No. 23-_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____◆_____

EDGAR BARRERA,

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

_____◆_____

PETITION FOR WRIT OF CERTIORARI

_____◆_____

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QUESTIONS PRESENTED

1) Whether the Constitution permits a sentencing judge to find non-elemental facts by a preponderance of the evidence and then rely on those facts to impose a sentence in excess of the one established by Congress for the offense of conviction, which is exactly what happened here where Barrera plead guilty, without a plea agreement, to the only offense charged in the indictment, a violation of 18 U.S.C. § 922(g)—an offense without a mandatory minimum—but was nevertheless sentenced to the fifteen-year mandatory minimum sentence set forth at 18 U.S.C. § 924(e) based solely on the judge's findings regarding non-elemental facts made over Barrera's substantive and procedural objections.

2) Whether, when determining if a state offense qualifies as a violent felony, a federal court is bound by the decision of the state's highest court to label a *mens rea* as something greater than reckless when this Court has unequivocally established that the same *mens rea* under federal law constitutes mere negligence.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

United States v. Barrera, No. 1:19-cr-00275-DAD (E.D. Cal. 2020)

United States v. Barrera, No. 20-10368, 2022 U.S. App. LEXIS 11418 (9th Cir. Apr. 27, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Edgar Barrera respectfully petitions this Court for a writ of certiorari to review the judgment by the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unpublished but available at *United States v. Barrera*, No. 20-10368, 2022 U.S. App. LEXIS 11418 (9th Cir. Apr. 27, 2022) and reprinted in the Appendix to Petition ("Pet. App.") at Pet. App.2a-9a. The order of the court of appeals denying rehearing is unpublished and reprinted at Pet. App. 1a. The judgment of the district court is unpublished and reprinted at Pet. App. 10a-16a.

JURISDICTION

The court of appeals issued its decision on April 27, 2022, Pet. App. 2a, and denied rehearing on September 21, 2022, *id.* at 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

The **Fifth Amendment** provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The **Sixth Amendment** provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI.

Under the ACCA, **18 U.S.C. § 924(e)**

(1) in the case of a person who violates section 922(g). . . and has three previous convictions . . . 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. . .

(2)(B)(i), "the term 'violent felony' means 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"

INTRODUCTION

The promise that only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty "stands as one of the Constitution's most vital protections against arbitrary government." *United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019) (plurality). That vital protection is at issue in this case, and is being undermined by every circuit court when it comes to the implementation of the Armed Career Criminal Act ("ACCA"). The government agrees "that the courts of appeals have uniformly erred in resolving [the] question" presented, "which has important implications for the procedures to be followed on a common criminal charge" and which is "frequently recurring and may eventually warrant this Court's review." Brief in Opposition, *Reed v. United States*, No. 22-336, at 6-7, 8-9 (filed Dec. 12, 2022).

When the lower courts have been stubbornly misinterpreting this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) for the past twenty-three

years despite clear direction from this Court in 2013[1] and again in 2016[2] that should have caused them to correct course, the time for this Court to act is now.

Edgar Barrera pled guilty, without a plea agreement, to the only count with which he was charged—a violation of 18 U.S.C. § 922(g). That sole count had no mandatory minimum and a statutory maximum of ten years.[3] The district court, nevertheless, reluctantly, and over Barrera's procedural and substantive objections, sentenced Barrera to the enhanced punishment proscribed by 18 U.S.C. § 924(e), which required the court to find two additional elements beyond those the government established to secure Barrera's conviction: (1) that Barrera had three prior convictions for a violent felony or a serious drug trafficking offense, or both, and (2) the conduct underlying those convictions was "committed on occasions different from one another." § 924(e)(1).

Substantively, neither additional element was satisfied here, and in finding to the contrary, the district court engaged in impermissible fact-finding about Barrera's three prior convictions, which the Ninth Circuit affirmed despite clear direction from this Court that "any fact," "[o]ther than the fact of a prior conviction, . . . that increases the penalty for a crime beyond the prescribed statutory

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[1] *Descamps v. United States*, 570 U.S. 254 (2013).

[2] *Mathis v. United States*, 136 S. Ct. 2243 (2016).

[3] Subsequently, in the Bipartisan Safer Communities Act, Congress increased the maximum penalty for a violation of Section 922(g) to "not more than 15 years" of imprisonment." See Pub. L. No. 117-159, div. A, tit. II, § 12004(c), 136 Stat. 1313, 1329 (June 25, 2022), codified at 18 U.S.C. § 924(a)(8). That amendment has no bearing on the constitutional issue in this case. Under the amended penalty scheme, as in the former one, ACCA significantly enhances both the minimum and the maximum sentence for a violation of Section 922(g).

maximum"— or that increases the mandatory minimum—"must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490; *Alleyne v. United States*, 570 U.S. 99 (2013) (applying *Apprendi* to mandatory minimums).

The Ninth Circuit is not alone. All of the circuit courts have been misreading *Apprendi* for the past twenty-three years for the proposition that when determining whether a defendant engaged in criminal conduct on three separate occasions, sentencing judges can go beyond determining the elements of a defendant's prior conviction to find facts about how the defendant committed the offenses because such fact-finding falls under the "recidivism exception." As this Court, however, has said "over and over" again since 2000, there is no such exception. The only exception created by *Apprendi* was one of timing—a sentencing court is able to rely on the fact of a prior conviction precisely because the elements of said conviction were necessarily found by a jury or admitted by a defendant subject to the requisite constitutional safeguards. *Mathis*, 136 S. Ct. at 2252-57 (citing *Apprendi*, 530 U.S. at 490). The circuit courts have made it clear that they do not intend to abandon the "recidivism exception" they created permitting judicial fact-finding to enhance sentences beyond the punishment proscribed by Congress until this Court explicitly directs them to do so. And, this Court's recent reservation of this issue in *Wooden v. United States*, 142 S. Ct. 1063, 1068 n.3 (2022) has further embolden the lower courts to continue further down the path they incorrectly chose over two decades ago.

Where individuals have been, and continue to be, stripped of their liberty for substantial periods of time beyond the penalty authorized by Congress for the offense of conviction, additional delay is unconscionable. Indeed, every year that passes without intervention by this Court approximately another 300 to 600 individuals are convicted of one offense—a violation of § 922(g) which does not require a custodial sentence—but are sentenced to the substantially enhanced penalty codified at § 924(e)—which mandates a custodial sentence of a least fifteen years—in violation of their Fifth and Sixth amendment right to have all of the elements necessary to support the deprivation of their liberty established either by their own admission or found by a jury beyond a reasonable doubt.[4]

The resolution of this pressing constitutional issue is remarkably straightforward and is dictated by this Court's jurisprudence. This case is the perfect vehicle for review: the issue was raised and preserved below, and the error is outcome determinative. Barrera was not charged with violating § 924(e), and he never admitted that his three prior convictions arise from conduct committed on three different occasions. Just like the Ninth Circuit did two years earlier in *United States v. Walker*, 953 F.3d 577 (9th Cir. 2020), it again refused to re-consider its jurisprudence, and it did so despite being encouraged by one of the three panel

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[4] *See* U.S. Sent'g Comm'n, *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways*, 19 (2021) (*available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303_ACCA-Report.pdf).

judges to course correct, and despite being informed that the government now appreciates the unconstitutionality of the Ninth Circuit's jurisprudence.

