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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The overarching theme of the Court-Appointed Amicus's brief is that this Court has been wrong, wrong, and wrong again. Wrong to explain in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and subsequent cases that the "prior conviction" exception is a deviation from history and tradition that must be interpreted "narrow[ly]." *Id.* at 490; *see also, e.g.*, *Pereida v. Wilkinson*, 592 U.S. 224, 238-39 (2021). Wrong in *Mathis v. United States*, 579 U.S. 500 (2016), and *Descamps v. United States*, 570 U.S. 254 (2013), to declare that the prior-conviction exception allows judges to "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 511-12. Wrong in *Shepard v. United States*, 544 U.S. 13 (2005), and succeeding cases to hold that courts may not use even judicial records to inquire into the "manner" in which the defendant committed previous offenses. *Mathis*, 579 U.S. at 505-06, 511. And wrong numerous times over the years to indicate that various practical devices exist to mitigate any prejudicial effects of entitling defendants to have juries, instead of judges, find facts regarding how prior offenses were committed.

In reality, this Court has been right all along. Judges applying ACCA may invoke the "prior conviction" exception to pinpoint what statutes the defendant previously violated (and to confirm that the convictions remain valid), but the Sixth Amendment precludes judicial inquiry into how defendants committed such underlying offenses. Applying that rule here leads to the inescapable conclusion that juries, not

judges, must determine whether the defendant committed previous offenses "on occasions different from one another." 18 U.S.C. § 924(e)(1).

This Court should reverse.

ARGUMENT

I. The *Almendarez-Torres* Exception Does Not Extend Beyond The Simple Fact Of A Prior Conviction.

The whole point of ACCA's occasions clause is to condition the statute's major sentence enhancement on something *more* than simply having three qualifying prior convictions. Petr. Br. 21-25. Court-Appointed Amicus (hereafter, "Amicus" or "CAA") thus does not dispute that, if the exception to *Apprendi* retained from *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), is limited to identifying what crimes, with what elements, the defendant was convicted of, then juries must determine whether a defendant's previous convictions were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). Instead, Amicus contends that the prior-conviction exception is not so limited. In Amicus's telling, the *Almendarez-Torres* exception permits judges to enhance a defendant's sentence based on any "recidivism-related facts." CAA Br. 10. The holding of *Almendarez-Torres*, however, is not nearly that expansive. And subsequent cases unequivocally limit the exception to the simple fact of a prior conviction.

1. Start with *Almendarez-Torres* itself. As Amicus would have it, that decision established a broad exception to the Sixth Amendment for "factfinding about recidivism." CAA Br. 32. But there was no need

in that case for any factfinding beyond the mere fact of a prior conviction. The "illegal reentry" statute at issue authorized an additional prison term so long as "the initial 'deportation was subsequent to a conviction for commission of an aggravated felony.'" 523 U.S. at 226 (quoting former 8 U.S.C. § 1326(b)(2)). And the Court confirmed that a judge could increase the defendant's sentence based simply on "the fact of an earlier conviction." *Id*. at 226, 235.

Amicus stresses that the statute in *Almendarez-Torres* still required a "sequencing determination"—that is, a recognition that the defendant's earlier conviction occurred before the initial deportation. CAA Br. 28. But that sequencing issue is inherent in the concept of a *prior* conviction. *See* Petr. Br. 30. A prior conviction, by definition, must occur before something else. *Id.* At any rate, the illegal reentry offense in *Almendarez-Torres* already required juries to find that the defendant's deportation occurred "*after* the aggravated felony conviction." *United States v. Guerrero-Jasso*, 752 F.3d 1186, 1189 (9th Cir. 2014); *see also United States v. Rojas-Luna*, 522 F.3d 502, 504-06 (5th Cir. 2008) (same). The "requisite *sequence*," therefore, had to be found by the jury anyway (or admitted, as it was in *Almendarez-Torres* itself). 752 F.3d at 1189; *see* 523 U.S. at 227.

