No. 20-5279

In the Supreme Court of the United States

WILLIAM DALE WOODEN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE PETITIONER

MICHAEL ROIG
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019

STEVEN L. MAYER
ARNOLD & PORTER KAYE SCHOLER LLP
3 Embarcadero Center
San Francisco, CA 94111

R. REEVES ANDERSON
ARNOLD & PORTER KAYE SCHOLER LLP
1144 Fifteenth Street, #3100
Denver, CO 80202

ALLON KEDEM
Counsel of Record
ANDREW T. TUTT
STEPHEN K. WIRTH
GRAHAM W. WHITE
JAYCE BORN
JOHN SWANSON
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
allon.kedem@arnoldporter.com

QUESTION PRESENTED

Whether offenses that were committed as part of a single criminal episode, but sequentially in time, were "committed on occasions different from one another" for purposes of a sentencing enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1).

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 12) is reported at 945 F.3d 498.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2019. A timely petition for rehearing was denied on February 26, 2020 (Pet. App. B1). The petition for a writ of certiorari was filed on July 24, 2020, and granted on February 22, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 922(g) of Title 18 of the U.S. Code provides:

> It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> …
>
> to … possess in or affecting commerce, any firearm or ammunition … .

Section 924(e)(1) of Title 18 of the U.S. Code 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, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

STATEMENT OF THE CASE

The Armed Career Criminal Act imposes a fifteen-year mandatory-minimum sentence on a defendant who possesses a gun after committing three or more predicate offenses. Congress reserved this harsh sanction for the limited few who, through repeated lawbreaking, have demonstrated their adherence to a life of crime: Congress required the Government to prove that the defendant's predicate offenses were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1).

Under the plain meaning of that provision, offenses were committed on different "occasions" when they arise from distinct criminal opportunities, such as where an intervening event (*e.g.*, an arrest) has qualitatively changed the circumstances between them. A career criminal thus is someone who exploits three or more *different* criminal opportunities—someone who commits an offense; then responds to changed circumstances by reoffending; then to another change of circumstances by offending yet again. The "occasions" clause is not satisfied by a single criminal episode that generates multiple charges. The "one-day career criminal," if he exists at all, should be a rare and exceptional character indeed.

Some courts of appeals, however, have divorced the "occasions" clause from any meaningful connection to its text, history, or purpose. These courts have reasoned backwards: from the truism that crimes committed on different occasions are usually separated in time, to the non-sequitur that crimes are *always* committed on different occasions if there was any temporal separateness. Under this approach, predicate offenses are automatically treated as separate for ACCA purposes unless they were committed simultaneously.

This case illustrates the simultaneity test at its most extreme and irrational. In the course of one night, petitioner William Dale Wooden and his confederates

breached the exterior of a ministorage facility and broke through the drywall connecting ten of the units, leading to ten burglary charges. Any proficient English speaker would say that these burglaries, which all exploited the same criminal opportunity, were committed on the same occasion. Yet the Sixth Circuit counted ten separate occasions—and hence ten ACCA predicates—because it was "possible to discern the point at which Wooden's first offense for entering or remaining in a building was completed and the subsequent point at which his second offense began." J.A. 23. According to the Sixth Circuit, Mr. Wooden became a career criminal before the burglary was even halfway through.

A. The Ministorage Break-In

On the evening of March 24, 1997, a ministorage facility located at 100 Williams Road in Dalton, Georgia, was burglarized. The building, a single structure, was "forcibly enter[ed]" and "the interior drywall of several rooms" was "crush[ed]." J.A. 32. Items from ten of the units were missing. J.A. 26-33.

At the time, Mr. Wooden was living in a small house next to the storage facility.[1] Addendum (Add.) 6a. An investigation led to charges against Mr. Wooden and three other men, who were indicted in Whitfield County Superior Court on ten counts of burglary—one for each of the storage units. J.A. 26-30. They also were charged with several counts of theft and with causing criminal damage to "the property of John Davis Jr.," the building's owner. J.A. 31-34.

Mr. Wooden pleaded guilty to all counts. At the plea hearing, his attorney explained that the burglary charges "all stemm[ed] from a mini warehouse, one event, with a number of units in that mini warehouse." Add. 4a. Asked

[1] A picture of both properties as they currently appear is available at https://bit.ly/3sMQsKX.

to describe Mr. Wooden's criminal conduct, the prosecutor agreed that the offenses "concern[ed] a mini warehouse on Williams Road which was adjacent to the residence that Mr. William Dale Wooden was living in." Add. 6a. He elaborated:

> We expect the evidence to show that Mr. William Dale Wooden, along with [the other defendants] were all involved to different extents breaking into the mini warehouse. Then once they made entry into the mini warehouse, they … burrowed through from compartment—or, rather, from unit to unit and that's why we have ten different burglaries and ten different theft by taking charges.

Ibid. Asked by the judge whether that account was "substantially correct," Mr. Wooden agreed that it was. *Ibid.*

The judge accepted Mr. Wooden's plea and entered conviction on all counts against him. J.A. 35. Mr. Wooden was sentenced to eight years on each burglary count, and the same or less on the other charges, with all the sentences to run concurrently (for a total sentence of eight years). J.A. 35-36.

B. The Gun Possession

"[O]ne chilly November morning" in 2015, three police officers went looking for a theft suspect and ended up at the house that Mr. Wooden shared with his wife, where the suspect's car had previously been seen. J.A. 13. Two uniformed officers "dispersed around the home" while the third, in plainclothes, knocked on the front door. J.A. 14. Mr. Wooden answered and the officer asked if he could "step inside, to stay warm." *Ibid.* Mr. Wooden agreed that he could.[2] Once inside the residence, officers found a

[2] Mr. Wooden disputes that he validly consented to the officers' entry. See Pet. 5-7.

rifle and a revolver; knowing that Mr. Wooden was a felon, they arrested him. *Ibid.*

1. A federal grand jury in the Eastern District of Tennessee charged Mr. Wooden with being a felon in possession of firearms and ammunition, in violation of 18 U.S.C. § 922(g)(1). J.A. 14. A defendant convicted of such an offense is ordinarily subject to a maximum sentence of ten years of imprisonment. 18 U.S.C. § 924(a)(2). Under the Armed Career Criminal Act, however, a defendant is subject to a mandatory-minimum sentence of fifteen years in prison if the defendant "has three previous convictions … for a violent felony or a serious drug offense, or both, committed on occasions different from one another." *Id.* § 924(e)(1).

Mr. Wooden's counsel assured him that he was "highly unlikely" to be designated an armed career criminal, and he pleaded guilty on that understanding. J.A. 38. The probation office prepared a presentence investigation report, which recommended that Mr. Wooden receive a sentence within the Sentencing Guidelines range of 21 to 27 months of imprisonment, most of which he had already served. J.A. 38-39, 42; see J.A. 4. Neither side objected. J.A. 39.

2. Shortly before Mr. Wooden's sentencing, however, the Government sought to label him a career criminal under the ACCA. D. Ct. Dkt. 41. Although Mr. Wooden had committed the ministorage burglaries "on the same date," the Government argued, "they involved ten separate storage units belonging to ten separate victims," and therefore should be treated "as separate ACCA predicate offenses." *Id.* at 8 n.9. Having previously raised no objection to the probation office's recommendation of 21 to 27 months, the Government now claimed that a fifteen-year sentence—the mandatory-minimum under the ACCA—was appropriate because Mr. Wooden "is precisely the

kind of individual whom the ACCA was meant to punish." *Id.* at 9.

The district court allowed Mr. Wooden to withdraw his guilty plea and his case proceeded to trial, where he was convicted. J.A. 6. At sentencing, Mr. Wooden argued that the ministorage burglaries had been committed on the same occasion and thus "should be grouped as one conviction." J.A. 52. In response, the Government argued that the offenses "were committed on occasions different from one another," on the principle that "[y]ou cannot be in two locations at the same time." J.A. 53-54.

The district court agreed with the Government. J.A. 57-59. Under Sixth Circuit precedent, the district court explained, prior offenses are automatically deemed as having been "committed on occasions different from one [an]other" for purposes of the ACCA if "it is possible to discern the point at which the first offense is completed and the subsequent point at which the second offense begins." J.A. 58. Mr. Wooden's ministorage burglaries satisfied that test, the court reasoned, because "[e]ach separate mini warehouse provides a discrete point at which the first offense was completed and the second began and so on," such that "it was possible for [Mr. Wooden] to stop at any point between the mini warehouses." J.A. 59. The court accordingly determined that Mr. Wooden had eleven qualifying ACCA offenses—the ten ministorage burglaries, plus a separate burglary conviction from 2005. *Ibid.*

Based on the ACCA enhancement, Mr. Wooden's advisory Sentencing Guidelines range was 188 to 235 months of imprisonment. J.A. 60. The district court sentenced him to 188 months, the bottom of the range. J.A. 61.

3. The Sixth Circuit affirmed. J.A. 12-25. Like the district court, the Sixth Circuit believed that it was "possible to discern the point at which Wooden's first offense for entering or remaining in a building was completed and

the subsequent point at which his second offense began." J.A. 23. Mr. Wooden had pleaded guilty to "'entering' ten different mini warehouses," the court explained, and he "could not be in two (let alone ten) of them at once. Rather, Wooden must have left one warehouse to 'enter' another." *Ibid.* The Sixth Circuit similarly agreed with the district court that it would have been possible "for Wooden to call it a night after the first burglary, without burglarizing nine more warehouses." J.A. 24. The Sixth Circuit accordingly held that the ministorage burglaries "were separate offenses for purposes of the ACCA, and thus there was no error in his imposed sentence." *Ibid.*

SUMMARY OF ARGUMENT

Mr. Wooden's ten ministorage burglaries arose from the same criminal opportunity, and thus were committed on the same occasion. One night in a storage facility does not a career make.

I. An "occasion" is defined by the juncture of circumstances or a common opportunity. Dictionaries from the time of the statute's enactment support that interpretation. So does regular speech, in which related events—such as purchasing a movie ticket, buying popcorn, using the restroom, and watching a film—take place on the same occasion if they arise from the same underlying circumstances. That use of "occasion" appears as well in various U.S. Code provisions and in this Court's decisions.

The ACCA requires the Government to prove that the defendant's three predicate offenses were committed "on occasions different from one another." 18 U.S.C. § 924(e)(1). Given its plain meaning, the "occasions" clause refers to offenses that arise from distinct criminal opportunities, such as where an intervening event has qualitatively changed the circumstances of the different offenses. (Think of a burglar who is arrested and released, only to head back out for another burglary.) While

factors such as physical or temporal proximity may help to *illustrate* the relationship between crimes, they do not *define* the relationship.

The provision's structure, history, and purpose confirm that the ACCA uses "occasions" in its ordinary sense. As its title suggests, the statute targets a *career* criminal—one devoted to a life of lawbreaking—not someone who commits interrelated offenses during a single criminal episode. The "occasions" language originated in an ABA draft rule for "an habitual offender," and then was absorbed into the Organized Crime Control Act of 1970. From there, the language was incorporated into the ACCA following the Solicitor General's confession of error in *United States* v. *Petty*, 798 F.2d 1157 (8th Cir. 1986). The defendant in *Petty* received an enhanced sentence based on his six prior robbery charges stemming from a stickup in a diner. The Solicitor General, citing the ACCA's extensive legislative history, explained that Congress did not intend for a mandatory-minimum to apply where multiple charges resulted from the same episode.

If the statutory language is given its plain meaning, Mr. Wooden's ten ministorage burglaries were committed on the same occasion, not on "occasions different from one another." The burglars breached the exterior of the ministorage facility adjacent to Mr. Wooden's house, and then broke through the drywall between units. The burglaries were thus committed at a single structure, on the same evening, by the same group of people, in order to exploit a common criminal opportunity. No intervening event interrupted the continuous criminal activity or made the circumstances of the first burglary any different than those of the second or third (or tenth).

The underlying state court prosecution unfolded in a manner that confirms the burglaries were closely related. Georgia law, which *required* all charges based on the break-in to be brought together in the same indictment,

gave the prosecutor discretion to choose between one burglary charge (based on the facility's owner) or ten charges (based on the units' renters). And since the sentences were ordered to run concurrently—yet another sign of relatedness—nothing of significance ultimately turned on that choice.

II. Under the interpretation adopted by the Sixth Circuit below, crimes are automatically committed on "occasions different from one another" if they are committed sequentially, rather than simultaneously. But a simultaneity test is at odds with the statute's text, structure, and purpose. It is also riddled with absurd distinctions and produces bizarre results that no rational legislator could have intended.

Return to the text. Under the Sixth Circuit's approach, the word "occasion" would have to mean "point in time," one of its more obscure definitions. And even then, the point-in-time definition has a strong association with the surrounding circumstances: a time *for* something in particular to occur. Congress also used a precise grammatical construction ("on occasions different from one another") that makes no sense as a way to distinguish crimes temporally, since all times are inherently "different from one another." If that is what Congress meant, it could easily have said "on different occasions"—or better yet, "at different times," a phrasing it frequently uses to distinguish simultaneous events from sequential ones.

The ACCA's extensive legislative history contains no indication that Congress intended separate treatment for crimes committed sequentially but arising from the same episode. To the contrary, lawmakers were focused on hardened criminals who reoffend no matter the circumstances. That concern fits the plain-language reading of the "occasions" clause, not the simultaneity test. Nor can the test be squared with the Solicitor General's confession

of error in *Petty*, where the defendant's six robberies occurred one after another.

The simultaneity test leads to absurd and anomalous results. The myopic focus on timing has little to do with culpability, and it raises difficult and metaphysical questions about temporal boundaries. For instance, when exactly does the crime of drug manufacturing begin, and when does it end? And since the key to avoiding separate treatment for offenses under the simultaneity test is to make sure they overlap, the test favors continuing offenses (like kidnapping) over point-in-time offenses (like breaking and entering); drawn-out crimes over abbreviated ones; and group crimes over solo offenses.

