No. 23-370

IN THE

Supreme Court of the United States

PAUL ERLINGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

**BRIEF FOR AMICUS CURIAE
THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF PETITIONER**

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BRIEF FOR AMICUS CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers is a nonprofit, voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958,

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the National Association of Criminal Defense Lawyers ("NACDL"), its members, or its counsel made a monetary contribution to this brief's preparation or submission.

NACDL has a nationwide membership of many thousands of direct members and up to 40,000 with affiliates. NACDL is the only nationwide professional bar association for both public defenders and private criminal-defense lawyers, and its members include private criminal-defense lawyers, public defenders, military defense counsel, law professors, and judges. Consistent with NACDL's mission of advancing the proper, efficient, and fair administration of justice, NACDL files numerous amicus briefs each year in this Court and other federal and state courts, all aimed at providing assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL maintains a particular interest in the question presented here, which NACDL first briefed in *Wooden*. See *Wooden* v. *United States*, 595 U.S. 360, 365 n.3 (2022) (citing NACDL brief); see also Br. for NACDL, *Reed* v. *United States*, No. 22-336 (Nov. 10, 2022).

SUMMARY OF ARGUMENT

NACDL submits this brief to reinforce petitioner's position that the decision below clearly contravenes the Sixth Amendment and this Court's precedents. As the Court has explained "over and over" for the past twenty years, the Sixth Amendment guarantees that "only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction." *E.g.*, *Mathis* v. *United States*, 579 U.S. 500, 511-20 (2016) (citing, *inter alia*, *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000)). In applying the prior-conviction exception, a sentencing judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id.* at 511-

12; see also, *e.g.*, *Alleyne* v. *United States*, 570 U.S. 99, 111-12 & n.1 (2013). As petitioner explains, the entire point of ACCA's occasions clause is to require findings that go beyond that crime and those elements. Specifically, the determination of whether offenses occurred on separate occasions necessarily depends on an array of fine-grained determinations pertaining to the factual circumstances and real-world conduct that gave rise to the convictions in question. This Court has repeatedly made clear that findings such as those must be made by a jury, on proof beyond a reasonable doubt. This case requires only a straightforward application of that bedrock constitutional principle. Nor is there any reason to shy away from that principle here. The decision below should be reversed.

ARGUMENT

I. ACCA's Occasions Inquiry Necessarily Depends On Factual Determinations That Must Be Made By A Jury.

ACCA's occasions inquiry necessarily requires findings regarding the factual circumstances underlying each predicate conviction. Cf. *Wooden*, 595 U.S. at 366-69. For more than two decades, this Court has made clear "over and over," to the point of "downright tedium," *Mathis*, 579 U.S. at 510, 519, that when such facts change the available sentence (as an ACCA enhancement indisputably does), they must be charged in the indictment and found by a jury on proof beyond a reasonable doubt.

A. The Sixth Amendment Clearly Forecloses The Use Of Judicial Factfinding To Support An Increased Sentence.

1. The precedential framework that governs this case begins with *Taylor* v. *United States*, in which the Court "established the rule for determining when a defendant's prior conviction counts as one of ACCA's enumerated predicate offenses." 495 U.S. 575 (1990); *Descamps* v. *United States*, 570 U.S. 254, 260-61 (2013). The Court has since described *Taylor*'s holding as establishing that a sentencing court may "'look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions.'" *Descamps*, 570 U.S. at 261 (quoting *Taylor*, 495 U.S. at 600). There are no exceptions to that bright-line rule. However, *Taylor* explained that in a "narrow range of cases" in which a statute of conviction might list alternative elements, such as by prohibiting unlawful "entry of an automobile" (which is not an ACCA predicate offense) "as well as [unlawful entry of] a building" (which is), applying *Taylor*'s rule could mean looking to "the charging paper and jury instructions" to determine what the crime of conviction actually was. *Taylor*, 495 U.S. at 602. As *Taylor* made clear, however, the inquiry must always remain focused on identifying the *elements* of the crime of conviction, as opposed to the underlying facts. *Id.*

