No. _____

IN THE
Supreme Court of the United States

JAMES JOSEPH BRYANT,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, for purposes of applying the categorical approach required by the Armed Career Criminal Act (ACCA), a prior conviction's elements can be determined using current judicial interpretations of the statute of conviction, as the Eleventh Circuit holds, or only interpretations in place at the time of the prior conviction, as the First and Fourth Circuits hold and the Eighth Circuit holds in the Guidelines context.

2. Whether the Constitution requires an indictment, jury trial, and proof beyond a reasonable doubt to find that a defendant's prior convictions were "committed on occasions different from one another," as is necessary to impose an enhanced sentence under ACCA, 18 U.S.C. § 924(e)(1). This same question is pending before the Court in *Erlinger v. United States*, No. 23-370. *See* Petition for Writ of Certiorari at i, *Erlinger v. United States*, No. 23-370; Brief for Petitioner at i, *Erlinger v. United States*, No. 23-370.

RELATED PROCEEDINGS

This case arises from these proceedings:

United States District Court (M.D. Fla.):

United States v. Bryant, No. 6:18-cr-188-PGB-TBS (M.D. Fla. May 30, 2019)

United States Court of Appeals (11th Cir.):

United States v. Bryant, No. 19-12283, 2023 WL 9018411 (11th Cir. Dec. 29, 2023).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Joseph Bryant respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion is unpublished, 2023 WL 9018411, and is provided in the Petition Appendix (Pet. App.).

JURISDICTION

The Eleventh Circuit issued its opinion on December 29, 2023. Pet. App. 1a. The Court granted Mr. Bryant an extension until April 27, 2024, to petition for a writ of certiorari. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution (U.S. Const. amend. V) provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment (U.S. Const. amend. VI) provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . and to be informed of the nature and cause of the accusation . . . .

Title 18, United States Code, § 922(g)(1) provides in relevant part:

> It shall be 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 or ammunition.

Title 18, United States Code, § 924(a)(2) (eff. Oct. 6, 2006, to Dec. 20, 2018) also provides:

> Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), provides in relevant part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection—
>
> . . .
>
> > (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that—
> >
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another . . . .

INTRODUCTION

This petition presents a circuit split on which interpretation of state law informs the categorical analysis under ACCA's violent felony provision: judicial interpretations in place at the time of the prior conviction or a later interpretation by the state's highest court. The First, Fourth, and Eighth Circuits hold, consistent with *McNeill v. United States*, 563 U.S. 816 (2011), that a court must look only to judicial interpretations of state law in effect at the time of the prior conviction. *United States*

v. Faust, 853 F.3d 39, 57 (1st Cir.), *rehearing denied*, 869 F.3d 11 (1st Cir. 2017); *United States v. Cornette*, 932 F.3d 204, 213–15 (4th Cir. 2019); *see United States v. Roblero-Ramirez*, 716 F.3d 1122, 1126–27 (8th Cir. 2013) (Sentencing Guidelines case); *see also United States v. Vickers*, 967 F.3d 480, 486 (5th Cir. 2020), *cert. granted, vacated, and remanded on other grounds*, 141 S. Ct. 2783 (2021).

The Eleventh Circuit, by contrast, looks to later interpretations by the state's highest court. *See* Pet. App. 9a–10a; *United States v. Fritts*, 841 F.3d 937, 942–43 (11th Cir. 2016). Mr. Bryant is a prime example of how these differing approaches can lead to differing results. When Mr. Bryant pleaded no contest in 1994 to being a principal to aggravated assault in Florida, he did so in a jurisdiction that described the *mens rea* element in terms of recklessness. *See Kelly v. State*, 552 So. 2d 206, 208 (Fla. 5th Dist. Ct. App. 1989) ("Where, as here, there is no proof of an intentional assault on the victim, that proof may be supplied by proof of conduct equivalent to culpable negligence . . . or by proof of willful and reckless disregard for the safety of others."). Under this interpretation of the aggravated assault statute, Mr. Bryant's 1994 conviction is not a violent felony under *Borden v. United States*, 593 U.S. 420, 429 (2021). But in 2022, the Florida Supreme Court interpreted the statute to require more than recklessness, holding that "Florida's assault statute, section 784.011(1), requires not just the general intent to volitionally take the action of threatening to do violence, but also that the actor direct the threat at . . . another person." *Somers v. United States*, 355 So. 3d 887, 892–93 (Fla. 2022). Under this later interpretation, Florida aggravated assault *is* an ACCA violent felony. *Somers v. United States*, 66

