Appellate Court Decisions –Week of 6/17/24

Note: This is not a comprehensive list of every case released this week.

Hey all - busy week for SCOTUS. *Rahimi* came out, reigning in *Bruen* at least a little. Sotomayor did file a concurring opinion which spoke to the confusion that *Bruen* has caused and how unwieldy that opinion is for lower courts and litigants to wade through. And of course Thomas dissented, opining that it was just fine for someone who was subject to a restraining order to possess firearms.

Also pay attention to the *Smith* opinion - basically it states that an expert who testifies about a testing report that was done by another non-testifying expert and bases his or her opinion on that testing is, in fact, offering it for the truth. Therefore, this is in violation of the Confrontation Clause if the court finds that the report was testimonial (and would it not always be since it is prepared by an expert in preparation for trial).

Finally, in following with SCOTUS' love of guns, bump stocks such as the one that was used in the mass shooting in Las Vegas, are just fine. And, of course, Thomas wrote that opinion in *Garland v. Cargill*.

First Appellate District of Ohio

***State v. Henderson*, C-230527**

Sufficiency; theft

Full Decision: (No web cite as of yet).

There was insufficient evidence presented to support appellant's conviction for theft. "Because the kiosk owner voluntarily allowed [appellant] to leave the store with the jewelry, the state presented insufficient evidence that [appellant] obtained control over the jewelry without the owner's consent . . . [t]he circumstances surrounding the interaction demonstrate that no reasonable person would believe that [appellant] did not have the jewelry owner's consent to leave with the jewelry. Therefore, [appellant] had consent to obtain control over the jewelry at the time that he came into possession of the jewelry." Conviction reversed, and appellant discharged from further prosecution.

***State v. Phillips*, C-240198**

Jail-time credit

Full Decision: (No web cite as of yet).

'[T]rial court erred by failing to calculate and award her jail-time credit on the 60-day suspended sentence." Case remanded for court to award such days of credit.

***State v. Ventura*, C-240051**

Consecutive sentences

Full Decision: (No web cite as of yet).

Trial court erred in imposing consecutive sentences for two counts of rape without making the required findings pursuant to R.C. 2929.14(C)(4) regarding "the seriousness and proportionality factors." State concedes error. Case remanded for court to make the proper findings both at the sentencing hearing and in the sentencing entry.

Second Appellate District of Ohio

***State v. Mason*, 2024-Ohio-2290**

Mandatory sentence/reckless homicide

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/2/2024/2024-Ohio-2290.pdf

In conviction for reckless homicide with gun specifications and WUD, trial court erred in designating the 36-month prison term for the reckless homicide as mandatory, thus preventing appellant "from seeking any time reductions as provided for in R.C. 2929.23 (judicial release) and R.C. 2967.193-194 (good time credit). Such conviction does not require a mandatory sentence.

***State v. Knott*, 2024-Ohio-2289**

Speedy trial

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/2/2024/2024-Ohio-

2289.pdf

In conviction for aggravated trafficking in drugs, trial court erred when it failed to dismiss the charge on statutory speedy-trial grounds. Appellant discharged from criminal liability.

While reading this decision, I discovered an amendment to R.C. 2945.73 which occurred in April of this year which is rather alarming, and I missed. As it pertains to felonies, subsection (C) has been rewritten as follows:

(C)(1) A person charged with a felony, who is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code, is eligible for release from detention. The court may release the person from any detention in connection with the charges pending trial and may impose any terms or conditions on the release that the court considers appropriate.
(2) Upon motion made at or before the commencement of trial, but not sooner than fourteen days before the day the person would become eligible for release pursuant to division (C)(1) of this section, the charges shall be dismissed with prejudice unless the person is brought to trial on those charges within fourteen days after the motion is filed and served on the prosecuting attorney. If no motion is filed, the charges shall be dismissed with prejudice unless the person is brought to trial on those charges within fourteen days after it is determined by the court that the time for trial required by sections 2945.71 and 2945.72 of the Revised Code has expired. If it is determined by the court that the time for trial required by sections 2945.71 and 2945.72 of the Revised Code has expired, no additional charges arising from the same facts and circumstances as the original charges may be added during the fourteen-day period specified under this division. The fourteen-day period specified under this division may be extended at the request of the accused or on account of the fault or misconduct of the accused.
R.C. 2945.73(C)(1)-(2).