2. *Taylor* mentioned, but did not expressly rest on, the Sixth Amendment. See 495 U.S. at 601. But "[d]evelopments in the law" between *Taylor* and the Court's next ACCA case, *Shepard* v. *United States*, 544 U.S. 13 (2005), made *Taylor*'s constitutional basis clear. In *Shepard*, the Court recognized that merely

reviewing "the charging paper and jury instructions," as *Taylor* had permitted, might be of little use in cases involving predicate convictions entered on the basis of guilty pleas rather than trials. See *Descamps*, 570 U.S. at 262 (citing *Shepard*, 544 U.S. at 26). So the Court slightly broadened the "restricted set of materials" sentencing courts were authorized to consult, which would thenceforth include "the terms of a plea agreement or transcript of colloquy between judge and defendant." *Id.* (quoting *Shepard*, 544 U.S. at 26). In doing so, however, the Court again emphasized that the inquiry must remain focused on identifying the crime of conviction and could not devolve into a search for facts that would have been legally extraneous in the prior proceeding. *Shepard*, 544 U.S. at 25-26 (plurality op.).[2]

In so holding, the Court explained for the first time that *Taylor*'s adoption of the categorical approach "anticipated the very rule later imposed for the sake of preserving the Sixth Amendment right, that any fact other than a prior conviction sufficient to raise the limit of [a] possible federal sentence must be found by a jury." *Shepard*, 544 U.S. at 24 (plurality op.) (citing *Apprendi*, 530 U.S. at 490; *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999)); see also U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a * * * trial[] by an impartial jury of the State[.]"). That rule became fully apparent five years before *Shepard*, in *Apprendi*, 530 U.S. at 490, in which the Court held that unless specifically found by a jury, facts regarding an offender's racially biased

[2] Although portions of the main opinion in *Shepard* garnered only a plurality, those portions reflect the narrowest position supporting the judgment and thus state the Court's holding. See *Marks* v. *United States*, 430 U.S. 188, 193 (1977).

motivation could not support exposing that offender to a greater maximum sentence than would otherwise have been applicable. The year before *Apprendi*, in *Jones*, 526 U.S. at 243 n.6, the Court had suggested the same Sixth Amendment rule, employing constitutional avoidance to interpret a statute to require a jury, rather than a judge, to make findings regarding a victim's injury when those findings increased an offense's otherwise-applicable sentencing range. Synthesizing those precedents, *Shepard* explained that any finding of "a fact *about* a prior conviction," as opposed to the simple fact *of* a prior conviction, "is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*," to fall within the narrow range of facts this Court has authorized sentencing judges to find themselves. 544 U.S. at 24-25 (plurality op.) (emphasis added).[3]

3. In more recent years, the Court has been still more explicit about the Sixth Amendment's prohibition on increasing a sentence based on judge-made findings about "the who, what, when, and where of a conviction." *Pereida* v. *Wilkinson*, 141 S. Ct. 754, 765 (2021). In *Descamps*, the Court reversed a judgment affirming an ACCA enhancement that was

[3] *Shepard*'s distinction of "the conclusive significance of a prior judicial record" is a reference to *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), in which the Court "recognized a narrow exception" to the *Apprendi* rule "for the fact of a prior conviction." *Alleyne*, 570 U.S. at 111 n.1. Although this Brief assumes *arguendo Almendarez-Torres*'s continuing validity, the Court has made clear that it rests on a shaky foundation, *e.g.*, *Alleyne*, 570 U.S. at 111 n.1; *Apprendi*, 530 U.S. at 489-90, and NACDL respectfully maintains that it was wrongly decided and should be overruled.

based on a judge-made, non-elemental finding that the defendant's prior conviction involved breaking and entering (which is an ACCA predicate) rather than shoplifting (which is not). See 570 U.S. at 259, 277-78. The Court explained that because the statute under which the conviction was entered encompassed both offenses, any inquiry into which one the defendant had committed was an impermissible quest for facts "superfluous" to the conviction itself and could not "license a later sentencing court to impose extra punishment." *Id.* at 270. As the Court put it, "[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt." *Id.* at 269.