The simultaneity test also transforms inconsequential and uncontested issues in an underlying criminal prosecution into high-stakes determinations, with momentous consequences for a later federal sentence. In this case, for instance, Georgia law was indifferent as to whether Mr. Wooden *personally* set foot in all ten ministorage units, or instead helped load the truck while his confederates did; as a result, no one involved in the state court proceeding bothered to make a record on that issue. But only the former scenario would count as separate occasions under the simultaneity test, so the lack of detail comes back to haunt Mr. Wooden years later.

In addition to its other flaws, the simultaneity test is incapable of consistent application. Courts that otherwise use the test abandon it when confronted with offenses of long duration, such as conspiracies, which can last for months or longer. Yet the "occasions" clause cannot have one meaning when applied to conspiracy offenses and a different meaning for other offenses.

Finally, insofar as there is any remaining doubt about how to read the "occasions" clause, the rule of lenity breaks the tie in Mr. Wooden's favor. Indeed, lenity is particularly appropriate here: Offenders should not be

subject to the ACCA's harsh mandatory-minimum—which prevents case-specific leniency even where merited—without an especially clear showing of congressional intent.

ARGUMENT

I. MR. WOODEN'S MINISTORAGE BURGLARIES WERE COMMITTED ON THE SAME OCCASION

Over the course of a single evening, Mr. Wooden and his accomplices breached the exterior of a ministorage facility and broke through the drywall between several interior units. In doing so, the burglars exploited a common opportunity afforded by the unguarded building adjacent to Mr. Wooden's house. As any English speaker would describe the events of that evening, the burglaries were committed on the same occasion, not on "occasions different from one another." 18 U.S.C. § 924(e)(1). Mr. Wooden did not have an entire criminal career between the first ministorage unit and the third.

A. Offenses are committed on the same "occasion" if they arise from a common criminal opportunity

A statute must be interpreted "consistent with [its] ordinary meaning at the time Congress enacted [it]." *Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2070 (2018) (ellipsis and quotation marks omitted). As used in ordinary speech—both when the "occasions" clause was adopted and now—an "occasion" encompasses the events arising from a particular juncture of circumstances or common opportunity.

1. As Judge Cabranes has explained, the "primary" meaning of "occasion" embraces "the totality of circumstances giving rise to an opportunity." *United States* v. *Bordeaux*, 886 F.3d 189, 195 (2d Cir. 2018). The Latin from which it derives (*occasionem*) literally means a "falling of things towards each other" with respect to a common "opportunity, motive, [or] reason." *Oxford English Dictionary* "occasion" n.1 (2d ed. 1989) (*OED*) (punctuation

omitted). Contemporaneous dictionaries reflect this original sense. The first definition listed in the *OED*, for instance, is "A falling together or juncture of circumstances favourable or suitable to an end or purpose, or admitting of something being done or effected; an opportunity." *Id.* def. I.1.a. Other dictionary definitions similarly connote multiple events that are gathered together under conditions conducive to a common opportunity. See, *e.g.*, *id.* def. 2.a ("A juncture or condition of things … affording ground for an action or a state of mind or feeling"); *Webster's Ninth New Collegiate Dictionary* 816 (1988) ("opportunity or circumstance"); *The Random House Dictionary of the English Language* 1339 (2d ed. 1987) ("opportunity, or juncture"); *Webster's New International Dictionary* 1683 (2d ed. 1960) ("a juncture affording a ground or reason for something").

Events thus occur on the same "occasion" when they arise from or exploit the same circumstances. For instance, various shopping activities—trying on shoes at the shoe store, browsing a furniture sale, stopping for ice cream, purchasing clothing at a department store—would naturally be described, if part of a continuous trip to the mall, as having taken place on "the same occasion." Although these events may occur nearby and close in time to one another, physical or temporal proximity does not *define* the relationship between them; it merely illustrates or evidences the relationship. No proficient English speaker would dispute that visiting the first and last shop occurred on the same "occasion," even if they were separated in time or occurred at opposite sides of the mall. And though the trip might involve some non-shopping conduct—such as using the restroom midway through—it would not give rise to a new occasion unless it qualitatively changed the underlying circumstances.

Conversely, physically proximate or close-in-time events may nevertheless occur on "*different* occasions" if

they arise from distinct sets of circumstances. A stock trader whose activity is briefly interrupted by an unexpected interest-rate hike from the Federal Reserve might say that the day presented "two different occasions for profitable trading." The acts involved both before and after the announcement may be similar, but the intervening event creates a new dynamic that severs the continuity between the two sessions.

As these examples indicate, the features that tie different events together into the same "occasion" depend on context. The relevant conduct may have a clear primary focus (*e.g.*, a trip to the bowling alley), making it easy to see the continuity between sub-components (*e.g.*, bowling the first and third games). But even where activity is less focused on a singular purpose, such as in the shopping mall example, the common circumstances can tie together otherwise-disparate activities (*e.g.*, browsing for furniture and eating ice cream). Context also explains why some interceding events are significant enough to generate separate occasions. In the stock-trading example, where *all* of the trader's activity is presumed to be oriented towards the same general profit motive, something more is necessary for trades to be grouped together into "occasions." The interest-rate hike—creating a qualitatively different opportunity to be exploited—serves that role.

2. Other federal statutes, and the decisions of this Court, similarly use "occasion" in the primary sense just described: as a juncture of circumstances providing conditions that are favorable for related activities or events.

Consider the recidivism enhancement for one who commits a "serious violent felony," under which the defendant is subject to a life sentence if he "has been convicted" of two additional serious violent felonies "on separate prior occasions." 18 U.S.C. § 3559(c)(1)(A). In applying this provision, courts and the Government appropriately treat as a single "occasion" *all* convictions

arising from the same indictment and entered on the same day. See, *e.g.*, *Drayton* v. *United States*, 476 F. Supp. 3d 298, 303 (D.S.C. 2020) ("The government explains that Drayton's assault with intent to ravish and armed robbery convictions from 1967 constitute a single conviction for the purposes of § 3559(c) because they appear to have happened on the same day."). The indictment and sentencing hearing are the common circumstances from which the separate convictions result. Even if one conviction was entered before the court recessed for lunch and another afterwards, no one would say that the convictions were entered on "separate … occasions." The lunch break, though it came between the convictions, would not qualitatively change the circumstances of the sentencing.

Other examples point in the same direction. The National Flood Insurance program provides funding to mitigate damage to "repetitive loss structures," 42 U.S.C. § 4104c(d)(2), a term defined to include a building that, among other things, "has incurred flood-related damage *on 2 occasions*," *id.* § 4121(a)(7) (emphasis added). Congress clearly envisioned that each occasion would include all the damage originating from a particular storm. Only one occasion would be involved, for instance, where damage to a beach house resulted from multiple ocean waves generated by the same underlying meteorological conditions.

Or closer to home: "To allow the observance of authorized ceremonies," the Marshal of this Court may suspend any rules relating to the use of the Supreme Court building and grounds "as may be necessary *for the occasion*." 40 U.S.C. § 6136 (emphasis added). The Marshal's authority thus extends throughout the entire ceremony, including any downtime in between activities.

This Court's opinions have used the term in a similar sense, including when characterizing disparate criminal activities related by an underlying set of circumstances.

In *Kelly* v. *United States*, 140 S. Ct. 1565 (2020), the Court recently described the closure of traffic lanes on the George Washington Bridge, during the morning rush hour on four consecutive days, as a "singular occasion." *Id.* at 1570. Though each closure was separated from the others by a normal day's worth of traffic, the lane closures all arose to exploit the same politically motivated opportunity. See also, *e.g.*, *United States* v. *Bryant*, 136 S. Ct. 1954, 1963 (2016) ("*On one occasion*, Bryant hit his live-in girlfriend on the head with a beer bottle and attempted to strangle her.") (emphasis added); *Turner* v. *Arkansas*, 407 U.S. 366, 368-69 (1972) ("[T]he State has stipulated that the robbery and murder arose out of 'the same set of facts, circumstances, *and the same occasion*.'") (emphasis added).

3. Congress used the ordinary meaning of "occasion" here as well. The ACCA applies to a defendant with three prior convictions for certain qualifying offenses, but only where the Government proves that the offenses were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). The offenses accordingly must involve activities aimed at exploiting different criminal opportunities. This is not merely a requirement that the *offenses* be distinct—a condition that Congress imposed simply by requiring that there be three of them. Rather, the inquiry focuses on the circumstances of their commission: Did the admittedly separate criminal acts arise from a juncture of the same favorable conditions, or in exploitation of a common opportunity?

Answering that question will sometimes be difficult, but context provides useful guidance. Each ACCA predicate must be "a violent felony or a serious drug offense," terms that are further defined to include an array of crimes. *Id.* § 924(e)(1), (2)(A), (B). Since all of the relevant activity is criminal by definition, a new occasion may arise through the intervention of *non*-criminal conduct that is

significant enough to change the underlying dynamic. (Think of the burglar who is arrested and released, only to head back out for another burglary.) And since the ACCA imposes no limitation on the *type* of violent felony or drug offense—allowing an enhancement based on three prior offenses of the same kind—Congress could not have thought that similarity in means of commission, by itself, suffices for crimes to be committed on the same occasion. An extortionist who uses a single *modus operandi* to target unrelated victims, for instance, may still commit those offenses on different occasions.

The key point for present purposes, however, is that the question whether different ACCA predicates were "committed on occasions different from one another" must be answered by reference to the criminal opportunities that gave rise to each offense. Because that inquiry is holistic and circumstance-dependent, there is no reason to elevate one particular type of contextual clue above another. Although factors such as timing and location will often be helpful, they do not merit special consideration—much less per se treatment.

Indeed, treating any single factor as dispositive would be especially unwarranted here. Per se rules are appropriate only when they reach the right result in every case, *e.g.*, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) ("permanent occupation of land" constitutes "a taking *per se*"), or where an over-inclusive test serves the prophylactic purpose of protecting rights, *e.g.*, *Miranda* v. *Arizona*, 384 U.S. 436 (1966). But the underlying circumstances that give rise to a particular criminal opportunity are inherently varied and circumstance-dependent. And using an over-inclusive test to determine whether to apply ACCA's harsh sentencing enhancement would be the *opposite* of prophylactic—especially given that the Government bears the burden of proof.

B. The ACCA's structure, history, and purpose confirm that different "occasions" are separate criminal opportunities

As its name suggests, the Armed Career Criminal Act targets those who make a profession of lawbreaking. This title is "not merely decorative." *Begay* v. *United States*, 553 U.S. 137, 146 (2008) (citation omitted). Rather, the ACCA's requirements must be read so as to "effectuate Congress' purpose to punish only a particular subset of offender, namely, *career* criminals." *Id.* at 147 (emphasis added); see *Florida Dep't of Rev.* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) ("[S]tatutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute.") (citation and quotation marks omitted).

The "occasions" clause should accordingly be given its plain meaning: A career criminal is one who demonstrates a pattern of exploiting distinct criminal opportunities. The law's target is not the offender whose bad judgment in a single situation leads to multiple charges, but the seasoned professional whose extensive "criminal history" shows that he cannot be deterred from his chosen vocation by regular punishment. *Begay*, 553 U.S. at 146.

1. The "occasions" language has its origins in the Organized Crime Control Act of 1970 (OCCA), Pub. L. No. 91-452, 84 Stat. 922, which included a variety of "measures intended to strengthen the Federal effort to eliminate organized crime." *Organized Crime Control: Hearings on S.30 and Related Proposals Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 91st Cong. at 1 (1970) (*Organized Crime Hearings*). This legislation is remembered mostly for Title IX, the Racketeer Influenced and Corrupt Organizations Act. But more relevant here is Title X, which established sentencing procedures for a "Dangerous Special Offender," for whom the normal

statutory maximum was lifted and the judge could impose a sentence of up to 25 years.

To qualify as a "special offender," the defendant had to fall into one of three categories. As originally drafted, the first category applied if "on two or more previous occasions the defendant has been convicted … for [any felony], and for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony." *Id.* at 71. The bill also provided that "conviction for offenses charged in separate counts of a single charge or pleading, or in separate charges or pleadings tried in a single trial, shall be deemed to be conviction on a single occasion." *Id.* at 72.

Witnesses explained to Congress, however, that in requiring separate occasions for the defendant's prior "conviction[s]," the bill had "misplaced" its focus:

> [T]he requirement should be that the previous offenses *were committed on different occasions*, for it is repetition of criminality over a period of time that suggests the possibility of special danger, not the number of prosecutions that may be founded on a single episode involving multiple offenses.

Id. at 523 (Herbert Wechsler). The American Bar Association similarly expressed concern that the special offender provision was "capable of including defendants far beyond the scope of those engaged in racketeering activities." *Id.* at 556.

The ABA accordingly proposed adoption of its model Standards on Sentencing Alternatives. *Id.* at 544. Under the model rule for punishing "an habitual offender":

> The offender [must have] previously been convicted of two felonies committed on different occasions, and the present offense [must be] a third felony committed on an occasion different from the first two.

ABA, *Standards Relating to Sentencing Alternatives and Procedures* § 3.3(b)(1) (Approved Draft 1968). The rule thus reserved heightened punishment for offenders who, through "repeated criminality," showed they were "unlikely to respond to the correctional process." *Id.* cmt. b. Testimony surrounding the ABA's proposal, though brief, makes clear that everyone understood it would be *more* protective of defendants than the original language. See, *e.g.*, *Organized Crime Hearings* at 562 (ABA rule ensures increased punishment "only in the cases of dangerous habitual offenders"); *id.* at 572, 577. The U.S. Department of Justice agreed that the ABA proposal appropriately targeted "a recidivist offender." H.R. Rep. No. 91-1549, 1970 U.S.C.C.A.N. 4007, 4065.

Congress accepted the ABA's suggestion, and the enacted legislation applied to a defendant who, among other things, "has previously been convicted … for two or more offenses *committed on occasions different from one another*." OCCA § 1001(a) (codified at 18 U.S.C. § 3575(e)(1) (1976)) (emphasis added). Also notable for present purposes, the other two categories of "special offender" shared the legislative focus on career criminals: Subsection (e)(2) applied where the defendant's crime was "part of a *pattern* of conduct … which constituted a substantial source of his income, and in which he manifested special skill or expertise"; and subsection (e)(3) applied to crimes "in furtherance of a conspiracy … to engage in a *pattern* of conduct" in which the defendant played a specified leadership role. (Emphasis added.)