2. The Court's subsequent precedent underscores that the holding of *Almendarez-Torres* does not extend beyond the "simple fact" of a prior conviction. *Mathis*, 579 U.S. at 511; *see also Apprendi*, 530 U.S. at 490 (carefully cabining *Almendarez-Torres* to the "fact of a prior conviction"). In other words, a judge applying a recidivist-enhancement statute "can do no

more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was [previously] convicted of." *Mathis*, 579 U.S. at 511-12. Accordingly, *Descamps* and *Mathis* squarely hold that judges "cannot go beyond identifying the crime of conviction to explore *the manner* in which the defendant committed that offense." *Id.* (emphasis added); *see also Descamps*, 570 U.S. at 269; Petr. Br. 16-18, 26-27; *id.* at 27-28 (discussing other case law to the same effect).

Amicus's primary retort is that these decisions purportedly rested on purely "statutory" grounds and "avoided" any consideration of "the scope of *Almendarez-Torres*." CAA Br. 34-35. This Court's decisions, however, speak for themselves. In *Descamps*, the Court based its holding in part on the categorical approach's "Sixth Amendment underpinnings." 570 U.S. at 269. In *Mathis*, the Court offered its unequivocal Sixth Amendment analysis as one of the "three basic reasons for adhering to an elements-only inquiry." *Mathis*, 579 U.S. at 510-11. And "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [it is] bound." *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996).

As a final salvo, Amicus suggests the Court should reconsider and reject its constitutional analyses in *Descamps* and *Mathis* based on the "full briefing" Amicus has now provided. CAA Br. 35. Suffice it to say, for the reasons petitioner and the Government set forth, that the constitutional explications in those decisions are sound. Nor has Amicus shown—as a matter of the *stare decisis* factors, *see, e.g., Dobbs v.*

Jackson Women's Health Org., 597 U.S. 215, 267-68 (2022)—that there is any other reason to disturb the precedential effect of those decisions.[1]

II. The Court Should Not Expand *Almendarez-Torres*'s Narrow Exception Beyond Its Current Boundary.

Even if precedent does not settle the matter, this Court should not extend the prior-conviction exception to cover ACCA's different-occasions inquiry. Amicus argues that (A) history and tradition justify stretching the exception to cover the different-occasions inquiry; (B) other legal doctrines support stretching it to cover the occasions inquiry; (C) at least so-called *Shepard* documents can support judicial factfinding of this sort; and (D) applying the Sixth Amendment here will actually harm defendants. None of these arguments holds water.

A. History And Tradition Supply No Basis For Keeping ACCA's Different-Occasions Determination From Juries.

Any "historical exception" to the Sixth Amendment rule that juries must find all facts necessary to impose criminal punishment must rest on evidence

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[1] Even if the Court were to conceive of *Descamps* and *Mathis* as purely statutory decisions, it could take the same approach in this case. *See* Petr. Br. 25 n.5. That is, the Court could construe Section 924(e)(1)'s references to when the defendant's prior offenses were "committed"—as opposed to when the convictions occurred—as signaling a matter for juries to decide. *See Mathis*, 579 U.S. at 511 (questions regarding "what the defendant had actually done," as opposed to what he was "convicted of," are for juries) (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)).

that is "convincing indeed"—something like "uniform postratification practice" from "the time the Bill of Rights was adopted" through the "19th century." *United States v. Gaudin*, 515 U.S. 506, 515-16, 519 (1995). Amicus does not come close to making any such showing.

1. History and tradition do not supply a firm footing even for *Almendarez-Torres* itself. Recidivist statutes date back to the early days of the Republic. CAA Br. 13. But Amicus points to only four states between the Founding and early twentieth century—South Carolina, Louisiana, Alabama, and Kansas—that allowed judges to find the fact of a prior conviction where it increased a defendant's sentencing range. CAA Br. 13-14.[2]

Nor does a "deeply rooted" tradition (CAA Br. 13) of judicial factfinding emerge when one considers the "supplemental-information" statutes that four other states used before the 1920s to administer recidivist enhancements. *See* CAA Br. 15-16. Those statutes

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[2] Amicus's reliance on Louisiana practices is particularly ironic. Given its civil law heritage and other historical aspects of its culture, that State's past practices have not exactly been a beacon for understanding the right to jury trial. *See Ramos v. Louisiana,* 140 S. Ct. 1390 (2020) (invalidating state law allowing convictions by nonunanimous juries); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (invalidating law excluding women from juries); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (invalidating law denying right to jury trial altogether for certain non-petty offenses).