The *Knott* court interpreted it as follows:

"The recent amendment to R.C. 2945.73 affects this [substantive] right since the statute now provides that criminal [felony] charges shall be dismissed with prejudice only if the defendant's case is not tried within a 14-day grace period or other longer period if extended in some way by the accused."

Third Appellate District of Ohio

***State v. Heffley*, 2024-Ohio-2218**

Relief from weapons disability

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/3/2024/2024-Ohio-2218.pdf

After appellant was convicted in 2000 and 2004 for M4 domestic violence and in 2006 for a felony domestic violence, he served his prison term, paid his fines and costs, and successfully completed PRC; in 2023, he then filed an "Application for Relief from Weapons Disability pursuant to R.C. 2923.14." Trial court denied such application. COA finds that two M4 convictions did not create a state disability under R.C. 2923.13; and "[a]s the convictions under R.C. 2919.25(C) do not have as an element 'the use or attempted use of physical force, or the threatened use of a deadly weapon' the convictions would not fall within the definition of "misdemeanor crime of domestic violence" under 18 U.S.C. 921(33)(A)(ii)." As for the conviction for the felony offense of domestic violence, a felony offense of violence, the trial court erred in holding that appellant was barred from relief because he had a federal disability. COA holds that "18 U.S.C. 921(a)(33)(B)(ii) empowers a state to remove a federal firearms disability when, under the state's law, the person has had those rights restored. *State ex rel. Suwalski*, ¶27. Accordingly, [COA] find[s] that the trial judge erred as a matter of law in finding [appellant] was 'otherwise prohibited by law from acquiring, having or using firearms.'" Case remanded for trial court to consider the merits of appellant's application.

Fourth Appellate District of Ohio

Nothing to report.

Fifth Appellate District of Ohio

***State v. Washington*, 2024-Ohio-2277**

Sufficiency; complicity to felonious assault

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/5/2024/2024-Ohio-2277.pdf

In conviction for, inter alia, complicity to felonious assault, "the State did not allege, nor does the evidence show, any actions the appellant undertook in supporting, assisting, encouraging, cooperating with, advising, or inciting Turk in the commission of the felonious assault. The appellant did not drive the victim to the scene of the assault; she did not threaten the victim; and she did not encourage, advise, or incite Turk into committing

the assault. Taken in the light most favorable to the State, the evidence merely shows the appellant was present in the car and turned her head away from victim during the assault." Therefore, there was insufficient evidence to support appellant's conviction for complicity to felonious assault. Conviction reversed, and appellant discharged as to that count.

Sixth Appellate District of Ohio

***State v. Strange*, 2024-Ohio-2199**

Self-defense/burden of proof

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2024/2024-Ohio-2199.pdf

In convictions for improperly discharging a firearm at or into a habitation and felonious assault, "trial court erred in giving the jury an instruction that failed to identify it was the state's burden to prove that appellant had not acted in self-defense, as described in R.C. 2901.05 . . . trial court's error 'probably misled' the jury in that the jury was never asked to determine whether the state disproved appellant's self-defense claim beyond a reasonable doubt." Judgment reversed, and case remanded.

***State v. Wallace*, 2024-Ohio-2201**

Confrontation Clause

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2024/2024-Ohio-2201.pdf

In conviction for domestic violence, trial court erred in permitting officers to testify as to the statements of the alleged victim where such victim did not appear at trial to testify. Such statements were "testimonial because there was no ongoing emergency when she made the statements to the officers" which violated appellant's Sixth Amendment right to confrontation. And the error was not harmless because the statements were prejudicial to appellant, were "the only evidence establishing that [appellant] caused the physical harm to [the victim]." Finally, " there [was] neither overwhelming evidence of guilt nor some other indication that the admission of [the victim's] statements did not contribute to the conviction." Judgment reversed, and case remanded for a new trial.

Seventh Appellate District of Ohio

Nothing to report.

Eighth Appellate District of Ohio

***State v. Wilson*, 2024-Ohio-2257**

Sufficiency; murder/cell phone analysis

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2024/2024-Ohio-2257.pdf

In convictions for, inter alia, murder, although there was sufficient evidence presented that appellant was complicit in one murder, the state failed to present sufficient evidence to support appellant's conviction in a second murder. Only circumstantial evidence was presented to show someone in a Nissan shot and killed the victim; however, the windows were too dark to see who was in the car. Also, there was no evidence that appellant's cell phone was in the area of the shooting at the time of the murder; in fact, appellant's cell phone pinged off a difference tower than her co-defendant shortly after the murder. Convictions vacated as to second murder.

