No. _____

IN THE
Supreme Court of the United States

TERREALL MCDANIEL,
Petitioner,
v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does Section 403 of the First Step Act, which dramatically clarifies the applicable penalties for which a defendant may be sentenced for gun-related crimes under 18 U.S.C. Section 924(c), apply to a defendant when his appeal is still pending?

Richardson v. United States, No. 18-7036, 139 S.Ct. 2713 (June 17, 2019).

II. Does the judicial determination of crimes "committed on occasions different from one another" under the Armed Career Criminal Act violate the Sixth Amendment right to a jury trial, especially when the lower court relied on the "scrivener's error" doctrine to resolve a factual dispute regarding when the prior convictions took place?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Terreall McDaniel respectfully requests this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's judgment and opinion affirming the judgment of the district court is reported at 925 F.3d 381 (8th Cir. 2019), and is included in Appendix A. The judgment of the district court is unpublished, but may be found in Appendix B. The order of the Eighth Circuit, denying the petition for rehearing, is unpublished but is located in Appendix C.

JURISDICTION

The decision of the Court of Appeals affirming the district court's judgment and sentence was entered on May 30, 2019. Subsequently, petitioner filed a timely petition for rehearing, which was denied on July 17, 2019. This Court has jurisdiction under 28 U.S.C. § 1291 and Sup. Ct. R. 13.3.

STATUTORY PROVISIONS INVOLVED

The First Step Act of 2018, Pub. L. No. 115-391, S.756 (2018).

Sec. 403, Clarification of Section 924 (c) of Title 18

(a) In General. Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking ``second or subsequent conviction under this subsection'' and inserting ``violation of this subsection that occurs after a prior conviction under this subsection has become final''.

(b) Applicability to Pending Cases.

This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

***

18 U.S.C. § 924. Penalties

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such persons shall be fined under this title and imprisoned not less than fifteen years.

INTRODUCTION

Petitioner is entitled to be resentenced under the recently passed First Step Act of 2018 ("FSA") which was signed into law by President Trump on December 21, 2018. A relevant provision of the FSA dramatically clarifies the applicable penalties for gun-related crimes pursuant to 18 U.S.C. § 924(c). Mr. McDaniel was sentenced to over fifty years imprisonment, thirty of those years stemming from two § 924(c) convictions. Because his conviction and sentence is pending on appeal, Petitioner is entitled to be resentenced under the FSA which clarified the applicable law.

This Court recently granted a petition for certiorari in at least one case, which presents an indistinguishable FSA issue under Section 403. *See Richardson v. United States*, No. 18-7036, 139 S.Ct. 2713 (June 17, 2019) (granting petition for

certiorari, vacating, and remanding to the circuit court); *see also Wheeler v. United States*, No. 18—7187, 139 S.Ct. 2664 (June 3, 2019) (granting petition for certiorari, vacating, and remanding to the circuit court on Section 401 FSA issue). The same result should follow in Mr. McDaniel's case.

Alternatively, Mr. McDaniel's petition for certiorari raises a second issue warranting plenary review by this Court. Where the facts of a prior conviction must be re-litigated to impose an ACCA mandatory minimum sentence which exceeds the statutory maximum otherwise applicable, the Sixth Amendment requires those facts to be submitted to a jury, or the enhancement must not be imposed. Circuit courts, including the Eighth Circuit, are analyzing the law improperly based on "inertia", because this Court "has all but announced that an expansive view of the prior-conviction exception is inconsistent with the Sixth Amendment." *United States v. Perry*, 908 F.3d 1126, 1135 (8th Cir. 2018) (Stras, J. concurring) This petition for certiorari should be granted, because it is time for this Court to resolve an important and reoccurring issue regarding the ACCA, which has been neglected by the lower courts for far too long.

STATEMENT OF THE CASE

The Bench Trial and Sentencing

In 2017, Mr. McDaniel was convicted, after a bench trial, of two counts of being a felon in possession of a firearm, two counts of possession with intent to distribute a controlled substance, and two counts of possession of a firearm in relation to a drug trafficking crime.

Based upon existing law prior to the First Step Act, Mr. McDaniel faced a mandatory minimum sentence of no less than thirty years just on the two counts of possession of a firearm in relation to a drug trafficking crimes, Counts II and V of the Indictment. Mr. McDaniel was sentenced to the aggregate mandatory minimum, thirty years, on those two counts.

As it pertained to his felon in possession of a firearm convictions under Counts III and VI of the Indictment, Mr. McDaniel was sentenced under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), and therefore he faced no less than fifteen years' imprisonment on both counts. The ACCA enhances sentences for defendants convicted under 18 U.S.C. § 922(g) if they have "three previous convictions ... for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1).

