

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



APPENDIX



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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SEP 21 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
v.

EDGAR BARRERA, AKA Cito,
Defendant-Appellant.

No. 20-10368

D.C. No.
1:19-cr-00275-DAD-SKO-1
Eastern District of California,
Fresno

ORDER

Before: CHRISTEN and BRESS, Circuit Judges, and FEINERMAN,* District Judge.

The panel has voted unanimously to deny the petition for panel rehearing.

Judges Christen and Bress have voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

* The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.

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APPENDIX B
NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APR 27 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDGAR BARRERA, AKA Cito,

Defendant-Appellant.

No. 20-10368

D.C. No.
1:19-cr-00275-DAD-SKO-1

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Dale A. Drozd, District Judge, Presiding

Argued and Submitted March 16, 2022
San Francisco, California

Before: CHRISTEN and BRESS, Circuit Judges, and FEINERMAN, ** District Judge.

Concurrence by Judge FEINERMAN.

Edgar Barrera pleaded guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He had three prior convictions for domestic battery under California Penal Code § 273.5. The district court found

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.

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that those three convictions were for “violent felon[ies] … committed on occasions different from one another,” and therefore sentenced him to the mandatory minimum fifteen-year prison term under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(1). Barrera appeals his sentence. We review *de novo* whether a state conviction qualifies as a violent felony under the ACCA, whether the district court’s factfinding regarding the timing of Barrera’s prior offenses violated his Sixth Amendment jury trial right, and whether those prior offenses in fact were committed on different occasions. *See United States v. Walker*, 953 F.3d 577, 578 n.1 (9th Cir. 2020); *United States v. Phillips*, 149 F.3d 1026, 1031 (9th Cir. 1998). We review the district court’s underlying factual findings for clear error. *See United States v. Gardenhire*, 784 F.3d 1277, 1280 (9th Cir. 2015). We affirm.

1. We held in *Walker* that domestic battery under § 273.5 is a violent felony for ACCA purposes. *See Walker*, 953 F.3d at 579-80. As a three-judge panel, we must adhere to that holding unless an “intervening higher authority” has “undercut the theory or reasoning … in such a way that the cases are clearly irreconcilable.” *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Barrera points to *Borden v. United States*, 141 S. Ct. 1817 (2021), but that decision is not clearly irreconcilable with *Walker*.

Borden held that an offense cannot “count as a ‘violent felony’ [for ACCA purposes] if it requires only a *mens rea* of recklessness.” *Id.* at 1821-22 (plurality opinion).¹ That holding followed from the ACCA’s elements clause, which defines “violent felony” to include a crime that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i). *Borden* reasoned that the word “against” “introduc[es] the conscious object (not the mere recipient) of the force,” which means “the clause covers purposeful and knowing acts, but excludes reckless conduct.” 141 S. Ct. at 1826.

Barrera’s prior convictions fall within *Borden*’s interpretation of the ACCA’s elements clause because a person convicted of violating § 273.5 must “willfully inflict a direct application of force on the victim,” “where willfully is a synonym for intentionally.” *Walker*, 953 F.3d at 579 (alterations and emphasis omitted) (first quoting *Banuelos-Ayon v. Holder*, 611 F.3d 1080, 1084 (9th Cir. 2010); then quoting *United States v. Laurico-Yeno*, 590 F.3d 818, 821 (9th Cir.

¹ For purposes of this appeal, we assume that Justice Kagan’s plurality opinion in *Borden* is controlling under *Marks v. United States*, 430 U.S. 188 (1977). See *Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015) (“With no majority opinion, [a Supreme Court decision] cannot serve as the requisite ‘controlling authority’ capable of abrogating our precedent.”); *Lair v. Bullock*, 697 F.3d 1200, 1204-06 (9th Cir. 2012) (conducting a *Marks* analysis to decide whether a splintered Supreme Court decision produced a “majority” opinion that abrogated circuit precedent).

2010)). In other words, § 273.5 requires that a defendant “consciously deployed” force “opposed to or directed at” the victim. *Borden*, 141 S. Ct. at 1827. *Walker* therefore is not clearly irreconcilable with *Borden*, and we accordingly remain bound by *Walker*’s holding that a violation of § 273.5 is a “violent felony” under the ACCA.

2. The district court did not violate Barrera’s Sixth Amendment jury trial right by making a finding—that his prior § 273.5 offenses occurred on different occasions—that increased his maximum sentence. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that, in general, a jury must find “any fact that increases the penalty for a crime beyond the prescribed statutory maximum”). But for the ACCA’s fifteen-year mandatory minimum, Barrera’s maximum sentence would have been ten years. *See* 18 U.S.C. § 924(a)(2).

A sentencing court “cannot[] rely on its own finding about a non-elemental fact to increase a defendant’s maximum sentence.” *Descamps v. United States*, 570 U.S. 254, 270 (2013); *see also Mathis v. United States*, 579 U.S. 500, 511 (2016) (“[A] judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense.”). That prohibition has a “narrow exception[]” for “the fact of a defendant’s a prior conviction.” *United States v. Haymond*, 139 S. Ct. 2369, 2377 n.3 (2019) (plurality opinion) (citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)). We held in *Walker* that

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the exception authorizes “a sentencing judge [to] find the dates of prior offenses in deciding if a defendant has committed three or more violent felonies.” 953 F.3d at 580 (citing *United States v. Grisel*, 488 F.3d 844, 845-47 (9th Cir. 2007) (en banc), *abrogated in part on other grounds by United States v. Stitt*, 139 S. Ct. 399 (2018)).

Barrera argues that this aspect of *Walker* cannot be reconciled with the Supreme Court’s decisions in *Descamps* and *Mathis*. But *Walker* postdates those Supreme Court decisions, so it remains binding here. *See Miller*, 335 F.3d at 900.

3. The district court did not err in determining that Barrera’s prior § 273.5 offenses were “committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). Barrera was convicted twice in 2010 and once in 2015. Relying on charging documents alleging that his first two domestic battery offenses occurred “[o]n or about December 25, 2009,” and “[o]n or about April 12, 2010,” respectively, the district court found that all three prior offenses “occur[red] on different dates.” That was not clear error.

Barrera suggests that his two 2010 convictions theoretically could have arisen from conduct that occurred on the same day because California law does not require a charging document’s allegations to match the offense’s actual date. But the district court reasonably could have inferred from the fact that the offenses were separately charged months apart that they were committed on different days.

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Cf. People v. Goolsby, 363 P.3d 623, 624 (Cal. 2015) (noting that California law “generally requir[es] all offenses involving the same act or course of conduct to be prosecuted in a single proceeding”). It follows that the district court correctly held that Barrera’s three prior offenses occurred on separate occasions for ACCA purposes. *See Wooden v. United States*, 142 S. Ct. 1063, 1070-71 (2022) (explaining that although the separate-occasions analysis is “multi-factored,” “[c]ourts … have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart”); *see also United States v. Lewis*, 991 F.2d 524, 526 (9th Cir. 1993) (holding that crimes committed three days apart took place on separate occasions).

AFFIRMED.

United States v. Barrera, No. 20-10368

APR 27 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FEINERMAN, District Judge, concurring:

The panel faithfully applies circuit precedent that forecloses Barrera’s Sixth Amendment challenge to his sentence. *See United States v. Walker*, 953 F.3d 577, 580 (9th Cir. 2020); *United States v. Grisel*, 488 F.3d 844, 847 (9th Cir. 2007) (en banc), *abrogated in part on other grounds by United States v. Stitt*, 139 S. Ct. 399 (2018)). No intervening higher authority has abrogated that precedent. *See Wooden v. United States*, 142 S. Ct. 1063, 1068 n.3 (2022) (declining to consider “whether the Sixth Amendment requires that a jury, rather than a judge, resolve whether prior crimes occurred on a single occasion”). The panel’s disposition of the Sixth Amendment issue accordingly is correct.