Historical practice in Kansas also appears more checkered than Amicus suggests. In 1915, the Kansas Supreme Court admonished that "the facts of the prior conviction" constituted part of a charged offense and thus had to be "set forth" in the information. *State v. Briggs*, 145 P. 866, 867 (Kan. 1915).

still required juries to find the defendants incurred the prior convictions. *See, e.g.*, *Graham v. West Virginia*, 224 U.S. 616, 623-29 (1912). And insofar as the statutes relieved the prosecution of the duty to allege the prior convictions supporting recidivist enhancements "in the same indictment charging the present offense," they departed from the prevailing common-law practice. Harold Dubroff, Note, *Recidivist Procedures*, 40 N.Y.U. L. Rev. 332, 333 n.7, 336 (1965).

Finally, it is irrelevant that this supplemental-information procedure was more "widely adopted" after the mid-1920s. CAA Br. 16. That is too late to establish any constitutionally significant tradition. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 66 (2022); *Gaudin*, 515 U.S. at 516 (limiting survey to practices up through the 19th century). Indeed, not even *Almendarez-Torres* relied on these laws.

2. When the focus is narrowed—as it must ultimately be in this case—to state laws requiring different-occasions determinations like the one in ACCA, there is no such historical tradition at all. None. All Amicus can do is point to the same three laws previously identified by petitioner that were enacted between 1929 and 1955, plus a few more enacted in the 1970s and '80s. *See* CAA Br. 25 nn.6 & 7. Once again, a smattering of state laws enacted beginning in the mid-twentieth century is immaterial to the constitutional question here. *See Bruen*, 597 U.S. at 66; *Gaudin*, 515 U.S. at 516.

That leaves Amicus attempting to liken ACCA's occasions clause to other recidivism-related findings that states over the years sometimes permitted judges to make. *See* CAA Br. 18-20 & nn.3-5. Several

recidivist statutes, Amicus observes, required judges to make "sequencing" type determinations—for instance, whether the present offense was the defendant's "second" or "subsequent" qualifying offense. CAA Br. 18-19 & n.3; *see also id.* 14 & n.1. But, as noted above, those statutes prove nothing helpful for Amicus. Establishing when a prior conviction occurred—that is, the date upon which the trial court entered the judgment—is inherent in finding the fact of a prior conviction. *See supra* at 3-4. (The same goes for inquiring whether the defendant successfully appealed the prior conviction, had the conviction annulled, or has been pardoned. *See* CAA Br. 18-20. Those are simply administrative components dictating whether a prior conviction is valid.)

Amicus also cites a few statutes seemingly allowing judges to find whether a prior offense itself occurred within a certain temporal proximity to the instant offense. *See* CAA Br. 18-20 & n.5. Such findings are much more akin to ACCA's different-occasions determination. But a few outlier statutes over 130-plus years are a distant cry from "a uniform postratification practice." *Gaudin*, 515 U.S. at 519. They constitute at most an exceedingly limited departure from the traditional practice of asking simply when the defendant's prior *conviction*—not offense—occurred. *See supra* at 5-7.[3]

[3] The same might be said of the few statutes allowing judges to find the present offense occurred after the defendant "escaped" or was "discharged from confinement." CAA Br. 20 (quoting 1 Rev. Code of the Laws of Va. 619 (1819)). While the sentence im-

Lastly, Amicus cites one or two statutes that purportedly allowed judges to resolve disputes over whether the defendant indeed was the person who incurred the prior conviction. *See* CAA Br. 18-19. One last time: A couple of statutes does not a tradition make—especially where, as here, the overwhelming practice was to the contrary. *See, e.g., Graham*, 224 U.S. at 624; Joel Prentiss Bishop, 1 Commentaries on the Criminal Law 332 (ch. 35, § 573) (4th ed. 1868) ("[A]s the question [of previous conviction] involves that of identity, it ought doubtless to be passed upon by the jury."); H.C. Underhill & Samuel Grant Gifford, Treatise on the Law of Criminal Evidence 1086 (ch. 48, §§ 778-79) (3d ed. 1923) (collecting cases holding same).

At any rate, in light of the nature of ACCA's occasions clause and this Court's precedent, the relevant metric for comparison here is whether any type of finding judges traditionally made arguably required examining "the *manner* in which the defendant committed [the prior] offense[s]." *Mathis*, 579 U.S. at 511 (emphasis added). Inquiring whether the defendant is the person who committed the prior offense does not have anything to do with the manner in which it was committed.