F.4th 890, 893–95 (11th Cir. 2023). Relying on its decision in *Fritts*, 841 F.3d at 942–43, that "[w]hen the Florida Supreme Court . . . interprets [a] statute, it tells us what that statute always meant," the Eleventh Circuit concluded here that the Florida Supreme Court's 2022 interpretation of the assault statute controlled whether Mr. Bryant's 1994 conviction was a violent felony. Pet. App. 9a–10a. Because the Eleventh Circuit's decision conflicts with *McNeill* and the approach of the First, Fourth, and Eighth Circuits, this Court's input is necessary to resolve the circuit split and restore uniformity to the application of the categorical analysis.[1]

STATEMENT OF THE CASE

1. In February 2018, local law enforcement arrested Mr. Bryant based on three arrest warrants issued in Volusia County, Florida. Doc. 28 at 19–20.[2] When the police arrested him, Mr. Bryant was seated in a wheelchair and had a firearm underneath his leg. *Id.* at 20. He ultimately pleaded guilty to one count of possessing a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1). Docs. 28, 29, 73.

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[1] This petition also raises the same question presented in *Erlinger v. United States*, No. 23-370. This Court granted certiorari in *Erlinger* to resolve the constitutional question of whether a jury must find that a defendant's prior state offenses were "committed on occasions different from one another" under ACCA, § 924(e)(1) (the "occasions clause"). Following *Wooden v. United States*, 142 S. Ct. 1063 (2022), the Solicitor General has agreed—including in *Erlinger*—that the Sixth Amendment jury right applies to ACCA's occasions clause. Because this Court's decision in *Erlinger* may resolve whether Mr. Bryant's ACCA sentence is lawful, he asks this Court to hold his petition pending the decision in that case.

[2] Mr. Bryant cites the docket entries in Case No. 6:18-cr-188-PGB-TBS (M.D. Fla).

The Presentence Report (PSR) recommended that Mr. Bryant be sentenced under ACCA based on four prior convictions: (i) Florida aggravated battery, allegedly committed on April 29, 1988; (ii) Florida principal to aggravated assault, allegedly committed on June 8, 1993 (for which Mr. Bryant was convicted in February 1994); (iii) federal possession with intent to distribute cocaine base, allegedly committed on January 8, 1999; and (iv) federal possession with intent to distribute cocaine base, allegedly committed on January 15, 1999. Doc. 54 (PSR) ¶ 24.[3] Mr. Bryant objected to the PSR's factual narratives about the assault and federal drug offenses. *Id.* ¶¶ 35–36. The district court determined he was an armed career criminal but sentenced him to 10 years in prison based on the Government's motion for a downward departure. *See* Docs. 60, 64.

2. On appeal to the Eleventh Circuit, Mr. Bryant challenged the validity of his ACCA sentence. *See* App. Doc. 21 at 23–33.[4] He argued (among other things) that (i) his 1994 Florida conviction for aggravated assault lacked the requisite *mens rea* to qualify as an ACCA "violent felony," *id.* at 23–24, and (ii) his ACCA sentence violated the Fifth and Sixth Amendments because he was sentenced above the statutory maximum based on facts not charged in the indictment and proven to a jury

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[3] Without ACCA, the statutory maximum penalty would have been 10 years in prison. 18 U.S.C. § 924(a)(2) (eff. Oct. 6, 2006) (applicable to Mr. Bryant). When ACCA applies, the mandatory minimum becomes 15 years in prison and the maximum is life. *Id.* § 924(e)(1).

