THE OCCASIONS CLAUSE PARADOX

INTRODUCTION

The Armed Career Criminal Act[1] (ACCA) mandates an enhanced sentence when a felon in possession of a firearm was previously convicted of at least three predicate offenses committed on "occasions different from one another."[2] This statute transforms a maximum ten-year sentence into a mandatory minimum sentence of fifteen years and a maximum sentence of life.[3] Over twenty years ago in *Apprendi v. New Jersey*,[4] the Supreme Court held that any fact that increases the maximum sentence for an offense must be charged in the indictment and proven to a jury beyond a reasonable doubt.[5] Currently, judges across the country are deciding whether a defendant's predicate offenses occurred on separate occasions by a preponderance of the evidence at sentencing. So far, no federal court of appeals has found this to be prohibitively problematic. In fact, every federal court of appeals to consider this question — which is every circuit but one — has held that judges may make the occasions determination by a preponderance of the evidence. All of these courts are wrong.

Apprendi marked a shift in Sixth Amendment jurisprudence. The courts could no longer defer to the states' decisions about what was a sentencing factor, to be decided by a judge by a preponderance of the evidence, and what was an element, to be decided by a jury beyond a reasonable doubt.[6] This deference would seriously erode the right to have every fact essential to the conviction be proven to a jury beyond a reasonable doubt.[7] But this is precisely what is happening today. Judges are turning convictions for offenses that carry a maximum ten-year sentence into convictions that carry a sentence of fifteen years to life. This practice violates the core of *Apprendi*, and none of the circuits' arguments to the contrary are availing. The occasions inquiry is far afield from the *Almendarez-Torres v. United States*[8] exception — a

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1 Pub. L. No. 98-473, tit. II, ch. XVIII, 98 Stat. 2185 (1984) (codified as amended at scattered sections of the U.S. Code).

2 18 U.S.C. § 924(e)(1).

3 *See id.*; *see also* United States v. Brame, 997 F.2d 1426, 1428 (11th Cir. 1993) (collecting cases from Second, Third, Fourth, Fifth, Seventh, and Tenth Circuits holding that § 924(e) authorizes a sentence of life). Under the ACCA, this sentencing range can be imposed if a defendant with three predicate offenses violated § 922(g), the felon-in-possession statute, which ordinarily only allows for a maximum sentence of ten years. 18 U.S.C. § 924(a)(2).

4 530 U.S. 466 (2000).

5 *Id.* at 466.

6 *See id.* at 476.

7 *See id.* at 484.

8 523 U.S. 224 (1998).

narrow exception that permits a judge to decide only the fact of a prior conviction by a preponderance of the evidence.[9]

Even if courts were to hold that the occasions question must be charged in the indictment and decided by a jury beyond a reasonable doubt, the complications would not end there. Requiring a jury to decide the occasions question would raise a significant risk of prejudice to the defendant, as juries would be exposed to details of the defendant's prior convictions. There are various ways that the defense might try to minimize the jury prejudice that is likely to result, including stipulation, Rule 403 of the Federal Rules of Evidence,[10] and bifurcation. While stipulation is an adequate solution in the many cases in which the occasions question is not seriously disputed, bifurcation is the only sufficient solution when the occasions question is actually up for debate.

This Note proceeds as follows. Part I discusses the history of Sixth Amendment and due process jurisprudence as it relates to recidivist enhancements. Part II argues that *Apprendi* and *Alleyne v. United States*[11] require that the occasions issue be charged in the indictment and proven to a jury beyond a reasonable doubt. And Part III discusses the problems that such a holding would create for criminal defendants and suggests possible ways to mitigate those problems, concluding that bifurcation is the only fully effective solution when the occasions question is seriously disputed. Ultimately, even though recognizing that the occasions question must be proven to a jury beyond a reasonable doubt creates practical complications, courts have an obligation to faithfully apply the Sixth Amendment and to use effective solutions to remedy the complications that arise.

I. RECIDIVIST ENHANCEMENTS, THE SIXTH AMENDMENT, AND DUE PROCESS

The debate over the ACCA's occasions clause is a continuation of a longstanding battle over what constitutes an element of an offense that must be charged in an indictment and proven to a jury beyond a reasonable doubt. Initially the Court deferred to states' decisions about what constituted an element of a particular offense.[12] However, the Court eventually switched gears and required that any fact that raises the mandatory sentencing range be charged in the indictment and proven to a jury beyond a reasonable doubt, regardless of what the state says.[13]

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[9] *Apprendi*, 530 U.S. at 487–88.

[10] FED. R. EVID. 403.

[11] 570 U.S. 99 (2013).

[12] *See* Patterson v. New York, 432 U.S. 197, 201, 210 (1977); McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986).

[13] *See Apprendi*, 530 U.S. at 466; *Alleyne*, 570 U.S. at 103.

*A. Pre-*Apprendi

In *Patterson v. New York*,[14] the Court laid the foundation for the pre-*Apprendi* approach to sentencing enhancements. The case involved a New York murder statute that created an affirmative defense, allowing the jury to find manslaughter if the defendant proved by a preponderance of the evidence that he acted "under the influence of extreme emotional disturbance for which there was a reasonable explanation."[15] The Court upheld the statute, holding that it did not violate the Due Process Clause to place the burden on the defendant to prove an affirmative defense.[16] In doing so, the Court deferred to the state's choices of what to label an element and what to label an affirmative defense.[17] Only those things that the state chooses to label an element must be proven beyond a reasonable doubt — and the state's choice alone is determinative.[18] The Court acknowledged that its deference to state definitions would allow state legislatures to "reallocate burdens of proof"[19] by categorizing certain facts as affirmative defenses rather than elements but assured that the state's ability to do so was not without limitations, as state legislatures could not "declare an individual guilty or presumptively guilty of a crime."[20]

Nine years later, the Court applied this logic to a sentencing enhancement in *McMillan v. Pennsylvania*.[21] The Court upheld a Pennsylvania statute that applied a five-year mandatory minimum to any person convicted of certain felonies if a sentencing judge found by a preponderance of the evidence that the person "visibly possessed a firearm"[22] during the commission of the offense.[23] The Court explained that in *Patterson* it had "rejected the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt."[24] Instead, the state's choice to label certain things as elements and others as sentencing factors is "usually dispositive."[25] The Court acknowledged that there may be some situations in which a state's reallocation of the burden of proof infringes due process but found that not to be the case in *McMillan*.[26] While the Court declined to create a bright-line test, it laid out certain factors indicating that a state statute defining elements and sentencing

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[14] 432 U.S. 197 (1977).
[15] *Id.* at 206.
[16] *See id.* at 210.
[17] *See id.* at 201, 210.
[18] *See id.* at 210.
[19] *Id.*
[20] *Id.* (quoting McFarland v. Am. Sugar Refin. Co., 241 U.S. 79, 86 (1916)).
[21] 477 U.S. 79 (1986).
[22] *Id.* at 81 (quoting 42 PA. CONS. STAT. § 9712 (1982)).
[23] *See id.* at 93.
[24] *Id.* at 84 (quoting *Patterson*, 432 U.S. at 214).
[25] *Id.* at 85.
[26] *See id.* at 86.

factors breaches due process.[27] After establishing this deferential standard, the Court started to change course just a year later.

