No. _____

In The
Supreme Court
Of The United States

October Term 2021

Norris Deshon Andrews ,

Petitioner,

vs.

United States of America,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented for Review

Whether the sentencing court violated Petitioner's Sixth Amendment jury trial rights by engaging in judicial fact-finding that two alleged assault convictions from 2011 were "committed on occasions different from one another," thereby resulting in two predicate crimes of violence, rather than just one, for application of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1).

Proceedings Directly Related to this Case

United States vs. Norris Deshon Andrews, 18-Cr-149 (SRN/DTS) (D. Minn.),

Judgment entered on 23 March 2020.

United States vs. Norris Deshon Andrews, No. 20-1644, (8th Cir.),

Judgment entered on 13 August 2021.

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United States v. Andrews, 861 F. App'x 113 (8th Cir. 2021).

Jurisdictional Statement

The judgment of the Eighth Circuit Court of Appeals was entered in this case on 13 August 2021. This Petition for Certiorari is timely filed within the meaning of Rule 13 of the rules of this Court. This Court has jurisdiction to review the decision of the court of appeals pursuant to a writ of certiorari under 28 U.S.C. § 1254 (1).

Constitutional and Statutory Provisions at Issue in the Case

18 U.S.C. § 924(e)(1):

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statement of the Case

This case arises from a federal grand jury indictment charging Petitioner Andrews with a single count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

After a trial to a jury resulting in a guilty verdict, the district court concluded that Petitioner qualified for sentencing under the Armed Career Criminal Act (ACCA) based in part on a finding that he had two prior convictions for the Minnesota crime of second-degree assault that were "committed on occasions different from one another." The assault convictions at issue arose from a single criminal episode, resulting in two charges that were consolidated for both trial and sentencing. Based on the district court's factual finding that the convictions were nonetheless committed on occasions different from one another, the district court sentenced Petitioner to a term of 262 months in prison. Petitioner timely filed a notice of appeal, and the court of appeals had jurisdiction from the district court's final judgment pursuant to 28 U.S.C. § 1291.

On appeal to the Eighth Circuit, Petitioner raised several challenges to the district court's conclusions and fact-finding, including a claim that the district court had violated his Sixth Amendment right to a jury trial by its own

factual finding that the two alleged assaults had occurred on occasions different from one another. Petitioner nonetheless acknowledged that Eighth Circuit precedent already had held to the contrary. The court of appeals dismissed the challenge on the basis of its prior precedent, acknowledging that the argument had been preserved for review by this Court:

> To constitute two separate ACCA predicate offenses, the two second-degree assaults must have occurred "on occasions different from one another." 18 U.S.C. § 924(e)(1). Andrews argues that the district court violated his Sixth Amendment right to a jury by concluding that they did. However, Andrews also acknowledges that we have rejected this argument. *United States v. Wyatt*, 853 F.3d 454, 458–59 (8th Cir. 2017). "It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel." *Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002) (per curiam) ("We therefore are not free to avoid the clear holding of the [*Wyatt*] court."). Knowing this, Andrews "raises the issue solely to preserve it for further review." Appellant's Br. at 25. Accordingly, Andrews's convictions for second-degree assault are not disqualified for this reason.

United States v. Andrews, 861 F. App'x 113, 116–17 (8th Cir. 2021) (Appendix at A-6).

Petitioner now requests that this Court accept review to decide this important constitutional question.

Argument

Petitioner seeks this Court's review of the decision of the court of appeals because it has decided an important federal constitutional question in a way that conflicts with the relevant decisions of this Court. Specifically, this

Court has held, consistent with the Sixth Amendment, 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. *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000). It also has held that "[m]andatory minimum sentences increase the penalty for a crime . . . [and therefore] any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Alleyne v. United States*, 570 U.S. 99, 103 (2013).

Petitioner properly objected to the district court's fact-finding for the reason that it permitted application of the ACCA, and thereby increased both the mandatory minimum sentence (from 0 to 15 years) and the statutory maximum sentence (from ten years to life): "I will start with the Court's factual findings that the two referenced alleged assaults occurred on occasions different from one another. I object to the Court making a factual finding in that regard. I think that violates *Apprendi* and *Alleyne*." Second Sentencing Hrg. Tr. (16 March 2020), at 14. The same argument was presented to the court of appeals, but as noted above, Eighth Circuit precedent already had foreclosed any relief to Petitioner.