The Court also reiterated that, as it had explained in *Shepard*, the Sixth Amendment prohibition applies no matter how clear-cut the facts might seem. As the Court explained, even when a predicate conviction was entered based on a defendant's express admission, "whatever [the defendant] sa[id], or fail[ed] to say, about superfluous [*i.e.*, non-elemental] facts cannot license a later sentencing court to impose extra punishment." *Descamps*, 570 U.S. at 270 (citing *Shepard*, 544 U.S. at 24-26); see *infra* at 8-9.

The Court articulated those principles yet again in *Mathis*. See 579 U.S. at 509-10. That case involved an ACCA enhancement imposed based on a prior conviction under a statute that enumerated various alternative means of committing a single element—in particular, breaking into a "building, structure, [or] land, water, or air vehicle"—some of which would be ACCA predicate offenses and some of which would not. *Id.* at 507. Although separately listed in the statute, those different means of committing the same

offense were legally extraneous facts, not elements, because state law did not require a jury to find which means was employed. *Id.* Straightforwardly applying *Descamps*, the Court held that a sentencing court could not refer to *Shepard* documents to determine which version of the offense was committed, because "[w]hether or not mentioned in a statute's text, alternative factual scenarios remain just that—and so remain off-limits to judges imposing ACCA enhancements." *Id.* at 512-13. Put differently, "[t]he itemized construction gives a sentencing court no special warrant to explore the facts of an offense[.]" *Id.* at 509.

Once more, the Court set forth the Sixth Amendment basis for its holding. As the Court explained, "a construction of ACCA allowing a sentencing judge to go any further [than identifying the elements of the crime of conviction] would raise serious Sixth Amendment concerns," because "[t]his Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction." *Mathis*, 579 U.S. at 511 (citing *Apprendi*, 530 U.S. at 490). "That means," the Court held, "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense." *Id.* For that proposition, the Court approvingly cited Justice Thomas's separate opinion in *Shepard*, in which he noted that exploration of extraneous facts would amount to "constitutional error." *Id.* (citing 544 U.S. at 28 (Thomas, J., concurring in part and concurring in judgment)). The Court fully endorsed Justice Thomas's view, holding once again that a sentencing judge "can do no more, consistent with the Sixth Amendment, than

determine what crime, with what elements, the defendant was convicted of." *Id.* at 511-12; see also, *e.g.*, *S. Union Co.* v. *United States*, 567 U.S. 343, 350-52, 359 (2012) (holding that *Apprendi* requires a jury to find "facts that determine [a] [criminal] fine's maximum amount," such as the "number of days the [defendant] violated [a] statute").

B. The Occasions Inquiry Requires Fine-Grained Factual Determinations A Judge Cannot Make.

The inquiry into whether prior offenses occurred on "occasions different from one another" necessarily depends on the sort of inquiry the precedents above assign to the jury. As *Wooden* explained it, the occasions determination hinges on "a range" of factual circumstances including the prior offenses' timing, location(s), and character. 595 U.S. at 369. "Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events." *Id.* Regarding location, "the further away crimes take place, the less likely they are components of the same criminal event." *Id.* And offenses' "character and relationship" can also be crucial, because "[t]he more similar or intertwined the conduct giving rise to the offenses—the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion." *Id.*[4]

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[4] As NACDL explained in *Wooden*, there is no conceivable interpretation of the occasions clause—including the one the Government unsuccessfully proffered there—that would avoid the Sixth Amendment issues on which this case focuses. See Br.

Accordingly, both before *Wooden* and in its wake, courts conducting the occasions inquiry have frequently found it necessary to make detailed findings regarding the precise factual circumstances surrounding predicate convictions. Those inquiries often make the findings held unconstitutional in *Shepard*, *Descamps*, *Mathis*, and elsewhere appear modest by comparison. For instance, though *Mathis* makes clear that a sentencing court cannot peek behind a burglary conviction for even the limited purpose of determining the type of structure burgled, the Eighth Circuit determined that an assault occurred on an occasion different from a robbery by relying on the following judge-found facts:

> [The defendant] entered a gas station, pointed a gun at the cashier, and took money from the register. * * * Grabbing the cash, [the defendant] ran outside, still holding the gun. Someone saw him. As [he] fled, this witness drove after him. [The defendant] then shot toward the witness's vehicle, close enough that the witness heard a "zing" and smelled gunpowder.