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posed is part and parcel of a prior conviction itself, facts concerning whether or how the defendant served that sentence go beyond the fact of the prior conviction. In any event, no such fact is at issue here.

B. No Other Legal Doctrine Supports Transforming *Almendarez-Torres* Into An All-Purpose Prior Conviction Exception.

Amicus next turns to other lines of cases. According to Amicus, the only way to make sense of cases involving ACCA's "serious drug offense" prong and certain double-jeopardy precedent is to hold that "judges can make *all* recidivism determinations at sentencing"—and not only that, but anything "recidivism-related." CAA Br. 24-25, 28, 30. Amicus is mistaken.

1. Amicus first maintains that ACCA cases dealing with the statutory definition of "serious drug offense" have something to say here. *See* CAA Br. 29-30 (citing *McNeill v. United States*, 563 U.S. 816 (2011), and *Brown v. United States*, No. 22-6389 (argued Nov. 27, 2023)). These cases require courts sometimes to identify the "date" and "location" of prior offenses. *Id.* In Amicus's view, that would not be permissible if the prior conviction exception were limited—as *Mathis* and *Descamps* say—to what crime, with what elements, the defendant previously committed. *Id.* at 29.

Not so. In *McNeill* and *Brown*, the defendants argued that the law that existed when they incurred a potentially qualifying prior drug conviction was materially different from law in effect when they committed the instant federal offense. To address those claims, the judges applying ACCA needed to pinpoint what "version of state law" the defendants were "convicted of violating," *McNeill*, 563 U.S. at 820 (internal quotation marks and citation omitted); *see also id.* at 818; Br. for United States at 13-14, *Brown v. United States*, No. 22-6389 (U.S. Aug, 21, 2023) (focusing on

the law "at the time of th[e prior] conviction" (quoting *McNeill*, 563 U.S. at 820)). Neither of those determinations of "the law under which the defendant was convicted," *McNeill*, 563 U.S. at 820, had anything to do with the *manner* in which the defendant committed the underlying offense.

Nor does what Amicus calls "venue" (CAA Br. 29) have anything to do with the manner in which the defendant committed his prior offense. To the contrary, the only pertinent locational fact under ACCA's "serious drug offense" prong is the state in which the prior conviction occurred. And that fact is relevant only for purposes of identifying the particular statute the defendant violated. As with pinpointing what version of state law the defendant was convicted of violating, it is impossible to know "what crime—with what elements—the defendant was convicted of," *Mathis*, 579 U.S. at 512, without knowing which state's criminal code the defendant transgressed. When, by contrast, it comes to the more precise "location" where the previous crime was committed, *Mathis* squarely holds that *Almendarez-Torres* does *not* apply to whether a prior offense was committed in a dwelling, as opposed to a vehicle dwelling—nor to the address of any such dwelling. *See Mathis*, 579 U.S. at 507-09, 511, 516-17.

2. Amicus's double-jeopardy argument fares no better. Amicus notes that courts often inquire into the manner in which the defendant committed a prior offense to determine whether the Double Jeopardy Clause bars a subsequent prosecution based on the same conduct. CAA Br. 25-26 (discussing jurisprudence stemming from *Ashe v. Swenson*, 397 U.S. 436 (1970)). But that situation is totally different. None of

the judicial factfinding that occurs under the *Ashe* doctrine exposes defendants to increased punishment. On the contrary, the bar against double jeopardy is an affirmative defense. *United States v. Young*, 503 F.2d 1072, 1074 (3d Cir. 1974) (collecting cases). The *Apprendi* doctrine does not apply to affirmative defenses. *Patterson v. New York*, 432 U.S. 197, 210 (1977); *see also Apprendi*, 530 U.S. at 483-84; *Leland v. Oregon*, 343 U.S. 790, 798-99 (1952).

Insofar as the double-jeopardy jurisprudence is relevant here, it favors petitioner. As explained in petitioner's opening brief, this Court's double-jeopardy caselaw tolerates judicially imposed recidivism enhancements only inasmuch as they punish defendants based exclusively on conduct that inheres in the present criminal offense. Petr. Br. 29-30. Exempting ACCA's occasions inquiry from *Apprendi* on the ground that it "does not relate to the commission of the offense" (CAA Br. 21 (citation omitted)) would be at odds with that jurisprudence.