The district court enhanced Mr. McDaniel's sentence based on one indictment charging three convictions for selling cocaine in violation of § 195.211 RSMo, finding that all three offenses qualified as a "serious drug offense." At sentencing, the government admitted a certified copy of the judgment from the case. The parties agreed the judgment states that both Counts I and II occurred on January 24, 2002. However, the government also admitted a certified copy of the information in the case. It included what purported to be a handwritten amendment to the offense date of Count II. In an attempt to clarify the discrepancy between the information and the judgment, the government also introduced a copy of the guilty plea transcript "of a group plea", where there were "nine defendants" pleading guilty while being

represented by the same public defender. (Sent. Tr., pg. 12).

In overruling Mr. McDaniel's objection to the ACCA enhancement, the district court found that it was:

> most persuaded by the verbatim transcript of the colloquy that took place the day of that conviction, and Mr. McDaniel's own words that Count 1 was on-- agreeing that Count 1 was on January 24th and in particular that Count 2 was four days later. "So four days later on January 28th did you sell crack cocaine again?" And he says, "Yes." And then in Count 3 when they ask Mr. McDaniel, "In Count 3 on February 4th, 2002, did you sell some crack cocaine again?" And he said, "Yes."

(Sent. Tr. 17-18).

Mr. McDaniel was ultimately sentenced to 262 months on those two counts for being a felon in possession of a firearm and the two counts for possession with intent to distribute. Because his convictions for the two counts of possession of a firearm in relation to a drug trafficking crime were required to run consecutive to the other counts, Mr. McDaniel's total sentence was 622 months, or approximately 51 years.

Appeal to the Eighth Circuit

On appeal before the Eighth Circuit, Mr. McDaniel raised a variety of issues regarding the validity of his sentence, arguing that his "conviction for both § 924(c) offenses occurred at the same trial, where stacking should not have occurred", and that the Supreme Court's precedent that allowed for such stacking of § 924(c) convictions, *United States v. Deal*, 508 U.S. 129 (1993), should be overruled.

After this case was fully briefed by the parties before the Eighth Circuit, Congress passed the First Step Act in December 2018. On January 11, 2019, Mr.

McDaniel filed a Rule 28(j) letter arguing why the First Step Act applied to his case, and therefore should provide him relief. The government filed a responsive Rule 28(j) letter on February 1, 2019, addressing the merits of Mr. McDaniel's First Step Act argument. In denying Mr. McDaniel's appeal, the Eighth Circuit did not address what impact, if any, the First Step Act had on Mr. McDaniel's sentence.

Additionally, Mr. McDaniel also appealed his ACCA sentence before the Eighth Circuit, based on his felon in possession of a firearm convictions. The Eighth Circuit affirmed the ACCA sentence, concluding that the district court did not err in relying on *Shepard* documents to conclude that he was previously convicted of three "serious drug offenses" for his "three violations of § 195.211 RSMo, occurring on three separate occasions. *United States v. McDaniel*, 925 F.3d 381, 388 (8th Cir. 2019). The panel of the Eighth Circuit concluded that the discrepancy in the sentencing record did not preclude the ACCA enhancement, because the court appeared to concluded that it was "likely a scrivener's error." *Id.*

Judge Stras concurred, noting that "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." *McDaniel*, 925 F.3d at 388, (Stras, J. concurring), citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). "That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense." *Id.*

Judge Stras explained why "[t]he unique facts of this case highlight just how troublesome our approach can be":

> The facts here are, at best, confusing, largely because the documents on which we have come to rely openly conflict with one another. The charging document, for example, originally indicated that two of McDaniel's three crimes occurred on the same day. But at some point someone with access to the document—we do not know who—made a handwritten amendment specifying that the three crimes were committed on three different dates. A transcript of the state-court proceedings likewise reflects an agreement between McDaniel, his lawyer, and the prosecutor that the offenses occurred on separate dates. Yet the final judgment of conviction, which presumably postdates everything else, says that two of the three crimes occurred on the same day. ***What we have here, in other words, is a good ol' fashioned factual dispute.***

Id. (emphasis added).

REASON FOR GRANTING THE WRIT

I. Does Section 403 of the First Step Act, which dramatically clarifies the applicable penalties for which a defendant may be sentenced for gun-related crimes under 18 U.S.C. Section 924(c), apply to a defendant when his appeal is still pending?

The First Step Act of 2018, enacted on December 21, 2018, significantly clarified how defendants must be sentenced for gun-related crimes under 18 U.S.C. Section 924(c), repealing harsh mandatory "stacking" sentences. Prior to the First Step Act, a criminal defendant like Mr. McDaniel "convicted of two § 924(c) violations in a single prosecution faced a 25-year minimum for the second violation." *United States v. Davis*, 139 S. Ct. 2319, 2324, fn 1, citing *Deal v. United States*, 508 U.S. 129, 132 (1993). But the First Step Act clarified the law, so that only a second §924(c) violation committed after a prior § 924(c) conviction has become final "will trigger the 25-year minimum." *Id*.

