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 OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Michael C. Holley
Co-Chair, Amicus Comm.
Joshua B. Carpenter
Jennifer Niles Coffin
Renee Pietropaolo
Carmen A. Smarandoiu
Assistant Federal Public Defenders
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

Davina T. Chen
Shelley M. Fite
SENTENCING RESOURCE COUNSEL, FEDERAL PUBLIC AND COMMUNITY DEFENDERS

Christopher B. Phillips
O'MELVENY & MYERS LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111

Michael R. Dreeben
Counsel of Record
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, DC 20006
(202) 383-5400
mdreeben@omm.com

Christopher P. Burke
O'MELVENY & MYERS LLP
Times Square Tower, 7 Times Square
New York, NY 10036

Jared R. Ginsburg
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES (continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of the National Association of Federal Defenders ("NAFD") as *amicus curiae* in support of petitioner.[1]

NAFD, formed in 1995, is a nationwide, nonprofit, volunteer organization whose membership comprises attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. Each year, federal defenders represent tens of thousands of indigent criminal defendants in federal court, including thousands sentenced under the enhancement provision in 18 U.S.C. § 924(e). Amicus therefore has particular expertise and interest in the subject matter of this litigation. The issues presented are of great importance to NAFD's work and to the welfare of its clients.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Armed Career Criminal Act ("ACCA") mandates a fifteen-year minimum sentence for defendants who have previously been convicted of certain qualifying offenses "committed on occasions different from one another." The ACCA therefore imposes one of the most severe punishments in federal law, converting a

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

firearms-possession offense punishable by a maximum of ten years into a mandatory-minimum term of fifteen years, with a potential sentence of life. The ACCA's title declares its purpose: to punish defendants whose persistence in recidivist conduct warrants dramatically enhanced sentences. The requirement that prior crimes occurred on "occasions different from one another" therefore plays a critical role in the statutory scheme: it distinguishes the "career" criminal that Congress meant to target from violators with multiple prior convictions that may have arisen from one criminal episode on a single night.

This case requires the Court to interpret this key provision in the ACCA. In light of the text, context, history, and purpose of the ACCA, the phrase "committed on occasions different from one another" requires that the prior offenses arise from distinct criminal episodes, separated by a significant intervening event. That intervening event is needed to establish a clear end to one episode of criminal activity before the beginning of another. The paradigmatic intervening event is the arrest of the defendant. To break the chain of events, other intervening factors must have comparable clarity in bringing an episode of criminal activity to a close.

That is the only interpretation that squares with the statutory scheme. A rule that looks only to temporal sequence, in contrast, asking only whether two crimes were committed at different "times," contradicts the ordinary meaning of "occasion" and produces results at odds with the ACCA's title, context, and history. Were there any doubt about the correct interpretation, the intervening-event standard is required

by the rule of lenity to avoid imposing harsh penalties in cases like this one, where a purely temporal approach to identifying the "occasions" on which prior crimes were committed produces grossly disproportionate results.

Finally, courts applying the correct legal test must rely on facts about the relationship between prior offenses that are not subsumed within the prior convictions themselves. That is because the relationship between prior crimes is not discernible from the "fact" of a prior conviction or the "elements" of a prior crime: a further inquiry is necessary to determine whether two crimes were committed on "occasions different from one another." This inquiry falls outside the narrow exception to the Sixth Amendment jury-trial right recognized in this Court's cases for the "fact" of a prior conviction and the elements of that offense. Sometimes the "occasions different" question will be easy to resolve based on an intervening arrest, a long temporal gap, or a complete change in participants or methods. In other cases, the question will be closer. But in every case, absent waiver by the defendant, the Constitution requires that the "occasions different from one another" requirement be alleged in the indictment, submitted to a jury, and proved beyond a reasonable doubt.

ARGUMENT

THE ACCA REQUIRES PROOF TO A JURY THAT THE DEFENDANT'S PRIOR OFFENSES AROSE FROM DISTINCT CRIMINAL EPISODES.

The ACCA enhances certain federal sentences when a defendant has three prior convictions for qualifying offenses that were "committed on occasions different from one another." As a matter of statutory interpretation, the enhancement demands proof of multiple criminal episodes, separated by a significant intervening event. A purely temporal rule, like that adopted by the courts of appeal, produces anomalous results at odds with the text of the ACCA and relevant contextual and historical considerations. And as a matter of constitutional law, the facts necessary to determine whether prior offenses occurred on "occasions different from one another" must (absent waiver by the defendant) be alleged in the indictment, resolved by the jury, and proved beyond a reasonable doubt. That is because the circumstances that define the relationship between prior offenses cannot be derived from the elements or fact of a prior conviction and thus fall within the constitutional rule announced by this Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

I. ACCA Is Triggered Only When Conduct Resulting In Multiple Convictions Arose From Multiple Criminal Episodes, Separated By A Significant Intervening Event.

A. Section 924(e)'s text compels a "multiple criminal episodes" test.

The ACCA provides for an enhanced sentence when a defendant is convicted of unlawful possession of a firearm, in violation of 18 U.S.C. § 922(g), "and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1). Congress reserved that mandatory enhancement only for repeat offenders whose prior convictions alone demonstrate a serious history of recidivism. It implemented that intention not only by requiring three separate convictions, but through a demand that the prior offenses were "committed on occasions different from one another." That phrase requires determining when one occasion ends and another begins. The text provides strong evidence that a break in the chain of events is required to separate offenses into distinct criminal episodes.

