No. 20-5279

IN THE

Supreme Court of the United States

WILLIAM DALE WOODEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR AMICUS CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers is a nonprofit, voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the National Association of Criminal Defense Lawyers ("NACDL"), its members, or its counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief.

accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of many thousands of direct members and up to 40,000 with affiliates. NACDL is the only nationwide professional bar association for both public defenders and private criminal-defense lawyers, and its members include private criminal-defense lawyers, public defenders, military defense counsel, law professors, and judges. Consistent with NACDL's mission of advancing the proper, efficient, and fair administration of justice, NACDL files numerous amicus briefs each year in the United States Supreme Court and other state and federal courts, all aimed at providing assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

SUMMARY OF ARGUMENT

The Armed Career Criminal Act's "occasions" requirement has given rise to a deluge of unconstitutional factfinding by sentencing courts. This Court should address and put a stop to it, and this is the case in which to do so. The Court has explained "over and over" for the past twenty years that under the Sixth Amendment, "only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction." *E.g.*, *Mathis* v. *United States*, 136 S. Ct. 2243, 2252-57 (2016) (citing, *inter alia*, *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000)). A sentencing court "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id.* at 2252; see also, *e.g.*, *Alleyne* v. *United States*, 570 U.S. 99, 111-12 & n.1 (2013). Yet to apply ACCA's occasions test, a factfinder must do much more.

Specifically, under any conceivable interpretation of the statutory phrase at issue here, any factfinder conducting the inquiry must make a series of fine-grained determinations pertaining not just to the elements of a defendant's prior convictions, but also to the factual circumstances and real-world conduct that gave rise to them. And when such findings are made to support an increased maximum penalty (as they indisputably are in this context), they must be made *by a jury*, on proof beyond a reasonable doubt.

"That simple point" has become a "mantra" in this Court's jurisprudence, *Mathis*, 136 S. Ct. at 2251, but as this case demonstrates, lower courts conducting the occasions inquiry routinely ignore it. The court of appeals based its conclusion that the petitioner's predicate offenses were temporally distinct entirely on the disputed premise that each involved his personally "entering" a "different mini warehouse[]" with a separate "location," "building number," and "storage space." Pet. App. 9-11. But not a single one of those facts was found in a constitutionally permissible manner. As the petitioner has made clear here (and demonstrated below), under the Georgia statute that gave rise to his predicate burglary offenses, it was legally irrelevant whether he actually entered any three structures or, instead, merely stood in one or two of them (or even outside all of them) while accomplices entered each simultaneously. See, *e.g.*, Pet'r Br. 42-43 & n.7. And although the court of appeals was preoccupied with the specific nature of the structures the petitioner burgled, the Georgia criminal code is decidedly not: As the court acknowledged, the statute merely required the state to prove the petitioner entered a "building"—not a warehouse, and certainly not one with its own location,

building number, or storage space. *E.g.*, Pet. App. 9 (citing Ga. Code Ann. § 16-7-1(a) (1997)). Accordingly, none of the facts the court of appeals relied on were elemental or otherwise "necessary" components of any predicate offense, and therefore, at the time of conviction—roughly twenty-five years ago—the petitioner would have had no reason to contest his indictment's recitation of them if it was inaccurate. Cf. *Mathis*, 136 S. Ct. at 2253. When the court of appeals nevertheless sifted through those "legally extraneous circumstances" to support the petitioner's ACCA enhancement, it was conducting the precise inquiry the Sixth Amendment and this Court's precedents unambiguously prohibit. See *Descamps* v. *United States*, 570 U.S. 254, 270 (2013); see also, *e.g.*, *Mathis*, 136 S. Ct. at 2251-52. Reversal is warranted for that reason alone. See, *e.g.*, S. Ct. R. 14.1(a); *City of Sherill* v. *Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 n.8 (2005).[2]

The same error is replicated on a near daily basis in federal courts across the country. In a typical year, 300 to 600 individuals are sentenced as Armed Career Criminals in United States courts, with no apparent jury involvement. U.S. Sent'g Comm'n, *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways* 19, 28 (2021) (*available at* https://tinyurl.com/v272h233). Each of them is exposed not only to ACCA's 15-year mandatory minimum term of

[2] NACDL agrees with the petitioner that the Sixth Circuit's judgment should be reversed for the independent reason that the sentence on review was imposed and affirmed based on a watered-down and mistaken interpretation of the occasions requirement that renders the term "*career* criminal" meaningless and cannot be reconciled with ACCA's plain language, structure, purpose, or history. See Pet'r Br. 12-46.

imprisonment, but also to a dramatically higher average sentence than a comparable non-ACCA offender. See, *e.g.*, *id.* at 28. Yet because the facts necessary to conduct the occasions inquiry are rarely (in fact, likely never) elements of any predicate offense, much less of all three predicate offenses necessary to support an ACCA sentence, see, *e.g.*, Pet'r Br. 38, virtually every one of those sentences rests on a court's decision to do "just what [this Court] ha[s] said it cannot: rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence." *Descamps*, 570 U.S. at 270. And every circuit to address the issue has mistakenly ratified that practice. See *infra* at 13-19.

