No. 20-5279

In the Supreme Court of the United States

WILLIAM DALE WOODEN, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

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The Government argues that past offenses were always "committed on occasions different from one another" except when the final element of each offense was satisfied at the very same instant. That idiosyncratic reading is entirely divorced from plain language and common sense. It also produces a simultaneity test far different—and harsher—than the one employed by the courts of appeals. The Government would require not just *overlapping* offenses, but point-in-time synchronicity, an approach so exacting that it would disqualify even the *Petty* robberies.

The Government cannot explain why Congress would use such a test to identify career criminals. Instead, its test is obviously jerry-rigged with the categorical approach in mind. But focusing on split-second timing—which *always* requires inquiry into factual details—is not compatible with the categorical approach. Nor is it more administrable than Mr. Wooden's (more textually appropriate) focus on circumstances, which has produced consistent, predictable outcomes in the courts that use it. And by insisting

sotto voce that offenses must be "intertwined" as well as simultaneous, the Government gives up the ghost entirely.

I. THE TEXT OF THE "OCCASIONS" CLAUSE SUPPORTS MR. WOODEN'S READING

A. Offenses are "committed on occasions different from one another" when they arise from distinct criminal opportunities, not when their final elements are distinct points in time

The Government's reading of the "occasions" clause depends on three textual leaps: an "occasion" is merely the precise time at which something happens (Br. 13); an offense is "committed" solely at the instant the last element has been satisfied (Br. 15); and every "commi[ssion]" of an offense requires its own "occasion" (Br. 14). All three are at war with plain language. Combined, they produce an ultra-harsh simultaneity test under which prior offenses are different occasions unless the final elements of *both* crimes are satisfied at the same instant.

Nothing supports these counter-intuitive textual moves, whether separately or in combination. Certainly not this Court's decision in *Coleman* v. *Tollefson*, 575 U.S. 532 (2015), which in fact refutes the Government's myopic focus on timing. But even if its reading were merely plausible, legitimate doubts must be resolved in Mr. Wooden's favor under the rule of lenity.

1. The Government's textual argument requires defining "occasion" solely in terms of *the time* at which an event occurs. Yet the Government offers a two-part definition, only one part of which is temporal: "'[a]n event or happening' or the 'time at which an event or happening occurs.'" Br. 13 (underline added). The Government then proceeds, throughout its brief, to use those two definitions interchangeably. The Government thus refers to the criminal conduct evaluated under § 924(e)(1) variously as an "event," an "occurrence," an "incident," a "happening,"

or an "episode." See, *e.g.*, Br. 13-14, 23, 26, 29, 36. The Government similarly relies (at 14, 27-28) on dictionaries that point to *the fact* that an event has happened, rather than to its timing. See, *e.g.*, *Webster's Third New International Dictionary* 1560 (1993) (*Webster's*) ("a particular occurrence"); see also *The American Heritage Dictionary of the English Language* 492 (paperback ed. 1970) (*American Heritage*) ("[a]n event or happening").

Yet event-based definitions do not help the Government because events are not exclusively, or even primarily, temporal. Much less is an "event" (occurrence, incident, happening, or episode) limited to conduct occurring at a particular instant in time—say, 42 seconds past 11:57 pm. Instead, the event spans discrete acts arising out of the same common circumstances, with temporal proximity as merely one factor to help identify which acts are associated. The content of an event is circumstance-dependent, just like an occasion. See Pet. Br. Addendum (Pet. Add.) 4a (burglary charges "all stemm[ed] from a mini warehouse, one event").

The Government's examples (at 16) similarly refer to the fact of an occasion (including the related activity it comprises), rather than to the precise time at which it happened. In *United States* v. *Stitt*, 139 S. Ct. 399 (2018), this Court illustrated "the way in which an individual offender acted on a particular occasion" by positing a hypothetical crime: "on January 25, Jones committed a burglary on Oak Street in South San Francisco." *Id.* at 405. The Court's reference to "a particular occasion" points to *all* burglary-related conduct that Jones engaged in on Oak Street on January 25, not merely to his conduct at a freeze-frame moment in time. Indeed, the point of describing this "particular occasion" in *Stitt*, and the similar discussion in *Chambers* v. *United States*, 555 U.S. 122 (2009), was to show that focusing on particularities would require delving into the manner in which the incident

unfolded to determine whether the defendant's actual conduct "involve[d] violent behavior"—*i.e.*, evaluating the relevant circumstances. *Id.* at 125.

