

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus SERGIO ANTONIO HOOD,  
Defendant-Appellant.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

2024 U.S. App. LEXIS 3982

No. 21-13903 Non-Argument Calendar

February 21, 2024, Filed

**Notice:**

**PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.**

**Editorial Information: Prior History**

{2024 U.S. App. LEXIS 1}Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 8:20-cr-00383-CEH-AEP-1.United States v. Aldridge, 2007 U.S. Dist. LEXIS 115635 (W.D. Mo., Apr. 6, 2007)

**Disposition:**

AFFIRMED.

**Counsel**

For UNITED STATES OF AMERICA, Plaintiff - Appellee: Linda Julin McNamara, Oberheiden, PC, HOUSTON, TX; Yvette Rhodes, U.S. Attorney Service - Middle District of Florida, U.S. Attorney, USAO, TAMPA, FL.

For SERGIO ANTONIO HOOD, Defendant - Appellant: Ray Christopher Lopez, Ray C. Lopez, PA, TAMPA, FL; Sergio Antonio Hood, USP Coleman I - Inmate Legal Mail, COLEMAN, FL.

**Judges:** Before WILSON, LUCK, and LAGOA, Circuit Judges.

**CASE SUMMARY**Resentencing under the ACCA would be improper because the predicate offenses were committed a day or more apart, which was sufficient to decisively differentiate the occasions, and the district court had the authority to judicially determine the prior convictions were committed on different occasions for purposes of the ACCA.

**OVERVIEW:** HOLDINGS: [1]-Resentencing under the ACCA would be improper because the predicate offenses were committed a day or more apart, which was sufficient to decisively differentiate the occasions, and the district court had the authority to judicially determine the prior convictions were committed on different occasions for purposes of the ACCA; [2]-The district court did not err in classifying Hood's 18 U.S.C.S. § 2 convictions as serious drug offenses under the ACCA because, for ACCA predicate purposes, there was no distinction between a person charged as a principal and a person charged as an aider and abettor.

**OUTCOME:** Convictions and sentences affirmed.

**LexisNexis Headnotes**

**Evidence > Relevance > Prior Acts, Crimes & Wrongs**

**Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion**

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APPENDIX A

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***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence***  
***Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Evidence***  
***Criminal Law & Procedure > Appeals > Reversible Errors > Evidence***

The appellate court reviews the admission of evidence under Fed. R. Evid. 404(b) for abuse of discretion. If a reviewing court finds that a district court has abused its discretion in admitting evidence in violation of Fed. R. Evid. 404(b), then its decision to uphold the conviction is properly reviewed under a harmless error standard. Under that standard, reversal is warranted only if the error resulted in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict. Overwhelming evidence of guilt is one factor that may be considered in finding harmless error.

***Evidence > Relevance > Prior Acts, Crimes & Wrongs***

Fed. R. Evid. 404(b) prohibits the introduction of evidence of a crime, wrong, or other act to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. It does, however, allow such evidence for other purposes, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Fed. R. Evid. 404(b)(2). Fed. R. Evid. 404(b) is a rule of inclusion, and accordingly 404(b) evidence, like other relevant evidence, should not be lightly excluded when it is central to the prosecution's case.

***Evidence > Relevance > Prior Acts, Crimes & Wrongs***  
***Evidence > Relevance > Confusion, Prejudice & Waste of Time***

There is a three-part test to determine whether evidence is admissible under Fed. R. Evid. 404(b): (1) the evidence must be relevant to an issue other than the defendant's character; (2) there must be sufficient proof that a jury could find by a preponderance of the evidence that the defendant committed the act; and (3) the probative value of the evidence must not be substantially outweighed by undue prejudice, as established in Fed. R. Evid. 403.

***Evidence > Relevance > Prior Acts, Crimes & Wrongs***  
***Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > Elements***

The first prong of the Fed. R. Evid. 404(b) test can be satisfied where the state of mind required for the charged and extrinsic offenses is the same. By pleading not guilty, a defendant places the knowledge element of the 18 U.S.C.S. § 922(g) offense in issue. A prior conviction in which the defendant possessed a gun provides a logical connection between a convicted felon's knowing possession of a firearm at one time and his knowledge that a firearm is present at a subsequent time (or, put differently, that his possession at the subsequent time is not mistaken or accidental).

***Evidence > Relevance > Prior Acts, Crimes & Wrongs***  
***Evidence > Relevance > Confusion, Prejudice & Waste of Time***

The third prong of the Fed. R. Evid. 404(b) test consists of balancing, under Fed. R. Evid. 403, the probative value of the evidence against its prejudicial effect and requires the court to conduct the Fed. R. Evid. 403 inquiry based upon the circumstances of the extrinsic offense. Fed. R. Evid. 403 is an extraordinary remedy that courts should employ only sparingly since it permits the trial court to exclude concededly probative evidence. Accordingly, the court views disputed evidence in a light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact.

***Criminal Law & Procedure > Jury Instructions > Limiting Instructions***

***Evidence > Relevance > Confusion, Prejudice & Waste of Time***

The risk of undue prejudice can be reduced by an appropriate limiting instruction. Indeed, a district court's reticence and careful efforts to preclude the admission of certain especially prejudicial aspects of a prior conviction through limiting instructions are significant.

***Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > Elements  
Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

18 U.S.C.S § 922(g) governs offenses for unlawful possession of a firearm and ammunition and entails three distinct elements: (1) that the defendant was a convicted felon; (2) that the defendant was in knowing possession of a firearm; and (3) that the firearm was in or affecting interstate commerce. § 922(g)(1). The Supreme Court has held that, in a prosecution under § 922(g) and 18 U.S.C.S § 924(a)(2), the government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.

***Evidence > Relevance > Confusion, Prejudice & Waste of Time***

In the 18 U.S.C.S § 922(g) context, the Supreme Court has held that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. However, when proffered evidence has the dual nature of legitimate evidence of an element and illegitimate evidence of character, the court must determine whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof.

***Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions  
Governments > Courts > Judicial Precedents***

Generally, the appellate court reviews the constitutionality of a statute de novo, as it is a question of law. But if the issue is raised for the first time on appeal, the court reviews for plain error only. Plain error occurs only if (1) there was error, (2) it was plain, (3) it affected the defendant's substantial rights, and (4) it seriously affected the fairness, integrity, or public reputation of judicial proceedings. Additionally, the prior precedent rule requires the court to follow a prior binding precedent unless it is overruled by the Court of Appeals or by the Supreme Court. To constitute an overruling for the purposes of this prior panel precedent rule, the Supreme Court decision must be clearly on point.