B. The Apprendi *Line*

In *Jones v. United States*,[28] the Court examined 18 U.S.C. § 2119, which established different sentencing ranges depending on whether a carjacking resulted in no serious bodily injury, serious bodily injury, or death.[29] The Court interpreted the statute to create three separate offenses with different elements, rather than a single offense with different factors to be determined by a judge at sentencing.[30] While this decision was grounded in statutory interpretation, the Court utilized the canon of constitutional avoidance, explaining that the alternate reading of the statute would raise Fifth and Sixth Amendment concerns.[31]

A year later, in *Apprendi*, the Court definitively held that "[o]ther 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."[32] The Court explained that the state could not get around the jury trial right by simply labeling something as a "sentence enhancement" rather than an element of the offense.[33] This right has always been understood to require that a jury decide "*the truth of every accusation*."[34] The Court also emphasized that allowing a judge to make these decisions — essentially deciding that the defendant committed a different, more serious offense than that for which the jury convicted — by a preponderance of the evidence seriously erodes that protection.[35] The Court emphasized that *McMillan* still maintained that "constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense."[36] While the Court has allowed judges to decide true "sentencing factors," those factors must neither "alter[] the maximum penalty for the crime committed nor create[] a separate offense calling for a separate

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[27] *Id.* at 91; *see id.* at 86–91.

[28] 526 U.S. 227 (1999).

[29] *See id.* at 230.

[30] *See id.* at 251–52.

[31] *See id.* at 239–51. The Court explained that the significance of the jury would be severely diminished if facts that mean the difference between a fifteen-year maximum sentence and a life sentence were determined by a judge by a preponderance of the evidence at sentencing. *Id.* at 243–44.

[32] Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

[33] *Id.* at 476.

[34] *Id.* at 477 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *343).

[35] *See id.* The Court emphasized the significance of the additional ten-year sentence at issue in the case, explaining that "it can hardly be said that the potential doubling of one's sentence — from 10 years to 20 — has no more than a nominal effect" and adding that "[b]oth in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance." *Id.* at 495.

[36] *Id.* at 486 (citing McMillan v. Pennsylvania, 477 U.S. 79, 85–88 (1986)).

penalty."[37] Instead, these factors may only "limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding."[38] In essence, the question of what constitutes a sentencing factor and what constitutes an element of the offense is "not of form, but of effect — does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[39]

In *Apprendi*, the Court also articulated a single, narrow exception to this general rule. Based on its decision in *Almendarez-Torres*, the Court explained that a judge may decide the *fact* of a prior conviction by a preponderance of the evidence.[40] In other words, a judge may decide that the defendant being sentenced was previously convicted of a particular offense, with a particular set of elements. The Court reasoned that this exception did not endanger the Sixth Amendment jury right because those elements had already been decided by a previous jury beyond a reasonable doubt.[41]

The Court cautioned against reading this exception too expansively. It characterized the exception as "at best an exceptional departure from the historic practice that we have described."[42] While admitting that "it is arguable that *Almendarez-Torres* was incorrectly decided,"[43] the Court declined to overrule the case, as the defendant had not contested the decision's validity, and such a ruling would have been unnecessary to the Court's decision.[44] The Court instead chose to characterize the case as a narrow exception to "the otherwise uniform course of decision during the entire history of our jurisprudence."[45]

Then, in *Alleyne*, the Court made clear that *Apprendi* applies not only to factors that increase the maximum sentence but also to those that increase the mandatory minimum.[46] In *Alleyne*, the trial judge imposed a mandatory minimum of seven years based on the factual finding that the defendant had brandished a gun during the commission of the offense, even though this fact had not been determined by the jury.[47] The Court reversed, holding that any fact that affects the mandated

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[37] *Id.* (quoting *McMillan*, 477 U.S. at 87–88).

[38] *Id.* (quoting *McMillan*, 477 U.S. at 88). In other words, the sentencing factor cannot be "a tail which wags the dog of the substantive offense." *Id.* (quoting *McMillan*, 477 U.S. at 88).

[39] *Id.* at 494.

[40] *See id.* at 487–88.

[41] *See id.* at 496 (explaining that there is a difference between "accepting the validity of a prior judgment of conviction" for which the defendant received the jury trial right and allowing the judge to find new facts that were never decided by a jury).

[42] *Id.* at 487.

[43] *Id.* at 489.

[44] *See id.* at 490.

[45] *Id.* at 490. Justice Thomas, however, joined by Justice Scalia, wrote separately, arguing against the exception. *See id.* at 499–523 (Thomas, J., concurring).

[46] *See* Alleyne v. United States, 570 U.S. 99, 103 (2013); *id.* at 108 (plurality opinion).

[47] *See id.* at 104.

sentencing range is an element that must be proved to a jury beyond a reasonable doubt.[48] The Court explained that a crime is in part defined by the sentencing range that it imposes, and any offense with a different range of prescribed punishment is a different crime.[49] The commission of that different crime must be decided by a jury beyond a reasonable doubt.[50]

C. Apprendi *and the ACCA*

Because the ACCA raises the statutory maximum and minimum sentences for a felon-in-possession conviction, it appears to fall into the core of the *Apprendi-Alleyne* rule. While the Court has never applied *Apprendi* to the occasions clause, it has applied the case to the rest of the ACCA.[51] The Court requires judges to use the categorical approach to determine whether a conviction is an ACCA predicate, a method that sticks exclusively to the elements of the offense.[52] This is precisely what is permitted by the *Almendarez-Torres* exception — a judicial determination of the prior conviction and its elements — and no more.[53] The Court has indicated that any other approach would raise concerns under the Sixth Amendment.[54]

The Court has long held that, in deciding whether a conviction counts as an ACCA predicate, the judge must focus exclusively on the elements of the prior offenses. In *Taylor v. United States*,[55] the Court held that courts must use the categorical approach to determine whether a conviction is an ACCA predicate.[56] Under this approach, the court may "look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions."[57] *Taylor* predated *Apprendi* and *Alleyne*, but it is consistent with their holdings. By defining a crime of violence based on its elements, the Court avoided a system in which judges were finding facts — other than the fact of the prior conviction and its elements — that raised the statutory sentencing range.

Even as the Court has further articulated the contours of the categorical approach, it has never strayed from an ultimate focus on the

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[48] *See id.* at 103.

[49] *See id.* at 108–09 (plurality opinion).

[50] *See id.*

[51] *See* Mathis v. United States, 136 S. Ct. 2243, 2252 (2016); Descamps v. United States, 570 U.S. 254, 269 (2013); Shepard v. United States, 544 U.S. 13, 24–26 (2005) (plurality opinion).

[52] As recently as last Term, however, both Justices Thomas and Alito have argued that the Court should abandon the categorical approach. *See, e.g.*, United States v. Taylor, 142 S. Ct. 2015, 2026–33 (2022) (Thomas, J., dissenting); *id.* at 2033 n.1 (Alito, J., dissenting).

[53] *See* Apprendi v. New Jersey, 530 U.S. 466, 487–88 (2000).

