

# *Erlinger v. United States*: Supreme Court Rules on Jury Determination for Prior Offenses for ACCA Sentencing Purposes

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## Introduction

Near the end of its term, the Supreme Court in *Erlinger v. United States* [held](#) that the right to a jury trial, complete with proof beyond a reasonable doubt found by a unanimous panel, attaches to the determination of whether a string of offenses counts as one or multiple offenses for purposes of sentencing under the Armed Career Criminal Act (ACCA). The decision, [at odds](#) with decisions in each of the federal circuits with criminal jurisdiction, also calls into question the Court’s [earlier](#) holding in *Almendarez-Torres v. United States* with respect to a sentencing court’s authority to find a prior conviction without referring the question to the jury.

## ACCA

The [ACCA](#) (18 U.S.C. § 924(e)), which the Court has interpreted over the course of dozens of cases, provides that a defendant with three or more prior violent felony or serious drug offenses “committed on occasions different from one another” who is convicted of unlawful possession of a firearm must be sentenced to imprisonment for not less than 15 years. The statute defines a “violent felony” to include burglary that is punishable by imprisonment for a term exceeding one year.

## Background

The government [charged](#) Paul Erlinger with unlawful possession of a firearm and asserted that he should be sentenced under the ACCA based on his prior burglaries of a pizza shop, two other restaurants, and a sporting goods store, committed within days of each other. He argued unsuccessfully before the district court that the string of burglaries should be treated as one continuous criminal episode—not three or more offenses “committed on occasions different from one another” as required under the ACCA; and that the bundle of facts surrounding the offenses that would determine the question should be decided by the jury.

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The United States Court of Appeals for the Seventh Circuit disagreed, although the government endorsed Mr. Erlinger's contention that the determination was fact-driven and accordingly should be left to the jury based on the government's [reading](#) of the Supreme Court's [decision](#) in *Wooden v. United States*. The government supported Mr. Erlinger's petition for Supreme Court review, which necessitated appointment of an amicus in opposition.

The question before the Supreme Court—whether the Fifth and Sixth Amendments require a jury to determine, beyond a reasonable doubt, that prior offenses were committed on separate occasions for ACCA purposes—entailed reconciliation of the Court's precedents. In *Almendarez-Torres v. United States*, the Court held that a defendant's sentence might be enhanced based solely on a sentencing judge's finding of a prior conviction. Soon [thereafter](#) in *Apprendi v. New Jersey*, the Court [explained](#) that “any fact (other than prior conviction) that increases the maximum penalty for a crime” must be proven to a jury beyond a reasonable doubt. Although conceding it was “arguable” that *Almendarez-Torres* may have been “incorrectly decided,” the Court in *Apprendi* left the earlier decision in place.

## Erlinger Decision

In an opinion authored by Justice Gorsuch, the Court [concluded](#) that the Fifth and Sixth Amendments demand that a jury decide beyond a reasonable doubt whether Erlinger's prior offenses were committed on separate occasions. The Chief Justice and Justices Thomas, Sotomayor, Kagan, and Barrett joined in the opinion for the Court, but the Chief Justice and Justice Thomas filed concurrences. Justices Kavanaugh and Alito agreed on a dissenting opinion, which Justice Jackson joined in part (in addition to authoring her own dissenting opinion).

The majority opinion built on *Apprendi*, indicating that the case and another regarding factfinding that increases a statutory minimum sentence were “nearly on all fours” with Erlinger's given “the sentencing court's factual finding that Mr. Erlinger's offenses occurred on at least three separate occasions had the effect of increasing *both* the maximum and minimum sentences he faced.” The Court also rejected the suggestion that the *Almendarez-Torres* decision, which the *Erlinger* majority described as “at best an exceptional departure from historical practice,” undermined that position. The Chief Justice predicated [his](#) concurrence on the view that the question of whether harmless error had occurred should be decided on remand. Justice Thomas concurred with the observation that the Court's work in *Almendarez-Torres* should be [revisited](#).

Justice Kavanaugh, joined by Justice Alito and in part by Justice Jackson, dissented because in [his](#) view, “*Almendarez-Torres* resolves the question of whether a judge may decide if the defendant committed his prior violent offenses on different occasions.” Justice Jackson premised her dissent on the [belief](#) that *Apprendi* was “wrongly decided.”

## Congressional Options

Congress's options are limited to those the Constitution affords it. Congress is free to amend the requirement in ACCA that the prior offenses must have been “committed on occasions different from one another.” Congress also has discretion to set and amend the punishment for possession of a firearm by a felon, regardless of prior offenses and within constitutional limits.

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