The First Step Act applies to Mr. McDaniel's case, entitling him to a re-

sentencing hearing because the plain language of the statute mandates it. Congress, by its own words, issued a "clarification" of 18 U.S.C. § 924(c)(1)(A)(i), by striking ``second or subsequent conviction under this subsection'' in the statute, and inserting ``violation of this subsection that occurs after a prior conviction under this subsection has become final''. FSA, § 403(a). In other words, the FSA amended the statute such that multiple violations of § 924(c) charged in a single indictment do not trigger the additional, mandatory minimum in the absence of a prior final conviction of § 924(c). Because Mr. McDaniel had no prior § 924(c) conviction, he is only subject to a mandatory 5 year sentence for each of his § 924(c) convictions. So instead of 5+25= 30 years' imprisonment, Mr. McDaniel's mandatory minimum sentence is now 5+5=10 years' imprisonment.

Below, the government maintained that the FSA did not apply to Mr. McDaniel's case, because it was passed when his appeal was pending before the Eighth Circuit. However, the FSA must apply here, because the FSA states in § 403(b), entitled "Applicability to *Pending* Cases", that it "*shall* apply to any offense that was committed before the date of enactment of this Act." First Step Act § 403(b) (emphasis added). The sole qualification of the retroactivity clause – that the Amendment applies "if a sentence for the offense has not been imposed as of such date of enactment" – was likely included to limit collateral, non-pending habeas challenges based on the FSA. It cannot be read to limit or prohibit its application to cases on direct appeal, because a sentence does not become a "final judgment" (or finally "imposed") until it has reached a judgment in the Supreme Court. *See*

Linkletter v. Walker, 381 U.S. 618, 622, n. 5 (1965) ("By final judgment we mean one where the availability of appeal has been exhausted or has lapsed, and the time to petition for certiorari has passed."); *see also Campa-Fabela v. United States*, 339 F.3d 993, 994 (8th Cir. 2003). That Congress intended the FSA to apply to pending appeals becomes particularly evident, when one discovers that § 403(b) was expressly passed as a "Clarification of Section 924(c)", which presents no new rule that must be applied retroactively pursuant to this Court's case law.

A. This Court recently granted a petition for certiorari in a case that presented an indistinguishable FSA issue under Section 403, and therefore it should grant this petition for certiorari, too.

This Court recently granted a petition for certiorari in at least one case, which presented an indistinguishable FSA issue under Section 403. *See Richardson v. United States*, No. 18-7036, 139 S.Ct. 2713 (2019) (granting petition for certiorari, vacating judgment, and remanding to the circuit court).

In *Richardson*, the defendant was convicted of, amongst other things, multiple counts of use of a firearm during and in relation to a crime of violence, pursuant to 18 U.S.C. § 924(c). *United States v. Richardson*, 906 F.3d 417, 421 (6th Cir. 2018). After filing his petition for certiorari, Richardson submitted a supplemental brief, raising a novel issue that the stacking of his § 924(c) convictions was improper because the First Step Act "dramatically changes the penalties for which Petitioner should be sentenced." *See* Supplemental brief of Richardson in 18-7036, filed January 3, 2019. The Solicitor General filed a brief in opposition, arguing that there was "no sound basis exists for granting" the petition, notwithstanding the passage

of the First Step Act. BIO, pg. 15. On June 17, 2019, this Court granted the petition for certiorari, and remanded the matter to the Sixth Circuit. *Richardson*, 139 S.Ct. 2713. Since remand to the Sixth Circuit, supplemental briefing has been filed by the parties regarding whether the First Step Act applies to Mr. Richardson's case, and that matter is still pending.

Because this case presents the identical legal issue as in *Richardson*, this petition for certiorari should be granted, and the judgment vacated and remanded to the Eighth Circuit for the court to consider the First Step Act's impact to Mr. McDaniel's case.

B. If this Court wishes to turn to the merits of the issue now, it should reject any argument that the FSA does not apply to Mr. McDaniel's case.

Below, the government did not dispute that, if §403 of the First Step Act applied to his case, Mr. McDaniel would not have been subjected to the twenty-five year mandatory minimum sentence he received on Count V of the Indictment. *See* Government's February 1, 2019 letter, filed in the Eighth Circuit. The only issue raised by the government was whether the First Step Act applied to Mr. McDaniel's case, because the FSA was passed when Mr. McDaniel's case was pending on direct appeal. *Id*. But in arguing that the First Step Act did not apply to Mr. McDaniel's case, the government failed to meaningfully address that Congress did not designate any other provision of the First Step Act – either §§ 401, 402, or 404 – as a "clarification." The express "clarification" designation is significant here, and cannot be ignored by a court when interpreting the meaning of § 403.

