No. 20-5578

IN THE
SUPREME COURT OF THE UNITED STATES

STEVEN GERARD WALKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

"At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,'. . . and the guarantee that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.'" *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000).

The government is correct that when a jury has previously found the elements of an offense beyond a reasonable doubt, a judge can rely on the fact of the prior conviction to increase the punishment beyond that authorized for the offense of conviction. The government is also correct that this Court's decisions in *Mathis v. United States*, 136 S. Ct. 2243 (2016) and *Descamps v. United States*, 570 U.S. 254 (2013) addressed a different predicate fact pertaining to the application of the Armed Career Criminal Act ("ACCA"). The government is likewise correct that "[u]nlike 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." BIO at 9-10. And there is the constitutional rub.

Precisely because the elements of a prior conviction have necessarily been found by a jury or admitted by the defendant, a sentencing judge *can* rely on the fact of a prior conviction in determining whether the defendant has sustained three qualifying predicate felonies. *Mathis* 136 S. Ct. at 2255 (because "an ACCA penalty may be based only on what a jury necessarily found to convict a defendant (or what he necessarily admitted). . . elements alone fit that bill") (internal quotations

omitted). Pursuant to the plain language of the statute, the analysis to determine whether a defendant has committed the three felonies on "occasions different from one another" looks not at elements but at real-world facts concerning how a defendant committed the offenses. *See, e.g.*, *Nijhawan v. Holder*, 557 U.S. 29, 33 (2009) (when a statute refers to the commission of an offense rather than the fact of a conviction, it calls for an inquiry into "the factual circumstances surrounding the commission of the crime on a specific occasion").

Because the different-occasion analysis demands an inquiry into facts that have not previously been found by a jury, consistent with the Fifth and Sixth amendments, said facts must either be found by a jury or admitted by the defendant in the present case before a judge could rely on them to increase both the statutory maximum and mandatory minimum for the offense of conviction. Indeed, the government recognized as much in *Nijhawan*, affirmatively acknowledging that because the determination of whether the offense at issue qualified as an aggravated felony depended not on the fact of conviction but on how the offense was committed on a specific occasion, and because classifying the offense as an aggravated felony in a criminal case alleging a violation of 8 U.S.C. § 1326 would increase the statutory maximum from two years to twenty, in a criminal prosecution a jury "would have to find [the] loss amount beyond a reasonable doubt [to] eliminate[e] any constitutional concern." *Nijhawan*, 557 U.S. at 40.

In other words, petitioner's argument is hardly the radical, upending procedure the government seems to suggest. A district court would most certainly

not have "to treat every prior conviction as having occurred on a single occasion," which would be clearly contrary to Congress' intent. BIO at 10. The government would simply have to carry its usual burden of proving beyond a reasonable doubt a fact that increases a defendant's mandatory minimum or statutory maximum in excess of the penalty established by Congress for the offense of conviction.

Indeed, it is the government—and every circuit court—that has staked out the revolutionary procedure of permitting judges to bypass juries and find non-elemental facts that "may be downright wrong," *Descamps*, 570 U.S. at 270, to substantially increase a defendant's sentence beyond the statutory penalties established by Congress for the offense of conviction—a proposition that finds no support in this Court's jurisprudence. *United States v. Haymond*, 139 S. Ct. 2369, 2379 (2019) ("As this Court has repeatedly explained, any 'increase in a defendant's authorized punishment contingent on the finding of a fact' requires a jury and proof beyond a reasonable doubt 'no matter' what the government chooses to call the exercise") (quoting *Ring v. Arizona*, 536 U.S. 584, 602 (2002)); *Alleyne v. United States*, 570 U.S. 99, 103, 114 (2013) (preserving "the historic role of the jury as an intermediary between the State and criminal defendants," "any fact that increases the mandatory minimum" must be found by a jury beyond a reasonable doubt); *Apprendi*, 530 U.S. at 497 (permitting a sentencing judge to find a non-elemental fact about how a defendant committed an offense to increase the statutory maximum "is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system"); *Jones v. United States*, 526 U.S.

227, 243 n.6, 243-44 (1999) (protecting the jury's role from becoming one of a "low-level gatekeep[er]," mandates certain "constitutional safeguards" for fact-finding procedures "that determine the maximum permissible punishment," including "the formality of notice, the identity of the factfinder, and the burden of proof").