As with all questions of statutory interpretation, this Court begins with the ordinary meaning of the words in the statute. *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) ("statutory terms are generally interpreted in accordance with their ordinary meaning" (internal citation omitted)); *see also Johnson v. United States*, 559 U.S. 133, 138 (2010) (defining "physical force" as used in the ACCA according to its ordinary meaning).

Here, "occasion" has two common meanings: (1) "the totality of circumstances giving rise to an opportunity," and (2) a "particular time" at which something happens. *United States v. Bordeaux*, 886 F.3d 189, 195 (2d Cir. 2018) (distinguishing between two definitions of "occasions" based on dictionary references). The first is the primary definition in the Oxford English dictionary, and it connotes a broad set of circumstances that together produce an opportunity. *Occasion*, n.1, Oxford English Dictionary (2d ed. 1989) ("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."); *see also Occasion*, para. 1, Webster's Third International Dictionary (1976) ("[A] situation or set of circumstances favorable to a particular purpose or development: a timely chance."). Under the secondary definition, "occasion" conveys a narrower meaning: an occurrence that takes place at a particular time. *Occasion*, n.1, § III.b.8, *Oxford English Dictionary*, *supra* ("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.").

As used in § 924(e), the primary, broader definition is the better fit. Not only is the primary dictionary definition the more logical one to assume Congress meant, but the narrow temporal definition makes little sense in § 924(e). If brief intervals of time between offenses were sufficient to treat crimes as arising on different occasions, then Congress could have easily used "acts" or "actions" that are "different

from one another" to denote that more limited degree of separation between prior violent felonies or serious drug offenses. *See* Merriam Webster Dictionary (primary definition of *Action*: "a thing done"). Or it could have said offenses "committed at different times." Applying the primary definition of "occasion," in contrast, reaches beyond the timing of offenses to consider whether two crimes resulted from the same "purpose" or "development." Congress had no reason to use the word "occasions" to differentiate prior offenses unless it sought to capture this more expansive meaning.

B. The context, structure, and title of the ACCA support the "multiple criminal episodes" reading of § 924(e).

The context in which "occasions different from one another" appears, the structure of the ACCA as a whole, and the statute's title further support treating a § 924(e) "occasion" as an uninterrupted criminal episode, rather than a single point in time. As this Court has recognized, statutory construction compels courts to "exhaust 'all the textual and structural clues'" that bear on a term's meaning. *Niz-Chavez v. Garland*, 2021 WL 1676619, at *4, *8 (U.S. Apr. 29, 2021) (quoting *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)); *see also Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (plurality opinion) (statutory terms are not construed "in a vacuum;" instead, they must be read in "context and with a view to their place in the overall statutory scheme" (citing *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989))); *Coleman v. Tollefson*, 575

U.S. 532, 538-39 (2015) (ascertaining the plain meaning of "occasion" in a different statute by looking to the context in which it was used).

Here, the ACCA's contextual and "structural clues" reinforce the natural meaning of § 924(e)'s language. The statute refers to crimes committed on "different" occasions. 18 U.S.C. § 924(e)(1). This emphasis on distinct occurrences suggests more than a simple gap in time. Virtually all offenses are committed with some gap in between them. And a single course of conduct can often give rise to multiple convictions. But Congress clearly intended to require more than that a defendant have multiple convictions for qualifying offenses. That focus supports an interpretation that requires separate criminal episodes, an interpretation that targets true recidivist offenders.

A narrower definition of "occasions" goes well beyond the confirmed recidivist by opening up the possibility that any crimes that occur non-simultaneously—*i.e.*, sequentially, no matter how small the time between them—are committed on "occasions different from one another." Such a narrow definition of "occasions" would cast too broad a net, running the risk of rendering the "occasions" language "inoperative," or "void and insignificant." *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (alterations and internal quotation marks omitted) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004))).

The ACCA's title supports the broader understanding of "occasion" too. *See Almendarez-Torres v.*

United States, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (internal quotation marks omitted)); *see also Yates v. United States*, 574 U.S. 528, 540 (2015) (plurality opinion); *id.* at 552 (Alito, J., concurring). Here, the statute's title—armed "career" criminal—signals a focus on offenders who have more extensive records than crimes committed within a short period of time or a single crime spree. A "career" is "an occupation or profession followed as a *life's* work." *Career*, Merriam-Webster Dictionary 117 (1974) (emphasis added). This definition implies a "lengthy, time-consuming undertaking which consumes a good portion of one's life." *United States v. Brady*, 988 F.2d 664, 676 (6th Cir. 1993) (Jones, J., dissenting). Commonly understood, a "career" "cannot . . . logically comprise[] the events of a single evening." *Id.* at 677. Accordingly, adopting a narrower construction of occasion, one that creates a "career criminal" in one night, would defy the statutory title, which trains on the career nature of the defendant's criminal conduct.

C. The ACCA's history and purpose further confirm that § 924(e) requires multiple criminal episodes.

Beyond context and structure, the history and purpose of the ACCA point towards a multiple criminal episodes test. *See Abramski v. United States*, 573 U.S. 169, 179 (2014) (statutory construction should be informed by the statute's "history [and] purpose"); *see also Kucana v. Holder*, 558 U.S. 233, 249 (2010) (relying on history of statutory provisions to "corroborate" the Court's construction of a particular clause).