[4] Mr. Bryant cites the appellate docket entries in No. 19-12283 (11th Cir.).

beyond a reasonable doubt, including whether the prior offenses were committed on different occasions, *id.* at 31–33.[5]

Before the Government filed its answer brief, Mr. Bryant moved to stay the appeal pending this Court's decision in *Borden*, which the court of appeals granted. App. Docs. 32, 34. This Court decided *Borden* on June 10, 2021, holding that a crime that requires only a *mens rea* of recklessness is not a "violent felony" under ACCA's "elements clause." 593 U.S. at 429. After *Borden* was decided, the Eleventh Circuit lifted the stay and the Government filed its brief. App. Docs. 50, 54.

Mr. Bryant then moved to stay the appeal pending this Court's decision in *Wooden* and the Eleventh Circuit's decision in *Somers*, which the court of appeals granted to the extent the appeal was stayed pending *Somers*. App. Docs. 59, 60. In *Somers*—a follow-on case to *Borden*—the Eleventh Circuit certified a question to the Florida Supreme Court about the *mens rea* needed to commit aggravated assault. *Somers v. United States*, 15 F.4th 1049, 1056 (11th Cir. 2021). In certifying the question, the Eleventh Circuit recognized that Florida's intermediate appellate courts were divided over the required *mens rea*, with Florida's Fifth District Court of Appeal holding in 1994 and before that recklessness was enough. *Id.* at 1054–56 (citing, *inter alia*, *Kelly*, 552 So. 2d at 208). The Florida Supreme Court answered the question in 2022, holding that "Florida's assault statute, section 784.011(1), requires

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[5] Relatedly, Mr. Bryant argued that the district court erred by sentencing him under ACCA because it relied on non-elemental facts to find that he committed the prior offenses "on occasions different from one another," § 924(e)(1), since the date of a criminal offense is not an element under Florida or federal law. App. Doc. 21 at 25–31.

not just the general intent to volitionally take the action of threatening to do violence, but also that the actor direct the threat at . . . another person." *Somers*, 355 So. 3d at 892–93. Based on that answer, the Eleventh Circuit held that Florida aggravated assault remains an ACCA violent felony after *Borden* because it requires more than a *mens rea* of recklessness. *Somers*, 66 F.4th at 893–95. The stay of Mr. Bryant's appeal was then lifted. App. Doc. 61. In the meantime, this Court had also decided *Wooden*—its first decision interpreting ACCA's different-occasions clause.

In his reply brief, Mr. Bryant maintained that his 1994 aggravated assault conviction was not an ACCA violent felony because, at the time of his state court proceedings, the jurisdiction in which he pleaded no contest described the *mens rea* element in terms of recklessness. App. Doc. 66 at 2–5. Under *McNeill*, he argued, "[t]he elements the defendant was convicted of were locked in at the time of the prior state proceedings," *id.* at 3, such that the Florida Supreme Court's 2022 *Somers* decision could not be relied on to rewrite the elements of his 1994 conviction, *id.* at 3–5. He also maintained his constitutional challenges to the district court's reliance on non-elemental facts to increase his sentence under ACCA. *Id.* at 6–8. He contended that whether the prior offenses were committed on different occasions had to be charged in an indictment and proven to a jury beyond a reasonable doubt. *Id.*

On December 29, 2023, the Eleventh Circuit affirmed Mr. Bryant's conviction and ACCA sentence. Pet. App. 1a. This Court granted certiorari in *Erlinger*, No. 23-370, on November 20, 2023, and heard argument on March 27, 2024. Because of a circuit split over how evolving judicial interpretations affect the categorical approach,

and because the constitutional different-occasions question is pending before this Court and may resolve the lawfulness of Mr. Bryant's ACCA sentence, he respectfully petitions this Court.

REASONS FOR GRANTING THE PETITION

I. This Court's review is needed to resolve whether, under ACCA's categorical approach, the elements of a prior conviction can be determined by reference to a judicial interpretation of the statute of conviction that post-dates the prior conviction.

A. The circuits are split on whether ACCA and the categorical approach require courts to look at judicial interpretations of state law in effect at the time of the prior conviction or at the time of the federal criminal proceedings.

This Court's review is needed to resolve a circuit split about whether ACCA's categorical approach for identifying a "violent felony" incorporates judicial interpretations of state law in effect at the time of (i) the prior conviction or (ii) the federal criminal proceedings. On one side, the First, Fourth, and Eighth Circuits look to judicial interpretations in place at the time of the prior conviction. On the other side, the Eleventh Circuit looks to current interpretations of state law.