[54] *See Mathis*, 136 S. Ct. at 2252; *Descamps*, 570 U.S. at 269; *Shepard,* 544 U.S. at 24–26 (plurality opinion).

[55] 495 U.S. 575 (1990).

[56] *See id.* at 600.

[57] *Id.*

elements of the offense. In *Taylor* and then in *Shepard v. United States*,[58] *Descamps v. United States*,[59] and *Mathis v. United States*,[60] the Court explained how to conduct the modified categorical approach.[61] Under this approach, a court may look to a specific subset of documents to determine under what portion of a statute a person was convicted.[62] Nevertheless, even when analyzing a conviction under a divisible statute, a court must maintain "a focus on the elements, rather than the facts, of a crime."[63] The Court explained in *Taylor* that a court may look to the additional documents in this "narrow range of cases" only to determine which elements the jury was required to find beyond a reasonable doubt.[64] The Court reiterated this point in *Shepard*, *Descamps*, and *Mathis*.[65]

The Court has repeatedly expressed that any approach that does not ultimately rest on the elements of the offense would run into Sixth Amendment concerns. A plurality of the Court in *Shepard* noted that the categorical approach embodied the very rule that *Apprendi* later imposed.[66] If a court used nonelemental facts to determine whether a defendant's prior conviction constituted a predicate offense under the ACCA, the judge would be making "a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea."[67] This factual determination raises concerns

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[58] 544 U.S. 13.

[59] 570 U.S. 254.

[60] 579 U.S. 500 (2016).

[61] *See Mathis*, 579 U.S. at 504–06; *Descamps*, 570 U.S. at 261–62; *Shepard*, 544 U.S. at 19–20; *Taylor*, 495 U.S. at 602.

[62] *See Descamps*, 570 U.S. at 261–62; *Taylor*, 495 U.S. at 602. For example, a state burglary statute may define burglary as the unlawful or unprivileged entry into, or remaining in, a building, other structure, *or motor vehicle*, with intent to commit a crime. This is broader than the generic definition of burglary: "[U]nlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime," where structure is defined to exclude a motor vehicle. *Taylor*, 495 U.S. at 598 (citing 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 8.13(a), at 466 (1986)). However, if the state statute requires that the jury find beyond a reasonable doubt which of the three places the defendant entered, the statute is divisible, creating three separate offenses, one of which matches the generic definition of burglary. *See Descamps*, 570 U.S. at 257. The court may then look to a specific subset of documents to determine whether the defendant was convicted of the offense that matches the generic definition. *See id.* at 261–62; *Taylor*, 495 U.S. at 602.

[63] *Descamps*, 570 U.S. at 263.

[64] *Taylor*, 495 U.S. at 602.

[65] *Shepard* is merely an extension of *Taylor* to the plea-deal context and does not expand the purposes for which the documents can be used. *See Shepard*, 544 U.S. at 19–20. In *Descamps*, the Court reaffirmed that the modified categorical approach is "a tool for implementing the categorical approach, to examine a limited class of documents to determine which of the statute's alternative elements formed the basis of the defendant's prior conviction." 570 U.S. at 262. The Court reached the same conclusion in *Mathis*, holding that "'[t]he only [use of that approach] we have ever allowed' . . . is to determine 'which *element[s]* played a part in the defendant's conviction.'" 579 U.S. at 513 (second and third alterations in original) (quoting *Descamps*, 570 U.S. at 260, 263).

[66] *See Shepard*, 544 U.S. at 24 (plurality opinion).

[67] *Id.* at 25.

under *Apprendi* and is too far removed from the fact of conviction to fall under *Almendarez-Torres*.[68] The Court reiterated this concern in *Descamps*, explaining that "[u]nder ACCA, the court's finding of a predicate offense indisputably increases the maximum penalty," and, therefore, such a finding "would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction."[69] The Court once again raised the same point in *Mathis*, stating that a fact-specific approach would "raise serious Sixth Amendment concerns,"[70] as the court may "do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of."[71] In the next Part, this Note argues that *Apprendi* is similarly applicable to the occasions clause.

II. *APPRENDI* AND THE OCCASIONS CLAUSE

While the Court has suggested that *Apprendi* carries implications for how courts should conduct the categorical approach, the same cannot be said for the occasions clause. Every circuit that has addressed the question of whether *Apprendi* applies to the occasions clause has held that the occasions issue may be decided by a judge by a preponderance of the evidence.[72] The First Circuit remains the sole holdout, having not decided the question. The Court has yet to weigh in.

Recently, in *Wooden v. United States*,[73] the Court declined to decide the issue, but Justice Gorsuch signaled that he would be open to doing so soon.[74] The *Wooden* Court considered whether offenses have been committed on different occasions whenever they are committed sequentially, as the government argued,[75] or whenever the offenses are part of separate criminal episodes or separate underlying circumstances, as the petitioner argued.[76] In a 9–0 decision written by Justice Kagan, the Court held that the word "occasion" means an event or episode.[77] The Court explained that the inquiry into whether offenses were part of the

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[68] *See id.*

[69] *Descamps*, 570 U.S. at 269.

[70] *Mathis*, 136 S. Ct. at 2252.

[71] *Id.*

[72] *See* United States v. Thomas, 572 F.3d 945, 952 n.4 (D.C. Cir. 2009) (holding that a judge may decide whether ACCA predicates occurred on different occasions); *see also* United States v. Dudley, 5 F.4th 1249, 1260 (11th Cir. 2021) (same); United States v. Walker, 953 F.3d 577, 581–82 (9th Cir. 2020) (same); United States v. Harris, 794 F.3d 885, 887 (8th Cir. 2015) (same); United States v. Dantzler, 771 F.3d 137, 144 (2d Cir. 2014) (same); United States v. Blair, 734 F.3d 218, 226–28 (3d Cir. 2013) (same); United States v. Michel, 446 F.3d 1122, 1133 (10th Cir. 2006) (same); United States v. White, 465 F.3d 250, 254 (5th Cir. 2006) (same); United States v. Thompson, 421 F.3d 278, 286 (4th Cir. 2005) (same); United States v. Burgin, 388 F.3d 177, 186 (6th Cir. 2004) (same); United States v. Morris, 293 F.3d 1010, 1012–13 (7th Cir. 2002) (same).

[73] 142 S. Ct. 1063 (2022).

[74] *See id.* at 1081 (Gorsuch, J., concurring in the judgment).

[75] *See* Brief for the United States at 12–13, *Wooden* (No. 20-5279).

[76] *See* Brief for the Petitioner at 8, *Wooden* (No. 20-5279).

[77] *Wooden*, 142 S. Ct. at 1069–70.

same event or episode will be "more multi-factored in nature."[78] Some factors include physical proximity, timing, and the purposes of the offenses.[79]

While the Court provided some clarity in *Wooden* on what the occasions clause means, it declined to resolve the *Apprendi* question, despite an amicus brief from the National Association of Criminal Defense Lawyers urging the Court to do so.[80] However, Justice Gorsuch discussed the issue briefly in his concurrence, writing in a footnote that "[a] constitutional question simmers beneath the surface of today's case."[81] He explained that the Court had not considered the *Apprendi* question because the petitioner did not raise the issue but added that "there is little doubt we will have to do so soon."[82]

The Department of Justice (DOJ) also appears to have recognized the significance of this issue. *Wooden* was decided on March 7, 2022,[83] and beginning in mid-July of the same year, the DOJ conceded that the occasions question must be charged in the indictment and decided by a jury beyond a reasonable doubt.[84] This concession does not end the question, however. Courts are free to reject the DOJ's concession, and it is entirely possible that some will. Since *Wooden*, three circuits have already issued opinions reaffirming that the occasions question does not need to be decided by a jury.[85] This concession is also subject to a change in presidential administrations, or a simple change of heart at the DOJ. It seems likely that the Court will soon weigh in on this matter.