These examples highlight a stunning deficiency in the Government's argument: It fails to identify even a single example in which "occasion" *must* refer to the specific moment in time at which conduct occurs, rather than to all the activity arising from the same underlying circumstances. Yet counterexamples—uses of "occasion" that foreclose a purely temporal meaning—are easy to find:

- "On this occasion, [the pitcher] struck out only 12 batters and hurled 127 pitches."[1]
- "In the study, binge drinking was defined as consuming five or more drinks in a single occasion for men and four or more for women."[2]
- "On one occasion on Oct. 11, multiple shunts were placed in three different locations in Whatcom and Skagit."[3]
- "On one occasion, the Tribe scored three runs after loading the bases."[4]

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[1] Ben Stepansky, *9 Most Impressive Debuts in MLB History*, Bleacher Report (Sept. 25, 2012), https://tinyurl.com/32j2bc7b.

[2] Karen Kaplan, *9 out of 10 problem drinkers in the U.S. aren't alcoholics, study says*, L.A. Times (Nov. 21, 2014), https://tinyurl.com/nnv3j9a5.

[3] Danielle Wallace, *Women linked with anarchist group charged with terrorist attack on train tracks north of Seattle*, Fox News (Dec. 1, 2020), https://tinyurl.com/56mxj4h2.

[4] *Indians Notebook: Hitters finding it tough to deliver with bases loaded*, Akron Beacon Journal (Apr. 27, 2012), https://tinyurl.com/9kux7pse.

- "On one occasion he ran track, then donned a uniform and played a baseball game—all on the same day."[5]
- "On another occasion [Babe] Ruth reportedly ate a dozen hot dogs and washed them down with several bottles of soda in the time between games of a scheduled double header."[6]

See 42 U.S.C. § 4121(a)(7) (money for buildings that "incurred flood-related damage on 2 occasions"). And whereas the Government would read "an occasion on which I purchased a pair of shoes and an ice cream cone" as referring to the timing of a single purchase made at a store that sells both footwear and dessert, see Br. 29, the natural meaning is two purchases made at two different stores on the same trip to the mall.

2. The Government's temporal reading also requires an idiosyncratic and hyper-technical standard for determining when offenses were "committed." It asserts that "[i]n common legal parlance, an offense is generally 'committed' when 'all elements of the offense are established.'" Br. 15 (quoting *United States* v. *Yashar*, 166 F.3d 873, 879-80 (7th Cir. 1996)). The Government's switch to "common legal parlance" from "plain meaning" (Br. 13, 15-16, 35, 37), is a red flag—and is especially suspect, since "committed" is *not* a term of art. Even the pretense to common legal parlance is farfetched. The lone supporting citation, *Yashar*, construed a statute of limitations that ran from the date on which the "offense *shall have been* committed." 18 U.S.C. § 3282(a) (emphasis added). Given the precise wording of that phrase, and the statute-of-limitations context, it made sense to look for a specific

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[5] *Donald Montgomery Hutson*, College Football Hall of Fame, https://tinyurl.com/hhvtamyj.

[6] David Miller, *Hot Dog Champion Consistent Winner*, Ponca City News (July 6, 2021), https://tinyurl.com/ezyvfk74.

point in time for starting the clock. Indeed, *Toussie* v. *United States*, 397 U.S. 112, 114-15 (1970), reached the same conclusion, but *only* as a matter of statutory purpose, without construing "committed" at all.

The "occasions" clause, by contrast, lacks § 3282(a)'s "shall have been" phrasing. It also serves a different function, as the Government itself points out (at 40). The clause's use of "committed" should accordingly be given its normal meaning, in which a person "commit[s]" an offense when he "do[es], perform[s], or perpetrate[s]" the illicit activity. *American Heritage* 145. For instance, a bank robbery was not "committed" solely at the freeze-frame moment—likely mid-heist—when the offense's final element was established.

In any event, the Government's attempt to construct a point-in-time definition fails on its own terms. As *Toussie* explained, "continuing" offenses (like kidnapping) are not complete until the perpetrator ceases his criminal activity altogether. 397 U.S. at 116. The Government responds (at 40) that the treatment of continuing offenses for statute-of-limitations purposes is irrelevant, because the ACCA has different "underlying rationales." But that is precisely why it makes no sense to define § 924(e)(1) ("committed") by reference to § 3282(a) ("shall have been committed") in the first place.