***Constitutional Law > Congressional Duties & Powers > Commerce Clause > Interstate Commerce > Prohibition of Commerce***

***Constitutional Law > Congressional Duties & Powers > Commerce Clause > Interstate Commerce > Tests***

***Constitutional Law > Congressional Duties & Powers > Commerce Clause > Limitations***

18 U.S.C.S § 922(g) is constitutional under the Commerce Clause. The government proves a minimal nexus to interstate commerce where it demonstrates that the firearms were manufactured outside of the state where the offense took place and, thus, necessarily traveled in interstate commerce.

***Criminal Law & Procedure > Sentencing > Criminal History > Prior Felonies***

The appellate court reviews constitutional challenges to a sentence de novo. It also reviews de novo whether prior offenses meet the ACCA's different-occasions requirement, 18 U.S.C.S. § 924(e)(1).

***Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence***

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

18 U.S.C.S. § 924(e)(1) kicks in only if (1) a 18 U.S.C.S. § 922(g) offender has previously been convicted of three predicate felony offenses, and (2) those three felonies were committed on occasions different from one another. The government must prove by a preponderance of the evidence, using reliable and specific evidence, that the defendant's prior convictions each arose out of a separate and distinct criminal episode. Only Shepard-approved sources may be used to determine if prior offenses were committed on different occasions for ACCA purposes.

***Criminal Law & Procedure > Sentencing > Imposition > Apprendi Rule***

***Criminal Law & Procedure > Guilty Pleas > Waiver of Defenses***

***Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Sentencing Issues***

Under the Fifth and Sixth Amendments, 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. Additionally, when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment.

Unlike the predicate felony determination, which focuses solely on the statutory legal elements, the different-occasions inquiry necessarily requires looking at the facts underlying the prior convictions. The argument has been rejected that judicially determining whether prior convictions were committed on different occasions from one another for purposes of the ACCA, 18 U.S.C.S. § 924, violates a defendant's Fifth and Sixth Amendment rights.

The district court may make a determination as to whether a state conviction qualifies as a predicate ACCA, 18 U.S.C.S. § 924, violent felony. However, in doing so, the district court is limited to Shepard-approved sources, as only information found in such conclusive judicial records has gone through a validation process that comports with the Sixth Amendment.

***Criminal Law & Procedure > Pretrial Motions > Joinder & Severance > Joinder of Offenses***

Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion, whereas offenses separated by substantial gaps in time or significant events may not.

***Governments > Legislation > Vagueness***

***Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness***

To overcome a vagueness challenge, statutes must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly, and must provide explicit standards for those who apply them. The plain language of the ACCA's occasions clause, 18 U.S.C.S. § 924, gives persons of ordinary intelligence fair notice that committing qualifying offenses on different occasions will result in the sentencing enhancement, and it permits non-arbitrary enforcement.

***Criminal Law & Procedure > Sentencing > Criminal History > Prior Felonies***

***Criminal Law & Procedure > Habeas Corpus > Appeals > Standards of Review > De Novo Review***

The appellate court reviews de novo whether a prior conviction qualifies as a serious drug offense for

ACCA, 18 U.S.C.S. § 924, purposes.

***Criminal Law & Procedure > Sentencing > Ranges***

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > Penalties***

21 U.S.C.S. § 841(a)(1) makes it unlawful to manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance, and § 841(b)(1)(C) creates a maximum penalty of twenty years' imprisonment for such an offense.

***Criminal Law & Procedure > Accessories > Aiding & Abetting***

Under 18 U.S.C.S. § 2, whoever aids, abets, counsels, commands, induces or procures the commission of an offense, or willfully causes another to perform an act that would be an offense if performed by him, is punishable as a principal. Aiding and abetting, under § 2, is not a separate federal crime, but rather an alternative charge that permits one to be found guilty as a principal for aiding or procuring someone else to commit the offense. An ostensible ACCA, 18 U.S.C.S. § 924, predicate crime is not deprived of that status merely because the conviction may have been based on conduct that aided and abetted the crime.

**Opinion**

PER CURIAM:

**Sergio Hood** appeals his convictions and total 262-month sentence for possession of ammunition by a felon, obstruction of justice, and tampering with a witness. He argues that the district court's determinations related to his prior convictions were error and, ultimately, that his conviction and sentence are unconstitutional. For the reasons discussed below, we affirm.

**I. FACTUAL & PROCEDURAL BACKGROUND**

A federal grand jury returned a three-count indictment against Hood, charging him with: possession of ammunition by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (Count One); obstruction of justice, in violation of 18 U.S.C. §§ 1503 and 2 (Count Two); and tampering with a **{2024 U.S. App. LEXIS 2}** witness, in violation of 18 U.S.C. §§ 1512(b)(2) and 2 (Count Three). As support for Count One, the indictment listed Hood's prior federal convictions for possession of firearms as a felon and distribution of controlled substances, and his prior Florida state conviction for lewd or lascivious battery.

Prior to trial, the government filed a motion *in limine* to admit evidence related to Hood's prior federal gun convictions to support the felon in possession charge. Specifically, the government sought to admit, *among other things*, certified records of Hood's prior conviction for two counts of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g), to prove his felon status, and a copy of the same records, signed by Hood, to prove that he knew of his status. The government argued that, even if Hood stipulated to his prohibited-person status, the evidence was still admissible under Federal Rule of Evidence 404(b). It noted that, while the Supreme Court in *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997), held that a defendant must be permitted to stipulate to the prior offense without identifying the nature of the underlying offense when the sole purpose of the evidence is to prove the element of prior conviction, Rule 404(b)

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guarantees the opportunity to seek admission of prior conviction evidence with{2024 U.S. App. LEXIS 3} multiple utility. The government asserted that the prior conviction evidence was admissible because it was relevant to an issue other than Hood's character, the records could prove that he committed the acts, and the significant probative value was not outweighed by undue prejudice.

Hood opposed the admission of this evidence. He argued that the probative value of the evidence was substantially outweighed by its unfair prejudice and that the admission would have a substantial and injurious effect on the jury verdict, such that this evidence needed to be excluded under Federal Rule of Evidence 403.

The district court held a hearing on the motion. The court determined that the evidence was admissible for the purpose argued by the government and that *Rehaif v. United States*, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019), "add[ed] the distinct requirement . . . of establishing [Hood's] knowledge." Noting that this Circuit had affirmed the admission of prior gun-related convictions to prove the knowledge element, the district court determined that the evidence was admissible at trial with specific redactions and a limiting jury instruction.

