No. 23-370

IN THE

Supreme Court of the United States

PAUL ERLINGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

This brief is submitted on behalf of the National Association of Federal Defenders ("NAFD") as *amicus curiae* in support of petitioner.[1]

NAFD, formed in 1995, is a nationwide, nonprofit, volunteer organization whose membership comprises attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. Each year, federal defenders represent tens of thousands of indigent criminal defendants in federal court, including hundreds sentenced under the Armed Career Criminal Act.

We wrote as amicus in *Wooden v. United States*, 595 U.S. 360 (2022), to offer an interpretation of ACCA's "occasions" requirement, to explain that any proper interpretation would require a jury determination, and to reassure the Court that this requirement is workable. We write now to reaffirm our views, as borne out by our post-*Wooden* experience.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Armed Career Criminal Act, 18 U.S.C. § 924(e), mandates a fifteen-year minimum sentence for unlawfully possessing a firearm, if the defendant has three qualifying convictions for "offenses committed on occasions different from one another." This "occasions" requirement turns not on the elements of prior convictions but on the factual circumstances surrounding prior offenses. *Wooden v. United States*, 595 U.S. 360 (2022).

As petitioner and the government agree, this factual inquiry falls squarely within *Apprendi v. New Jersey*'s rule that any fact that increases the statutory range of imprisonment must be proved to a jury beyond a reasonable doubt—not its narrow exception for the "fact of a prior conviction." 530 U.S. 466, 490 (2000). As such, the fact that offenses were "committed on occasions different from one another" is an element of ACCA.

This brief focuses on the real-world impact of this rule. We share our first-hand experience with the rights guaranteed by the Fifth and Sixth Amendments in the context of § 924(e)'s "occasions" requirement. And, although we recognize that efficiency and fairness do not provide the measure for whether these guarantees apply, proceedings since *Wooden* confirm that requiring the "occasions" element to be indicted by the grand jury, submitted to a petit jury, and proved beyond a reasonable doubt, provides a workable rule that courts are well-equipped to administer, including by protecting defendants from unwarranted prejudice.

ARGUMENT

Over the past quarter-century, this Court has repeatedly held that Fifth and Sixth Amendment guarantees apply to criminal punishment. *Mathis v. United States*, 579 U.S. 500 (2016); *Johnson v. United States,* 576 U.S. 591 (2015); *Descamps v. United States*, 570 U.S. 254 (2013); *Alleyne v. United States*, 570 U.S. 99 (2013); *S. Union Co. v. United States*, 567 U.S. 343 (2012); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002), *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 (1999).

These cases establish a bedrock rule: "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." *Apprendi,* 530 U.S. at 490. That is, for constitutional purposes, such a fact is an "element[]" of an aggravated offense. *Alleyne*, 570 U.S. at 111. And with respect to *Apprendi*'s exception for the "fact of a prior conviction," a judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Mathis*, 579 U.S. at 511–512.

The petitioner and government agree that, because ACCA's "occasions" requirement increases the penalty for unlawful firearm possession, and because the facts underlying this requirement cannot be determined solely with reference to "what crime, with what elements, the defendant was convicted

of," that requirement is an element, to which the rights to indictment by a grand jury, submission to a petit jury, and proof beyond a reasonable doubt attach. This Court should endorse that position.

I. The Fifth and Sixth Amendment guarantees, as applied to § 924(e)'s "occasions" requirement, are important.

The Fifth and Sixth Amendment rights recognized in *Apprendi* and its progeny have real-world effects in the lives of our clients. The failure to honor those rights can result in unfair and unjust punishment.

A. Notice is important.

Recognizing the "occasions" requirement as an element to which Fifth and Sixth Amendment rights attach will allow the grand jury to perform its historical role. That role is to limit a defendant's "jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone v. United States*, 361 U.S. 212, 218 (1960). And it will give defendants the right to receive notice of the facts against which they must defend and the penalty they might face if the government proves those facts to the proper factfinder by the required quantum of proof. *Jones*, 526 U.S. at 243 n.6.

This Court has described the pre-*Apprendi* state of federal drug sentencing like this: "a defendant with no warning in either his indictment or his plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment based not on facts proved to his peers

beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong." *Blakely*, 530 U.S. at 311–12 (citation omitted). Almost a quarter century after *Apprendi,* this still can happen under ACCA.

Specifically, without the protections of *Apprendi*, a defendant can be convicted of § 922(g) at trial and sentenced under § 924(e) without any formal pretrial notice of the penalties to which he can be subjected. *See United States v. Mack*, 229 F.3d 226, 231 (3d Cir. 2000) (collecting cases). Indeed, some defendants who plead guilty after being advised that the maximum sentence they could receive was ten years are nevertheless sentenced to fifteen years or more. *See, e.g., United States v. Lockhart*, 947 F.3d 187 (4th Cir. 2020) (en banc) (reversing and remanding to permit defendant to withdraw plea based on misadvisement)[2]; *United States v. Massenburg*, 564 F.3d 337 (4th Cir. 2009) (recognizing plain error of misadvisement but affirming after holding defendant's substantial rights were not affected by error).

This is woefully unfair. Without an understanding of what penalty they face, our clients do not have the information they need to decide whether and how to seek bail, whether to engage in early plea negotiations and possible cooperation, and ultimately

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[2] On remand, Mr. Lockhart withdrew his plea, proceeded to trial, and was acquitted of the § 922(g). Verdict, *United States v. Lockhart*, No. 3:15-cr-34 (W.D.N.C. June 15, 2020), ECF No. 68.

the most fundamental decision—whether to proceed to trial or to plead guilty. Nor do we have the information we need to provide them the counsel they need. Moreover, when our clients are affirmatively misadvised of the consequences of their decision to waive many of their constitutional rights and to plead guilty, trust in our criminal legal processes is eroded.

B. The rights to a jury trial and to the reasonable-doubt burden of proof are important.

According the "occasions" requirement its proper status as an element to which Fifth and Sixth Amendment rights attach will also ensure that defendants are not deprived of additional years of their liberty unless it is absolutely clear they are covered by ACCA. This is because *Apprendi* requires "occasions" facts to be proved to a jury beyond a reasonable doubt.