This Court has held that a clarification of a penal statute, even after a

conviction has been entered, merely interprets the meaning of the statute at the time of conviction, is not new law, and thus "presents no issue of retroactivity." *Fiore v. White*, 121 S. Ct. 712, 714 (2001). In *Fiore*, defendant was convicted of operating a hazardous waste facility without a permit, when he had a permit but had deviated from the permit's terms. 121 S.Ct. at 714. On appeal before this Court, a question was certified to the Pennsylvania Supreme Court, as to whether its prior interpretation of that state statute announced a new rule of law in a case called *Commonwealth v. Scarpone*. *Id.*[1] In response, the Pennsylvania Supreme Court replied that *Scarpone* "merely clarified the plain language of the statute." *Id.* Because "*Scarpone* merely clarified the statute", this Court concluded that it was the law at the time of Fiore's conviction", and therefore this change in the law "presents no issue of retroactivity." *Id*. Accordingly, the *Fiore* Court concluded that Fiore had been convicted and incarcerated "for conduct that [Pennsylvania's] criminal statute, as properly interpreted, does not prohibit", such that defendant's conviction and continued incarceration on the charge violated due process. *Fiore*, 121 S. Ct. at 714.

Fiore is instructive here. Congress has expressly clarified § 924(c) in the FSA, by making unambiguous that the 25-year mandatory minimum sentence does not apply unless a prior § 924(c) conviction has previously become final. In *Fiore,*

[1] *Scarpone* held that "the statute made it unlawful to operate a facility *without* a permit; one who deviated from his permit's terms was not a person *without* a permit; hence, a person who deviated from his permit's terms did not violate the statute." *Fiore*, 121. S.Ct. at 713.

the clarification was not a new law; instead it merely clarified proper interpretation and application of the statute, i.e. how it should have been applied at the time the defendant was convicted and sentenced. *Fiore*, 121 S. Ct. at 714. Similarly, application of § 403 of the First Step Act to Mr. McDaniel, while his case remains on direct appeal, "presents no issue of retroactivity." *Fiore*, 121 S. Ct. at 714.

In interpreting the FSA, it is also important to understand that a sentence is not final so long as the case is "pending" on direct appeal. Section 403(b), entitled "Applicability to Pending Cases," provides that "the amendments made by this section. . .shall apply to any offense that was committed before the date of this Act, if a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018]," The First Step Act of 2018, Pub. L. No. 115-391. While Mr. McDaniel was sentenced prior to the date of enactment of the FSA, Congress' "clarification" applies to his "pending case" on direct review, because a sentence is not "final" (and is not finally "imposed") so long as his case is still "pending" on direct appeal. *See Linkletter v. Walker*, 381 U.S. 618, 622, n. 5 (1965); *see also Campa-Fabela v. United States*, 339 F.3d 993, 994 (8th Cir. 2003) (holding that judgment of conviction becomes final on the date on which defendant's petition for a writ of certiorari was denied) (string citation of circuit courts reaching the same conclusion omitted).

The Sixth Circuit has analyzed an indistinguishable legal issue – whether the then newly passed safety valve statute (18 U.S.C. § 3553(f)) – "should be applied to cases pending on appeal when it was enacted." *United States v. Clark*, 110 F.3d

15, 17 (6th Cir. 1997) (superseded by regulation). The congressional amendment in question in *Clark*, § 3553(f), stated that it applied "to all sentences imposed on or after" the date of enactment. *Clark*, 110 F.3d at 17.

In holding that § 3553(f) applied to pending appeals, the Sixth Circuit concluded that "[a] case is not yet final when it is pending on appeal", and that "[t]he initial sentence has not been finally 'imposed' . . . because it is the function of the appellate court to make it final after review or see that the sentence is changed in in error." *Id*. Thus, in *Clark*, the Sixth Circuit concluded that the sentence was not yet "imposed" because the sentence was still being reviewed on direct appeal, and further concluded that applying the safety valve to cases pending on appeal when it was enacted was "consistent with its remedial intent." *Id.*

Similarly, in Section 403 of the First Step Act, Congress provided that the amendment shall apply to a case "if a sentence for the offense has not been imposed as of such date of the enactment." FSA, Section 403. Here, Section 403 applies to Petitioner's case, because like in *Clark*, his sentence has not been "finally 'imposed.'" *Clark*, 110 F.3d at 17.