United States v. *Perry*, 908 F.3d 1126, 1131 (8th Cir. 2018).

Elsewhere, courts have relied on their own findings regarding such non-elemental facts as which particular buildings were burgled, how many feet apart they were, and how many seconds it would have taken to bridge the distance. *E.g.*, *United States* v. *Weeks*, 711 F.3d 1255, 1258, 1261 (11th Cir. 2013) (per curiam) ("Shirley's Restaurant" and "the Florida Times Union Building": separate occasions). In

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for NACDL 19-24, *Wooden* v. *United States*, *supra* ("NACDL *Wooden* Br.").

another case, before being reversed solely for straying from *Shepard* documents—not for finding non-elemental facts—a district court found different occasions based on non-jury findings that one offense was "for a robbery committed on February 18, 2006 in Brooklyn, at 11:00 a.m., in which [the defendant] and a co-defendant stole a debit card from the victim using a box cutter," another was "for a robbery committed on the subway in Manhattan on February 19, 2006, together with two co-defendants, using a box cutter and a bladed knife," and a third was "for a robbery also committed on February 19, 2006, on the subway in Queens, with two unnamed individuals, using a box cutter and a bladed knife." *United States* v. *Dantzler*, 771 F.3d 137, 139-40 (2d Cir. 2014).

This case presents another stark example. Here, the lower courts conducted their occasions analysis by concluding that the petitioner's prior offenses "took place on three different dates and at three different businesses[:] * * * April 4, 1991 at Mazzio's Pizza, April 8, 1991 at The Great Outdoors, Inc., and April 11, 1991 at Schnitzelbank." Pet. App. 8a; see also *id.*at 56a-57a. But—obviously—neither those dates nor those locations were elements of the offenses. Under this Court's clear precedent, any determination of where and when the offenses occurred was therefore for a jury, not the court.

II. The Courts Of Appeals' Rationales For Rejecting Petitioner's Position Are Unpersuasive.

Although lower courts have resisted petitioner's position, their rationales cannot be squared with this Court's precedents.

1. At least one court has refused to apply *Apprendi*'s holding to the occasions clause on the theory that doing so would be too disruptive to ACCA's framework. See, *e.g.*, *United States* v. *Hennessee*, 932 F.3d 437, 443 (6th Cir. 2019) (reasoning that if judges "were only allowed to look to elemental facts," they would be "hamstrung * * * in making most different-occasions determinations"). Petitioner ably refutes the notion that undue disruption would follow from a holding in his favor. See Pet'r Br. 41-42. But even assuming it would, this Court has never "hesitate[d]" to hold that the Constitution's requirements override such statutory concerns. *E.g.*, *United States* v. *Haymond*, 139 S. Ct. 2369, 2377 (2019) (plurality op.). Moreover, to the extent *Hennessee*'s suggestion is that empaneling a jury to make the occasions determination would be too difficult, a plurality of this Court recently rejected an analogous notion, reasoning that the "age-old criticism" of jury trials as inefficient is irrelevant to the Sixth Amendment's application. *Haymond*, 139 S. Ct. at 2384. "[L]ike much else in our Constitution," *Haymond* explained, "the jury system isn't designed to promote efficiency but to protect liberty." *Id.*[5]

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[5] See also, *e.g.*, *Blakely* v. *Washington*, 542 U.S. 296, 305-06 (2004) ("Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended." (citations omitted)).