Three features of the ACCA's history and purpose confirm that § 924(e) requires multiple criminal episodes: (1) the Solicitor General's confession of error in *United States v. Petty*, 798 F.2d 1157 (8th Cir. 1986), *vacated*, 481 U.S. 1034 (1987), which led directly to the ACCA amendment that inserted the "occasions" language; (2) the use of "occasions different from one another" in the ACCA's predecessor statutes; and (3) the Sentencing Commission's implementation of that language, which was well known to the Congress that amended the ACCA.

1. Originally, the ACCA did not include the phrase "committed on occasions different from one another." *Compare* 18 U.S.C. App. 1202(a)(1) (Supp. 1984) (no "occasions" language), *with* 18 U.S.C. § 924(e)(1) (with "occasions" language). This changed in 1988, when Congress amended the ACCA to further explain the "requisite type of prior convictions that trigger the law's mandatory minimum sentencing provisions." 134 Cong. Rec. S17370-02 (daily ed. Nov. 10, 1988) (statement of Sen. Biden). The amendment clarified that a "career criminal" eligible for the enhancement was a person who "*over the course of time* commits three or more of the enumerated kinds of felonies and is convicted therefor." *Id.* (emphasis added).

The impetus for this amendment was the Solicitor General's confession of error in *Petty*. In *Petty*, at sentencing, the government sought an ACCA enhancement based partially on treating a six-count robbery conviction as six separate predicate offenses. 798 F.2d at 1159-60. That six-count conviction arose from a robbery of six individuals committed on one evening at one restaurant. *Id.* During that single episode, the

defendant and several associates *sequentially* robbed six patrons, taking each patron's valuables before moving on to the next. Resp. Br. 16-19, *People v. Valentine*, 53 A.D. 2d 832 (N.Y. App. Div. 1976).

The district court applied the ACCA enhancement at sentencing, and the Eighth Circuit affirmed on appeal. *Petty*, 798 F.2d at 1160. Petty sought certiorari, and in a brief responding to his petition, the Solicitor General acknowledged that while the ACCA lacked the "occasions" language found in other recidivist statutes, *see infra* Section I.C.2, neither Congress nor the Justice Department intended the ACCA's sentencing enhancement to sweep "more broadly than in the case of other federal enhanced penalty statutes." U.S. Br. 5-6, *Petty v. United States*, 481 U.S. 1034 (1987) (No. 86-6263) (*Petty* Br.).

As support, the Solicitor General pointed to statements by legislators in floor debates and legislative reports concerning the ACCA, which referenced "career criminals," "repeat offenders," "habitual offenders," "recidivists," "revolving door" offenders, "third-time offender," and other similar language to support his position that Congress did not intend "to count previous convictions on multiple felony counts arising from a single criminal episode as multiple 'previous convictions.'" *United States v. McElyea*, 158 F.3d 1016, 1020 (9th Cir. 1998) (quoting *Petty* Br. 7).

Relying on this history, the Solicitor General concluded that the Eighth Circuit erred when it construed "the statute to reach multiple felony convictions arising out of a single criminal episode." *Petty* Br. 10. Instead, the offenses underlying prior convictions must occur in "multiple criminal episodes." *Id.*

This Court subsequently granted certiorari, vacated the judgment of the court of appeals, and remanded for further consideration in light of the position asserted by the Solicitor General. *Petty v. United States*, 481 U.S. 1034 (1987).[2]

In response to these events, Congress amended the ACCA to "reflect the Solicitor General's construction." 134 Cong. Rec. S17370-02 (statement of Sen. Biden). According to then-Senator Biden, this clarification was necessary "both to avoid future litigation and to insure that [the ACCA's] rigorous sentencing provisions apply only as intended in cases meriting such strict punishment." *Id.* That history makes clear that Congress directly amended the ACCA to include the "occasions different from one another" language in order to prevent the ACCA's application to defendants who commit crimes in rapid succession over the course of a single criminal episode—as was the case in *Petty*.

2. To craft the amendment in response to *Petty*, Congress expressly relied on two other enhanced penalty provisions, namely: (1) 18 U.S.C. § 3575(e)(1), the

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[2] Notably, the Eighth Circuit's position in that case rested on a more plausible textual ground than the Sixth Circuit in petitioner's case. In *Petty*, at least, the court of appeals had a colorable argument supported by the plain language of the statute at the time, which applied the enhancement when the defendant "had three previous convictions," 798 F.2d at 1159, in contrast to statutes drawing a distinction between prior offenses that were committed on different occasions. But today, given that Congress amended the statute to overturn cases like *Petty*, the text cannot plausibly be read, as the Sixth Circuit did, to require only modest temporal separation between prior offenses.

Organized Crime Control Act of 1970 ("OCCA"), Pub. L. No. 91-452, 84 Stat. 922 (1970) (repealed effective Nov. 1, 1987) (special dangerous offender); and (2) 21 U.S.C. § 849(e)(1), the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (repealed effective Nov. 1, 1987) (special drug offender). *See* 134 Cong. Rec. S17370-02 (statement of Sen. Biden). Both statutes confirm that the proper test requires multiple criminal episodes.

