separate crimes. (Def. Sentencing Mem., R.29, PageID# 50-58.) He argued it would violate his constitutional right to a jury trial for the sentencing court to determine that those two convictions, which were incurred on the same date, were based on underlying crimes that in fact occurred on separate occasions. (*Id.*) Thus, he argued that he did not qualify for an ACCA enhancement, that consequently his maximum penalty for the gun crime was 10 years, and that his maximum sentence for both crimes combined was 13 years, which is the sentence he requested. (*Id.* PageID# 60-61, 64.)

The district court rejected each of his arguments, and it sentenced him to 20 years, which was near the bottom of the sentencing guidelines range that it calculated. (Sentencing Tr., R.42, PageID# 208-17, 234.) West filed this appeal. (Notice of Appeal, R.39, PageID# 121.)

On appeal, West pursued the same constitutional objection to his ACCA enhancement, and the Sixth Circuit rejected it because it had already rejected it in binding precedent, *United States v. Hennessee*, 932 F.3d 437 (6th Cir. 2019).

In *Hennessee*, the Sixth Circuit, in a split decision, explained its governing rule as follows.

- In light of the *Apprendi* doctrine, a sentencing court making a different-occasions determination can consider *only* documents listed in *Taylor* or *Shepard* as valid sources of evidence; those document are the indictment, jury instructions, plea agreement, plea

colloquy, and judgment pertaining to the prior conviction (commonly referred to as "*Shepard* documents").

- Yet a sentencing court can consider the *Shepard* documents to glean not just elemental facts but also "non-elemental facts."

Hennessee, 932 F.3d at 442-44 (permitting "consideration of non-elemental facts contained within *Shepard* documents"). In short, under the *Hennessee*'s holding, a sentencing court can enhance a defendant's sentence based on its consideration of whatever facts the pertinent *Shepard* documents happen to contain, including non-elemental facts.

But why allow consideration of non-elemental facts when the *Apprendi* doctrine limits the consideration of "the fact of a prior conviction" to that conviction's elemental facts? And why limit the sentencing court's consideration to *Shepard* documents if not in order to limit its consideration to the conviction's elemental facts? *Hennessee* identified no principle to support its position. The only reason the majority gave for approving reliance on non-elemental facts in *Shepard* documents was expedience: "A sentencing judge would be hamstrung . . . in making most different-occasions determinations if he or she were only allowed to look to elemental facts in *Shepard* documents which rarely involve date, time, or location." *Hennessee*, 932 F.3d at 443.

Chief Judge Cole, dissenting, wrote at length to demonstrate that the majority's decision is unprincipled. *Id.* at 446-55. Citing this Court's precedent stretching from *Taylor* to *Apprendi* to *Mathis*, he showed that, when a sentencing court is determining "the fact of a prior conviction" for purposes of applying the ACCA enhancement, the court is restricted to "consideration of certain types of *evidence*, not certain types of *documents*." *Id.* at 449 (emphasis in original). And the evidence to which a court is restricted is the evidence of "elemental facts"—indeed, that restriction is the point of the *Apprendi* doctrine.

Chief Judge Cole also noted that, like the district judge, other judges have recently recognized that the *Apprendi* doctrine simply cannot be squared with a rule that lets sentencing judges consider so-called "*Shepard* documents" to make prior-conviction-related determinations based on non-elemental facts that those documents happen to contain. *Id.* at 450-51. *See United States v. Perry*, 908 F.3d 1126, 1134 (8th Cir. 2018) (Stras, J., concurring); *id.* at 1137 (Kelly, J., concurring); *see also United States v. Starks*, No. 18-5309, 2019 U.S. App. LEXIS 24727, *4 (6th Cir. Aug. 20, 2019) (Merritt, J., concurring) ("Chief Judge Cole issued a persuasive dissent in *Hennessee* with which I agree and would follow if not bound by the majority in *Hennessee*.").