2. Congress enacted the ACCA to target the "most dangerous, frequent, and hardened offenders," who at the time were responsible for "a highly disproportionate amount of the violent crime plaguing America." S. Rep. No. 97-585, at 5, 20 (1982). The legislation was first introduced as a three-strikes law for committing armed robbery or burglary after two prior convictions for robbery

or burglary. S. 1688, 97th Cong. (1981). Congress decided that harsh federal punishment was necessary because existing state sentences were "insufficient" to close the "'revolving door'" on career criminals. S. Rep. No. 97-585, at 25; see *id.* at 32 (bill targets offenders "making a career of crime"); *id.* at 72 ("hardened career criminal" who has "'graduat[ed]' to a higher level of criminality"); *id.* at 81 ("beyond rehabilitation").

President Reagan vetoed the larger bill in which the three-strikes language was included, however, believing it afforded too much discretion to prosecutors and, by federalizing traditionally local crimes, might strain federal-state relations. See S. Rep. No. 98-190, at 3 (1983). Congress sought to address these concerns by tying the penalty to the preexisting federal ban on possession of firearms by a felon. See *id.* at 3, 13. At the same time, Congress reiterated that federal legislation was necessary to address the "revolving door" problem. *Id.* at 6.

As ultimately enacted in 1984, the ACCA imposed a mandatory-minimum sentence of fifteen years for unlawful possession of a firearm, if the defendant had "three previous convictions … for robbery or burglary, or both," under state or federal law. Armed Career Criminal Act of 1984, Pub. L. No. 98-473, § 1802, 98 Stat. 2185. Two years later, Congress amended the provision to apply where the three prior convictions were "for a violent felony or a serious drug offense, or both." Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402(a), 100 Stat. 3207-39.

3. As originally enacted, the ACCA did not expressly distinguish a defendant whose prior offenses were committed on *separate* occasions from one who had committed multiple crimes on the *same* occasion. Federal prosecutors accordingly argued that even a multi-count conviction arising from a single criminal episode should qualify as multiple predicates for ACCA purposes. Most notable is

United States v. *Petty*, 798 F.2d 1157 (8th Cir. 1986), where the Government secured an enhanced ACCA sentence against the defendant, Samuel Petty, based on his prior conviction under "a single indictment of six counts of robbery stemming from an incident during which he robbed six different people." *Id.* at 1159.

The robbery incident—in which a group of armed men held up a Manhattan diner—was infamous because one of the perpetrators was the activist H. Rap Brown.[3] The robbers forced everyone to the floor, then ordered them to "'take off your jewelry and your wallets.'" Add. 15a. Next, as the District Attorney described the scene:

> While [one of the gunmen] remained at the front of the barroom, Petty [and another gunman] began to pick their way among their prostrate victims, gathering money, jewelry, and other valuables in a black bag.

Ibid.; see Add. 15a-16a. Petty and his confederates were charged under New York law "with six counts of robbery in the first degree with respect to six individuals," and Petty was convicted on all six charges. Add. 11a-12a.

When Petty was caught with a gun in Missouri years later, the Government argued that the six robbery convictions arising from the diner incident subjected him to an ACCA sentence. See 798 F.2d at 1159-60. The Eighth Circuit agreed, noting that "Petty's conduct resulted in loss to six different victims," and therefore "could have been charged under six separate indictments." *Id.* at 1160.

In response to Petty's certiorari petition, however, the Solicitor General confessed error. See Add. 24a-32a.

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[3] See, *e.g.*, James F. Clarity, *Rap Brown Wounded Here In Shootout After Holdup*, N.Y. Times (Oct. 17, 1971), https://nyti.ms/3x477w9.

He acknowledged that the ACCA lacked language found in the Organized Crime Control Act—and in another recidivist statute enacted shortly afterwards, see Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236 (codified at 21 U.S.C. § 849(e)(1) (1976))—which expressly required that predicate convictions be for offenses "committed on occasions different from one another." Add. 25a. But despite this "omission," the Solicitor General explained, "the legislative history of the Armed Career Criminal Act of 1984 makes it appear that both Congress and those supporting the legislation, including the Department of Justice, did not intend that the penalty provision would apply more broadly than in the case of the other federal enhanced penalty statutes." Add. 26a.

Among other things, the Solicitor General pointed to "[t]he title of the Act," as well as to committee reports indicating "that the legislators intended that prior convictions would be based on multiple criminal episodes that were distinct in time." *Ibid.* He also catalogued numerous references, "throughout the legislative reports and floor debates," making clear that Congress did not intend "to count previous convictions on multiple felony counts arising from a single episode," including references to:

> "career criminals," "repeat offenders," "habitual offenders," "recidivists," "revolving door" offenders, "three time loser[s]," "third-time offender[s]," "defendants convicted three times," and to defendants committing a "third or subsequent robbery[.]"

Add. 27a (brackets omitted); see Add. 27a n.6 (collecting citations). And the Solicitor General highlighted testimony from the Assistant Attorney General:

> These are people who have demonstrated … that locking them up and letting them go doesn't do any good. They go on again, you lock them up, you let them go, it doesn't do any good, they are back for a third time. At that juncture, we should say, "That's it; time out; it is all over."

Add. 29a (quoting *Armed Career Criminal Act: Hearing on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 98th Cong. 64 (1984)).

Given this overwhelming evidence of congressional intent, the Solicitor General concluded that "the court of appeals was in error in construing the statute to reach multiple felony convictions arising out of a single criminal episode." Add. 30a. This Court vacated and remanded in light of the confession of error. *Petty* v. *United States*, 481 U.S. 1034 (1987). On remand, the Eighth Circuit vacated Petty's sentence, agreeing with the Solicitor General that the ACCA "was intended to reach multiple criminal episodes that were distinct in time, not multiple felony convictions arising out of a single criminal episode." *United States* v. *Petty*, 828 F.2d 2, 2 (1987).

4. Congress responded to *Petty* by amending the ACCA to add language from the Organized Crime Control Act requiring that predicate convictions be for offenses "committed on occasions different from one another." Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7056, 102 Stat. 4402. As then-Senator Biden explained the amendment:

> The proposed amendment clarifies the armed career criminal statute to reflect the Solicitor General's construction and to bring the statute in conformity with the other enhanced penalty provisions cited above. Under the amendment, the three previous convictions would have to be for offenses "committed occasions different from one another." Thus, a single multi-count conviction could still qualify where the

> counts related to crimes committed on different occasions, but a robbery of multiple victims simultaneously (as in *Petty*) would count as only one conviction. This interpretation plainly expresses that concept of what is meant by a "career criminal," that is, a person who over the course of time commits three or more of the enumerated kinds of felonies and is convicted therefor. It is appropriate to clarify the statute in this regard, both to avoid future litigation and to insure that its rigorous sentencing provisions apply only as intended in cases meriting such strict punishment.

134 Cong. Rec. S17,370 (daily ed. Nov. 10, 1988).

The ACCA's history thus tells a consistent story: From the start, Congress maintained a laser-like focus on *habitual* offenders who made a *career* of exploiting *distinct* criminal opportunities. When courts began treating multi-count convictions from the same episode as separate predicates, Congress responded by adding the "occasions" language, which was copied from another statute that sought to close the revolving door on repeat offenders.

C. Mr. Wooden's ministorage burglaries all arose from the same criminal opportunity

Reading the phrase in accordance with its plain meaning—and consistent with the ACCA's structure, history, and purpose—Mr. Wooden's ministorage burglary offenses were not "committed on occasions different from one another." They arose from a single episode of continuous criminal activity exploiting a common opportunity; no intervening change in circumstances made his entry into the first storage unit any different from his entry into the second or third (or tenth).

1. Several features of the ministorage break-in illustrate that all ten of Mr. Wooden's burglaries resulted from a single criminal opportunity:

- The burglaries occurred wholly within a single structure, the ministorage facility "located at 100 Williams Road." J.A. 26-30. The opportunity to break into the facility evidently arose in part because Mr. Wooden's residence was "adjacent" to it. Add. 6a.
- The burglaries were committed on the same evening. J.A. 26-30. No chronology among the burglaries is alleged, nor is it possible to discern the order from the criminal conduct involved. Indeed, nothing suggests that the order even would have been *relevant* to the opportunity being exploited.
- The burglaries all involved the same personnel. *Ibid.* No distinction between the burglars' roles in the different offenses is apparent, suggesting unity with regard to the underlying circumstances. See Add. 6a. ("Mr. William Dale Wooden, along with [the other defendants] were all involved to different extents").
- The crimes unfolded in a manner that evidences the execution of a single plan: The burglars breached the exterior of the facility and then "burrowed through … from unit to unit." *Ibid.*; see J.A. 32 ("forcibly entering said building and crushing the interior drywall of several rooms").
- There is no indication of an intervening event while the burglaries were being executed that might have changed the opportunity—no hint of a meaningful break in the action; no sign that any of the burglars left the facility mid-crime; and certainly no arrest or other intervention by law enforcement. To the contrary, the unbroken execution suggests that the dynamic remained constant from start to finish.

Finally, imagine trying to describe the events of that evening in plain language. No one would say: "On *one* occasion, Mr. Wooden and his associates burglarized a unit of the ministorage facility. On a *different* occasion, they

burglarized a second unit of the facility. On still *another* occasion…," and so on, until the tenth. It is far more natural to refer to that evening as "an occasion on which Mr. Wooden and his associates burglarized ten units of the facility." See Add. 4a (attorney at burglary plea hearing stating that the burglaries "all stemm[ed] from a mini warehouse, *one event*, with a number of units in that mini warehouse") (emphasis added).

2. Other features of Mr. Wooden's 1997 conviction reinforce the conclusion that the ministorage burglaries were part of a single criminal episode.

First, consider that the State of Georgia charged Mr. Wooden and his confederates in a single indictment for all ten counts of burglary, with each count nearly a verbatim copy of the others. J.A. 26-30. As the "occasions" language was originally drafted in the Organized Crime Control Act—under which "conviction for offenses charged in separate counts of a single charge or pleading … shall be deemed to be conviction on a single occasion," *Organized Crime Hearings* at 71—there is no question that the burglaries would have been considered as having occurred "on a single occasion." And as noted, the final version of that language, which was eventually incorporated into the ACCA, was intended to be *more* defendant-friendly. See p. 20, *supra*.

But the inclusion of all the ministorage burglaries in a single indictment is significant in a more fundamental respect: State law *required* them to be charged that way. In Georgia, where "several crimes *arising from the same conduct* are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they *must be* prosecuted in a single prosecution." Ga. Code. Ann. § 16-1-7(b) (emphasis added).

Thus, had Georgia initially elected to prosecute Mr. Wooden only for his entry into the first storage unit,

it could not have prosecuted him later for entering the other nine, since all ten charges "ar[ose] from the same conduct." See *Morgan* v. *State*, 469 S.E.2d 340, 342 (Ga. App. 1996) (separate drug offenses were required to be charged together under § 16-1-7(b) where they "occurred on the same date and very close in time, involved the purchase or the possession for sale of the same type of drugs, and were part of an ongoing chain of events arising directly from the confidential informant's purchase of drugs"). That statutory requirement reflects double jeopardy principles. See *Griffin* v. *State*, 464 S.E.2d 371, 374 (Ga. 1995). Whatever the merits of importing preclusion principles into the criminal context as a matter of federal constitution law, cf. *Currier* v. *Virginia*, 138 S. Ct. 2144, 2152-56 (2018) (plurality op.), if criminal offenses *must be* indicted together under state law because the conduct is so closely related, surely that confirms that the conduct all occurred on the same "occasion."

In fact, the prosecution did not have to charge the ministorage burglaries as separate crimes at all. The entire episode could have been charged as a single offense: Under Georgia law, the victim of a burglary of a rental unit can *either* be the property owner (the "general" occupant) *or* the renter (the "special" occupant). See *Green* v. *State*, 213 S.E.2d 60, 61 (Ga. App. 1975). The prosecutor's decision to charge Mr. Wooden's burglaries as ten separate offenses based on the units' renters, rather than as a single offense based on the structure's owner, thus was optional. And here, literally nothing turned on the prosecutor's decision. The sentence for each burglary offense (eight years) was the same, and the judge ordered them to run concurrently, J.A. 36, demonstrating that the judge thought the sentence for each one of the offenses was sufficient to reflect all of Mr. Wooden's criminal conduct.

In sum, the ministorage burglaries (1) would have been treated as a "single occasion" under the original, less-defendant-friendly "occasions" language; (2) arose "from the same conduct," and thus had to be combined into a single indictment under state law; (3) could have been prosecuted under a single charge that covered all the conduct; and (4) were punished no differently than they would have been under a single charge. Those features make the plain-language interpretation of the "occasions" clause an even clearer fit here.

II. OFFENSES ARE NOT COMMITTED ON "OCCASIONS DIFFERENT FROM ONE ANOTHER" MERELY BECAUSE THEY ARE COMMITTED SEQUENTIALLY RATHER THAN SIMULTANEOUSLY

At the Government's urging, the Sixth Circuit determined that Mr. Wooden's burglaries were committed on different occasions because it was "possible to discern the point at which Wooden's first offense for entering or remaining in a building was completed and the subsequent point at which his second offense began." J.A. 23. Under that approach, crimes automatically take place on "occasions different from one another" if they are committed *sequentially*—even moments apart—rather than *simultaneously*. The Sixth Circuit accordingly dismissed the relevance of other contextual clues showing that Mr. Wooden's ministorage burglaries arose from a common criminal opportunity. See *ibid.* ("Whatever the contours of a 'mini' warehouse, Wooden could not be in two (let alone ten) of them at once.").

The Sixth Circuit's interpretation finds no basis in the ACCA's text, structure, or purpose; it creates numerous oddities and absurdities in the statute's application; and it vastly expands the statute's reach beyond any meaningful limit. Worse still, the courts that employ a simultaneity test do not even do so consistently, abandoning the test in a significant percentage of cases. The far better approach

is to honor the statute's plain meaning, and to do so consistently: Congress did not turn someone like Mr. Wooden—who exploits a single opportunity at a single building on a single night of continuous criminal activity—into a career criminal subject to a fifteen-year mandatory-minimum sentence.