The Sixth Circuit was not alone in concluding that the newly passed § 3553(f), applied to defendants who had already been sentenced. In *United States v. Mihm*, the Eighth Circuit considered whether a defendant that had already been sentenced could receive the benefit of § 3553(f), pursuant to a sentencing reduction motion under 18 U.S.C. § 3582(c)(2). *See United States v. Mihm*, 134 F.3d 1353, 1355-56 (8th Cir. 1998), citing to *Clark*, 110 F.3d at 17. In answering the question in the

affirmative, the Eighth Circuit noted that several circuit courts applied § 3553(f) "to a sentence imposed after appellate remand even though the original sentence preceded the statute's effective date." *Id*. at 1355 (string cite omitted). In concluding that a § 3582(c)(2) re-sentencing must take into account § 3553(f) even though the defendant has already been sentenced, *Mihm* held that "there is no retroactivity bar to applying § 3553(f) in these circumstances", because granting relief results in a sentence "imposed on or after" the passage of § 3553(f). 134 F.3d at 1356. Furthermore, in concluding that the statute applied to his case, the Eighth Circuit held that "it would violate the rule of lenity to deny § 3553(f) relief to Mr. Mihm." *Id*.

What is more, the Supreme Court has long held that a repeal of a criminal statute while an appeal is pending, including any "repeal and re-enactment with different penalties...[where only] the penalty was reduced," *Bradley v. United States*, 410 U.S. 605, 607-08 (1973), must be applied by the court of appeals, absent "statutory direction...to the contrary." *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974). In so concluding, this Court noted it had "recognized a distinction between the application of a change in the law that takes place while a case is on direct review on the one hand, and its effect on a final judgment under collateral attack on the other hand." *Sch. Bd. of Richmond*, 416 U.S. at 711-12, citing *Linkletter v. Walker*, 381 U.S. 618, 627 (1965). Simply put, the general rule is that "a court is to apply the law in effect at the time it renders its decision", unless the legislature clearly provides to the contrary. *Id.*

The "statutory direction" in this case, far from suggesting a "contrary" presumption should govern, provides that the amendments "shall apply to any offense that was committed *before* the date of enactment of this Act." First Step Act of 2018, Pub. L. No. 115-391, at § 403(b) (emphasis added). This language confirms the general federal "saving statute," 1 U.S.C. 109 (1871), cannot bar the application of § 403 here because its express language applies to a certain class of defendants whose cases were pending prior to the passage of the FSA.

Additionally, there is no "statutory direction" in the First Step Act that would bar application of the reduced penalty structure to cases on direct appeal. To the contrary, Congress indicated its intent that § 403 be applied to pipeline cases like Mr. McDaniel's, by expressly titling § 403 "Clarification of Section 924(c)," and addressing applicability of that "clarification" to "pending" cases in § 403(b). The additional language in § 403(b), that the amendment shall apply if a sentence for the offense has not been "imposed", suggests that Congress intended the amendment not to apply to those on collateral review. Again, this is a distinction with a difference, one that has been repeatedly acknowledged by this Court. *Sch. Bd. of Richmond*, 416 U.S. at 711-12; *Linkletter,* 381 U.S. at 627.

This Court, in an analogous situation, has highlighted the injustice inherent in affirming a conviction or sentence based on an antiquated law while that case is pending on direct review, where the new law "positively changes the rule which governs." *Hamm v. City of Rock Hill*, 379 U.S. 306, 308, 317 (1964). In *Hamm*, this Court vacated the convictions of defendants who had staged unlawful "sit-ins' at

retail stores that refused to provide services to defendants based on their race. *Id.* After defendants were convicted, but before their convictions became final, Congress passed the Civil Rights act of 1964, which de-criminalized the illegal conduct, i.e. the "sit-ins". *Id.*

In vacating defendants' convictions, the *Hamm* Court focused on the fact that defendants' convictions had not yet become final such that they were entitled to the projections of the Civil Rights Act. *Id.* In reaching this conclusion, the Court traced back the roots of its decision back nearly 150 years because "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." *Id;* quoting *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801).

While the Supreme Court has rejected the suggestion that a statute is "clarifying" if there is no textual indication in that regard, or any possible ambiguity in the prior statutory language, *see Cherokee Nation of Okla. v. Leavitt*, 543 U.S 631, 647-48 (2005), Congress specifically designated § 403 of the First Step Act as a "clarification" of the prior statutory provision in the title to § 403, without any similar designation in the titles of other sections – in particular, neither § 401 nor § 402. And § 402, notably, makes no reference to applicability in "pending cases", "if a sentence for the offense has not been imposed as of the date of enactment."

Congress was clear in the title to § 402 that the provision was a "Broadening of [the] Existing Safety Valve," and in § 402(b) that "[t]he amendments made by this section shall apply only to a conviction entered on or after the date of enactment of this Act." (Emphasis added). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

It is indisputable that the First Step Act definitively rejected this Court's interpretation in *Deal* of the phrase "second or successive conviction" in § 924(c). *Davis*, 139 S.Ct. at 2319. While the term "clarification" is in the title of the § 403 and titles are not dispositive to statutory interpretation, such titles are useful in interpreting the statute "when they shed light on some ambiguous word or phrase", and therefore this language is a useful tool available "for the resolution of a doubt." *Trainmen v. Baltimore & O. R. Co.,* 331 U.S. 519, 529 (1947).

