No. 20-5578

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN GERARD WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that petitioner's prior convictions were for offenses "committed on occasions different from one another" for purposes of sentencing under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(1).

2. Whether the California offense of infliction of corporal punishment on a spouse or cohabitant, in violation of Cal. Penal Code §§ 273.5(a) (West Supp. 1998 and Supp. 2014) and 273.55 (West Supp. 1999), is a "violent felony" under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Cal.):

United States v. Walker, No. 16-cr-88 (May 25, 2018)

United States Court of Appeals (9th Cir.):

United States v. Walker, No. 18-10211 (Mar. 20, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B11) is reported at 953 F.3d 577.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2020. A petition for rehearing was denied on June 26, 2020 (Pet. App. A1). The petition for a writ of certiorari was filed on August 28, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of California, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. C1. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Id. at C2-C3. The court of appeals affirmed. Id. at B1-B11.

1. In 2016, a police officer in Fresno, California, encountered petitioner, who was stumbling down the sidewalk with an open container of alcohol. Presentence Investigation Report (PSR) ¶ 5. A pat-down search uncovered a loaded, concealed, and holstered semi-automatic pistol. Ibid. A records check showed multiple prior felony convictions. Ibid.

A federal grand jury indicted petitioner on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. He pleaded guilty to the charge. Pet. App. C1.

2. A conviction under 18 U.S.C. 922(g)(1) has a default statutory sentencing range of zero to ten years of imprisonment. 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), specifies a statutory sentencing range of 15 years to life, ibid. The ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year * * * that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The first clause of that definition is commonly referred to as the "elements clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

The Probation Office's presentence report classified petitioner as an armed career criminal under the ACCA, listing three prior felony convictions for infliction of corporal punishment on a spouse or cohabitant, in violation of Cal. Penal Code §§ 273.5(a) (West Supp. 1998 and Supp. 2014) and 273.55 (West Supp. 1999), and stating that they had been committed on different occasions. See PSR ¶¶ 19, 28-30. Petitioner objected, contending that California infliction of corporal punishment on a spouse or cohabitant does not qualify as a violent felony and that a jury, rather than a sentencing court, should determine whether those offenses were committed on different occasions. See D. Ct. Doc. 33-2 (Apr. 30, 2018). The district court overruled those objections and determined that his three prior California convictions for infliction of corporal punishment on a spouse or cohabitant were for violent felonies under the ACCA that were committed on occasions different from one another. Sent. Tr. 16.

It then sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Pet. App. C2-C3.

3. The court of appeals affirmed. Pet. App. B1-B11. The court explained that it had repeatedly found that California infliction of corporal punishment on a spouse or cohabitant categorically qualifies as a "crime of violence" under the Sentencing Guidelines and 18 U.S.C. 16(a) -- which are defined similarly to a "violent felony" under the ACCA's elements clause -- because it requires the intentional use of force against the person of another. Pet. App. B5-B8 (citation omitted). The court further explained that it had previously recognized that the Sixth Amendment does not forbid a sentencing court from determining whether prior convictions occurred on separate occasions. Id. at B8-B11.

ARGUMENT

Petitioner contends (Pet. 17-27) that the Sixth Amendment prohibited the district court from determining from judicial records of his prior convictions that his prior offenses were "committed on occasions different from one another" for purposes of sentencing under the ACCA, 18 U.S.C. 924(e)(1). He also contends (Pet. 27-35) that California infliction of corporal punishment on a spouse or cohabitant, in violation of Section 273.5, is not a violent felony under 18 U.S.C. 924(e). The court of appeals correctly rejected those contentions, and its decision does not conflict with any decisions of this Court or of other

court of appeals. Pet. App. B1-B11. The petition for a writ of certiorari should be denied.