Hood proceeded to trial. During jury selection, the court determined that the nature of Hood's prior felony conviction for lewd and lascivious battery{2024 U.S. App. LEXIS 4} was inadmissible but followed its pretrial ruling regarding his prior gun-related convictions. The court read Count One to the prospective jurors, stating that Hood "knowing that he had previously been convicted in a court of a crime punishable by imprisonment for a term exceeding one year including possession of firearms as a convicted felon and distribution of controlled substances . . . did knowingly possess . . . ammunition." During *voir dire*, the government asked jurors if they could follow the court's limiting instructions as to the prior convictions evidence and consider the evidence only for its proper purpose. One prospective juror stated that it might affect their judgment but agreed that they would probably be able to overcome the prejudice during deliberations. Multiple other prospective jurors stated that the knowledge that Hood was previously convicted of a crime involving firearms would make them more likely to believe that he would commit another firearm crime.

The government stated its intention to introduce Hood's prior firearm possession and drug distribution convictions as impeachment evidence against Hood, should he testify. Hood then testified on his own behalf.{2024 U.S. App. LEXIS 5} Factually, he denied possessing a gun and stated that he was at his brother's house watching sports when the alleged shooting occurred. However, cell phone records showed that Hood left his brother's home before the shooting occurred. As to his felon status, Hood testified that he had been convicted of two gun charges and three drug charges. He stated, "I have nothing illegal, no guns, no drugs, no nothing. I'm already on probation for that so I know I'm prohibited of having those things." Testimony from Hood's U.S. Probation Officer and certified records of Hood's convictions admitted into evidence confirmed that, at the time of the shooting, Hood was on supervised release for two counts of possession of a firearm by a felon.

Tampa Police Department Detective Daniel Romonosky testified that, following the incident, Hood was arrested and held in state custody for about a year, until he was transferred to federal custody for his supervised release revocation hearing. He testified that, while in custody, Hood called his brother multiple times, using different inmates' pin numbers, to discuss his alibi that they had been together at the time of the shooting. Before jury deliberations,{2024 U.S. App. LEXIS 6} the district court instructed the jury:

During the trial, you heard evidence of acts allegedly done by the Defendant on other occasions that may be similar to acts with which the Defendant is currently charged. You must not consider any of this evidence to decide whether the Defendant engaged in the activity alleged in the indictment. This evidence is admitted and may be considered by you in determining whether the

Defendant had the state of mind or intent necessary to commit the crime charged in the indictment and whether the Defendant had a motive or the opportunity to commit the acts charged in the indictment.

At the end of the six-day trial, the jury found Hood guilty on all three counts. The U.S. Probation Office generated Hood's presentence investigation report ("PSI"). The PSI grouped Counts Two and Three in accordance with U.S.S.G. § 3D1.2(a), then grouped Counts Two and Three with Count One in accordance with § 3D1.2(c). The PSI calculated an offense level of 20 in accordance with U.S.S.G. § 2K2.1(a)(4)(A), based on the determination that Hood was previously convicted of three counts of distribution of methylenedioxymethamphetamine ("MDMA"), a controlled substance offense. Probation then applied: (1) a four-level enhancement, under **{2024 U.S. App. LEXIS 7}** § 2K2.1(b)(6)(B), because Hood possessed ammunition in connection with another felony offense<sup>1</sup>; and (2) a two-level adjustment, under U.S.S.G. § 3C1.1, for obstruction of justice. The resulting adjusted offense level was 26.

Additionally, the PSI determined that Hood qualified as an armed career criminal under U.S.S.G. § 4B1.4 because he had at least three prior convictions for a violent felony or serious drug offense, committed on occasions different from one another. This classification was based on Hood's convictions for: (1) distribution of MDMA on March 1, 2011, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C); (2) distribution of MDMA on March 2, 2011, in violation of § 841(a)(1) and (b)(1)(C); and (3) distribution of MDMA on June 21, 2011, in violation of §§ 841(a)(1), (b)(1)(C) and 2. The PSI determined that the application of the armed career criminal enhancement resulted in a total offense level of 34 because Hood possessed ammunition in connection with aggravated assault with a deadly weapon, a crime of violence.

The PSI then detailed Hood's criminal history. It listed Hood's prior convictions, which included petit theft, lewd and lascivious battery, distribution of MDMA, possession of a firearm by a felon, and trespass. Based on his convictions, the PSI calculated an initial criminal history **{2024 U.S. App. LEXIS 8}** score of six but added two points, see U.S.S.G. § 4A1.1(d), because Hood committed the instant offense while on supervised release. A total criminal history score of eight yielded a criminal history category of IV. However, the PSI assigned a criminal history category of VI under § 4B1.4(c)(2) because of Hood's armed career criminal status and because he possessed the ammunition in connection with a crime of violence. Hood's total offense level of 34 and a criminal history category VI yielded a guideline range of 262 to 327 months' imprisonment.

In his objections to the PSI, Hood objected, in relevant part, to the application of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Specifically, he argued that the imposition violated the Fifth and Sixth Amendments because the requirements were not charged in the indictment nor proven to a jury beyond a reasonable doubt. He also objected to the PSI's reliance on non-*Shepard*<sup>2</sup> approved documents. Hood also objected to the classification of his prior convictions under 18 U.S.C. § 2 as ACCA predicate "serious drug offense[s]" because § 2 offenses are not included in the statutory definition. He objected to the classification of his predicate conviction, which consisted of three separate counts, as being three predicate offenses "committed on occasions different **{2024 U.S. App. LEXIS 9}** from one another," arguing that the determination erroneously relied on non-elemental facts. Finally, he challenged the ACCA's "occasions clause" as void for vagueness.

The government filed a sentencing memorandum in response to Hood's objections and in support of its sentencing recommendation. In relevant part, the government contended that the ACCA need not be set forth in the indictment nor proved beyond a reasonable doubt because it is a sentencing enhancement provision, not a distinct offense. Next, it argued that Hood's prior convictions were supported by the *Shepard*-permissible indictment, plea colloquy, and undisputed facts from the PSI

from his prior federal case. Third, the government argued that Hood's § 2 argument was a misunderstanding of his prior convictions, as § 2 does not define a crime and Hood was principally liable for all three counts. Fourth, responding to Hood's "occasions clause" argument, the government contended that Hood's prior convictions were all temporally distinct, i.e., successive rather than simultaneous, and thus committed on different occasions. Finally, the government argued that the application of the ACCA in Hood's case did not violate the Fifth or Sixth Amendments. To support{2024 U.S. App. LEXIS 10} its contentions, the government submitted alongside its memorandum: (1) the certified judgment; (2) the transcript of the guilty plea hearing; (3) the transcript of the sentencing hearing; and (4) the indictment from Hood's prior convictions for three counts of distribution of MDMA.

Hood then filed a sentencing memorandum, in which he briefly reasserted his arguments that he should not be classified as an armed career criminal, and that his sentence should be limited accordingly.