Stated another way, there can be no doubt that Congress intended a "clarification" of § 924(c)(1)(C), by passing § 403 of the First Step Act to preclude a mandatory consecutive 25-year penalty, absent a prior final conviction. This evidences Congress' original intent, and should be applied to cases that are not yet final on direct appeal. Even if a different reading of Congress' use of the words "pending," "imposed," and "clarification" in § 403 were possible, such a reading should be rejected based upon principles favoring lenity in the interpretation of criminal provisions. *See Moskal v. United States*, 498 U.S. 103, 107 (1990); *United*

States v. Santos, 553 U.S. 507, 514 (2008).

In denying Mr. McDaniel's appeal, and affirming his conviction and sentence, the Eighth Circuit did not issue any ruling on how the First Step Act impacted his case. Because the lower court did not address this question, this Court should remand for the Eighth Circuit to decide this issue in the first instance, because this Court is a court of review, not first view. *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019), citing *Thacker* v. *TVA*, 139 S.Ct. 1435, 1443 (2019).

II. Does the judicial determination of crimes "committed on occasions different from one another" under the Armed Career Criminal Act violate the Sixth Amendment right to a jury trial, especially when the lower court relied on the "scrivener's error" doctrine to resolve a factual dispute regarding when the prior convictions took place?

Where the facts of a prior conviction must be re-litigated to impose a mandatory minimum sentence which exceeds the statutory maximum otherwise applicable, the Sixth Amendment requires those facts to be submitted to a jury, or the enhancement must not be imposed. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"). This petition for certiorari should be granted, because it is time for this Court to resolve an important and reoccurring issue regarding the ACCA, which has been neglected by the lower courts for far too long.

A. The question presented is extremely important.

The ACCA removes an otherwise applicable ten year sentencing ceiling, and imposes a fifteen year mandatory minimum sentence for certain firearms crimes. *See* 18 U.S.C. § 924(a)(2), (e)(1). Specifically, the ACCA may be imposed only when

three prior "violent felony" or "serious drug offense" are "committed on occasions different from one another." See 18 U.S.C. § 924(e)(1).

The Constitution requires that "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." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (reversing state statute allowing for doubling of statutory maximum in absence of jury finding); *see also Alleyne v. United States*, 570 U.S. 99, 103 (2013) (applying *Apprendi* to statutory mandatory minimum sentences). This Court has mandated that lower courts be mindful of the potential Constitutional error inherent in judicial factfinding under the guise of applying "sentencing factors" to increase a defendant's sentence. *See Apprendi*, 530 U.S. at 478; *Alleyne*, 570 U.S. at 113-14.

The fact bound inquiry necessary to determine the ACCA different-occasions clause is an element of the offense which a jury must determine; it is not a sentencing factor left to the discretion of the district court judge. The *Apprendi* Court endorsed the concurring opinions in *Jones v. United States*: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Id*. at 490, citing *Jones v. United States*, 526 U.S. 227, 252-53 (opinion of Stevens, J.) and 526 U.S. at 253 (opinion of Scalia, J.).

The Supreme Court has strictly and repeatedly adhered to *Apprendi* in its ACCA decisions, which highlights why it must do the same as it pertains to the

"different occasions" analysis regarding predicate offenses. In requiring the categorical analysis in ACCA determinations, the Supreme Court prohibits judges from making findings of fact regarding a defendant's prior convictions and confines the analysis to the statutory elements necessarily established by the fact of conviction. *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016). "[A] judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense." *Id.* at 2252. "He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id.* "Statements of 'non-elemental fact' in the records of prior convictions are prone to error precisely because their proof is unnecessary." *Id.* at 2253. At trial, and even more so in guilty plea proceedings, defendants have no incentive to contest what does not matter under the law. *Id.*

Under the ACCA, a "court's finding of a predicate offense indisputably increases the maximum penalty," and such a finding would "raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction." *Descamps v. United States*, 570 U.S. 254, 269 (2013). The modified categorical approach may be used only "in identifying the defendant's crime of conviction" which "the Sixth Amendment permits." *Id.* Any facts regarding a defendant's underlying conduct "must be found unanimously [by a jury] and beyond a reasonable doubt." *Id.* "[W]hen a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra

punishment. *Id.* A court cannot "rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence." *Id.* at 270.

In *Shepard v. United States*, this Court prohibited the use of complaint applications and police reports to determine whether the defendant had previously pled guilty to generic burglary. *Shepard v. United States,* 544 U.S. 13, 15 (2005). Specifically, a sentencing judge considering an ACCA enhancement could not "make a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea." *Id.* at 25. The plurality opinion explained, "[w]hile the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." *Id.*, citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

This Court grants an exception to the *Apprendi* rule for the simple fact of a prior conviction. *Apprendi,* 530 U.S. at 476 (citing *Jones*, 526 U.S. 227); *Almendarez-Torres*, 523 U.S. at 248. But the scope of that exception is narrow. *Alleyne*, 570 U.S. at 111 n.1 (finding Sixth Amendment violation when judge determined means of firearm possession, increasing mandatory minimum).