As petitioner's brief explains, before *Wooden*, many courts of appeals permitted judges to engage in extensive judicial factfinding as to whether prior convictions were committed on different occasions, so long as they limited their investigation to court records referenced in *Shepard v. United States*, 544 U.S. 13 (2005). Pet. Br. at 37–40 (citing cases). A few courts of appeals, adhering to prior precedent, permit this after *Wooden* as well. *See, e.g.*, *United States v. Williams*, 39 F.4th 342, 351 (6th Cir. 2022); *United States v. Haynes*, 2022 WL 3643740, at *5 (11th Cir. Aug. 24, 2022). These courts claim that judicial fact-

finding in the "occasions" context complies with *Apprendi* so long as it is conducted using only *Shepard* documents. *See*, *e.g.*, *United States v. King*, 853 F.3d 267, 273 (6th Cir. 2017); *United States v. Sneed*, 600 F.3d 1326, 1332–33 (11th Cir. 2010).

The Eleventh Circuit recently explained this reasoning: Information found in *Shepard* documents "has gone through a validation process that comports with the Sixth Amendment." *United States v. Dudley*, 5 F.4th 1249, 1259 (11th Cir. 2021). So, "[a]s long as a court limits itself to *Shepard*-approved sources, the court may determine both the existence of prior convictions and the factual nature of those convictions, including whether they were committed on different occasions, based on *its own factual findings*." *Id.* at 1259–60 (internal quotation marks and citation omitted) (emphasis added).

Petitioner's brief explains that this judicial fact-finding violates *Apprendi*, regardless of the source documents upon which it is based. Pet. Br. at 37–40. Here, we explain why the results of this procedure are unreliable. As this Court has explained, "[s]tatements of 'non-elemental fact' in the records of prior convictions are prone to error precisely because their proof is unnecessary." *Mathis*, 579 U.S. at 512 (quoting *Descamps*, 570 U.S. at 270). "At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he 'may have good reason not to'—or even be precluded from doing so by the court." *Id.* (quoting *Descamps*, 570 U.S. at 270). "Such inaccuracies should not come back to haunt a defendant

many years down the road by triggering a lengthy mandatory sentence." *Id.*

Our experience confirms that using *Shepard* documents to find facts beyond the legal elements of a prior offense is not just constitutionally unsound; it is unreliable and unfair. Below are a few illustrative examples:

Different Actors. In *United States v. Cartwright*, in the Eastern District of Tennessee, the defendant challenged an ACCA sentence of 288 months' imprisonment. The district judge determined that Mr. Cartwright's prior assault and burglary offenses, both allegedly committed in October 1980 (one on October 6, the other on an unspecified date that month), were committed on different occasions because they involved different co-defendants and different victims. *United States v. Cartwright*, 2019 WL 2453660, at *5 (E.D. Tenn. June 12, 2019).

But as it turns out, the offenses did not involve entirely different co-defendants and may not have involved different victims either. As for the co-defendant, motions to take judicial notice later filed in the Sixth Circuit showed that two state indictments had simply recorded the name of a co-defendant in two different ways.[3] One indictment identified the co-defendant as Walter F. Bowman:

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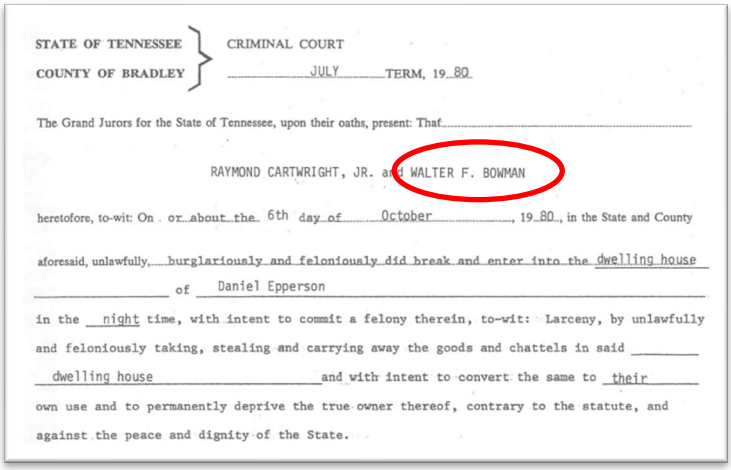
[3] Def. Mot. to Take Judicial Notice, Att. at 2, *Cartwright v. United States*, No. 19-5852 (6th Cir. Nov. 16, 2020), ECF No. 14-2; Gov. Mot. To Take Judicial Notice, Att. at 24, 30, *Cartwright*, No. 19-5852 (6th Cir. Jan. 15, 2021), ECF No. 19-2.



STATE OF TENNESSEE
COUNTY OF BRADLEY

CRIMINAL COURT

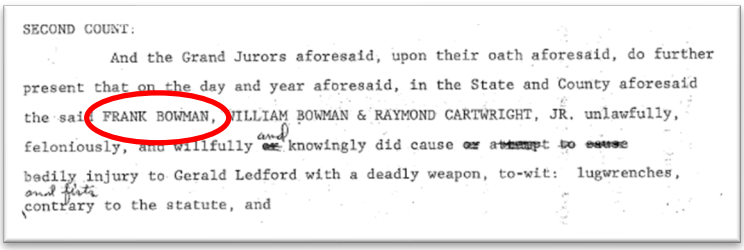
JULY TERM, 19 80

The Grand Jurors for the State of Tennessee, upon their oaths, present: That

RAYMOND CARTWRIGHT, JR. and WALTER F. BOWMAN

heretofore, to-wit: On or about the 6th day of October, 19 80, in the State and County aforesaid, unlawfully, burglariously and feloniously did break and enter into the dwelling house of Daniel Epperson in the night time, with intent to commit a felony therein, to-wit: Larceny, by unlawfully and feloniously taking, stealing and carrying away the goods and chattels in said dwelling house and with intent to convert the same to their own use and to permanently deprive the true owner thereof, contrary to the statute, and against the peace and dignity of the State.

