No. 21-6657

In The Supreme Court of the United States

JOSHUA RESHI DUDLEY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION

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An undeniable tension exists between the judicial factfinding sanctioned by the courts below and this Court's Sixth Amendment decisions since *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Despite that tension and a growing number of judges recognizing Sixth Amendment problems with the different occasions language of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), the government asks the Court to deny Mr. Dudley's petition and maintain the status quo. U.S. Br. in Opp'n at 2. That position is untenable. This Court's review of the issue is needed because the lower courts and government are unwilling to apply now familiar Sixth Amendment principles to the ACCA's different occasions clause until this Court explicitly does so.

Judge Newsom's dissent below explains why the status quo is incompatible with this Court's Sixth Amendment decisions. That opinion details contradictions between (1) circuit law allowing judicial factfinding for the ACCA's different occasions inquiry and (2) this Court's continued disallowance of judicial factfinding that increases a sentence. Pet. App. 47a-58a (Newsom, J., concurring in part and dissenting in part). Noting that tension and that other circuit judges have recognized the same issue, Judge Newson suggested that this Court "might want to clear things up." *Id.* at 53 n.8, 58a. Just two months later, the Court held oral argument in its first case involving the different occasions clause, and multiple Justices noted the same Sixth Amendment concerns. *See* Oral Argument tr. at 15-16, 31-32, 39, 72,

Wooden v. United States, No. 20-5279. The time has come for this Court to directly address the Sixth Amendment issues with the ACCA's different occasions clause.

In addition to that larger issue, Mr. Dudley has also asked the Court to review the Eleventh Circuit's ruling that *Shepard v. United States*, 544 U.S. 13 (2005), allows a sentencing court to review a plea transcript from a prior conviction and decide for ACCA purposes that a defendant had *implicitly* confirmed a prosecutor's factual proffer. Pet. App. at 22a. The government appears to contend that *Shepard* allows this approach, asserting that "*Shepard* does not require a particular form of words for a defendant's acceptance of the factual basis for his plea," U.S. Br. in Opp'n at 4. But *Shepard* expressly limits ACCA factfinding to matters "an earlier guilty plea necessarily admitted," 544 U.S. at 16. The government's position, like the holding below, misreads *Shepard* and injects too much potential for arbitrariness when increasing statutory ranges of imprisonment, the exact result this Court has sought to avoid. The Court's review is necessary on both questions, and the petition for a writ of certiorari should be granted.

I. The government relies on an outdated conception of judicial factfinding to argue that the different occasions language of the ACCA poses no Sixth Amendment issues.

The government opposes review of the petition by contending that a federal sentencing judge should have the authority to determine *when* a defendant's prior offense occurred. In support, the government notes that sentencing courts may determine "the fact of a prior conviction" and cites a Second Circuit case from 20 years ago for the proposition that the *occasion* of the offense is "'sufficiently interwoven'

with the fact of the [prior] conviction." U.S. Br. in Opp'n at 7, *Walker v. United States*, 141 S. Ct. 1084 (2021) (No. 20-5578) (quoting *United States v. Santiago*, 268 F.3d 151, 157 (2d Cir. 2001)).[1] That understanding of judicial authority is unsupported by this Court's intervening decisions.

For context, the *Santiago* court ruled on the heels of *Apprendi*'s holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. The exception for "the fact of a prior conviction" arose from *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). There, the Court upheld a statutory sentencing enhancement for aliens previously deported "for commission of an aggravated felony." *Id.* at 226. In 2001, the *Santiago* court was weaving the *occasion* of a prior conviction into the *Almendarez-Torres* exception for "the fact of a prior conviction." 268 F.3d at 157.

But this Court has never adopted the Second Circuit's handiwork. Instead, the Court has emphasized that *Almendarez-Torres* is "a narrow exception" to *Apprendi*'s "general rule," *see Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013), and applied *Apprendi* to curtail judicial factfinding as to the ACCA. *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps v. United States*, 570 U.S. 254 (2013). This Court's more recent decisions plainly state that a sentencing court "cannot rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence." *Descamps*,

[1] The government's memorandum in opposition to Mr. Dudley's petition incorporates its brief in opposition to the petition for a writ of certiorari in *Walker*. U.S. Mem. 2.

570 U.S. at 270 (punctuation omitted). The Court has further described the *Almendarez-Torres* exception as only "for the simple fact of a prior conviction," which "means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense." *Mathis*, 136 S. Ct. at 2252 (citing *Apprendi*, 530 U.S. at 490; *Shepard*, 544 U.S. at 25, 28). This Court has plainly stated that a sentencing judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id.*

The more recent decisions in *Descamps* and *Mathis* have simply eclipsed the conception of judicial authority espoused in *Santiago* and endorsed by the government. But without an explicit decision from this Court, the lower courts, like the Eleventh Circuit below, are unwilling to apply these principles to the different occasions language of the ACCA. In doing so, they, like the government, have drawn an artificial distinction between different-occasions findings and violent felony determinations. *Walker*, U.S. Br. in Opp'n at 9-10. And without direct guidance from the Court about that distinction, the courts have repeatedly declined to reconsider that approach as "[s]ometimes courts just continue along the same well-trodden path even in the face of clear signs to turn around." *United States v. Perry*, 908 F.3d at 1135 (Stras, J., concurring).