3. The Government's reading depends on yet another questionable textual move: It insists that because § 924(e)(1) talks of qualifying offenses "'*committed* on occasions different from one another,' … [t]he relevant event is thus the 'commit[ing]' of [the qualifying offense], which occurs when the offense conduct is completed." Br. 14 (emphasis and second brackets in original). The Government claims that a verb form ("committed") paired with "occasions" means that "[t]he relevant event" is a single incidence of the verb.

That claim is demonstrably false. Look back at the examples on pages 4-5. Each disproves the Government's theory. A male binge drinker "*consume*[*s*] five or more drinks in a single occasion," not on five or more occasions. The pitcher who "*struck out* 12 batters and *hurled* 127 pitches" did so "[o]n this occasion," not on twelve (or maybe 127) occasions. And so on.

Or consider again the lane closures in *Kelly* v. *United States*, 140 S. Ct. 1565 (2020), where "the information that the Port Authority's engineers *collected* on this singular occasion was mostly 'not useful' and 'discarded.'" *Id.* at 1570 (emphasis added). The "collect[ing]" occurred in separate, hour-long installments on four consecutive days. *Ibid.* The Government admits (at 31) that the Court was referring holistically to the episode as a single "multiday affair." Exactly right: Four incidents of "collect[ing]," but only one "occasion." The textual lesson is that occasions routinely span multiple acts. See, *e.g.*, *United States* v. *Bryant*, 136 S. Ct. 1954, 1963 (2016) ("On *one occasion*, Bryant *hit* his live-in girlfriend on the head with a beer bottle and *attempted* to strangle her.") (emphasis added).

4. Other textual clues reinforce the conclusion. The statute's peculiar phrasing requires offenses committed "on occasions *different from one another*." No one would refer to discrete points in time that way. The Government responds (at 29) that the odd phrasing reflects that "not all *crimes* are necessarily committed at different times." But if that is what Congress meant, why not just say so? See 18 U.S.C. § 3584 ("Multiple terms of imprisonment *imposed at different times* run consecutively") (emphasis added); see, *e.g.*, 16 U.S.C. § 2621(d)(3) ("at different times"); 19 U.S.C. § 1431a(d)(4) ("at different times"). The Government cannot muster a single example—no statute, no case, not even a sentence of its own formulation—using "occasions different from one another" to refer to discrete moments in time.

The statute's title provides a further "useful device[] to resolve doubt." *Yates* v. *United States*, 574 U.S. 528, 552 (2015) (Alito, J., concurring). The Government does not venture a theory under which its temporal reading of the "occasions" clause could be compatible with an "Act" aimed at "Armed *Career* Criminal[s]." Instead, its question-begging response (at 35) is that statutory titles "cannot override the [text's] plain meaning." True enough, but the Government's reading is hardly "plain."

The Government observes (*ibid.*) that "the ACCA had the same title when initially enacted—without *any* textual requirement that offenses be 'committed on occasions different from one another.'" Yet the Solicitor General told this Court that the version initially enacted *did* require "multiple criminal episodes." Pet. Add. 26a. And what was the first clue to which the Solicitor General pointed? "The title of the Act—the 'Armed Career Criminal Act.'" *Ibid.*

5. The Government relies (at 13-14) on *Coleman*, but that case offers no support. At issue there was the three-strikes provision of 28 U.S.C. § 1915(g), under which IFP status is unavailable "if the prisoner has, on 3 or more occasions, … brought an action or appeal" that was "dismissed" on certain grounds. The Court read that phrase to mean that a "prior dismissal on a statutorily enumerated ground counts as a strike even if the dismissal is the subject of [a pending] appeal." 575 U.S. at 537. The Court explained that "[a]n 'occasion' is 'a particular occurrence,' a 'happening,' or an 'incident.'" *Id.* at 538 (quoting *Webster's* 1560). Because every dismissal was a relevant "incident," there was no reason to read the phrase "'3 or more occasions'" as treating dismissals pending on appeal any differently than other dismissals. *Ibid.*

The Government's reliance on *Coleman* is a telling overreach. The three-strikes provision at issue there was designed to *count* strikes, not to group some of them but not others into "occasions" (as § 924(e)(1) does). In any

event, the Court did not suggest that "occasions" had even a temporal connotation, much less that it referred exclusively to moments in time. Indeed, the three-strikes provision *rules out* a temporal reading: Even if three unrelated prisoner suits are dismissed at the exact same moment, they would still count as three "occasions."