Starting with the OCCA, the American Bar Association first proposed the "committed on occasions" language in 1970, so that § 3575(e)(1) would match the language in the ABA's *Standards Relating to Sentencing Alternatives and Procedures*, § 3.3 (Habitual offenders) (1968). H.R. Rep. 91-1549, at 4065 (1970) . The legislative report on the OCCA refers not only to section 3.3 but also to a "statement by the Association's President-Elect, which was submitted to the subcommittee on July 23, 1970." *Id.* at 4064–65. That submission reveals that the phrase "committed on occasions different from one another" was meant to eliminate ambiguities in an earlier draft of the bill and that any impact was expected to *benefit* defendants. *See Organized Crime Control Act: Hearing on S. 30 and Related Proposals Before the H. Comm. on the Judiciary*, 91st Cong. 562, 568 (1970) (statement of Edward L. Wright, President-Elect, American Bar Association) (noting that prior OCCA version "lacks sufficient clarity and criteria to permit it to be a guideline for judges in using extended term sentences only in the cases of dangerous habitual offenders" and sug-

gesting adoption of the ABA standards, which "require the commission of different crimes on different occasions" as a way to avoid that ambiguity).

Other commentators on the OCCA made similar points:

> I submit that the 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 a special danger, not the number of prosecutions that may be founded on a single episode involving multiple offenses.

See id. at 523 (statement of Herbert Wechsler). These statements emphasize that OCCA's enhancement was meant to target career offenders.

When Congress subsequently enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970, it borrowed the ABA's "occasions" language from the OCCA. 116 Cong. Rec. H9189 (daily ed. Sept. 24, 1970). In doing so, Congress reiterated that the "occasions" language introduced into the earlier version of the OCCA was intended to help defendants. Specifically, Congressman Poff stated that § 849 "incorporates the substantive and procedural changes recommended by the board of governors of the American Bar Association, and those changes I think better protect the rights of the accused and better structure the penalty package." *Id.*

Borrowing from both predecessor statutes, then-Senator Biden affirmed the same purpose when he proposed adding the different "occasions" language to

the ACCA. *See* 134 Cong. Rec. S17370-02 (statement of Sen. Biden) (proposing the amendment to clarify that a "career criminal" eligible for the enhancement was a person who "over the course of time commits three or more of the enumerated kinds of felonies and is convicted therefor"). In doing so, the history makes clear that Congress intended the enhancements to target only serious re-offenders.

3. In addition, by 1988, when it amended the ACCA, Congress was well aware of how different "occasions" had been interpreted in similar sentencing contexts. In 1984, Congress passed the Sentencing Reform Act, which delegated to the Sentencing Commission (the "Commission") the task of ensuring that the Sentencing Guidelines would provide for "a substantial term of imprisonment" when the defendant "has a history of two or more prior . . . felony convictions for offenses committed on different occasions." 28 U.S.C. § 994(i)(1). As with the ACCA, this different "occasions" language was derived from 18 U.S.C. § 3575(e)(1) and 21 U.S.C. § 849(e)(1), each of which would expire on November 1, 1987, the effective date of the Sentencing Reform Act. *See* S. Rep. 98-225, at 176 (1983).

To carry out this congressional directive, the Commission created the criminal history categories of the Sentencing Guidelines. Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985-1987*, 45 Hofstra L. Rev. 1167, 1287-88 (2017). In crafting these categories, the Commission looked primarily at the Parole Commission's "Salient Factor Score" ("SFS"). *Id.* at 1288-89. The SFS provided that "[c]onvictions for

prior offenses that are charged or adjudicated together (*e.g.*, three burglaries) are counted as a single prior conviction, except when such offenses are separated by an intervening arrest." 28 C.F.R. § 2.20 (1986). Accordingly, the Guidelines adopted the following language for determining whether criminal acts should be considered as related or treated independently for the purpose of calculating a defendant's criminal history: "Cases are considered related if they (1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing." U.S.S.G. § 4A1.2, comment, n.3 (1987). At the same time, the Commission signaled that cases should be considered independent where "the defendant commits a number of offenses on independent occasions separated by arrests." *Id.*[3]

When Congress amended the ACCA, it was well aware of the Commission's interpretation. The Commission reported its initial set of Guidelines to Congress on April 13, 1987, and they took effect on November 1, 1987, only after "the prescribed period of Congressional review." U.S. Sent'g Guidelines Manual ch. 1, pt. A, introductory cmt. 1.2 (U.S. Sent'g Comm'n 2018); *see also Mistretta v. United States*, 488

[3] In refining its implementation of § 994(i)(1), the Commission most recently identified an intervening arrest as a dispositive event to identify when offenses were committed on occasions different from one another. *See* U.S.S.G. Amendment 709, Reason for Amendment ("Under the amendment, the initial inquiry will be whether the prior sentences were for offenses that were separated by an intervening arrest (i.e., the defendant was arrested for the first offense prior to committing the second offense). If so, they are to be considered separate sentences, counted separately, and no further inquiry is required.").

U.S. 361, 369 (1989); 28 U.S.C. § 994(a), (p). Accordingly, Congress incorporated the relevant language into the ACCA with an understanding of the Commission's expert view about the type of events that distinguish one "occasion" of criminal conduct from another.