The government does not contest that Mr. Dudley's case is an excellent vehicle or that the issue is important, with hundreds of sentences significantly enhanced under the ACCA each year. U.S. Sent'g Comm'n, *Federal Armed Career Criminals:*

Prevalence, Patterns, and Pathways, March 2021. Until the Court directly addresses the Sixth Amendment limits on different occasions factfinding, the lower courts' allowance for far-ranging factfinding will remain and will continue to alter statutory ranges of imprisonment. The practical importance of the question presented underscores the need for this Court's review and that need is urgent.

II. *Shepard* does not endorse an ACCA finding based on a defendant's implicit confirmation of a prosecutor's factual proffer.

The government's claim that sentencing courts may apply the ACCA by finding that defendant implicitly confirmed a prosecutor's factual proffer cannot be squared with *Shepard*. *Shepard* allows a sentencing court to consider a "transcript of colloquy between judge and defendant in which the factual basis for the plea *was confirmed by the defendant*." 544 U.S. at 26 (emphasis added). But the government appears to contend that the Eleventh Circuit properly created a new rule of "implicit confirmation" because, it says, "*Shepard* does not require a particular form of words for a defendant's acceptance of the factual basis for his plea." U.S. Br. in Opp'n at 4. This expansive application of *Shepard* disregards the fundamental rationales for the holding, which this Court has reinforced in *Descamps* and *Mathis*.

As explained by Judge Newsom's dissent below, "the mere fact that *Shepard* does not 'preclude' an implicit-confirmation theory hardly demonstrates that *Shepard* is best read to embrace it." Pet. App. 44a. "[T]here are good reasons to read *Shepard* as requiring express confirmation." *Id.* Those reasons are multifold and clear when considering the rationales for *Shepard*'s limitations on evidentiary sources.

First, a rule that sentencing courts may mine a prior plea transcript for information indicating a defendant's "implicit confirmation" of particular facts cannot be squared with *Shepard*'s concern for "records approaching the certainty of the conviction." 544 U.S. at 23 (citing *United States v. Taylor*, 495 U.S. 575, 601 (1990)). *Shepard* limits ACCA factfinding to matters "an earlier guilty plea necessarily admitted," *Id.* at 16. The Court delineated a specific list of sources for these matters—including a "transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant"—while expressly prohibiting a sentencing court's consideration of other sources, even if the information within the records was "uncontradicted" and "internally consistent." *Id.* at 23-24 n.4. "[I]f all plea-colloquy transcripts were *Shepard*-approved," and, therefore, available for a court to suss out implicit confirmation, "the *Shepard* Court's insistence that the defendant confirm a plea's factual basis would have been pointless," Pet. App. at 44a, and the Court's express exclusion of other "uncontradicted" and "internally consistent" documents would be illogical.

Second, the Sixth Amendment concerns this Court recognized in *Shepard* "caution against empowering courts to make case-by-case determinations about whether, on balance, a defendant *actually* made certain admissions." Pet. App. at 45a. *Shepard* built upon *Taylor*'s Sixth Amendment concerns about judicial factfinding that increases a defendant's sentencing exposure. *Shepard*, 544 U.S. at 24-25

(plurality op.).[2] This Court later reinforced those concerns in *Descamps* and *Mathis*. Within the context of a prior guilty plea, the Court specifically warned that judicial factfinding about a prior conviction should not extend to a detail that "a defendant may have no incentive to contest" because it "does not matter under the law," *Mathis*, 136 S. Ct. at 2253. A defendant "may have good reason not to" risk "irk[ing] the prosecutor or court by squabbling about superfluous factual allegations." *Descamps,* 570 U.S. at 270. The Eleventh Circuit's new rule that sentencing judges may consider "the totality of circumstances" and find a defendant's "implicit confirmation" of a prosecutor's factual proffer from a plea transcript invokes the precise situations the Court has sought to avoid. Pet. App. at 45a.

The court of appeals clearly misapplied *Shepard*'s holding that a factual recitation may be considered *only* if it "was confirmed by the defendant," 544 U.S. at 26. Allowing the Eleventh Circuit's new rule to stand injects arbitrariness into the application of the ACCA, which this Court has repeatedly sought to avoid. Because it is undisputed that Mr. Dudley never expressly confirmed the prosecutor's factual recitation, this Court should summarily reverse the decision below on this basis or, alternatively, grant review for both questions presented by Mr. Dudley.

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[2] A four-justice plurality raised the *Apprendi* concerns, with Justice Thomas writing separately that the plurality's concerns would not only give rise to "constitutional doubt," but actual "constitutional error." *Shepard*, 544 U.S. at 28 (Thomas, J., concurring in part and concurring in the judgment). Thus, Justice Thomas was even more concerned about the *Apprendi* concerns than the four-justice plurality. *See also Descamps*, 570 U.S. at 269 (a majority of the Supreme Court recognizing the Sixth Amendment problem); *Mathis*, 136 S. Ct. at 2252 (same).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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