This Court has long held that "[t]o decide whether an offense satisfies the elements clause, courts use the categorical approach." *Borden*, 593 U.S. at 424 (citing *Stokeling v. United States*, 139 S. Ct. 544, 555 (2019)). The purpose of the categorical approach is to discern "what a jury 'necessarily found' to convict a defendant (or what he necessarily admitted)," and "elements alone fit that bill." *Mathis v. United States*, 579 U.S. 500, 515 (2016) (citations omitted). "Under that by-now-familiar method, . . . the facts of a given case are irrelevant." *Borden*, 593 U.S. at 424. "The focus is

instead on whether the elements of the statute of conviction meet the federal standard," which here "means asking whether a state offense necessarily involves the defendant's 'use, attempted use, or threatened use of physical force against the person of another.'" *Id.* (quoting 18 U.S.C. § 924(e)(2)(B)(i)).[6] In this context, "the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010). And "[t]he phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual," which excludes "offenses criminalizing reckless conduct." *Borden*, 593 U.S. at 429.

This Court held in *McNeill* that in determining whether a prior state drug offense was punishable by 10 years or more in prison so as to qualify as an ACCA "serious drug offense," "the 'maximum term of imprisonment' . . . is the maximum sentence applicable to his offense when he was convicted of it." 563 U.S. at 817–18. That was so, the Court explained, because "[t]he plain text of ACCA requires a federal sentencing court to consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense," and "[t]he only way to answer this backward-looking question is to consult the law that applied at the time of that conviction." *Id.* at 820. Because "ACCA is concerned with convictions

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[6] As this Court explained in *Mathis*, there are "three basic reasons for adhering to an elements-only inquiry": (i) "ACCA's text favors that approach," (ii) "a construction of ACCA that would allow a sentencing judge to go [beyond the elements of a prior conviction] would raise serious Sixth Amendment concerns," and (iii) "an elements-focus avoids unfairness to defendants," who may have had no reason in a prior proceeding to contest non-elemental facts that "do[ ] not matter under the law." 579 U.S. at 510–12.

that have already occurred," whether a prior conviction is an ACCA predicate "can only be answered by reference to the law under which the defendant was convicted." *Id.* The Court drew support for this approach from "the adjacent definition of 'violent felony,'" which, despite using the present tense, called on the Court to "turn[ ] to the version of state law that the defendant was actually convicted of violating." *Id.* at 821 (discussing *Taylor v. United States*, 495 U.S. 575 (1990), and *James v. United States*, 550 U.S. 192 (2007)). "Having repeatedly looked to the historical statute of conviction in the context of violent felonies," the Court "s[aw] no reason to interpret 'serious drug offense[s]' in the adjacent section of the same statute any differently." *Id.* at 822. The Court added that "absurd results . . . would follow from consulting current state law to define a previous offense." *Id.* For example, "a prior conviction could 'disappear' entirely for ACCA purposes if a State reformulated the offense between the defendant's state conviction and federal sentencing," *id.*, which "cannot be correct," *id.* at 823. Thus, the Court "conclude[d] that a federal sentencing court must determine whether 'an offense under State law' is a 'serious drug offense' by consulting the 'maximum term of imprisonment' applicable to a defendant's previous drug offense at the time of the defendant's state conviction for that offense." *Id.* at 825.

In line with *McNeill*'s teaching that ACCA is "backward-looking," 563 U.S. at 820, the First and Fourth Circuits hold that only judicial interpretations of state law that were in place at the time of the prior conviction can inform the categorical analysis. *Faust*, 853 F.3d at 57 (concluding that *McNeill* supported the defendant's

