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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 2019 TERM

HUBERT CARTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Does the judicial determination of crimes "committed on occasions different from one another" at sentencing under the Armed Career Criminal Act, 18 U.S.C. § 924(e) violate the Sixth Amendment right to a jury trial?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Hubert Carter 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.

OPINION BELOW

The Eighth Circuit's judgment and opinion affirming the judgment of the district court is reported at 794 Fed.Appx. 5544 (8th Cir. 2019) (unpublished), and is included in Appendix A.

JURISDICTION

The decision of the Court of Appeals affirming the district court's judgment and sentence was entered on February 19, 2020. This Court has jurisdiction under 28 U.S.C. § 1291 and Sup. Ct. R. 13.3.

STATUTORY PROVISION INVOLVED

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

Mr. Carter's petition for certiorari raises an issue warranting plenary review by this Court. Where the facts of a prior conviction must be 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

Following his indictment for unlawful possession of a firearm, Mr. Carter pled guilty on June 7, 2018, under a written plea agreement that preserved Mr. Carter's right to challenge the ACCA enhancement at sentencing and on appeal.

A presentence investigation report concluded that Mr. Carter faced a minimum sentence of fifteen years' imprisonment under the ACCA based on his Missouri prior convictions for sale

of and possession with intent to distribute a controlled substance. Mr. Carter objected to the constitutionality of applying the ACCA enhancement at sentencing (Sentencing Transcript [ST] at 3). The court overruled the objection and sentenced Mr. Carter to 180 months' imprisonment (ST at 3-4).

Mr. Carter challenged his ACCA sentence before the Eighth Circuit. The Eighth Circuit affirmed the ACCA sentence based on a long line of precedent that allows judicial fact-finding regarding the temporal relationship between prior convictions.

REASON FOR GRANTING THE WRIT

Where the facts of a prior conviction must be 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 also* 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 lower courts to be mindful of the potential Constitutional gravity of judicial factfinding under the guise of applying "sentencing factors" which raise either the sentencing floor or the ceiling, which in fact are elements of the offense. *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. 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 *Nijhawan v. Holder*, an immigration case, this Court found that circumstances specific to how prior offenses were committed, but which are not elements, may be found without the evidentiary limitations established in *Shepard* for criminal cases. 129 S. Ct. 2294 (2009). The Court noted that certain prior offenses covered by the definition of "aggravated felony" at 8 U.S.C. § 1101(a)(43) were not amenable to the approaches authorized by *Shepard* because the definitions refer to specific circumstances, rather than generic crimes. *Nijhawan*, 129 S. Ct. at 2300. The Court crafted a "circumstance-specific" approach that allowed the immigration judge to find the specific circumstance surrounding this offense by "clear and convincing" evidence. *Id*. The Court noted

that deportation is a civil proceeding that did not demand proof of such facts beyond a reasonable doubt. Id. at 42. *See also Descamps v. United States*, 133 S. Ct. 2276, 2286 (2013) (holding that "inquiry is over" if prior conviction "does not correspond to the relevant generic offense"); *United States v. Rosales-Aguilar*, 818 F.3d 965, 973 (9th Cir. 2016) (recognizing "deep and widespread" circuit split over means/elements test, and concluding that "[b]ecause the petition for certiorari granted in *Mathis* is directly relevant to our resolution of Rosales's challenge to his sentence enhancement, we will defer the resolution of this one issue pending the Supreme Court's decision in *Mathis*.").

In *Shepard v. United States*, this Court prohibited the use of complaint applications and police reports to determine whether the defendant had pled guilty to generic burglary. 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. Whether *Almendarez-Torres* allows a sentencing court to make a finding that certain prior offenses were committed sequentially, however, raises a "difficult constitutional question." *See Dretke v. Haley*, 541 U.S. 386, 395-396 (2004).

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.

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.

Perhaps the best example demonstrating the fact-finding allowed by such precedent is *Levering v. United States*, 890 F.3d 738 (8th Cir. 2018). *Levering* involved two assault convictions that occurred in two separate counties during the defendant's high-speed flight from police officers. *Id*. at 739. The court noted that the inquiry regarding what constitutes "on occasions different from one another" depends on how the court defines an "episode" as well as a "continuous course of conduct." *Id*. at 740. The court found that the two assaults counted separately because the offenses occurred at different times in different locations and involved different victims. *Id*. at 742.

In *United States v. Kempis-Bonola*, the Eighth Circuit relied on *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.'" 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*, if a sentencing court could 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 intending to commit larceny).

Supreme Court precedent holds that state court criminal proceedings cannot be factually litigated in federal court years later, 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.

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, e.g., Rehaif v. United States*, 139 S.Ct. 2191 (2019) (rejecting Solicitor General's argument 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 – Sentencing Transcript