Almendarez-Torres itself rests on shaky ground in the wake of *Apprendi*. "*Almendarez-Torres* represents at best an exceptional departure from the historic practice that we have described. . . . [I]t is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should

apply if the recidivist issue were contested." *Apprendi*, 530 U.S. at 487-90.

Supreme Court precedent does not authorize a sentencing judge to find any disputed fact simply because "the disputed fact can be described as a fact about a prior conviction." *Shepard*, 544 U.S. at 25. Judicial fact-finding related to non-elemental facts is not allowed. *Descamps*, 570 U.S. at 270. There is a meaningful difference between "the fact of a prior conviction" and "non-elemental facts about a prior conviction." *Almendarez-Torres* and *Apprendi* authorize an increased sentence based on "the fact of a prior conviction," but they do not permit judicial exploration of all recidivism-related facts. *United States v. Perry*, 908 F.3d 1126, 1135 (8th Cir. 2018) (Stras, J. concurring) ("Indeed, if all facts having some relationship to recidivism were exempt from the Sixth Amendment, then the leading ACCA cases would not contain the reasoning that they do"); *see also United States v. Hennessee*, 932 F.3d 437, 446-455 (6th Cir. 2019) (Cole, C.J. dissenting) (quoting *Perry* concurrence).

B. The Eighth Circuit's ruling is incorrect.

Here, the Eighth Circuit improperly concluded that "[i]n determining whether a plea necessarily rested on *facts* that qualify the conviction for an enhancement, the court may refer to [the Shepard documents.]" *United States v. McDaniel*, 925 F.3d 388 (8th Cir. 2019) (emphasis added). Indeed, the Eighth Circuit has repeatedly held that no Sixth Amendment violation occurs when a sentencing court looks to the facts underlying prior convictions to determine whether the offenses were committed on different occasions. *See e.g.*, *United States v. Evans*, 738 F.3d 935, 936

(8th Cir. 2014), citing *United States v. Davidson*, 527 F.3d 703, 707 (8th Cir. 2008) and *United States v. Wilson*, 406 F.3d 1074, 1075 (8th Cir. 2005); *United States v. Wyatt*, 853 F.3d 454, 458-59 (8th Cir. 2017). The reasoning in these cases is contrary to Supreme Court precedent, and therefore incorrectly decided.

For example, in *United States v. Kempis-Bonola*, a panel of the Eighth Circuit favorably cited the Second Circuit's decision in *United States v. Santiago*, 268 F.3d 151, 156 (2d Cir. 2001), for the proposition that "'[j]udges frequently must make factual determinations for sentencing, so it is hardly anomalous to require that they also determine the 'who, what, when, and where' of a prior conviction.'" *United States v. Kempis-Bonola*, 287 F.3d 699, 703 (8th Cir. 2002); also see *United States v. Marcussen*, 403 F.3d 982, 984 (8th Cir. 2005) ("we have previously rejected the argument that the nature of a prior conviction is to be treated differently from the fact of a prior conviction"). "We agree with the Second Circuit that it is entirely appropriate for judges to have 'the task of finding not only the mere fact of previous convictions *but other related issues as well*.'" *Kempis-Bonola*, 287 F.3d at 703 (emphasis added).

That is incorrect. As Judge Stras pointed out in *Perry* and in his concurring opinion this case, if a sentencing court was allowed to determine disputed facts such as where a prior conviction occurred, the Supreme Court's ACCA precedents would have been decided differently. *See e.g.*, *Mathis*, 136 S.Ct. at 2250 (disputed fact was whether the defendant had unlawfully entered a building, structure, or vehicle); *Descamps v. United States*, 570 U.S. 254, 258-59 (2013) (disputed issue was whether

the defendant entered a store unlawfully or entered legally with the intent to commit larceny).[2]

Supreme Court precedent holds that state court criminal proceedings cannot be factually re-litigated in federal court fifteen years later, like what happened in this case, because it is fundamentally unfair to criminal defendants. "[A]t plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he may have good reason not to. . . Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence." *Mathis*, 136 S.Ct. at 2253.