The Government insists (at 31) that *Coleman* gave "occasions" a temporal reading, rather than a circumstance-based one, because "a dismissal and its review on appeal undoubtedly arise from the same 'juncture of circumstances'—namely, the inmate's lawsuit." But the circumstances relevant to the three-strikes provision are the "statutorily enumerated grounds" on which dismissal has occurred (*i.e.*, being "'frivolous, malicious, or fail[ing] to state a claim'"). 575 U.S. at 538-39 (quoting 28 U.S.C. § 1915(g)). A pending appeal does not share that circumstance with the underlying district court dismissal.

B. The Government views simultaneous offenses as having been committed on the same occasion only if they are "intertwined"

The Government's textual theory is not merely unpersuasive; it is incoherent: The Government does not give the "occasions" clause a *purely* temporal meaning. Instead, it says that a defendant, to avoid application of the ACCA's mandatory-minimum, must show not only the "temporal indistinguishability" of his offenses, but also their "factual congruence." Br. 25. Thus the Government describes the "occasions" clause as "expressly preclud[ing] the statute's application to *intertwined* simultaneous offenses." Br. 10 (emphasis added); see Br. 21 ("'simultaneous' intertwined offenses").

The Government has practical reasons for treating the simultaneity of offenses as necessary but not sufficient. If criminal confederates mutually plan, but separately execute, unrelated offenses simultaneously—say, a burglary in the suburbs and a robbery downtown, both at 12:04 a.m.

precisely—the Government can argue that the offenses were nonetheless committed on different occasions because they were not "intertwined." Or the Government may anticipate that the simultaneity of offenses will often be impossible to rule out (perhaps because the date or time of commission is unknown). See pp. 17-18, 21, *infra*. In such cases, an additional "factual congruence" requirement provides a hedge against limited information.

Whatever the reasons for the Government's hedge, it undermines any semblance of textual coherence. The phrase "on occasions different from one another" cannot mean *both* "non-simultaneous" *and* "non-intertwined." And how does the Government propose to determine whether offenses are intertwined? Factual congruence is qualitative—an inherently "indeterminate standard" that, according to the Government (at 41), "would quickly lead to a variety of vexing questions." Indeed, it is unclear how the concept of "intertwined" offenses differs, if at all, from the common-circumstances approach Mr. Wooden advocates. These unanswered (and unacknowledged) questions further underscore the lack of textual foundation for the Government's approach.

C. Congress targeted criminals who reoffend after changed circumstances, not split-second intervals

From its origins as an ABA model rule for "habitual offender[s]," Pet. Br. 18-20, through its incorporation into the ACCA following *Petty* v. *United States*, 481 U.S. 1034 (1987), see Pet. Br. 20-25, the "occasions" clause has always targeted repeat offenders. The Government's statutory-purpose argument focuses on *Petty*, but cannot explain the outcome even in that case—much less why Congress would want career-criminal status to turn on split-second distinctions.

1. The Government asserts (at 25) that the *Petty* robberies, unlike Mr. Wooden's mini-storage burglaries, were "temporal[ly] indistinguishab[le]." That is incorrect:

Petty and another gunman "pick[ed] their way among their prostrate victims, gathering money, jewelry, and other valuables in a black bag." Pet. Add. 15a. In other words, the robberies were sequential. That the robbers made a "continuous show of force," Gov. Br. 25, is irrelevant under the Government's own theory. The robberies became complete one after another as the robbers grabbed the goods. See *People* v. *Alamo*, 315 N.E.2d 446, 457 (N.Y. 1974) ("asportation"—including "grasp[ing]" goods and moving them "no more than several inches"—results in "a completed larceny"); N.Y. Penal Code § 160.00 (robbery requires "larceny").

The Government is also wrong (at 36) that everyone "understood" *Petty* to involve six simultaneous robberies. This Court does not normally assume that Congress and lower court judges are ill-informed, and presumably the Solicitor General did not confess error by mistake. In any event, the robberies involved six victims but only four perpetrators. See Pet. Add. 11a. The math was simple, even for those ignorant of how the crime actually unfolded.

To be sure, the robberies were sometimes described as occurring "simultaneously," 134 Cong. Rec. 13,783 (1988), or "at the same time," Pet. Add. 23a. But context makes clear that those phrases were used in the colloquial sense that they arose "from a single criminal episode." *Id.* at 25a-27a. Indeed, the same legislator who described *Petty* as "a robbery of multiple victims simultaneously" also described the "occasions" clause, in his very next sentence, as "plainly express[ing] that concept of what is meant by a 'career criminal.'" 134 Cong. Rec. at 13,783. There is no evidence that the statements to which the Government now points were intended in some hyper-technical sense.