The district court addressed Hood's objections at sentencing. The district court overruled Hood's objection arguing that the government needed to allege the ACCA violations in the indictment, finding that this Court's precedent did not require such. The court then determined that Hood's prior convictions were supported by *Shepard*-approved documents, and relying on these documents, determined that Hood's prior convictions were three separate, temporally distinct offenses that qualified Hood as an armed career criminal under the ACCA. The court next overruled Hood's § 2 objection to the ACCA, determining that, although Hood pleaded guilty to aiding and abetting in addition to his drug distribution charges, this did not{2024 U.S. App. LEXIS 11} disqualify the convictions as ACCA predicates. The court then overruled Hood's Fifth and Sixth Amendment objections because this Court's caselaw foreclosed the arguments.

The district court imposed a total sentence of 262 months' imprisonment, consisting of 262 months on Count 1, 120 months on Count 2, and 240 months on Count 3, to run concurrently, and a five-year term of supervised release. This appeal ensued.

## II. DISCUSSION

On appeal, Hood argues that: (1) the district court erred in admitting evidence of his prior felon-in-possession convictions at trial; (2) 18 U.S.C. § 922(g)(1) violates the Commerce Clause, both facially and as applied; (3) his sentence should be vacated and remanded in light of the Supreme Court's decision in *Wooden v. United States*, 595 U.S. 360, 142 S. Ct. 1063, 212 L. Ed. 2d 187 (2022), and because the ACCA sentencing enhancement violates the Fifth and Sixth Amendments since the "occasions different" requirement was neither charged in the indictment, nor found by the jury; and (4) the district court erred in determining that Hood's convictions under 18 U.S.C. § 2 qualified as "serious drug offenses" because it is not among the statutes listed in the ACCA's definition. We address these arguments in turn.

### A. The Admission of Hood's Prior Convictions

We review the admission of evidence under Federal Rule of Evidence 404(b) for abuse of discretion. *United States v. Culver*, 598 F.3d 740, 747 (11th Cir. 2010). "If a reviewing{2024 U.S. App. LEXIS 12} court finds that a district court has abused its discretion in admitting evidence in violation of Rule 404(b), then its decision to uphold the conviction is properly reviewed under a harmless error standard." *United States v. Hubert*, 138 F.3d 912, 914 (11th Cir. 1998). Under that standard, "[r]eversal is warranted 'only if [the error] resulted in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict.'" *United States v. Phaknikone*, 605 F.3d 1099, 1109 (11th Cir. 2010) (second alteration in original) (quoting *United States v. Guzman*, 167



F.3d 1350, 1353 (11th Cir. 1999)). "Overwhelming evidence of guilt is one factor that may be considered in finding harmless error." *Id.* (quoting *Guzman*, 167 F.3d at 1353).

Rule 404(b) prohibits the introduction of evidence of "a crime, wrong, or other act" to "prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." It does, however, allow such evidence for other purposes, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). "Rule 404(b) is a rule of inclusion, and accordingly 404(b) evidence, like other relevant evidence, should not be lightly excluded when it is central to the prosecution's case." *United States v. Kapordelis*, 569 F.3d 1291, 1313 (11th Cir. 2009) (alteration adopted) (quoting *United States v. Jernigan*, 341 F.3d 1273, 1280 (11th Cir. 2003), *abrogated in part on other grounds by Rehaif v. United States*, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019)).

We recognize a three-part{2024 U.S. App. LEXIS 13} test to determine whether evidence is admissible under Rule 404(b): (1) the evidence must be relevant to an issue other than the defendant's character; (2) there must be sufficient proof that a jury could find by a preponderance of the evidence that the defendant committed the act; and (3) the probative value of the evidence must not be substantially outweighed by undue prejudice, as established in Federal Rule of Evidence 403. *United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007).

The first prong of the Rule 404(b) test can be satisfied "where the state of mind required for the charged and extrinsic offenses is the same." *Id.* at 1345. "[B]y pleading not guilty, [a defendant] place[s] th[e] [knowledge] element of the § 922(g) offense in issue." *Jernigan*, 341 F.3d at 1281 n.7. This Court has held that a prior conviction in which the defendant possessed a gun provides a "logical connection between a convicted felon's knowing possession of a firearm at one time and his knowledge that a firearm is present at a subsequent time (or, put differently, that his possession at the subsequent time is not mistaken or accidental)." *Id.* at 1281 (stating that a defendant's prior offenses involving the knowing possession of a firearm "plainly bore" on the defendant's knowledge that the gun was present in the charged instance).

The third prong of the Rule 404(b) test consists{2024 U.S. App. LEXIS 14} of balancing, under Rule 403, the probative value of the evidence against its prejudicial effect and requires the court to conduct the Rule 403 inquiry based "upon the circumstances of the extrinsic offense." *Edouard*, 485 F.3d at 1345 (quoting *United States v. Dorsey*, 819 F.2d 1055, 1059 (11th Cir. 1987)). Rule 403 is an extraordinary remedy that courts should employ "only sparingly since it permits the trial court to exclude concededly probative evidence." *United States v. Smith*, 459 F.3d 1276, 1295 (11th Cir. 2006) (quoting *United States v. Norton*, 867 F.2d 1354, 1361 (11th Cir. 1989)). Accordingly, we view the disputed evidence "in a light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact." *Id.* (quoting *United States v. Elkins*, 885 F.2d 775, 784 (11th Cir. 1989)).

The risk of undue prejudice can be reduced by an appropriate limiting instruction. *United States v. Ramirez*, 426 F.3d 1344, 1354 (11th Cir. 2005); see, e.g., *United States v. Diaz-Lizaraza*, 981 F.2d 1216, 1225 (11th Cir. 1993) (noting that, where the district court issued a limiting instruction both at the presentation of the evidence and in its final charge to the jury, "any unfair prejudice possibly caused by its introduction was mitigated"). Indeed, a district court's reticence and careful efforts "to preclude the admission of certain especially prejudicial aspects of" a prior conviction through limiting instructions are significant. See *Jernigan*, 341 F.3d at 1282.

Section 922(g) governs offenses for unlawful possession of a firearm and ammunition and "entails three distinct elements: (1) that the defendant was{2024 U.S. App. LEXIS 15} a convicted felon; (2) that the defendant was in knowing possession of a firearm; and (3) that the firearm was in or

affecting interstate commerce." *Id.* at 1279; § 922(g)(1). The Supreme Court has held that, in a prosecution under §§ 922(g) and 924(a)(2), the government "must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehail*, 139 S. Ct. at 2200.

In the § 922(g) context, the Supreme Court has held that "evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant." *Old Chief v. United States*, 519 U.S. 172, 174-77, 185, 191, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). However, when proffered evidence "has the dual nature of legitimate evidence of an element and illegitimate evidence of character," the court must determine "whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof." *Id.* at 184.