Further, the court of appeals' approach achieves its supposed efficiency gains only by jettisoning accuracy and fairness. As the Court explained in *Descamps* and *Mathis*, "[s]tatements of 'non-elemental fact' in the records of prior convictions" are inherently "prone to error." *Mathis*, 579 U.S. at 512 (quoting *Descamps*, 570 U.S. at 270); see also *Descamps*, 570 U.S. at 269-70. That is because "[a]t trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he 'may have good reason not to'—or even be precluded from doing so by the court." *Mathis*, 579 U.S. at 512 (quoting *Descamps*, 570 U.S. at 270). In this case, for instance, there is no reason to think that petitioner would have cared in the least if his prior plea agreement misstated the dates or locations of the burglaries in question. Nor is such a circumstance at all unusual. As NACDL explained in *Wooden*, the sentence at issue there depended on non-elemental facts the petitioner would have had no incentive to contest. See NACDL *Wooden* Br. 3-4. And in another illustrative case, *United States* v. *Hamell*, 3 F.3d 1187, 1191 (1993), the Eighth Circuit imposed ACCA's fifteen-year mandatory minimum by concluding that a stabbing and a shooting that took place in a single evening nevertheless occurred on different occasions because, twenty-five years earlier, the defendant admitted in his plea colloquy to the then-immaterial proposition that one occurred inside and the other outside a bar. See also, *e.g.*, *United States* v. *Rollins*, 518 F. App'x 632, 633, 636 (11th Cir. 2013) (finding that robberies more than ten years before sentencing were successive, not simultaneous, because defendant "drove away" between them). To the extent appointed *amicus*'s position achieves efficiency, it is only by

assigning life-altering consequence to such allegations and admissions, even when they are years or decades old and were legally irrelevant—and thus unworthy of scrutiny or contest—at the time they were made. See, *e.g.*, *Mathis*, 579 U.S. at 512. The claimed efficiency gains are thus illusory.

2. Other rationales the courts of appeals have invoked are equally unpersuasive. Often, courts have reasoned that the date, location, and other specific factual circumstances underlying a given conviction are all "recidivism-related" and are therefore inseparable from the fact of conviction itself. *United States* v. *Harris*, 794 F.3d 885, 887 (8th Cir. 2015).[6] But that view—which the Government shared until *Wooden*[7]—is precisely what the Court rejected in

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[6] See also, *e.g.*, *United States* v. *Brown*, 67 F.4th 200, 213 (4th Cir. 2023); *United States* v. *Reed*, 39 F.4th 1285, 1295 (10th Cir. 2022); *Dantzler*, 771 F.3d at 144 ("[A] sentencing judge's determination of whether ACCA predicate offenses were committed 'on occasions different from one another' is no different, as a constitutional matter, from determining the fact of those convictions.") (quoting *United States* v. *Santiago*, 268 F.3d 151, 153 (2d Cir. 2001)); *United States* v. *Blair*, 734 F.3d 218, 227-28 (3d Cir. 2013) (interpreting *Descamps* to permit court to find "the date or location of the crimes charged"); *United States* v. *Thomas*, 572 F.3d 945, 952 n.4 (D.C. Cir. 2009); *United States* v. *White*, 465 F.3d 250, 254 (5th Cir. 2006) (per curiam); *United States* v. *Michel*, 446 F.3d 1122, 1132-33 (10th Cir. 2006) (holding that "*Apprendi* left to the judge[]" the task of finding facts beyond "the mere fact of previous convictions"); *United States* v. *Thompson*, 421 F.3d 278, 286 (4th Cir. 2005) ("To take notice of the different dates or locations of burglaries—something inherent in the conviction—is to take notice of different occasions of burglary as a matter of law."); *United States* v. *Burgin*, 388 F.3d 177, 186 (6th Cir. 2004) (similar); *United States* v. *Morris*, 293 F.3d 1010, 1012-13 (7th Cir. 2002) (similar).

[7] See, *e.g.*, Br. for United States In Opposition at 6-7, *Starks* v. *United States*, No. 19-6693 (Jan. 21, 2020) ("A sentencing court's

Shepard, *Descamps*, and *Mathis*. As noted, in *Shepard* and *Mathis*, the findings the Court held impermissible were about the modest question of whether prior burglaries had targeted buildings (as would trigger the enhancement) or vehicles (as would not). See *Mathis*, 579 U.S. at 507-08; *Shepard*, 544 U.S. at 15-16. In *Descamps*, the impermissible finding was about whether the defendant had entered a store illegally (triggering the enhancement) or legally (not). See 570 U.S. at 259. As this case illustrates, the occasions inquiry routinely depends on factual determinations that are far more detailed and far more distant from the elements of any offense than those. As Judge Stras has observed, "there simply is no way" to interpret *Descamps* and *Mathis* as permitting a court to make such findings. See *Perry*, 908 F.3d at 1135 (Stras, J., concurring).