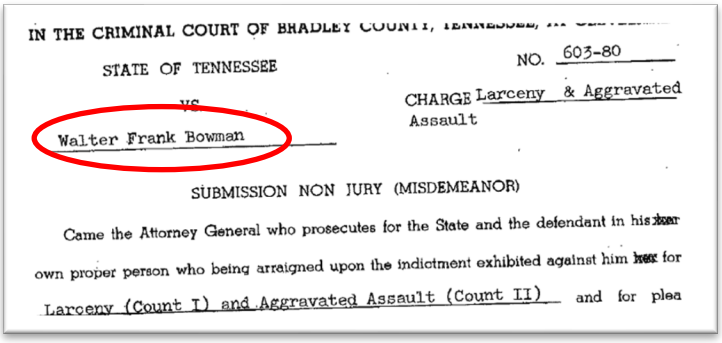
The second indictment identified a co-defendant as Frank Bowman:



SECOND COUNT:

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that on the day and year aforesaid, in the State and County aforesaid the said FRANK BOWMAN, WILLIAM BOWMAN & RAYMOND CARTWRIGHT, JR. unlawfully, feloniously, and willfully ~~or~~ and knowingly did cause ~~or attempt to cause~~ bodily injury to Gerald Ledford with a deadly weapon, to-wit: lugwrenches, and fists contrary to the statute, and

But as the judicial-notice motion established, in the second case, "Frank" Bowman pleaded guilty under his legal name of "Walter Frank Bowman":



IN THE CRIMINAL COURT OF BRADLEY COUNTY, TENNESSEE, AT CLEVELAND

STATE OF TENNESSEE

NO. 603-80

VS.

CHARGE Larceny & Aggravated Assault

Walter Frank Bowman

SUBMISSION NON JURY (MISDEMEANOR)

Came the Attorney General who prosecutes for the State and the defendant in his ~~her~~ own proper person who being arraigned upon the indictment exhibited against him ~~her~~ for Larceny (Count I) and Aggravated Assault (Count II) and for plea

That is, Walter F. Bowman *was* Frank Bowman, also known as Walter Frank Bowman: the same co-defendant.

Digging still further into the records of these four-decades-old state cases reveals that the district court's finding about distinct victims was also suspect. The alleged victim of the aggravated assault, Gerald Ledford, was summoned as a state witness in the matter of the predicate burglary, suggesting that the assault and burglary were part of the same criminal episode.[4]

On appeal, the Sixth Circuit did not reach any of this. It reversed Mr. Cartwright's ACCA sentence based on a holding that Tennessee first- and second-degree burglary are not generic burglary. *Cartwright v. United States*, 12 F.4th 572, 578 (6th Cir. 2021). But the record of the case illustrates that real-

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[4] Appellant's Opening Br. at 45, *Cartwright v. United States*, 19-5852 (6th Cir. Nov. 16, 2020), ECF No. 15 (citing Reply to Government's Resp., *Cartwright v. United States*, 1:16-CV-517 (E.D. Tenn. Dec. 3, 2018), ECF No. 14).

world problems arise from using *Shepard* documents to find non-elemental facts. There was no way for Mr. Cartwright to know, in 1980, that the identification of Walter F. Bowman as Frank Bowman in a state charging document would decades later be used to justify a 288-month sentence, or that the identity of the victims or relationship between them might also be relevant. Even if he had known, it's not clear what he could have done about it.

Different Dates. A Middle District of North Carolina case, *United States v. Watkins*, illustrates that *Shepard* documents are also unreliable when it comes to one of the most important facts underlying the "occasions" determination: dates. Our clients have no reason, nor generally any opportunity, to make sure that every date listed in a court document is correct since, in most states, the date is not an essential element of the offense.[5] That is, it would not be a defense that the offense occurred on a different date, and defendants are not required to admit the date to enter a guilty plea. Nevertheless, federal

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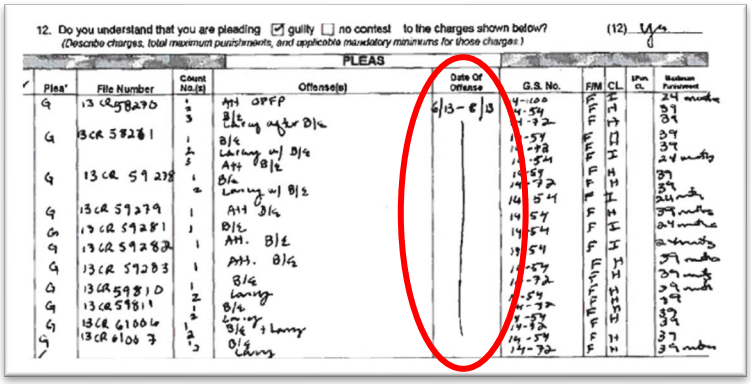
[5] *E.g.*, *People v. Singer*, 194 N.E.3d 890, 898 (Ill. App. 2021); *Comm. v. Knight*, 773 N.E.2d 390, 396 (Mass. 2002); *State v. Mulkey*, 560 A.2d 24, 30 (Md. 1989); *State v. Schaaf*, 449 N.W.2d 762, 766 (Neb. 1989); *Tingley v. State*, 549 So.2d 649, 651 (Fla. 1989); *People v. Morris*, 461 N.E.2d 1256, 1259 (N.Y. 1984); *State v. Price*, 313 S.E.2d 556, 599 (N.C. 1984); *State v. Hatch*, 346 N.W.2d 268, 276 (N.D. 1984); *People v. Crosby*, 375 P.2d 839, 844-45 (Cal. 1962); *Martinez v. State*, 360 P.2d 836, 838 (Nev. 1961); *State v. Palmer*, 306 S.W.2d 441, 444 (Mo. 1957).

courts routinely rely on state-court documents for offense dates.