A number of the active judges of the Eighth Circuit Court of Appeals have made clear that the precedent that binds them appears to conflict with this Court's precedent. Judge Stras, for example, in a published concurrence

in a different recent case, has made clear his position that the judicial fact-finding required by the "occasions" analysis is a violation of the Sixth Amendment right to have a jury make such determinations. In his lengthy and well-reasoned concurrence in *United States v. Perry*, 908 F.3d 1126 (8th Cir. 2018), he lamented that the court's precedent required the majority's holding, despite the obvious constitutional infirmity. All of his observations are relevant to this Petition, including the following salient excerpts:

> The court's approach in addressing Perry's past crimes, and in particular whether he committed them "on occasions different from one another," falls in line with our cases but is a departure from fundamental Sixth Amendment principles. I join the court's opinion because it is a faithful application of existing circuit precedent, but I write separately to express my concerns about what is, in my view, an erosion of the jury-trial right.
>
> . . . .
>
> To be sure, the Supreme Court has carved out an exception allowing district courts to find "the fact of a prior conviction." But the exception is "narrow," and permits the court to "do no more ... than determine what crime, with what elements, the defendant was convicted of," *Mathis v. United States*, ––– U.S. ––––, 136 S.Ct. 2243, 2252 (2016).
>
> The district court did much more here. Determining whether Perry committed his robbery and assaults on separate occasions is not just a straightforward matter of identifying the crimes he committed. Rather, it requires closely examining what he did to commit each offense, when and where he did it, and what he did in between. The court must then weigh "at least three factors"—the timing, location, and "overall substantive continuity" of the crimes, plus whatever else might be relevant in a particular case—in a context-specific balancing test that we still struggle to put into words.
>
> . . . .

> I acknowledge that our approach of permitting a judge to make the different-occasions determination puts us in good company. *See United States v. Blair*, 734 F.3d 218, 228 (3d Cir. 2013) (collecting cases from most other circuits). . . .
>
> Inertia may be part of the explanation. Sometimes courts just continue along the same well-trodden path even in the face of clear signs to turn around. We have missed more than a few bread crumbs leading away. The Supreme Court has all but announced that an expansive view of the prior-conviction exception is inconsistent with the Sixth Amendment.
>
> . . . .
>
> What the district court did in this case is just what [the Supreme Court has said it cannot do. But it is also what we have expressly and repeatedly instructed district courts they should do. I reluctantly concur.

Perry, 908 F.3d 1126, 1134–36 (Stras, J., concurring) (cleaned up). Judge Kelly, in her separate concurrence, agreed: "I agree with the concurrence that judicial determination of facts that increase the penalty for a crime beyond the prescribed statutory maximum would appear to conflict with Supreme Court precedent. But that's just what our case law requires, at least until the Supreme Court . . . takes up the issue." *Id.* at 1137 (cleaned up).

It is time for this Court to take up the issue.

In fact, it may already have taken up the issue in a case presently pending on this Court's docket. In *Wooden v. United States*, Docket No. 20-5279 (now under advisement), the precise question for review was "whether offenses that were committed as part of a single criminal episode, but sequentially in time, were 'committed on occasions different from one

another' for purposes of a sentencing enhancement under the Armed Career Criminal Act." While conceding that resolution of that issue does not *require* the Court to resolve whether a jury must make the required factual findings, *Wooden* certainly provides the Court with ample opportunity to address the issue, which is subsumed in the larger issue for review. If the Court does not resolve the issue in *Wooden*, it should accept review here to do so.

This Court has never held, or even suggested, that the "committed on occasions different from one another" is a fact that falls within the narrow exception reserved for the fact of a prior conviction. It does not. Whether offenses were committed on different occasions is not a "simple fact of a prior conviction" that a court can determine, using the categorical approach, consistent with *Apprendi*. Rather, this second determination calls for wide-ranging factual findings about the convictions that will rarely, if ever, be elements of the prior offense. Therefore, these facts—that a defendant's three prior convictions are for offenses committed on occasions different from one another—fit within the rule of *Apprendi*, rather than its exception. They must be charged in the indictment and proved to the jury beyond a reasonable doubt. The Eighth Circuit's contrary holdings directly conflict with this Court's precedents. The Court should accept review to resolve the conflict.

Conclusion

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition for certiorari.

Dated: 12 November 2021

Respectfully submitted,

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