It is also no answer to suggest, as some lower courts have, that such inquiries are permissible as long as they are confined to *Taylor* and *Shepard* documents. Cf., *e.g.*, *United States* v. *Carter*, 969 F.3d 1239, 1243 (11th Cir. 2020); *United States* v. *Young*, 809 F. App'x 203, 209-10 (5th Cir. 2020) (per curiam) (discussing circuit precedents); *Hennessee*, 932 F.3d at 444-45. As explained, this Court has made clear that such documents are inherently unreliable as sources for non-elemental facts. See *supra* at 6-8. Indeed, "'[r]epurpos[ing]' *Taylor* and *Shepard* to *justify*

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authority under *Almendarez-Torres* to determine the fact of a conviction, without offending the Sixth Amendment, necessarily includes the determination of when a defendant's prior offenses occurred, and whether two of them occurred on the same or separate occasions.") (citing *Santiago*, 268 F.3d at 156-57); Br. for The United States In Opposition at 10-11, *Hennessee* v. *United States*, No. 19-5924 (Dec. 6, 2019) (similar).

judicial fact-finding * * * turns those decisions on their heads." *Perry*, 908 F.3d at 1136 (Stras, J., concurring) (quoting *Mathis*, 579 U.S. at 513-14) (emphasis added). To begin with, the principal holding of each case is that *no matter what documents are used*, sentencing courts cannot engage in factfinding beyond the offense of conviction and its elements. *Supra* at 3-7. That is why, as *Descamps* explained, the sole permissible use of *Taylor* and *Shepard* documents is for the "limited function" of identifying that offense and those elements, and this Court has never—in any circumstance—"authorized" the use of them toward any other end. 570 U.S. at 260, 262-63. Once the offense of conviction is known—as it must be to trigger an occasions analysis—"the inquiry is over," and those documents "ha[ve] no role to play." See *id.* at 264-65.[8]

III. Proper Application Of The Sixth Amendment Furthers The Interests Of Criminal Defendants.

A final argument appointed *amicus* may offer is that enforcing the jury right can undermine the interests of criminal defendants by allowing juries to be exposed to the facts surrounding a given defendant's

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[8] Another rationale some lower courts have invoked is still less substantial. Specifically, the Ninth and Eleventh Circuits have suggested that because *Descamps* and *Mathis* addressed a different part of section 924(e)(1)—the "violent felony" definition—they have no application to the occasions inquiry. See, *e.g.*, *United States* v. *Walker*, 953 F.3d 577, 581 (9th Cir. 2020) ("To the extent that *Mathis* expresses broader disfavor of factual determinations by sentencing judges, it is not clear whether and how this disfavor extends beyond determining that a given state-law crime is an ACCA predicate."); *United States* v. *Doctor*, 838 F. App'x 484, 487 (11th Cir. 2020) (similar). Any suggestion that the Sixth Amendment's meaning changes halfway through section 924(e)(1) is unsupportable.

prior convictions. But this Court already answered that argument in *Blakely* and *Shepard*, and the answer applies equally here. As the Court observed in *Blakely*, "nothing prevents a defendant from waiving his *Apprendi* rights," either by stipulating to particular facts or by agreeing to put an issue before the judge. 542 U.S. at 310; see also *Shepard*, 544 U.S. at 26 n.5 (plurality op.) ("[A]ny defendant who feels that the risk of prejudice is too high can waive the right to have a jury decide questions about his prior convictions."). In addition, courts are fully capable of devising procedures to avoid any unfairness to defendants, such as by bifurcating proceedings or including limiting instructions. See *United States* v. *Blanton*, 476 F.3d 767, 769 (9th Cir. 2007) (noting that district court "bifurcate[d] the guilt and ACCA sentencing phases of the trial"). Any concern that petitioner's position would work against criminal defendants is thus illusory, in addition to being irrelevant to any inquiry into the Sixth Amendment's scope. Cf. *Blakely*, 542 U.S. at 313 (Sixth Amendment's application "cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice").

CONCLUSION

For the foregoing reasons and those in the petitioner's and the Government's briefs, the judgment should be reversed.

Respectfully submitted,

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