In *Watkins*, the district court relied on dates recited in arrest warrants and judgments to find that Mr. Watkins had committed at least three felony breaking-and-entering offenses on different occasions in 2013.[6] The court relied on these dates even though, as a matter of North Carolina law, the date of offense is not an essential element of a breaking-and-entering offense, *State v. Andrews*, 99 S.E.2d 745, 747 (N.C. 1957). And it did so even though the dates on Mr. Watkins's plea did not match those on the judgment.[7]

The plea listed a range of dates for each offense:


12. Do you understand that you are pleading ☑ guilty ☐ no contest to the charges shown below? (12) Ys
(Describe charges, total maximum punishments, and applicable mandatory minimums for those charges.)

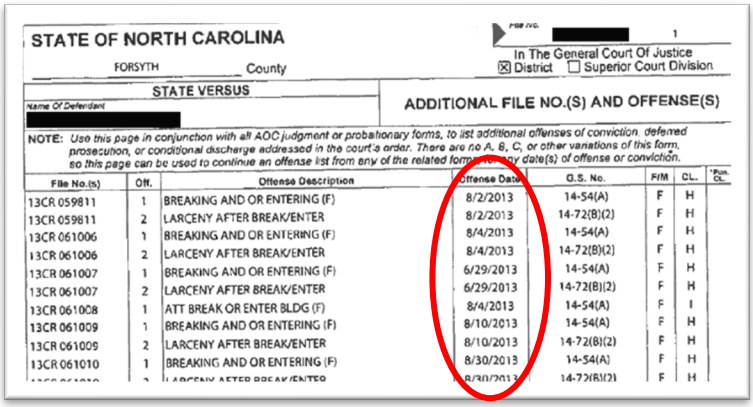
PLEAS

Plea	File Number	Count No.(s)	Offense(s)	Date Of Offense	G.S. No.	F/M	CL	Prm. Cl.	Maximum Punishment
G	13 CR 58270	4 3	Att OFP; B/E Entering after B/E	6/13 - 8/13	14-100 14-54 14-72	F F	H H		24 months 39 39
G	13CR 58281	1 2 3	B/E Larceny w/ B/E Att B/E		14-57 14-72 14-54	F F F	H H H		39 39 24 months
G	13 CR 59 278	1 2	B/E Larceny w/ B/E		14-57 14-72 14-54	F F F	H H H		39 39 24 months
G	13 CR 59279	1	Att B/E		14-54	F	H		39 months
G	13 CR 59281	1	B/E		14-54	F	H		24 months
G	13 CR 59283	1	Att. B/E		14-54	F	H		24 months
G	13 CR 59283	1	Att. B/E		14-54	F	H		39 months
G	13 CR 59810	1	B/E Larceny		14-54 14-72	F F	H H		39 months 39
G	13 CR 59811	2 3	B/E Larceny		14-54 14-72	F F	H H		39 39
G	13 CR 61006	1 2	B/E; Larceny		14-54 14-72	F F	H H		39 39
G	13 CR 61007	3	B/E Larceny		14-54 14-72	F F	H H		39 months

[6] Transcript at 35-42, *United States v. Watkins*, 1:22-cr-265 (M.D.N.C. Aug. 1, 2023), ECF No. 42.

[7] *State v. Watkins* state court documents are on file with author.

The judgment, in contrast, identified a specific date for each offense:



STATE OF NORTH CAROLINA

FORSYTH County

In The General Court Of Justice
☒ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant [redacted]

ADDITIONAL FILE NO.(S) AND OFFENSE(S)

NOTE: Use this page in conjunction with all AOC judgment or probationary forms, to list additional offenses of conviction, deferred prosecution, or conditional discharge addressed in the court's order. There are no A, B, C, or other variations of this form, so this page can be used to continue an offense list from any of the related forms for any date(s) of offense or conviction.

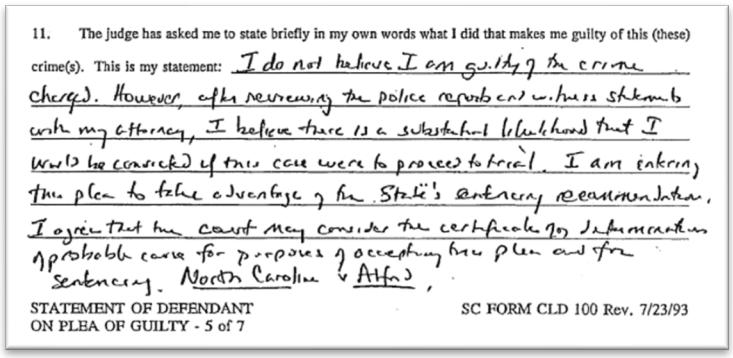
File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	Cl.	*Pun. Cl.
13CR 059811	1	BREAKING AND OR ENTERING (F)	8/2/2013	14-54(A)	F	H	
13CR 059811	2	LARCENY AFTER BREAK/ENTER	8/2/2013	14-72(B)(2)	F	H	
13CR 061006	1	BREAKING AND OR ENTERING (F)	8/4/2013	14-54(A)	F	H	
13CR 061006	2	LARCENY AFTER BREAK/ENTER	8/4/2013	14-72(B)(2)	F	H	
13CR 061007	1	BREAKING AND OR ENTERING (F)	6/29/2013	14-54(A)	F	H	
13CR 061007	2	LARCENY AFTER BREAK/ENTER	6/29/2013	14-72(B)(2)	F	H	
13CR 061008	1	ATT BREAK OR ENTER BLDG (F)	8/4/2013	14-54(A)	F	I	
13CR 061009	1	BREAKING AND OR ENTERING (F)	8/10/2013	14-54(A)	F	H	
13CR 061009	2	LARCENY AFTER BREAK/ENTER	8/10/2013	14-72(B)(2)	F	H	
13CR 061010	1	BREAKING AND OR ENTERING (F)	8/30/2013	14-54(A)	F	H	
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	F	H	

Documents will rarely reflect date discrepancies as plainly as these. But our experience confirms that discrepancies are numerous, and their source is structural: non-elemental allegations in state-court documents are not subject to Fifth and Sixth Amendment protections in the prior proceeding and so cannot be considered validated by those protections for later federal proceedings. As this Court has observed, "during plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations." *Descamps,* 570 U.S. at 270. It is for real-world, on-the-ground reasons that records of conviction cannot establish anything more than the elements of the offense.