A. The "occasions" clause cannot be read to enact a simultaneity test

Under the test applied below, offenses that occur sequentially, even moments apart, are automatically treated as separate ACCA predicates; only offenses that overlap in time are eligible to have been committed on the same "occasion." But the Sixth Circuit did not explain why that is the best reading of the "occasions" clause—or even a permissible one. Indeed, the textual foundations for the test applied below (and by likeminded courts of appeals) are essentially nonexistent.

1. The word "occasion" can sometimes refer to "an occurrence that takes place at a particular time." *Bordeaux*, 886 F.3d at 195. Yet that is very much a subsidiary definition. See *ibid.* ("Th[e] broader sense [*i.e.*, the juncture of circumstances] is the primary definition of the word"). In the *OED*, for instance, the point-in-time definition is the sixteenth (in section III.b.8); in *Webster's Unabridged*, it is definition 3(b).

Even when "occasion" is used in this ancillary sense, moreover, it connotes a time that is not merely *distinct* from other times, but also qualitatively *different* with respect to some underlying circumstance. The full entry in the *OED* is:

> 8. A particular casual occurrence or juncture; a case of something happening; the time, or one of the times, at which something happens; a particular time marked by some occurrence or by its special character.

The time of day thus is not referred to as an "occasion" unless it has an underlying significance—that is, unless it is an occasion *for* something particular to occur. 5:00 pm is not an occasion; a 5 o'clock wedding is.

2. Other textual clues also cut against reading the "occasions" clause as a mechanism for distinguishing offenses committed simultaneously from those committed sequentially. Start with the statute's title: The Armed Career Criminal Act. The essence of a "career" is dedication to an endeavor across different chapters of life. See *Webster's New Collegiate Dictionary* 166 (8th ed. 1980) ("a profession for which one trains and which is undertaken as a permanent calling"). That fits with the plain-language definition of "occasion," since a person who reoffends after a change of circumstances—such as an intervening arrest—thereby demonstrates an appreciably greater level of commitment to lawbreaking as way of life.[4] But the same is not true where multiple offenses exploit a single criminal opportunity, even if they are committed sequentially rather than simultaneously. See *Yates* v. *United States*, 574 U.S. 528, 539-40 (2015) (plurality op.) (statutory titles are "[f]amiliar interpretive guides" that "supply cues" about meaning); *id.* at 552 (Alito, J., concurring) ("Titles can be useful devices to resolve doubt about the meaning of a statute.") (quotation marks and citation omitted).

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[4] Congress directed the Sentencing Commission to adopt guidelines that provide "a substantial term of imprisonment" for defendants with two or more prior felony convictions "for offenses committed on different occasions." 28 U.S.C. § 994(i)(1). To implement that directive, the Commission counts "offenses contained in the same charging document" as a single offense—unless they were "separated by an intervening arrest," in which case they are counted separately. U.S.S.G. § 4A1.2(a)(2). Some version of the intervening-arrest principle has existed since the relevant guideline was adopted. See U.S.S.G. § 4A1.2 n.3 (1987).

The "occasions" clause is also precisely phrased: It refers not to crimes "committed on different occasions," but rather to crimes committed "on occasions *different from one another*." Congress would not have used that phrasing if "occasions" merely denoted different times—since, by definition, all times are different from one another. By contrast, it makes perfect sense to speak of circumstances or opportunities "different from one another," which conveys the added sense that those circumstances or opportunities must be different in kind or quality.

Indeed, when Congress intends to distinguish events that are simultaneous from those that are distinct in time, it knows how to do so. Under federal sentencing law, for instance, "[m]ultiple terms of probation, whether imposed *at the same time or at different times*, run concurrently with each other." 18 U.S.C. § 3564(b) (emphasis added); see also, *e.g.*, 17 U.S.C. § 114(j)(7) ("If an entity offers both interactive and noninteractive services (*either concurrently or at different times*), the noninteractive component shall not be treated as part of an interactive service.") (emphasis added). If Congress wanted the ACCA to embody a simultaneity test, either it would have imposed the enhancement on a defendant with three qualifying offenses "committed at different times," or else it would have grouped together multiple offenses "committed at the same time."

3. The extensive legislative history—which elucidates both Congress's reasons for enacting the sentencing enhancement generally, and for adopting the "occasions" clause in particular—points in the same direction. As detailed above, the ACCA targets those who have shown themselves to be dedicated to a career in crime. See pp. 20-21, *supra*.[5] That purpose is consistent with imposing

[5] See, *e.g.*, H.R. Rep. No. 98-1073, at 2 (1984) ("chronic offenders"); S. Rep. No. 98-190, at 2 ("hardened and frequent offenders");

an enhanced sentence on a defendant who committed an offense under one set of circumstances; then, facing a *different* set of circumstances, offended again; then, facing still *another* set of circumstances, did so for a third time. Congress's goal, however, has no connection to the Sixth Circuit's simultaneity test.

Nor is the Sixth Circuit's test compatible with Congress's reasons for adopting the "occasions" clause. The clause's path—from an ABA model rule for "habitual offender[s]," to the Organized Crime Control Act, to the ACCA—is described at length above and is not repeated here. See pp. 18-25, *supra*. The incompatibility of that story with the Sixth Circuit's interpretation is self-evident. But two additional points are worth emphasizing.

First, the Sixth Circuit's simultaneity requirement cannot be reconciled with the origins of the "occasions" clause in the Organized Crime Control Act. Consistent with that law's title and purpose, all three categories of "special offender" it created were hardened criminals. See 18 U.S.C. § 3575(e)(1)-(3) (1976). Applying the Sixth Circuit's interpretation of the "occasions" language to subsection (e)(1)—broadening its sweep to include all non-simultaneous crimes—would make that provision over-broad and a serious mismatch with its far more selective neighbors. See *id.* § 3575(e)(2) ("part of a pattern of conduct … which constituted a substantial source of his income, and in which he manifested special skill or expertise"); *id.* § 3575(e)(3) ("committed … in furtherance of a

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id. at 5 ("repeat offenders"); S. Rep. No. 97-585, at 5 ("habitual offenders"); *id.* at 25 ("revolving door"); 130 Cong. Rec. S1560 (daily ed. Feb. 23, 1984) (Sen. Kennedy) ("active group of habitual offenders"); 130 Cong. Rec. H10550 (Oct. 1, 1984) (Rep. Hughes) ("repeat offenders"); 127 Cong. Rec. 22,670 (1981) (Sen. Specter) ("recidivists").

conspiracy … to engage in a pattern of conduct" in which the defendant played a specified leadership role).

Second, the Sixth Circuit's approach is irreconcilable with the Solicitor General's confession of error in *Petty*, which led to the "occasion" clause's addition to the ACCA. Samuel Petty robbed his victims one after another. Add. 15a ("Petty [and another gunman] began to pick their way among their prostrate victims, gathering money, jewelry, and other valuables in a black bag"). Yet the Solicitor General repeatedly referred to the diner robbery as resulting in "multiple felony convictions arising out of a *single criminal episode*." Add. 31a. (emphasis added); see Add. 27a ("single criminal episode"); Add. 25a ("single criminal episode"). There is no indication that the Solicitor General was interested in whether it was "possible to discern the point at which [Petty's] first offense … was completed and the subsequent point at which his second offense began." J.A. 23. Nor, in the Solicitor General's extensive discussion of the ACCA's legislative history, did he point to a single legislator who was focused on that kind of metaphysical question.

In a prior decision, the Sixth Circuit argued that its rule is consistent with the Solicitor General's confession of error because "*Petty* expressly recognized the distinction … between convictions for simultaneous robberies and convictions for robberies distinct in time." *United States* v. *Brady*, 988 F.2d 664, 668 n.5 (1993) (en banc) (citation omitted). That is incorrect. To be sure, the Solicitor General at one point stated that Petty's sentencing enhancement was "based on his robbery of six individuals at a restaurant at the same time." Add. 25a. In context, however, it is clear that the Solicitor General was using the phrase "at the same time" interchangeably with "[in] a single criminal episode." *Ibid.* Indeed, the Solicitor General cited, as support for his position, numerous state court decisions "construing similar enhanced sentencing

statutes," Add. 30a n.8, and several of those decisions are irreconcilable with a simultaneity test. See, *e.g.*, *State* v. *Tavares*, 630 P.2d 633, 635 (Haw. 1981) (rejecting enhancement based on separate treatment for two "burglaries which the appellant had committed on December 30, 1974"); *Rezin* v. *State*, 596 P.2d 226, 227 (Nev. 1979) (rejecting enhancement based on separate treatment for rape and robbery).

4. The courts of appeals that have interpreted the "occasions" clause as embodying a simultaneity test have sometimes justified doing so on the ground that where offenses occur sequentially, the defendant "was free to cease and desist from further criminal activity" after the first offense. *United States* v. *Hudspeth*, 42 F.3d 1015, 1022 (7th Cir. 1994) (en banc); see, *e.g.*, *Brady*, 988 F.2d at 669 (defendant "could have decided that the one [offense] he had committed was enough for the evening"). These courts have argued that an enhanced sentence is appropriate because if "the defendant had a meaningful opportunity to desist activity before committing the second offense," then the subsequent crimes "reflect distinct aggressions." *United States* v. *McCloud*, 818 F.3d 591, 595 (11th Cir. 2016) (punctuation omitted); see J.A. 24. This argument fails on multiple levels.

As an initial matter, the argument is entirely unmoored from the statutory text. The ACCA does not speak of "distinct *aggressions*," but of "*occasions* different from one another." Nor is there a connection between the word "occasion" and the concept of being "free to cease and desist" from further activity. See *Hudspeth*, 42 F.3d at 1022. A speaker is "free to cease and desist" after every word spoken in a conversation, but that does not turn each word into its own occasion.

Focusing on whether the defendant was "free to cease and desist" from further criminal activity after his first offense also conflates the "occasion" inquiry with the

distinct question whether separate offenses were appropriate at all. To decide whether criminal activity can be broken into multiple offenses—the so-called "unit of prosecution" question—courts generally ask "whether criminal acts are separate or part of the same crime … us[ing] a 'fork in the road' test." *United States* v. *Richardson*, 167 F.3d 621, 627 (D.C. Cir. 1999) (citation omitted). Under this test, "[a]cts are separate where there was an appreciable interval—albeit quite brief—between the two criminal episodes which showed that the defendant had reached a 'fork in the road' or had acted in response to a 'fresh impulse.'" *Ibid.* (citation and quotation marks omitted).

That the defendant's conduct can give rise to multiple offenses, however, says nothing about whether those offenses were committed on the same "occasion." Indeed, the presence of multiple offenses is the *starting point* for the ACCA inquiry; the "occasions" clause must set a different threshold. And there are good reasons to think that the "occasions" threshold must be far higher.

When related criminal conduct is broken into multiple offenses, the sentencer usually has discretion to mitigate the harshness of that result by imposing concurrent sentences for those offenses. See *State* v. *Riggs*, 799 S.E.2d 770, 776 (Ga. 2017) ("Coextensive with their ability to impose a sentence that fits the crime, trial courts have great discretion in determining whether to run sentences concurrently or consecutively."). That is precisely what happened with Mr. Wooden's ministorage burglaries: The judge sentenced him to eight years for each burglary charge, but also ordered each sentence to run concurrently with the others, for a total of eight years.

Under the ACCA, by contrast, once the sentencing judge determines that the enhancement applies, the statutory minimum of fifteen years is *mandatory*. See *Harris* v. *United States*, 536 U.S. 545, 570 (2002) (Breyer, J., concurring in part and in the judgment) ("[S]tatutory

mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency."). The severity of that fact, of course, counsels in favor of adopting a defendant-friendly construction of the text, if at all possible, as a matter of lenity. See pp. 45-46, *infra*. But more specifically, it means that the test for whether multiple offenses merit an ACCA enhancement must be far more exacting than the test for whether multiple offenses can be charged at all. Whether the defendant was "free to cease and desist" from further crimes cannot be the test for both.

Finally and in any event, the court of appeals' argument fails even on its own terms. Even when multiple offenses overlap in time, the offender is "free to cease and desist" from committing more than one unless the offenses all begin and end at *exactly* the same points. A robber (like Petty) is free not to take the second victim's wallet; a drug dealer is free not to sell to the second purchaser. See, *e.g.*, *United States* v. *Willoughby*, 653 F.3d 738, 740-41 (8th Cir. 2011) (separate drugs sales overlapped in time but were completed sequentially). The atextual "free to cease and desist" test is not even a good match with the atextual simultaneity test.

B. The simultaneity test creates numerous anomalies and absurdities

In addition to being textually untenable, the Sixth Circuit's approach is a practical nightmare. It turns on fine-grained, arbitrary distinctions that are irrelevant under state law and have nothing to do with culpability or any other congressional aim. As a result, details that are otherwise meaningless in the underlying prosecutions end up producing outsized consequences for federal defendants sentenced years or decades later.

1. ***Timing***. The simultaneity test elevates the question of timing—when did one crime end and another begin?—to a central determinant of the ACCA's applicability. That question, however, has little to do with culpability or criminal careerism.[6] And since timing is normally not an element of the offense, see *Wharton's Criminal Procedure* § 511 (12th ed. 1975), the simultaneity test takes what is typically a minor and uncontested issue in the underlying criminal prosecution and transforms it into a high-stakes determination, with momentous consequences for a later federal sentence that may be imposed years or even decades afterward. See *Mathis* v. *United States*, 136 S. Ct. 2243, 2253 (2016) ("At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law").