No decision limited to addressing the Sixth Circuit's simultaneity rule will put a stop to the constant stream of Sixth Amendment violations that has resulted. Although it may be tempting to think the simultaneity rule reduces the role of unconstitutional factfinding by making a single fact—temporal separateness—dispositive, precisely the opposite is true. As an initial matter, the simple fact that the Sixth Circuit's rule increases the raw number of ACCA enhancements imposed is enough to demonstrate its hostility to the Sixth Amendment, because as the occasions inquiry is currently conducted in lower courts across the country, there is likely no such thing as a constitutional ACCA sentence. Indeed, as this case demonstrates, determinations regarding temporal separateness invariably depend on detailed findings and analyses regarding non-elemental facts, most of which are themselves mined from years- or decades-old allegations or admissions that relate only to the timing of an offense or to other factors that were

legally irrelevant at the time of the prior conviction. See Pet'r Br. 37-43. Furthermore, as the petitioner explains, even courts that have endorsed the simultaneity rule routinely look beyond it to apply a totality-of-the-circumstances test when they deem it appropriate to do so, thus defeating any contention that the rule is a meaningful Sixth Amendment bulwark. See *id.* at 43-44. The bottom line is this: No matter what substantive definition of "occasions" this Court adopts, the facts lower courts will apply it to will be ones they have found in a manner that clearly contravenes the Sixth Amendment and this Court's precedents.

This case presents a prime opportunity for the Court to end that practice and, in the process, reestablish the controlling force of its decisions. The courts of appeals have "missed more than a few * * * clear signs" that their current approach to the occasions inquiry is unconstitutional, *United States* v. *Perry*, 908 F.3d 1126, 1135 (8th Cir. 2018) (Stras, J., concurring) (citing, *inter alia*, *Mathis*, 136 S. Ct. at 2252, *Descamps*, 570 U.S. at 268-69, and *Alleyne*, 570 U.S. at 111 n.1), and, despite the existence of three demonstrably correct separate opinions addressing the issue, see *United States* v. *Hennessee*, 932 F.3d 437, 446-55 (6th Cir. 2019) (Cole, C.J., dissenting); *Perry*, 908 F.3d at 1134-36 (Stras, J., concurring); *United States* v. *Thomas*, 572 F.3d 945, 952-53 (D.C. Cir. 2009) (Ginsburg, J., concurring in part), there is no indication that any lower court will change its approach unless this Court intervenes. Accordingly, the Court should seize the chance this case presents to state directly—not for the first time, but perhaps for the last—that the Sixth Amendment does not permit mandatory sentence enhancements to be

imposed based on judicial findings regarding non-elemental facts.

ARGUMENT

I. LOWER COURTS UNIFORMLY APPLY THE OCCASIONS REQUIREMENT IN A MANNER THE SIXTH AMENDMENT PROHIBITS.

No ACCA enhancement can be imposed without a finding that the defendant's predicate offenses were committed "on occasions different from one another." 18 U.S.C. § 924(e). That inquiry necessarily requires a factfinder to determine on what "occasions" the offenses were committed, which in turn necessitates findings regarding the factual circumstances underlying each predicate conviction. This Court has made clear "over and over," to the point of "downright tedium," *Mathis*, 136 S. Ct. at 2252, 2257, that such findings cannot be made by a sentencing court when they change the available sentence, as an ACCA enhancement indisputably does. Yet the lower courts routinely make the findings themselves.

A. The Sixth Amendment Clearly Forecloses The Use Of Judicial Factfinding To Support An ACCA Enhancement.

1. In *Taylor* v. *United States*, the Court "established the rule for determining when a defendant's prior conviction counts as one of ACCA's enumerated predicate offenses." 495 U.S. 575 (1990); *Descamps*, 570 U.S. at 260-61. The Court has since described *Taylor*'s holding as establishing that a sentencing court may "'look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions.'"