D. An ACCA "occasion" is an uninterrupted course of conduct that ends only upon a significant break.

Reading ACCA's text in the context of its history and background, the different "occasions" requirement must involve separate episodes, broken by a significant intervening event. The facts in *Petty* are particularly telling: they show that the Solicitor General rejected an application of the ACCA that would allow a rapid-fire sequence of criminal activity to serve as the basis for an ACCA enhancement. And Congress then implemented that understanding through the use of language that was designed to require more than a multicount indictment charging closely related crimes. Accordingly, the ACCA requires distinct episodes, and distinct episodes can be established only when one episode of criminal conduct ends before a new one begins. This requires the existence of a significant intervening event to mark the boundary between occasions.

The archetypal "significant intervening event" is the arrest of the defendant. *See, e.g.*, *United States v. Wilks*, 464 F.3d 1240, 1243-44 (11th Cir. 2006) (intervening arrest separated the underlying predicate convictions); U.S.S.G. § 4A1.2(a)(2) (prior sentences counted separately if the sentences were imposed for offenses separated by an intervening arrest). Indeed, when Congress added the "occasions different from

one another" requirement in 1988, it was aware that recidivism theorists counted separate crimes by looking to whether the underlying criminal conduct was separated by the intervention of the criminal justice system. *See Abuelhawa v. United States*, 556 U.S. 816, 823-24 (2009) (Congress "legislate[s] against a background usage of terms").

During hearings on the OCCA's enhanced penalty provisions, one scholar described recidivism as "a basis for extended sentences" only when the defendant's actions proceeded thusly: "offense, correctional experience, offense, correctional experience, offense." *Hearing Before the Committee on the Judiciary United States Senate*, 91st Cong. 200 (1969) (statement of Peter W. Low, University of Virginia Law School). In this view, "[i]f the defendant has been afforded two separate opportunities to respond to normal sentencing treatment, and after each opportunity has committed a new offense, then, and only then, . . . should he become subject to recidivist sentencing laws." *Id.*

Scholars retained this view of recidivism around the time of the ACCA amendment: "The effectiveness of criminal justice policies and practices is often gauged by the extent to which offenders, after the imposition of punishment, continue to engage in crime." Lawrence A. Greenfield, *Examining Recidivism*, U.S. Dep't of Justice: Bureau of Justice Statistics, Special Report (Feb. 1985) (defining "recidivists" as those who "had previously served a sentence to incarceration as a juvenile, adult, or both"); *see also, e.g.*, Michael D. Maltz, *Recidivism* 1 (1984), *available at* https://indigo.uic.edu/articles/book/Recidivism_/10773719

("Recidivism, in a criminal justice context, can be defined as the reversion of an individual to criminal behavior after he or she has been convicted of a prior offense, sentenced, and (presumably) corrected.").

Given this history, and the way that Congress understood recidivism in 1988, an ACCA "occasion" ends only with an intervening event of significance comparable to an arrest. That could include a significant passage of time*, see, e.g.*, *United States v. Thornton*, 23 F.3d 1532 (9th Cir. 1994) (two burglaries of the same residence were separate occasions because they were committed twelve days apart); a significantly different type of criminal conduct that is not an outgrowth of the first crime; or a complete change in participants or methods. In contrast, crimes committed during an attempted escape from a burglary would not qualify as two ACCA "occasions," *see*, *e.g.*, *United States v. Graves*, 60 F.3d 1183 (6th Cir. 1995); nor would two drug trafficking offenses involving related distributions to the same buyer one day apart, *cf. Blockburger v. United States,* 284 U.S. 299, 301-02 (1932) ("shortly after delivery of the drug which was the subject of the first sale, the purchaser paid for an additional quantity, which was delivered the next day"). *But see United States v. Cardenas*, 217 F.3d 491 (7th Cir. 2000) (incorrectly concluding that two narcotics sales within forty-five minutes and one block apart were committed on occasions different from one another).

The test necessarily turns on identifying a clear break between offenses, beyond mere sequential commission of separately prosecutable crimes. And in close cases, where the dividing lines between offenses

are not clear, the government will likely be unable to carry its burden of proof. But that is a virtue in the context of a recidivism statute that imposes harsh mandatory punishment only on offenders whose crimes reflect engrained patterns rather than short-term sprees. *See Graham v. West Virginia*, 224 U.S. 616, 623 (1912) ("the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted.").

E. Any ambiguity in the statute must be resolved by applying the rule of lenity.

If the Court concludes that, notwithstanding the evidence above, the different "occasions" requirement is ambiguous, the rule of lenity requires adopting a multiple-episodes test, defined by a significant intervening event. Ambiguous criminal statutes should always be interpreted with an eye towards lenity. *Jones v. United States*, 529 U.S. 848, 858 (2000) ("We have instructed that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971))); *Taylor v. United States*, 495 U.S. 575, 596 (1990) ("[C]riminal statutes, including sentencing provisions, are to be construed in favor of the accused.").[4]

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[4] As Justice Kavanaugh has noted, the Court has varied in its rule-of-lenity cases between requiring "ambiguity" and "grievous ambiguity." *Shular v. United States*, 140 S. Ct. 779, 788 (2020) (Kavanaugh, J., concurring). The rule's purposes support a simple ambiguity test: the rule protects citizens from punishment that is not "clearly prescribed" and encourages Congress to clar-

Requiring multiple criminal episodes separated by a significant intervening event comports with lenity. In contrast, tests for identifying different "occasions" that sweep in offenses without requiring such a break in the chain of events extend the ACCA far beyond the true recidivist. This case provides a paradigmatic example of such overreach. Petitioner's prosecutors decided to divide up a single course of conduct into multiple crimes. *See Ashe v. Swenson*, 397 U.S. 426, 436 n.10 (1970) ("[W]ith the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction."). But that single night of criminal activity did not transform petitioner into a "career" criminal who should be subject to a mandatory sentence of fifteen years in prison.