Where the circuit courts have made it clear they do not intend to change course absent clear direction from this Court, and where the government has not suggested any reason why this case does not represent an excellent vehicle for this Court to provide the much needed clarification, this Court should grant Walker's petition for certiorari.

Alternatively, this Court should hold Walker's petition pending resolution of *Borden v. United States* (Case No. 19-5410), which, based on the substance of the oral argument, will address the question of whether "against the person of another" simply identifies the victim of the use of force as the government and the Ninth Circuit contend here, or whether the inclusion of said limiting language requires proof that when the defendant used force he was at least aware that his conduct could harm another as this Court held in *Leocal v. Ashcroft*, 543 U.S. 1, 9-10 (2004).

I. This Court Has Consistently Held Without Exception that a Fact that Increases an Individual's Sentence Beyond the Offense of Conviction Must be Found by a Jury or Admitted by the Defendant.

Notwithstanding the government's reliance on *Apprendi* and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (BIO at 5-7), those cases support petitioner's position, not the government's. *Almendarez-Torres* "stands for the proposition that not every fact expanding a penalty range must be stated in a felony

indictment," and did not address "the Sixth Amendment right to jury trial." *Jones*, 526 U.S. at 248-49. Just like here, Almendarez-Torres was subject to an increased statutory maximum if a certain predicate fact was established, which in that case was a prior conviction for an aggravated felony. In sharp contrast to what happened here, at his plea colloquy Almendarez-Torres *admitted* that his three prior convictions were aggravated felonies, *Almendarez-Torres*, 523 U.S. at 227, and thus there was "no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court." *Apprendi*, 530 U.S. at 488. The whole point is that Walker *did not admit* the predicate fact of committing the offenses on three different occasions. Instead, the sentencing judge engaged in fact-finding in the first instance by a preponderance of the evidence to conclude that he did, and on the basis of that judicial fact-finding, increased the mandatory minimum from zero months to fifteen years in custody.

Moreover, as the *Apprendi* court observed, the fact of Almendarez-Torres' prior convictions resulted from "proceedings with substantial procedural safeguards of their own." *Id.* Indeed, "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones*, 526 U.S. at 249. It was precisely because of "the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that 'fact' in his case," that "mitigated the due process and Sixth Amendment concerns otherwise implicated in

allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." *Apprendi*, 530 U.S at 488.

As the government acknowledges, the "facts relevant to the different-occasions inquiry—including the time, location, or specific victim of the prior offense—are infrequently elements of the offense." BIO at 10. In other words, the facts necessary to determine whether offenses were committed on three different occasions" are *not* facts that have been previously found through the requisite procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. Accordingly, *Almendarez-Torres* cannot be read to resolve the due process and Sixth Amendment questions implicated by [a judge making factual-findings in the first instance to increase an individual's incarceration beyond that established by Congress for the offense of conviction] as the Government urges." *Jones*, 526 U.S. at 249. Where the federal government "threatened [Walker] with certain pains if he unlawfully possessed a weapon and with additional pains if he" had previously committed three predicate felonies on different occasions, "[a]s a matter of simple justice, it seems obvious that the procedural safeguards designed to protect [Walker] from unwarranted pains should apply equally to the two acts that [Congress] has singled out for punishment." *Apprendi*, 530 U.S. at 476.

As obvious as it seems, every circuit court is getting it wrong by accepting the government's invitation to bypass a jury finding in lieu of judicial fact-finding in the first instance, and on the basis of a fact that has never been found by a jury or admitted by the defendant, increase both the statutory maximum and mandatory

minimum beyond that proscribed by Congress for a violation of 18 U.S.C. § 922(g). BIO at 8 (acknowledging that "the court of appeals have uniformly" endorsed the practice of consulting Shepard documents "for non-elemental facts relevant to the different-occasions inquiry").

II. Whether Two Offenses Occurred on Different Occasions is a Subjective Inquiry that is Resolved by the Factfinder Weighing the Unique Facts of a Particular Case.