C. Sentencing Courts Cannot Use "*Shepard* Documents" To Determine The Factual Basis Of A Prior Conviction.

Dialing back his full-throated request to expand the *Almendarez-Torres* exception, Amicus contends that, "at a minimum," judges should be allowed to make "different occasions" findings based on *Shepard* documents attendant to prior convictions—that is, "the charging documents and [the defendant's] plea agreement." CAA Br. 35-39.

There are several problems with this argument. To begin, "the *only* [*way*] [this Court] ha[s] ever allowed"

judges to use *Shepard* documents is to determine which of the alternative elements within a "divisible" statute served as the basis for the prior conviction under the modified categorical approach. *Mathis*, 579 U.S. at 505, 513 (emphasis added); *see also id.* at 518 (underscoring this "sole and limited purpose") (citation omitted); *Descamps*, 570 U.S. at 262-63 (same). In other words, judges may use *Shepard* documents to clarify what crime the defendant was convicted of. But the Sixth Amendment precludes judges from using such documents to make findings as to *how* the crime was committed. *See Mathis*, 579 U.S. at 511, 513-14. And for good reason: *Shepard* documents are notoriously "prone to error" regarding any "statements of 'non-elemental fact'" they contain. *Id.* at 512; *see also* NAFD Br. 8-15 (detailing examples). Defendants often have "little incentive" to dispute any assertions of non-elemental fact and "may have good reason not to." *Descamps*, 570 U.S. at 270; *see also* NACDL Br. 13-16.

Amicus responds by asserting that judges applying ACCA may still use *Shepard* documents to determine the "who, what, when, and where" of prior convictions. CAA Br. 37-38. But these generalizations do not amount to anything significant. As indicated above, this Court's precedent allows judges to use *Shepard* documents to determine the "where" (which state's law); the "what" (what crime with what elements), and the "when" (the date of conviction). *See supra* at 10-11. All of these things inhere in the very notion of a prior conviction. *See id.* And insofar as the defendant does not object, the sentencing court may use *Shepard* documents to confirm the "who." But

that is all judges may do. And it does not come close to resolving the question that the occasions inquiry raises. *See* Petr. Br. 15-16, 37-40.

Even Amicus himself admits that identifying the states, statutory elements, and dates of a defendant's prior convictions does not necessarily resolve ACCA's occasions inquiry. CAA Br. 40. Recall that the occasions clause demands a "multi-factored" inquiry into "the character and relationship of the [prior] offenses," their timing, whether they shared "a common scheme or purpose," and the geographic "[p]roximity" of the offenses. *Wooden v. United States*, 595 U.S. 360, 369 (2022). Knowing, for example, that two prior offenses occurred in Virginia (or even Virginia and Maryland) is a long way from knowing whether they occurred nearby one another—not to mention resolving the ultimate qualitative issue of whether the prior convictions arose "from a single criminal episode." *Id.* at 371.

Even if Amicus is right that facts relating to location or timing might sometimes suggest that prior offenses were not committed in a single criminal episode, that still does not matter. The Sixth Amendment does not permit directed verdicts, no matter how clear the evidence may seem. *Rose v. Clark*, 478 U.S. 570, 578 (1986). Accordingly, just as judges cannot find before trial that certain elements of a charged offense are obviously satisfied, neither can they find sentence-enhancing facts covered by the *Apprendi* doctrine are obviously present. A defendant is *always* entitled to require a jury to find such facts, no matter how strongly a judge might believe they are established by *Shepard* documents or otherwise.

D. Applying the *Apprendi* Doctrine Here Is Eminently Workable.

The Sixth Amendment question here does not turn on perceived "efficiency" or even "fairness." Petr. Br. 42 (quoting *Blakely v. Washington*, 542 U.S. 296, 313 (2004)). Amicus nevertheless predicts that applying the Sixth Amendment here would "prejudic[e] defendants with a constitutional provision designed to protect them." CAA Br. 42. This prediction is as baseless as it is immaterial. The same is true for Amicus's suggestion that applying the *Apprendi* doctrine to the occasions clause "would upend recidivism sentencing nationwide." CAA Br. 47.