Hood argues that the district court committed fundamental and harmful error when, at trial, it granted the government's motion to admit evidence of his prior convictions under a Rule 404(b) exception to show that Hood had "knowledge" of his prohibited person status. He argues that the district court incorrectly determined that *Rehail* established a {2024 U.S. App. LEXIS 16} requirement for the court to allow evidence that the defendant knew of his prohibited person status or that he was prohibited from possessing the firearms, even when the defendant stipulated to that issue. Hood contends that, because he did not dispute knowledge of his status, the element was not at issue in his case, and thus his prior crimes were unnecessary and only showed propensity. He also asserts that the court failed to follow *Old Chief* and should have allowed him to stipulate to his prohibited status in exchange for prohibiting the admission of the evidence. He contends that the district court's limiting instruction to the jury could not cure undue prejudice. And he asserts that any probative value of the evidence was substantially outweighed by unfair prejudice.

Here, the district court did not abuse its discretion in allowing Hood's prior convictions into evidence because they were relevant to show his knowledge about Count One. By pleading not guilty to the charges, Hood made knowledge of possession of ammunition an issue in the case, regardless of his alibi defense and testimony that he was not present at the shooting. See *Jernigan*, 341 F.3d at 1281 & n.7. As for Hood's reliance on *Old Chief*, the Supreme {2024 U.S. App. LEXIS 17} Court held that the district court abused its discretion by admitting a prior conviction record for the sole purpose of establishing that the defendant was a convicted felon in order to satisfy the prior conviction element of § 922(g)(1), despite the defendant's stipulation as to the conviction. See 519 U.S. at 174. Here, however, Hood's prior convictions were admitted for a separate evidentiary purpose, and *Old Chief* thus does not preclude their admission. *Id.* Similarly, because the government's burden to prove that Hood knew that he belonged to a category of persons prohibited from possessing a firearm is separate from its burden to prove that he knowingly possessed a firearm, his stipulation to the former does not bar the government's introduction of evidence intended to satisfy the latter requirement. See *Rehail*, 139 S. Ct. at 2200; *Jernigan*, 341 F.3d at 1279.

The prior convictions' probative value was also not "substantially outweighed" by their prejudicial effect. Any risk of unfair prejudice to Hood was minimal due to the district court's careful efforts to redact the conviction records, and any undue prejudice that resulted from the district court's allowance of the prior convictions was mitigated by the three limiting instructions that it gave to the {2024 U.S. App. LEXIS 18} jury. Accordingly, we affirm as to this issue.

#### **B. The Constitutionality of 18 U.S.C. § 922(g)(1)**

For the first time on appeal, Hood argues that his conviction must be vacated because § 922(g)(1) is unconstitutional, both facially and as applied, for exceeding congressional authority under the Commerce Clause. He contends that Congress is not permitted to criminalize the intrastate possession of ammunition simply because the ammunition crossed state lines at some time. Hood,

however, acknowledges that his arguments here are foreclosed by this Court's precedent, although he criticizes that precedent as being based on a statutory interpretation decision that used a standard well below the contemporary substantial effects test in *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995).

Generally, we review the constitutionality of a statute *de novo*, as it is a question of law. *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010). But if the issue is raised for the first time on appeal, we review for plain error only. *Id.* Plain error occurs only if (1) there was error, (2) it was plain, (3) it affected the defendant's substantial rights, and (4) it seriously affected the "fairness, integrity, or public reputation of judicial proceedings." *Id.* (quoting *United States v. Jones*, 289 F.3d 1260, 1265 (11th Cir. 2002)). Additionally, the prior precedent rule requires us to follow a prior binding precedent{2024 U.S. App. LEXIS 19} unless it is overruled by this Court *en banc* or by the Supreme Court. *United States v. White*, 837 F.3d 1225, 1228 (11th Cir. 2016). "To constitute an 'overruling' for the purposes of this prior panel precedent rule, the Supreme Court decision must be 'clearly on point.'" *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009) (quoting *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1292 (11th Cir. 2003)).

"We have clearly held that § 922(g) is constitutional under the Commerce Clause." *United States v. Longoria*, 874 F.3d 1278, 1283 (11th Cir. 2017). We have also rejected as-applied challenges to § 922(g), holding that the government proves a "minimal nexus" to interstate commerce where it demonstrates that the firearms were manufactured outside of the state where the offense took place and, thus, necessarily traveled in interstate commerce. See *Wright*, 607 F.3d at 715-16. And we have specifically rejected constitutional challenges to § 922(g) under *Lopez*, concluding that "[n]othing in *Lopez* suggest[ed] that the 'minimal nexus' test should be changed." *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996).

Here, because Hood did not object on these grounds below, we review only for plain error. The district court did not plainly err in convicting Hood under § 922(g) because we have upheld the constitutionality of § 922(g) against both facial and as applied challenges under the Commerce Clause, as Hood argues here. Thus, Hood's challenge to the constitutionality of § 922(g) is foreclosed by the prior precedent rule, and we affirm as to this issue.

### C. The Constitutionality of Hood's Sentence

We{2024 U.S. App. LEXIS 20} review constitutional challenges to a sentence *de novo*. *Longoria*, 874 F.3d at 1281. We also review *de novo* "whether prior offenses meet the ACCA's different-occasions requirement." *Id.*

The ACCA states:

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. 18 U.S.C. § 924(e)(1). This provision "kicks in only if (1) a § 922(g) offender has previously been convicted of three [predicate felony offenses], and (2) those three felonies were committed on 'occasions different from one another.'" *Wooden*, 595 U.S. at 368 (quoting § 924(e)). The government "must prove by a preponderance of the evidence, using 'reliable and specific evidence,' that the defendant's prior convictions each 'arose out of a separate and distinct criminal episode.'" *United States v. McCloud*, 818 F.3d 591, 595 (11th Cir. 2016) (citation omitted) (first quoting *United States v. Almenida*, 686 F.3d 1312, 1315 (11th Cir. 2012); then quoting *United States v. Sneed*, 600 F.3d 1326, 1329 (11th Cir. 2010)). Only *Shepard*-approved sources may be used to determine if prior

offenses were committed on different occasions for ACCA purposes. *Sneed*, 600 F.3d at 1333.

Under the Fifth and Sixth Amendments, "[o]ther than the fact of a prior conviction, any fact that increases the penalty{2024 U.S. App. LEXIS 21} for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Additionally, "when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment." *Descamps v. United States*, 570 U.S. 254, 270, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013).

The Supreme Court addressed the correct approach for determining whether a state conviction qualifies as a predicate ACCA violent felony in *Descamps* and *Mathis v. United States*, 579 U.S. 500, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016). The Court emphasized the "elements-only" categorical approach in making such a determination, noting that the consideration of non-elemental facts would require impermissible judicial fact-finding. *Mathis*, 579 U.S. at 510-12. And the Court specifically stated that an elements-centric approach was necessary to avoid Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries-i.e., whether the elements of the predicate convictions were proven beyond a reasonable doubt. See *Descamps*, 570 U.S. at 267.