Descamps, 570 U.S. at 261 (quoting *Taylor*, 495 U.S. at 600). There are no exceptions to that bright-line rule. However, *Taylor* explained that in a "narrow range of cases" in which a statute of conviction might list alternative elements, such as by prohibiting unlawful "entry of an automobile" (which is not an ACCA predicate offense) "as well as [unlawful entry of] a building" (which is), applying *Taylor*'s rule could mean looking to "the charging paper and jury instructions" to determine what the crime of conviction actually was. *Taylor*, 495 U.S. at 602. As *Taylor* made clear, however, the question would always remain focused on identifying the elements of the crime of conviction, as opposed to any legally extraneous underlying facts. *Id.*

2. *Taylor* mentioned, but did not expressly rest on, the Sixth Amendment. See 495 U.S. at 601. But "[d]evelopments in the law" between *Taylor* and the Court's next ACCA case, *Shepard* v. *United States*, 544 U.S. 13, 24 (2005), made *Taylor*'s constitutional basis clear. In *Shepard*, the Court recognized that merely reviewing "the charging paper and jury instructions," as *Taylor* had permitted, might be of little use in cases involving predicate convictions entered on the basis of guilty pleas rather than trials. See *Descamps*, 570 U.S. at 262 (citing *Shepard*, 544 U.S. at 26). So the Court slightly broadened the "restricted set of materials" sentencing courts were authorized to consult, which would henceforth include "the terms of a plea agreement or transcript of colloquy between judge and defendant." *Id.* In doing so, however, the Court again emphasized that the inquiry must remain focused on identifying the crime of conviction and could not devolve into a search for legally extraneous facts. *Shepard*, 544 U.S. at 25-26.

In so holding, the court explained for the first time that *Taylor*'s adoption of the categorical approach "anticipated the very rule later imposed for the sake of preserving the Sixth Amendment right, that any fact other than a prior conviction sufficient to raise the limit of [a] possible federal sentence must be found by a jury[.]" *Shepard*, 544 U.S. at 24 (citing *Apprendi*, 530 U.S. at 490; *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999)); see also U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a * * * trial[] by an impartial jury of the State[.]"). That rule became fully apparent five years before *Shepard*, in *Apprendi*, 530 U.S. at 490, in which the Court so held in the context of concluding that unless specifically found by a jury, facts regarding an offender's racially biased motivation could not permissibly support exposing that offender to a greater maximum sentence than would otherwise have been applicable. The year before *Apprendi*, in *Jones*, 526 U.S. at 243 n.6, the Court had suggested the same, employing constitutional avoidance to interpret a statute to require a jury, rather than a judge, to make findings regarding a victim's injury when those findings increased an offense's otherwise-applicable sentencing range. As *Shepard* explained its own holding, any finding of "a fact *about* a prior conviction," as opposed to the simple fact *of* a prior conviction, "is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*" to fall within the narrow range of facts this Court had authorized sentencing judges to find themselves. *Shepard*, 544 U.S. at 24-25 (emphasis added) (citing

Apprendi, 530 U.S. at 490; *Jones*, 526 U.S. at 243 n.6).[3]

3. In more recent years, the Court has been still more explicit about the Sixth Amendment's prohibition on increasing a sentence based on judge-made findings about "the who, what, when, and where of a conviction." Cf. *Pereida* v. *Wilkinson*, 141 S. Ct. 754, 765 (2021). In *Descamps*, the Court reversed a judgment affirming an ACCA enhancement that was based on a judge-made, non-elemental finding that the defendant's prior conviction involved breaking and entering (which is an ACCA predicate) rather than shoplifting (which is not). See 570 U.S. at 259, 277-78. The Court explained that because the statute under which the conviction was entered encompassed both offenses, any inquiry into which one the defendant had committed was an impermissible quest for facts "superfluous" to the conviction itself and could not "license a later sentencing court to impose extra punishment." *Id.* at 270. As the Court put it, "[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt." *Id.* at 269.

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[3] *Shepard*'s distinction of "the conclusive significance of a prior judicial record" is a reference to *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), in which the Court "recognized a narrow exception" to the *Apprendi* rule "for the fact of a prior conviction." *Alleyne*, 570 U.S. at 111 n.1. Although this Brief assumes *arguendo Almendarez-Torres*'s continuing validity, the Court has made clear that it rests on a shaky foundation, *e.g.*, *Alleyne*, 570 U.S. at 111 n.1; *Apprendi*, 530 U.S. at 489-90, and NACDL respectfully maintains that it was wrongly decided and should be overruled.