Facts Explicitly* Not *Admitted. A case out of the Western District of Washington, *United States v. Wilkinson*, illustrates that federal judges sometimes find facts from state-court documents even when the

documents themselves indicate they should *not* be relied upon.

Below is a snippet from a signed state plea agreement that was used in that case, where for the factual basis the defendant hand-wrote: "I do not believe I am guilty of the crime charged. However, after reviewing the police reports and witness statements with my attorney, I believe there is a substantial likelihood that I would be convicted if this case were to proceed to trial. I am entering this plea to take advantage of the State's sentencing recommendation. I agree that the court may consider the certificate for determination of probable cause for purposes of accepting the plea and for sentencing. North Carolina v. Alford."[8]



11. The judge has asked me to state briefly in my own words what I did that makes me guilty of this (these) crime(s). This is my statement: I do not believe I am guilty of the crime charged. However, after reviewing the police reports and witness statements with my attorney, I believe there is a substantial likelihood that I would be convicted if this case were to proceed to trial. I am entering this plea to take advantage of the State's sentencing recommendation. I agree that the court may consider the certificate for determination of probable cause for purposes of accepting this plea and for sentencing. North Carolina v. Alford,

STATEMENT OF DEFENDANT ON PLEA OF GUILTY - 5 of 7

SC FORM CLD 100 Rev. 7/23/93

The issue in *Wilkinson* was whether Washington burglary constituted generic burglary, and the sen-

[8] Ex. 1 to Government's Sentencing Mem. at 14, *United States v. Wilkinson*, 3:12-cr-05088-1 (W.D. Wash. Sept. 3, 2013), ECF No. 74.

tencing court (pre-*Mathis*) relied on *Shepard* documents to find what kind of structure was involved.[9] So, even when a defendant makes every effort to object to non-elemental (indeed, even elemental) facts in state court, federal courts have relied upon them to add years to a federal sentence.

* * *

Doubtless, in some instances, non-elemental allegations found within *Shepard* documents have benefitted defendants. *See, e.g.*, *Wooden*, 595 U.S. at 363 (citing a statement of the Assistant District Attorney regarding the relationship between the burglaries—specifically that, once the co-defendants made entry into the facility, "they burrowed through from unit to unit" (cleaned up)).[10] Likewise, we recognize that by expanding the inquiry beyond *Shepard* documents to all evidence admissible at a jury trial, the constitutional rule we endorse will sometimes show that offenses *were* committed on occasions different from one another whereas the bare documents could not.

But the rule we endorse will lead to more reliable determinations of whether offenses were "committed on occasions different from one another"—a fact that

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[9] Sentencing Transcript at 11, *United States v. Wilkinson*, 3:12-cr-05088-1 (W.D. Wash. Nov. 4, 2013), ECF No. 83.

[10] In *Wooden*, the Court noted that the petitioner did not raise the question whether the Constitution permitted this sort of factfinding. *Wooden*, 595 U.S. at 365 n.3; *see also id.* at 397 n.7 (Gorsuch, J., concurring) (noting the possible impropriety of the practice).

a jury must find, beyond a reasonable doubt, before a defendant may be subjected to ACCA's penalty. Although the *results* will differ in different cases, this is always true with the right to a jury trial. But that is the rule mandated by both the text of ACCA's "occasions" requirement and the Fifth and Sixth Amendments to our Constitution.

II. Treating § 924(e)'s "occasions" requirement as an element is a workable constitutional rule that can be administered consistent with the due process rights of criminal defendants.

A. Treating the "occasions" requirement as an element has already proved to be workable.

In our amicus brief in *Wooden*, the National Association of Federal Defenders predicted that the litigation burden of treating ACCA's "occasions" requirement as an element subject to Fifth and Sixth Amendment guarantees would be modest—nothing so great as to override defendants' weighty and constitutionally protected interest in having a jury determine the issue beyond a reasonable doubt. NAFD *Wooden* Br. 26–27. We observed that federal courts well know how to preside over a jury trial when the government is required to prove facts surrounding a prior conviction, when necessary to satisfy a statutory standard. *Id.* at 27–28 (citing *United States v. Hayes*, 555 U.S. 415, 418 (2009) (misdemeanor crime of domestic violence); *Nijhawan v. Holder*, 557 U.S. 29, 40 (2009) ("an offense that . . . involves fraud or

deceit in which the loss to the victim or victims exceeds $10,000"); *United States v. Doss*, 630 F.3d 1181, 1197–98 (9th Cir. 2011) ("prior sex conviction in which a minor was the victim")). And we noted that juries are well-suited to making determinations about non-elemental facts surrounding a prior criminal conviction. *Id.*

Of course, the reach of the Fifth and Sixth Amendments "cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." *Blakely*, 542 U.S. at 313. But here, our experience thus far has borne out our prediction that where courts agree that ACCA's "occasions" requirement is an element, this provides a workable rule that courts are well-equipped to administer.

Litigation. In July 2022, four months after this Court's decision in *Wooden*, the Department of Justice determined—consistent with arguments defendants had been making for decades—that § 924(e)'s requirement that prior offenses be "committed on occasions different from one another" would have to be treated as an element of ACCA that was subject to

Apprendi's constitutional strictures. Shortly thereafter, prosecutors began to seek grand jury indictments that included "occasions" facts.[11]

In his petition for writ of certiorari, petitioner described a chaotic state of affairs driven by lower courts' disagreement over whether to accept the government's concession. Cert. Pet. at 25–27. Where courts have disagreed with the parties that the "occasions" requirement is an element, individuals continue to be sentenced under ACCA without grand jury indictment or proper notice, and judges continue to impose enhanced sentences based on facts they find at sentencing by a preponderance of the evidence.