However, *Descamps* and *Mathis* focused solely on the predicate felony stage of the ACCA inquiry. *United States v. Dudley*, 5 F.4th 1249, 1260 (11th Cir. 2021). "Unlike the predicate felony determination, which focuses solely on the statutory legal{2024 U.S. App. LEXIS 22} elements, the different-occasions inquiry necessarily 'requires looking at the facts underlying the prior convictions.'" *Id.* (quoting *United States v. Richardson*, 230 F.3d 1297, 1299 (11th Cir. 2000)). We have "repeatedly rejected the argument that judicially determining whether prior convictions were committed on different occasions from one another for purposes of the ACCA violates a defendant's Fifth and Sixth Amendment rights." *Id.* at 1260. Specifically, in *Dudley*, we held that "[n]either *Descamps* nor *Mathis* is clearly on point" to abrogate our existing precedent as to the occasions clause, "as neither case deals with the different-occasions inquiry." *Id.* at 1265. Accordingly, the district court may make such a determination. *Id.* at 1259-60. However, in doing so, the district court "is limited to *Shepard*-approved sources, as only information found in such conclusive judicial records has gone through a validation process that comports with the Sixth Amendment." *Id.* at 1259.

We have rejected a defendant's argument that the district court could consider only elemental facts-specifically, the dates of his prior convictions-contained in *Shepard*-approved documents, because it was foreclosed by precedent. *Longoria*, 874 F.3d at 1283. In *Longoria*, a defendant pleaded guilty to unlawful possession of a firearm by a felon, and the district court sentenced him pursuant to the ACCA. *Id.* at 1280. The district court{2024 U.S. App. LEXIS 23} overruled his objections regarding the ACCA enhancement, finding that his three predicate offenses occurred on "occasions different from one another" to qualify for a sentence enhancement under the ACCA. *Id.* On appeal, we held that the district court did not err in looking at the plea agreement and transcript from the change-of-plea hearing to determine that those predicate convictions, charged in a single indictment, were temporally distinct. *Id.* at 1283; see also *Dudley*, 5 F.4th at 1260 ("[I]n determining whether a defendant's prior convictions were committed on different occasions from one another, a district court may rely on 'non-elemental facts' contained in the *Shepard*-approved sources.").

In March 2022, the Supreme Court issued its decision in *Wooden*, interpreting the "different occasions" requirement. First, the Court noted that "[t]he Courts of Appeals have divided over the meaning of ACCA's 'occasions' clause." 595 U.S. at 365. It also identified our precedent as

consistent with the Sixth Circuit's "sequentially rather than simultaneously" test. *Id.* at 365 & n.1. The Court concluded that treating each temporally distinct offense as its own occasion was inconsistent with the plain meaning of the word "occasion" and the legislative history{2024 U.S. App. LEXIS 24} of the ACCA. *See id.* at 366-76. Rather, the inquiry of whether offenses occurred on different occasions was more "multi-factored in nature" and required consideration of: (1) the timing of the offenses; (2) the proximity of location; and (3) the character and relationship of the offenses. *Id.* at 368-70. The Court clarified that offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion, whereas offenses separated by substantial gaps in time or significant events may not. *See id.* (stating "[t]iming of course matters"). It added that, "[i]n many cases, a single factor-especially of time or place-can decisively differentiate occasions" and that courts have "nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart." *Id.* at 369-70.

Thus, the Supreme Court reversed the Sixth Circuit's judgment and concluded that the defendant's commission of ten burglaries-on a single night at the same location, in a single uninterrupted course of conduct, with each offense essentially identical and intertwined-was one criminal occasion for purposes of the ACCA. *Id.* at 370-71. However, the Supreme Court did not address whether the Sixth Amendment requires a jury,{2024 U.S. App. LEXIS 25} rather than a judge, to resolve whether the prior crimes occurred on a single occasion. *Id.* at 366 n.3.

We first applied *Wooden* in *United States v. Penn*, 63 F.4th 1305 (11th Cir. 2023). In *Penn*, we addressed whether the defendant's cocaine distribution offenses committed thirty days apart "occurred on the same 'occasion' based on the ordinary meaning of the word." *Id.* at 1318. Citing to the language in *Wooden* that clarified the significance of temporal proximity, we determined that "the answer [was] obvious": the offenses "did not occur on the same occasion" because the similarities between the offenses "[could] not overcome the substantial gap in time." *Id.* *Penn* also argued that under the Fifth and Sixth Amendments, a jury must find, or a defendant must admit, that two offenses occurred on separate occasions. *Id.* However, because *Penn* did not preserve this challenge below, we declined to resolve the issue on the merits, holding only that the defendant could not show plain error. *Id.*

We decline to remand Hood's case for resentencing. Hood's predicate offenses were committed a day or more apart, and the temporal differences are sufficient to decisively differentiate the occasions. Additionally, Hood's argument that the district court erred by relying on non-elemental facts is foreclosed by our precedent.{2024 U.S. App. LEXIS 26} Further, as we held in *Dudley*, the Supreme Court's decisions in *Mathis* and *Descamps* did not abrogate our occasions clause precedent, i.e., that district courts may judicially determine whether prior convictions were committed on different occasions from one another for purposes of the ACCA. Because the Supreme Court expressly declined to reach this issue in *Wooden*, *Dudley* remains controlling precedent, and Hood's Sixth Amendment challenge fails.

Further, we reject Hood's argument the ACCA's occasions clause is not unconstitutionally vague. "To overcome a vagueness challenge, statutes must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly,' and 'must provide explicit standards for those who apply them.'" *Leib v. Hillsborough Cnty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1310 (11th Cir. 2009) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)). The plain language of the ACCA's occasions clause gives persons of ordinary intelligence fair notice that committing qualifying offenses on different occasions will result in the sentencing enhancement, and it permits non-arbitrary enforcement. Accordingly, we affirm as to this issue.

#### D. Hood's Prior Convictions Under 18 U.S.C. § 2

Hood also contends that the district court erroneously determined that his prior convictions under 18 U.S.C. § 2 qualify as "serious{2024 U.S. App. LEXIS 27} drug offenses" to support the ACCA enhancement. We review *de novo* whether a prior conviction qualifies as a serious drug offense for ACCA purposes. *White*, 837 F.3d at 1228.

The ACCA defines a "serious drug offense" as, in relevant part, "an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law." § 924(e)(2)(A)(i). Section 841(a)(1) makes it unlawful to manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance, and § 841(b)(1)(C) creates a maximum penalty of twenty years' imprisonment for such an offense.