This Part will argue that all of the federal circuits have gotten this question wrong: the occasions question must be charged in the indictment and decided by a jury beyond a reasonable doubt. The occasions clause inquiry gets at the core of the concerns articulated in the *Apprendi*

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[78] *Id.* at 1070.

[79] *See id.* at 1071.

[80] Brief for Amicus Curiae the National Association of Criminal Defense Lawyers in Support of Petitioner at 2–6, *Wooden* (No. 20-5279) [hereinafter Criminal Defense Lawyers Brief].

[81] *Wooden*, 142 S. Ct. at 1087 n.7 (Gorsuch, J., concurring in the judgment).

[82] *Id.* (citing United States v. Dudley, 5 F.4th 1249, 1273–78 (11th Cir. 2021) (Newsom, J., concurring in part and dissenting in part); United States v. Perry, 908 F.3d 1126, 1134–36 (8th Cir. 2018) (Stras, J., concurring); United States v. Thompson, 421 F.3d 278, 287–95 (4th Cir. 2005) (Wilkins, C.J., dissenting)).

[83] *Id.* at 1063.

[84] *See, e.g.*, Supplemental Letter Brief of the United States, United States v. McCall, No. 18-15229 (11th Cir. Aug. 5, 2022); Response to Sentencing Memorandum at 1, United States v. Dutch, No. 16-1424 (D.N.M. July 20, 2022) ("[T]he United States informs the Court that after review of *Wooden v. United States*, 142 S. Ct. 1063 (2022), it has determined that the Armed Career Criminal Act's requirement that prior offenses be 'committed on occasions different from one another' is a fact that must be established by a jury beyond a reasonable doubt or admitted by a defendant."); Government's Motion to Continue or in the Alternative Dismiss Without Prejudice at 4, United States v. Penn, No. 20-CR-00266 (W.D. Mo. July 20, 2022); Letter from Ross B. Goldman, Crim. Div., App. Section, U.S. Dep't of Just., to Patricia S. Connor, Clerk, U.S. Ct. of Appeals for the Fourth Cir., United States v. Hadden, No. 19-4151 (July 25, 2022).

[85] *See* United States v. Reed, 39 F.4th 1285, 1295–96 (10th Cir. 2022); United States v. Stowell, 40 F.4th 882, 885–86 (8th Cir. 2022); United States v. Williams, 39 F.4th 342, 351 (6th Cir. 2022).

line of cases and does not fall under the *Almendarez-Torres* exception. However, if the Court agrees that *Apprendi* requires the occasions question to be determined by a jury beyond a reasonable doubt, the issues will not end there. After arguing that a faithful application of the Sixth Amendment requires a jury to decide the occasions question, Part III addresses the practical consequences of such a decision and how courts may resolve those consequences.

A. Applying Apprendi *to the Occasions Clause*

The occasions clause falls squarely within the *Apprendi* rule. When a person is convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922, they are ordinarily subject to a maximum sentence of ten years and no minimum.[86] However, a finding that the defendant has previously been convicted of three predicate offenses that occurred on separate occasions imposes a mandatory minimum sentence of fifteen years and a maximum sentence of life imprisonment.[87] Therefore, whether or not the predicate offenses occurred on separate occasions is a fact that raises the statutory maximum and minimum sentences and must be decided by a jury beyond a reasonable doubt under *Apprendi* and *Alleyne*.

Requiring a jury to decide the occasions question beyond a reasonable doubt would also be faithful to the reasoning behind *Apprendi*. In *Apprendi*, the Court was concerned that the jury's significance would be severely diminished if the judge were allowed to find facts that increased the maximum penalty. It explained that when a sentencing enhancement increases the maximum penalty, "it is appropriately characterized as 'a tail which wags the dog of the substantive offense.'"[88] The ACCA is an excellent example of that. In convicting the defendant of a violation of § 922, the jury finds facts that authorize a maximum penalty of ten years.[89] In finding that the defendant has three predicate offenses that occurred on different occasions, the judge authorizes a penalty of fifteen years to life.[90] In this situation, the judge's factual findings may be more significant to the defendant and his liberty than the findings of the jury.

The Court's ruling in *Wooden* makes these concerns even more urgent. In *Wooden*, the Court explained that the test for determining whether predicate offenses occurred on different occasions is "multifactored"[91] and depends on "a range of circumstances."[92] After *Wooden*,

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[86] *See* 18 U.S.C. § 924(a)(2).

[87] *See id.* § 924(e)(1).

[88] Apprendi v. New Jersey, 530 U.S. 466, 495 (2000) (quoting McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986)).

[89] *See* 18 U.S.C. § 924(a)(2).

[90] *See id.* § 924(e)(1).

[91] Wooden v. United States, 142 S. Ct. 1063, 1070 (2022).

[92] *Id.* at 1071.

it is clear that the occasions question can involve a complex weighing of various details of prior offenses. Unlike a test that rests on one discrete fact, these multifactor analyses make the identity of the factfinder and the standard of proof even more significant. Many of these cases are likely to be close calls, and reasonable minds may differ on whether certain offenses occurred on the same occasion.

B. The Occasions Clause and Almendarez-Torres

The occasions inquiry also does not fall under *Almendarez-Torres* — the single exception to the *Apprendi* rule. Various courts have held that whether offenses occurred on separate occasions falls under the *Almendarez-Torres* exception.[93] However, the *Almendarez-Torres* exception covers only the *fact* of a prior conviction.[94] In other words, it covers the fact that a defendant was previously convicted of a particular offense with particular elements. The facts underlying the occasions inquiry, on their face, are not elements of the underlying offense under most state laws. Facts such as the timing, location, intervening events, and relationship between two offenses — all factors listed in *Wooden*[95] — are rarely if ever elements of a state or federal conviction.