If there was any ambiguity before, after *Descamps* and *Mathis*, the law has been crystal clear. The time to allow the circuit courts to course correct has come and gone. This Court's decision in *Wooden* does not reset that clock. *Wooden* defined the term "occasion" under the ACCA, which is not the issue here. Prior to *Wooden*, all of the circuits (with the government's blessing) had long since held that the different-occasions analysis—however occasions was defined—was not limited to elements, and were routinely permitting sentencing judges to find and rely on a wide range of non-elemental facts to deprive individuals of their liberty beyond that authorized by their offense of conviction.

It is time for this Court to correct the long-held misconception created by this Court's decision in *Apprendi* and dispense with the fictitious "recidivism exception." Without decisive action by this Court on this straightforward issue, similarly situated individuals are going to be treated profoundly differently depending on the whims of the government (and possibly geography should a circuit split be created in the future).

STATEMENT

A. Legal Framework

An individual convicted of violating 18 U.S.C. § 922(g)—an offense with no mandatory minimum—may be subjected to a fifteen-year mandatory minimum under 18 U.S.C. § 924(e) only if the government establishes *two additional elements*:

(1) three prior convictions for either a violent felony or a serious drug offense or both, and (2) that the conduct underlying the three prior convictions was "committed on occasions different from one another." 18 U.S.C. § 924(e)(1).

This Court has never created an exception to "the historic rule that a jury must find *all* of the facts necessary to authorize a judicial punishment." *Haymond*, 139 S. Ct. at 2381 (citing *Alleyne*, 570 U. S. at 117 and *Apprendi*, 530 U. S. at 483) (emphasis in original). In *Apprendi* this Court explained that the reason a sentencing judge can find the fact of a prior conviction is because that fact has necessarily already been found by a jury (or admitted by a defendant) subject to the requisite procedural safeguards. *Apprendi*, 530 U.S. at 488; *see, e.g.*, *Jones v. United States*, 526 U.S. 227, 249 (1999) (noting that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees"). In sharp contrast, however, where there has been no such admission or a previous finding by a jury of the fact in question, it "is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system" for a sentencing judge to find said fact in the first instance and then rely on it as the basis for increasing an individual's punishment beyond that proscribed by Congress for the offense of conviction. *Apprendi*, 530 U.S. at 497; *see, e.g., Alleyne,* 570 U.S. at 103 (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), *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004) (explaining that the

"right [to trial by jury] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure," and "*Apprendi* carries "out this design by insuring that a judge's authority to sentence derive[s] wholly from a jury's verdict").

Notwithstanding the clarity of *Apprendi*, the lower courts misread this Court's decision as creating a "recidivist exception" that permits sentencing judges to find not only the fact *of* a prior conviction, and the statutory elements underlying the conviction, but also facts *about* how, why, when a prior conviction was committed. This Court attempted to put a stop to that when it reviewed the Ninth Circuit's decision in *Descamps v. United States*, 570 U.S. 254 (2013).

In the decision underlying *Descamps* the Ninth Circuit had held that a sentencing judge could look beyond the elements of the prior conviction and engage in its own factual findings regarding how the defendant committed the offense. *Descamps*, 570 U.S. at 259. Not surprisingly, this Court chastised the Ninth Circuit for doing what it has "repeatedly forbidden," reiterating that "'other 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.'" *Descamps*, 570 U.S. at 269, 274 (quoting *Apprendi*, 530 U.S. at 490) (alteration omitted). As this Court clarified, the only facts about a prior conviction that a "court can be sure the [prior] jury so found are those constituting the elements of the offense," and thus those are the only facts about a prior conviction that, consistent with the Sixth Amendment, a subsequent court can use

as the basis for increasing an individual's sentence beyond the maximum proscribed for the offense of conviction. *Id*. at 269-70. By rummaging through *Shepard* documents to find non-elemental facts about a prior conviction, the Ninth Circuit "did just what [this Court has] said it cannot: rely on its own finding about a non-element fact to increase a defendant's maximum sentence." *Id*. at 270.

As if that was not clear enough, *Mathis v. United States*, 136 S. Ct. 2243 (2016), clarified that "an ACCA penalty may be based only on what a jury necessarily found to convict a defendant (or what he necessarily admitted). . . [a]nd elements alone fit that bill." *Mathis*, 136 S. Ct. at 2248, 2255 (defining elements as limited to the "things the prosecution must prove to sustain a conviction"). This Court instructed the lower courts that when it comes to imposing a penalty beyond that proscribed by Congress for the offense of conviction based on a defendant's prior criminal history, "consistent with the Sixth Amendment," a sentencing judge "can do no more" than "determine what crime, with what elements, the defendant was [previously] convicted of." *Id*. at 2252.

The inquiry into whether three prior convictions were "committed on occasions different from one another," is not limited to what crime, with what elements, the defendant was convicted of. It is not an inquiry into what "the prosecution must prove to sustain a conviction." *Id*. at 2248. Instead, it is an inquiry into "real-world things," the determination of which in most, if not all, cases requires the sentencing judge to "go beyond identifying the crime of conviction to

explore the manner in which the defendant committed the offense," which is exactly what the Constitution prohibits a judge from doing. *Id*. at 2248, 2252.

B. Proceedings Below

On December 19, 2019, the government charged Barrera with one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The indictment alleged that Barrera had three prior convictions in violation of California Penal Code ("CPC") § 273.5, but did not allege that the crimes had been committed on occasions different from one another, nor did it allege a violation of 18 U.S.C. § 924(e). Pet. App. 17a-19a.

On June 18, 2020, Barrera pled guilty to one count of violating § 922(g)(1) without a plea agreement. He did not admit that the conduct underlying his three convictions occurred on different occasions nor did the factual basis supporting the conviction read into the record by the government so state. Indeed, the only mention of Barrera's prior convictions at his change of plea colloquy was as follows:

> At the time he possessed the firearm, the defendant knew that he had three prior convictions for violating California Penal Code Section 273.5, and at the time he possessed the firearm, the defendant knew that each of the prior convictions for violating California Penal Code Section 273.5 were convictions for a crime punishable by imprisonment for a term exceeding one year.

Pet. App. 28a. Prior to establishing the factual basis for the conviction, the government asked the court to advise Barrera about the fifteen year mandatory minimum applicable to a violation of § 924(e). Pet. App. 23a. Defense objected, and the court informed Barrera that it "under[stood] your lawyer is going to be arguing

that you do not fall within that provision, and will be taking the position that the maximum possible punishment is a ten-year term of imprisonment." *Id*..