Ninth Appellate District of Ohio

Nothing to report.

Tenth Appellate District of Ohio

***State v. Khalif*, 2024-Ohio-2239**

Verdict form

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/10/2024/2024-Ohio-2239.pdf

In conviction for discharge of a firearm on or near prohibited premises, a third-degree felony with an accompanying three-year firearm specification, "because the jury verdict form here did not contain either the degree of the offense or the presence of the aggravating element, the jury verdict form could only constitute a finding of guilty of the least degree of the offense charged. Accordingly, the jury verdict form supports only a conviction of

discharge of a firearm on or near prohibited premises as a first-degree misdemeanor. As a result, the three-year firearm specification contained in R.C. 2941.145(A) cannot be attached to Khalif's conviction of a misdemeanor offense pursuant to R.C. 2929.14(B)(1)(a)." Third-degree felony conviction and the attached firearm specification vacated, and case remanded.

Eleventh Appellate District of Ohio

Nothing to report.

Twelfth Appellate District of Ohio

Nothing to report.

Supreme Court of Ohio

Nothing to report.

Sixth Circuit Court of Appeals

Nothing to report.

Supreme Court of the United States

***Garland v. Cargill*, 602 U.S. ____ (2024)**

Bump stock regulation

Full Decision:
https://www.supremecourt.gov/opinions/23pdf/22-976new_0971.pdf

***Held*: ATF exceeded its statutory authority by issuing a Rule that classifies a bump stock as a "machinegun" under §5845(b). Pp. 6–19.**

(a) A semiautomatic rifle equipped with a bump stock is not a "machinegun" as defined by §5845(b) because: (1) it cannot fire more than one shot "by a single function of the trigger" and (2) even if it could, it would not do so "automatically." ATF therefore exceeded its statutory authority by issuing a Rule that classifies bump stocks as machineguns. P. 6.

(b) A semiautomatic rifle equipped with a bump stock does not fire more than one shot "by a single function of the trigger." The phrase "function of the trigger" refers to the mode of action by which the trigger activates the firing mechanism. No one disputes that a semiautomatic

rifle without a bump stock is not a machinegun because a shooter must release and reset the trigger between every shot. And, any subsequent shot fired after the trigger has been released and reset is the result of a separate and distinct "function of the trigger." Nothing changes when a semiautomatic rifle is equipped with a bump stock. Between every shot, the shooter must release pressure from the trigger and allow it to reset before reengaging the trigger for another shot. A bump stock merely reduces the amount of time that elapses between separate "functions" of the trigger.

ATF argues that a shooter using a bump stock must pull the trigger only one time to initiate a bump-firing sequence of multiple shots. This initial trigger pull sets off a sequence—fire, recoil, bump, fire—that allows the weapon to continue firing without additional physical manipulation of the trigger by the shooter. This argument rests on the mistaken premise that there is a difference between the shooter flexing his finger to pull the trigger and pushing the firearm forward to bump the trigger against his stationary finger. Moreover, ATF's position is logically inconsistent because its reasoning would also mean that a semiautomatic rifle without a bump stock is capable of firing more than one shot by a "single function of the trigger." Yet, ATF agrees that is not the case. ATF's argument is thus at odds with itself. Pp. 7–14.

(c) Even if a semiautomatic rifle with a bump stock could fire more than one shot "by a single function of the trigger," it would not do so "automatically." Section 5845(b) specifies the precise action that must "automatically" cause a weapon to fire "more than one shot"—a "single function of the trigger." If something more than a "single function of the trigger" is required to fire multiple shots, the weapon does not satisfy the statutory definition. Firing multiple shots using a semiautomatic rifle with a bump stock requires more than a single function of the trigger. A shooter must maintain forward pressure on the rifle's front grip with his nontrigger hand. Without this ongoing manual input, a semiautomatic rifle with a bump stock will not fire multiple shots.

ATF counters that machineguns also require continuous manual input from a shooter: The shooter must both engage the trigger and keep it pressed down to continue shooting. ATF argues there is no meaningful difference between holding down the trigger of a traditional machinegun and maintaining forward pressure on the front grip of a semiautomatic rifle with a bump stock. This argument ignores that Congress defined a machinegun by what happens "automatically" "by a single function of the trigger." Simply pressing and holding the trigger down on a fully automatic rifle is not manual input in addition to a trigger's function. By contrast, pushing forward on the front grip of a semiautomatic rifle equipped with a bump stock is not part of functioning the trigger.