argument that, in determining whether his prior Massachusetts conviction for assault and battery on a police officer was an ACCA violent felony, the court had to consider the elements of the offense according to judicial interpretations in place at the time of the prior conviction); *Cornette*, 932 F.3d at 213 ("Utilizing the categorical approach, we move to whether, at the time of Cornette's conviction in 1976, the definition of burglary in the Georgia burglary statute criminalized more conduct than ACCA generic burglary."); *id.* at 214–15 (declining to consider 1977 and 1980 Georgia Supreme Court decisions interpreting the burglary statute because they did not inform the elements of the crime at the time the defendant was convicted of burglary; looking instead to intermediate appellate court decisions in place in 1976). The Eighth Circuit holds the same in the context of determining whether a prior conviction is a "crime of violence" under the Sentencing Guidelines. *Roblero-Ramirez*, 716 F.3d at 1126–27 (in deciding whether the defendant's prior Nebraska conviction for sudden-quarrel manslaughter was a "crime of violence" under § 2L1.2(b)(1)(A)(ii), looking to the highest state-court case law in place at the time of the prior conviction, not a later Nebraska Supreme Court decision that manslaughter required intent because "[t]hat interpretation was not Nebraska law when Roblero-Ramirez was convicted"). Likewise, although its decision was vacated on other grounds, the Fifth Circuit rejected a defendant's reliance on a state court interpretation of the Texas felony murder statute that post-dated his murder conviction, reasoning that *McNeill* required it to "apply the state court interpretation [of the felony murder statute] at the time of Vickers's conviction." *Vickers*, 967 F.3d at 486.

The Eleventh Circuit sees it differently. The Eleventh Circuit holds that the categorical approach incorporates judicial interpretations of state law that post-date a prior conviction. Pet. App. 9a–10a; *Fritts*, 841 F.3d at 942–43 (consulting a 1997 Florida Supreme Court decision to determine whether the defendant's 1989 Florida armed robbery conviction was a violent felony under ACCA's elements clause); *see also United States v. Stokeling*, 684 F. App'x 870, 872–76 (11th Cir. 2017) (Martin, J., concurring) (while it made no difference for Stokeling, arguing that *Fritts*'s consideration of a judicial interpretation of the robbery statute that post-dated a defendant's prior conviction violated *McNeill*, 563 U.S. 816). In *Fritts*, the Eleventh Circuit concluded that a defendant's 1989 Florida conviction for armed robbery was an ACCA violent felony based mainly on a 1997 Florida Supreme Court decision, *Robinson v. State*, 692 So. 2d 883 (Fla. 1997), which held that Florida robbery did not include taking property by sudden snatching. *Fritts*, 841 F.3d at 942–43. The court reasoned that "[w]hen the Florida Supreme Court in *Robinson* interpret[ed] the robbery statute, it tells us what that statute always meant." *Id.* at 943 (citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 & n.12 (1994)).

The Eleventh Circuit applied the same rationale to Mr. Bryant, concluding that his 1994 conviction for being a principal to aggravated assault was an ACCA violent felony based on the Florida Supreme Court's 2022 decision in *Somers*, 355 So. 3d 887. *See* Pet. App. 8a–10a. When Mr. Bryant pleaded no contest to being a principal to aggravated assault in 1994, he did so in a jurisdiction that described the *mens rea* element in terms of recklessness. *Kelly*, 552 So. 2d at 208 ("Where, as here, there is

no proof of an intentional assault on the victim, that proof may be supplied by proof of conduct equivalent to culpable negligence . . . or by proof of willful and reckless disregard for the safety of others."); *see LaValley v. State*, 633 So. 2d 1126, 1127–28 (Fla. 5th Dist. Ct. App. 1994) ("We held in *Kelly* . . . that 'willful and reckless disregard for the safety of others' could substitute for proof of intentional assault on the victim" (citing *Kelly*, 552 So. 2d 206)); *DuPree v. State*, 310 So. 2d 396, 398 (Fla. 2d Dist. Ct. App. 1975) (using the term "culpable negligence"); Br. for U.S., *Borden v. United States*, No. 19-5410, 2020 WL 4455245, at *20 & n.5 (citing *Dupree*, 310 So. 2d at 398, for the proposition that Florida aggravated assault encompasses reckless conduct). Three decades later, the Florida Supreme Court contradicted these decisions in *Somers*, 355 So. 3d 887. There, it held that assault under Florida Statutes Section 784.011(1)—which underlies aggravated assault—"require[s] that the intentional threat to do violence be directed at or targeted towards another individual . . . and therefore cannot be accomplished via a reckless act." *Id.* at 892. The Eleventh Circuit concluded that *Somers*—not *Kelly*, *LaValley*, or *Dupree*—controlled whether Mr. Bryant's 1994 conviction was an ACCA violent felony. Citing *Fritts*, the court reasoned that "'[w]hen the Florida Supreme Court . . . interprets [a] statute, it tells us what that statute always meant,' so prior differing interpretations do not alter whether convictions qualify, even if the conviction occurred while the interpretation was binding." Pet. App. 9a–10a (quoting *Fritts*, 841 F.3d at 942–43). The court bluntly stated that "prior interpretations of the statute, even if binding on the court wherein Bryant was convicted, make no difference." *Id.* 10a. Thus, the court