A simultaneity test also draws arbitrary distinctions based on whether the crime is a so-called "point-in-time" or "instantaneous" offense (like battery), see *Johnson* v. *United States*, 559 U.S. 133, 137 (2010), or instead is a "continuing" offense (like kidnapping), see *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 281 (1999) ("A kidnaping, once begun, does not end until the victim is free."). This distinction has nothing to do with the ACCA's goals, and has no connection to the plain-language concept of a criminal "occasion." Yet defendants who commit continuing offenses—which are more likely to overlap in time—fare significantly better under a simultaneity test. Complicating matters further, some offenses have both incarnations: Burglary, for instance, can involve the "enter[ing]"

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[6] In one case, the Government acknowledged that under the simultaneity test, "if a gunman entered a room and murdered seven people in the room … it would probably be one occasion." *Hudspeth*, 42 F.3d at 1022 n.12. But "if the gunman entered seven different rooms and murdered one person in each room," that would count as seven different occasions in light of "the intervening time as the gunman marched from room to room." *Ibid.*

of a structure (instantaneous) or "remain[ing] within" it (continuing). Ga. Code Ann. § 16-7-1(a). And then there are offenses that have no clear temporal boundaries. For instance, what are the precise beginning and end points for the "manufacture" of a large batch of drugs? See 21 U.S.C. § 841(a)(1), (b)(1)(A).

Perversely, the simultaneity test actually treats some defendants less harshly if they keep their crimes going for *longer*. The kidnapper who lets his victim go before fleeing from the police, for instance, would be worse off under the simultaneity test: Better to take the victim along, so that the kidnapping overlaps with any further crimes committed during the attempted escape.

This is not a hypothetical concern; close-in-time offenses are quite common. In *United States* v. *Barbour*, 750 F.3d 535 (6th Cir. 2014), the defendant and his associates robbed a motorist parked in front of a convenience store, and then the defendant "proceeded inside and robbed the store." *Id.* at 538. The district court determined that the two robberies were different "occasions," but the Sixth Circuit reversed. Asking whether it was "possible to discern the point at which the first robbery was completed and when the second offense began," the Sixth Circuit decided that it was not: The record did not indicate "whether the robbery outside the store concluded before the robbery inside the store began." *Id.* at 540-41; see *ibid.* ("Nothing in the record refutes Barbour's argument that the threat to the motorist could have continued beyond the point where the robbery of the store clerk began."). But if the defendant and his associates had freed the motorist *earlier*—"before the robbery of the store began"—the two robberies would have counted as separate predicates. *Ibid.* Whether or not *Barbour* reached the right ultimate result regarding the ACCA's applicability, Congress could not have intended for longer robberies to result in shorter sentences.

2. ***Ownership***. The simultaneity test can also elevate the importance of property distinctions, even in situations where they make no difference under state law. For many crimes, the unit of prosecution can be determined multiple ways depending on the ownership interests involved. Under Georgia law, as noted above, "the ownership of the place burglarized may be laid in either the general or special occupant." *Green*, 213 S.E.2d at 61. Depending on whether sub-units within a single structure are separately owned or rented, therefore, a burglary will sometimes generate one offense, and sometimes multiple offenses. See *McCulloch* v. *State*, 849 S.E.2d 795, 798 (Ga. App. 2020). Yet the offender will not necessarily know about the relevant property interests at the time of the crime. And even where criminal activity generates multiple state-law charges based on separate ownership interests, the offenses will typically be viewed as closely related, and thus give rise to concurrent sentences—as Mr. Wooden's case illustrates.

Although these issues may have no practical effect in state prosecutions, they can make all the difference under the simultaneity test, where each non-simultaneous offense is a new occasion. Under the approach advocated by Mr. Wooden, by contrast, property interests affect the outcome only when they bear on whether separate offenses arose from qualitatively different criminal opportunities. A circumstance-focused approach thus places significance on aspects of the crime that are known to the defendant and likely to receive attention in the underlying criminal prosecution.

3. ***Accomplices***. The simultaneity test also creates arbitrary distinctions between crimes committed by individuals and those committed by groups. Modern criminal law "uniformly" treats principals and accomplices the same, such that all participants are responsible for "the criminal activities" of their confederates. *Gonzales* v. *Duenas-Alvarez*,

549 U.S. 183, 189 (2007); see, *e.g.*, 18 U.S.C. § 2. As a result, when courts apply the simultaneity test, they must ask not merely whether *the defendant's* conduct in committing the first offense overlapped with his *own* conduct in committing the second, but whether the offenses overlapped taking into account the conduct of *all* perpetrators.

A good example is *United States* v. *Tucker*, 603 F.3d 260 (4th Cir. 2010), which involved "two break-ins at a mini warehouse that occurred minutes apart." *Id.* at 264. The district court treated the two burglaries as separate ACCA predicates, but the Fourth Circuit disagreed. The record indicated that the defendant's burglaries were committed with an accomplice, but did not disclose whether the defendant "*himself* entered at least two storage units" in succession, or instead the perpetrators each entered a different unit at the same time. *Id.* at 265-66. "Without evidence that the first crime ended before the second crime began," the Fourth Circuit explained, "we cannot determine whether Tucker committed the two burglaries sequentially on separate occasions or simultaneously with the aid of his accomplice." *Id.* at 266.

Tucker is not an outlier: The presence of accomplices is often determinative under the simultaneity test where crimes are committed in close succession. In *United States* v. *Murphy*, 107 F.3d 1199 (6th Cir. 1997), the defendant and his accomplices burgled both units of a duplex. While his accomplices moved on to the second unit, the defendant stayed behind in the first unit to guard its occupant. *Id.* at 1208. Under those circumstances, the Sixth Circuit explained, "there exists no principled way of distinguishing between the end of the first burglary and the beginning of the second." *Id.* at 1210. As in *Tucker*, the presence of accomplices saved the defendant from an ACCA enhancement. See also, *e.g.*, *Barbour*, 750 F.3d at 541 ("The actions of Barbour's co-defendants directly affect whether these robberies were separate episodes").

And indeed, the more people involved in a crime, the harder it will typically be to determine when the criminal conduct underlying the first offense ended and that of the next offense began. Yet Congress could not have intended for the ACCA to be *less* applicable to criminals working in groups than to solo offenders.

Even focusing just on the defendant's own conduct, moreover, the presence of accomplices significantly complicates the simultaneity inquiry. Because the legal distinction between principals and accomplices has been abolished, the issue is rarely relevant to the underlying prosecution. Whether the defendant is guilty as a principal or an accomplice normally does not have to be charged in the indictment, admitted in a guilty plea, or proven at trial. See, *e.g.*, *Davis* v. *State*, 765 S.E.2d 336, 338-39 (Ga. 2014) (defendant may be indicted as a principal but convicted and punished upon showing that he was an accomplice); see also Ga. Code Ann. § 16-2-21. As a result, the defendant's precise role in the offense may be impossible to determine later.

This case illustrates the point. The ministorage indictment recited, in copy-and-paste fashion, that Mr. Wooden and his confederates "enter[ed]" each of the ten units. J.A. 22-33. No distinction was made between the conduct of the different offenders—presumably because the prosecution did not know (or care) who did what. See Add. 6a. (prosecutor stated at plea hearing that "Mr. William Dale Wooden, along with [the other defendants] were all involved to different extents breaking into the mini warehouse"). This lack of specificity, though perfectly understandable given the issue's irrelevance under state law, now exacts a hefty price.[7] See *Mathis*, 136 S. Ct. at

[7] At his federal sentencing, Mr. Wooden argued that the record was insufficient to determine whether he personally had entered each unit:

2253 ("Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.").

C. The simultaneity test cannot be applied consistently

Given its atextual moorings, and the absurdities it produces, the simultaneity test would be bad enough even if it could be applied consistently. But it cannot: The test falls apart for crimes of significant duration, such as long-lasting conspiracies. As a consequence, even the courts that otherwise embrace the simultaneity test abandon it in a significant percentage of cases.

The Eighth Circuit, for instance, normally applies the simultaneity test to determine whether offenses were committed on different "occasions." See *United States* v. *Humphrey*, 759 F.3d 909, 910-12 (2014). But the court has decided that the test is an "awkward fit for analysis in the conspiracy context," given that conspiracies may last for months or even years. *United States* v. *Melbie*, 751 F.3d 586, 589 (2014). Instead, when a defendant's prior offenses include "an underlying conspiracy conviction that overlaps with a separate conviction for conduct that occurred as a punctuated event within that conspiracy," the court instead asks a different question: whether the non-conspiracy offense "formed a separate unit within the

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> There were four individuals in this. … [O]ne possibility is that Mr. Wooden came late to the burglary, after they drug everything out in the hallway and helped them load it in the truck, and he'd still be … convicted of burglary [f]or helping with these other individuals to burglarize all these units. And maybe he never went into any of the units.

J.A. 55-56. The district judge rejected that argument based on the indictment's boilerplate recitation that Mr. Wooden had entered each unit. J.A. 58. On appeal, the Government did not dispute that the burglaries would have counted as a single occasion if Mr. Wooden had merely helped load the truck while his confederates entered the units. See Gov't C.A. Br. 19-20.

whole." *Ibid.* (citation omitted). Thus in *Melbie*, the court treated the defendant's drug-possession and conspiracy convictions as distinct predicates, even though "the possession offense was his final act of involvement with the conspiracy." *Id.* at 590.

Like the Eighth Circuit, other courts of appeals that normally apply the simultaneity test switch to something like a "separate unit" standard when a conspiracy or other long-duration crime is involved. See *United States* v. *Torres*, 961 F.3d 618, 622 (3d Cir. 2020) (treating state drug-possession offenses as distinct from a federal distribution conspiracy, even though the "state drug possession offenses were part of the federal drug distribution conspiracy"); *United States* v. *Godinez*, 998 F.2d 471, 472-73 (7th Cir. 1993) (affording separate treatment to robbery committed while kidnapping was in progress); see also, *e.g.*, *United States* v. *Pham*, 872 F.3d 799, 802-03 (6th Cir. 2017); *United States* v. *Longoria*, 874 F.3d 1278, 1281-82 (11th Cir. 2017). The result in each of these cases was adopted at the Government's urging.

Of course, the meaning of the "occasions" clause cannot depend on whether a conspiracy or other long-duration offense is involved in a particular case. See *Clark* v. *Martinez*, 543 U.S. 371, 386 (2005) (rejecting the "dangerous principle that judges can give the same statutory text different meanings in different cases"). That courts are unable to resolve cases consistently under the simultaneity test is more than just a failing of administrability; it shows that the test is built on sand. The better, fairer, and more textually coherent approach is to give the "occasions" clause its plain meaning—in *every* case.

D. The rule of lenity supports Mr. Wooden's interpretation

Finally, insofar as "text, structure, and history fail to establish that the Government's position is unambiguously correct," this Court must "apply the rule of lenity and resolve the ambiguity in [Mr. Wooden's] favor." *United States* v. *Granderson*, 511 U.S. 39, 54 (1994); see *United States* v. *Davis*, 139 S. Ct. 2319, 2333 (2019) ("[A]mbiguities about the breadth of a criminal statute should be resolved in the defendant's favor."). Although lenity principles apply whenever the scope of a criminal penalty is at stake, see *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980), they have particular force when interpreting the ACCA.

First, while "criminal punishment usually represents the moral condemnation of the community," *United States* v. *Bass*, 404 U.S. 336, 348 (1971), the ACCA goes further than a typical criminal statute: Its "underlying premise" is that, "at a certain point, a career criminal becomes practically impossible to rehabilitate." S. Rep. No. 97-585, at 76. Imposing a one-size-fits-all minimum sentence that abandons the rehabilitative goal raises more than routine constitutional concerns, and should accordingly require an especially clear showing of congressional intent.

Second, mandatory-minimum sentences create "interpretive asymmetries [that] give the rule of lenity special force." *Dean* v. *United States*, 556 U.S. 568, 585 (2009) (Breyer, J., dissenting). An erroneously lenient interpretation of the ACCA still affords substantial discretion to those involved in fashioning an appropriate sentence, both in individual cases (the probation office and the sentencing judge) and in categories of cases (the Sentencing Commission). "[A]n interpretation that errs on the side of *inclusion*," by contrast "would prevent a sentencing court from giving a lower sentence even in an unusual case" that might merit it. *Ibid.* And the statutory minimum similarly

prevents the Sentencing Commission from issuing guidelines that take account of cases where leniency is warranted.

Here, the probation office originally recommended that Mr. Wooden receive a sentence within the Sentencing Guidelines range of 21 to 27 months of imprisonment, and the Government did not object to that recommendation until it changed position on whether Mr. Wooden was a career criminal. J.A. 38-39, 42. Even if the district court agreed that a shorter sentence was sufficient to serve the purposes of punishment, see 18 U.S.C. § 3553(a), the court was unable to sentence Mr. Wooden to less than the mandatory-minimum.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

MICHAEL ROIG
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019

STEVEN L. MAYER
ARNOLD & PORTER
KAYE SCHOLER LLP
3 Embarcadero Center
San Francisco, CA 94111

R. REEVES ANDERSON
ARNOLD & PORTER
KAYE SCHOLER LLP
1144 Fifteenth Street, #3100
Denver, CO 80202

ALLON KEDEM
Counsel of Record
ANDREW T. TUTT
STEPHEN K. WIRTH
GRAHAM W. WHITE
JAYCE BORN
JOHN SWANSON
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
allon.kedem@arnoldporter.com

MAY 2021

ADDENDUM

TABLE OF CONTENTS

IN THE SUPERIOR COURT
FOR THE COUNTY OF WHITFIELD
STATE OF GEORGIA

STATE OF GEORGIA, Plaintiff, versus WILLIAM DALE WOODEN, Defendant.	Case No. 97CR37326

Guilty plea hearing, pages 1 through 14, held before the Honorable Jack Partain, Judge, Whitfield Superior Court, on the 18th day of September 1997. Reported by Rita S. Carpenter, CCR, Deceased, and transcribed by Margaret G. Palmer, CCR, B-1364, to the best of her ability.

APPEARANCES OF COUNSEL:

FOR THE STATE:
SCOTT HELTON
ASST. DISTRICT ATTORNEY
Conasauga Judicial Circuit
P. O. Box 1086
Dalton, Georgia 30722-1086

FOR THE DEFENDANT:
ROBERT D. JENKINS, SR.
COURT-APPOINTED
ATTORNEY
P. O. Box 6124
Dalton, Georgia 30722-6124

[3] **(September 18, 1997, Unknown Time)**

(WITH THE DEFENDANT PRESENT, THE FOLLOWING TRANSPIRED:)

THE COURT: All right. This is William Dale what?