Any interpretation of the *Almendarez-Torres* exception that permits judges to determine anything beyond the elements of the prior conviction contradicts the Court's conception of this exception in *Shepard*, *Descamps*, and *Mathis*. In those cases, the Court explained that any consideration of nonelemental facts underlying a prior conviction would run into Sixth Amendment concerns, precisely because the Sixth Amendment permits the judge to find only the fact of a prior conviction and its elements.[96]

In *Shepard*, the Court held that courts could not look at the underlying facts of a conviction to determine the location of a burglary, stating that such an inquiry may violate the Sixth Amendment.[97] This detail — the location of the offense — is one of the exact pieces of information that courts are now looking to in their occasions clause

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[93] *See, e.g.*, United States v. Harris, 794 F.3d 885, 887 (8th Cir. 2015) (citing United States v. Evans, 738 F.3d 935, 936–37 (8th Cir. 2014) (per curiam)); United States v. Dantzler, 771 F.3d 137, 144 (2d Cir. 2014) (quoting United States v. Santiago, 268 F.3d 151, 156 (2d Cir. 2001)); United States v. Blair, 734 F.3d 218, 226–28 (3d Cir. 2013); United States v. Thomas, 572 F.3d 945, 952 n.4 (D.C. Cir. 2009); United States v. Michel, 446 F.3d 1122, 1133 & n.4 (10th Cir. 2006) (quoting *Santiago*, 268 F.3d at 156–57); United States v. White, 465 F.3d 250, 254 (5th Cir. 2006) (per curiam); United States v. Thompson, 421 F.3d 278, 286 (4th Cir. 2005); United States v. Burgin, 388 F.3d 177, 186 (6th Cir. 2004); United States v. Morris, 293 F.3d 1010, 1012–13 (7th Cir. 2002); *see also* Criminal Defense Lawyers Brief, *supra* note 80, at 15 n.4.

[94] *See* Apprendi v. New Jersey, 530 U.S. 466, 487–88 (2000).

[95] *See Wooden*, 142 S. Ct. at 1071.

[96] Mathis v. United States, 136 S. Ct. 2243, 2252 (2016); Descamps v. United States, 570 U.S. 254, 269–70 (2013); Shepard v. United States, 544 U.S. 13, 24 (2005) (plurality opinion).

[97] *Shepard*, 544 U.S. at 16–20; *id.* at 24–26 (plurality opinion).

analyses.[98] Some courts have argued that because *Taylor*, *Shepard*, *Descamps*, and *Mathis* did not discuss the occasions clause, their analysis need not extend to that portion of the ACCA.[99] However, it is difficult to see how the reasoning in those cases would not apply equally to the occasions clause.[100] In both contexts, a judge would be making a decision that increases the defendant's maximum penalty based on underlying facts that were never found by a jury. In addition, the other reason why the Court required the elements-based approach — to "avert[] 'the practical difficulties and potential unfairness of a factual approach'"[101] — applies equally, if not more heavily, to the occasions clause. The Court was concerned that judges would have to conduct detailed analyses of documents that are often quite old and base decisions on details in the record that the defendant had no incentive to challenge in the initial proceedings.[102] This concern is highly relevant in the occasions clause context, as *Wooden* called for a multifactor analysis that takes into account many details that are rarely elements of an offense.[103]

An interpretation of *Almendarez-Torres* that allows a judge to decide nonelemental facts by a preponderance of the evidence also betrays the reasoning behind the exception. The Court explained in *Apprendi* that *Almendarez-Torres* created an exception for the fact of a prior conviction because that conviction was decided previously by a jury beyond a reasonable doubt.[104] However, facts beyond the elements of the offense — such as location and timing — were never decided by a jury and, therefore, did not receive the same procedural protections.

Such an interpretation also contradicts the Court's warnings against reading the exception too broadly. This reading would expand *Almendarez-Torres* from a narrow exception to the rule. It would allow judges to decide, based on a preponderance of the evidence, any underlying fact related to a conviction, even if that fact raised the maximum or minimum sentences. As explained above, the Court has chosen to construe *Almendarez-Torres* narrowly, and Justices and scholars have even gone so far as to suggest that it should be overruled.[105]

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[98] *See, e.g.*, *Santiago*, 268 F.3d at 156–57 (holding that judges may determine the "who, what, when, and where" of a prior conviction, *id.* at 156).

[99] *See, e.g.*, United States v. Doctor, 838 F. App'x 484, 487 (11th Cir. 2020); United States v. Walker, 953 F.3d 577, 581 (9th Cir. 2020); *see also* Criminal Defense Lawyers Brief, *supra* note 80, at 18.

[100] *See* United States v. Hennessee, 932 F.3d 437, 447–48 (6th Cir. 2019) (Cole, C.J., dissenting).

[101] *Descamps*, 570 U.S. at 267 (quoting Taylor v. United States, 495 U.S. 575, 601 (1990)).

[102] *Id.* at 270 ("A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense — and may have good reason not to.").

[103] *See* Wooden v. United States, 142 S. Ct. 1063, 1070–71 (2022).

[104] *See* Apprendi v. New Jersey, 530 U.S. 466, 496 (2000).

[105] *See id.* at 489–90; *see also id.* at 518–23 (Thomas, J., concurring); Mathis v. United States, 136 S. Ct. 2243, 2258–59 (2016) (Thomas, J., concurring); *Descamps,* 570 U.S. at 279–81 (Thomas,

Resorting to *Shepard* also does not fix the problem, as *Shepard* is still constrained by the requirements of *Almendarez-Torres* that mandate an exclusive focus on the elements of the offense. Some courts have held that it is permissible for a judge to conduct the occasions inquiry by sifting through the facts underlying the prior conviction, as long as the court looks only to the documents listed in *Taylor* and *Shepard* to do so.[106] However, this method is in direct conflict with how the Court has repeatedly chosen to construe *Shepard*. The Court has emphasized time and time again that, even when courts look to *Shepard* documents, it is only to determine the elements under which the defendant was convicted.[107] The Court in *Descamps* cautioned against the very practice courts have now adopted, stating that it did not want to turn an "examination of extra-statutory documents" from "a tool used in a 'narrow range of cases' to identify the relevant element from a statute with multiple alternatives," into "a device employed in every case to evaluate the facts that the judge or jury found."[108] The Court explained again in *Mathis* that "[h]ow a given defendant actually perpetrated the crime — what we have referred to as the 'underlying brute facts or means' of commission — makes no difference."[109] The Court explained in these cases that any other reading of *Shepard* would risk violating the Sixth Amendment.[110]

Because the occasions clause hits at the heart of *Apprendi* and does not fall under the *Almendarez-Torres* exception, courts have an obligation to require that the question be determined by a jury beyond a reasonable doubt. Nevertheless, this holding creates a new problem, which risks harming criminal defendants. The next Part will discuss that problem and what courts can do to mitigate the harm.

J., concurring); Shepard v. United States, 544 U.S. 13, 26–28 (2005) (Thomas, J., concurring in part and concurring in the judgment). Many scholars have gone so far as to claim that an overruling of *Almendarez-Torres* is inevitable. *See, e.g.*, Nancy J. King, *Juries and Prior Convictions: Managing the Demise of the Prior Conviction Exception to* Apprendi, 67 SMU L. REV. 577, 577 (2014). *Almendarez-Torres* was decided during the *McMillan* era, and since deciding *Apprendi*, the Court has not presented any legal justification for the *Almendarez-Torres* doctrine, instead simply explaining that an over-ruling of the exception is not necessary to deciding the case before it. *See, e.g.*, *Apprendi*, 530 U.S. at 489–90. It may be unwise, therefore, to rest an argument on an expansion of a doctrine that is likely to be overruled and has not been supported under current Sixth Amendment jurisprudence.

106 *See, 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); United States v. Hennessee, 932 F.3d 437, 444–45 (6th Cir. 2019); *see also* Criminal Defense Lawyers Brief, *supra* note 80, at 17.