Most tellingly, the Solicitor General endorsed state court decisions "construing similar enhanced sentencing statutes" to "reject[] the position taken by the court of appeals in [*Petty*]." Pet. Add. 30a n.8. Several *expressly*

rejected enhancements where the defendant was "given at most one opportunity to reform." *State* v. *Carlson*, 560 P.2d 26, 30 (Alaska 1977). For instance, *State* v. *Tavares*, 630 P.2d 633, 635 (Haw. 1981), rejected separate treatment for two "burglaries which the appellant had committed on December 30." The Government cannot explain the Solicitor General's reliance on those decisions.

2. The Government's remaining statutory-purpose arguments are unpersuasive. The Government asserts (at 36-37) that the extensive history of § 924(e)(1) provides "no concrete support" for a "conception of repeat offenders as only those whose multiple prior offenses differed in some unspecified fact-dependent way." But what is a "repeat offender" if not someone who returns to crime after a change of circumstances, like an intervening arrest? No credible use of the term would cover breaking into ten adjacent storage units on a single evening of uninterrupted criminal activity. Much less would such activity make one a "career criminal," a "habitual offender," a "recidivist," a "revolving door offender"—or any other kind of "three time loser" that Congress targeted. Pet. Add. 27a (plurals omitted).

The Government criticizes a circumstance-based approach as "elevat[ing] the happenstance of whether an intervening event interrupts the continuous criminal activity." Br. 44 (cleaned up). But if the intervening arrest itself is "happenstance," the defendant's choice to return to crime afterwards is not; indeed, it *defines* a repeat offender—exactly what the Assistant Attorney General meant when he told Congress that "locking them up and letting them go doesn't do any good." Pet. Add. 29a.[7] The

[7] True happenstance is whether "sub-units within a single structure are separately owned," and other property distinctions that may "make no difference under state law," yet "can make all the difference under a simultaneity test." Pet. Br. 40.

same return-to-crime label applies to a hypothetical offender (Gov. Br. 44) who commits a crime, goes "on the lam," and then offends again. And the Government is wrong in claiming (*ibid.*) that a circumstance-based approach "fails to penalize offenders for committing *more* crimes." More offenses means greater sentencing exposure, just not necessarily a career-offender designation and fifteen-year mandatory minimum.

The Government argues that Congress deliberately "left behind" other statutory models "requir[ing] that the defendant ha[d] 'been imprisoned' for at least one of his prior convictions 'prior to the commission of' the instant offense." Br. 32 (quoting 18 U.S.C. § 3575(e)(1) (1982)). But in *Petty*, the Solicitor General argued *against* drawing a "negative implication" from that fact, because "both Congress and those supporting the legislation, including the Department of Justice, did not intend that [§ 924(e)(1)] would apply more broadly than in the case of th[ose] other federal enhanced penalty statutes." Pet. Add. 26a. In any event, Congress's choice not to require one specific type of intervening event (imprisonment) hardly supports the inference that *no* intervening event matters—much less that Congress only cared about temporal simultaneity.

The Government argues (at 38) for ratification through congressional inaction, but that ignores the deep circuit split, which began to develop within the provision's first decade, see *United States* v. *McElyea*, 158 F.3d 1016, 1020 (9th Cir. 1998) ("The Circuits Are Split On The Meaning Of "Occasions Different From One Another'"). It also ignores the self-acknowledged confusion even among circuits using a simultaneity test. See pp. 14-15, *infra*.

Finally, the Government's disquisition on how text trumps policy (at 37-38) simply begs the central question in this case. It also highlights the absence of any plausible reason why Congress would use a simultaneity requirement

to identify "career" criminals meriting harsh mandatory-minimum sentences.

II. A CIRCUMSTANCE-BASED APPROACH MAKES MORE PRACTICAL SENSE THAN A SIMULTANEITY TEST

The Government says (at 41) that "the prevailing temporal-distinction rule … is not only workable but working." The rule is neither, and the clearest evidence comes from the Government itself: It abandons the version of the simultaneity test used by the courts of appeals, in favor of a vastly different (and far harsher) test that no court has ever adopted. But even the Government's untested approach is riddled with inconsistencies and practical pitfalls.