MR. JENKINS: If we could be heard, there is another case Mr. Wooden is being -- would plea today to that is on Judge Pannell's calendar. We could run that concurrent, I believe, from my understanding of the recommendation. We could get that resolved if the Court would -- we'd ask that that be brought down from the clerk's office.

MR. HELTON: That's fine, Your Honor. There is a case in another courtroom that's pending against Mr. Wooden and I've agreed with Mr. Jenkins to run that case concurrent. My recommendation is still standing. I'm not going to withdraw that. We can plea that case later.

THE COURT: Yeah. Judge Pannell may want to, you know, do his own thing on that case.

MR. HELTON: Right.

THE COURT: I can't --

MR. HELTON: But that's the agreement. He's correct.

THE COURT: Yeah. Okay. Well, I'll run this concurrent with whatever -- that's what you want me to do, run it concurrent with whatever Judge Pannell might do in that case. I don't have any problem with that.

MR. JENKINS: Yes, Your Honor. That matter is -- well, I think the Court will find this is substantially [4] greater. The problem with this case is that the charge on that is a one count, the credit card matter that is perhaps not as substantial.

THE COURT: All right. Of course, on the other hand, I'm sure Judge Pannell probably would like for me to handle the credit card, too, and I'll be glad to do it, but we don't have time for his schedule, do we, for Mr. Jenkins' schedule?

MR. HELTON: Probably not. But if we can (unintelligible) his plea if we can get up there and get it...

THE COURT: All right. You are William Dale Wooden; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And you're pleading guilty to Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16; is that right?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Let's see what those are. You're represented by Mr. Bob Jenkins?

THE DEFENDANT: Yes, sir.

THE COURT: And I want to ask you if you understand all these charges. Have you had an opportunity to read them?

THE DEFENDANT: Yes, sir. [5]

THE COURT: All 16?

THE DEFENDANT: Yes, sir.

THE COURT: And have you gone over them with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: Is there anything that you do not understand about any of the charges that you would like for me to explain to you?

THE DEFENDANT: No, sir.

THE COURT: Okay. How old are you?

THE DEFENDANT: Thirty-four.

THE COURT: And how much education have you had?

THE DEFENDANT: Ninth grade, sir.

THE COURT: Okay. Can you read and write?

THE DEFENDANT: Yes, sir.

THE COURT: All right. These are primarily burglary cases. There are a few theft cases in here and criminal damage to property as well.

MR. JENKINS: Yes, Your Honor. That's correct.

They're all stemming from a mini warehouse, one event, with a number of units in that mini warehouse.

THE COURT: Okay. Has anybody promised you, forced you or threatened you with anything to get you to plead guilty to these charges?

THE DEFENDANT: No, sir. [6]

THE COURT: Are you currently under the influence of any alcohol, drugs or narcotics?

THE DEFENDANT: No, sir.

THE COURT: Now, the maximum sentence on burglary in Georgia is 20 years in prison. The maximum sentence for theft by taking, a felony -- well, let's see if we have a felony.

MR. HELTON: Yes, sir.

THE COURT: There's a felony, yeah. Count 12 is a felony, theft by taking. That's ten years in prison.

THE DEFENDANT: Yes, sir.

THE COURT: Count 11 is ten years in prison. That's a theft by taking. That's a felony. Count 13, the maximum sentence for criminal damage to property in the second degree is five years. And Count 14, misdemeanor theft by taking, the maximum penalty on that is 12 months. Count 15, which is misdemeanor theft by taking, 12 months. And Count 16, theft by taking, misdemeanor, is 12 months.

Now, all of those counts could be added to one another, so the total would be over a hundred years, okay? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: I haven't figured it out, but it would be a considerable amount of time because it'd be -- each charge would be the maximum that I told you and then those [7] would be added together to equal the maximum. Have you figured that out, Mr. Helton? You got that figure?

MR. HELTON: No, I have not figured --

THE COURT: Okay.

MR. HELTON: -- the total, no, sir.

THE COURT: All right.

MR. HELTON: There is a recommendation, though.

THE COURT: Okay. So that's what you could face. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Plus a fine of over $100,000, okay, on the felonies and $1,000 on the misdemeanor. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now, you have a right to a jury trial in this case. In other words, you do not have to plead guilty. Now, in a jury trial the State would have the burden of proving the case beyond a reasonable doubt. You would have the presumption of innocence with you throughout a jury trial if and until the State did prove it beyond a reasonable doubt. And you would have the right to confront your accusers. That means cross-examine any witnesses that might be called to testify against you.

You would have the right to present your own evidence or any evidence you chose to, and that could be in the [8] form of witnesses or documents or whatever, your own testimony. And you could -- you'd have the right to the subpoena power of the Court to force witnesses that might be reluctant to come in, to force them to come in to testify on your behalf.

You'd have the right to have an attorney. You could testify yourself if you wanted to. And if you lost the case, then you could appeal it to the Georgia Court of Appeals.

Now, do you understand those rights?

THE DEFENDANT: Yes.

THE COURT: Now, if you plead guilty, you're giving up all of these rights that I've mentioned and you'll be sentenced today. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Are you pleading guilty freely and voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: All right. I think I'm familiar with the facts in this case, but please for the record run through them briefly for me.

MR. HELTON: Yes, Your Honor. As Mr. Jenkins had mentioned, this concerns a mini warehouse on Williams Road which was adjacent to the residence that Mr. William Dale Wooden was living in. [9]

We expect the evidence to show that Mr. William Dale Wooden, along with Terry Lynn Wooden, Melvin Wasden, Shirley Russell and Dexter Baggett were all involved to different extents breaking into the mini warehouse. Then once they made entry into the mini warehouse, they were burrowed through from compartment -- or, rather, from unit to unit and that's why we have ten different burglaries and ten different theft by taking charges.

Mr. Terry Lynn Wooden has entered a guilty plea, as has Mr. Wasden. Mr. Baggett, Ms. Russell, Mr. Wasden and Terry Lynn Wooden all gave statements all of which implicated William Dale as well. There were some items found in Mr. Wooden's home after a search warrant. None of the victims in any of the units gave anyone permission to be in there.

THE COURT: Okay. I did the motion to suppress on this case and so I'm quite familiar with the factual situation. I'll consider that as a factual basis in addition to what you've just said.

MR. HELTON: Okay.

THE COURT: Is that substantially correct, Mr. Wooden?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Is there anything -- well, first of all, do you have a recommendation? [10]

MR. HELTON: Yes, Your Honor.

THE COURT: All right. What is it?

MR. HELTON: Just for the record, Mr. Wasden, as part of his plea, he was required to pay restitution. And we would expect the others to be required to do the same.

The recommendation in this case is that Mr. William Dale Wooden receive a sentence on Count 1 of eight years to serve and on each subsequent burglary count that he be given eight years to serve concurrent. Then on Counts 11 and 12 that he be given eight years to serve concurrent with Count 1. On Count 13 he be given five years to serve concurrent with Count 1. And Counts 14 through 16 that he be given 12 months to serve concurrent with Count 1. That should be a total of eight years to serve.

Mr. Wooden has been on probation before and we do not feel that he would be a candidate for probation.

THE COURT: Okay. The only other defendant that's entered a plea so far is Mr. Wasden?

MR. HELTON: Mr. Wasden. That's correct, Your Honor.

THE COURT: All right. So what's going to happen to the others?

MR. HELTON: Mr. Baggett and Ms. Russell announced ready last trial calendar. They're represented by Mr. Corbin. Mr. Corbin has -- well, he's here in the courtroom. We're not sure what's happening on Friday. [11] They may enter a plea; they may not. If not, they'll go to trial.

THE COURT: Well, I guess my question is they're scheduled for trial --

MR. HELTON: That's correct.

THE COURT: -- next week? Okay.

MR. HELTON: Mr. Terry Lynn Wooden has entered a plea also, but he has not been sentenced yet.

THE COURT: And he's represented by Mr. McGuffey; is that correct?

MR. HELTON: That's correct, Your Honor.

THE COURT: Okay. There's a pre-sentence done on that one.

MR. HELTON: That's correct. We expect him to testify.

THE COURT: All right. Okay. Is there anything that you would like to say, Mr. Wooden, or your lawyer?

THE DEFENDANT: No, Your Honor.

MR. JENKINS: Your Honor, I have one matter I'd like to bring before the Court. And just for the Court's awareness, it is difficult in a case like this. There were a number of items seized from Mr. Wooden's residence, Mr. William Dale Wooden's residence, some of which are his or members of his family that either have not been identified by one of the victims that ought to be returned [12] to his family's residence to either his wife or his parents.

Also, for the Court's understanding, there are some items that there may be some mistaken identification with some of the victims. For example, a tool or a piece of -- a tool or a camping piece of equipment that one of the victims may claim is theirs. They think that it was theirs because they've, you know, identified specifically that particular wrench was theirs or not when, in fact, some of those items are Mr. Wooden's. And I thought it would help the Court to know that when it comes to the trial next week with the other co-defendants. And also the DA in helping identify and returning some of that property after the trial's over.

THE COURT: Okay. Anything else that you'd like to say?

MR. JENKINS: With that in mind, I think the only items that Mr. Wooden knows that were taken from the burglary that were seized from his residence were fishing rods and reels, I believe. The other items were taken from cars and other -- other persons that are co-defendants in this matter.

THE COURT: All right. Okay. I'll find that Mr. Wooden understands the nature of the crime, that he understands the consequences of his plea of guilty, that [13] there is a factual basis for the plea of guilty and that he knowingly, intelligently and voluntarily has entered into

this plea. And I'll sentence Mr. Wooden in accordance with the State's recommendation.

MR. JENKINS: Thank you. Your Honor, may he be given credit for time served? I believe he's --

THE COURT: Well, that's automatic. It's done automatically under the law.

(HEARING CONCLUDED, UNKNOWN TIME)

To be argued by
Robert K. Hood

New York Supreme Court
Appellate Division—First Department

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
against

H. RAP BROWN, SAMUEL PETTY, LEVI VALENTINE, ARTHUR YOUNG,
Defendants-Appellants.

RESPONDENT'S BRIEF

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(212) 732-7300

ROBERT M. PITLER
ROBERT K. HOOD
Assistant District Attorneys
Of Counsel

* * *

Introduction

Early in the morning of October 16, 1971, Brown, Petty, Valentine, and Young robbed, at gunpoint, the patrons and employees of a Manhattan bar and grill and other persons the defendants had forced into the bar from the street. Each of the defendants was heavily armed. Their weapons included sawed-off shotguns, an M2 carbine, and an assortment of handguns. The police arrived while the robbery was still in progress. The four gunmen fled, opening fire upon the police as they ran. They shot and seriously wounded Patrolman Gary Hunt. Other police units arrived at the scene, and, after a brief chase and further exchange of fire between the police and the gunmen, Brown, Petty, Valentine, and Young were captured. The police recovered six firearms, a substantial quantity of ammunition, and some of the property which had been taken from the robbery victims.

In an indictment filed December 3, 1971, Brown, Petty, Valentine, and Young were jointly charged with six counts of robbery in the first degree with respect to six individuals, six counts of robbery in the second degree with respect to the same individuals, three counts of attempted murder with respect to three named police officers, one count of assault in the first degree with respect to one of three police officers, two counts of attempted assault in the first degree with respect to the other two police officers, and six counts of felonious possession of a weapon with respect to six specified firearms. Indictment No. 5513/71. The four defendants were tried jointly before a jury. The trial court submitted to the jury the following counts: (1) six counts of robbery in the first degree against each defendant; (2) one count of assault in the first degree against each defendant; (3) three counts of attempted murder against Brown, Petty, and Young; (4) one

count of attempted murder against Valentine; and (5) six counts of felonious possession of a weapon, each of which charged one defendant with the possession of a specified firearm. The trial court dismissed the other counts of the indictment.

On March 29, 1973, following a two-and-one-half-month trial, the jury rendered its verdict. Each of the four defendants was found guilty of the six robbery counts and the assault count. In addition, Brown and Young were each found guilty of two counts charging possession of a weapon. Petty and Valentine were found not guilty of the weapon count which pertained to each of them. The jury was unable to reach a verdict on any of the attempted murder counts, and a mistrial was declared with respect to those counts. Thereafter, Brown, Petty, Valentine, and Young were sentenced.

* * *

THE EVIDENCE AT TRIAL

The People's Case

The robbery at the Red Carpet Lounge

* * *

One of the gunmen announced, "[T]his is a stickup, everybody on the floor" (Holdan: 4238-39; Mack: 3263; Teddy Jackson: 3313; Harley: 3420; Ware: 3567; David Harris: 3701; Leo Harris: 3854; Blair: 4158). Valentine, brandishing a shotgun, made the instructions more emphatic. "All you motherfuckers," he shouted, "on the floor" (Jenkins: 4270-71, 4272; Goins: 4645).

Most of the establishment's employees and customers immediately heeded these instructions and found places on the floor upon which to lie (Mack: 3263; Harley: 3422-23; Hawkins: 3485-87; Ware: 3567-68; David Harris: 3701, 3703-04; Blair: 4158-59; Holdan: 4239; Goins: 4647-49). Leo Harris, however, who was sitting with his back to the

door, thought that a joke was being played and got up to see what was happening. The gunman in the gray tweed overcoat immediately smacked him in the side of the face with a sawed-off shotgun. The blow knocked Mr. Harris against the window on the front wall of the barroom, and the glass shattered (Harley: 3426-27; David Harris: 37020-03; Leo Harris: 3854, 3863-64). The assailant was Samuel Petty (David Harris: 3713; Leo Harris: 3867).[9] People's Exhibit 14, one of the sawed-off shotguns, was "almost identical" to the weapon wielded by Petty (David Harris: 3705-06).