Judge Stras' concurring opinion explains why "[t]he unique facts of this case highlight just how troublesome our approach can be", because they are "at best, confusing, largely because the [*Shepard*] documents on which we have come to rely openly conflict with one another." *McDaniel*, 925 F.3d at 390, (Stras, J. concurring). "The charging document, for example, originally indicated that two of McDaniel's three crimes occurred on the same day." *Id.* "But at some point someone with access to the document—we do not know who—made a handwritten amendment specifying

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[2] While it is true that Mr. McDaniel waived his right to jury trial as it pertained to whether he was guilty of the substantive offenses charged, he never waived his right to be sentenced as the ACCA mandates as a matter of law, namely in a fashion consistent with the text of the statute and the Sixth Amendment. Numerous defendants plead guilty (and therefore necessarily waive certain constitutional rights in doing so), but no one disputes that they retain their constitutional rights to be sentenced properly under the ACCA. To give just one example, the defendant in *Mathis* pled guilty, but that did not prevent the Court from concluding that the sentencing judge can "do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Mathis*, 136 S.Ct at 2252.

that the three crimes were committed on three different dates." *Id.* "A transcript of the state-court proceedings likewise reflects an agreement between McDaniel, his lawyer, and the prosecutor that the offenses occurred on separate dates." *Id.* "Yet the final judgment of conviction, which presumably postdates everything else, says that two of the three crimes occurred on the same day." *Id.* "*What we have here, in other words, is a good ol' fashioned factual dispute*." *Id.* (emphasis added).

Ultimately, in resolving this dispute, the district court in 2018 decided that the plea transcript from 2003 was "most persuasive", but neither the text of the ACCA, the Sixth Amendment, nor fundamental notions of fair play pursuant to the Supreme Court's precedent, allow the district court to fill in such gaps. "Resolving this type of factual dispute, however, is a long way from the narrow power to decide 'what crime . . . McDaniel was convicted of.'" *McDaniel*, 925 F.3d at 390 (Stras, J. concurring) (quoting *Mathis*, 136 S. Ct. at 2252). Furthermore, in affirming that decision, the Eighth Circuit relied on the scrivener's error doctrine, 925 F.3d at 388, which this Court's ACCA case law dictates should have no role in this determination because it does not "satisfy '*Taylor*'s demand for certainty." *Mathis*, 136 S.Ct at 2257, quoting *Shepard*, 125 S.Ct. at 1254.

This is especially so when a "state court decision definitely answers the question" *Mathis*, 136 S.Ct. at 2256, and here the Missouri Supreme Court has held that a "presumption exists that there are no clerical errors in judgments." *McGuire v. Kenoma, LLC*, 447 S.W.3d 659, 665 (Mo. banc 2014). Mr. McDaniel's judgment—that lists his convictions as having occurred on the same date—is therefore

dispositive of this ACCA issue.

C. The petition for certiorari should be granted because other circuits are also improperly interpreting and applying the ACCA, and therefore only a decision from this Court will rectify the constitutional infirmity of the "different occasions" analysis of the ACCA.

Several circuit courts have rejected challenges to the status quo as it pertains to the ACCA's "different occasions" analysis, but in doing so have invited this Court to clarify the law. *See, e.g., United States v. Farrad,* 895 F.3d 859, 888 (6th Cir. 2018) (citing circuit's "binding precedent" as basis to reject constitutional argument "until the Supreme Court explicitly overrules it"); *United States v. Dutch*, 753 Fed. Appx. 632, 635 (10th Cir. 2018) (circuit precedent foreclosed Sixth Amendment challenge); *United States v. Weeks*, 711 F.3d 1255, 1259 (11th Cir. 2013) ("*Almendarez-Torres* remains binding until it is overruled by the Supreme Court"); *United States v. Thomas*, 572 F.3d 945, 952 (D.C. Cir. 2009) (Sixth Amendment challenge to different-occasions issue "is more difficult than the court lets on,") (Ginsburg, J., concurring in part); *United States v. Browning*, 436 F.3d 780, 782 (7th Cir. 2006) ("We are not authorized to disregard the Court's decisions even when it is apparent that they are doomed,"); *United States v. Jurbala,* 198 Fed. Appx. 236, 237 (3d Cir. 2006); *United States v. White*, 465 F.3d 250, 254 (5th Cir. 2006) (per curiam); *United States v. Thompson*, 421 F.3d 278, 283 (4th Cir. 2005); *United States v. Santiago*, 268 F.3d 151, 156-57 (2d Cir. 2001).

Thus, there is no "circuit split" on this issue. However, there need not be for this Court to reverse the lower courts because they are collectively misinterpreting the law. *See, for example*, *Rehaif v. United States*, 139 S.Ct. 2191 (2019) (rejecting

Solicitor General's argument in its brief in opposition to the petition for certiorari, that "every circuit to consider the question has determined that a conviction under Section 922(g) requires proof that the defendant knowingly possessed a firearm, but not proof that he knew his own status. In the absence of a circuit conflict, this Court has repeatedly declined to review that issue."). It is respectfully submitted that the time for this Court to resolve this important and re-occurring issue is now.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A – Judgement and Opinion of the Eighth Circuit Court of Appeals

Appendix B – Judgement of the District Court

Appendix C – Order denying rehearing of the Eighth Circuit Court of Appeals