I write separately, however, to note that *Walker* and *Grisel* are 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.” *Mathis v. United States*, 579 U.S. 500, 511-12 (2016). California Penal Code § 273.5 does not include the date of offense as an element. It seems to follow, then, that the dates set forth in Barrera’s charging documents are “amplifying but legally extraneous circumstances,” and therefore that they “cannot license a later sentencing court to impose extra

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punishment.” *Descamps v. United States*, 570 U.S. 254, 270 (2013); *see also* *United States v. Haymond*, 139 S. Ct. 2369, 2381 (2019) (plurality opinion) (“A mandatory minimum … sentence that comes into play *only* as a result of additional judicial factual findings by a preponderance of the evidence cannot stand.”); *id.* at 2386 (Breyer, J., concurring) (“[I]n an ordinary criminal prosecution, a jury must find facts that trigger a mandatory minimum prison term.”).

Given the apparent conflict between circuit law and Supreme Court precedent, this case may be an appropriate candidate for further review, whether by the en banc court, *see* Fed. R. App. P. 35(a)(1), or the Supreme Court, *see Wooden*, 142 S. Ct. at 1087 n.7 (Gorsuch, J., concurring in the judgment) (noting that “there is little doubt” the Supreme Court will consider the Sixth Amendment question “soon”).

APPENDIX C
UNITED STATES DISTRICT COURT
Eastern District of California

UNITED STATES OF AMERICA

v.

EDGAR BARRERA
 AKA: Cito

JUDGMENT IN A CRIMINAL CASECase Number: **1:19CR00275-001**

Defendant's Attorney: Peggy Sasso, Assistant Federal Defender

THE DEFENDANT:

pleaded guilty to count(s) 1 of the Indictment.
 pleaded nolo contendere to count(s) ___, which was accepted by the court.
 was found guilty on count(s) ___ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1)	Felon in Possession of a Firearm (Class A Felony)	11/10/2019	1

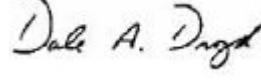
The defendant is sentenced as provided in pages 2 through ___ of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) ___.
 Count(s) ___ dismissed on the motion of the United States.
 Indictment is to be dismissed by District Court on motion of the United States.
 Appeal rights given. Appeal rights waived.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution or fine, the defendant must notify the court and United States attorney of material changes in economic circumstances.

10/29/2020

Date of Imposition of Judgment



Signature of Judicial Officer

Dale A. Drozd, United States District Judge

Name & Title of Judicial Officer

10/30/2020

Date

Case 1:19-cr-00275-DAD-SKO Document 28 Filed 10/30/20 Page 2 of 7

AO 245B-CAED (Rev. 09/2019) Sheet 2 - Imprisonment

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Page 2 of 7

DEFENDANT: **EDGAR BARRERA**
CASE NUMBER: **1:19CR00275-001****IMPRISONMENT**

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
180 Months.

No TSR: Defendant shall cooperate in the collection of DNA.

The court makes the following recommendations to the Bureau of Prisons:
The court recommends that the defendant be incarcerated at Mendota, CA or Lompoc, CA, but only insofar as this accords with security classification and space availability. The court recommends the defendant participate in the 500-Hour Bureau of Prisons Substance Abuse Treatment Program.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district
[] at ____ on ____.
[] as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[] before ____ on ____.
[] as notified by the United States Marshal.
[] as notified by the Probation or Pretrial Services Officer.

If no such institution has been designated, to the United States Marshal for this district.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States Marshal

By Deputy United States Marshal

Case 1:19-cr-00275-DAD-SKO Document 28 Filed 10/30/20 Page 3 of 7

AO 245B-CAED (Rev. 09/2019) Sheet 3 - Supervised Release

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Page 3 of 7

DEFENDANT: **EDGAR BARRERA**
CASE NUMBER: **1:19CR00275-001****SUPERVISED RELEASE**

Upon release from imprisonment, you will be on supervised release for a term of:
60 Months.

MANDATORY CONDITIONS

You must not commit another federal, state or local crime.

You must not unlawfully possess a controlled substance.

You must refrain from any unlawful use of controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two (2) periodic drug tests thereafter, not to exceed four (4) drug tests per month.

- The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse.
- You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution.
- You must cooperate in the collection of DNA as directed by the probation officer.
- You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense.
- You must participate in an approved program for domestic violence.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

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AO 245B-CAED (Rev. 09/2019) Sheet 3 - Supervised Release

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DEFENDANT: **EDGAR BARRERA**
CASE NUMBER: **1:19CR00275-001****STANDARD CONDITIONS OF SUPERVISION**

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by the probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

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AO 245B-CAED (Rev. 09/2019) Sheet 3 - Supervised Release

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DEFENDANT: **EDGAR BARRERA**
CASE NUMBER: **1:19CR00275-001****SPECIAL CONDITIONS OF SUPERVISION**

1. As directed by the probation officer, the defendant shall participate in an outpatient correctional treatment program to obtain assistance for drug or alcohol abuse.
2. As directed by the probation officer, the defendant shall participate in a program of testing (i.e. breath, urine, sweat patch, etc.) to determine if he has reverted to the use of drugs or alcohol.
3. As directed by the probation officer, the defendant shall participate in a program of outpatient mental health treatment.
4. As directed by the probation officer, the defendant shall complete up to 20 hours of unpaid community service per week until employed for at least 30 hours per week or participating in a previously approved educational or vocational program.
5. As directed by the probation officer, the defendant shall participate in a co-payment plan for treatment or testing and shall make payment directly to the vendor under contract with the United States Probation Office of up to \$25 per month.
6. The defendant shall submit to the search of his person, property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects at any time, with or without a warrant, by any law enforcement or probation officer in the lawful discharge of the officer's supervision functions with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

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AO 245B-CAED (Rev. 09/2019) Sheet 5 - Criminal Monetary Penalties

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DEFENDANT: **EDGAR BARRERA**
CASE NUMBER: **1:19CR00275-001****CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

TOTALS

<u>Processing Fee</u>	<u>Assessment</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>	<u>Fine</u>	<u>Restitution</u>

\$100.00

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[]

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

[] Restitution amount ordered pursuant to plea agreement \$ ____

[] The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[] The interest requirement is waived for the [] fine [] restitution

[] The interest requirement for the [] fine [] restitution is modified as follows:

[] If incarcerated, payment of the fine is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

[] If incarcerated, payment of the restitution is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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AO 245B-CAED (Rev. 09/2019) Sheet 6 - Schedule of Payments

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DEFENDANT: **EDGAR BARRERA**
CASE NUMBER: **1:19CR00275-001****SCHEDEULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of \$ 100.00 due immediately, balance due
 Not later than ___, or
 in accordance C, D, E, or F below; or

B. Payment to begin immediately (may be combined with C, D, or F below); or

C. Payment in equal __ (e.g. weekly, monthly, quarterly) installments of \$ __ over a period of __ (e.g. months or years), to commence __ (e.g. 30 or 60 days) after the date of this judgment; or

D. Payment in equal __ (e.g. weekly, monthly, quarterly) installments of \$ __ over a period of __ (e.g. months or years), to commence __ (e.g. 30 or 60 days) after release from imprisonment to a term of supervision; or

E. Payment during the term of supervised release/probation will commence within __ (e.g. 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F. Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States: The Preliminary Order of Forfeiture is hereby made final as to this defendant and shall be incorporated into the Judgment.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

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APPENDIX D

1 MC GREGOR W. SCOTT
2 United States Attorney
3 JOSEPH BARTON
4 Assistant United States Attorney
5 2500 Tulare Street, Suite 4401, Fresno, CA 93721
6 Telephone: (559) 497-4000
7 Facsimile: (559) 497-4099

8 Attorneys for Plaintiff
9 United States of America

FILED
DEC 19 2019
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY *[Signature]*
DEPUTY CLERK

10 IN THE UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,

13 Plaintiff,

v.