But where district courts have concurred that ACCA's "occasions" requirement is an element that must be alleged in the indictment and proved to a jury beyond a reasonable doubt, or admitted by the defendant as part of his plea, the rule has proven eminently administrable. Although the procedure is still new (such that many cases it impacts are still

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[11] *See, e.g.*, Indictment at 2, *United States v. Singer*, No. 5:22-cr-309 (W.D. Okla. Aug. 2, 2022), ECF No. 5; Superseding Indictment at 6, *United States v. Hines*, 2:22-cr-25 (E.D. Tenn. Nov. 9, 2022), ECF No. 81; Superseding Indictment at 3, *United States v. Harrell*, No. 1:22-cr-20245 (S.D. Fla. Nov. 30, 2022), ECF No. 26; Superseding Indictment at 1, *United States v. Ellis*, No. 4:20-cr-293 (E.D. Ark. Dec. 7, 2022), ECF No. 33; Superseding Indictment at 1, *United States v. Lewis*, No. 3:22-cr-290 (M.D. Tenn. Aug. 14, 2023), ECF No.51.

pending, so we cannot discuss them), our experience is that the rule causes no unusual difficulty.

To the contrary, the fact that indictments now include "occasions" facts resolves, rather than creates, problems. It means that, for the first time, before a person is sentenced under ACCA, a grand jury will have been presented with and found probable cause to believe that he has three prior qualifying conviction for offenses "committed on occasions different from one another" and should be prosecuted as an armed career criminal. Just as important, these indictments make clear at the earliest possible moment what the government anticipates the consequences of a guilty verdict or plea would be—avoiding the scenario described above where an individual proceeds to sentencing before learning that his offense carries a fifteen-year mandatory minimum.

With proper notice, some defendants have elected to admit both the "occasions" facts and the application of ACCA in their guilty pleas.[12] Others

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[12] *See* Plea Agreement at 2, *United States v. Daniels*, No. 5:21-cr-15 (W.D. Ky. Oct. 20, 2022), ECF No. 30; Plea Agreement at 1–3, *United States v. Lynch*, No. 0:22-cr-356 (D. Minn. Feb. 2, 2023), ECF No. 24; Notice of Intent to Stipulate to Remaining Portions of the Indictment at 1–2, *United States v. Osbourn*, No. 1:22-cr-383 (N.D. Ala. May 15, 2023), ECF No. 25; Amended Plea Agreement at 1–2, *United States v. Lindsey*, 8:22-cr-383 (M.D. Fla. Sept. 12, 2023), ECF No. 46; Plea Agreement at 1–2, *United States v. Jackson*, 8:22-cr-311 (M.D. Fla. Oct. 11, 2023), ECF No. 45; Plea Agreement at 2, *United States v. Diaz-Lopez*, No. 3:21-cr-157 (D.P.R. Nov. 15, 2023), ECF No. 150.

have admitted the "occasions" facts but challenged the characterization of their prior convictions as ACCA predicates—a legal determination that turns not on the circumstances surrounding a prior offense but the statutory elements underlying the conviction. *Mathis*, 579 U.S. at 511–12.[13] These cases have proceeded much as § 924(e) cases proceeded before the government's post-*Wooden* concession. The factual questions of guilt have been resolved through a plea, with the legal characterization of prior convictions left to the court.

In other cases, our clients have sought to contest either their alleged unlawful firearm possession, or the separateness of their prior offenses, but not both. Some have gone to trial on the § 922(g) offense, but stipulated to the "occasions" facts.[14] Where, by contrast, individuals seek to admit and accept responsibility for the § 922(g) offense, but disagree that prior convictions were for offenses committed on different occasions, we anticipate stipulated-facts trials, where clients effectively admit to the § 922(g) offense while contesting the ACCA-related "occasions" facts. These proceedings, like the pleas described above, would not differ significantly from most trials.

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[13] Plea Transcript at 14, *Singer*, No. 5:22-cr-309 (W.D. Okla. Sept. 14, 2023), ECF No. 54; Sentencing Transcript at 8. Mo. 5:22-cr-309 (W.D. Okla. Sept. 14, 2023), ECF No. 56.

[14] *See* Transcript at 6-12, *Harrell*, No. 1:22-cr-20245 (S.D. Fla. July 26, 2023), ECF No. 95.

Last but not least, when individuals seek to hold the government to its burden on both the unlawful firearm possession and the "occasions" requirement, we've seen bifurcated trials. In these cases, the jury first hears the evidence on the underlying § 922(g) offense. Unless and until the jury returns a guilty verdict, no mention is made of the "occasions" requirement. If the jury does return a guilty verdict, it then hears evidence regarding the "occasions" element and decides that matter. Some of those cases have resulted in acquittal or dismissal on the unlawful firearm possession at trials that were not marred by irrelevant prejudicial evidence of prior convictions.[15] In one case, the jury convicted the defendant of being a felon in possession before finding that the government had not carried its burden of proving his

[15] In one case, the court granted the motion to bifurcate the trial, but the jury acquitted Mr. Young of the § 922(g). Minutes, *United States v. Young*, No. 2:22-cr-20118 (W.D. Tenn. Feb. 6, 2023), ECF No. 47; Verdict, *Young*, No. 2:22-cr-20118 (W.D. Tenn. Feb. 9, 2023), ECF No. 51. In another, the court ordered a bifurcated trial, but the government moved to dismiss the charges after taking testimony. Order, *United States v. Sledge*, No. 7:22-cr-270 (N.D. Ala. June 7, 2023), ECF No. 51; Judgment, *Sledge*, No. 7:22-cr-270 (N.D. Ala. Oct. 6, 2023).

prior convictions were for offenses committed on occasions different from one another.[16] Still other trials have resulted in guilty verdicts at both phases.[17]

Charging decisions. It is possible that according the "occasions" requirement its appropriate constitutional status may lead to a small increase in trials. Of course, any potential increase in trial rates could not override the Constitution. *Blakely*, 524 U.S. at 313. But also, there is good reason to doubt that an increase in trials will materialize. Section 922(g) cases where our clients potentially face a § 924(e) enhancement are already among the most likely to go to trial.[18] Recognizing the "occasions" re-

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[16] *See* Verdicts, *United States v. Pennington*, No. 1:19-cr-455 (N.D. Ga. Sept. 20, 2022), ECF Nos. 171, 173.