II. The Factual Issue Of Whether Offenses Were "Committed On Occasions Different From One Another" Requires A Finding By The Jury Beyond A Reasonable Doubt.

The ACCA raises a defendant's sentencing range from a maximum of ten years to fifteen years to life and is thus subject to the constitutional principle that "[o]ther 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

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ify the law while preventing courts from inventing it "in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion of Scalia, J.).

jury and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490; *see also Alleyne v. United States*, 570 U.S. 99, 103 (2013) (same for facts that impose a mandatory minimum); *Almendarez-Torres*, 523 U.S. at 230, 234, 244 (announcing recidivism exception). A correct application of that constitutional principle to the test for identifying different "occasions" under the ACCA requires that the relevant facts be alleged in the indictment and proved to a jury beyond a reasonable doubt.

A. *Almendarez-Torres*'s exception to the jury trial right for the fact of a prior conviction is limited to identifying the elements of the offense of conviction.

Almendarez-Torres's exception for the fact of a prior conviction is a limited one: it reaches only the fact of the conviction itself and the elements of the offense of conviction. *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016) ("This 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. . . . [A judge] can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." (citing *Apprendi*, 530 U.S. at 490)). "[A] judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense." *Id.* (citing *Shepard v. United States*, 544 U.S. 13, 25 (2005)). "Allowing a sentencing judge to go any further would raise serious Sixth Amendment concerns." *Id.*

This principle had guided the Court's adoption of the categorical approach since the inception of its

analysis of the ACCA. *See Taylor*, 495 U.S. at 601 ("If the sentencing court were to conclude from its own review of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?"). And it persists to this day. *Mathis*, 136 S. Ct. at 2252. Accordingly, the Sixth Amendment dictates that courts cannot find non-elemental facts about prior convictions without the defendant's consent.

B. ACCA's different "occasions" requirement turns on facts that cannot be determined from the elements of the offense.

ACCA's different "occasions" requirement turns on facts that cannot be determined by ascertaining the elements of the offense, so *Apprendi* requires that this issue be resolved by a jury. *See, e.g., United States v. Hennessee*, 932 F.3d 437, 446, 449-50 (6th Cir. 2019) (Cole, C.J., dissenting) (ACCA's "different-occasions analysis" limits "judicial factfinding regarding sentencing enhancements" because "*Taylor* and its progeny require an 'elements-only approach'" and "an ACCA penalty may be based only on what a jury 'necessarily found' to convict a defendant (or what he necessarily admitted)"(internal citations omitted)); *United States v. Thompson*, 421 F.3d 278, 294 (4th Cir. 2005) (Wilkins, C.J., dissenting) (employing *Apprendi* analysis to find that facts "*about* a crime underlying a prior conviction," including dates, are beyond the "fact of a prior conviction" exception).

As discussed *supra*, *see* Section I.D, the proper inquiry considers whether the prior offenses occurred on "occasions different from one another" by considering whether the commission of the crimes was broken

up by a significant intervening event. A simple fact-of-conviction inquiry does not reveal information sufficient to make the requisite determination, because the fact of two prior convictions says nothing about whether they arose from a single, criminal episode. Nor will the elements of prior offenses reveal the factual relationship *between* the offenses.

Petitioner's case is illustrative. He was convicted on ten counts of burglary, but determining whether each count arose from conduct "committed on occasions different from one another" includes numerous factual inquiries that the fact of conviction itself does not reveal. For example, what was the location of these burglaries? Were they all in one spot? What about the timing of these burglaries? Were some on one day, while others took place the following week or month? Each are factual questions that go well beyond the simple fact that he was convicted of multiple crimes.

Relatedly, so-called *Shepard* documents cannot reveal the facts needed to determine whether prior crimes were committed on different occasions. *Shepard* documents consist of conviction records such as the charging instrument, a guilty plea transcript, or jury instructions; the court may review this narrow set of documents only to determine which of the alternative elements within a divisible statute necessarily served as the basis for the prior conviction. *Descamps v. United States*, 570 U.S. 254, 262-63 (2016) (*Shepard* documents can only be used for the "narrow" purpose of determining "whether [a defendant's] plea was to the version of the crime in the Massachusetts stat-

ute (burglary of a building) corresponding to the generic offense"). As *Descamps* confirmed, *Shepard* documents cannot be used "to determine what the defendant and state judge must have understood as the factual basis of the prior plea." *Id.* (internal quotation marks omitted). *Mathis* reaffirmed this holding, explaining that it is unfair to defendants to rely on "'non-elemental fact[s]' in the records of prior convictions," because these purported facts "are prone to error precisely because their proof is unnecessary." 136 S. Ct. at 2253; *id.* ("a defendant may have no incentive to contest what does not matter under the law; to the contrary, he may have good reason not to" (internal quotation marks omitted)). "Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence." *Id.*