Hood argues that § 2-the federal aiding and abetting statute-is not among those specific portions of the U.S. Code enumerated in the ACCA's definition of "serious drug offense." He asserts that canons of statutory interpretation indicate that Congress did not intend for § 2 offenses to be "serious drug offenses" under the ACCA definition. Therefore, he argues, his prior convictions under § 2 cannot properly be "serious drug offenses," and he lacks the requisite number of predicate offenses to qualify for the ACCA enhancement and should be resentenced.

Under § 2, whoever "aids, abets, counsels, commands, induces or procures" the commission of an{2024 U.S. App. LEXIS 28} offense, or "willfully causes" another to perform an act that would be an offense if performed by him, is punishable as a principal. Aiding and abetting, under § 2, "is not a separate federal crime, 'but rather an alternative charge that permits one to be found guilty as a principal for aiding or procuring someone else to commit the offense.'" *United States v. Sosa*, 777 F.3d 1279, 1292 (11th Cir. 2015) (quoting *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004)). In concluding that a Georgia conviction for aiding and abetting burglary qualified as a "violent felony" ACCA predicate offense, we have held that "an ostensible [ACCA] predicate crime is not deprived of that status merely because the conviction may have been based on conduct that aided and abetted the crime." *United States v. Coats*, 8 F.4th 1228, 1245 (11th Cir. 2021). We noted that, because every jurisdiction has expressly abrogated the distinction between principals and aiders and abettors, "[w]ere it otherwise, Congress would have enacted a sentencing enhancement statute for which no prior criminal conviction could ever serve as a predicate crime." *Id.*

We thus conclude that the district court did not err in classifying Hood's § 2 convictions as "serious drug offense[s]" under the ACCA because, for ACCA predicate purposes, there is no distinction between a person charged as a principal and a{2024 U.S. App. LEXIS 29} person charged as an aider and abettor. Therefore, we affirm as to this issue.

#### III. CONCLUSION

For the foregoing reasons, we affirm Hood's convictions and sentences.

**AFFIRMED.**

**Willie Lee Lewis, Petitioner v. United States.**  
**SUPREME COURT OF THE UNITED STATES**  
**142 S. Ct. 1439; 212 L. Ed. 2d 536; 2022 U.S. LEXIS 1832; 90 U.S.L.W. 3309**  
**No. 20-7617.**  
**April 4, 2022, Decided**

**Editorial Information: Prior History**

United States v. Lewis, 833 Fed. Appx. 261, 2020 U.S. App. LEXIS 33910, 2020 WL 6301872 (11th Cir. Fla., Oct. 28, 2020)

**Judges:** {2022 U.S. LEXIS 1}Roberts, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett.

**Opinion**

Motion of petitioner for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Wooden v. United States*, 595 U. S. \_\_\_, 142 S. Ct. 1063, 212 L. Ed. 2d 187 (2022).

Turning to Lewis's argument about the number of offenses resulting from his 1990 conviction, we note that each charge was based on separate cocaine transactions. Per the charging document, count one relates to a sale of cocaine on September 18, 1990, count two relates to a sale of cocaine on September 14, 1990, and count three relates to a sale of cocaine on August 31, 1990. Because each count relates to a separate, successive act that was temporally distinct from the others, the three charges constitute separate, predicate offenses for purposes of the ACCA. *See Longoria*, 874 F.3d at 1281.



**Christopher Williams, Petitioner v. United States.**  
**SUPREME COURT OF THE UNITED STATES**  
**142 S. Ct. 1439; 212 L. Ed. 2d 536; 2022 U.S. LEXIS 1829; 90 U.S.L.W. 3309**  
**No. 20-7798.**  
**April 4, 2022, Decided**

**Editorial Information: Prior History**

United States v. Williams, 976 F.3d 781, 2020 U.S. App. LEXIS 31047 (8th Cir. Mo., Sept. 30, 2020)

**Judges:** {2022 U.S. LEXIS 1} Roberts, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett.

**Opinion**

Motion of petitioner for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Wooden v. United States*, 595 U. S. \_\_\_, 142 S. Ct. 1063, 212 L. Ed. 2d 187 (2022).

Christopher R. Williams pled guilty, without a plea agreement, to possessing a firearm as a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The district court<sup>1</sup> sentenced him to 190 months in prison pursuant to the Armed Career Criminal Act (ACCA). He appeals, challenging his sentence. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

On September 13, 1995, Williams distributed cocaine base and was convicted of one count of violating RSMo § 195.211 in May 1999. On or about July 25, July 27, and August 1, 2000, Williams sold cocaine and was convicted of three counts of violating **{2020 U.S. App. LEXIS 2}** RSMo § 195.211 in October 2002. The presentence investigation report (PSR) concluded that Williams had "at least three prior convictions for a serious drug offense, which were committed on different occasions," thus authorizing an enhanced sentence under the ACCA—a statutory minimum of 180 months and a guidelines range of 180-210 months (which included a **{976 F.3d 783}** 3-level reduction for acceptance of responsibility).

Williams, by counsel, objected to the PSR's conclusion, arguing "[i]t was an ongoing business of dealing drugs" and that "because they were resolved the same day they constitute one continuous occasion and therefore he would only have two controlled substance convictions that coun

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus SERGIO ANTONIO HOOD,  
Defendant-Appellant.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

507 Fed. Appx. 859; 2013 U.S. App. LEXIS 2750

No. 12-11713 Non-Argument Calendar

February 8, 2013, Decided

**Notice:**

**PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.**

**Editorial Information: Subsequent History**

Dismissed by Hood v. United States, 2016 U.S. Dist. LEXIS 98027 (M.D. Fla., July 27, 2016)

**Editorial Information: Prior History**

{2013 U.S. App. LEXIS 1}

Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 8:11-cr-00453-JSM-TGW-1.

**Disposition:**

AFFIRMED.

**Counsel**

For UNITED STATES OF AMERICA, Plaintiff - Appellee: Peter J. Sholl, Michelle Thresher Taylor, Mark E. Bini, James A. Muench, Robert E. O'Neill, U.S. Attorney's Office, TAMPA, FL.

For SERGIO ANTONIO HOOD, Defendant - Appellant: Dionja Dyer, Federal Public Defender's Office, TAMPA, FL; Rosemary Cakmis, Donna Lee Elm, Federal Public Defender's Office, ORLANDO, FL.