1. Petitioner renews his contention (Pet. 17-27) that the Sixth Amendment prohibited the district court from determining from judicial records of his prior convictions that his prior offenses were "committed on occasions different from one another," 18 U.S.C. 924(e)(1). This Court has recently and repeatedly denied review of similar issues in other cases.* It should follow the same course here.

a. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a * * * trial[] by an impartial jury." U.S. Const. Amend. VI. "This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt," or be admitted by the defendant. Alleyne v. United States, 570 U.S. 99, 104 (2013) (opinion of Thomas, J.). In a line of decisions beginning with Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court has held that facts -- other than the fact of a prior conviction -- that increase the minimum or maximum sentence that may be imposed on the defendant are elements of the defendant's offense "and must be submitted to the jury and found

* See, e.g., McDaniel v. United States, 140 S. Ct. 1272 (2020) (No. 19-6078); Starks v. United States, 140 S. Ct. 1139 (2020) (No. 19-6693); Jones v. United States, 140 S. Ct. 1137 (2020) (No. 19-6662); Hennessee v. United States, 140 S. Ct. 896 (2020) (No. 19-5924); Perry v. United States, 140 S. Ct. 90 (2019) (No. 18-9460); Smallwood v. United States, 137 S. Ct. 51 (2016) (No. 15-9179).

beyond a reasonable doubt." Alleyne, 570 U.S. at 108; see id. at 123-124 (Breyer, J., concurring in part and concurring in the judgment).

In Almendarez-Torres v. United States, 523 U.S. 224 (1998), this Court held that a defendant's prior conviction may be used as the basis for enhanced penalties without transforming it into an element of the offense that must be alleged in the indictment and proven beyond a reasonable doubt to the jury, see id. at 239-247. Consistent with Almendarez-Torres, the Court's holding in Apprendi is cabined to penalty-enhancing facts "[o]ther than the fact of a prior conviction." Apprendi, 530 U.S. at 490. And this Court has repeatedly confirmed that the rule announced in Apprendi does not apply to "the simple fact of a prior conviction." Mathis v. United States, 136 S. Ct. 2243, 2252 (2016); see United States v. Haymond, 139 S. Ct. 2369, 2377 n.3 (2019); Descamps v. United States, 570 U.S. 254, 269 (2013); Alleyne, 570 U.S. at 111 n.1 (majority opinion); Southern Union Co. v. United States, 567 U.S. 343, 346 (2012); Carachuri-Rosendo v. Holder, 560 U.S. 563, 567 n.3 (2010); James v. United States, 550 U.S. 192, 214 n.8 (2007), overruled on other grounds by Johnson v. United States, 576 U.S. 591 (2015); Cunningham v. California, 549 U.S. 270, 274-275 (2007); United States v. Booker, 543 U.S. 220, 244 (2005); Blakely v. Washington, 542 U.S. 296, 301-302 (2004).

A sentencing court's authority under Almendarez-Torres to determine the fact of a conviction, without offending the Sixth

Amendment, necessarily includes the determination of when a defendant's prior offenses occurred, and whether two of them occurred on the same or separate occasions. That determination is "sufficiently interwoven" with the fact of the conviction that "Apprendi does not require different fact-finders and different burdens of proof for Section 924(e)'s various requirements." United States v. Santiago, 268 F.3d 151, 157 (2d Cir. 2001), cert. denied, 535 U.S. 1070 (2002). Indeed, whether two offenses occurred on separate occasions "is not a fact which is different in kind from the types of facts already left to the sentencing judge by Almendarez-Torres," such as the fact that "the defendant being sentenced is the same defendant who previously was convicted of those prior offenses." Id. at 156 (emphasis omitted). And it would be anomalous for the Constitution to require a judge to determine whether a prosecution is barred altogether by the Double Jeopardy Clause because the defendant was previously convicted of the "same offence" -- which may entail a determination of the time when the prior offense occurred -- but foreclose that same judge from making such a determination for sentencing purposes. U.S. Const. Amend. V; see Oregon v. Kennedy, 456 U.S. 667, 669-670, 679 (1982).