In advance of sentencing, probation prepared a Presentence Report in which it purported to summarize other probation reports it had reviewed about Barrera's three prior convictions, and to the PSR it attached various California state court records. The records established three separate case numbers (F09301073, F10300327 and F15900007), but not that the conduct underlying them occurred on three different occasions. Specifically, the records established that with respect to the case ending in 1073, Barrera pled *nolo contendere* on January 6, 2010 to one count of violating CPC § 273.5 "on or about December 25, 2009," and was sentenced on February 24, 2010 to a term of three years of formal probation with 13 days to be served in the county jail. And, with respect to the case ending in 0327, Barrera pled *nolo contendere* on May 5, 2010 to one count of violating CPC § 273.5 "on or about April 12, 2010," and was sentenced on June 8, 2010 to a term of three years of formal probation, with 180 days to be served in the county jail concurrent with the sentence imposed in the case ending in 1073. The only document provided with respect to the case ending in 0007 was a single form signed by Barrera, a defense attorney and a superior court judge on January 16, 2015, indicating that Barrera was requesting to enter a plea of no contest to a violation of § 273.5 that occurred at some unknown time involving some unknown person, and that he would admit that he had one prior conviction for violating § 273.5. Pet. App. 43a-44a.

The government relied on the record created by probation at Barrera's sentencing hearing on October 29, 2020. Defense argued that (1) Barrera's convictions for violating CPC § 273.5 did not qualify as violent felonies under the ACCA because a conviction under § 273.5 does not require proof that when the defendant intentionally engaged in forceful conduct that he had any awareness that his conduct could result in harm to another, (2) because Barrera had never admitted, and no jury had ever found, that his convictions for violating § 273.5 had been committed on three different occasions, the Fifth and Sixth amendments prohibited the district court from engaging in judicial fact-finding in the first instance as a basis for sentencing Barrera in excess of the 10-year statutory maximum for his offense of conviction, and (3) even if the court did engage in impermissible fact-finding, the documents before the court were insufficient to establish that the offenses underlying the convictions were committed on three distinct occasions. Pet. App. 31a-36a.

The court overruled all of Barrera's objections, and believing that it was bound by Ninth Circuit precedent, it "reluctantly" imposed a fifteen-year sentence, opining that said sentence was "anything but reasonable," and " 'if [it] wasn't bound, there's zero possibility, zero, that [it] would impose a 180-month sentence in this case" because such a sentence is "absurd," "clearly not called for," "makes no sense," "is not proportional," and "is clearly unduly harsh." Pet. App. 39a-42a.

Barrera renewed all three arguments at the Ninth Circuit, contending that CPC § 273.5 does not qualify as a violent felony under the ACCA, that the district

court violated Barrera's Fifth and Sixth Amendment rights when it found and relied upon non-elemental "facts" to increase Barrera's custodial sentence beyond that authorized by Congress for his offense of conviction, and that, even if such factfinding were permissible, the government had failed to establish that the conduct underlying Barrera's three convictions had occurred on different occasions.

After oral argument, the Ninth Circuit affirmed the district court across the board, relying on its precedent. Pet. App.3a-7a. Visiting Judge Feinerman wrote a concurrence in which he observed that it was "difficult to reconcile" the Ninth Circuit's precedent with *Mathis*, and thus the court should consider revisiting its precedent en banc. Pet. App. 8a-9a.

Barrera filed a petition for rehearing en banc, and subsequently advised the court that the government now agreed that the facts necessary to determine whether conduct was committed on different occasions must be found by a jury or admitted by the defendant. The Ninth Circuit did not ask for the government to respond, and the government remained silent. No judge on the Ninth Circuit voted to hear the case en banc. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

The resolution of the question presented here flows directly from this Court's jurisprudence, which the lower courts have been flagrantly ignoring for the past two decades, and which has resulted in thousands upon thousands of individuals being deprived their liberty far in excess of the penalty established by Congress for their offense of conviction, in violation of their Fifth and Sixth Amendment rights. And, far from improving the situation, this Court's recent decision in *Wooden*, in which it

explicitly reserved the question presented here, has made the situation worse by emboldening the lower courts to continue trampling on this Court's precedents and the Constitution. The current state of affairs is untenable in a democracy that prides itself on protecting its citizens from the arbitrary actions of the government, and will not be resolved until this Court takes up the question it reserved in *Wooden*.

This case is the perfect vehicle to address the issue. Barrera raised and preserved the constitutional issue at every relevant stage. He was never charged with violating § 924(e), he has never admitted that the conduct underlying his three prior convictions occurred on different occasions, he objected to the district court enhancing his sentence beyond that authorized by the offense to which he plead guilty, and at no time did the government establish beyond a reasonable doubt that his convictions did in fact arise from conduct committed on three different occasions. The case arises on direct review, and the court of appeals reached the question presented, and the full court of the Ninth Circuit yet again bypassed the opportunity to revisit its erroneous precedent through the en banc process. The petition should be granted, and the decision below reversed.

A. The Decision Below is Wrong

A decade after being chastised, the Ninth Circuit is *still* doing exactly what this Court has said it cannot do—relying on its own finding about a non-element fact to increase a defendant's maximum sentence. Just like the Ninth Circuit did in *Descamps*, it is "[d]ismissing everything [this Court has] said on the subject as

lacking conclusive weight," *Descamps*, 570 U.S. at 265, and is still rummaging through documents to find non-elemental facts to affirm sentences in excess of the penalty established by Congress for a conviction premised solely on a violation of 18 U.S.C. § 922(g). "[I]n this case, that meant Mr. [Barrera] faced a minimum of [fifteen] years in prison instead of as little as none." *Haymond*, 139 S. Ct. at 2378.

The Ninth Circuit's last published decision on this issue was *United States v. Walker*, 953 F.3d 577 (9th Cir. 2020). The undersigned was counsel for Walker and made the same substantive arguments again in the case below. Walker (and Barrera) argued that following *Decamps* and *Mathis* there is no ambiguity that sentencing judges cannot rely on non-elemental facts they find in the first instance to impose sentences in excess of the proscribed penalty for the offense of conviction. The Ninth Circuit retorted that "*Mathis* is not so encompassing," and "[t]o the extent that *Mathis* expresses broader disfavor of factual determinations by sentencing judge, it is not clear whether and how this disfavor extends beyond determining that a given state-law crime is an ACCA predicate." *Walker*, 953 at 581. In other words, "[y]et again, the Ninth Circuit's ruling flouts [this Court's] reasoning. . . by extending judicial factfinding beyond the recognition of a prior conviction." *Descamps*, 570 U.S. at 269.

Walker filed for en banc review, arguing that it "strains credibility that when the Supreme Court said a sentencing judge cannot engage in fact-finding in the first instance to enhance a defendant's sentence under the ACCA because non-elemental facts are 'prone to error because their proof is unnecessary to a conviction,' that

what the Supreme Court really meant to say is that it is okay to use those 'error prone' facts to enhance a sentence under the ACCA so long as the judge is doing so for the purpose of determining whether three offenses were committed on three different occasions." Petition for Rehearing En Banc *United States v. Walker*, No. 18-10211 (9th Cir.), Dkt. Entry 42 at 10-11 (filed June 2, 2020) (quoting *Mathis*, 579 U.S at 501). Walker cited Judge Stras' observation that the "approach the [Supreme] Court rejected in *Descamps* is not meaningfully different from using *Shepard* documents to make the different occasions determination. Both call for sifting through record materials for evidence of what a defendant actually did, either to determine whether it fits the definition of a violent felony. . . or to determine if two or more crimes were committed on different occasions," and if one violates the Constitution, so does the other.[5] *Id.* at 11. The Ninth Circuit was unimpressed with Judge Stras, and not a single member of the Court even requested a vote to hear the matter en banc. Order Denying Rehearing En Banc, *United States v. Walker*, No. 18-10211, Dkt. Entry 43, at 1 (filed June 26, 2020).