14 EDGAR BARRERA,

15 Defendant.

16 CASE NO.

17 19 CR 00275 LJO SKO
18 U.S.C. § 922(g)(1) (FELON IN POSSESSION OF
19 FIREARM) (ONE COUNT); 18 U.S.C. § 924(d)(1)
20 AND 28 U.S.C. § 2461(c) (CRIMINAL
21 FORFEITURE)

22 INDICTMENT

23 COUNT ONE: [18 U.S.C. § 922(g)(1) – Felon in Possession of Firearm]

24 The Grand Jury charges:

25 EDGAR BARRERA,

26 defendant herein, as follows:

27 On or about November 10, 2019, in the County of Fresno, State and Eastern District of
28 California, the defendant, knowing that he had previously been convicted of a crime punishable by a
term of imprisonment exceeding one year, to wit:

29 1) Corporal Injury To Spouse, Cohabitant, Etc., in violation of California Penal Code
30 Section 273.5(a)(1), on or about January 6, 2010, in Fresno County Superior Court
31 Case Number F09301073,

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1 2) Corporal Injury To Spouse, Cohabitant, Etc. with Prior Assault, in violation of
2 California Penal Code Section 273.5(e)(1), on or about May 5, 2010, in Fresno
3 County Superior Court Case Number F10300327,
4 3) Corporal Injury To Spouse, Cohabitant, Etc. with Prior Assault, in violation of
5 California Penal Code Section 273.5(f)(1), on or about January 16, 2015, in Fresno
6 County Superior Court Case Number F15900007,
7 did knowingly possess a firearm, to wit: a New England 12-Gauge Shotgun, Serial Number 208212, in
8 and affecting interstate commerce, in that said firearm had previously been transported in interstate and
9 foreign commerce, all in violation of Title 18, United States Code, Section 922(g)(1).

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11
12 FORFEITURE ALLEGATION: [18 U.S.C. § 924(d)(1) and 28 U.S.C. § 2461(c) – Criminal Forfeiture]

13 Upon conviction of the offense alleged in Count One of this Indictment, the defendant shall
14 forfeit to the United States, pursuant to Title 18, United States Code, Section 924(d)(1) and Title 28,
15 United States Code, Section 2461(c), any firearms, ammunition, and magazines involved in or used in
16 the knowing commission of the offense.

17 If any property subject to forfeiture, as a result of the offense alleged in Count One of this
18 Indictment, for which defendant is convicted:

19 a. cannot be located upon the exercise of due diligence,
20 b. has been transferred or sold to, or deposited with, a third party,
21 c. has been placed beyond the jurisdiction of the Court,
22 d. has been substantially diminished in value, or
23 e. has been commingled with other property which cannot be divided without difficulty,

24 it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), as

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26 ///

27 ///

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incorporated by Title 28, United States Code, Section 2461(c), to seek forfeiture of any other property of the defendant up to the value of the property subject to forfeiture.

A TRUE BILL.

/s/ Signature on file w/AUSA

FOREPERSON

MCGREGOR W. SCOTT
United States Attorney
KIRK E. SHERRIFF

By: **KIRK E. SHERIFF**
Assistant United States Attorney
Chief, Fresno Office

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)
Plaintiff,) 1:19-cr-00275-DAD
vs.) CHANGE OF PLEA
EDGAR BARRERA,)
Defendant.)

Fresno, California Thursday, June 18, 2020

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES OF COUNSEL:

For the Government: **STEPHANIE STOKMAN**
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For the Defendant: **Federal Defender's Office
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Suite 330
Fresno, CA 93721
BY: PEGGY SASSO**

REPORTED BY: RACHAEL LUNDY, CSR, RPR, Official Reporter

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

1 impose a sentence that's either more severe or less severe
2 than that called for by those guidelines?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: Do you understand that parole has been
5 abolished in the federal criminal justice system, and if you
6 are sentenced to a term of imprisonment in this case, you will
7 not be released on parole?

8 THE DEFENDANT: Yes.

9 THE COURT: Do you understand that both you and the
10 government may have the right to appeal from a sentence that I
11 impose?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: You've been charged in the indictment in
14 Count 1 with the being a convicted felon in possession of a
15 firearm, in violation of the 18 U.S.C. Section 922(g)(1). Do
16 you understand the nature of that charge, the essential
17 elements of that offense, and what the government would be
18 required to prove in order to convict you of that crime?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: Ms. Sasso, is there going to be an
21 admission to the forfeiture allegation?

22 MS. SASSO: Yes, Your Honor.

23 THE COURT: Okay. And so long as we're talking about
24 that, Mr. Barrera, there is a forfeiture allegation in the
25 indictment that, if proven -- and Ms. Sasso indicates that you

1 intend to admit to that allegation here this morning -- that
2 given that admission, that the property, specifically, any
3 firearms, ammunition, or magazines involved in the commission
4 of this offense, will be forfeited to the government, and we
5 won't discuss that matter any further at the time of your
6 sentencing. I'll simply sign an order forfeiting the property
7 to the government at that time. Do you understand that?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Have you seen a copy of the indictment,
10 the document setting forth in writing that charge in Count 1
11 and the forfeiture allegation?

12 THE DEFENDANT: I have seen a document, but I'm
13 pretty confident what my attorney has given me.

14 THE COURT: Way back when you appeared in front of a
15 magistrate judge for arraignment, I'm pretty sure that's when
16 you entered your not guilty plea to the indictment. You had a
17 copy of the indictment there at the table with you.

18 THE DEFENDANT: Maybe. I'm pretty sure I have,
19 because I still have all the paperwork.

20 THE COURT: Okay. Do you have any questions about
21 the nature of the charge that's been alleged against you?

22 THE DEFENDANT: No, I do not.

23 THE COURT: All right. The maximum possible penalty
24 for this offense as alleged in Count 1 --

25 MS. STOKMAN: Judge, if I may.

1 THE COURT: Yes.

2 MS. STOKMAN: He was advised of this with the
3 magistrate judge, but we also just wanted to have the Court
4 advise him that the government believes he falls under the
5 armed career criminal. So that would make the minimum of this
6 offense 15 years, with a maximum of life.

7 MS. SASSO: And we don't agree, but we under -- we
8 agree that -- that as it applies to -- if that applies too,
9 the maximum would be life, and a minimum of 15. If it
10 doesn't, the maximum is 10.

11 THE COURT: So Mr. Barrera, do you understand that if
12 the Court ultimately concludes that you do fall within the
13 armed career criminal provision of what is at 18 U.S.C.
14 Section 924(e) --

15 THE DEFENDANT: Yes, sir.

16 MS. STOKMAN: Yeah.

17 THE COURT: -- that the maximum possible penalty for
18 this offense is a mandatory minimum of 15-year term of
19 imprisonment up to a maximum of life imprisonment, a fine of
20 up to \$250,000, a five-year term of supervised release, and a
21 mandatory \$100 special assessment.

22 I understand that -- I understand your lawyer is
23 going to be arguing that you do not fall within that
24 provision, and will be taking the position that the maximum
25 possible punishment is a ten-year term of imprisonment. But

1 do you understand that potentially the maximum here is a
2 mandatory minimum 15 up to a maximum of life?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: Do you understand what supervised release
5 is?

6 THE DEFENDANT: Yes, I do.

7 THE COURT: Are you a citizen of the United States?

8 THE DEFENDANT: Yes, I am.

9 THE COURT: Are you presently on parole or probation
10 for any other offense or --

11 THE DEFENDANT: No.

12 THE COURT: Okay. Are you currently facing any other
13 criminal charge in this court or in any other court?

14 THE DEFENDANT: No, Your Honor.

15 THE COURT: You have a right to stand by your
16 previously entered plea of not guilty too if you desire to do
17 so. Do you understand that right?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: Also you have a right to a jury trial in
20 this charge. Do you understand that right?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: Do you understand that at that trial you
23 would be presumed innocent, the government would have the
24 burden of proving you guilty of the charge by competent
25 evidence and beyond a reasonable doubt?

1 THE DEFENDANT: Yes.

2 THE COURT: At that trial, you would have the right
3 to be assisted by counsel, the right to see, hear, and
4 question the witnesses for the government through your
5 attorney. You'd also have the right to object to evidence
6 offered by the government and to offer evidence on your own
7 behalf. Do you understand each of these rights?