Moreover, a semiautomatic rifle with a bump stock is indistinguishable from the Ithaca Model 37 shotgun, a weapon the ATF concedes cannot fire multiple shots "automatically." ATF responds that a shooter is less physically involved with operating a bump-stock equipped

rifle than operating the Model 37. It explains that once a shooter pulls the rifle's trigger a single time, the bump stock harnesses the firearm's recoil energy in a continuous back-and-forth cycle that allows the shooter to attain continuous firing. But, even if one aspect of a weapon's operation could be seen as "automatic," that would not mean the weapon "shoots . . . automatically more than one shot . . . by a single function of the trigger." §5845(b) (emphasis added). Pp. 14–17.

(d) Abandoning the text, ATF attempts to shore up its position by relying on the presumption against ineffectiveness. That presumption weighs against interpretations of a statute that would "rende[r] the law in a great measure nugatory, and enable offenders to elude its provisions in the most easy manner." The Emily, 9 Wheat. 381, 389. In ATF's view, Congress "restricted machineguns because they eliminate the manual movements that a shooter would otherwise need to make in order to fire continuously" at a high rate of fire, as bump stocks do. Brief for Petitioners 40. So, ATF reasons, concluding that bump stocks are lawful "simply because the [trigger] moves back and forth . . . would exalt artifice above reality and enable evasion of the federal machinegun ban." Id., at 41–42. The presumption against ineffectiveness cannot do the work that ATF asks of it. Interpreting §5845(b) to exclude semiautomatic rifles equipped with bump stocks comes nowhere close to making the statute useless. Pp. 17–19.

57 F. 4th 447, affirmed.

THOMAS , J. delivered the opinion of the Court, in which ROBERTS , C. J., and ALITO, GORSUCH, KAVANAUGH, and BARRETT , JJ., joined. ALITO, J., filed a concurring opinion. SOTOMAYOR , J., filed a dissenting opinion, in which KAGAN and J ACKSON, JJ., joined.

***United States v. Rahimi*, 602 U.S. ____ (2024)**

Second Amendment/*Bruen* analysis/restraining orders

Full Decision:
https://www.supremecourt.gov/opinions/23pdf/22-915_8o6b.pdf

***Held*: When an individual has been found by a court to pose a credible threat to the physical safety of another, that individual may be temporarily disarmed consistent with the Second Amendment. Pp. 5–17.**

(a) Since the Founding, the Nation's firearm laws have included regulations to stop individuals who threaten physical harm to others from misusing firearms. As applied to the facts here, Section 922(g)(8) fits within this tradition.

The right to keep and bear arms is among the "fundamental rights necessary to our system of ordered liberty." *McDonald v. Chicago*, 561 U. S. 742, 778. That right, however, "is not unlimited," *District of Columbia*

***v. Heller*, 554 U. S. 570, 626. The reach of the Second Amendment is not limited only to those arms that were in existence at the Founding. *Heller*, 554 U. S., at 582. Rather, it "extends, prima facie, to all instruments that constitute bearable arms, even those that were not [yet] in existence." *Ibid.* By that same logic, the Second Amendment permits more than just regulations identical to those existing in 1791.**

Under our precedent, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin the Nation's regulatory tradition. *Bruen*, 597 U. S., at 26–31. When firearm regulation is challenged under the Second Amendment, the Government must show that the restriction "is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U. S., at 24. A court must ascertain whether the new law is "relevantly similar" to laws that our tradition is understood to permit, "apply[ing] faithfully the balance struck by the founding generation to modern circumstances." *Id.*, at 29, and n. 7. Why and how the regulation burdens the right are central to this inquiry. As *Bruen* explained, a challenged regulation that does not precisely match its historical precursors "still may be analogous enough to pass constitutional muster." *Id.*, at 30. Pp. 5–8.

(b) Section 922(g)(8) survives Rahimi's challenge. Pp. 8–17.