107 Taylor v. United States, 495 U.S. 575, 602 (1990); *Mathis*, 136 S. Ct. at 2253; *Shepard*, 544 U.S. at 19–20.

108 *Descamps*, 570 U.S. at 267.

109 *Mathis*, 136 S. Ct. at 2251 (citation omitted) (quoting Richardson v. United States, 526 U.S. 813, 817 (1999)); *see also id.* at 2253 (noting that those facts are "irrelevant" and that "[f]ind them or not, by examining the record or anything else, a court still may not use them to enhance a sentence").

110 *See id.* at 2252; *Descamps*, 570 U.S. at 269; *Shepard,* 544 U.S. at 24–26 (plurality opinion).

III. THE PREJUDICE PROBLEM

At first, it may appear that applying *Apprendi* to the occasions clause would only help defendants because it would require a key fact that could significantly increase the defendant's sentence to be proven to a higher standard of proof. However, such a requirement would mean that jurors would hear details of defendants' prior convictions — a type of evidence that has historically been guarded from jurors' view and has the potential to be extremely prejudicial to defendants. This Part will discuss this problem, as well as potential ways to mitigate it, including stipulation, Rule 403, and bifurcation. It will conclude that bifurcation is the only sufficient solution in cases in which the occasions issue is in dispute.

A. The Problem

There is a major concern that the process of proving the occasions issue will prejudice the jury against the defendant. There is a long tradition of avoiding exposing the jury to a defendant's prior convictions.[111] This common law tradition was eventually codified in Rule 404(b)(1),[112] which prohibits the admission of a defendant's prior conviction for propensity purposes.[113] The concerns underlying this rule are twofold. First, exposing the jury to evidence of prior bad acts runs the risk of leading to a propensity inference — because the defendant did something bad before, they will do something bad again.[114] Second, jurors may choose to convict regardless of whether they believe the defendant committed this new crime, seeking to punish the defendant simply because they believe her to be a bad person or because they want to punish her for the prior bad act.[115] It is not so much that evidence of a person's character is irrelevant but that the jury will simply give this type of evidence outsized weight.[116] Psychological research backs

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111 *See* Michelson v. United States, 335 U.S. 469, 475 (1948) ("Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt.").

112 FED. R. EVID. 404(b)(1).

113 *See, e.g.*, *id.* ("Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.").

114 *See* Old Chief v. United States, 519 U.S. 172, 180–81 (1997) (explaining that exposing the jury to a prior conviction could lead to "unfair prejudice," *id.* at 180, by suggesting to the jury that the defendant has a bad character and therefore is more likely to have committed a bad act again).

115 *See* United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982) ("Although . . . 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged — or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment — creates a prejudicial effect that outweighs ordinary relevance.").

116 *See Michelson*, 335 U.S. at 475–76 ("The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." (footnote omitted)).

up the widely held belief that evidence of prior bad acts, particularly evidence of past convictions, creates a negative impression of the defendant and increases the likelihood of conviction.[117]

Having the government prove the occasions question to a jury creates a significant new exception to the general policy of disallowing evidence of prior bad acts. *Wooden* makes this exception even more significant. Not only must the jury find out that the defendant has three prior convictions and what those convictions are, but it must also find out the details of what the defendant allegedly did in committing those offenses.[118] The test laid out in *Wooden* for whether offenses occurred on the same occasion is "multi-factored in nature."[119] It may depend on "a range of circumstances," such as timing, "[p]roximity of location," "the character and relationship of the offenses," and whether there was an "uninterrupted course of conduct" or "significant intervening events."[120] Proving to a jury that offenses occurred on different occasions, therefore, may require telling a story about what exactly the defendant allegedly did — what their motivation was, how they carried out the offense, how long they took between offenses, and possibly more. These details have the potential to be deeply prejudicial.[121] While jurors can be instructed not to make propensity inferences and to use this evidence only to answer the occasions question, jurors often struggle with limiting their inferences in this way.[122]

While the vast majority of federal criminal defendants plead guilty rather than go to trial, these problems will likely affect guilty pleas as

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[117] *See, e.g.*, Dennis J. Devine & David E. Caughlin, *Do They Matter? A Meta-analytic Investigation of Individual Characteristics and Guilt Judgments*, 20 PSYCH. PUB. POL'Y & L. 109, 122 (2014); Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 LAW & HUM. BEHAV. 67, 76 (1995); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 38 (1985).

[118] *See* Wooden v. United States, 142 S. Ct. 1063, 1070–71 (2022).

[119] *Id.* at 1070.

[120] *Id.* at 1071.

[121] Psychological studies bolster this concern, finding not only that jurors tend to be prejudiced by character evidence but also that negative character evidence, and evidence of specific acts, is more prejudicial than positive character evidence or general statements about a person's character. *See* Jennifer S. Hunt, *The Cost of Character*, 28 U. FLA. J.L. & PUB. POL'Y 241, 258–59 (2017).

[122] Studies of motivated reasoning suggest that when people are motivated to make the "right" decision — which is often true in a criminal trial — they tend to use all information that is available to them that appears to be relevant. *See* Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480, 481 (1990); Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCH. PUB. POL'Y & L. 677, 678 (2000). It may also be confusing and seemingly arbitrary to a juror to hear that a piece of information is sufficiently reliable to use for one purpose but not for another.

well.[123] Parties strike plea deals in the shadow of trial, based on expectations of what will happen at trial.[124] If the occasions question must be proven to a jury beyond a reasonable doubt, this may initially seem like a favorable bargaining chip for defendants. Prosecutors may consider their heightened burden and may offer a more favorable plea. They may also consider the time and resources that would go into proving the occasions question. Nevertheless, prosecutors may possess an equal or even greater bargaining chip: the threat of presenting evidence of the defendant's prior convictions at trial. In the face of such a threat, defendants may be willing to accept a less favorable plea. In this way, this jury-prejudice problem is likely to be reflected in plea bargains.

B. The Solutions

This section will explore various avenues for eliminating the prejudice involved in proving the occasions question to a jury. It will investigate the efficacy of three options — stipulation, Rule 403, and bifurcation — and conclude that, while stipulation will be a sufficient solution for the many cases in which the occasions question is not seriously in dispute, bifurcation is the only sufficient resolution when the occasions issue is legitimately contested.

1. Stipulation. — Defendants could alleviate the prejudice of the jury learning details of their prior convictions by simply stipulating that their predicate offenses occurred on separate occasions. Ordinarily, the government is permitted to prove its case as it sees fit.[125] This includes rejecting the defense's proposed stipulations.[126] However, there is an exception for stipulations to felon status.[127] Defendants may stipulate to a prior conviction in order to avoid revealing details about the nature of the conviction, including the offense for which they were convicted.[128] This rule is motivated by the particularly prejudicial effect of evidence

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[123] Ninety percent of federal criminal defendants plead guilty. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, And Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty [https://perma.cc/LRQ3-TVTZ].

[124] *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 31–32 (Univ. of Chi. Press 1971) (1966) ("[A]t every stage of this informal process of pre-trial dispositions . . . decisions are in part informed by expectations of what the jury will do. Thus, the jury is not controlling merely the immediate case . . . , but the host of cases . . . which are destined to be disposed of by the pre-trial process."); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309–17 (1983).