8 THE DEFENDANT: Yes, I do.

9 THE COURT: Do you understand that at that trial you
10 would have the right to testify in your own defense, but that
11 if you elected not to do so, no inference of guilt could be
12 drawn from the fact that you chose not to testify?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: Do you understand by entering a plea of
15 guilty to the charge in Count 1 here this morning, you'll
16 giving up all of these rights as to that charge, because
17 there'll be no trial, you'll no longer be presumed innocent of
18 the charges, because you'll be telling me you are, in fact,
19 guilty of it?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: Is that what you wish to do, plead guilty
22 to Count 1 of the indictment and admit the forfeiture
23 allegation?

24 THE DEFENDANT: That I do.

25 THE COURT: Counsel join in the waiver?

1 MS. SASSO: Yes, Your Honor.

2 THE COURT: And Mr. Barrera, has anyone made any
3 promises to you in order to get you to plead guilty?

4 THE DEFENDANT: No.

5 THE COURT: Has anyone threatened you or anyone close
6 to you in order to get you to plead guilty?

7 THE DEFENDANT: No, sir.

8 THE COURT: Counsel, have I overlooked anything
9 required under Rule 11?

10 MS. SASSO: No, Your Honor.

11 MS. STOKMAN: No.

12 THE COURT: Mr. Barrera, what then is your plea to
13 the charge that on or about November 10, 2019, in Fresno
14 County, State and Eastern District of California, knowing that
15 you had previously been convicted of a crime punishable by a
16 term of imprisonment exceeding one year, specifically, the
17 three convictions for corporal injury to a spouse and in
18 violation of California Penal Code Section 273.5, that you
19 suffered on or about January 6, 2010?

20 MS. SASSO: Your Honor, just to be clear, we're not
21 pleading to -- we have a factual basis that we submitted to
22 the Court. So he's not pleading because he doesn't know
23 specifics. So he's admitting that he has three prior
24 convictions for violating 273.5.

25 THE COURT: All right. Sir, what is your plea to the

1 charge that on or about November 10, 2019, in Fresno County,
2 State and Eastern District of California, you -- knowing that
3 you had been previously convicted of a crime punishable by a
4 term of imprisonment exceeding one year, specifically prior
5 convictions for California Penal Code Section 273.5, you did
6 knowingly possess a firearm, the New England 12-gauge shotgun,
7 in and affecting interstate commerce, and that firearm had
8 previously been transported in interstate or foreign commerce,
9 all in violation 18 U.S.C. 922(g)(1); guilty or not guilty,
10 sir?

11 THE DEFENDANT: Guilty.

12 THE COURT: And do you admit or deny the forfeiture
13 allegation alleged in the indictment?

14 THE DEFENDANT: I believe I do admit.

15 THE COURT: All right. And a factual basis for that
16 plea?

17 THE DEFENDANT: I don't understand.

18 THE COURT: Oh, one of the lawyers. I'm not sure
19 which, whether Ms. Stokman or Ms. Sasso is going to read the
20 factual basis into the record, but when they do, please listen
21 to what they say.

22 THE DEFENDANT: All right.

23 MS. SASSO: If you want, I can read it, or did you
24 have -- did you have it?

25 MS. STOKMAN: -- if you want to read it. But I'm

1 pulling it up if you want me to read it. I closed my email to
2 prevent noise on the record, and it was attached to that. So
3 I'm pulling that up now if you'd like me to read it.

4 MS. SASSO: It doesn't matter to me.

5 MS. STOKMAN: Give me one second, please.

6 MS. SASSO: Okay.

7 MS. STOKMAN: Judge, in the factual basis that
8 Ms. Sasso and Mr. Barton agreed upon that, on or about
9 November 10, 2019, in the County of Fresno, State and Eastern
10 District of California, the defendant knowingly possessed a
11 firearm, specifically, a New England 12-gauge shotgun with
12 serial number 208212, which had been shipped and transported
13 in interstate and foreign commerce.

14 At the time he possessed the firearm, the defendant
15 knew that he had three prior convictions for violating
16 California Penal Code Section 273.5, and at the time he
17 possessed the firearm, the defendant knew that each of the
18 prior convictions for violating California Penal Code Section
19 273.5 were convictions for a crime punishable by imprisonment
20 for a term exceeding one year.

21 THE COURT: And that's what the government would
22 prove if this case proceeded to trial, correct?

23 MS. STOKMAN: Correct, yes.

24 THE COURT: And Mr. Barrera, is that an accurate
25 statement as to what it is you did?

1 THE DEFENDANT: Yeah, pretty accurate.

2 THE COURT: Any change to it at all?

3 THE DEFENDANT: No, sir.

4 THE COURT: So it is an accurate statement as to what
5 it is you did?

6 THE DEFENDANT: That it is, sir.

7 THE COURT: All right. I find that there's a factual
8 basis for Mr. Barrera's plea of guilty. I find that he
9 understands the nature of the charge and the consequences of
10 his plea.

11 I also find that he understands his constitutional
12 rights, and his plea of guilty was freely and voluntarily
13 made. Accordingly, I accept that plea of guilty.

14 The matter will be referred to the probation office
15 for preparation of a presentence report. Sentencing to be
16 scheduled for?

17 THE CLERK: September 11th, at 8:30.

18 THE COURT: Is that date agreeable?

19 THE DEFENDANT: I didn't hear the date.

20 THE COURT: September 11th, at 8:30. Is that date
21 agreeable to counsel?

22 MS. SASSO: Yes, Your Honor.

23 MS. STOKMAN: It is, yes.

24 THE COURT: All right. Anything further?

25 MS. SASSO: No, Your Honor. Thank you.

**30a
APPENDIX F**

1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HON. DALE A. DROZD

UNITED STATES OF AMERICA,) 1:19-cr-00275 DAD-SKO
Plaintiff,) SENTENCING
vs.)
EDGAR BARRERA,)
Defendant.)

Fresno, California

Thursday, October 29, 2020

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES OF COUNSEL:

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BY: **PEGGY SASSO**

REPORTED BY: RACHAEL LUNDY, CSR, RPR, Official Reporter

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

1 October 2nd, the defendant's formal objections to the
2 presentence report, filed October 9th, the defense sentencing
3 memorandum, filed October 16th, the government's reply to
4 formal objections and sentencing memorandum, filed
5 October 16th. And of course, I've also reviewed the Ninth
6 Circuit's decision in *United States vs. Walker*, found at
7 953 F.3d 577, Ninth Circuit, 2020.

8 Is there anything else I should have received in
9 connection with sentencing?

10 MS. SASSO: Not from the defense.

11 MR. GILIO: Not from the government, Your Honor.

12 THE COURT: Let's take up the objections then.

13 Ms. Sasso, I understand the objections. I know from
14 reading *Walker* that you handled that case. I know that an
15 appeal is pending before the U.S. Supreme Court. All your
16 objections -- I think, all of the more nuanced objections were
17 addressed by the probation officer, noting the defense
18 position at various aspects of the presentence report where
19 there might have been disagreements.

20 But your basic objection is based upon an argument
21 that *Walker* was wrongly decided, and your position that it
22 should be, and you hope that it will be, eventually
23 overturned.

24 Is that fair to say?

25 MS. SASSO: Yes -- yes, Your Honor. There's two

1 prongs that were raised in terms of -- that are not, we don't
2 believe, three predicate violent felonies, proper application
3 of *LocaI v. Ashcroft* would strongly suggest that these are
4 not violent felonies.

5 Also, this Court cannot make judicial findings that
6 have not been established by a jury or pled beyond a
7 reasonable doubt. There's no evidence here that these
8 offenses were committed on -- well, certainly, there was no
9 admission at any time or proved to a jury that these offenses
10 were committed on occasions different to one another.

11 I would note that I think on this record the Court
12 doesn't need to reach any of those issues, because the
13 government has not put forth Shepard documents that would
14 allow this Court to, even if it was going to engage in the
15 practice of judicial fact finding, to increase a mandatory
16 minimum or statutory maximum, which I strongly objects to and
17 do not believe that the Sixth Amendment or the due process
18 permits this Court to do that. But even if this Court was
19 going to do that, the record isn't here.

20 All that is in this record is documents showing there
21 were two convictions that were secured in 2010 for events that
22 were alleged to have been committed within a range of four
23 months, on/or about. There's no specific finding at any time
24 when those offenses actually occurred.