The Court also reiterated that, as it had explained in *Shepard*, the Sixth Amendment prohibition applies no matter how confident a sentencing court might be of the veracity of the facts it wishes to find. That is because the *Almendarez-Torres* exception, see *supra* at 10 n.3, extends only to "identifying the defendant's crime of conviction," and does not permit an inquiry into the conduct from which the conviction arose. *Descamps*, 570 U.S. at 269. Accordingly, even when a predicate conviction was entered based on a defendant's express admission, "whatever [the defendant] sa[id], or fail[ed] to say, about superfluous [*i.e.*, non-elemental] facts cannot license a later sentencing court to impose extra punishment." *Id.* at 270 (citing *Shepard*, 544 U.S. at 24-26); see *infra* at 12-13.

The Court articulated those principles yet again in *Mathis*. See 136 S. Ct. at 2251. That case involved an ACCA enhancement imposed based on a prior conviction under a statute that enumerated various alternative means of committing a single element—in particular, breaking into a "building, structure, [or] land, water, or air vehicle"—some of which would be ACCA predicate offenses and some of which would not. *Id.* at 2250. Although separately listed in the statute, those different means of committing the same offense were legally extraneous facts, not elements, because state law did not require a jury to find which means was employed. *Id.* Based on *Descamps*, the Court held that a sentencing court could not refer to *Shepard* documents to determine which version of the offense was committed, because "[w]hether or not mentioned in a statute's text, alternative factual scenarios remain just that—and so remain off-limits to judges imposing ACCA enhancements." *Id.* at

2253. Put differently, "[t]he itemized construction gives a sentencing court no special warrant to explore the facts of an offense[.]" *Id.* at 2251.

Once more, the Court set forth the Sixth Amendment basis for its holding. As the Court explained, "a construction of ACCA allowing a sentencing judge to go any further [than identifying the elements of the crime of conviction] would raise serious Sixth Amendment concerns," because "[t]his Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction." *Mathis*, 136 S. Ct. at 2252 (citing *Apprendi*, 530 U.S. at 490). "That means," the Court held, "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense." *Id.* For that proposition, the Court approvingly cited Justice Thomas's separate opinion in *Shepard*, in which he noted that exploration of extraneous facts would amount to "constitutional error." *Id.* (citing 544 U.S. at 28 (concurring in part and concurring in judgment)). The Court fully endorsed Justice Thomas's view, holding once again that a sentencing judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id.*

Picking up on a thread from earlier cases, the Court also explained that basing an increased sentence on judicial findings regarding non-elemental facts is profoundly unfair to defendants. As *Descamps* had set forth, permitting such findings would allow sentencing courts, "[i]n case after case," to "examin[e] (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at

trial, facts that, although unnecessary to the crime of conviction," might otherwise be relevant to ACCA's application. 570 U.S. at 270. "The meaning of those documents will often be uncertain[,] [a]nd the statements of fact in them may be downright wrong." *Id.* "A defendant, after all, often has little incentive to contest facts that are not the elements of the charged offense—and may have good reason not to," such as where a dispute might confuse the jury or appear to a prosecutor or court as irksome "squabbling about superfluous factual allegations." *Id.* "Such inaccuracies," *Mathis* explained, "should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence." *Mathis*, 136 S. Ct. at 2253.

B. ACCA Enhancements Are Routinely Imposed Based On Improper Judicial Factfinding.

Despite the clear force of those precedents, lower courts around the country regularly impose ACCA enhancements based on their own findings regarding non-elemental, otherwise-superfluous facts. Indeed, *every* ACCA enhancement depends on a determination that the occasions requirement is satisfied, and every occasions inquiry requires a factfinder to determine, at the very least, when a prior offense was committed. Yet an offense's date and time will rarely, if ever, have been anything other than an "extraneous fact[]," see *Descamps*, 570 U.S. at 270, irrelevant to establishing guilt as to any prior offense, much less as to all three prior offenses required to support an ACCA sentence.

Moreover, unconstitutional findings regarding *when* an offense occurred are often insufficient, standing alone, to support a "different occasions" finding. So

courts often go even further, mapping out the precise details of how they believe each of a number of putative predicates was committed. The inquiry often devolves, as it did in this case, into a minute-by-minute narrative account that makes the findings held unconstitutional in *Shepard*, *Descamps*, *Mathis*, and elsewhere appear modest by comparison. For instance, even though *Mathis* makes clear that a sentencing court cannot peek behind a burglary conviction for even the limited purpose of determining the type of structure burgled, one Eighth Circuit case deemed the occasions inquiry satisfied based on the following judge-found facts:

> [The defendant] entered a gas station, pointed a gun at the cashier, and took money from the register. * * * Grabbing the cash, [the defendant] ran outside, still holding the gun. Someone saw him. As [he] fled, this witness drove after him. [He] then shot toward the witness's vehicle, close enough that the witness heard a 'zing' and smelled gunpowder. For that, [he] received [an] assault conviction. The question is whether the * * * assault was committed on an occasion different from the robbery itself.