(1) Rahimi's facial challenge to Section 922(g)(8) requires him to "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U. S. 739, 745. Here, Section 922(g)(8) is constitutional as applied to the facts of Rahimi's own case. Rahimi has been found by a court to pose a credible threat to the physical safety of others, see §922(g)(8)(C)(i), and the Government offers ample evidence that the Second Amendment permits such individuals to be disarmed. P. 8.

(2) The Court reviewed the history of American gun laws extensively in *Heller* and *Bruen*. At common law people were barred from misusing weapons to harm or menace others. Such conduct was often addressed through ordinary criminal laws and civil actions, such as prohibitions on fighting or private suits against individuals who threatened others. By the 1700s and early 1800s, though, two distinct legal regimes had developed that specifically addressed firearms violence: the surety laws and the "going armed" laws. Surety laws were a form of "preventive justice," 4 W. Blackstone, Commentaries on the Laws of England 251 (10th ed. 1787), which authorized magistrates to require individuals suspected of future misbehavior to post a bond. If an individual failed to post a bond, he would be jailed. If the individual did post a bond and then broke the peace, the bond would be forfeit. Surety laws could be invoked to prevent all forms of violence, including spousal abuse, and also targeted the misuse of firearms. These laws often offered the accused significant procedural protections.

The "going armed" laws—a particular subset of the ancient common law prohibition on affrays, or fighting in public—provided a mechanism for punishing those who had menaced others with firearms. Under these laws, individuals were prohibited from "riding or going armed, with dangerous

or unusual weapons, [to] terrify[ ] the good people of the land." 4 Blackstone 149. Those who did so faced forfeiture of their arms and imprisonment. Prohibitions on going armed were incorporated into American jurisprudence through the common law, and some States expressly codified them. Pp. 9–13.

(3) Together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed. Section 922(g)(8) is not identical to these founding-era regimes, but it does not need to be. Like the surety and going armed laws, Section 922(g)(8)(C)(i) applies to individuals found by a court to threaten the physical safety of another. This prohibition is "relevantly similar" to those founding era regimes in both why and how it burdens the Second Amendment right. *Id.*, at 29. Section 922(g)(8) restricts gun use to check demonstrated threats of physical violence, just as the surety and going armed laws do. Unlike the regulation struck down in *Bruen* Section 922(g)(8) does not broadly restrict arms use by the public generally.

The burden that Section 922(g)(8) imposes on the right to bear arms also fits within the Nation's regulatory tradition. While the Court does not suggest that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse, see *Heller*, 554 U. S., at 626, Section 922(g)(8) applies only once a court has found that the defendant "represents a credible threat to the physical safety" of another, §922(g)(8)(C)(i), which notably matches the similar judicial determinations required in the surety and going armed laws. Moreover, like surety bonds of limited duration, Section 922(g)(8) only prohibits firearm possession so long as the defendant "is" subject to a restraining order. Finally, the penalty—another relevant aspect of the burden—also fits within the regulatory tradition. The going armed laws provided for imprisonment, and if imprisonment was permissible to respond to the use of guns to threaten the physical safety of others, then the lesser restriction of temporary disarmament that Section 922(g)(8) imposes is also permissible.

The Court's decisions in *Heller* and *Bruen* do not help Rahimi. While Section 922(g)(8) bars individuals subject to restraining orders from possessing guns in the home, *Heller* never established a categorical rule that the Constitution prohibits regulations that forbid firearm possession in the home. Indeed, *Heller* stated that many such prohibitions, like those on the possession of firearms by "felons and the mentally ill," are "presumptively lawful." *Heller*, 554 U. S., at 626, 627, n. 26. And the Court's conclusion in *Bruen* that regulations like the surety laws are not a proper historical analogue for a broad gun licensing regime does not mean that they cannot be an appropriate analogue for a narrow one. Pp. 13–15.

(4) The Fifth Circuit erred in reading *Bruen* to require a "historical twin" rather than a "historical analogue." 597 U. S., at 30. The panel also misapplied the Court's precedents when evaluating Rahimi's facial challenge. Rather than consider the circumstances in which Section

922(g)(8) was most likely to be constitutional, the panel instead focused on hypothetical scenarios where the provision might raise constitutional concerns. P. 16.

(5) Finally, the Court rejects the Government's contention that Rahimi may be disarmed simply because he is not "responsible." The Court used this term in *Heller* and *Bruen* to describe the class of citizens who undoubtedly enjoy the Second Amendment right. Those decisions, however, did not define the term and said nothing about the status of citizens who were not "responsible." P. 17.