concluded that Mr. Bryant's 1994 principal-to-aggravated-assault conviction was a violent felony based on a 2022 interpretation of the assault statute. *Id.*

B. The Eleventh Circuit's approach is wrong.

The Eleventh Circuit's approach is wrong for at least two reasons. First, the purpose of the categorical approach is to discern "what a jury 'necessarily found' to convict a defendant (or what he necessarily admitted)." *Mathis*, 579 U.S. at 515 (emphasis added; citations omitted). By relying on a judicial interpretation of state law that post-dates the prior conviction, the Eleventh Circuit's approach subverts that purpose. Second, the text of ACCA's violent felony provision, as confirmed by this Court's decision in *McNeill* and its predecessors, requires a court to "consult the law that applied at the time of [the prior] conviction." *McNeill*, 563 U.S. at 820.

Relying on a subsequent judicial interpretation of the statute of conviction—which here modified the *mens rea* element—distorts what a defendant like Mr. Bryant was necessarily convicted of. He has no quarrel with the general premise that when a jurisdiction's highest court interprets a statute, that interpretation is supposed to represent what the statute always meant. *See Rivers*, 511 U.S. at 312–13 ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."). But that premise is beside the point when it comes to ACCA's categorical analysis. The purpose of the categorical approach is to discern "what a jury '*necessarily* found' to convict a defendant (or what he *necessarily* admitted)." *Mathis*, 579 U.S. at 515 (emphasis added; citations omitted). And the only way to

determine what Mr. Bryant necessarily admitted when he pleaded *nolo contendere* to aggravated assault is to consult the elements of the crime as understood in 1994. Measured by that rubric, Mr. Bryant necessarily admitted to having only a *mens rea* of recklessness, *see Kelly*, 552 So. 2d at 208; *LaValley*, 633 So. 2d at 1127–28, which does not qualify the conviction as an ACCA violent felony, *Borden*, 593 U.S. at 429.

McNeill compels this conclusion because it teaches that ACCA is "backward-looking." 563 U.S. at 820. "ACCA is concerned with convictions that have already occurred," so whether a prior conviction is an ACCA predicate "can only be answered by reference to the law under which the defendant was convicted." *Id.* Indeed, in the violent felony context, this Court has already determined that ACCA requires it to "turn[ ] to the version of state law that the defendant was actually convicted of violating." *Id.* at 821 (discussing *Taylor*, 495 U.S. 575, and *James*, 550 U.S. 192); *see also Descamps v. United States*, 570 U.S. 254, 295 n.5 (2013) (Alito, J., dissenting) ("The majority suggests that California law is ambiguous . . . , but any confusion appears to have arisen after petitioner's 1978 conviction and is therefore irrelevant for purposes of this case." (citing *McNeill*, 563 U.S. 816)). Looking to current interpretations would yield "absurd results." *McNeill*, 563 U.S. at 822. Just as "[i]t cannot be correct that subsequent changes in state law can erase an earlier conviction for ACCA purposes," *id.* at 823, it cannot be correct that subsequent interpretations of state law can transform an earlier conviction into an ACCA violent felony. And the Eleventh Circuit's "interpretation . . . make[s] ACCA's applicability depend on the timing of the federal sentencing proceeding." *Id.* "[T]wo defendants who violated §

922(g) on the same day and who had identical criminal histories—down to the dates on which they committed and were sentenced for their prior offenses—[c]ould receive dramatically different federal sentences" just because one's sentencing occurred after the state's highest court reinterpreted the statute of conviction. *Id.* ACCA and *McNeill* do not tolerate such a result.