Perry, 908 F.3d at 1131 (quotation omitted).

And that is just one example. In other cases, courts have relied on their own findings regarding such non-elemental facts as which particular buildings were burglarized, how many feet apart they were, and how many seconds it would have taken to bridge the distance, *United States* v. *Weeks*, 711 F.3d 1255, 1258, 1261 (11th Cir. 2013) ("Shirley's Restaurant" and "the Florida Times Union Building": separate occasions), or which particular Minnesota lakes three burglarized cabins were on, *United States* v. *Deroo*, 304 F.3d 824,

828 (8th Cir. 2002) ("Spider Lake," "Boulder Lake," and "Island Lake": separate occasions), or, in analyzing two hand-to-hand drug sales, the exact locations of the purchasers and the physical distance between them, *United States* v. *Willoughby*, 653 F.3d 738, 744 (8th Cir. 2011) (purchasers "stood side-by-side": one occasion). In another case, before being reversed solely for straying from *Shepard* documents—not for finding non-elemental facts—a district court found different occasions based on non-jury findings that one offense was "for a robbery committed on February 18, 2006 in Brooklyn, at 11:00 a.m., in which [the defendant] and a co-defendant stole a debit card from the victim using a box cutter," another was "for a robbery committed on the subway in Manhattan on February 19, 2006, together with two co-defendants, using a box cutter and a bladed knife," and a third was "for a robbery also committed on February 19, 2006, on the subway in Queens, with two unnamed individuals, using a box cutter and a bladed knife." *United States* v. *Dantzler*, 771 F.3d 137, 139-40 (2d Cir. 2014). Reliance on such findings blatantly contravenes this Court's precedents.

The justifications lower courts have invoked for continuing along that path are profoundly unpersuasive. Often, courts have reasoned that the date, location, and other specific factual circumstances underlying a given conviction are all "recidivism-related," and are therefore inseparable from the fact of conviction itself. *United States* v. *Harris*, 794 F.3d 885, 887 (8th Cir. 2015).[4] The

[4] See also, *e.g.*, *Dantzler*, 771 F.3d at 144 ("[A] sentencing judge's determination of whether ACCA predicate offenses were committed 'on occasions different from one another' is no different, as a constitutional matter, from determining the *fact*

Government apparently shares that view. See, *e.g.*, Brief For The United States In Opposition at 6-7, *Starks* v. *United States*, No. 19-6693 (Jan. 21, 2020) ("A sentencing court's authority under *Almendarez-Torres* to determine the fact of a conviction, without offending the Sixth Amendment, necessarily includes the determination of when a defendant's prior offenses occurred, and whether two of them occurred on the same or separate occasions.") (citing *Santiago*, 268 F.3d at 156-57); Brief For The United States In Opposition at 10-11, *Hennessee* v. *United States*, No. 19-5924 (Dec. 6, 2019) (similar). But this Court expressly rejected it in *Shepard*, then again in *Descamps*, and still again in *Mathis*. As noted, in *Shepard* and *Mathis*, the findings the Court held impermissible were about the modest question of whether previous burglaries had targeted buildings (as would trigger the enhancement) or vehicles (as would not). See *Mathis*, 136 S. Ct. at 2250-51; *Shepard*, 544 U.S. at 15-16. In *Descamps*, the out-of-bounds finding was about whether the defendant had entered a store illegally (triggering the enhancement)

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of those convictions.") (quoting *United States* v. *Santiago*, 268 F.3d 151, 153 (2d Cir. 2001)); *United States* v. *Blair*, 734 F.3d 218, 227-28 (3d Cir. 2013) (interpreting *Descamps* to permit court to find "the date or location of the crimes charged"); *Thomas*, 572 F.3d at 952 n.4; *United States* v. *White*, 465 F.3d 250, 254 (5th Cir. 2006); *United States* v. *Michel*, 446 F.3d 1122, 1132-33 (10th Cir. 2006) (holding that "*Apprendi* left to the judge[]" the task of finding facts *beyond* "the mere fact of previous convictions") (quotation omitted); *United States* v. *Thompson*, 421 F.3d 278, 286 (4th Cir. 2005) ("To take notice of the different dates or locations of burglaries—something inherent in the conviction—is to take notice of different occasions of burglary as a matter of law."); *United States* v. *Burgin*, 388 F.3d 177, 186 (6th Cir. 2004) (similar); *United States* v. *Morris*, 293 F.3d 1010, 1012-13 (7th Cir. 2002) (similar).