Shepard documents thus cannot be used to establish the facts underlying a prior conviction. "[T]he who, what, when, and where of a conviction" all "pose questions of fact." *Pereida v. Wilkinson*, 141 S. Ct. 754, 765 (2021). And it follows that they cannot be used by a sentencing court to resolve the "occasions different from one another" inquiry. Not even the date or location of an offense is an element that can be discerned from the *Shepard* documents consistent with *Apprendi*. For these reasons, the courts of appeal that have relied on *Shepard* documents to make the different "occasions" determination have erred. *See, e.g.*, *United States v. Dantzler*, 771 F.3d 137, 139 (2nd Cir. 2014) ("[I]n determining whether crimes were committed 'on occasions different from one another' for purposes of applying the ACCA, a court is

limited to examining only the types of materials approved by the Supreme Court in *Taylor* and *Shepard*." (citations omitted))

C. Requiring a jury determination of the different "occasions" inquiry provides a workable rule.

Requiring the jury to determine whether prior convictions occurred on different occasions (unless the right is waived), and on a record not limited to *Shepard* documents, provides a workable constitutional rule.[5] To start, our experience as federal public defenders indicates that the issue is not and will not be contested in the vast majority of ACCA cases, because prior offenses are generally separated by intervening arrests—indeed intervening convictions—and it is thus often beyond dispute that the offenses were committed on different occasions.[6] Accordingly, the litigation burden from adopting the rule proposed here is

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[5] Of course, the Court's "decision cannot turn on whether or to what degree trial by jury impairs the efficiency . . . of criminal justice." *Blakely v. Washington*, 542 U.S. 296, 313 (2004); *see also Ring v. Arizona*, 536 U.S. 584, 607 (2002) ("The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders."). But here, no conflict exists between the constitutionally mandated procedures and a judicially administrable standard.

[6] During the ten-year period between October 2009 and September 2019, courts have imposed 4,480 ACCA sentences. U.S. Sent'g Comm'n, *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways*, 18-19 & n. 44 (March 2021). Searches on Westlaw and Lexis for the ten-year period beginning October 1, 2010 (to allow for the appellate process) and using the search string "*924(e)" & "occasions different"* produce 490 decisions total in the courts of appeals. And still, only a portion of these 490

likely to be minimal. And while the workload for courts and juries will likely be light, the interest of defendants facing § 924(e) enhancements in having a jury determine the issue is weighty and constitutionally protected. Under the current system, defendants facing a § 924(e) enhancement are subject to the less exacting evidentiary standards applied at sentencing and the lower burden of proof for the government. The enhancement may thus turn on a sentencing court's interpretation of ambiguous documents from prior convictions asserting "facts" that were never subjected to adversary testing. As this Court has explained, "[a]t trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he 'may have good reason not to'—or even be precluded from doing so by the court." *Mathis*, 136 S. Ct. at 2253. "When that is true, a prosecutor's or judge's mistake . . . is likely to go uncorrected. Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence." *Id.*

Courts are already well versed in according jury trials to facts surrounding a prior conviction when

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decisions actually addressed the factual question whether two or more offenses were committed on different occasions. In many circuits, the rate was well below 50 percent. Even assuming the rate was the same as in the Sixth Circuit—the circuit where this issue was litigated at the highest rate (53 out of 97 decisions, or 54 percent)—the maximum number of cases in which the issue was litigated across all circuits during this period was just 267 cases total. This represents just 5.9 percent of 4,480 ACCA sentences imposed.

necessary to satisfy a statutory standard. For example, in *United States v. Hayes*, 555 U.S. 415, 418 (2009), this Court held that the domestic relationship necessary to qualify a prior misdemeanor conviction for prosecution under 18 U.S.C. § 922(g)(9) (prohibiting firearms possession by a person convicted of a misdemeanor crime of domestic violence) must be established to a jury beyond a reasonable doubt. And the government conceded the same with respect to the amount of loss involved in a prior fraud conviction offered for sentencing enhancement in an illegal reentry prosecution. *See Nijhawan v. Holder*, 557 U.S. 29, 40 (2009). The courts of appeal have done so as well. *See, e.g.*, *United States v. Doss*, 630 F.3d 1181, 1197-98 (9th Cir. 2011), *as amended on reh'g in part* (2011).

These cases reflect an understanding that juries are well suited to make determinations about non-elemental facts surrounding a prior conviction. They are equally well suited to determining whether a defendant's prior convictions arose from multiple criminal episodes separated by significant intervening events. *Cf. H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989) (prosecutors seeking to prove "a pattern of racketeering activity . . . must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity"). Juries frequently apply general standards of this type to particular sets of facts. *See, e.g.*, *Johnson v. United States*, 576 U.S. 591, 604 (2015) (noting the prevalence of criminal "laws that call for the application of a qualitative standard such

as 'substantial risk' to real world conduct" (citation omitted)).