In the underlying case, counsel again tried to get the Ninth Circuit's attention regarding this important issue. Once again, the Ninth Circuit held that *Almendarez-Torres* creates an exception to *Descamps* and *Mathis* that permits judges to make factual findings about an individual's prior convictions and to rely on those non-elemental facts to subject an individual to punishment in excess of what Congress proscribed for the offense of conviction, and any argument to the

[5] *United States v. Perry*, 908 F.3d 1126,1136 (8th Cir. 2018) (Stras, J., concurring).

contrary is foreclosed by *Walker*. Pet. App. 5a-6a. Visiting Judge Feinerman wrote a concurrence recognizing that *Walker* is "difficult to reconcile with the Supreme Court's admonition that a sentencing judge evaluating whether a defendant's prior offenses qualify as ACCA predicate offenses 'can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of,'" and opined, therefore, that the case might "be an appropriate candidate for further review. . . by the en banc court. . . or the Supreme Court." Pet. App. 8a-9a (Feinerman, J. concurring) (quoting *Mathis*, 579 U.S. at 511-12). In seeking review, Barrera advised the Ninth Circuit that the government had changed its position and now agreed with Barrera that there is no exception permitting judges to rely on non-elemental facts concerning a prior conviction as the basis for imposing a sentence in excess of the penalty Congress proscribed for a violation of § 922(g). Unimpressed by Judge Feinerman and uninterested in the government's changed position, no judge on the Ninth Circuit requested a vote on whether to hear the matter en banc. Order Denying Rehearing En Banc, *United States v. Barrera*, No. 20-10368 (9th Cir.), Dkt. Entry 39 (filed Sept. 21, 2022).

B. The Courts of Appeal Have Had Twenty-Three Years to Course Correct, and Have Made It Clear They Will Not Do So Absent This Court's Intervention.

The Ninth Circuit is not alone. All of the circuit courts have been doing the same thing for many years, reasoning that, notwithstanding *Mathis* and *Descamps*, *Almendarez -Torres* permits sentencing judges to make non-elemental factual findings about an individual's prior convictions and then rely on those factual

findings to impose sentencing enhancements in excess of the penalties proscribed by Congress for the offense of conviction—otherwise known as the "recidivism exception" to this Court's Sixth Amendment jurisprudence. *See, e.g.*, *United States v. Bordeaux*, 886 F.3d 189, 196-97 (2d Cir. 2018) (confirming that sentencing judges can examine non-elemental "facts" about a conviction to determine if they were committed on different occasions so long as those "facts" are contained in *Shepard* documents); *United States v. Blair*, 734 F.3d 218, 227 (3d Cir. 2013) (rejecting the suggestion that *Descamps* had anything relevant to say when it comes to sentencing judges finding non-elemental facts in the first instance to determine whether offenses occurred on different occasions, opining that if the Supreme Court had "meant to say that all details related to prior convictions are beyond judicial notice, it would have said so plainly"); *United States v. Span*, 789 F.3d 320, 326-27, 330 (4th Cir. 2015) (likewise rejecting the notion that *Descamps* restricts a sentencing judge's ability to engage in fact-finding in the first instance to determine if prior convictions were committed on different occasions, holding instead that a sentencing judge "faced with inconsistent evidence may look to secondary sources. . . to engage in fact-finding in a routine and conscientious sense") (internal quotations omitted); *United States v. Fuller*, 453 F.3d 274, 279-80 (5th Cir. 2006) (because the court was not able to find sufficient "facts" in the "*Shepard*-approved material" in the record to determine whether two robberies were committed on different occasions, the court vacated the defendant's sentence under the ACCA); *United States v. Hennessee*, 932 F.3d 437, 442-43 (6th Cir. 2019) (citing the Second, Fourth,

Fifth, Seventh, Tenth, Eleventh and D.C. Circuits for the proposition that there is "no limitation on a sentencing court's consideration of non-elemental facts contained within *Shepard* documents") (internal quotations omitted); *United States v. Elliott, 703 F.3d 378,* 381-82 (7th Cir. 2012) (acknowledging, without concern, that the inquiry into whether convictions were committed on different occasions "is a question that looks beyond the fact of a prior conviction. . . and for that matter beyond the elements essential to that conviction") (internal quotations omitted); *United States v. Stowell*, 40 F.4th 882, 885 (8th Cir. 2022) (affirming its precedent that "the different occasions analysis involves 'recidivism-related facts' that do not need to be submitted to the jury") (petition for rehearing en banc granted on November 15, 2022 but no argument date has been set); *United States v. Reed*, 39 F.4th 1285, 1295 (10th Cir. 2022) (affirming its longstanding precedent that any non-elemental facts "inherent in the convictions themselves[6] or sufficiently interwoven with the facts of the prior crimes do not need to be submitted to a jury and found beyond a reasonable doubt because *Apprendi* left to the judge the task of finding not only the mere fact of previous convictions but other related issues as well") (internal quotations omitted); *United States v. Dudley*, 5 F.4th 1249, 1260 (11th Cir. 2021) (affirming circuit precedent dating back to 2013 because [n]either *Descamps* nor *Mathis* is clearly on point as neither case deals directly with the different–occasions inquiry," opining that sentencing judges must be able to consider non-elemental facts to make the "different-occasions determination as the

[6] Facts inherent to the fact of a conviction, include the "time, place, and substance of the prior convictions." *United States v. Harris*, 447 F.3d 1300, 1304 (10th Cir. 2006).

elemental facts rarely ever involve the date, time, or location of crimes"); *United States v. Thomas*, 572 F.3d 945, 952 n.4 (D.C. Cir. 2009) (rejecting the argument that the Sixth Amendment prohibits judicial fact finding to determine if offenses were committed on different occasions in light of *Apprendi*'s recidivist exception).

1. *Wooden* Did Nothing to Change the Relevant Legal Landscape.

The government's suggestion that *Wooden* somehow changed the legal landscape by looking to non-elemental facts as part of the different occasions analysis is specious. As evinced by the above citations, no circuit court before *Wooden* thought the different occasions analysis was limited to only those facts that could be gleaned from the elements of a defendant's prior convictions, nor did the courts fail to appreciate that the different occasion analysis could involve a deep dive into the underlying facts to "identify the who, when, and where of the prior offenses." *Hennessee*, 932 F.3d at 442; *see, e.g.*, *Span*, 789 F.3d at 328 (determining whether three convictions were committed on separate occasions requires consideration of "(1) whether the offenses arose in different geographic locations; (2) whether the nature of each offense was substantively different; (3) whether each offense involved different victims; (4) whether each offense involved different criminal objectives; and (5) whether the defendant had the opportunity after committing the first-in-time offense to make a conscious and knowing decision to engage in the next-in-time offense"); *United States v. Morris*, 293 F.3d 1010, 1012 (7th Cir. 2002) (holding that the *Almendarez-Torres* exception permits courts to find any fact pertaining to recidivism, including facts about the "nature of the crimes,

the identities of the victims, and the locations") (internal quotations omitted); *United States v. Santiago*, 268 F.3d 151, 156 (2d Cir. 2001) (holding judges can make the necessary factual regarding "the who, what, when, and where of a prior conviction" to determine if offenses were committed on separate occasions).