As the First Circuit's Judge Lynch highlighted, the question of which judicial interpretation of state law informs ACCA's categorical analysis—current interpretations or those in place at the time of the prior conviction—is a significant question that demands an answer. *Faust*, 869 F.3d at 11–12 (Lynch, J., dissenting from the denial of panel rehearing).[7] Accordingly, Mr. Bryant respectfully asks that this Court grant a writ of certiorari to review the Eleventh Circuit's conclusion that his 1994 principal-to-aggravated assault conviction is an ACCA violent felony in light of a 2022 Florida Supreme Court decision.

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[7] This Court's forthcoming decision in *Jackson v. United States*, No. 22-6640, and *Brown v. United States*, No. 22-6389, will not resolve this issue. The question in *Brown* and *Jackson* is whether ACCA's "serious drug offense" definition "incorporates the federal drug schedules that were in effect at the time of the federal firearm offense . . . or the federal drug schedules that were in effect at the time of the prior state drug offense." Petition for Writ of Certiorari at i, *Jackson*, No. 22-6640; *see also* Petition for Writ of Certiorari at i, *Brown*, No. 22-6389. Thus, the question in *Brown* and *Jackson* is which version of the *federal standard* controls whether a prior state conviction is a serious drug offense. Here, by contrast, the issue is the proper method for discerning what a prior conviction necessarily consisted of—i.e., what its elements were.

II. Mr. Bryant respectfully asks this Court to hold his petition pending the decision in *Erlinger*, No. 23-370.

This Court granted certiorari in *Erlinger* to decide whether the Constitution requires a jury trial and proof beyond a reasonable doubt to find that a defendant's prior offenses were "committed on occasions different from one another" under ACCA. *See* Petition for Writ of Certiorari at i, *Erlinger*, No. 23-370.

In *Wooden*, this Court interpreted ACCA's different occasions clause to require consideration of multiple factors, including the timing, location, and the character and relationship of the prior offenses. 142 S. Ct. at 1070-71. Because the Petitioner in *Wooden* had not presented a Sixth Amendment question, the Court did not address it. *Id.* at 1068 n.3. But as Justice Gorsuch observed, "[a] constitutional question simmers beneath the surface." *Id.* at 1087 n.7 (Gorsuch, J., concurring in the judgment).

This Court has held that the Fifth and Sixth Amendments mean that any fact that increases the statutory minimum or maximum penalty, other than "the fact of a defendant's prior conviction," is an "element" that must be charged in an indictment and proven to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 103 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). This Court has described the "fact of a defendant's prior conviction" as a "narrow" exception to this constitutional requirement. *See United States v. Haymond,* 139 S. Ct. 2369, 2377 n.3 (2019) (plurality) (citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)); *Apprendi*, 530 U.S. at 490.

Deciding whether a defendant's prior offenses were committed on different occasions, however, requires a consideration of more than just the "fact of a prior conviction." As the Government has acknowledged, the "different-occasions inquiry. . . goes beyond the 'simple fact of a prior conviction'" and falls outside the "narrow exception" to the constitutional rule. Gov't Br. Opp. at 4–8, *Daniels v. United States*, No. 22-5102. Following *Wooden*, the Government has "agree[d] . . . that the Sixth Amendment requires a jury to find (or a defendant to admit) that predicate offenses were committed on different occasions before the defendant may be sentenced under the ACCA." Gov't Br. at 11, *Erlinger*, No. 23-370. As this Court is now reviewing the issue in *Erlinger*, No. 23-370, Mr. Bryant asks this Court to hold his petition pending the decision in that case.

In the decision below, the Eleventh Circuit rejected Mr. Bryant's argument that the Fifth and Sixth Amendments require an indictment, jury trial, and proof beyond a reasonable doubt to find that his prior offenses were committed on different occasions. Pet. App. 12a–13a. The court cited its holding in *United States v. Dudley*, 5 F.4th 1249, 1260 (11th Cir. 2021), that "a defendant's prior convictions and the dates he committed the crimes need not be alleged in the indictment, admitted in the defendant's plea, or proven beyond a reasonable doubt," Pet. App. 12a–13a. The Eleventh Circuit affirmed the sentence under plain-error review based on its determination that "[t]he facts reported by the PSR establish that Bryant's Florida law aggravated assault conviction and his two possessions with intent to distribute convictions occurred on different dates, separated by no less than seven days." *Id.*