Notably, neither the majority nor the dissent commented on Hennessee's proposal to overrule precedent and hold that the different-occasions requirement must be deemed an element to be decided by a jury, not something determined by a sentencing court. Such a correction to long-standing precedent has been championed by Judge Stras as the simple and correct solution to the problem:

> Simple facts and simple law should lead to a simple conclusion. A finding that [the defendant] Perry committed his past crimes on different occasions exposes him to a longer sentence, so the jury should make the finding, not the court. To be sure, the Supreme Court has carved out an exception allowing district courts to find "the fact of a prior conviction." . . . But the exception is "narrow," . . . and permits the court to "do no more . . . than determine what crime, with what elements, the defendant was convicted of."

Perry, 908 F.3d at 1134 (Stras, J., concurring).

ARGUMENT

The Court should grant certiorari because the Circuit Courts have uniformly established a sentencing practice that violates the Sixth Amendment.

Congress has enacted several criminal laws that identify facts that will trigger a longer term of imprisonment. *See, e.g., Alleyne*, 570 U.S. at 104 (fact that firearm was brandished); *United States v. O'Brien*, 560 U.S. 218 (2010) (fact of the type of firearm). As explained above

in Background Section A, the *Apprendi* doctrine allows the courts to handle such sentence-enhancing facts in only one of two ways: (1) treat the fact as an element that must be found by a jury; or, (2) treat the fact as part of "the fact of a prior conviction" and let the sentencing court find the fact as long as the court bases its finding on previously determined "elemental facts," *i.e.*, facts that were necessarily determined to authorize the prior conviction. *Apprendi*, 530 U.S. at 490; *Shepard*, 544 U.S. at 20-21, 26; *Alleyne*, 570 U.S. at 111, n.1; *Descamps*, 570 U.S. at 269-70; *Mathis*, 136 S.Ct. at 2248, 2252.

That last restriction is necessary because otherwise the sentencing court would be making new factual determinations beyond the "fact of the prior conviction."

Prior to *Apprendi*, Congress enacted the ACCA which triggers a longer sentence if the defendant previously "committed" three predicate offenses "on occasions different from one another." 18 U.S.C. § 924(e)(1). Had the courts foreseen *Apprendi*, they would have recognized that there were only the two, aforementioned legitimate ways to handle the ACCA's committed-on-different-occasions requirement: (1) treat it as an element; or (2) treat it as part of the "fact of the prior conviction," subject to findings based only on elemental facts.

But courts evidently did not foresee *Apprendi*. They universally did the following.

1. They assumed that the different-occasions requirement was *not* an element of the offense, but instead treated it as a sentencing factor to be found by the sentencing judge.[1]

[1] *United States v. Anderson*, 921 F.2d 335 (1st Cir. 1990); *United States v. Mitchell*, 932 F.2d 1027 (2d Cir. 1991); *United States v. Schoolcraft*, 879 F.2d 64 (3d Cir. 1989); *United States v. Mason*, 954 F.2d 219 (4th Cir. 1992); *United States v. Herbert*, 860 F.2d 620 (5th Cir. 1988); *United States v. Hayes*, 951 F.2d 707 (6th Cir. 1991); *United States v. Schieman*, 894 F.2d 909 (7th Cir. 1990); *United States v. Rush*, 840 F.2d 580 (8th Cir. 1988); *United States v. Wicks*, 833 F.2d 192 (9th Cir. 1987); *United States v. Bolton*, 905 F.2d 319 (10th Cir. 1990); *United States v. Greene*, 810 F.2d 999 (11th Cir. 1986).

2. They directed sentencing judges to apply a test that usually turned on an analysis of non-elemental facts, *viz.*, the crime's time, place and victim.[2]

Accordingly, for decades federal sentencing courts have considered non-elemental facts to decide whether a defendant committed the pertinent prior offenses on occasions different from one another. Even after *Apprendi* issued, courts declined to reverse course. Rather, they chose to hold explicitly that the different-occasions requirement is *not* an element of the offense. *United States v. Burgin*, 388 F.3d 177, 185-86 (6th Cir. 2004); *United States v. Santiago*, 268 F.3d 151, 157 (2d Cir. 2001); *United States v. Morris*, 293 F.3d 1010, 1012 (7th Cir. 2002); *United States v. Campbell*, 270 F.3d 702, 708 (8th Cir. 2001).