[17] *See* Jury Verdict (Phase II), *Hines*, No. 2:22-cr-25 (E.D. Tenn. June 26, 2023), ECF. Nos. 172, 174); Verdict, Phase II, *Lewis*, No. 3:22-cr-290 (M.D. Tenn. Aug. 30, 2023), ECF No. 71; Special Jury Verdict, *Ellis*, No. 4:20-cr-293 (E.D. Ark. Sept. 13, 2023), ECF No. 54, 55.

[18] In fiscal years 2018–2022, Sentencing Commission Individual Offender Datafiles reflect that individuals sentenced under ACCA were six times more likely (14%) to have gone to trial than other individuals (2.4%) sentenced under the firearms guideline, U.S.S.G. § 2K2.1. These data are consistent with the Commission's observation that individuals sentenced under ACCA were more likely to proceed to trial even as compared to individuals subject to other harsh mandatory-minimum penalties. U.S. Sent'g Comm'n, Mandatory Minimum Penalties for Federal Firearm Offenses 37 (2018).

quirement as an element will increase the government's ability to settle these cases, leading to fewer unnecessary trials and more just outcomes.

Let us explain: As § 924(e) has been interpreted in the past, with no aspect of ACCA subject to jury determination, prosecutors had no discretion to forgo seeking an ACCA sentence. *United States v. Moyer*, 282 F.3d 1311, 1318 (10th Cir. 2002). Accordingly, in the past, there has been no way definitively to settle a § 922(g) charge for less than fifteen years' imprisonment—the final decision whether an individual was subject to ACCA's minimum sentence was in the judge's hands at sentencing. If the firearm in question was also stolen, NAFD members can sometimes negotiate pleas to a different offense, § 922(j), which has no minimum sentence. But if the firearm was not stolen, such a plea is unavailable.

A change was signaled in the fall of 2022, when the government started alleging "occasions" facts in indictments. For the government also began—in selected cases where it had reason to believe it may not be able to meet its burden of proof beyond a reasonable doubt under *Wooden*'s test or when it agreed that a mandatory-minimum sentence was not warranted—occasionally to exercise its discretion *not* to indict these ACCA-triggering facts. So long as the court concurred that ACCA's "occasions" requirement is an element, this charging decision left in place the base statutory sentencing range for § 922(g). For § 922(g) offenses committed before June 25, 2022, this range was zero-to-ten years; for those committed on or after that date, the range increased to zero-to-fifteen years. *See* Bipartisan Safer

Communities Act, Pub. L. No. 117-159, div. A, tit. II, § 12004(c), 136 Stat. 1313, 1329 (June 25, 2022). This increase in penalty for § 922(g) offenses permits the government to advocate for a fifteen-year sentence even without charging the ACCA.

To be clear, a prosecutor's decision to forgo ACCA's mandatory minimum in selected cases provides no windfall to defendants. The decision to charge an individual in federal court for unlawfully possessing a firearm is a discretionary one in the first place. That charging decision converts what would ordinarily be a state prosecution into a federal prosecution, with its stiffer penalties.[19] This exercise of federal prosecutorial discretion is a feature of our federal system. Likewise, a federal prosecutor's discretion to seek, or not seek, an *enhanced* federal penalty is also an "integral feature of the criminal justice system." *United States v. LaBonte*, 520 U.S. 751, 762 (1997).

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[19] Federal firearm enforcement initiatives have disproportionately targeted people of color and their communities. *See,* David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 Emory L.J. 1011, 1021–25 (2020); Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 Mich. J. Race & L. 305, 315–17 (2007).

B. District courts are well-equipped to protect the due process rights of individuals accused of federal crimes.

A final potential concern—a concern at the heart of NAFD's mission—is whether the rule that petitioner seeks in this case can be administered in a manner consistent with our clients' other constitutional due process rights. Undoubtedly, it can.

Numerous jurists over the past quarter-century have voiced legitimate concerns that a right to a jury trial on any recidivist elements of an aggravated offense would cause our clients more harm than good. *See, e.g.*, *Almendarez-Torres v. United States,* 523 U.S. 224, 235 (1998) ("the introduction of evidence of a defendant's prior crimes risks significant prejudice"); *United States v. Brown*, 67 F.4th 200, 215 (4th Cir. 2023); *United States v. Burgin*, 388 F.3d 177, 185 (6th Cir. 2004); *United States v. Morris*, 293 F.3d 1010, 1013 (7th Cir. 2002); *United States v. Santiago*, 268 F.3d 151, 156 (2d Cir. 2001).

We disagree that having more Fifth and Sixth Amendment rights hurts our clients. As discussed, treating ACCA's "occasions" requirement as a legal element permits the government to elect whether—and, importantly, whether not—to charge occasions-related facts in an indictment. And whichever route they choose, our clients are provided with ample notice, when they need it most, about what the consequences of a guilty plea or verdict will be.

For cases that go to trial (where "occasions" facts are alleged), we agree that our clients' rights to a fair trial on the unlawful firearm possession would be

significantly prejudiced by introduction of evidence regarding their prior convictions. But courts are well-equipped to protect *all* the rights of our clients. Since *Wooden*, those courts that have agreed to submit the "occasions" facts to a jury have redacted indictments provided to the jury and bifurcated trials, ensuring that defendants can insist that the prosecutor prove to a jury all facts legally essential to the punishment without foregoing their other rights.

To our knowledge, every jury trial but one has been bifurcated when the jury was permitted to decide *both* the § 922(g) unlawful-firearm-possession question and the § 924(e) "occasions" question.[20] We

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[20] *See* Order, *Pennington*, No. 1:19-cr-455 (N.D. Ga. Sept. 21, 2022), ECF No. 174 (explaining that the court would bifurcate the trial to accommodate government desire to present proof to jury); Memorandum and Order, *Hines*, No. 2:22-cr-25 (E.D. Tenn. June 16, 2023), ECF No. 153 (granting motion for bifurcated trial); Order, *Lewis*, No. 3:22-cr-290 (M.D. Tenn. Aug. 16, 2023), ECF No. 53 (granting motion for bifurcated trial); Minute Entry, *Ellis*, No. 4:20-cr-293 (E.D. Ark. Sept. 13, 2023), ECF No. 50 (reflecting bifurcated trial). As noted above at n.15, in other § 922(g) cases, acquittal or dismissal at phase one has obviated the need for the second phase.