**Judges:** Before CARNES, BARKETT and HULL, Circuit Judges.

**Opinion**

{507 Fed. Appx. 860} PER CURIAM:

After pleading guilty, Defendant Sergio Antonio Hood appeals his total 94-month sentence on three counts of distribution of methylene-methylamphetamine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) and 18 U.S.C. § 2, and two counts of possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). On appeal, Hood argues that the district court incorrectly applied a four-level firearms enhancement, pursuant to U.S.S.G. § 2K2.1(b)(1)(B). After review, we affirm.<sup>1</sup>

TRULINCS 55473018 - HOOD, SERGIO ANTONIO - Unit: VIP-B-B

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FROM: News, Lisa

TO: 55473018

SUBJECT: History is Bunk, Sotomayor Says in Erlinger Argument LISA Newsletter for April 1, 2024

DATE: 03/31/2024 07:36:20 PM

LISA publishes a free newsletter sent every Monday to inmate subscribers in the Federal system.

Edited by Thomas L Root, MA JD

Vol 10, No 14

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Supreme Court Erlinger Argument May Limit Judicial Fact-Finding In ACCA Cases

More Sex Abuse Fallout at BOP

Package Store

To Sleep, Perchance to Dream

Holloway Project Battles DOJ On Compassionate Release

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## SUPREME COURT ERLINGER ARGUMENT MAY LIMIT JUDICIAL FACT-FINDING IN ACCA CASES

Supreme Court justices appear to be siding with the defendant on the issue of whether a jury instead of a judge has to find that a defendant is eligible for the Armed Career Criminal Act (18 USC 922(e)) mandatory 15-year sentence.

Under 18 USC 922(g)(1), a person previously convicted of a felony may not possess a gun or ammo. Violators face a sentence of 0 to 15 years. But if the defendant has three prior drug or violent crime convictions, the ACCA raises the minimum sentence to 15 years.

In last Wednesday's argument, the issue was whether the 6th Amendment right to a jury trial in criminal cases means the jury rather than a judge must find the facts that qualify a defendant for an ACCA sentence.

That question is important because the Supreme Court has previously said that any fact that increases a penalty, other than the fact of a prior conviction, must be decided by the trier of fact, typically a jury, and proved beyond a reasonable doubt. Back in 2000, the Court held in *Apprendi v New Jersey* that any facts that increased the statutory sentence must be decided by a jury. But there is an exception: in *Almendarez-Torres v US* the Court held that the fact of a prior conviction may be found by a judge.

Justice Thomas has waged a lonely battle against *Almendarez-Torres* since *Apprendi*, and asked as his first question after the defense's opening statement, "Wouldn't it be more straightforward to overrule *Almendarez-Torres*?"

In spite of Pete Enslinger's claim that four burglaries he committed at age 18 were all committed on the same occasion and thus could not support an ACCA sentence, a judge decided otherwise and gave Pete an ACCA 15-year minimum sentence. On appeal, Pete argued the judge violated the 6th Amendment by engaging in judicial fact-finding. The 7th Circuit turned him down.

Wednesday's argument was unusual in that the government had previously decided that Pete was right. So both Pete's lawyer and the Dept of Justice were arguing that ACCA elements should be jury questions. In cases like this, the Court appoints a lawyer to argue the other side of the issue so that SCOTUS has a complete record on which to base its decision.

The argument last week focused both on the history of the 6th Amendment and the practicality of making ACCA elements a jury question.

The Supremes have moved broadly toward testing constitutional questions against historical traditions when reviewing present-day laws or practices. In the 2022 *NY State Rifle & Pistol Assn v Bruen* holding, the Court established a new test instructing courts to consider whether a similar law to the challenged one was on the books when the 2nd Amendment was enacted in 1791 or when the 14th Amendment was enacted in 1868.

Since then, arguments over the history and tradition behind different constitutional rights have been mainstays in briefs filed with the court.

"When we start talking about history, I get very annoyed, because in every history, there are exceptions," Justice Sotomayor said during Wednesday's session. "The question then becomes how many exceptions defeat the general rule."

In Pete's case, she argued, it did not matter whether 4 or 8 states allowed judges to make enhanced sentencing decisions around the year 1791 because either number did not "defeat the general rule" that defendants are entitled to jury trials.

Justice Kavanaugh, on the other hand, found history relevant. "The text itself of the Constitution does not tell us the answer, just the bare words, correct?" he asked the court-appointed amicus arguing in favor of the ACCA. "So then we usually look to history. We might not like it, but unless we're just making it up, I don't know where else we're going to look."

The other issue, how a rule requiring juries to make habitual defender determinations would work in practice, was more problematic.

Justice Alito said the inquiry would be difficult for a jury because it centers on a "multidimensional and nuanced" look at a defendant's past convictions. But the Dept of Justice attorney told the Justices that "we believe it will be manageable."

Counsel defending the ACCA warned that putting recidivism issues in front of a jury would alert it to the defendant's past, and "would gravely prejudice defendants." But Sotomayor said that defense attorneys have already sided with Pete, suggesting that they don't think defendants will be harmed by putting prior convictions in front of the jury.

Wednesday's argument suggested that the question of who must decide the issue of the existence of a prior conviction the Almendarez-Torres rule will not be disturbed by a decision in Pete's case.

Erlinger v US, Case No 23-370 (oral argument Mar 27)

Bloomberg Law, High Court Suggests Robust Jury Right for Longer Sentences (Mar 27)

Courthouse News Service, Supreme Court leans toward jury review for career criminal sentences (Mar 27)

Law360.com, Sotomayor 'Annoyed' By Supreme Court's Focus On History (Mar 27)

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## MORE SEX ABUSE FALLOUT AT BOP

A former FCI Dublin correctional officer was sentenced to 6 years last Wednesday after he admitted to sexually abusing more than a half-dozen women at the scandal-plagued facility.

Nakie Nunley became the 7th Dublin staff member to be sentenced in recent years, part of what COs called a "rape club" at the facility that tormented inmates. The defendants include a warden and chaplain. An 8th officer has pled guilty to sexual misconduct charges.

Nunley was convicted of 4 counts of sexual abuse of a ward and five of abusive sexual contact of 5 women. He also admitted to lying to federal officials. His sentence comes amid mounting concerns that the initial arrests have done little to reform a toxic culture at the prison.

Meanwhile, a second suit has been filed in Ft Worth alleging that a former prisoner at FMC Carswell was repeatedly raped by former BOP employee Marerllis Nix. Nix has denied the allegations in the first suit and has not yet responded to the second complaint.

A 2022 investigation by the Fort Worth Star-Telegram found a pattern of abuse and cover-ups at Carswell that KERA-TV has called "among the worst of any facility across the US."

San Jose Mercury News, FCI Dublin officer sentenced to six years in prison after admitting he sexually abused several inmates (Mar 28)

NBC, Former correctional officer at women's prison in California sentenced for sexually abusing inmates (Mar 28)

KERA-TV, Sexual abuse a 'severe problem' at Fort Worth's Carswell prison, attorneys for 2 women say (Mar 11)