A circumstance-based approach, by contrast, has been applied for decades by several courts of appeals, with none of the uncertainty or inconsistency predicted by the Government. These circuits have coalesced around criteria for judging whether offenses were committed on the same or different "occasions," as well as rules-of-thumb that resolve the vast majority of cases. Although borderline cases are inevitable—regardless of which standard is used—these circuits at least ask the right question.

A. The Government proposes a simultaneity test that is different from the courts of appeals' test

The Government's insistence that the simultaneity test is "working" would be news to courts that use it, which lament its "inconsistent results." *United States* v. *Carnes*, 309 F.3d 950, 955 (6th Cir. 2002). Because the test "turns on fine-grained, arbitrary distinctions" tied to details that are irrelevant in underlying prosecutions, Pet. Br. 37, nearly identical fact patterns routinely result in divergent outcomes, even within the same circuit. Compare *United States* v. *Thomas*, 211 F.3d 316, 321 (6th Cir. 2000) (same occasion where two victims were raped in a car), with *United States* v. *Wilson*, 27 F.3d 1126, 1131 (6th

Cir. 1994) (different occasions where two victims were raped on different floors of the same house); see also *United States* v. *Barbour*, 750 F.3d 535, 539 (6th Cir. 2014) ("Multiple panels have noted the inconsistency of our opinions."). No wonder the Government has abandoned the existing test.

1. The courts of appeals that apply a simultaneity test, in order to decide whether two crimes were committed on the same occasion, have asked the following question: "is [it] possible to discern the point at which the first offense is completed, and the subsequent point at which the second offense begins"? *United States* v. *Hill*, 440 F.3d 292, 297 (6th Cir. 2006); see, *e.g.*, *United States* v. *Tucker*, 603 F.3d 260, 266 (4th Cir. 2010) (asking whether "the first crime ended before the second crime began"); *United States* v. *Fuller*, 453 F.3d 274, 279 (5th Cir. 2006) (whether "the first offense is complete before the second begins"). That test was applied here—at the Government's urging—by the district court, J.A. 58, and court of appeals, J.A. 23. For courts that use this test, "completion of the first crime before commencement of the second indicates," in and of itself, "that they are distinct criminal episodes." *United States* v. *Pope*, 132 F.3d 684, 690 (11th Cir. 1998).

The test's key feature is that the duration of an offense is measured from "commencement" through "completion." *Ibid.* With the notable exception of long-duration offenses like conspiracies, see Pet. Br. 43-44, courts generally consider an offense as spanning *all* criminal activity in furtherance of the offense, whether or not the activity was necessary to satisfy an element. Thus in *United States* v. *Murphy*, 107 F.3d 1199 (6th Cir. 1997), the duplex-burglaries case, the court explained that because the defendant "never left his original location, he never ceased his original conduct and he never successfully escaped the site of the first crime until the second was complete." *Id.* at 1210. And in *Fuller*, which involved

burglaries of two trailers, the court *rejected* the defendant's assertion that he and an associate had entered the trailers "simultaneously," but nevertheless treated the burglaries as occurring on the same occasion. 453 F.3d at 279. The defendant might only have "aided the [second] burglary" by "acting as a lookout while he stood inside the other trailer," in which case the first burglary would have overlapped with the second. *Ibid.*

2. The Government proposes a different simultaneity test—though without acknowledging the about-face. The Government now says that an offense is "committed" *only* at the precise moment in time at which "all elements of the offense are established, regardless of whether the defendant continues to engage in criminal conduct." Br. 15 (citation omitted). As a result, crimes are not simultaneous for purpose of the Government's test unless the final elements of *both* crimes are satisfied at the same instant. See Gov. Br. 40 (offense is "complete" once "all elements of an offense have been 'committed,' " even if offense conduct continues).

The Government's version, because it requires split-second synchronicity, is far harsher than that of the courts of appeals. In *Murphy* or *Fuller*, for instance, the Government's test would have produced the opposite result: The defendants there were still at the first location—and hence all elements of the first burglary were "complete" —when the second burglary began. Petty's robberies would similarly have been non-simultaneous, since the final element of each robbery was satisfied at different moments. See pp. 10-11, *supra*. Indeed, apart from crimes involving a single act that affects multiple victims simultaneously, like a bomb, it is hard to imagine when the Government's point-in-time concept of simultaneity would *ever* be satisfied.