[125] *See* Old Chief v. United States, 519 U.S. 172, 186–87 (1997) ("[T]he prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it.").

[126] *See id.*

[127] *See id.* at 190–92 (holding that the prosecution could not present additional evidence regarding a defendant's prior conviction once he had offered to stipulate to that conviction); *see also id.* at 183 n.7 ("[O]ur holding is limited to cases involving proof of felon status.").

[128] *See id.* at 190–92.

of prior convictions, as well as the longstanding practice of excluding such evidence.[129] In felon-in-possession cases, details of the prior conviction are also irrelevant to understanding the underlying facts of the case before the jury.[130]

Stipulation could minimize the jury's prejudice. Rather than hearing what offenses the defendant committed and details about how the defendant committed them, the jury would simply hear that the defendant had committed three predicate offenses on separate occasions. Stipulation of this kind would prevent the jury from hearing harmful details that could make them view the defendant as violent, dangerous, or simply a bad person. In addition, the form in which the information is conveyed would likely be less emotionally charged; rather than hearing a narrative about prior offenses, the jury would learn the information in a more sterile, technical form.[131]

Stipulation does not entirely eliminate the potential for jury prejudice, but it may sufficiently mitigate that prejudice in most cases. Even if a defendant stipulates to the occasions issue, the jury will hear that the defendant committed three prior offenses on separate occasions. This information necessarily suggests that the defendant made three separate decisions to commit bad acts. While the emotional weight of this evidence would be more limited, the evidence still invites a propensity inference — if the defendant committed bad acts three times before, they are more likely to do something bad again. Nevertheless, this may be a compromise worth making. Many evidentiary rules seek to strike a balance between admitting relevant evidence and minimizing the potential for prejudice, and this balance often does not involve entirely eliminating that prejudice.[132] Stipulation may strike that balance in many cases — admitting the essential information without the narrative and details that make this type of evidence particularly damaging.

Nevertheless, stipulation is cold comfort in cases where the occasions question is genuinely disputable. Stipulation requires the defendant to give up any argument that they committed the prior offenses on the same occasion. This leaves them no better off than if they did not have the right to have the jury decide the occasions question in the first place. Relying on stipulation to resolve the problem of jury prejudice leaves the defendant in a difficult position: if stipulation is the only way to prevent prejudicial information from coming out, the defendant may feel pressured to give up their right to make this argument, fearing that

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[129] *See id.*

[130] *See id.* at 190–91.

[131] How the jury learns of information can have an important effect on the jurors' impressions of both sides. Narrative may be essential to showing the jury why the defendant's actions were wrong and to keep them invested and engaged in coming to the right answer. *See id.* at 187. Narrative may also "establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment." *Id.* at 187–88.

[132] *See, e.g.*, FED. R. EVID. 403.

it will make a guilty verdict more likely.[133] Stipulation, therefore, does not actually resolve the problem of jury prejudice resulting from the *Apprendi* right — it simply means that defendants may eliminate that prejudice by waiving a right to which they are entitled.[134]

2. Rule 403. — Another way to minimize the prejudicial effect of the occasions evidence is to rely on the discretion of the judge under Rule 403 to exclude evidence when its "probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[135] The judge could use this discretion to prevent the government from admitting evidence that does not meaningfully add to the occasions calculus but carries a high risk of inflaming the emotions of the jury. The judge could also consider the availability of other less emotionally weighty evidence that could establish the same point under the occasions clause.[136] The defense may also have an argument that presenting too much information about the prior offenses may confuse the issues, as presenting a minitrial on a prior conviction may suggest to the jury that it is being charged with adjudging the prior offense, rather than simply determining whether it was committed on the same occasion as another offense. The judge may also limit the amount of evidence about the prior offenses that comes in by declaring some of that evidence to be cumulative.

The judge's discretion under Rule 403 does not offer sufficiently reliable relief, however. First, the bar for excluding evidence under Rule 403 is high, as the risk of unfair prejudice must "substantially

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[133] The extent of this pressure would depend on various factors. For defendants who cannot plausibly argue that their offenses occurred on the same occasion, stipulation would be an easy choice. However, after *Wooden*, there are likely to be more cases in which the occasions question is genuinely contested. *See* Wooden v. United States, 142 S. Ct. 1063, 1080 (2022) (Gorsuch, J., concurring in the judgment) ("Multi-factor balancing tests of this sort, too, have supplied notoriously little guidance . . . ."). Prior to *Wooden*, many circuits utilized a simultaneity test, which made it difficult for any person to argue that their offenses occurred on a single occasion. *See* Brief for the United States at 18–19, *supra* note 75. *Wooden*'s multifactor episode analysis creates far more gray area in which to argue. *See Wooden*, 142 S. Ct. at 1080 (Gorsuch, J., concurring in the judgment).

[134] Courts have long sanctioned the placement of extraordinary pressure on criminal defendants to waive rights to which they are constitutionally entitled. *See, e.g.*, Brady v. United States, 397 U.S. 742, 757 (1970) (holding that a guilty plea was not unconstitutionally compelled even when the defendant faced a likelihood of receiving the death penalty if he did not accept the plea). Nevertheless, just because the criminal legal system regularly places criminal defendants in untenable positions, that does not mean that these situations should be allowed to abound. If the concerns animating the Sixth Amendment right to have every element decided by a jury are to be taken seriously — enough to recognize that that right extends to the occasions clause — courts should make that right a reality.

[135] FED. R. EVID. 403. This is precisely the circumstance that Rule 403 was designed to address. The Advisory Committee note on Rule 403 explains that "'[u]nfair prejudice' . . . means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." FED. R. EVID. 403 advisory committee's note.

[136] *See* FED. R. EVID. 403 advisory committee's note on proposed rules ("In reaching a decision whether to exclude on grounds of unfair prejudice, . . . [t]he availability of other means of proof may also be an appropriate factor.").

outweigh[]" the probative value of the evidence.[137] It is particularly difficult for prejudice to outweigh probative value in the context of an occasions question, where many different factors and types of evidence will arguably be relevant.[138] While more innocuous facts like timing might be most relevant to the occasions question in many cases, other factors like the defendant's motivations or planning could also be relevant.[139] The prejudice those factors cause would then have to substantially outweigh their potentially strong probative value.

Judges may also choose to resolve Rule 403 concerns by issuing limiting instructions, rather than by excluding the evidence altogether. Trial courts are encouraged to consider the effectiveness of limiting instructions before choosing to exclude evidence under Rule 403.[140] The court may therefore choose to resolve the prejudice issue by instructing the jury to consider the evidence only for the purposes of answering the occasions question, reminding the jury not to make a propensity judgment from it. These types of instructions, however, are widely acknowledged to be ineffective.[141] It is difficult to consider a piece of evidence for one purpose and not another, especially when that evidence is emotionally weighty and seems to be relevant.[142]

Finally, relying on Rule 403 would mean depending on the wide discretion of the trial court. Courts of appeals are reluctant to reverse Rule 403 rulings of trial courts.[143] Higher courts generally believe that because a district court judge can witness the evidence and the jury's reactions, they are in a better position to determine how the jury is likely to perceive certain evidence.[144] Appellate courts afford district courts "especially wide latitude" when it comes to Rule 403, and "[o]nly rarely — and in extraordinarily compelling circumstances — will [they] . . . reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect."[145] Therefore,

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137 FED. R. EVID. 403.