1. The National Association of Criminal Defense Lawyers and the National Association of Federal Defenders support petitioner for a good reason: Based on experience already accumulated, it is clear that giving defendants the right to have juries instead of judges make ACCA's "different occasions" finding is not just legally required but is also sound policy. *Cf. Blakely*, 542 U.S. at 312 (stressing the "implausibility" that NACDL was "somehow duped" into supporting a rule that would be "unfair to criminal defendants").

Waivers. It is true that the prosecution must consent to a defendant's waiver of the right to jury trial. CAA Br. 42. But Amicus gives no examples in this context of such consent being withheld. Nor is there good reason for a prosecutor—tasked with the "special duty" to seek justice above all else, *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011)—to resist an effort to ensure the decision-maker is not unduly influenced by the defendant's criminal record. Accordingly, what this Court has said twice before remains true today:

"We do not understand how *Apprendi* can possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable." *Blakely*, 542 U.S. at 310; *accord Shepard*, 544 U.S. at 26 n.5 (plurality opinion).

Stipulations. As with waivers, this Court has already spoken on the issue of stipulations: When defendants believe it is in their best interest, they can "stipulate[] to the relevant facts" regarding a sentencing enhancement. *Blakely*, 542 U.S. at 310. Amicus flags that when a defendant proceeds to trial, such stipulations must be read to juries. CAA Br. 43. And from that premise, Amicus maintains that telling juries that the defendant committed prior offenses on different occasions is "enough to poison the well" regarding the jury's overall guilt/innocence finding. *Id.* But the conclusion does not follow from the premise. If the trial is bifurcated, Amicus's concern disappears.

In any event, the jury can always be instructed that it should not treat the defendant's prior convictions as establishing any sort of propensity to have committed the currently charged offense. *See* U.S. Br. 27; *Richardson v. Marsh*, 481 U.S. 200, 207 (1987). While Amicus denigrates such limiting instructions as ineffectual, CAA Br. 46, this Court has squarely rejected the argument that they are somehow "inadequate" and held instead that they protect "defendants' interests." *Spencer v. Texas*, 385 U.S. 554, 561-62 (1967). Just last Term, the Court reaffirmed that "jurors will follow instructions to consider a defendant's prior conviction only for purposes of a sentence en-

hancement and not in determining whether he committed the criminal acts charged." *Samia v. United States*, 599 U.S. 635, 646 (2023).

Amicus also suggests that *Old Chief v. United States*, 519 U.S. 172 (1997), might permit prosecutors or courts to reject stipulations that prior offenses were committed on different occasions. CAA Br. 44. But, contrary to Amicus's suggestion (*id.*), *Old Chief*'s construction of Federal Rule of Evidence 403 is not limited to "the fact of a prior conviction." Instead, it covers any evidence regarding "the nature of the prior offense"—or "concrete details of the prior crime"—that "would be arresting enough to lure a juror into a sequence of bad character reasoning." 519 U.S. at 185, 190. That describes ACCA's "different occasions" factor precisely—even more so, in fact, than the prototypical prior-conviction element at issue in *Old Chief* itself.

Bifurcated proceedings. Amicus notes that bifurcation is not "compelled" in this setting. CAA Br. 44. But when the defendant and Government jointly request bifurcation, as is now happening in the lower courts (*see* NAFD Br. 26-27), one is hard-pressed to imagine a good reason why a district court would deny the request. All the more so if this Court endorses this procedure here, along the lines it has already done in the past, as the "fairest" path forward. *Spencer*, 385 U.S. at 567-68; *see also id.* at 569 (Stewart, J., concurring); *Apprendi*, 530 U.S. at 521 n.10 (Thomas, J., concurring).

Amicus cites cases holding that "[b]ifurcation [of] elements of a single crime" is rare. CAA Br. 45. Maybe

so in the circumstance those cases address, where juries would be asked to return a verdict on elements that do not comprise a complete offense. But that is not the situation under ACCA. Here, bifurcation still allows the jury to find the defendant guilty of a base offense, and the only question is whether a recidivist-based enhancement is warranted. In this situation, bifurcation is a time-honored approach. *See* Petr. Br. 41-42 (citing authority); *Spencer*, 385 U.S. at 586 (Warren, J., concurring and dissenting) (noting that a majority of states at that time had "recidivist procedures which postpone the introduction of prior convictions until after the jury has found the defendant guilty of the crime currently charged").