The fact that the government, following *Wooden*, has now decided to acknowledge the constitutional issues that have been plainly apparent following this Court's decisions in *Apprendi*, *Alleyne*, *Descamps*, and *Mathis* (and which was explicitly not addressed in *Wooden*) does not reset the clock. The question presented in *Wooden* simply concerned the definition of an occasion. *Wooden*, 142 S. Ct. at 1067, 1069. Nobody—not even the government—thought the inquiry could be limited to factual findings concerning just the elements of the prior offenses of conviction.

Notably, eight months before the government filed its brief in *Wooden*, it argued to this Court that "[b]ecause facts relevant to the different-occasions inquiry—including the time, location, or specific victim of the prior offense—are infrequently elements of the offense" courts may consult *Shepard* documents "for non-elemental facts relevant to the different-occasions inquiry," and any suggestion that *Descamps* and *Mathis* say otherwise "is misplaced." Brief of Respondent United States in Opposition, *Walker v. United States*, No. 20-5578, at 8-10 (filed Oct. 28, 2020).

Even when the government attempted to back-track in *Wooden* from the sweeping position it took in *Walker*, it had to acknowledge that "[i]n some cases,

neither the offense elements nor the charging document will be enough to establish that prior offenses occurred on separate occasions," and the government opined that the practice of judges making factual findings from "judicial records allowed under this Court's decision in *Shepard v. United States*. . . as courts of appeal generally do, is. . . . relatively unproblematic." Brief of Respondent, *Wooden v. United States*, No. 20-5279, at 46 (filed June 28, 2021).

If *Mathis* and *Descamps*, which explicitly directed courts that in the context of the ACCA judges cannot rely on their own finding about a non-elemental fact to increase a defendant's maximum sentence, *Descamps*, 570 U.S. at 270, *Mathis*, 136 S. Ct. at 2252, did not prompt the lower courts to change course, it is delusional to contend the lower courts are going to self-correct because of this Court's decision in *Wooden*, which explicitly did not address the issue. Not surprisingly, many of the lower courts have already said as much. *See, e.g.*, *United States v. Barrera*, No. 20-10368, 2022 U.S. App. LEXIS 11418, at *5 (9th Cir. 2022) (Feinerman, J., concurring) (explaining that Barrera's Sixth Amendment argument was foreclosed because *Wooden* declined to consider the issue) (rehearing en banc denied); *United States v. Reed*, 39 F.4th 1285, 1296 (10th Cir. 2022) (refusing to change course "especially in light of the Supreme Court's refusal to reach the issue in *Wooden,*" which the court construed as an endorsement of its position that the "prior-conviction exception" permits non-elemental fact-finding, and opined that it would only revisit its precedent if someday the "Supreme Court . . . reach[es] a different result in the future") (rehearing en banc denied); *United States v. Stevens*, No. 20-

11264, 2022 U.S. App. LEXIS 35317, at *2 (5th Cir. 2022) (noting that while its definition of an "occasion" was rejected by this Court in *Wooden*, *Wooden* did not overturn its jurisprudence that permits sentencing judges to make factual findings regarding non-elemental facts); *United States v. Zamichieli*, No. 18-3053, 2022 U.S. App. LEXIS 33643, at *4-5 (3d Cir. 2022) (remanding for additional fact-finding by the district court to comply with *Wooden*); *United States v. Cook*, No. 22-5056, 2022 U.S. App. LEXIS 27663, at *4-5 (6th Cir. 2022) (holding that because *Wooden* did not reach the constitutional issue, *Wooden* does not disrupt its prior case law permitting judges to impose ACCA based on their own findings concerning non-elemental facts about a defendant's prior convictions); *United States v. Daniels*, No. 21-4171, 2022 U.S. App. LEXIS 10446, at *3 (4th Cir. 2022) (holding that because *Wooden* "declined to address [the] issue of non-elemental fact-finding in the context of the different occasions analysis, the court remains bound by its precedent). In other words, *Wooden* is not a magic panacea that will reverse two decades of deeply entrenched jurisprudence across the circuits.

2. For Thirteen Years the Circuit Courts have Failed to Course Correct Despite Being Admonished To Do So By Their Colleagues.

Since at least 2005 appellate judges have been admonishing their colleagues for their failure to appreciate that *Apprendi* did not create an exception to the constitutional requirement that a court's authority to impose punishment is limited to those facts necessarily found by a jury or admitted by a defendant. *See United States v. Thompson*, 421 F.3d 278, 292-94 (4th Cir. 2005) (Wilkins, C.J., dissenting). (explaining that where the Supreme Court has held that a judge can only rely on

the fact of a prior conviction, not a fact about a prior conviction, to enhance a sentence beyond that proscribed for the offense of conviction, the lower courts are not "at liberty to reject either the rule announced by the Supreme Court in *Apprendi* or the analysis that the Court employed to shape that rule"). Chief Judge Wilkins' colleagues were unimpressed then, and have remained unimpressed for the past eighteen years, believing that so long as a fact about a prior conviction is "inherent in a conviction," it doesn't count as fact-finding about a prior conviction that would otherwise be barred by the Constitution. *Id*. at 285. After *Descamps*, the Fourth Circuit still left it "to another case on another day [to determine] the continued vitality of *Thompson*." *Span*, 789 F.3d at 332. Seven years after *Mathis*, and eighteen years after Chief Judge Wilkins correctly identified the constitutional outer bounds of judicial fact finding under the ACCA, "another day" still has not come. *See, e.g.*, *United States v. Smith*, 703 F. App'x 174, 179 (4th Cir. 2017).

Similarly, in the Sixth Circuit, citing *Shepard*, *Descamps* and *Mathis*, Judge Cole explained to his colleagues that "sentencing courts can only consider facts on which the conviction necessarily relied—those that a jury necessarily found or a defendant necessarily admitted—in enhancing a defendant's sentence." *United States v. Hennessee*, 932 F.3d 437, 447, 449 (6th Cir. 2019) (Cole, J., dissenting). Shortly thereafter, Judge Merritt endorsed Judge Cole's dissent in *Hennessee*. *United States v. Starks*, 775 F. App'x 233, 234 (6th Cir. 2019) (Merritt, J. concurring). The Sixth Circuit, however, has steadfastly rejected its colleagues' analysis, holding on at least eighteen occasions that the majority's decision in

Hennessee forecloses any argument that it violates the Constitution for judges to find non-elemental facts to conduct the different-occasions analysis. Notably, following *Wooden*, the Sixth Circuit has doubled down on its position, dismissing the defendant's Sixth Amendment challenge as not "a strong merits argument," finding comfort in the fact that *Wooden* did not reach the issue. *See Mitchell v. United States*, 43 F.4th 608, 616 (6th Cir. 2022) (noting that while "[p]erhaps the Supreme Court will take up the issue one day," until such time, *Hennessee* remains the law of the circuit); *United States v. Williams*, 39 F. 4th 342, 351 (6th Cir. 2022) (reaffirming that *Apprendi* permits judges to make whatever factual findings are necessary to answer the different occasions question). And, even after the government changed its position to that of Judge Cole's, the Sixth Circuit has refused to re-consider the issue en banc. Order Denying Rehearing En Banc Rehearing, *United States v. Williams*, No. 21-5856, Dkt. Entry 62, at 1 (filed Oct. 26, 2022).