138 Recall that the occasions clause analysis under *Wooden* is a "multi-factor" analysis that will depend on a "range of circumstances." *Wooden*, 142 S. Ct. at 1070–71.

139 *See id.* at 1071 ("The burglaries were part and parcel of the same scheme, actuated by the same motive, and accomplished by the same means.").

140 FED. R. EVID. 403 advisory committee's note on proposed rules ("In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.").

141 *See, e.g.*, Madelyn Chortek, *The Psychology of Unknowing: Inadmissible Evidence in Jury and Bench Trials*, 32 REV. LITIG. 117, 121–27 (2013).

142 *See* Kunda, *supra* note 122, at 481; Lieberman & Arndt, *supra* note 122, at 678.

143 *See, e.g.*, United States v. Mehanna, 735 F.3d 32, 59 (1st Cir. 2013) (applying a "deferential standard" to the district court's Rule 403 analysis).

144 *See, e.g.*, Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 387 (2008) ("With respect to evidentiary questions in general and Rule 403 in particular, a district court virtually always is in the better position to assess the admissibility of the evidence in the context of the particular case before it.").

145 *Mehanna*, 735 F.3d at 59 (quoting United States v. Candelaria-Silva, 162 F.3d 698, 705 (1st Cir. 1998); United States v. Pires, 642 F.3d 1, 12 (1st Cir. 2011)).

not only must defendants rely on the subjective balancing of the district court regarding whether the unfair prejudice of a piece of evidence substantially outweighs its probative value to the occasions issue, but they also have little resort to appellate review. While the lack of appellate review may be a positive in the eyes of the prosecution and the court, it leaves the defendant with little assurance that Rule 403 will serve as a sufficient blockade to prejudicial evidence.[146]

3. Bifurcation. — The only avenue that fully eliminates the potential for jury prejudice is bifurcation. In this context, bifurcation would entail separating the trial into a guilt phase and a sentencing phase, either before the same jury or before different juries. Jurors would make a determination regarding guilt before they were exposed to any evidence related to the applicability of sentencing enhancements, including evidence related to the occasions question. Unlike stipulation and Rule 403, this method would not only minimize juror prejudice in determining guilt, but also eliminate it entirely by ensuring that jurors are not exposed at all to evidence of prior convictions during the guilt phase.

However, there may be barriers to convincing a district court to grant such a procedure. So far, no court has held that there is a constitutional right to bifurcation.[147] And there is no federal statutory guarantee of bifurcation when evidence establishing certain sentencing enhancements threatens to prejudice the jury in criminal cases.[148]

There are, however, circumstances in which courts have permitted bifurcated proceedings, and defendants may be able to borrow from those circumstances to argue that bifurcated proceedings are advisable or even required in the occasions clause context. The Court, for example, recognized the need for bifurcation in capital cases.[149] At least some of the reasoning behind that decision appears to apply equally to the occasions clause context. The Court explained in *Gregg v. Georgia*[150] that having a jury conduct sentencing "creates special problems."[151] This is because "[m]uch of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may

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146 While rules that eliminate most but not all potential for jury prejudice are often tolerated, Rule 403 simply does not do enough to provide meaningful relief to defendants in this context. Because prejudicial information connected to defendants' prior convictions is likely to be highly probative in the context of the occasions inquiry, it will be extremely difficult to argue that the prejudice substantially outweighs that probative value.

147 *See* Wes Reber Porter, *Threaten Sentencing Enhancement, Coerce Plea, (Wash, Rinse,) Repeat: A Cause of Wrongful Conviction by Guilty Plea*, 3 TEX. A&M L. REV. 261, 279 (2015).

148 Some states have passed statutes in recent years to require bifurcation in such situations. *See, e.g.*, IOWA R. CRIM. P. 2.19(9). While the Federal Rules of Civil Procedure allow for bifurcation "[f]or convenience, to avoid prejudice, or to expedite and economize," FED. R. CIV. P. 42(b), no similar rule exists for criminal cases.

149 *See* Gregg v. Georgia, 428 U.S. 153, 190–92 (1976) (plurality opinion).

150 428 U.S. 153.

151 *Id.* at 190 (plurality opinion).

even be extremely prejudicial to a fair determination of that question."[152] The Court concluded that this problem can be resolved through bifurcation.[153] This logic is not unique to capital punishment but applies in any situation in which the jury is called on to decide additional factors for the purposes of sentencing.

Some may argue that the justifications for providing bifurcated proceedings in capital cases are unique to the capital context. The Court in *Gregg* emphasized that "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice."[154] In justifying bifurcation in capital cases, the Court also explained that:

> When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.[155]

However, simply because the stakes are higher in capital cases does not mean that the logic of why bifurcation is necessary is any different. In both circumstances, the facts relevant to sentencing are irrelevant to the question of guilt and are likely highly prejudicial. Just because a person is facing a life sentence, rather than death, does not mean that they may be subjected to the whims of a prejudiced jury.

Others may argue that bifurcation is simply too costly. However, this procedure is likely less costly than it may first appear.[156] In many cases, it may simply not be worth it to the defendant to contest the occasions question. This will likely happen where the prior convictions occurred months or years apart. In fact, many states either allow or require bifurcation when the jury must determine the fact of a prior conviction or some fact related to that conviction.[157] In those states, it is common for defendants not to exercise their right to force the government to prove the prior conviction to the jury.[158]

CONCLUSION

The occasions clause debate raises the issue of what to do when reforms that appear to benefit a group wind up having unintended consequences for that very group. Currently, defendants across the country

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[152] *Id.*

[153] *See id.* at 191 ("The obvious solution . . . is to bifurcate the proceeding, abiding strictly by the rules of evidence until and unless there is a conviction, but once guilt has been determined opening the record to the further information that is relevant to sentence." (quoting MODEL PENAL CODE § 201.6, cmt. 5 at 74 (AM. L. INST., Tentative Draft No. 9, 1959))).

[154] *Id.* at 188.

[155] *Id.* at 191–92.

[156] King, *supra* note 105, at 586 ("In theory, this option would be more costly to the state than a partial guilty plea or jury waiver. . . . In practice, however, the bifurcation option may not be much more costly than the waiver approach[].").

[157] *See id.* at 585 nn.44–46.

[158] *See id.* at 586.

are being denied their fully fledged Sixth Amendment rights when their sentences are increased, potentially by decades, based on facts found by a judge by a preponderance of the evidence. A resolution of this problem opens the door to new hurdles by allowing juries to consider potentially prejudicial evidence of prior convictions, thereby requiring defendants to advocate for a new set of procedural protections. Although the issue is complicated, courts may not continue to deprive defendants of their Sixth Amendment rights. There is no escape hatch for when enforcement of the Sixth Amendment becomes too difficult. Rather, courts have an obligation to come to the correct conclusion — that the occasions question must be charged in the indictment and proven to the jury beyond a reasonable doubt — and then to ensure that proper procedures are in place to protect defendants against the unintended consequences.