25 And then, with respect to the third conviction, all

1 we have is a change of plea form with no relevant facts that
2 there's been -- there's -- this Court could not possibly, on
3 this record, even if it was going to engage in additional fact
4 finding, find beyond a preponderance of the evidence, let
5 alone beyond a reasonable doubt, that these three offenses
6 were committed on occasions different from one another.

7 So I don't think this Court even needs to get to
8 *Walker*. But yes, we have made those objections.

9 THE COURT: Anything, Mr. Gilio, the government
10 wishes to add in that regard?

11 MR. GILIO: Your Honor, I would just point the Court
12 to, I believe, the document is 21-1. That's the document that
13 Ms. Sasso seems to be referring to. And in that document, it
14 has the advisement of rights and change of plea for all three
15 of these convictions.

16 The two in 2010, one of them was signed 1-6-2010.
17 The second one was 5-6-2010. And then the third conviction,
18 which was five years later, was signed 1-16-2015. And
19 included in that document for the first two convictions, the
20 2010 convictions, there was plenty of additional Shepard
21 documents that the Court can look at.

22 And the only -- I guess, I'll make two other points.
23 One would be that, I believe, in the -- in the PSR, there is
24 statements about his prior offenses, you know, in the criminal
25 history section. I don't think those were objected to as far

1 as the dates included there.

2 And the final point I would make, obviously my point
3 there is that these offenses occurred on different dates.
4 There's police reports that outline they occurred on different
5 dates. Now you have these additional Shepard documents that
6 show when the convictions actually occurred.

7 And the final point I would make -- AUSA Barton has
8 asked me to remind the Court as well -- the defendant pled to
9 an indictment that listed the conviction dates, and those were
10 three separate conviction dates listed in the indictment. And
11 with that, I would submit, Your Honor.

12 THE COURT: Anything in reply, Ms. Sasso?

13 MS. SASSO: Yes. The government is attempting to
14 rely on non-Shepard documents that -- the PSR, police reports,
15 those are not Shepard documents.

16 The only document that the government provided with
17 respect to the last conviction is a change of plea form that
18 says absolutely nothing about whether the conviction -- when
19 the offense was committed.

20 So we have absolutely no idea based on the Shepard
21 documents that the Court has -- that the government has
22 provided to this Court.

23 Additionally, there was a -- Mr. Barrera did not
24 plead to the indictment. He pled to a factual basis. So he
25 at no time has pled to when these offenses were committed.

1 There's absolutely no evidence that this Court has that can
2 establish that these offenses were committed on occasions
3 separate from one another.

4 THE COURT: The Court is overruling all of the
5 defense objections, in light of the decision -- the bind
6 decision found, Ninth Circuit, in *United States vs. Walker*
7 found at 953 F.3d 577, decided March 20th, 2020, as well as
8 based upon the documents that are attached to the final
9 presentence report, and the entry of plea to the charge, and
10 the factual basis for that plea.

11 When considered in combination, the Court is
12 satisfied that as addressed in *Walker*, that it is apparent to
13 the Court by any applicable standard that the three separate
14 offenses -- the three separate prior offenses did occur on
15 different dates, separate dates. At least a couple of them,
16 or one of them, a lengthy period of time removed from the
17 others, but it clearly was three separate incidents. And I
18 think there's sufficient documentation before me to establish
19 that.

20 In all other respects, *Walker* has the next -- and I
21 took it the *Walker* opinion has rejected the defense arguments
22 here. And based upon that binding authority, I feel I have no
23 choice but to reject them as well. So all objections are
24 overruled.

25 MS. SASSO: For the record, Your Honor, could you

1 establish/set forth what documents you're relying on to
2 establish that he has committed offenses on three separate
3 occasions?

4 THE COURT: The ones attached to the final
5 presentence report, that's what I said, as well as the entry
6 of plea.

7 I think Mr. Gilio referred to docket number 21. That
8 was the draft presentence report. I'm referring to the final
9 presentence report, the docket number 22.

10 MS. SASSO: Thank you, Your Honor.

11 THE COURT: There being no other objections to the
12 presentence report in this case, I find -- well, stop. Excuse
13 me.

14 Before I go any further. Ms. Sasso, have you had the
15 opportunity to review the presentence report and discuss it
16 with Mr. Barrera in detail?

17 MS. SASSO: I have, Your Honor.

18 THE COURT: And, Mr. Barrera, have you reviewed the
19 presentence report in your case and discussed it with your
20 attorney in detail?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: There being no other formal objections to
23 the presentence report, I adopt the findings of that report,
24 find them to be true and correct. I, therefore, find the
25 applicable offense level is 30.

1 Mr. Barrera's criminal history places him in category
2 Roman Numeral IV. That guideline calculation would normally
3 result in an advisory sentencing guideline range calling for a
4 term of imprisonment of between 135 and 168 months. However,
5 in light of the mandatory minimum sentence here, the guideline
6 range becomes the mandatory minimum sentence of 180 months.

7 The sentencing guidelines are only the beginning
8 point in the sentencing process. The Court is ultimately to
9 impose a sentence that's reasonable as described by the
10 Supreme Court in its decisions in *Booker* and *FanFan*.
11 Therefore, I will give due weight to the statutory factors at
12 18 U.S.C. Section 3553(a).

13 However, Congress has essentially stripped the Court
14 of its ability to take into account those factors by imposing
15 this mandatory minimum sentence. As I'll state again later, I
16 do not think a 180 month's sentence in this case is
17 reasonable. I think it's anything but reasonable. But I've
18 been mandated by Congress to impose it.

19 Is there any legal cause why judgment and sentence
20 should not now be pronounced?

21 MS. SASSO: Your Honor, I think Mr. Barrera would
22 like to allocute, and I -- I just would like to echo the --

23 THE COURT: I'm sorry. Ms. Sasso, you just broke up.
24 I will get to Mr. Barrera last -- or Mr. Barrera last.

25 MS. SASSO: Okay.

1 THE COURT: If you can go back and repeat. I don't
2 think either myself or the court reporter got your entire
3 sentence there.

4 MS. SASSO: Okay.

5 I just wanted to say that I agree that, really, the
6 sentence of 15 years in this case is really pretty obscene.
7 It's not what Congress intended. It doesn't satisfy the
8 penological objectives of 3553(a). It makes no policy sense
9 whatsoever.

10 We're dealing with someone here who has a serious
11 drug addiction, who was in a dysfunctional relationship with
12 another person when they were in their mid and early 20s.
13 Their relationship stabilized. They were both -- at that
14 time, they were both using drugs. They became sober and
15 clean. The relationship stabilized over five years ago. They
16 are the parents of three young children, children whose
17 prospect for future success and stability is markedly reduced
18 with the removal of their father from their lives.

19 Mr. Barrera is someone who actually figured out how
20 to get his G.E.D. in Fresno County Jail. That's a feat that
21 very few federal inmates accomplish. He is ready and eager to
22 go to college. And he would otherwise have a bright future
23 ahead of him.

24 He has strong community support. He needs a
25 comprehensive drug treatment program, not 15 years in custody.

1 That's a sentence that would likely destroy his life
2 and possibly those of his children as well. And the cycle
3 repeats. It makes no sense, and it's not what Congress
4 intended.

5 This guideline, I think, under 3553(a), a guideline
6 sentence -- well, if I would calculate the guidelines, it
7 would be 21 months, and I think that represents a sentence
8 under 3553(a) which is sufficient, but not greater than
9 necessary, to accomplish the penological goals of sentencing.

10 THE COURT: Submitted?

11 MS. SASSO: Yes, Your Honor.

12 THE COURT: Mr. Gilio, anything the government wishes
13 to add with respect to sentencing?

14 MR. GILIO: Submitted, Your Honor. Submitted, Your
15 Honor. Thank you.

16 THE COURT: I want to make one thing clear before I
17 turn to Mr. Barrera. I do not mean to diminish the
18 seriousness of his prior offenses. They are very serious.
19 He's obviously got serious, serious anger management control
20 issues. Engaging in multiple prior offenses involving
21 domestic violence is nothing to be taken lightly. It's very,
22 very serious conduct.