As the *Apprendi* doctrine developed—ultimately through *Shepard, Descamps,* and *Mathis*—this Court made it clear that, when a sentencing court is acting pursuant to the prior-conviction exception to *Apprendi* it can only consider elemental facts inhering to that prior conviction. *Shepard*, 544 U.S. at 20-21, 26; *Descamps*, 570 U.S. at 269-70; *Mathis*, 136 S.Ct. at 2248, 2252. And this Court's cases indicated that those elemental facts are typically found in certain documents—indictment, jury instructions, plea agreement, plea colloquy, and judgment—which came to be known as *Shepard* documents. *Id.*

In light of these developments, the Courts of Appeals have uniformly devised an unprincipled accommodation with the *Apprendi* doctrine. Like the Sixth Circuit here, the Courts

[2] *United States v. Riddle*, 47 F.3d 460, 462 (1st Cir. 1995); *United States v. Rideout*, 3 F.3d 32, 35 (2d Cir. 1993); *United States v. Schoolcraft*, 879 F.2d 64, 73 (3d Cir. 1989); *United States v. Letterlough*, 63 F.3d 332, 335 (4th Cir. 1995); *United States v. Washington*, 898 F.2d 439, 441-42 (5th Cir. 1990); *United States v. Brady*, 988 F.2d 664, 670 (6th Cir. 1993) (en banc); *United States v. Schieman*, 894 F.2d 909 (7th Cir. 1990); *United States v. Hammell*, 3 F.3d 1187, 1191 (8th Cir. 1993); *United States v. Wicks*, 833 F.2d 192, 193 (9th Cir. 1987); *United States v. Tisdale*, 921 F.2d 1095, 1099 (10th Cir. 1990); *United States v. Pope*, 132 F.3d 684, 692 (11th Cir. 1998).

of Appeals have decided that a sentencing judge deciding the different-occasions question *is limited* to *Shepard* documents, yet *is not limited* to *Shepard* evidence.[3] In other words, they have decided that the sentencing judge can consider whatever non-elemental facts happen to be contained in *Shepard* documents, even though the entire point of *Shepard* and its progeny is to limit the sentencing court's consideration to a certain type of evidence, namely, the evidence of elemental facts.

This accommodation is intolerable because it is both unprincipled and unconstitutional. Yet the Courts of Appeals are entrenched in that position for two reasons.

The first of those reasons is expedience. The Courts have painted everyone into a corner. That is so because, possibly against congressional intent, they have long held that the different-occasions requirement must be treated not as an element but rather as a sentencing factor for the judge to decide. And long ago they created a test for finding this putative sentencing factor that typically requires the judge to consider non-elemental facts (*i.e.*, the crime's time, place and victim). Therefore, to avoid severely restricting the ACCA, the courts must continue to let sentencing judges consider non-elemental facts. That is, due to decisions that the appellate courts made long ago, the consequences are simply too great for the courts—like the majority in Hennessee's case—to admit it is unprincipled and unconstitutional to let a sentencing judge consider non-elemental facts as long as they appear in so-called *Shepard* documents.

[3] App. 6; *United States v. Bordeaux*, 886 F.3d 189, 196 (2d Cir. 2018); *United States v. Span*, 789 F.3d 320, 326 (4th Cir. 2015); *Kirkland v. United States*, 687 F.3d 878, 883 (7th Cir. 2012); *United States v. Sneed*, 600 F.3d 1326, 1333 (11th Cir. 2010); *United States v. Thomas*, 572 F.3d 945, 950 (D.C. Cir. 2009); *United States v. Fuller*, 453 F.3d 274 (5th Cir. 2006); *United States v. Taylor*, 413 F.3d 1146, 1157-58 (10th Cir. 2005).

The second of these reasons is inertia. As Judge Stras has explained, "[i]nertia may be part of the explanation" since [s]ometimes courts just continue along the same well-trodden path even in the face of clear signs to turn around." *Perry*, 908 F.3d at 1134.

Because the Courts of Appeals are uniformly entrenched in their error, the petitioner urges this Court to grant certiorari, and to determine whether the different-occasions requirement must be treated as an element of the offense or instead must be determined only by reference to elemental facts.

CONCLUSION

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

June 12, 2019

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