The only outlier is *United States v. Harrell*, in which the court denied a motion to bifurcate. Minute Order, *Harrell*, No. 1:22-cr-20245 (S.D. Fla. Feb. 28, 2023), ECF No. 57. As a result, the defendant stipulated to the "occasions" facts. Transcript,

have not heard complaints from judges or attorneys. The procedures have been straightforward. Indeed, in most of these cases, the motions to bifurcate came from the government.[21]

The benefits of this procedure are many. It ensures that a jury deciding guilt on the core § 922(g) offense does not hear evidence about prior convictions or offenses unless it is relevant to the § 922(g) offense. It streamlines the trial on the core offense and avoids prejudice to the defendant and juror confusion. It obviates the need for complicated jury instructions. And it protects both the defendant's interest in a trial before a jury that has not heard about unrelated offenses and the government's interest in a defensible conviction, with less risk of reversal on appeal.

The lower courts' ready assimilation of bifurcated trials into their procedure is unsurprising. Federal

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Harrell, No. 1:22-cr-20245 (S.D. Fla. July 26, 2023), ECF No. 95.

In other cases where courts have denied bifurcation motions, they have also refused to submit the "occasions" requirement to the jury. *See, e.g.*, *United States v. Durham*, 655 F. Supp. 3d 598, 608 (W.D. Ky. 2023), *appeal docketed*, No. 23-5162 (6th Cir. Feb. 28, 2023); Order Denying Government's Motion to Bifurcate, *United States v. Penn*, No. 4:20-cr-266 (W.D. Mo. Aug. 11, 2022), ECF No. 120.

[21] *See, e.g.*, United States' First Motion in Limine Regarding Bifurcated Trial, *Hines*, No. 2:22-cr-25 (E.D. Tenn. June 13, 2023), ECF No. 147; United States' Unopposed Motion to Present Proof of Prior Convictions to the Jury in a Bifurcated Trial, *Lewis*, No. 3:22-cr-290 (M.D. Tenn. Aug. 7, 2023), ECF No. 48.

courts are well-versed in providing bifurcated trials to avoid confusion and prejudice, including in criminal settings. For example, courts routinely bifurcate criminal forfeiture proceedings from substantive criminal charges to prevent juror confusion and to safeguard the rights of the defendant. *United States v. DesMarais*, 938 F.2d 347, 349–50 (1st Cir. 1991) (collecting cases). Likewise, after this Court's decision in *Blakely*, 542 U.S. at 303, raised the question whether sentencing guideline enhancements must be tried to a jury, but before this Court provided a different remedy in *Booker*, 543 U.S. at 245, district courts tried facts related to guideline enhancements to juries in bifurcated proceedings. *See, e.g., United States v. Harris*, 332 F. Supp. 2d 692, 695–96 (D.N.J. 2004); *United States v. Hurst*, 2004 WL 2810064, at *4 (E.D. Pa. Nov. 30, 2004).

Indeed, in his concurrence in *Apprendi*, criticizing the prior-conviction exception, Justice Thomas anticipated that courts would be able to address concerns about informing jurors of prior convictions by using the "common practice," with historical pedigree, of "bifurcat[ing] the trial, with the jury only considering the prior conviction after it has reached a guilty verdict on the core crime." *Apprendi*, 530 U.S. at 521 n.10 (Thomas, J., concurring) (citing 1 J. Bishop, Criminal Law § 964, at 566–67 (5th ed. 1872); *People v. Saunders*, 5 Cal. 4th 580, 587–88, 853 P.2d 1093, 1095–96 (1993)).

To be sure, in *Spencer v. Texas*, this Court held that the Due Process Clause of the Fourteenth Amendment does not provide a *right* to bifurcation in all circumstances. 385 U.S. 554 (1967). But, even

in 1967, most states already provided for bifurcation of trials when prior convictions were at issue. *Spencer*, 385 U.S. at 586–87 & n.11 (Warren, C.J., dissenting and concurring). And every justice in *Spencer* recognized bifurcation as the "fairer," "wiser," most protective procedure.[22] In 1967, empirical research had already confirmed the prejudicial effect of prior-conviction evidence. *Spencer*, 385 U.S. at 575 (Warren, C.J., dissenting and concurring) (citing Harry Kalven, Jr. & Hans Zeisel, The American Jury, 127–30, 177–80 (Little, Brown and Company, 1966)). Over the ensuing decades, social scientists have continued to document the overwhelming prej-

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[22] *Spencer*, 385 U.S. at 564 (majority) ("[A] state rule of law does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.") (internal quotation marks and citations omitted); *id.* at 569 (Stewart, J., concurring) ("[I]t is clear to me that the [bifurcated trial procedures] are far superior to those utilized in the cases now before us."); *id.* at 579 (Warren, C.J., dissenting and concurring) ("The purpose of admitting prior-convictions evidence should be served and prejudice completely avoided by the simple expedient of a procedure which reflects the exclusive relevance of recidivist statutes to the issue of proper punishment.").

udice that inheres in admitting prior bad act evidence, and the inefficacy of limiting instructions in combatting such prejudice.[23]

So, again, it is not surprising that federal district courts that have tried the "occasions" question to a jury have granted bifurcated trials when requested. In their careful practice, trial courts have shown that enforcing our clients' Fifth and Sixth Amendment rights need not harm their other rights under the Due Process Clause. This Court should not deny our clients the protections of the Fifth and Sixth Amendments in this context based on an unfounded fear that it will cause them more harm than good.

* * *

The jury trial right "has never been efficient; but it has always been free." *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring). Our experience has confirmed that the constitutional rule we endorse is both workable and fair.

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[23] *See, e.g.*, David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 Creighton L. Rev. 215, 267–274 (2011); Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 Law & Hum. Behav. 67, 76 (1995); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 Law & Hum. Behav. 37, 38 (1985).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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