or legally (not). See 570 U.S. at 259. "[T]here simply is no way to square an expansive view of the prior conviction exception" with those holdings. See *Perry*, 908 F.3d at 1135 (Stras, J., concurring). Indeed, given that *Mathis* and *Shepard* clearly hold that "a finding of * * * the location of the crime * * * cannot be treated the same as the fact of a prior conviction," it cannot possibly be permissible to "assign judges the role of finding even *more* facts—including the timing, location, *and* nature of *multiple* convictions—in search of an answer to the * * * different-occasions question." *Id.*

In addition to misapplying the *Almendarez-Torres* exception, lower courts have also often misconceived the inquiry *Taylor* and *Shepard* permit. Thus, it has become common for courts of appeals (including the court below) to limit the occasions inquiry to *Taylor* and *Shepard* documents, but to permit a sentencing court to rely on whatever non-elemental facts it might find in them. See, *e.g.*, *United States* v. *Carter*, 969 F.3d 1239, 1243 (11th Cir. 2020); *United States* v. *Young*, 809 F. App'x 203, 209-10 (5th Cir. 2020) (discussing circuit precedents); *Hennessee*, 932 F.3d at 444-45. But "[r]epurpos[ing] *Taylor* and *Shepard* to *justify* judicial fact-finding * * * turns those decisions on their heads." *Perry*, 908 F.3d at 1136 (Stras, J., concurring) (quoting *Mathis*, 136 S. Ct. at 2254) (emphasis added). To begin with, the principal holding of each case is that sentencing courts *cannot* engage in factfinding beyond the offense of conviction and its elements. *Supra* at 7-11. Moreover, as *Descamps* explained, the sole permissible use of *Taylor* and *Shepard* documents is for the "limited function" of identifying that offense and those elements, and this Court has never—in any

circumstance—"authorized" the use of them toward any other end. 570 F.3d at 260, 262-63. Once the offense of conviction is known—as it must be to trigger an occasions analysis—"the inquiry is over," and those documents "ha[ve] no role to play." *Id.* at 264-65.

Nor can unconstitutional factfinding be justified by the supposedly "counterintuitive" results to which proper application of this Court's precedents might sometimes give rise. Cf. *Mathis*, 136 S. Ct. at 2251. It may well be that "[i]n some cases, a sentencing judge knows (or can easily discover)" the facts underlying a given offense, and might be frustrated by his or her inability to impose an ACCA enhancement based on that knowledge. *Id.* But as the Court has explained, that is "[n]o matter." *Id.* Just as a court cannot enter a judgment of liability based on its own view that a defendant is guilty, it cannot increase a sentencing range based on its own view that the statutory prerequisites are satisfied. No matter how certain a judge may feel, determining the facts that will expose a defendant to a greater sentence is fundamentally the role of the jury.[5]

Two other rationales the lower courts have invoked are still less substantial. More than one court has

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[5] Cf. *Blakely* v. *Washington*, 542 U.S. 296, 305-06 (2004) ("Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. * * * *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.") (citations omitted).

suggested that merely because *Descamps* and *Mathis* addressed a different part of section 924(e)(1)—the "violent felony" definition—they have no application to the occasions inquiry. See, *e.g.*, *United States* v. *Walker*, 953 F.3d 577, 581 (9th Cir. 2020) ("To the extent that *Mathis* expresses broader disfavor of factual determinations by sentencing judges, it is not clear whether and how this disfavor extends beyond determining that a given state-law crime is an ACCA predicate."); *United States* v. *Doctor*, 838 F. App'x 484, 487 (11th Cir. 2020). And another has reasoned that to faithfully apply this Court's precedents would simply be too disruptive to ACCA's framework. See, *e.g.*, *Hennessee*, 932 F.3d at 443 (refusing to apply *Descamps* and *Mathis* because "[a] sentencing judge would be hamstrung * * * in making most different-occasions determinations if he or she were only allowed to look to elemental facts"). Both lines of reasoning fail. The Sixth Amendment does not cease to apply halfway through section 924(e)(1), and if the Constitution and the Armed Career Criminal Act conflict, it is not the Constitution that must give way. See, *e.g.*, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). There simply is no basis for imposing ACCA enhancements based on judge-found facts.