12a; *see also id.* 13a.[8] To reach this conclusion, the Eleventh Circuit relied on non-elemental "facts"—i.e., that according to the PSR, Mr. Bryant was a principal to an aggravated assault on June 8, 1993, and that he possessed cocaine with intent to distribute on January 8 and 15, 1999. *See* Pet. App. 3a, 12a; *see also* PSR ¶ 24. But the dates of the offenses are not elemental facts. *United States v. McIntosh*, 580 F.3d 1222, 1228 (11th Cir. 2009) ("Because the date of the offense was not an essential element of the offense, the error in the original indictment was of form, not substance, and was not fatally defective."); *Tingley v. State*, 549 So. 2d 649, 650–51 (Fla. 1989) (holding that the date "is not a substantive element" of the offense and therefore "there may be a variance" between the date alleged and proved at trial).

Mr. Bryant's case thus presents the constitutional question arising after *Wooden* and now pending in *Erlinger*. As Mr. Bryant contended below, the district court (and the appeals court) should not have used non-elemental dates alleged in the PSR to increase his statutory penalties. App. Doc. 21 at 25–33; App. Doc. 66 at 6–8. Even if the dates of the offenses were undisputed, the dates alone wouldn't necessarily establish that Mr. Bryant's prior federal drug offenses were committed on different occasions under *Wooden*'s multi-factor analysis. *Wooden* requires a consideration of not only timing but of locational proximity and "the character and relationship of the offenses." 142 S. Ct. at 1070–71. Still, the Eleventh Circuit relied

[8] Mr. Bryant objected to the factual narratives concerning the principal-to-aggravated-assault and federal drug convictions, *id.* ¶¶ 35–36, but the Eleventh Circuit found the objections to have been withdrawn and applied plain error review, Pet. App. 12a.

on non-elemental dates alleged in the PSR to conclude "that Bryant's Florida law aggravated assault conviction and his two possessions with intent to distribute convictions occurred on different dates, separated by no less than seven days," and "[t]hey were, thus, on separate occasions." Pet. App. 12a.[9] But, as this Court has explained, that is "the constitutional rub. The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts [as to the underlying conduct], unanimously and beyond a reasonable doubt." *Descamps*, 570 U.S. at 270; *accord Mathis*, 579 U.S. at 511 ("[A] judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. . . . He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.").

Mr. Bryant maintains that the Eleventh Circuit erred in affirming the different-occasions determination. Whether Mr. Bryant's prior offenses were "committed on occasions different from one another" was neither charged in his indictment nor proven to a jury beyond a reasonable doubt. *See* Docs. 16, 73, 76. Because this Court's decision in *Erlinger* may resolve the lawfulness of his ACCA sentence, Mr. Bryant respectfully asks the Court to hold his petition pending its decision in *Erlinger*. *See, e.g.*, *Robinson v. United States*, No. 23-6631; *Brown v.*

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[9] In rejecting Mr. Bryant's Fifth and Sixth Amendment claims, the court also said that "Bryant confirmed the factual basis of his plea, and the district court used that information to determine his sentencing under ACCA." *Id.* While the factual basis of Mr. Bryant's plea admitted the existence of his prior convictions and the dates on which he was *convicted*, it neither admitted their character as ACCA predicates nor whether they were *committed* on different occasions. Doc. 28 at 20–21; Doc. 73 at 12, 14–15.

United States, No. 23-6433; *Stowell v. United States*, No. 23-6340.

CONCLUSION

If Mr. Bryant's federal firearm offense had occurred in the First, Fourth, or Eighth Circuits, his 1994 Florida conviction for principal to aggravated assault would not be an ACCA violent felony. But because he was convicted in the Eleventh Circuit, a subsequent state decision transformed his 1994 conviction into an ACCA predicate. The imposition of an onerous sentencing enhancement should not depend on geographical happenstance. Mr. Bryant thus asks the Court to grant his petition to review the decision below. Alternatively, he requests that this Court hold his petition pending the Court's decision in *Erlinger*, No. 23-370.

Respectfully submitted,

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