Mr. Jenkins was also slow in getting to the floor. Amid the wild scrambling of customers, employees, and robbers, Mr. Jenkins saw Mr. Harley lying on the floor near the front of the barroom. Believing that Mr. Harley was on the floor as a result of Mr. Blair's frantic dash to the rear, Mr. Jenkins went to his aid. As he leaned down to help Mr. Harley to his feet, Mr. Harley raised up slightly and was promptly kicked in the back and told, "You black motherfucker, s[t]ay on the floor before I blow your head off" (Jenkins: 4273, 4518-26, 4533-37; Harley: 3425-26; Goins: 4650). Mr. Jenkins looked up to see who had uttered this threat. It was a tall, bearded black man, wearing dark glasses and a brown leather coat similar to People's Exhibit 32. The man held a carbine similar to People's Exhibit 12 (Jenkins: 4280-82; Goins: 4647, 4650). Mr. Jenkins identified Brown as the man with the carbine (Jenkins: 4273, 4280).[10]

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[9] In addition to identifying Petty at trial, both of the Harris brothers identified him in lineups shortly after the robbery, David on October 22, 1971 (David Harris: 3710-12; Poncet: 7751; People's Exh. 23). and Leo on October 28, 1971 (Leo Harris: 3864-67; Poncet: 7752; People's Exh. 25).

[10] At a lineup conducted at Bellevue Hospital on November 22, 1971, Mr. Jenkins failed to identify Brown. Mr. Jenkins pointed

When he saw the carbine, Mr. Jenkins, a former military policeman who was familiar with such weapons, fled through the barroom to the kitchen (Jenkins: 4273, 4280-81, 4563-66). At the doorway to the kitchen, he confronted Teddy Jackson (Teddy Jackson: 3314-16, 3356-57; Jenkins: 4273, 4326, 4438-39, 4579-80). Teddy had also not gotten immediately to the floor. In the confusion which followed the orders to lie down, Teddy, with great presence of mind, had made his way to the kitchen. There, he had hidden most of his valuables behind the refrigerator (Teddy Jackson: 3314). He had just finished, when he encountered Mr. Jenkins. Thinking that Teddy was one of the robbers, Mr. Jenkins threw up his hands. Teddy assured him that he was not a robber. But Mr. Jenkins was not taking any more chances. He turned towards the barroom and dived to the floor (Teddy Jackson: 3315-16; Jenkins: 4273-74, 4326-27, 4579-80). Teddy laid down nearby (Teddy Jackson: 3316-17).

As their victims found places on the floor, the robbers deployed themselves about the barroom. Petty ran through the barroom towards the rear (Jenkins: 4271, 4387). Young hoisted himself over the bar and also ran towards the rear (Jenkins: 4271, 4387, 4404-06, 4538; Goins: 4650-51, 4656-57).[11] Valentine, with a shotgun in his hands and a handgun under his belt, stood momentarily at

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out another man as the robber armed with the carbine and indicated that still another member of the lineup looked "most like" that individual (Jenkins: 4294-98, 4623-27; People's Exhs. 40A-B). However, at a hearing held just prior to trial, Mr. Jenkins saw Brown in court and recognized him as the robber with the carbine (Jenkins: 4295-96, 4631-33).

[11] In addition to identifying both Petty and Young at trial, Mr. Jenkins and Mr. Goins identified them in lineups conducted on October 22, 1971, shortly after the robbery (Jenkins: 4291-94; Goins: 4662-65; Poncet: 7750-51; People's Exhs. 37, 42).

the entrance (Jenkins: 4272, 4329, 4426-27). The man with the carbine, identified as Brown by Mr. Jenkins, was also near the front of the barroom (Teddy Jackson: 3320-21; Jenkins: 4279-80; Goins: 4657).

Once they had established control of the bar, the gunmen issued further instructions. "Brothers and sisters, take off your jewelry and take out your wallets," they ordered (Goins: 4653; Teddy Jackson: 3313-14, 3317-18; Harley: 3424). They warned everyone to keep his head down (Teddy Jackson: 3313-14). While Brown remained at the front of the barroom, Petty and Valentine began to pick their way among their prostrate victims, gathering money, jewelry, and other valuables in a black bag (Mack: 3264; Teddy Jackson: 3319-21; Harley: 3424-25; Hawkins: 3487-89; Ware: 3568; David Harris: 3704-05; Leo Harris: 3855-56; Blair: 4159-60; Holdan: 4240; Jenkins: 4276-77; Goins: 4651-53). Young, who was behind the bar, attempted to open the cash registers (Goins: 4734-36, 4880). When he failed, he came from behind the bar, found Mary Smith, the barmaid, and told her, "Bitch, get up and open up these God damn registers" (Goins: 4650-51, 4656-57, 4736, 4881; Jenkins: 4275, 4406; Mack: 3265-66; Teddy Jackson: 3318; Holdall: 4241). He threatened to "blow [her] fuck[ing] head off" if she refused and warned her not to look at him. Ms. Smith begged Young not to shoot her and complied with his demands (Jenkins: 4408-10; Goins: 4881).[12]

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[12] Alton Mack, Teddy Jackson, and Curtis Holdan did not see this incident, but they heard the exchange. Teddy did see Young inside the Red Carpet Lounge at some point and noticed that, in addition to the sawed-off shotgun Teddy had seen outside, Young had a German Luger (Teddy Jackson: 3318-19). Teddy testified that People's Exhibit 15, a German Luger, looked like the weapon Young had had (Teddy Jackson: 3329-30).

It was Petty who relieved Mr. Jenkins and Mr. Goins of their belongings. Petty kicked Mr. Jenkins and, putting a German Luger to his victim's head, demanded, "Fat Boy, where is that fuck[ing] money box you had in the kitchen?" (Jenkins: 4276).[13] Mr. Jenkins told Petty where he could find the box, which contained $97. Petty took from Mr. Jenkins' person an additional $350, a diamond ring, and a watch (Jenkins: 4276).[14] Petty, again by putting a German Luger to his victim's head, also took $150 and a watch from Mr. Goins (Goins: 4652-53, 4655).

It was Valentine who accosted Teddy Jackson. Armed with a handgun, Valentine pulled Teddy's pockets inside-out, emptying them of the keys and small change Teddy had not bothered to hide in the kitchen. The keys and the change fell onto the floor, and, after the robbery, the keys were gone (Teddy Jackson: 3318-20). It is likely that Valentine also accosted David Harris. Valentine was

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[13] Petty's knowledge of the existence of a money box in the kitchen did not surprise Mr. Jenkins. Valentine had been in the Red Carpet Lounge about one-half hour before the robbery. He had been alone, and he had come into the kitchen to order a sandwich. Valentine had paid Mr. Jenkins in the kitchen with a $20 bill, and he had watched Mr. Jenkins open the money box to deposit the bill and withdraw his change (Jenkins: 4284-86, 4304-11, 4312-16, 4581-86). Curtis Holdan remembered that, when the four gunmen entered the bar at the time of the robbery, one of them said, "Yes, motherfucker, we are back again * * *" (Holdan: 4240).

[14] Mr. Jenkins testified that Petty had snatched the watch, a Longines, from his wrist causing the strap to break (Jenkins: 4287). He identified People's Exhibit 36, a Longines wristwatch with a broken strap, as his watch (Jenkins: 4287-88, 4439-40, 4634). He said that he had purchased it in a Bridgeport, Connecticut jewelry shop in 1964 or 1965 for about $90 and that he had had it cleaned once by a New York City jeweler (Jenkins: 4440-44). Following the trial, however, it was established through the efforts of both Petty's attorneys and the prosecutor that People's Exhibit 36 belonged, in fact, to Petty (10293-10328, 10376-79).

wearing a short, dark leather jacket (Jenkins: 4290; Goins: 4646). Mr. Harris said that a man dressed in such a jacket and armed with a handgun removed a ring from his finger and searched his back pocket (David Harris: 3704-05).

Mr. Harley, Mr. Holdan, and Leo Harris did not see the person who took their belongings. In compliance with the gunmen's instructions, Mr. Harley removed his watch and his ring and took his money from his pocket, and he placed these things on the floor beside him. One of the robbers picked up Mr. Harley's possessions and placed them in a bag (Harley: 3424-25). Later Mr. Harley found about $400 missing from his cash registers (Harley: 3430). One of the robbers told Mr. Harris to empty his pockets. Mr. Harris did so but managed to conceal a $5 bill under his body. As a consequence, the robber got only Mr. Harris' empty wallet and some change. The robber also told Mr. Harris to remove his ring, but the ring could not be removed (Leo Harris: 3855-56). Mr. Holdan had a watch, a ring, and a few dollars taken from him (Holdan: 4239-40). He identified People's Exhibit 35 as his watch and ring (Holdan: 4246-47).

Delays by the victims in complying with the robbers' directions were treated harshly. Jennie Harris, Leo's wife, was apparently too slow in removing her jewelry. One of the robbers struck her in the face with his gun and told her, "Bitch, next time don't take so long" (David Harris: 3705). Robert Hawkins, who was robbed of his watch, his ring, and his wallet, had a similar experience (Hawkins: 3487-89). Mr. Hawkins identified People's Exhibit 20 as his ring (Hawkins: 3495-96).

As the robbers completed their work, one of them said to his companions, "Shoot all these motherfuckers and leave no witnesses" (Goins: 4653; Jenkins: 4277; Blair: 4178-79; Holdan: 4240-41). But before this command could be executed, there was a knock at the door, and a

voice, which seemed to come from outside, said, "The cops are coming" (Goins: 4653; Ware: 3572; Harley: 3428; Holdan: 4241; Jenkins: 4277). Then a voice from inside the bar urged, "Come on, let's go" (Harley: 3428; Holdan: 4241). The robbers ran to the front door, stepping on their victims in their haste to escape (Holdan: 4242). At the front door, one of them said, "We got to come out shooting" (Ware: 3372).

* * *

NO. 86-6263

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

SAMUEL PETTY, PETITIONER

V.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner's previous convictions on six counts of robbery based on his participation in a robbery of six individuals in a restaurant constitute multiple robbery convictions in determining the applicability of the enhanced sentencing provision of the Armed Career Criminal Act of 1984, 18 U.S.C. App. (Supp. II) 1202(a) (repealed 1986).

2. Whether petitioner, a convicted felon, violated 18 U.S.C. 922(g), which makes unlawful the shipping or transporting of ammunition or a firearm in interstate commerce by a convicted felon, by ordering 3000 rounds of ammunition from California and a rifle from Kansas for delivery to petitioner in St. Louis.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1157-1162) is reported at 798 F. 2d 1157.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1986. A petition for rehearing was denied on October 24, 1986. On November 29, 1986, Justice Blackmun extended the time for filing a petition for a writ of certiorari to January 22, 1987, and on January 21, 1987, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 846; one count of possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1); one count of being a felon in possession of a firearm, in violation of 18 U.S.C. App. (Supp. II) 1202(a)(1) (repealed 1986); and two counts of unlawfully shipping or transporting firearm or ammunition in interstate or foreign commerce, in violation of 18 U.S.C. 922(g). He was sentenced to concurrent ten-year terms on the drug counts, to be followed by two five-year consecutive sentences on the two Section 922(g) counts. Those sentences were made to run concurrently with a 22-year term of imprisonment without parole for the felon-in-possession offense under Section 1202(a). Petitioner was also sentenced on the drug counts to pay a $20,000 fine and to serve a five-year term of special parole following his prison term.

1. At trial, the government established that petitioner and Deborah Randle were distributing cocaine from a house they shared in St. Louis, Missouri (Pet. App. 1159, 1161). The government also established that petitioner, who had previously been convicted on felony charges (see 4 Tr. 49) ordered 3000 rounds of ammunition through a friend who arranged the purchase through a federally licensed firearms dealer; the dealer then ordered the ammunition from a distributor in California. Petitioner picked up the ammunition from the dealer upon its arrival in St. Louis. Pet. App. 1160; 3 Tr. 23-36. Petitioner also directly contacted the same dealer and ordered an A.K.S. rifle from a distributor in Kansas. Petitioner picked up the rifle from the dealer upon its arrival in St. Louis. Pet. App. 1160; 2 Tr. 166-167; 3 Tr. 45-49. During a search of the home shared by petitioner and Randle, the

government discovered nine guns, including two semi-automatic rifles, an Uzi submachine gun, and an A.K.S. rifle, thousands of rounds of ammunition, seven bullet proof vests, military training manuals, and more than 30 grams of cocaine (1 Tr. 44-45, 51-62, 112; 4 Tr. 51-52).

Prior to trial, the government notified petitioner of its intention to seek imposition of sentence under the enhanced sentencing provision of 18 U.S.C App. (Supp. II) 1202(a), which at that time provided that a person in possession of a firearm "who has three previous convictions * * * for robbery or burglary, or both, * * * shall be imprisoned not less than fifteen years and * * * the court shall not suspend the sentence of, or grant a probationary sentence to, such person * * * and such person shall not be eligible for parole."[1] Petitioner had previously been convicted of armed robbery in Missouri and on six counts of armed robbery in New York, based on his participation in a robbery at a restaurant during which six different people were robbed at the same time (see Pet. App. 1159-1160). In sentencing petitioner, the district court rejected petitioner's contention that the enhanced penalty provision was inapplicable because his conviction on six robbery counts constituted only one conviction within the meaning of the federal statute.

2. The court of appeals affirmed (Pet. App. 1157-1162). The court noted that New York law provides "that there are as many offenses as there are victims when the same conduct results in a loss to two or more people" (id. at 1160). Accordingly, the court concluded that petitioner's previous robbery convictions satisfied the enhanced sentencing provisions of Section 1202(a), which required proof that the defendant had three previous robbery or burglary convictions (ibid.). The court rejected

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[1] As is discussed below, Congress has since repealed 18 U.S.C. App. (Supp. II) 1202.

petitioner's contention that the New York convictions on six robbery counts should be considered to constitute only one conviction for the purposes of the federal law, either because the six counts were charged in a single indictment or because New York law required that he receive concurrent sentences on the six counts (ibid.).