Apart from relying on the circuit courts that have been consistently misreading *Apprendi* and *Amendarez-Torres* for the proposition that sentencing judges can rely not only on the fact *of* a prior conviction but on real world facts they determine in the first instance *about* how a prior conviction was committed to increase the punishment beyond that authorized by the offense of conviction, as well as on the inconvenience of having to meet its burden of proving all the facts necessary to support the applicable mandatory minimum and statutory maximum beyond a reasonable doubt, the only other opposition to petitioner's request for certiorari that the government offers is a misplaced analogy to the Double Jeopardy Clause, which further highlights its failure to appreciate the constitutional issue raised here.

The only fact-finding at issue here is fact-finding that *strips the jury* of its role in finding all of the facts necessary to establish the framework for sentencing. The judicial fact-finding pertaining to the Double Jeopardy Clause does not subject an individual to punishment beyond that authorized by the facts found by a jury; a judge's adverse ruling simply submits the matter *to a jury*.

Not only is the different context constitutionally dispositive, the requisite analysis under the Double Jeopardy Clause is profoundly different from determining whether prior offenses occurred on different occasions. Putting aside the fact that the case the government relies on, *Oregon v. Kennedy*, 456 U.S. 667 (1982), BIO at 7, had nothing to do with judicial fact-finding regarding when an offense occurred,[1] the different-occasions inquiry under the ACCA is not confined to an objective analysis of "different dates of judgments"[2] (BIO at 10), but instead can be a fact intensive inquiry that "conceivably may turn upon any combination of circumstances" requiring "a case-by-case examination of the totality of the circumstances" surrounding the commission of an offense in order to determine whether the defendant had a meaningful opportunity to reflect on his conduct before committing another offense. *United States v. Stearns*, 387 F.3d 104, 108 (1st Cir. 2004). *See* Walker's Petition at 6-9 (collecting cases).

Putting aside that non-elemental facts may be "downright wrong," because an inquiry into whether two offenses occurred on different occasions is a subjective one, there is no definitive correct answer; the answer will vary by factfinder. *Compare United States v. Hudspeth*, 42 F.3d 1015 (7th Cir. 1994) (an individual became an Armed Career Criminal during the span of 36 minutes when he burglarized three stores in one shopping mall by chopping through the wall to get from one store to

[1] In *Oregon v. Kennedy* there was no dispute about whether two different offenses were one in the same, but simply whether a mistrial granted on the defendant's motion could preclude a subsequent prosecution on the charge. 456 U.S. at 668-70.

[2] The different-occasions analysis would rarely, if ever, be advanced by looking at "dates of judgements." The date of judgment says little, if anything, about when an offense was actually committed.

another) with *United States v. McElyea*, 158 F.3d 1016 (9th Cir. 1998) (just like Hudspeth, the defendant burglarized three stores in one shopping mall by chopping through the wall to get from one store to the next, but the court could not say the defendant was an Armed Career Criminal without more information about exactly how long the defendant was in each store and where his accomplice had been during the burglaries), and *United States v. Tisdale*, 921 F.2d 1095 (10th Cir. 1990) (Tisdale became an Armed Career Criminal during the course of one night when he burglarized three stores in one shopping mall because the court decided he had ample opportunity for reflection between each burglary) with *United States v. Murphy*, 107 F.3d 119 (6th Cir. 1997) (even though the defendant was involved in two armed robberies at a duplex because the court determined that the defendant stayed in the first duplex to prevent the occupant from calling the police while his accomplice kicked in the door of the remaining duplex, there was insufficient time for reflection and thus the robberies occurred on the same occasion),[3] and *United States v. Schiemann*, 894 F.2d 909 (7th Cir. 1990) (after burglarizing a store, the defendant had gotten three blocks away before the police caught up with him and the defendant pushed the officer, which the court concluded was ample time for reflection and thus the two offenses occurred on different occasions) with *United States v. Graves*, 60 F.3d 1183 (6th Cir. 1995) (even though the defendant had "completed the burglary and had stashed the loot in the woods" before assaulting

[3] *See, e.g.*, *United States v. Barbour*, 750 F.3d 535, 541 (6th Cir. 2014) (reaffirming that the actions of a defendant's "co-defendants directly affect[s] whether . . . robberies [are] separate episodes" or committed on the same occasion).

the police, because the defendant "was still at the location of the burglary when he was chased by police," the court concluded the defendant had not had the requisite time for meaningful reflection and thus the offenses were committed on the same occasion).