Indeed, bifurcation remains commonplace today in the federal system where an element goes only to the permissibility of a certain type of punishment. Sentencing proceedings in death penalty cases (which are considerably more involved than anything required here) provide one example. *See, e.g.*, 18 U.S.C. §§ 3591, 3593; *United States v. Tsarnaev*, 595 U.S. 302, 317 (2022) (discussing statutory bifurcation scheme). Criminal forfeiture proceedings provide a more ordinary point of comparison. NAFD Br. 28. And remember that a separate sentence-enhancement proceeding is not required at all where the defendant declines to contest the different-occasions allegation or is acquitted at trial.

2. The effect on recidivism sentencing in general from applying the *Apprendi* doctrine to the occasions clause would be minimal.

Start with ACCA itself. Amicus frets about judges deciding before trial (or at least before the sentence-

enhancement component of a bifurcated proceeding) whether prior convictions qualify under ACCA as "violent felonies" or "serious drug offenses." CAA Br. 48. But insofar as ruling for petitioner here would provide earlier notice and clarity regarding defendants' sentencing exposure, that is reason to adopt petitioner's approach, not to reject it. Under current practice, defendants all too often plead guilty to crimes they think are punishable by no more than ten years in prison, only to find out later that their true exposure (because ACCA applies) is fifteen-years-to-life. *See* NAFD Br. 5-6.

At any rate, Federal Rule of Criminal Procedure 12(b)(1), allows defendants to file pretrial motions on legal issues that can be decided "without a trial on the merits." Such motions, therefore, are already regularly made to determine whether prior convictions meet various statutory requirements—for instance, whether a prior conviction constitutes a "crime punishable by imprisonment for a term exceeding one year" or a "misdemeanor crime of domestic violence" for purposes of triggering 18 U.S.C. § 922(g)(1) or (9). *See, e.g.*, *United States v. Del Valle-Fuentes*, 143 F. Supp. 3d 24, 27 (D.P.R. 2015) (§ 922(g)(1)); *United States v. Steffes*, No. CR15-3019-LTS, 2016 WL 1175205, at *2 (N.D. Iowa Mar. 23, 2016) (§ 922(g)(9)). That procedure is readily adaptable here.

Amicus also contends that following the "elements-only" approach to the prior-conviction exception would "upend the categorical approach." CAA Br. 33. This is a curious argument. This Court rejected this precise argument in *Mathis* that "when we talked about 'elements'" in prior categorical-approach cases,

"we did not really mean it." 579 U.S. at 514. In doing so, the Court reiterated—quite emphatically—that a judge applying the categorical approach "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id.* at 511-12; *accord Descamps*, 570 U.S. at 269-70. "That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense." *Mathis*, 579 U.S. at 511-12. In short, it is Amicus's argument, not petitioner's, that would "introduce inconsistency and arbitrariness into our ACCA decisions." *Id.* at 520. The Court should decline that invitation.

There is another reason to resist breaching the current boundary cordoning off from judicial factfinding the manner in which the defendant committed his prior offense: It would create serious line-drawing problems. As petitioner explained in his opening brief, there is no clear dividing line between "recidivism facts" and "facts of conduct" underlying prior convictions. Petr. Br. 32-33.

Amicus, in fact, never disagrees. Instead, Amicus seems to urge this Court to evade this difficulty by going even further than the Fourth Circuit suggested in *United States v. Brown*, 67 F.4th 200, 211-12 (4th Cir. 2023), *cert. pending*, No. 23-6433. But if Amicus really means to suggest this Court should hold that *all* "past conduct" related to prior convictions falls within *Almendarez-Torres*, his argument flies all the more in the face of established precedent. *Stare decisis* cannot tolerate such destabilization. *See Mathis*, 579 U.S. at 520.

Amicus lastly cites a handful of modern state laws with provisions similar to the occasions clause. CAA Br. 48-49 & n.8. But nothing prevents states from retrofitting those laws or sentencing practices to comport with the Sixth Amendment. Such tweaks would be exceedingly marginal compared to the sentencing reform efforts the *Apprendi* doctrine has already required numerous states to undertake. *Compare* Petr. Br. 12-13 (citing cases). If the truth were otherwise, one would expect at least some states themselves to be appearing here as *amici*. The fact they are not tells this Court all it needs to know.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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