23 The current offense, being a convicted felon in
24 possession of a firearm, also very serious conduct. Not at
25 all suggesting that those offenses are not serious ones. I'm

1 only indicating that, in my view, were I not bound by the
2 sentence guideline, and I, in some respects, I really have no
3 idea what Congress did or did not intend. I only know what
4 they did. But this is an example of a case, in my view, that
5 if I really -- if I wasn't bound, there's zero possibility,
6 zero, that I would impose a 180-month sentence in this case.
7 It's, in my view, absurd; clearly not called for.

8 That doesn't mean a significant prison sentence isn't
9 called for, and I'd probably no doubt impose one. But it
10 wouldn't be anything close to 180 months.

11 There's underlying issues here that should be
12 addressed, and punishment is certainly necessary. It's just,
13 this sentence makes no sense, in my view, and is not
14 proportional, is clearly unduly harsh, and yet, I have no
15 choice in the matter.

16 Mr. Barrera, is there -- Mr. Barrera, is there
17 anything you wish to say to me before I impose sentence in
18 your case?

19 THE DEFENDANT: Yeah. For first and foremost, I
20 would like to say thank you for stating what you just stated.
21 And I completely agree with what you just said.

22 I want to thank you for taking the time to address my
23 letter. I won't say that the charge in question should be
24 overlooked, only that you see it at face value, that I'm not a
25 career criminal. This is my first and last possession case

1 that I will receive, given the chance. I made a mistake that
2 I feel has taken away my life, the relationship with my
3 children, the presence of my mother. My biggest downfall in
4 every case in my past has, and always will be, drugs.
5 Although drugs have not been in any of my cases, I've been
6 more than familiar with them for more than half of my
7 32 years. I know that I've made mistakes in the past, and
8 some worse than others, but I also know that I do not belong
9 in the wide net of what is considered the Career Criminal Act
10 for my first and only felony possession.

11 What I need is rehab to teach me my coping strategies
12 that I failed to learn when I was 13 years old. I, myself,
13 enrolled in a substance abuse class, and pinpointed my
14 triggers. I just need to further my knowledge on how to cope
15 after my triggers feel overwhelming. Just look at it at face
16 value, and you'll be able to see 15 years to life is too steep
17 a sentence. Just see it in your heart, and I just want to say
18 thank you again.

19 THE COURT: Pursuant to the -- thank you,
20 Mr. Barrera. You know, I hope that you can find some way to
21 make some use of the time, because there are serious issues
22 that you've got to deal with.

23 THE DEFENDANT: I best believe that I realize what
24 they are, and I know what I will do while I'm in prison. I
25 just -- I just feel this sentence is too steep. Not saying

1 that I deserve to be let go. I understand that a sentence or
2 some type of punishment is imposed and should be imposed. I
3 do not -- I do not reject any of that. I know I messed up.
4 So I -- I'm free to do the time that I need to do. I just
5 don't feel that 15 years is the time that should be given.

6 THE COURT: Pursuant to the Sentencing Reform Act of
7 1984, it's the judgment of the Court that the defendant
8 Edgar Barrera is hereby committed to the custody of the Bureau
9 of Prisons to be imprisoned for a term, which the Court is
10 imposing reluctantly, but out of mandatory sentencing imposed
11 upon the Court by Congress, a term of imprisonment is imposed
12 of 180 months.

13 The defendant shall pay a special assessment of \$100,
14 payment to begin immediately. The Court finds the defendant
15 does not have the ability to pay a fine; imposition of a fine
16 is therefore waived.

17 If a preliminary order of forfeiture has been filed,
18 which I do not have in front of me, so it may not have been as
19 to this defendant, it shall be incorporated in the judgment.

20 Upon release from imprisonment, the defendant shall
21 be placed on supervised release for a term of 60 months.

22 Within 72 hours of release from the custody of the
23 Bureau of Prisons, the defendant shall report in person to the
24 probation office in the district to which he is released.

25 While on supervised release, the defendant shall not

<p>SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO 1100 Van Ness Avenue Fresno, California 93724-0002</p>		<p>FOR COURT USE ONLY</p> <p>FILED</p> <p>JAN 16 2005</p> <p>FRESNO COUNTY SUPERIOR COURT By _____ f DEPUTY</p>
<p>PEOPLE OF THE STATE OF CALIFORNIA</p> <p>vs.</p> <p>DEFENDANT: <u>B Areosa, Edgar</u></p>		<p>CASE NUMBER:</p> <p>F1590007</p>
<p>FELONY ADVISEMENT, WAIVER OF RIGHTS, AND PLEA FORM</p>		

I understand the nature of the charges against me. I request to withdraw my plea of not guilty and now plead GUILTY NO CONTEST to the following violation(s) of law (list counts, code sections, priors, and any conditions of the plea):

Penal Code 273.5(f)(1) Adult 1 prior DV
com.v. (2-24-10)

Stipulated term of mitigation by

53

RIGHT TO AN ATTORNEY:

I understand I have the right to be represented by an attorney at all stages of the proceedings, and if I am unable to afford an attorney, the court will appoint one for me. I have had enough time to discuss my case and all possible defenses with my attorney.

EB

CONSTITUTIONAL RIGHTS:

I understand I am presumed innocent and the State is required to prove me guilty beyond a reasonable doubt. I also understand that I have the following constitutional rights as to all matters charged against me:

I understand this right I give up this right

1. The right to a speedy, public JURY or COURT TRIAL.
2. The right to be CONFRONTED by WITNESSES against me; that is, to see, hear and question all witnesses against me.
3. The right to NOT INCRIMINATE MYSELF; that is, not to be compelled to testify against myself though I may testify if I choose to do so.
4. The right to PRESENT EVIDENCE at no cost to me and to have the court issue subpoenas to bring into court all witnesses and evidence favorable to me.

EB	EB	✓

CONSEQUENCES OF PLEA OF GUILTY OR NO CONTEST: I understand:

✓ 1. If I am presently on parole, postrelease community supervision, mandatory supervised release, or probation, my change of plea could be a reason for finding me in violation of my parole, postrelease community supervision, mandatory supervised release, or probation.

✓ 2. If I am not a citizen, my change of plea can result in my deportation, exclusion from admission to the United States, and/or a denial of naturalization. **Deportation may be mandatory for this offense.**
I have fully discussed this matter with my attorney and understand the serious immigration consequences of my plea.

✓ 3. The maximum sentence I can receive as a result of my plea includes:

58

FB

3. The maximum sentence I can receive as a result of my plea includes:

a. 5 years 0 months in state prison. I could be placed on parole at the conclusion of said term for a maximum period of 3, with 1 year return to prison for every parole violation. I could also be released from prison at the conclusion of said term on a term of postrelease community supervision for a maximum period of 3 years, with up to 180 days in custody of the County Jail as the result of each violation of postrelease community supervision. If I should receive probation, it could be for up to 5 years and could include up to 1 year in custody. I understand that if I violate any terms or conditions of probation I can be sent to state prison for the maximum term.

18

b. I can also be fined up to \$10,000 and ordered to pay restitution in the minimum amount of \$200, and up to \$10,000. EB

c. If I am addicted to or in danger of becoming addicted to dangerous drugs, I can be sent to the California Rehabilitation Center. EB

4. Other possible consequences of this plea may include (e.g. registration): DV probation offense EB

5. I understand that I will be required to provide buccal swab samples and any blood specimens or other biological samples for law enforcement identification analysis. EB

6. The matter of probation and sentence is to be determined solely by the court. EB

7. I am entering into my plea freely and voluntarily, without fear or threat to me or anyone closely related to me. EB

8. The facts on which I base my plea are: People v. West EB

I declare under PENALTY OF PERJURY, under the laws of the State of California, that I have read, understood, and initialed each item above, and everything on this form is true and correct.

Date: 1/16/15

Signed: Edgar Barrera
(Defendant)

WAIVER OF JUDGE

I understand that I have the right to enter my plea before and be sentenced by a judge. I give up this right and agree to enter my plea and be sentenced by a temporary judge.

Date: _____

Signed: _____
(Defendant)

ATTORNEY'S STATEMENT

I am the attorney of record for the defendant and have reviewed this form with my client. I have explained to the defendant each of his/her rights and answered all of the defendant's questions with regard to this plea. I have discussed the facts of the case with the defendant, and explained the consequences of this plea, the elements of the offense(s), and the possible defense(s). I concur with this plea and the defendant's decision to waive his/her constitutional rights.