Finally, the court of appeals rejected (id. at 1160-1161) petitioner's claim that the evidence was insufficient to support his convictions on the two counts charging him with transporting or shipping a firearm or ammunition in violation of 18 U.S.C. 922 (g). The court held that although petitioner had no physical contact with the ammunition and firearm until the interstate transportation was complete, he was liable under Section 922(g) because he caused the interstate transportation by ordering the firearm and ammunition, thereby "set[ting] the entire delivery process in motion" (Pet. App. 1161 (quoting United States v. Smith, 542 F.2d 711, 715 (7th Cir. 1976)).

ARGUMENT

1. Petitioner claims (Pet. 9-15) that he should not have been subject to the enhanced sentencing provision of 18 U.S.C. App. (Supp. II) 1202(a) (repealed 1986), because he did not have "three previous convictions * * * for robbery or burglary," within the meaning of the federal statute. We agree that the court of appeals erred by applying the enhanced sentencing provisions to petitioner. For that reason, we suggest that the petition for writ of certiorari should be granted on that issue, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.[2]

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[2] Congress has since repealed 18 U.S.C. App. (Supp. II) 1202(a), but it has made the enhanced penalty provision of former Section 1202(a) applicable to violations of 18 U.S.C. 922(g). See Firearms Owners' Protection Act of 1986, Pub. L. 99-308, §§ 102, 104, 100 Stat. 452, 458-459 (1986). The pertinent language of the amended version

The applicability of the enhanced sentencing provision to petitioner turns on a question of federal law: whether Congress intended that convictions on multiple robbery counts arising from a single criminal episode should be treated as multiple "previous convictions * * * for robbery" under 18 U.S.C. App. 1202(a).[3] Petitioner had previously been convicted of armed robbery in Missouri and on six counts of armed robbery in New York based on his robbery of six individuals at a restaurant at the same time. Hence, petitioner has "three previous convictions" only if the New York robbery constitutes more than one conviction for purposes of the federal statute. The court of appeals agreed with the district court that the New York robberies amounted to six previous convictions. On that basis, the court of appeals upheld petitioner's sentence. After further consideration of the issue, including a close examination of the language, purpose, and legislative history of the statute, we disagree with the court of appeals.

The statutory language, which was added to Section 1202(a) by the Armed Career Criminal Act of 1984, Pub. L. 98-473 § 1802, 98 Stat. 2185 (1984), is ambiguous. Unlike the language Congress included in other enhanced penalty provisions, Congress did not explicitly require, in Section 1202(a), that the defendant have "previously been convicted * * * for two or more offenses committed on occasions different from one another and from [the] felony"

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of Section 922(g) is the same as the language of former Section 1202(a), and the legislative history of the new statute indicates that it was intended to be applied in the same way as the enhanced sentencing provision of former Section 1202(a). See H.R. Rep. 99-495, 99th Cong., 2d Sess. 17 (1986).

[3] Because we conclude that the threshold issue of federal law is dispositive in this case, we need not respond to petitioner's primary contention, which is that the court of appeals misconstrued New York law (see Pet. 14-15).

for which he is currently being sentenced. See 18 U.S.C. 3575(e)(1); 21 U.S.C. 849(e)(1). The negative implication of such a legislative omission might be weighty in the absence of contrary indicators of legislative intent. See Rodriguez v. United States, No. 86-5504 (Mar. 23, 1987), slip op. 3-4. In this case, however, the legislative history of the Armed Career Criminal Act of 1984 makes it appear that both Congress and those supporting the legislation, including the Department of Justice, did not intend that the penalty provision would apply more broadly than in the case of the other federal enhanced penalty statutes.

The title of the Act -- the "Armed Career Criminal Act" -- as was well as the relevant legislative reports, the debate on the floor of both chambers and testimony before Congress by Department of Justice officials all support this view. The description of the scope of the legislation contained in two relevant Senate reports is perhaps the most telling. Both reports concerned predecessor bills to the bill ultimately enacted by Congress, which included similar (or broader) language, except that they required only two rather than three previous convictions.[4] The two reports strongly suggest that the legislators intended that prior convictions would be based on multiple criminal episodes that were distinct in time. In describing the scope of the legislation, each Report provided, in identical language, that "[t]he bill applies to any person who participates in an armed robbery or burglary if that person has been convicted of robbery or burglary on two or more occasions in the past." S. Rep. 98-190, 98th Cong., 1st Sess.

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[4] See S. Rep. 98-190, 98th Cong., 1st Sess. 1 (1983) (provision applicable if defendant "has been convicted of at least two offenses described in subsection (c) of this section"); S. Rep. 97-585, 97th Cong. 2d Sess. 3 (1982) (provision applicable "if such person has previously been twice convicted of robbery or burglary").

10 (1983) (emphasis supplied); S. Rep. 97-585, 2d Sess. 9 (1982) (emphasis supplied).[5]

Likewise, references throughout the legislative reports and the floor debates to "career criminals," "repeat offenders," "habitual offenders," "recidivists," "revolving door" offenders, "three time loser," "third-time offender," "[defendants] convicted three times," and to defendants committing a "third or subsequent robbery," are inconsistent with the notion that Congress intended in 18 U.S.C. App. 1202(a), unlike in the other federal enhanced penalty provisions, to count previous convictions on multiple felony counts arising from a single criminal episode as multiple "previous convictions."[6] The legislative

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[5] As originally proposed in both the House and Senate versions, the federal law would have allowed an enhanced penalty in the sentencing of a defendant for his third robbery or burglary. In response to federalism concerns expressed by some legislators and organizations, Congress restricted the scope of the bill "to provide enhanced penalties for certain persons possessing firearms after three previous convictions for burglaries or robberies." H.R. Rep. 98-1073, 98th Cong., 2d Sess. 1, 3-6 (1984); see Armed Career Criminal Act, Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 66-128 (1984) (testimony of Arthur C. Eads on behalf of the American Bar Association and of Austin McGuigan on behalf of the National District Attorneys Association).

[6] See, e.g., H.R. Cong. Rep. 98-1159, 2d Sess. 418 (1984) ("convicted three times"); H.R. Rep. 98-1073, 98th Cong., 2d Sess. 2 (1984) ("chronic offenders," "recidivism," "repeat offenders"); id. at 5 ("convicted three times," "three-time loser"); S. Rep. 98-190, supra, at 2 ("hardened and frequent offenders"); id. at 5 ("repeat offenders," "recidivism")' id. at 6 ("'revolving door' phenomenon"); ("third or subsequent robbery or burglary"); id. at 17 ("third-time offender"); id. at 18 ("three-time serious offender"); S. Rep. 97-585, supra, at 5 ("habitual offenders"); id. at 11, 53, 71 ("third or subsequent robbery or burglary"); id. at 20-21 ("repeat offenders"); id. at 66 (description of multiple prior convictions and sentences); 130 Cong. Rec. S1559 (daily ed. Feb. 23, 1984) (remarks of Sen. Specter) ("where an individual had twice been convicted of robberies or burglaries"); id. at S1560

history leads to the conclusion that Congress intended that Section 1202(a), like the other federal enhanced penalty provisions, should not be read so broadly. For example, both Senate reports refer to one of the other federal enhanced penalty provisions (21 U.S.C. 849) as precedential support for enactment of the proposed legislation, both reports describe the scope of that other statutory provision in terms virtually identical to the statutory language of the Armed Career Criminal Act of 1984, and neither report suggests an intent to enact an enhanced penalty provision of broader scope. See S. Rep. 98-190, supra, at 15; S. Rep. 97-585, supra, at 53.

Testimony of Department of Justice officials before Congress is also consistent with the narrower reading of the federal statute. The concern of Department officials in their testimony was with "hard core recidivist robbers and burglars," "repeat offenders," and "three-time losers." See Armed Career Criminal Act, Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 47-66 (1984) (testimony of Assistant Attorney General Stephen S. Trott); Armed Career Criminal Act of 1983, Hearing Before the Senate

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(remarks of Sen. Kennedy) ("our limited resources must be targeted to this active group of habitual offenders"); id. at H10550 (remarks of Rep. Hughes) ("repeat offenders," "chronic offenders," "convicted three times of felonies for robbery or burglary," "three-time loser"); 129 Cong. Rec. S295 (daily ed. Jan. 26, 1983) (remarks of Sen. Specter) ("The [Act] would make the commission of an armed robbery or armed burglary a federal offense when the perpetrator has previously been convicted of a series of felony robberies or burglaries."); 128 Cong. Rec. 10137 (1982) (remarks of Rep. Wyden) ("a third conviction will no longer mean another trip through the revolving door of a severely overloaded local criminal justice system"); 127 Cong. Rec. 22670 (1981) (remarks of Sen. Specter) ("repeat offenders," "recidivists"); see also S. Rep. 99-849, 99th Cong., 2d Sess. 3 (1986) ("the defendant has been convicted three times of a felony for robbery or burglary," "three time robber").

Comm. on the Judiciary, 98th Cong., 1st Sess. 11, 15, 18-19 (1983) (testimony of Deputy Assistant Attorney General James Knapp); Armed Robbery and Burglary Prevention Act, Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 30-32, 39-41 (1982) (testimony of Deputy Assistant Attorney General Roger Olsen); Career Criminal Life Sentence Act of 1981, Hearings Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 14-23 (1981) (testimony of Assistant Attorney General D. Lowell Jensen). No Justice Department official suggested that the statute should be given the broad construction that was adopted by the court of appeals in this case. Instead, as is reflected in the testimony of Assistant Attorney General Stephen S. Trott during the 1984 House Hearing (concerning proposed legislation that would have required only two prior convictions), the scope of the federal statute was more narrowly perceived:

> These are people who have demonstrated, by virtue of their definition, that locking them up and letting them go doesn't do any good. They go on again, you lock them up, you let them go, it doesn't do any good, they are back for a third time. At that juncture, we should say, "That's it; time out; it is all over. We, as responsible people, will never give you the opportunity to do this again."

Armed Career Criminal Act, 1984 House Hearing, supra, at 64. Finally, in commenting on proposed legislation that was subsequently enacted by Congress in 1986 to expand the scope of the enhanced sentencing provision of 18 U.S.C., App. 1202(a) in other respects,[7] the Department of

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[7] In 1986, Congress enacted the Anti-Drug Abuse Act of 1986, Pub. L. 99-570 § 1402, 100 Stat. 5053, 5092-5093 (1986), which, inter alia,

Justice even more recently made clear its view that convictions on multiple counts arising from a single criminal episode should not count as multiple "previous convictions" for the purposes of 18 U.S.C. App. 1202(a). As described by the Justice official, the enhanced sentencing provision applies only after the individual "ha[s] been convicted on 3 or more occasions." See Armed Career Criminal Legislation, Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 15, 21 (1986) (testimony of Deputy Assistant Attorney General James Knapp) ("This bill would amend 1202 to provide for a mandatory minimum term of 15 years imprisonment for persons who receive or possess a firearm after they have been convicted on 3 or more occasions of a violent felony or a serious drug offense.").[8]

In sum, although we recognize that the language of former Section 1202(a) is ambiguous, we believe that the underlying purpose of the statue and the intent of Congress as revealed by the legislative history indicate that the court of appeals was in error in construing the statute

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amended 18 U.S.C. 924e, the successor to the enhanced sentencing provision of 18 U.S.C. App. 1202(a), by replacing the statutory language "previous convictions * * * for robbery or burglary" with "previous convictions * * * for a violent felony or a serious drug offense."

[8] State courts construing similar enhanced sentencing statutes have overwhelmingly rejected the position taken by the court of appeals in this case. See, e.g., State v. Carlson, 560 P.2d 26 (Alaska 1977); Johnson v. Cochran, 139 So.2d 673 (Fla. 1962); State v. Tavares, 63 Haw. 509, 630 P.2d 633 (1981); State v. Lohrbach, 217 Kan. 588, 538 P.2d 678 (1975); State v. Henderson, 283 So.2d 210, 211-212 (La. 1973); People v. Chaplin, 102 Mich. App. 748, 302 N.W.2d 569 (1980); Crawley v. State, 423 So.2d 128 (Miss. 1982); State v. Ellis, 214 Neb. 172, 333 N.W.2d 391 (1983); Rezin v. State, 596 P.2d 226 (Nev. 1979); State v. Sanchez, 87 N.M. 256, 531 P.2d 1229 (1975); State v. Sorter, 10 Or. App. 316, 499 P.2d 1370 (1972); State v. Brezillac, 19 Wash. App. 11, 573 P.2d 1343 (1978).

to reach multiple felony convictions arising out of a single criminal episode.[9]

2. Petitioner also claims (Pet. 15-16) that his convictions on two counts of transporting or shipping a firearm or ammunition in interstate commerce should be reversed on the ground that "a person can only be said to have 'caused the shipment' if he was physically present at the place the delivery process began." The court of appeals correctly rejected this claim, and its decision does not conflict with any decision of any other court of appeals or of this Court. Accordingly, the petition should be denied with respect to this second claim.

Contrary to petitioner's claim, his physical presence at the point at which delivery originated is not a necessary element of the federal offense. Under 18 U.S.C. 2(b), "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." At trial, the government established that by ordering an A.K.S. rifle and 3000 rounds of ammunition, petitioner caused their shipment in interstate commerce. As the court of appeals held (Pet. App. 1161), petitioner cannot escape liability under 18 U.S.C. 922(g) simply because he caused someone else to ship the firearm and ammunition in interstate commerce, rather than personally taking the items to an interstate shipper. It is sufficient that petitioner "'set the entire delivery process in motion'" (Pet., App. 1161 (quoting United States v. Smith, 542 F.2d 711, 715 (7th Cir. 1976)).

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[9] Disposition of this case does not require resolution of the question whether convictions on multiple counts arising out of multiple criminal episodes, yet covered by a single indictment, count as multiple "previous convictions," within the meaning of the since-repealed 18 U.S.C. App. (Supp. II) 1202(a), or the successor to its enhanced sentencing provision, 18 U.S.C. 924e (see Firearm Owner's Protection Act, Pub. L. 99-308, §104, 100 Stat. 458-459).

CONCLUSION

The petition for a writ of certiorari should be granted with respect to the first question presented by the petition, the judgment of the court of appeals vacated in that respect, and the case remanded for further proceedings on that issue. In all other respects, the petition should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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