Having a jury make this determination is just as workable as the regime currently applied in the lower courts, which relies on the sentencing judge to make the different "occasions" determination. And it avoids the reversal of ACCA enhancements when sentencing courts rely on inadequate *Shepard* documents. *See, e.g.*, *United States v. Span*, 789 F.3d 320, 327-30 (4th Cir. 2015) (conflicting dates in an indictment and judgment meant the government failed to prove the predicate convictions were committed on different occasions). It is also more reliable because sending this issue to the jury expands the universe of evidence that can be relied upon in making the different "occasions" determination, which allows for more accurate outcomes. And prosecutors are capable of gathering admissible evidence to establish the conduct involved in prior criminal activity, whether it must be presented to the sentencing judges or juries.[7]

Evidence of prior crimes can be prejudicial, but courts are fully capable of devising procedures to avoid any unfairness to defendants. *Cf. Old Chief v. United States*, 519 U.S. 172, 183 (1997) (judges applying Federal Rule of Evidence 403 must balance competing concerns in a way that protects defendants

[7] To the extent it is more onerous on prosecutors, that is no reason to disregard the Constitution's requirements. *Cf. Cunningham v. California*, 549 U.S. 270, 293-94 (2007) (putting the onus on states to conform their sentencing practices with the Constitution).

from unfair prejudice stemming from the possible admission of facts surrounding prior convictions). Potential procedures to limit any unfairness could include limiting instructions, or bifurcated proceedings where the risk of unfair prejudice is high. *See United States v. Blanton*, 476 F.3d 767, 769 (9th Cir. 2007) (noting the district court "bifurcate[d] the guilt and ACCA sentencing phases of the trial"). And some defendants may decide to waive the jury determination on this issue altogether, calculating that the risk of jury prejudice outweighs the benefit of allowing the jury to make this determination. *See Shepard*, 544 U.S. at 26 n.5 ("[I]f the dissent turns out to be right that *Apprendi* will reach further, any defendant who feels that the risk of prejudice is too high can waive the right to have a jury decide questions about his prior convictions."). In that case, the sentencing judge could resolve the question using the rules of evidence and beyond-a-reasonable-doubt standard.

Finally, the proposed rule may lead to fewer unnecessary trials and more just outcomes. In our members' experiences, § 922(g)(1) cases where a defendant faces a § 924(e) enhancement are among the most likely to go to trial because the mandatory minimum removes any incentive to plead guilty. This is so because, as the lower courts have administered the statute, the judge ultimately determines whether the ACCA applies at sentencing. This means that prosecutors have no discretion to forgo seeking an ACCA sentence because the enhancement "is not subject to governmental waiver or prosecutorial discretion." *United States v. Symington*, 781 F.3d 1308, 1313 (11th Cir. 2015). Accordingly, many defendants

choose trial, viewing it as the best possible way to avoid a potential fifteen-year mandatory minimum. If this Court agrees that *Apprendi* applies to the different "occasions" requirement, prosecutors must allege different "occasions" in the indictment. *See United States v. Cotton*, 535 U.S. 625, 627 (2002). But the government could forgo charging the different "occasions" issue in exchange for a plea in appropriate cases, eliminating the sentencing court's authority to impose an ACCA sentence. And prosecutors may well do so since the defendant would be subject to the criminal history rules that most defendants already face under the Sentencing Guidelines, and a guideline range that in many cases approaches the ten-year statutory maximum. *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, U.S. Sentencing Comm'n, at 41-42 (June 18, 1987) ("[f]rom a crime control perspective, a criminal history component is especially important because it is predictive of recidivism" and "prior criminal conduct consistently are found to be among the most powerful predictors" of "future criminal conduct" (citation omitted)); U.S.S.G. § 2K2.1(a) (providing for enhanced offense levels of 24 or 26 for defendants with at least two separately counted prior convictions for a controlled substance offense or crime of violence); *id.* Ch. 5, Pt. A (Sentencing Table).

When Congress enacted the ACCA, it had no reason to anticipate the need for a jury trial; *Apprendi* lay years in the future. But that is true for all of the sentencing schemes in which this Court has vindicated Sixth Amendment rights. *See, e.g.*, *United*

States v. Booker, 543 U.S. 220 (2005). And *any* proposed test for the different "occasions" inquiry requires fact-finding outside of the judgment of conviction and the elements of the offense. In other words, the lower courts' tests, like ours, equally triggers the jury trial right. And no test can make permissible use of *Shepard* documents to answer the different "occasions" inquiry: any such test, no matter how circumscribed, would inevitably require a court to find non-elemental facts concerning a defendant's prior convictions. *See* Section II.B *supra*. Accordingly, that the correct different "occasions" standard will require a jury determination provides no reason to turn away from it.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Michael C. Holley
Co-Chair, Amicus Comm.
Joshua B. Carpenter
Jennifer Niles Coffin
Renee Pietropaolo
Carmen A. Smarandoiu
Assistant Federal Public Defenders
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

Davina T. Chen
Shelley M. Fite
SENTENCING RESOURCE COUNSEL, FEDERAL PUBLIC AND COMMUNITY DEFENDERS

Christopher B. Phillips
O'MELVENY & MYERS LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111

Michael R. Dreeben
Counsel of Record
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, DC 20006
(202) 383-5400
mdreeben@omm.com

Christopher P. Burke
O'MELVENY & MYERS LLP
Times Square Tower, 7 Times Square
New York, NY 10036

Jared R. Ginsburg
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071

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