b. As petitioner acknowledges (Pet. 23), "all of the circuit courts" have recognized that the Sixth Amendment does not foreclose Congress from assigning to sentencing judges the task of determining whether a defendant has committed three or more

predicate felonies on "occasions different from one another" for purposes of the ACCA, 18 U.S.C. 924(e)(1). See, e.g., United States v. Harris, 794 F.3d 885, 887 (8th Cir. 2015); United States v. Blair, 734 F.3d 218, 227-228 (3d Cir. 2013), cert. denied, 574 U.S. 828 (2014); United States v. Thomas, 572 F.3d 945, 952 n.4 (D.C. Cir. 2009), cert. denied, 559 U.S. 986 (2010); United States v. White, 465 F.3d 250, 254 (5th Cir. 2006) (per curiam), cert. denied, 549 U.S. 1188 (2007); United States v. Michel, 446 F.3d 1122, 1132-1133 (10th Cir. 2006); United States v. Spears, 443 F.3d 1358, 1361 (11th Cir.) (per curiam), cert. denied, 549 U.S. 916 (2006); United States v. Ivery, 427 F.3d 69, 75 (1st Cir. 2005), cert. denied, 546 U.S. 1222 (2006); United States v. Thompson, 421 F.3d 278, 284-287 (4th Cir. 2005), cert. denied, 547 U.S. 1005 (2006); United States v. Burgin, 388 F.3d 177, 184-186 (6th Cir. 2004), cert. denied, 544 U.S. 936 (2005); United States v. Morris, 293 F.3d 1010, 1012-1013 (7th Cir.), cert. denied, 537 U.S. 987 (2002); Santiago, 268 F.3d at 156-157.

As petitioner likewise acknowledges (Pet. 23-26), the courts of appeals have uniformly recognized, in accord with the decision below, that documents that fall within this Court's decision in Shepard v. United States, 544 U.S. 13 (2005), may be consulted for non-elemental facts relevant to the different-occasions inquiry. This Court held in Shepard that a sentencing court may consider a limited class of documents, including the "charging document, written plea agreement, transcript of plea colloquy, and any

explicit factual finding by the trial judge to which the defendant assented," to determine whether the defendant's prior conviction qualifies as a "violent felony" or "serious drug offense" under the ACCA. Id. at 16. Petitioner contends (Pet. 19-21), however, that sentencing courts are foreclosed from looking to any aspect of those documents that does not directly bear on an offense element. That contention is unsound. A federal indictment, for example, may contain "time-and-place information" that is not strictly an element of the offense in order to comply with the "constitutional requirement[]" that its allegations sufficiently "protect[] against the risk of multiple prosecutions for the same crime," United States v. Resendiz-Ponce, 549 U.S. 102, 108 (2007). Under petitioner's approach, however, courts could not rely on such information for ACCA purposes.

To the extent that petitioner relies on Descamps and Mathis (Pet. 19-22) for the proposition that sentencing courts conducting the different-occasions inquiry may not consider any non-elemental facts contained in Shepard documents, that reliance is misplaced. Those cases concerned the "modified categorical approach" sometimes used to determine whether a prior conviction qualifies as a "violent felony" under 18 U.S.C. 924(e)(2)(B), not whether two or more such felonies were "committed on occasions different from one another" under 18 U.S.C. 924(e)(1). Unlike the "violent felony" determination, the different-occasions requirement of Section 924(e)(1) does not involve any form of categorical

comparison between a prior crime of conviction and a generic federal offense. Instead, it focuses on the question of whether prior offenses were "committed on" different occasions. Compare 18 U.S.C. 924(e)(1), with 18 U.S.C. 924(e)(2)(B) (defining "violent felony" based on generic federal offenses and elements). Thus, neither Descamps nor Mathis supports petitioner's position here, under which a district court apparently would have to treat every prior conviction as having occurred on a single occasion, unless the convictions at issue present the rare circumstance in which the date or time is an element of the offense.

Because facts relevant to the different-occasions inquiry -- including the time, location, or specific victim of the prior offense -- are infrequently elements of the offense, petitioner's proposed rule would prohibit district courts from making the different-occasions determination in many cases. See United States v. Hennessee, 932 F.3d 437, 443 (6th Cir. 2019), cert. denied, 140 S. Ct. 896 (2020). "Such a restriction would not make sense," and would "render violent-felony convictions adjudged together by the same court inseparable in the different-occasions context." Ibid. Indeed, it is not clear how, under petitioner's proposal, courts could even rely on different dates of judgment (which is not an offense element) as a basis for determining that offenses were committed on different occasions. The Sixth Amendment imposes no such restriction, and petitioner provides no

sound reason why Congress would have chosen to impose it in drafting the ACCA.