Likewise, in the Eleventh Circuit, Judge Newsom chastised his colleagues for continually side-stepping "*Descamps* and *Mathis* on the ground they didn't address ACCA's different-occasions inquiry." *United States v. Dudley*, 5 F.4th 1249, 1270, 1272 (11th Cir. 2021) (Newsom, J. dissenting). The majority, however, remained convinced that "*Descamps* and *Mathis* have no bearing" because the different-occasions analysis is not limited to the facts that a jury necessarily found or a defendant admitted because such analysis "necessarily requires looking at the facts underlying the prior convictions." *Id.* at 1264-65 (internal quotations omitted). The

Eleventh Circuit has had numerous opportunities to reconsider the issue, even after the government came to appreciate the wisdom of Judge Newson's dissent, but has not been willing to do so *See, e.g.*, Order Denying Rehearing En Banc Rehearing, *United States v. Haynes*, No. 19-12335, Dkt. Entry 75, at 1 (filed Nov. 1, 2022).

And, of course, as discussed above, the full court of the Ninth Circuit ignored the admonishment provided by Judge Stras (*Walker*) and panel judge Feinerman (*Barrera*).

3. The Government's Newfound, But Remarkably Inconsistent, Appreciation of This Court's Jurisprudence Will Not Meaningfully Alter the Trajectory of the Past Two Decades.

The government's efforts to do what a number of appellate jurists have been unable to accomplish is hardly off to a roaring start as exemplified by the cases below.

On or about July 15, 2022, the Solicitor General's office issued guidance that the different occasions analysis does in fact require "a jury to find, or a defendant to admit, that the defendant's ACCA predicate convictions were committed on occasions different from one another." Government's Motion to Continue, *United States v. Earl B. Penn*, No. 4:20-cr-00266 (WD. Missouri), Dkt. Entry 100, at 3 (filed July 20, 2022). On July 25, 2022, the government notified the Fourth Circuit of its changed position. Government's Supplemental Letter to the Court, *United States v. Hadden*, No. 19-4151 (4th Cir.), Dkt. Entry 57, at 1 (filed July 25, 2022). When the government similarly failed to notify the Ninth Circuit of its changed position in Barrera's case, Barrera informed the Ninth Circuit of the government's changed

position. Defendant's Letter to the Court, *United States v. Barrera*, No. 20-10368 (9th Cir.), Dkt. Entry 36, at 1-2 (filed July 26, 2022). Instead of taking the prompt, and informing the Ninth Circuit of its changed position, the government advised the court that it would only share its position if it was ordered to do so. Government's Letter to the Court, *United States v. Barrera*, No. 20-10368 (9th Cir.), Dkt. Entry 38, at 1 (filed July 26, 2022). The Ninth Circuit denied Barrera's petition for rehearing en banc on September 21, 2022 without ordering the government to respond. The government's decision not to share its position with the Ninth Circuit is particularly galling when just a few months later it informed the Seventh Circuit that it disagrees with the Ninth Circuit's decision in *Barrera*, and suggests the Ninth Circuit reached the decision it did because it was "decided without the benefit of the government's new position." Brief of the United States, *United States v. Erlinger*, No. 22-1926 (7th Cir.), Dkt. Entry 15, at 11 (filed Oct. 19, 2022).

Only a week after it played coy in Barrera's case (and while Barrera's case was still pending), the government felt like notifying the Ninth Circuit of its changed position in a different case. Government's Letter to the Court, *United States v. Raya Man*, No. 21-10241 (9th Cir.), Dkt. Entry 33, at 1 (filed Aug. 3, 2022) (withdrawing its previous argument that a sentencing judge could find non-elemental facts to increase the penalty beyond that established by Congress for the offense of conviction, but contended that any such error was harmless). Given the government's tepid endorsement of the constitutional rights at stake, the Ninth Circuit not surprisingly did not reach the issue. Instead, in an unpublished decision

it sent the case back to the district court to decide "the issue of the proof necessary to establish that any prior convictions involve offenses committed on separate occasions." *United States v. Man*, No. 21-10241, 2022 U.S. App. LEXIS 32807, at *4 (9th Cir. 2022).

The government has engaged in similarly arbitrary conduct in the Sixth Circuit. In *United States v. Cook*, the government filed a letter in August to inform the Court that it had "recently changed its position," and "now contends that a jury should find (or a defendant should admit) that ACCA predicates were committed on occasions different from one another." Government's Letter to the Court, No. 22-5056 (6th Cir.), Dkt. Entry 33, at 1 (filed Aug. 18, 2022). Notwithstanding its changed position the government informed the Court that because it had previously held that a judge could find non-elemental facts when conducting the different-occasions analysis, it was "bound by that precedent." *Id.*

Despite already having done so in *Cook*, in *United States v. Williams*, the government elected not to inform the court of its changed position after being ordered to respond to the defendant's petition for rehearing. Instead, the government contended that the district court had correctly followed precedent, and that the panel had followed "the clear guidance of *Wooden*" when it "correctly concluded that Williams's robbery crimes occurred on different occasions," and thus urged the Sixth Circuit not to rehear the case en banc. Government's Response to Petition for En Banc Rehearing, *United States v. Williams*, No. 21-5856, Dkt. Entry 56, at 2, 4 (filed Sept. 6, 2022). As in *Barrera*, where the government elected not to

inform the court of its changed position, defense counsel did. Petition for En Banc Rehearing, *United States v. Williams*, No. 21-5856, Dkt. Entry41, at Appendix 1-5 (filed August 19, 2022). The Sixth Circuit denied rehearing en banc.

Just like in the case below, in the Tenth Circuit, the government again elected to remain silent instead of informing the Court of its changed position. Specifically, in *United States v. Reed*, the defendant filed a petition for rehearing en banc and the Federal Defenders filed an Amicus Curiae to which it attached the government's filing from July 20, 2022 in *United States v. Dutch*, No. 16-cr-1424 (D. New Mexico)[7] in which the government noted that it would ask the Tenth Circuit to revisit its jurisprudence permitting sentencing judges to find non-elemental facts as part of the different-occasions analysis "at an appropriate time." Brief of the Federal Defenders as Amici Curiae in Support of Rehearing En Banc, *United States v. Reed*, No. 21-2073 (10th Cir.), at 21 (filed Aug. 25, 2022). Apparently when the issue was presented in *Reed*, the government did not deem it "an appropriate time" as it remained silent. And, notwithstanding being advised of the government's position that the court should revisit its jurisprudence, the Tenth Circuit did not

[7] Notably *Dutch* was back in district court following remand for resentencing after the government had convinced the Tenth Circuit that the defendant *had* committed his crimes on different occasions. *United States v. Dutch*, 753 F. App'x 632, 633 (10th Cir. 2018) The government elected to share its changed position with the district court and asked the court to impose a non-ACCA sentence on remand. Government's Response to Sentencing Memorandum, *United States v. Reed*, No. 1:16-cr-01424 (D. New Mexico), Dkt. Entry 102, at 2-3 (filed July 20, 2022). This was six days *before* the government played coy with the Ninth Circuit in Barrera's case below.

order the government to respond, and denied the petition for rehearing en banc without recorded dissent.