61 F. 4th 443, reversed and remanded.

ROBERTS , C. J., delivered the opinion for the Court, in which ALITO , SOTOMAYOR, KAGAN, GORSUCH, KAVANAUGH, BARRETT , and JACKSON, JJ., joined. SOTOMAYOR, J., filed a concurring opinion, in which K AGAN, J., joined. GORSUCH, J., KAVANAUGH, J., BARRETT , J., and JACKSON, J., filed concurring opinions. THOMAS, J., filed a dissenting opinion.

***Smith v. Arizona*, 602 U.S. ____ (2024)**

Confrontation Clause/hearsay/expert test results offered for the truth

Full Decision:
https://www.supremecourt.gov/opinions/23pdf/22-899_97be.pdf

***Held*: When an expert conveys an absent analyst's statements in support of the expert's opinion, and the statements provide that support only if true, then the statements come into evidence for their truth. Pp. 11–22.**

(a) The parties agree that Smith's confrontation claim can succeed only if Rast's statements came into evidence for their truth. Smith argues that the condition is satisfied here because her statements were conveyed, via Longoni's testimony, to establish that what she said happened in the lab did in fact happen. The State contends that Rast's statements came into evidence not for their truth, but to "show the basis" of Longoni's independent opinion. It emphasizes that Arizona's Rules of Evidence authorize the admission of such statements for that limited purpose. Evidentiary rules, however, do not control the inquiry into whether a statement is admitted for its truth. Instead, courts must conduct an independent analysis of that question.

Truth is everything when it comes to the kind of basis testimony presented here. If an expert conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts. The truth of the basis testimony is what makes it useful to the State; that is what supplies the predicate for—and thus gives value to—the state expert's opinion. And

from the factfinder's perspective, the jury cannot decide whether the expert's opinion is credible without evaluating the truth of the factual assertions on which it is based. But that is what raises the Confrontation Clause problem. For the defendant has no opportunity to challenge the veracity of the out-of-court assertions that are doing much of the work.

Here, Rast's statements came in for their truth, and no less because they were admitted to show the basis of Longoni's expert opinions. All of Longoni's opinions were predicated on the truth of Rast's factual statements. And the jury could credit those opinions because it too accepted the truth of what Rast reported about her lab work. So the State's basis evidence—more precisely, the truth of the statements on which its expert relied—propped up the whole case; yet the maker of the statements was not in the courtroom, and Smith could not ask her any questions. Pp. 11–19.

(b) What remains is whether the out-of-court statements Longoni conveyed were testimonial. The testimonial issue focuses on the "primary purpose" of the statement, and in particular on how it relates to a future criminal proceeding. But that issue is not now fit for resolution by this Court. The question presented in Smith's petition for certiorari took as a given that Rast's out-of-court statements were testimonial, and the Arizona Court of Appeals did not decide the issue. Indeed, there may not remain a matter to decide, as Smith maintains that the State has forfeited any argument that Rast's statements were not testimonial. The testimonial issue, including the threshold forfeiture question, is thus best considered by the state court in the first instance. Pp. 19–22.

Vacated and remanded.

KAGAN, J., delivered the opinion of the Court, in which SOTOMAYOR, K AVANAUGH, BARRETT , and JACKSON, JJ., joined, and in which THOMAS and GORSUCH, JJ., joined as to Parts I, II, and IV. THOMAS , J., and GORSUCH, J., filed opinions concurring in part. ALITO , J., filed an opinion concurring in the judgment, in which ROBERTS , C. J., joined.

***Erlinger v. United States*, 602 U.S. ____ (2024)**

Armed Career Criminal Act/enhancing prior offenses must be decided by a jury

Full Decision:
https://www.supremecourt.gov/opinions/23pdf/23-370_i4dj.pdf

***Held*: The Fifth and Sixth Amendments require a unanimous jury to make the determination beyond a reasonable doubt that a defendant's past offenses were committed on separate occasions for ACCA purposes. Pp. 5–26.**

77 F. 4th 617, vacated and remanded.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS , SOTOMAYOR, K AGAN, and BARRETT , JJ., joined. ROBERTS , C. J., and THOMAS , J., filed concurring opinions. KAVANAUGH, J., filed a dissenting opinion, in which ALITO, J., joined, and in which JACKSON, J., joined except as to Part III. JACKSON, J., filed a dissenting opinion.