2. Petitioner separately contends (Pet. 27-35) that California infliction of corporal punishment on a spouse or cohabitant, in violation of Section 273.5(a), does not qualify as a violent felony under the elements clause of the ACCA, 18 U.S.C. 924(e)(2)(B)(i). The court of appeals correctly rejected that contention, determining that California infliction of corporal punishment on a spouse or cohabitant has as an element the "use, attempted use, or threatened use of physical force against the person of another." Ibid. That determination is based on an interpretation of state law and does not conflict with any decision of this Court or any other court of appeals.

The court of appeals has determined that under California law, infliction of corporal punishment on a spouse or cohabitant "require[s] a person willfully to inflict upon another person a traumatic condition, where willfully is a synonym for intentionally," where "traumatic condition" is defined as "one that is 'caused by a physical force,'" and where "willful infliction requires 'a direct application of force on the victim by the defendant.'" United States v. Laurico-Yeno, 590 F.3d 818, 821 (9th Cir.) (citations omitted), cert. denied, 562 U.S. 886 (2010). Petitioner does not appear to dispute that the state law, so construed, would involve the "use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C.

924(e)(2)(B)(i); see Pet. App. B5-B8. He instead effectively challenges (Pet. 27-35) the court of appeals' determination that the state law in fact requires the intentional, as opposed to negligent, use of force. That claim does not warrant this Court's review.

The prior circuit case law on which the decision below relies accepted petitioner's primary federal-law contention here (Pet. 27-28) -- namely, that a provision worded like the ACCA's elements clause applies "only to the intentional use of force" and that "neither recklessness nor gross negligence supports a finding of 'crime of violence.'" Laurico-Yeno, 590 F.3d at 821, 822 n.4 (citing Fernandez-Ruiz v. Gonzales, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc)); see Pet. App. B5-B6 (relying on Laurico-Yeno). That circuit precedent also rejected petitioner's contention (Pet. 27-28) that California infliction of corporal punishment on a spouse or cohabitant is comparable to simple battery, explaining that "[u]nder California law, a simple battery allows for liability by way of a 'least' or slightest touching," whereas infliction of corporal punishment on a spouse or cohabitant "requir[es] the deliberate use of force that injures another." Laurico-Yeno, 590 F.3d at 822 (citation omitted); cf. Stokeling v. United States, 139 S. Ct. 544, 552-553 (2019). And contrary to petitioner's assertion that the court of appeals' reasoning "omits from the analysis the limiting language 'against the person of another,'" Pet. 30, it examined the decisions of the California courts, some

of which petitioner cites, and specifically determined that "a defendant can be convicted" of infliction of corporal punishment on a spouse or cohabitant "only if he or she intentionally uses 'physical force against the person of another,'" Laurico-Yeno, 590 F.3d at 821; see Pet. 27-29.

Because petitioner's disagreement with the court of appeals is thus limited solely to its construction of state law, it does not provide a sound basis for certiorari. This Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004), abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014); see Bowen v. Massachusetts, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law."). Petitioner identifies no reason to depart from that settled policy in this case. In particular, his contention (Pet. 33-35) that the court of appeals confused federal and state mental-state standards disregards the court of appeals' reliance on its own federal precedents describing the mental state it deemed a federal elements clause to require. See Laurico-Yeno, 590 F.3d at 821, 822 n.4.

3. Petitioner separately contends (Pet. 27) that the Court should hold this case for Borden v. United States, cert. granted, No. 19-5410 (oral argument scheduled for Nov. 3, 2020), which

presents the question whether a crime committed with the mens rea of recklessness can involve the "use of physical force" under the ACCA's elements clause, see Pet. at ii, Borden, supra (No. 19-5410). But even if this Court were to hold in Borden that such a crime does not involve the "use of physical force," that would not entitle petitioner to any relief. That is because the court of appeals already applied the more defendant-favorable approach, under which crimes with a means rea of recklessness do not qualify. See p. 12, supra. Accordingly, there is no need to hold the petition in this case pending the resolution of Borden. And any error in the application of the defendant-favorable approach to the particular state law at issue here would not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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