In the Eleventh Circuit the government has again failed to be either consistent or proactive. In *United States v. Haynes*, the Eleventh Circuit held that any "argument that judicially determining whether prior convictions were committed on different occasions from one another for purposes of the ACCA violates a defendant's Fifth and Sixth Amendment rights is foreclosed by our precedents." *United States v. Haynes*, No. 19-12335, 2022 U.S. App. LEXIS 23802, at *14 (11th Cir. 2022) (citing *Dudley*, 5 F.4th at 1260). The defendant filed a petition for rehearing on October 12, 2022, but the government elected not to share its changed position, and the court denied rehearing on November 1, 2022. The government's silence in *Haynes* is perplexing given that two months earlier in a different case it had elected to share its changed position with the Court. Government's Supplemental Letter Brief, *United States v. McCall*, No. 18-15229, Dkt. Entry 99, at 6 (filed Aug. 5, 2022). Even in *McCall*, however, the government, did not encourage the Eleventh Circuit to reconsider its jurisprudence. Instead, the government argued that because "*Wooden* expressly declined to reach that issue," given the court's binding precedent, the court was "bound to uphold the ACCA enhancement if the record supports the district court's different-occasions finding." *Id*. at 7.

In the Fourth Circuit, while the government has advised the Court of its changed position, it is hardly beating down the bushes asking the Court to review

its jurisprudence firmly holding to the contrary. *See* Government's Supplemental Letter, *United States v. Hadden*, No-19-4151 (4th Cir.), Dkt. Entry 57 (filed July 25, 2022) (urging the court to affirm as the defendant could not show reversible plain error) and Government's Supplemental Letter, *United States v. Rico Brown*, No 21-4253 (4th Cir.), Dkt. Entry 31 (filed July 26, 2022) (urging the court to affirm as any error was harmless). The government has taken a similar position in the Seventh Circuit. *See* Brief of the United States, *United States v. Erlinger*, No. 22-1926 (7th Cir.), Dkt. Entry 15, at 16-19 (filed Oct. 19, 2022).

And, in the Fifth Circuit the government relied on *Wooden* for the proposition that fact-finding in the context of the different-occasions analysis was no longer restricted to *Shepard* documents, and encouraged the court to engage in wide-ranging fact finding, neglecting to mention its new position that only a jury could find said facts, not the court. Government's Letter to the Court, *United States v. Stevens*, No. 20-11264, Dkt. Entry 139, at 1-2 (filed Oct. 25, 2022).

To date, only in the Eight Circuit has the government actually supported a defendant's petition for rehearing en banc so that the Court could revisit its jurisprudence concerning the different-occasions analysis. Tellingly, in doing so, the government relied on this Court's decisions in *Mathis* and *Descamps*. Government's Response to Appellant's Petition for Rehearing En Banc, *United States v. Stowell*, No. 21-2234 (8th Cir.), at 8-9 (filed Oct. 26, 2022). Notably, the government elected to support rehearing in banc even though, just like in other

circuits where it elected not to support the petition for rehearing en banc, it contends that the error was harmless. *Id.* at 10-12.

As evinced by the foregoing, the government's litigation position in the courts below appears to be troublingly arbitrary, and should be far from reassuring when it comes to correcting decades of deeply entrenched jurisprudence in the lower courts. As the foregoing demonstrates, protecting individual liberty should not be left to the arbitrary whims of the government to safeguard. Indeed, the very purpose of our jury system is to provide a "necessary check on governmental power," *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 210 (2017), and operate "as a protection against arbitrary rule." *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968).

C. The Ninth Circuit is Further Exacerbating the Arbitrariness of the ACCA By Ignoring This Court's Substantive Definitions of Negligence and Reckless, and is Instead Putting Form Over Substance by Binding Application of the ACCA to Labels Used by the California Courts.

In *Borden v. United States*, five justices held that to satisfy the elements clause of 18 U.S.C. § 924(e)(2)(B)(i), a conviction must necessarily establish the defendant was more than merely reckless regarding the possibility that his intentional use of force would result in harm on another. 141 S. Ct. 1817, 1819 (2021) (plurality); *Id.* at 1835 (Thomas, J., concurring in the judgment) (agreeing that a crime that merely requires the government to establish "mere recklessness" does not satisfy the elements clause). And this Court agreed on the applicable definition of the term "reckless." *Id.* at 1844 (Kavanaugh, J. dissenting) (A "person acts recklessly when he consciously disregards a substantial and unjustifiable risk

that his conduct will result in harm to another person") (internal quotations omitted) (emphasis added). *Id*. at 1824 (plurality) (same).

In California, no matter whether the offense at issue is assault or battery,[8] a defendant will be found guilty if it is established that he was "aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur." *People v. Williams*, 26 Cal. 4th 779, 788 (2001); *People v. Colantuono*, 7 Cal. 4th 206, 214-15, 217 (1994) (explaining that there is an "infrangible nexus" between assault and battery, which "means that once the violent-injury-producing course of conduct begins, untoward consequences will naturally and proximately follow," and, thus, while assault (which punishes the initiation of the force) and battery (which punishes the resulting injury) are discrete offenses, "only an intent to commit the proscribed act is required" for both, and thus an "intent. . . to injure in the sense of inflicting bodily harm is not necessary"). Indeed, the California Supreme Court has repeatedly held that it does not matter whether a defendant is aware that his intentional conduct could injure another because "the requisite *mens rea* may be found even when the

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[8] Barrera's three prior convictions are for violating CPC § 273.5, a domestic battery statute that prohibits a battery involving a cohabitant that results in a bodily injury, "whether of a minor or serious nature." California Jury Instructions, Criminal § 9.35 (7th Ed. 2005) ("CALJIC"). While the act that results in the bodily injury must have been "willful," that simply requires proof that the defendant intentionally engaged in conduct, not that the defendant had "any intent to . . . injure another." CALJIC §§ 1.20, 9.35.

defendant honestly believes his act is not likely to result in such injury." *People v. Wyatt*, 48 Cal. 4th 776, 781 (2010).

In other words, California's assault and battery statutes look at the facts known to the defendant and asks "whether a reasonable person equipped with that knowledge, not the actual defendant, would have recognized the harmfulness of his conduct," and "[t]hat is a negligence standard," *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015). Pursuant to both *Borden*, as well *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (holding that "a higher degree of intent than negligent. . . conduct" is required to satisfy the elements clause), it follows as a matter of course that the battery proscribed by CPC § 273.5 is defined too broadly to qualify as a predicate for the fifteen-year mandatory minimum under the ACCA.