B. The Government's proposed simultaneity test is incompatible with the categorical approach

The Government's odd construction of the "occasions" clause is jerry-rigged to comply with the ACCA's categorical approach. According to the Government: "A focus on *when* a prior offense was committed allows for a straightforward application of the different-occasions clause without the need to conduct the very inquiry, into the details of 'how' the offense was committed, that the categorical approach avoids." Br. 16. The Government asserts (*ibid.*) that in many cases, "the offense elements alone will allow for a determination that the 'occasions' were 'different.'" And when the elements are insufficient, the Government says (at 18) that any gaps can be filled by "other judicial records of a prior conviction available under *Shepard* v. *United States*, 544 U.S. 13 (2005)."

Every part of that argument is wrong: The Government's approach *does* require inquiring into the details of prior offenses; offense elements alone will *never* be sufficient to determine whether "occasions" were different; and *no* relevant *Shepard* information is available to fill in the gaps.

First, the timing of a defendant's prior crimes can never be determined based on "offense elements alone." As Mr. Wooden noted (at 38), "timing is normally not an element of the offense." A bare recitation of elements thus will not reveal the date or time on which prior offenses were committed. Nor will it disclose whether the offenses involved the same or different locations, victims, or means of commission—none of which is an element either. Indeed, the "offense elements alone" say essentially nothing relevant to the timing inquiry.

The Government offers only a single example of an offense whose elements alone supposedly necessitate separate "occasions" for multiple convictions: burglary. Where a burglary statute "requires entering a discrete

building with criminal intent," the Government argues (at 16-17) that a defendant cannot commit two or more such offenses at the same time "because it is physically impossible to enter two different buildings simultaneously."

Yet even such a burglary statute may be violated multiple times by simultaneous conduct. The Government acknowledges (at 41) that "parallel entry into [multiple] buildings at once" by accomplices counts as "simultaneous conduct" that can produce "multiple convictions." Since the existence of accomplices (or their absence) is not an offense element, the number of participants will not be known based on elements alone. Here, for instance, the Government says (at 17) it "would be physically impossible" for Mr. Wooden and three co-burglars "to have burglarized ten different" storage units at once. That is false.[8] But even if it were true, the indictment's identification of only four burglars was not elemental and does not rule out the involvement of additional accomplices.

The Government also cannot explain how to apply its test to an offender who personally commits *none* of the offense elements but is an accomplice to others' crimes, such as one who "merely helped load the truck while his confederates entered the units." Pet. Br. 43 n.7. At what point in time did the truck-loader "commit" *his* burglaries? The "offense elements alone" provide no answers.[9]

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[8] Under the common law and the laws of many states, "entry" can be satisfied by "any part of the body, or with an instrument held in the hand." 4 William Blackstone, *Commentaries on the Law of England* 227 (1770); see, *e.g.*, *People* v. *King*, 463 N.E.2d 601, 603 (N.Y. 1984). Where burglarized structures are close to one another, therefore, a single defendant can enter multiple buildings at the same time using different body parts or instruments.

[9] The Government also ignores that some crimes, like drug "manufacture," have no clear endpoint. Pet. Br. 39 (quoting 21 U.S.C. § 841(a)(1), (b)(1)(A)).

Second, the Government is wrong (at 46) that resort to charging documents and other judicial records, to determine the timing of underlying offenses, is "allowed under this Court's decision in *Shepard*." Mr. Wooden's amici explain at length the errors of this assertion. See Fed'l Defenders Br. 23-26; NACDL Br. 19-24.

It suffices to respond with the "simple point" that this Court has reiterated so frequently as to "risk … downright tedium": *Shepard* does not permit a sentencing court to consider "non-elemental facts," like offense timing, regardless of the document in which those facts appear. *Mathis* v. *United States*, 136 S. Ct. 2243, 2252 (2016). The Government's assertion that *Shepard* makes applying a "temporal-distinction rule … relatively unproblematic," Br. 46, thus is irreconcilable with "the sole and limited purpose" that *Shepard* allows for such documents, *Mathis*, 136 S. Ct. at 2256 (citation omitted).[10]

C. A circumstance-based approach facilitates consistent, sensible outcomes

1. For more than three decades, several circuits have applied a circumstance-focused approach to determining whether past offenses were committed on the same occasion. These courts have coalesced around criteria for deciding whether offenses arose from a common opportunity, as well as rules-of-thumb that readily resolve most cases.