In other words, the inquiry here is not simply whether the elements of two distinct offenses have been satisfied as is called for in the double jeopardy analysis, *Blockburger v. United States*, 284 U.S. 299, 302-03 (1932), but is much closer to "the 'closely related to' or 'inextricably intertwined with' test" that this Court explicitly rejected as the definition for what constitutes an "offense" in the context of double jeopardy and the right to counsel. *Texas v. Cobb*, 532 U.S. 162, 173-74 (2001). Where the question presented, the method of analysis called for and the significance of the resulting decision are critically distinct, the government's analogy to the Double Jeopardy Clause is inapposite.

When the result of the subjective fact-finding endeavor that defines the "different occasions" analysis is the basis for depriving an individual years of his liberty beyond what Congress authorized for the offense of conviction, the Fifth and Sixth Amendment demands that that said fact-finding be done by a jury of one's peers subject to the requisite procedural safeguards. Notwithstanding the clarity that this Court has provided over the past decade regarding what constitutes the fact of a prior conviction—those fact necessarily found by a jury subject to the requisite constitutional safeguards—the circuit courts appear paralyzed into inertia when it comes to confronting the unconstitutionality of the exception they have

carved out that denies individuals their liberty without the protection of a jury. Urgent action is needed by this Court, and where the issue was preserved at all levels below, and where the Ninth Circuit has once again flouted this Court's reasoning in the context of the ACCA by extending judicial factfinding beyond recognition of a prior conviction, this case presents an excellent vehicle to do so.

III. The Only Interpretation At Issue Here is the Ninth Circuit's Interpretation of 18 U.S.C. § 924(e)(2)(B)(i) that Reads the Limiting Language "Against the Person of Another" Out of the Statute.

The government's opposition proceeds from a false premise. Contrary to the government's assertion (BIO at 11-12), the crux of petitioner's argument here, as it is in *Trayvon Smith v. United States*, Case No. 19-5727, and *Juan Manuel Perez v. United States*, Case No. 19-5749 (both distributed to conference on February 28, 2020), is that a statute such as CPC § 273.5 that merely requires the intentional use of physical force that happens to result in injury to a person *does not* qualify as a violent felony pursuant to *Leocal v. Ashcroft*, 543 U.S. 1 (2004). Following *Leocal*, it is petitioner's position that the language "against the person of another" is not mere surplusage but instead requires proof that when the defendant acted he was necessarily aware that his conduct could harm another—an element that is unequivocally not required to sustain a conviction for battery or assault in California. *People v. Williams*, 26 Cal. 4th 779, 777-78, 788 n.3 (2001) (explaining that even if a defendant "honestly believe[d] that his act was not likely to result in a battery," he is still guilty so long as a reasonable person knowing the facts the defendant knew, would have appreciated the risk of harm to another); *c.f.*, *People v.*

Rocha, 3 Cal. 3d 893, 899 (1971) (noting that when the legislature initially enacted California's assault statute, it had required proof that the defendant acted with the "intent to do bodily harm," but the legislature subsequently deleted "all reference to intent," and by so doing unequivocally established that proof of the "intent. . . to injure in the sense of inflicting bodily harm is not necessary" to sustain a conviction); *People v. Mansfield*, 200 Cal. App. 3d 82 (1988) ("[T]he state of mind necessary for the commission of a battery with serious bodily injury is the same as that for simple battery; it is only the result which is different.").

The Ninth Circuit was therefore only able to reach the conclusion that CPC § 273.5 is a violent felony by reading "against the person of another" out of the statute and holding defendants strictly liable for the fact that an individual was injured by their conduct, which is exactly what it did in the trilogy of cases the *Walker* court relied upon. *United States v. Walker*, 953 F.3d 577, 579 (9th Cir. 2020). In the first of the trilogy, *United States v. Laurico-Yeno*, 590 F.3d 818 (9th Cir. 2010), the Ninth Circuit had no problem interpreting California law as far as it went. It correctly understood that a conviction under CPC § 273.5 requires an intentional use of force that results in harm to another, and it was precisely "[b]ecause a person cannot be convicted without the intentional use of physical force, [that the Ninth Circuit held] § 273.5 categorically falls within the scope of a 'crime of violence.'" *Id.* at 821. Glaringly absent from the Ninth Circuit's reasoning was any recognition that Congress' inclusion of the limiting phrase "against the person of another" means that the intentional use of force that happens to result in

injury to another is not enough. *Leocal*, 543 U.S. at 9 ("Whether or not the word 'use' alone supplies *a mens rea* element, the parties' primary focus on that word is too narrow," explaining that simply using force that harms another is not enough; the conviction must at a minimum establish that when the defendant intentionally used force he was at least aware that his conduct could harm another).