The twist here is that California labels the aforementioned *mens rea* as something greater than "recklessness. . . because a jury cannot find a defendant guilty of assault based on facts he should have known but did not know." *Williams*, 26 Cal. 4th at 111. Instead of recognizing that the *mens rea* articulated by the California Supreme Court is the very definition of negligence under federal law, the Ninth Circuit has decided it is bound by the label the California Supreme Court attached to the *mens rea* it established. *See, e.g.*, *United States v. Vasquez-Gonzalez*, 901 F.3d 1060, 1067, 1067 n.5 (9th Cir. 2018) (dismissing *Elonis* because this "Court in *Elonis* did not discuss *Williams*, nor did it discuss the *mens rea* for assault"). In *Walker* the Ninth Circuit refused to consider the substantive definition of the applicable *mens rea* established by the California Supreme Court because it

"collide[d] headlong with [its] precedent." *Walker*, 953 F.3d at 579. The court below refused to reconsider *Walker*. Pet. App. 3a-5a.

In so doing, the Ninth Circuit is once again ignoring this Court's clear direction and evincing a troubling inability to apply this Court's reasoning in subsequent cases. In *Johnson v. United States*, 559 U.S. 133 (2010) this Court directed the lower courts that when it comes to defining legal terms that place an offense on one side of the ACCA or the other, that "is a question of federal, not state law." 559 U.S. at 138. By refusing to adhere to that clear directive, the Ninth Circuit has created a situation where individuals who engage in the exact same substantive conduct are being subjected to the ACCA in the Ninth Circuit but not in other Circuits, violating Congress' intent to afford states the prerogative to establish the substantive elements of their offenses so long as federal judges ensure "that the same type of conduct is punishable on the Federal level in all cases." *Taylor v. United States*, 495 U.S. 575, 582 (1990) (internal quotations omitted).

Counsel sought en banc review on this issue from the Ninth Circuit in both *Walker* and *Barrera*, and it is clear the Ninth Circuit is not going to reverse course without explicit direction from this Court. This is a simple issue in desperate need of clarification by this Court to ensure that the scope of federal recidivist sentencing enhancement provisions are not being hijacked by the oddities of state law, and are instead being applied consistently to federal defendants regardless of geography.

D. This Case is An Ideal Vehicle to Address The Question Presented.

The legal issues have been cleanly presented to the Ninth Circuit by counsel both in *Walker* and in *Barrera*, which relied on *Walker*, and in both cases the Ninth Circuit denied rehearing en banc. In the case below it did so notwithstanding a member of the three-judge panel pointing out that its jurisprudence was seemingly irreconcilable with this Court's jurisprudence and notwithstanding being advised that the government had changed its position and now agreed with Barrera that the Ninth Circuit's precedent permitting judges to find and rely on non-elemental facts to impose punishment in excess of that authorized by Congress for the offense of conviction violates the Constitution. Just like it did in *Descamps*, the Ninth Circuit is again flouting this Court's reasoning, and is again rummaging through documents to find non-elemental facts to dramatically increase an individual's sentence beyond that established for the offense of conviction, "[d]ismissing everything [this Court has] said on the subject as lacking conclusive weight." *Descamps*, 570 U.S. at 265. As such, this case provides this Court with a particularly effective vehicle in which to clarify how the lower courts should be applying its reasoning in subsequent cases. *Cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989) (explaining "that when the Supreme Court . . . decides a case, not merely the outcome of that decision, but the mode of analysis that it applies will thereafter be followed by the lower courts").

This case also presents a particularly attractive vehicle to take up this issue where the sentence imposed was, as the district observed, absurd and clearly not

called for, and where the question presented is also outcome determinative. Barrera was never charged under the ACCA, he never admitted that the conduct underlying his three convictions occurred on different occasions, and the record does not support a finding beyond a reasonable doubt that the conduct underlying the three convictions did in fact occur on separate occasions.

At the trial phase the only evidence in the record is Barrera's admission that he had three prior convictions for violating CPC § 273.5. There is no evidence in the trial record regarding when, where or with whom the criminal conduct occurred. In other words, the government satisfied only the elements of § 922(g), not § 924(e). Accordingly, it is not "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999); *see e.g.*, *United States v. Lane*, 474 U.S. 438, 445 (1986) (explaining that whether a constitutional error was harmless requires the "reviewing court to consider *the trial record* as a whole. . . given the myriad safeguards provided to assure a fair trial") (emphasis added) (internal quotations omitted); *Greer v. United States*, 141 S. Ct. 2090, 2102 (2021) (Sotomayor, J., concurring in part and dissenting in part) ("Appellate courts cannot find errors harmless simply because they believe that inculpatory evidence the Government never put before the jury. . .is sufficient to find the defendant guilty").

Even at Barrera's sentencing hearing the government did not submit sufficient evidence to establish beyond a reasonable doubt that the conduct underlying the three convictions occurred on different occasions. With respect to

one of the convictions, the only evidence in the record is the signed plea form without any information about when, where or with whom the charged conduct occurred. Pet. App. 43a-44a. In California, a case is commenced for purpose of satisfying the statute of limitations simply with the issuance of an arrest warrant; the actual prosecution can occur years later. *See, e.g.*, *People v. Lewis*, 180 Cal. App. 3d 816 (1986). Moreover, with respect to violations of CPC § 273.5, the state can dismiss the case and file two times more times if the complaining witness fails to appear. CPC § 1387(a)(3) (the only limitation being that the refiling must be within six months of the original dismissal). That means that a case in which there are two complaining witnesses, and one of them does not show for a trial that has been continued for years, the state can dismiss and refile, which means conduct that occurred on the same occasion can result in convictions that are many years apart. Notably, on the plea form dated in 2015, Barrera only admitted to one prior violation of CPC § 273.5. Pet. App. 43a.

Additionally, although the government did provide complaints for the other two convictions, the complaints simply state that one offense was committed "on or about" December 25, 2009 and the other "on or about" April 12, 2010. Under California law, the term "on or about" does not provide the requisite specificity regarding when an offense was actually committed that the different-occasions analysis demands. *See, e.g.*, *People v. Starkey*, 234 Cal. App. 2d 822, 827 (1965) (explaining that "when it is charged that an offense was committed 'on or about' a named date, the exact date need not be proved unless the time 'is a material

ingredient in the offense'") (quoting CPC § 955). In other words offenses that are alleged to have been committed on or about a date, may have in fact been committed many months earlier. *See, e.g.*, *People v. Garcia*, 247 Cal. App. 4th 1013, 1021-22 (2016) (holding that an allegation that an offense was committed on or about a date does not mean the offense actually occurred in the year alleged); *People v. Peyton*, 176 Cal. App. 4th 642, 660-61 (2009) (while the charging document alleged the offenses took place on or about October 1, 2005, and the evidence established the offenses actually occurred "during the fall of 2004"—a whole year earlier—the court held the variance was immaterial).

The government's failure to provide proof beyond a reasonable doubt that Barrera engaged in criminal conduct on three different occasions underscores the prejudice here. Absent clarification from this Court, the Sixth Amendment's promise that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury" and the Fifth Amendment's promise that no one shall be deprived of liberty without "due process of law," are merely illusory for individuals such as Barrera whose punishment is not limited by a jury's factual findings, but is instead dramatically increased beyond that established by Congress for the offense of conviction based on a judge's subjective balancing of non-elemental facts concerning the when, where, how, and why a prior offense was committed, resulting not only in unconstitutional, but, as in this case, absurd sentences.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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