Date: 1-16-2015

Signed: EDGAR BARRERA
(Attorney for Defendant)

INTERPRETER'S STATEMENT (IF APPLICABLE)

I, _____, have been duly sworn and have truly translated this form to the defendant in the _____ language. The defendant indicated that (s)he understood the contents of the form, and (s)he has initialed the form.

Date: _____

Signed: _____
(Court Interpreter)

COURT'S FINDINGS AND ORDER

The Court, having reviewed this form and having questioned the defendant concerning the defendant's constitutional rights, accepts the defendant's plea(s) and the factual basis for the plea(s), and finds that the defendant has expressly, knowingly, understandingly, and intelligently waived his/her constitutional rights. The Court finds that the defendant's plea(s) is freely and voluntarily made with an understanding of the nature and consequences of the plea(s). The defendant is convicted on the basis of his/her plea(s).

The Court orders this form filed and entered in this case.

Date: 1-16-15

Signed: Judge of Superior Court
(Judge of Superior Court)

APPENDIX H

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
STEVEN GERARD WALKER,
Defendant-Appellant.

No. 18-10211

D.C. No.
1:16-cr-00088-LJO-
SKO-1

OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Argued and Submitted October 24, 2019
San Francisco, California

Filed March 20, 2020

Before: Michael J. Melloy,* Jay S. Bybee, and N. Randy
Smith, Circuit Judges.

Opinion by Judge Bybee

* The Honorable Michael J. Melloy, United States Circuit Judge for
the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

SUMMARY**

Criminal Law

The panel affirmed a criminal judgment in a case in which the defendant, who pleaded guilty to being a felon in possession of a firearm, challenged the application of a fifteen-year-minimum sentencing enhancement under the Armed Career Criminal Act (ACCA) based on his 1998, 1999, and 2014 domestic-violence convictions under California Penal Code § 273.5.

The defendant argued that his § 273.5 convictions do not qualify as categorical violent felonies under the ACCA. The panel held that this contention is foreclosed by *United States v. Laurico-Yeno*, 590 F.3d 818 (9th Cir. 2010); *Banuelos-Ayon v. Holder*, 611 F.3d 1080 (9th Cir. 2010); and *United States v. Ayala-Nicanor*, 659 F.3d 744 (9th Cir. 2011). Because no Supreme Court or en-banc opinion from this court has obviously limited or otherwise abrogated those decisions, and because the defendant did not show that California law regarding § 273.5 has changed, the panel reaffirmed *Laurico-Yeno* and its progeny.

The defendant also argued that the Sixth Amendment requires a jury, not a sentencing judge, to find that a defendant's prior convictions were for crimes on different occasions, and that the district court therefore transgressed the Sixth Amendment by deciding that the defendant had committed three separate felonies. The panel held that this

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

argument is foreclosed by *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007) (en banc), which held that a sentencing judge may find the dates of prior offenses in deciding if a defendant has committed three or more violent felonies. The panel explained that because *Mathis v. United States*, 136 S. Ct. 2243 (2016), only proscribed judges from determining whether a given factual scenario substantively qualifies as a predicate offense, *Grisel* is not clearly irreconcilable with *Mathis*'s reasoning or theory.

COUNSEL

Peggy Sasso (argued), Assistant Federal Defender; Heather E. Williams, Federal Defender; Office of the Federal Public Defender, Fresno, California; for Defendant-Appellant.

Ross Pearson (argued), Assistant United States Attorney, Camil A. Skipper, Appellate Chief; McGregor W. Scott, United States Attorney; United States Attorney's Office, Fresno, California; for Plaintiff-Appellee.

OPINION

BYBEE, Circuit Judge:

Defendant Steven Walker challenges the application of a fifteen-year-minimum sentencing enhancement under the Armed Career Criminal Act (ACCA) to his sentence for being a felon in possession of a firearm. He makes two arguments. First, he says that his predicate domestic-violence convictions do not qualify as categorical violent felonies under the ACCA. Second, he claims that the district court

transgressed the Sixth Amendment by deciding that Walker had committed three separate felonies. Walker's assertions, however, are foreclosed by precedent. As such, we affirm.

I. FACTS AND PROCEDURAL BACKGROUND

Walker was found in possession of a firearm. He had three prior felony convictions for "willfully inflict[ing] corporal injury" on a spouse or cohabitant in violation of California Penal Code § 273.5. His three prior convictions occurred in 1998, 1999, and 2014.

Walker pleaded guilty to being a felon in possession of a firearm. But he did not admit to having been convicted of three separate incidents violating § 273.5. The United States presented certified copies of the prior judgments. The district court determined that Walker had been previously convicted of three separate violent felonies, requiring that he be sentenced to a mandatory-minimum fifteen-year sentence under the ACCA. *See* 18 U.S.C. § 924(e)(1). He appeals this sentence.¹

II. DISCUSSION

Walker raises two issues concerning his sentence. First, he claims that his three prior convictions under California Penal Code § 273.5 do not qualify as a "violent felony" under the ACCA, 18 U.S.C. § 924(e)(2)(B)(i). Second, he argues

¹ We review de novo a district court's determination that a prior conviction qualifies as a "violent felony" under the ACCA. *United States v. Walton*, 881 F.3d 768, 770–71 (9th Cir. 2018). Constitutional questions are also reviewed de novo. *United States v. Holden*, 908 F.3d 395, 399 (9th Cir. 2018).

that it was error under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for the district court to have determined that his prior convictions were separate incidents, and that such determination had to be made by a jury. We will consider each in turn.

A. *Convictions Under § 273.5 Constitute a Categorical “Violent Felony”*

The ACCA makes it “unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . [to] possess in or affecting commerce, any firearm” 18 U.S.C. § 922(g)(1). Any person who violates § 922(g)(1) “and has three previous convictions . . . for a violent felony” shall be imprisoned for a minimum of fifteen years. *Id.* § 924(e)(1). A prior conviction may qualify as a “violent felony” only if it “has as an element the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i). Walker contends that his convictions under § 273.5 cannot qualify because intent to harm the victim is not an element of that crime.² Specifically, he points to several California cases speaking to how convictions may be obtained under various assault-and-battery statutes without showing an intent to harm the victim.

Walker’s argument, however, collides headlong with our precedents. In *United States v. Laurico-Yeno*, we determined that § 273.5 was a “crime of violence” for the purposes of U.S. Sentencing Guideline § 2L1.2(b)(1)(A). 590 F.3d 818,

² Section 273.5 provides in relevant part: “Any person who willfully inflicts corporal injury resulting in a traumatic condition upon a victim . . . is guilty of a felony.” Cal. Penal Code § 273.5(a).

821–23 (9th Cir. 2010). That provision increases a sentence if the defendant committed three or more “crimes of violence.” U.S. Sentencing Guidelines Manual § 2L1.2(b)(3)(E) (U.S. Sentencing Comm’n 2018). “Crime of violence” in the Sentencing Guidelines is defined identically to the phrase “violent felony” in the ACCA: “[a]ny other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.” *Id.* § 2L1.2 cmt. n.2. We therefore emphasized in *Laurico-Yeno* how § 273.5 punishes a “person who willfully inflicts” injury upon a cohabitant “where willfully is a synonym for intentionally.” 590 F.3d at 821.

In *Banuelos-Ayon v. Holder*, we held that § 273.5 “is a categorical crime of violence” for the purposes of 18 U.S.C. § 16(a), which has language identical to § 924(e)(1) and U.S.S.G. § 2L1.2 Application Note 2. 611 F.3d 1080, 1086 (9th Cir. 2010). We specifically noted that under § 273.5 a defendant must “willfully inflict[] . . . a *direct application of force* on the victim.” *Id.* at 1084 (emphasis in original) (quoting *People v. Jackson*, 91 Cal. Rptr. 2d 805, 810 (Cal. Ct. App. 2000)).