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[10] For similar reasons, some jurists have concluded that "judicial factfinding involving ACCA's different-occasions requirement itself violate[s] the Sixth Amendment." *United States* v. *Dudley*, --- F.4th ----, 2021 WL 3086186, at *19 (11th Cir. July 22, 2021) (Newsome, J., dissenting in relevant part). But even those who believe that judges may apply a simultaneity test acknowledge that it "necessarily requires looking at the facts underlying the prior convictions." *Id.* at *6 (majority op.).

The First Circuit's decision in *United States* v. *Stearns*, 387 F.3d 104 (2004), is illustrative. To determine whether the two burglaries at issue there arose from the same or different occasions, the court considered: "the identity of the victim; the type of crime; the time interval between the crimes; the location of the crimes; the continuity *vel non* of the defendant's conduct; [and] the apparent motive for the crimes." *Id.* at 108. Since the burglaries were divided by a significant period "devoid of criminal activity"—a "breather," wherein the defendant had "safely escaped"—the court rejected the defendant's claim that they comprised a "continuous course of extended criminal conduct." *Ibid.*

Other courts using a circumstance-focused approach describe the relevant inquiry in similar terms, relying on nearly identical considerations. See, *e.g.*, *United States* v. *Bordeaux*, 886 F.3d 189, 196-97 (2d Cir. 2018) (unrelated robberies, against different victims spaced a mile apart, were different occasions where defendant had to expend "substantial effort" to transition from one to another); *United States* v. *Antoine*, 953 F.2d 496, 499 (9th Cir. 1991) (second robbery "occurred in a different city, at a different time, and was perpetrated against different victims"). The consistency of these decisions—both in the criteria they considered and results they produced—belies the Government's assertion (at 43) that a circumstance-focused approach is "subjective and arbitrary."

Moreover, certain intervening events have been held sufficient, in themselves, to interrupt the continuity between offenses. An "intervening arrest" is a quintessential example, *Brown* v. *United States*, 636 F.3d 674, 675 (2d Cir. 2011), but courts have coalesced around others as well. Courts uniformly treat offenses as arising from different circumstances where they were committed on "different dates," *United States* v. *Riddle*, 47 F.3d 460, 462 (1st Cir. 1995), where the defendant "traveled a

significant distance between the two offenses," *United States* v. *Rideout*, 3 F.3d 32, 35 (2d Cir. 1993), or where he "safely escaped" the first crime scene, *Stearns*, 387 F.3d at 108.

These rules-of-thumb lead to easy resolutions. Whether past offenses were committed on the same or different days, for instance, will usually be known with relative certainty; so too for an intervening arrest. Although the Government posits hypotheticals (at 43) designed to show that a circumstance-focused approach is arbitrary or difficult to administer, real-world cases have produced consistent outcomes. Indeed, the Government identifies *no instance* where such an approach has led to divergent results under similar facts. The "occasions" issue is raised relatively infrequently, with no evidence of a higher rate in circuits applying a circumstance-focused approach. See Fed'l Defenders Br. 26 n.6 (noting issue has been "litigated at the highest rate" in Sixth Circuit, which uses simultaneity test).

2. Even if the Government's approach produced consistent results, they would be consistently focused on the wrong issue. And the consistency is illusory: A point-in-time approach raises record-based "implement[ation]" concerns, Gov. Br. 46, just like a circumstance-focused approach.

The Government myopically narrows the factual inquiry to a single issue: the timing of an offense's final element. That issue is unlikely to receive *any* attention in the underlying prosecution, and hence unlikely to be reflected in identifiable documents with sufficient precision. And since a split-second's difference between offenses will trigger a fifteen-year mandatory-minimum, the Government's approach magnifies the consequences of error. Even miniscule misstatements in the record—which "a defendant may have no incentive to contest"—can result

years later in dire consequences for an ACCA sentence. *Mathis*, 136 S. Ct. at 2253.

A circumstance-focused approach, by contrast, rests on a more robust set of considerations. Asking whether the defendant returned to criminal activity after changed circumstances places significance on aspects of the underlying offenses that bear on culpability. And insofar as close cases are inevitable under any standard, a circumstance-focused approach—unlike a simultaneity test—asks questions relevant to the ACCA's goal of singling out recidivist offenders.

Finally, the Government abandons any pretense of administrability by insisting (at 10, 21) that crimes must be "intertwined" as well as "simultaneous." That double-requirement has the practical drawbacks of *both* approaches.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

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