By focusing exclusively on the use of force that happens to result in injury to another, the Ninth Circuit in *Laurico-Yeno* and its progeny is performing exactly the truncated analysis that this Court in *Leocal* held was insufficient. *See Banuelos-Ayon v. Holder*, 611 F.3d 1080, 1084-85 (9th Cir. 2010) (relying on *People v. Jackson*, 77 Cal. App. 4th 574 (2000) for the uncontroversial proposition that CPC § 273.5 requires the "direct application of force," and then extrapolating from that fact that the "direct application of force" "is the equivalent of the 'intentional use of force,'" and then concluding that therefore § 273.5(a) was categorically a crime of violence" *without ever reaching the dispositive issue in Leocal* and asking whether the conviction required proof that when the defendant used force he was aware of the possibility of harming another, which pursuant to the California Supreme Court is unambiguously not an element of the offense); *United States v. Ayala-Nicanor*, 659 F.3d 744, 750-51 (9th Cir. 2011) (reaffirming that "[i]n *Laurico-Yeno*, we held that § 273.5 was a categorical crime of violence *precisely because* the statute requires intentional use of *physical force that results* in a traumatic condition," once again holding the defendant strictly liable for the resulting injury regardless of his intent) (emphasis added).

The Ninth Circuit's reasoning in *Laurico-Yeno* and its progeny relied upon by the *Walker* court is directly at odds with this Court's instruction in *Leocal* that the "use of force" alone is not dispositive; it matters whether the defendant was aware that he might harm another when he acted. And it should. What is at issue here is the interplay between two statutes: 18 U.S.C. § 3553(a), which mandates that judges consider, among other things, the history and characteristics of the defendant and the need to avoid unwarranted disparities between similarly situated defendants to arrive at a sentence that is sufficient but not greater than necessary to accomplish the penological objectives of sentencing, and 18 U.S.C. § 924(e), which strips sentencing judges of their discretion for a small subset of armed career criminals for whom there is no viable alternative but a lengthy period of incarceration, regardless of the long-term consequences for the defendant, his family and the next generation. In other words, the ACCA predicates are intended to identify those individuals who "will use [a] gun deliberately to harm a victim." *Begay v. United States*, 533 U.S. 137, 145 (2008), not simply those whose possession of a firearm represents a danger to the community generally. Congress enacted 18 U.S.C. § 922(g) in combination with § 3553(a) to address the latter concern.

The government is incorrect, therefore, that the resolution of *Borden v. United States* (Case No. 19-5410) is not relevant to the analysis here. BIO at 14. Indeed, the core question presented here was at the heart of the oral argument in *Borden v. United States* (November 3, 2020). Just like in *Borden*, and consistent with the Ninth Circuit, the government here wants to truncate the analysis by

focusing just on the intentional act that happened to result in harm without inquiry into whether the defendant was aware that his conduct could result in harm to another. Yet, as Justice Gorsuch, citing *Leocal*, reminded the government, when Congress elects to include the limiting language "against the person of another," it is not enough to simply look at the defendant's conduct and the resulting harm, the critical issue is the defendant's awareness of how his intentional conduct might impact another. *Borden*, No. 19-5410, Tr. of Oral Arg., at 57-59 (Nov. 3, 2020). Because *Borden* will almost certainly address the significance of the limiting language "against the person of another," and whether a defendant must at least be aware that his intentional conduct could result in harm to another, the Court's reasoning in *Borden* could be dispositive here.

CONCLUSION

For all the above reasons, together with those presented in the petition, this Court should grant Mr. Walker's petition for a writ of certiorari.

Dated: December 10, 2020

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