II. The Simultaneity Test Does Not Reduce The Central Role Of Impermissible Factfinding In The Occasions Analysis.

No answer limited to addressing the simultaneity rule the court of appeals applied is likely to affect the pivotal role unconstitutional factfinding plays in the occasions analysis. Indeed, although that rule often results in a near-reflexive finding that predicate offenses occurred on separate occasions, it still requires courts to rest their judgments on

impermissible findings regarding non-elemental facts. Worse still, as the petitioner explains, the simultaneity rule elevates to dispositive significance facts that were legally irrelevant and would have appeared inconsequential at the time a predicate conviction was entered. See Pet'r Br. 37-43.

1. This case is a perfect example. As the petitioner has made clear at every stage, the statute underlying his predicate convictions was agnostic as to whether he was liable as a principal or an accomplice. See, *e.g.*, Pet'r Br. 42-43 & n.7; Pet'r Cert. Reply 5-6; Pet'r C.A. Reply 9; Pet'r C.A. Br. 20-21. Thus, no one could conclude solely from the statute of conviction or any Sixth Amendment-approved inquiry that he entered *any* structure, much less ten of them sequentially (and still less that they were separate mini-warehouses with separate building numbers, as the court of appeals appears to have thought was vital, see Pet. App. 9-10). The petitioner would have been guilty of precisely the same offense if he had entered and remained in one or two structures while his accomplices entered the others, or if he had entered none of them and simply loaded goods or stood watch. Accordingly, it was only by making findings (based, in this case, on legally extraneous facts contained in the indictment) regarding the means by which the petitioner committed an indivisible offense that the court of appeals could even apply the simultaneity rule. For the reasons explained, those findings were clearly unconstitutional, are inextricably linked to the occasions analysis (and thus within the question presented), and are themselves reversible error, particularly given that the petitioner has contested their propriety at every step of the way. See *supra* at

3-4.[6] Moreover, as *Descamps* and *Mathis* teach, the basis for the findings was inherently unreliable, because at the time of the conviction, even if it was wrong, the petitioner would have had no reason to contest the legally irrelevant factual recital on which the court of appeals here relied. *Supra* at 12-13; see also Pet'r Br. 37-43.

Nor is the distinction between principal and accomplice liability the only insignificant circumstance the simultaneity rule so exalts. To take but one more example, under the court of appeals' approach, otherwise-irrelevant allegations or admissions regarding offenses' locations can also be the difference between an ordinary offender and an armed career criminal. For instance, in *United States* v. *Hamell*, 3 F.3d 1187, 1191 (1993), the Eighth Circuit held that a stabbing and a shooting that took place in a single evening nevertheless occurred on different occasions because, twenty-five years earlier, the defendant had admitted in his plea colloquy to the then-immaterial proposition that one occurred inside and the other outside a bar. The location of those offenses would have been irrelevant to the underlying state court proceeding, and thus may well have gone unchallenged if inaccurate, see *Descamps*, 570 U.S. at

[6] As the petitioner correctly notes, the possibility that he was convicted as an accomplice rather than a principal was actively litigated in both lower courts. See Pet'r Br. 42-43 n.7. In the court of appeals, the Government's only answer was to state—in clear contravention of *Mathis*—that actual entry is an element merely because it is listed in the statute of conviction, see Gov't C.A. Br. 19-20, even though, as the petitioner explains, state law makes clear that it need not be charged or proven beyond a reasonable doubt, Pet'r Br. 42 (citing *Davis* v. *State*, 765 S.E.2d 336, 338-39 (Ga. 2014)). The court of appeals then ignored the issue entirely.

270-71, but took on life-altering consequence when a federal sentencing court discovered the admission decades later. The casebooks are full of similar examples. See *supra* at 13-19; Pet'r Br. at 37-43; see also, *e.g.*, *United States* v. *Rollins*, 518 F. App'x 632, 633, 636 (11th Cir. 2013) (finding that robberies more than ten years earlier were successive, not simultaneous, because defendant "drove away" between them). Cf. *United States* v. *Allen*, 488 F. App'x 377, 379-80 (11th Cir. 2012) (drug sales "within a short time period," to a single individual and involving "the same drug," were on separate occasions because, four years earlier, charging document had set forth dates three days apart).