We reaffirmed both *Laurico-Yeno* and *Banuelos-Ayon* in *United States v. Ayala-Nicanor*, 659 F.3d 744, 753 (9th Cir. 2011). Ayala argued that *Johnson v. United States*, 559 U.S. 133 (2010), undermined *Laurico-Yeno* because even a “slight touching” might constitute domestic violence under § 273.5. *Ayala-Nicanor*, 659 F.3d at 749–50. We were not persuaded by the argument that several California Court of Appeal decisions showed minor touching could violate § 273.5. *Id.* at 750. We explained that *Laurico-Yeno* had determined that minimal touching could not give rise to a conviction under

§ 273.5. *Id.* at 749–50. We concluded that “nothing in *Johnson* undermines the validity of *Laurico-Yeno*, a conclusion we already reached in *Banuelos-Ayon*, and that we reaffirm today.” *Id.* at 752.

We find no grounds to depart from our prior reading of § 273.5 here.³ As a three-judge panel, “[w]e will not overrule the decision of a prior panel of our court absent an en banc proceeding, or a demonstrable change in the underlying law.” *Kohler v. Presidio Int’l, Inc.*, 782 F.3d 1064, 1070 (9th Cir. 2015). A panel may find controlling circuit precedent overruled when “the reasoning or theory of our prior circuit authority is *clearly irreconcilable* with the reasoning or theory of intervening higher authority.” *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) (emphasis added). Generic assertions that our precedents are inconsistent with higher authority will not do: “It is not enough for there to be ‘some tension’ between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to ‘cast doubt’ on the prior circuit precedent.” *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (citations omitted). Instead, “[t]he intervening higher precedent must be ‘clearly inconsistent’ with the prior circuit precedent.” *Id.*

No Supreme Court or en-banc opinion from our court has obviously limited or otherwise abrogated our decisions in

³ Walker also asserts that interpretations of California’s general assault-and-battery statutes are applicable here because § 273.5 is just another battery statute and simple battery could include non-violent touching. We considered and rejected this argument in *Laurico-Yeno*. 590 F.3d at 822. In that case we found this argument lacking and concluded that § 273.5 penalizes domestic violence with “intentional use of force that results in a traumatic condition.” *Id.*

Laurico-Yeno, *Ayala-Nicanor*, or *Banuelos-Ayon*. Nor has Walker shown that California law regarding § 273.5 has changed. We therefore reaffirm *Laurico-Yeno* and its progeny.

B. A Sentencing Judge May Determine the Number of Prior Convictions

We turn next to Walker’s contention that the Sixth Amendment forbids a sentencing judge from determining whether prior convictions occurred on separate occasions. For Walker to receive the fifteen-year mandatory minimum under the ACCA, he must have had “three previous [violent felony] convictions . . . committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). Walker asserts that the Sixth Amendment requires a jury, not a sentencing judge, to find that a defendant’s prior convictions were for crimes committed on different occasions. But, once again, Walker’s argument is foreclosed by circuit precedent.

Under *Apprendi*, facts that increase the penalty of a conviction must be found by the jury beyond a reasonable doubt. 530 U.S. at 490. However, a sentencing judge may find “the fact of a prior conviction” and enhance the sentence accordingly. *Id.* The specific issue here is whether a judge can find that each conviction was a “separate” incident for the purposes of applying the ACCA.

We previously held that a sentencing judge may find the dates of prior offenses in deciding if a defendant has committed three or more violent felonies. See *United States v. Grisel*, 488 F.3d 844, 845–47 (9th Cir. 2007) (en banc), *abrogated-in-part on other grounds by United States v. Stitt*, 139 S. Ct. 399 (2018). *Grisel* rejected the argument that the

sentencing judge's finding the dates of a given offense fell "outside [Apprendi's] prior-conviction exception." *Id.* at 846. We explained that "the date of the offense" is a fact determinable on "the face of the document demonstrating Defendant's prior conviction." *Id.* at 847. Hence, the date of the offense is intimately connected with the fact of a prior conviction. *Id.* As we noted in *Grisel*, our decision accorded with the decisions of no fewer than six circuits. *See id.* n.1; *see, e.g.*, *United States v. Burgin*, 388 F.3d 177, 186 (6th Cir. 2004) ("[T]he 'different occasions' requirement of § 924(e) cannot be significantly distinguished from 'the fact of a prior conviction.'"). And, since *Grisel*, at least one other circuit has found no Sixth Amendment problem with a sentencing judge determining whether a defendant's prior convictions were for crimes committed on separate occasions. *See, e.g.*, *United States v. Blair*, 734 F.3d 218, 228 (3d Cir. 2013) (rejecting the argument that a jury must find the dates of prior convictions and collecting cases explaining the same).

To get around *Grisel*, Walker claims that the case has been implicitly overruled by *Mathis v. United States*, 136 S. Ct. 2243, 2253 (2016). Specifically, he points to discussions in *Mathis* explaining that a "non-elemental fact" cannot be used to enhance sentences under the ACCA. Thus, he asserts that because the dates of his prior convictions are non-elemental facts, they cannot be considered by the sentencing judge for the purposes of applying the ACCA.

Context, however, shows that *Mathis* is not so encompassing as to abrogate *Grisel*. The only issue in *Mathis* was whether judges could determine if a crime was an ACCA predicate for statutes "enumerat[ing] various factual means of committing a single element" of a given crime—i.e., whether the categorical approach could apply to these types of

statutes. *Mathis*, 136 S. Ct. at 2249. The Supreme Court’s concern was that judges would necessarily consider the facts *underlying the offense*—an approach antithetical to ACCA jurisprudence. *Id.* at 2251. In line with the Court’s prior holdings, *Mathis* concluded that “a sentencing judge may look only to ‘the elements of the [offense], not to the facts of [the] defendant’s conduct’” in determining whether the state-law conviction was an ACCA predicate. *Id.* (alterations in original). *Mathis*, therefore, only proscribed judges from determining whether a given factual scenario substantively qualifies as a predicate offense. *See id.* at 2252 (“[A] judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense.”). *Mathis* did not speak to courts looking at dates of conviction.

With no on-point discussion in *Mathis* regarding how judges determine the number of prior offenses, Walker fails to show that *Grisel* “is clearly irreconcilable with [*Mathis*’s] reasoning or theory.” *Miller*, 335 F.3d at 893. To the extent that *Mathis* expresses broader disfavor of factual determinations by sentencing judges, it is not clear whether and how this disfavor extends beyond determining that a given state-law crime is an ACCA predicate. *See United States v. Dunn*, 728 F.3d 1151, 1156 (9th Cir. 2013) (“Although the circuit opinion need not be expressly overruled by the Supreme Court, both the circuit and Supreme Court cases must be ‘closely on point.’” (quoting *Miller*, 335 F.3d at 899)). Pointing to “‘some tension’ between [stray statements in *Mathis*] and prior circuit precedent” is not enough for the panel to consider *Grisel* overruled. *Lair*, 697 F.3d at 1207. In finding that Walker had been convicted of three or more violent felonies, the sentencing judge needed to look no further than the face

of the certified judgments to determine these convictions were for distinct acts. *See United States v. Harris*, 447 F.3d 1300, 1304 (10th Cir. 2006) (“The time, place, and substance of the prior convictions can ordinarily be ascertained from court records associated with those convictions, and the Supreme Court has held that the Constitution allows sentencing courts to rely on such records to make findings about prior convictions.”); *accord United States v. Thompson*, 421 F.3d 278, 282–83 (4th Cir. 2005) (explaining that the “date, statutory violation, and the like” are “as much a part of the conviction as the fact that twelve jurors agreed about the defendant’s guilt”); *United States v. Santiago*, 268 F.3d 151, 156 (2d Cir. 2001) (Sotomayor, J.) (“[W]e read *Apprendi* as leaving to the judge, consistent with due process, the task of finding not only the mere fact of previous convictions but other related issues as well.”). Thus, per *Grisel*, the district court did not err in making a finding that Walker committed three separate offenses.

III. CONCLUSION

Despite his best efforts, Walker has failed to demonstrate that our prior decisions are obviously inconsistent with intervening Supreme Court opinions. We therefore cannot and will not declare our prior precedents *causa non grata*. The judgment is

AFFIRMED.