2. Moreover, as the decision below also demonstrates, see Pet. App. 8-9, courts that apply the simultaneity rule routinely resort to an all-the-circumstances analysis when that rule is not satisfied. For instance, in *United States* v. *Sweeting*, 933 F.2d 962, 967 (1991), the Eleventh Circuit, ordinarily a simultaneity jurisdiction, conducted its occasions inquiry based on the premise that the defendant had burglarized one home, fled to another home when the police approached, and hid in a closet to escape detection (one occasion). And in *United States* v. *Wilson*, 27 F.3d 1126, 1131 (1994) and *United States* v. *Thomas*, 211 F.3d 316, 318-21 (2000), the court of appeals whose decision is currently on review reached divergent results based on the apparent difference between committing two rapes against different victims on different floors of the same house in one day (career criminal) and committing two rapes in a single day against two victims in a car driven from one location to another (not). As the petitioner explains, these highly fact-specific decisions from courts that

supposedly apply the simultaneity rule demonstrate that the rule is "built on sand" and cannot be consistently applied. Pet'r Br. 43-44. But moreover, the constant need in simultaneity-rule jurisdictions to fall back on all-the-circumstances analyses forecloses any assertion that the court of appeals' approach lessens the role of non-elemental facts. If anything, the simultaneity rule gives rise to greater Sixth Amendment concerns than the petitioner's proposed approach, both because it leads to a greater raw number of unconstitutional sentences and because, when it is applied, a single finding regarding an otherwise-irrelevant fact will often be dispositive.

3. At least one circuit that applies the simultaneity rule also employs it to shift the burden to a defendant to demonstrate that offenses *did not* occur on different occasions. See, *e.g.*, *United States* v. *Bookman*, 263 F. App'x 398, 401 (5th Cir. 2008) ("Defendant argued that the ACCA enhancement was improper because ambiguity might exist regarding the date of the offenses, but Defendant failed to introduce any evidence, much less a preponderance, that his offenses occurred simultaneously."); see also *United States* v. *Owens*, 753 F. App'x 209, 213 (5th Cir. 2018) (describing burden-shifting approach). That is an independent Sixth Amendment violation and still further reason for this Court to intervene. At the very root of the *Apprendi* line of cases rests the maxim that facts that increase the maximum available sentence must not only be found by a jury, but also proven *by the state* beyond a reasonable doubt. See, *e.g.*, *Apprendi*, 530 U.S. at 484-85 (discussing *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975)); *Jones*, 526 U.S. at 240-43 (same). To the extent the simultaneity rule has been employed in service of the Fifth Circuit's

additional violation, that is yet another reason to reject any suggestion that it lessens the Sixth Amendment problems the occasions inquiry begets.

III. The Court Should State Unequivocally—Yet Again—That ACCA Enhancements Cannot Be Based On Judge-Found Facts.

For the reasons explained, to impose an ACCA enhancement based on judge-found facts is "to cast a blind eye over a good many precedents" of this Court. See *Pereida*, 141 S. Ct. at 764.[7] That is precisely what the lower courts have done, and no decision limited to the simultaneity rule's validity is likely to stop them. However, this case presents an excellent chance to confirm, for the benefit of lower courts and in the interest of enforcing this Court's supremacy, that the currently prevailing approach to the occasions inquiry clearly contravenes the Sixth Amendment and the unambiguous holdings of *Apprendi*, *Shepard*, *Descamps*, *Mathis*, and the other cases set forth

[7] See also, *e.g.*, *supra* at 7-13 (discussing *Mathis*, *Descamps*, *Shepard*, and *Apprendi*); *United States* v. *Davis*, 139 S. Ct. 2319, 2327 (2019) (noting the "Sixth Amendment complications" that arise when court attempts to "reconstruct[], long after [an] original conviction, the conduct underlying that conviction") (quoting *Johnson* v. *United States*, 576 U.S. 591, 605 (2015)) (emphasis omitted); *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1217 (2018) ("[T]his Court adopted the categorical approach in part to avoid the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries."); *Alleyne*, 570 U.S. at 111 & n.1; *S. Union Co.* v. *United States*, 567 U.S. 343, 346 (2012); *United States* v. *O'Brien*, 560 U.S. 218, 224 (2010); *United States* v. *Booker*, 543 U.S. 220, 230-31 (2005) ("We held [in *Apprendi*]: 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'") (quoting *Apprendi*, 530 U.S. at 490); *Blakely*, 542 U.S. at 305-06.

herein. The Court should use this opportunity to do so, or, at the least, should invite petitions for certiorari addressing the issue in another appropriate case.

CONCLUSION

For the foregoing reasons and those in the petitioner's brief, the Court should reverse the judgment on Sixth Amendment grounds. Alternatively, the Court should reverse on statutory grounds, emphasize that imposing an ACCA sentence based on judge-found facts contravenes the Sixth Amendment and this Court's precedents, and encourage the filing of petitions for certiorari addressing that issue.

Respectfully submitted,

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