No. _____

IN THE
Supreme Court of the United States

WILLIAM C. McGEE,
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

LAINE CARDARELLA
Federal Public Defender
Western District of Missouri

Dan Goldberg
Counsel of Record
1000 Walnut, Suite 600
Kansas City, Missouri 64106
Tel: (816) 471-8282
Dan_Goldberg@fd.org

QUESTIONS PRESENTED

I. Whether omitting an essential element of the crime in both the indictment and jury instructions may be reviewed for harmlessness as held by the Eighth Circuit, or whether these are structural errors that violate a defendant's substantial rights and undermine confidence in the outcome of the trial proceedings as held by the Fourth Circuit?

II. Whether the judicial determination of crimes "committed on occasions different from one another" under the Armed Career Criminal Act violates the Sixth Amendment right to a jury trial?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William McGee 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 district court's order, denying Mr. McGee's motion for new trial, is unpublished and unreported. It is included in Appendix A. The Eighth Circuit's judgment, granting the government's motion for summary affirmance, is unpublished and unreported. It is included in Appendix B.

JURISDICTION

The decision of the Court of Appeals affirming the district court's judgment and sentence was entered on September 4, 2020. Petitioner did not file a petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1291 and Sup. Ct. R. 13.3.

STATUTORY PROVISIONS INVOLVED

U.S. CONST. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . . .

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 of the State and district wherein the crime shall

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation. . . .

18 U.S.C. § 922. Unlawful acts

(g)(1) It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

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.

STATEMENT OF THE CASE

Jury Trial, Motion for New Trial and Sentencing

On April 4, 2019, prior to this Court's decision in *Rehaif v. United States*, 139 S.Ct. 2191 (2019), Mr. McGee was convicted after a jury trial of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Before trial, Mr. McGee was indicted of this charge, with indictment stating, simply, that Mr. McGee "did knowingly possess, in and affecting commerce, a firearm" after "having been convicted of a crime punishable by imprisonment for a term exceeding one year."

1. *Evidence presented at Mr. McGee's trial*

Police responded to a "shots fired call" on June 13, 2018, at 7:30 p.m., from the Great Western Motel in Independence, Missouri. When the police arrived shortly thereafter, they were told that a Black male shot a weapon approximately five times in the air. The caller also informed the police where the shooter could be found, not far from the Motel. When the police arrived, they observed a Black male and female arguing in the driveway.

A police officer saw the Black male – later identified as Mr. McGee – pull a handgun from the back of his waist band, and throw it over his car. Mr. McGee was arrested by the police. The police approached the female next to Mr. McGee – later identified as Holly Lemonde – who was crying because she had been shot. Ms. Lemonde informed the police she got into an argument with Mr. McGee, and that he got a handgun and shot her in the buttocks.

A firearm was later recovered by the police in the grass, near the area where an officer saw Mr. McGee throw the handgun, and where Ms. Lemonde said the handgun was thrown. The gun recovered was a Hi-Point, Model C-9, 9mm handgun, Serial No. P1667921.

At trial, the parties stipulated to the fact "that at the time of the offense alleged in the indictment, the defendant had been convicted of a felony offense for which he could receive a term of imprisonment of greater than one year." The parties also stipulated this firearm had an interstate nexus affecting commerce.

At the end of the government's evidence, Mr. McGee made a motion for

judgment of acquittal, which was denied by the district court.

At the close of all the evidence, the jury was instructed by the district court on the law, before its deliberations. Instruction Number 16 omitted an element requiring the jury to find that Mr. McGee knew he was a convicted felon at the time he possessed the gun:

> It is a crime for a felon to possess a firearm, as charged in Count One of the Indictment. This crime has three elements, which are:
>
> *One,* the defendant had been convicted of a crime punishable by imprisonment for more than one year:
>
> *Two*, after that, the defendant knowingly possessed a firearm, that is a Hi-Point Model C-9, 9mm caliber handgun, Serial Number P1667921; and
>
> *Three,* the firearm was transported across a state line at some time during or before the defendant's possession of it.

Instruction Number 16 stated that, because the first and third elements of the charge had been stipulated to by the parties, "[i]f the second element has been proved beyond a reasonable doubt, then you must find defendant guilty of the crime charged in Count One; otherwise, you must find him not guilty of this crime."

After deliberating, the jury returned a guilty verdict.

2. *Mr. McGee's motion for new trial*

On March 3, 2020, Mr. McGee filed his motion for new trial, based on *Rehaif v. United States*, 139 S.Ct. 2191, 2200 (2019), because the indictment did not allege the *Rehaif* knowledge element, and also because the district court instructed the jury there were only three elements to the crime, omitting the knowledge element from *Rehaif*. After the government conceded this was instructional error, the

district court concluded that it erred in instructing the jury.

However, on plain error review, the district court denied relief because "Defendant has failed to prove elements three and four of the plain error test", based on its conclusion Mr. McGee "failed to demonstrate that the jury instructional error affected his substantial rights." Appendix A, pg. 3-5. In concluding this, the district court rejected Mr. McGee's argument that "these errors go beyond mere prejudicial error to break the Constitutional structure for trials enshrined in the Sixth Amendment to ensure a fair and reliable adversarial determination of guilt or innocence." *Id*. at fn 4. The district court further concluded that "[a]lthough the Supreme Court has found that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, not all trial errors automatically call for reversal", and "the failure to instruct the grand jury on the *Rehaif* element did not render the jury trial fundamentally unfair." *Id*.

Based on a harmless error review, the district court denied Mr. McGee's motion because it concluded that he could not show a reasonable probability of a different outcome absent the instructional error. Specifically, the court concluded there were three sources it could rely on to conclude Mr. McGee knew of his prohibited status: 1) his trial stipulation conceding he had been convicted of a crime punishable by a term exceeding one year; 2) his prior Michigan drug convictions and sentences – evidence not submitted to the jury – but was in his Presentence Investigation Report ("PSR"); and 3) "Defendant's attempt to conceal his firearm when the policed arrived at the scene", when he was arrested for being a felon in

possession of a firearm in this case. *Id*.

3. *Mr. McGee's sentencing hearing*

The PSR concluded that Mr. McGee was an Armed Career Criminal, subject to enhanced sentencing under the Guidelines and the ACCA. (DCD 84, paragraph 21). Specifically, the PSR relied on three prior Michigan drug convictions it concluded were "serious drug offenses." *Id*. These drug convictions allegedly occurred on or about:

- 1) February 17, 1998, where Mr. McGee was convicted of Mich. Comp. Laws § 333.7401(2)(a)(iv) for delivery or manufacture of less than 50 grams of cocaine;
- 2) March 2, 1998, where Mr. McGee was convicted of Mich. Comp. Laws §333.7401(2)(a)(iv) for delivery or manufacture of less than 50 grams of cocaine; and
- 3) March 30, 1998, where Mr. McGee was convicted of Mich. Comp. Laws §333.7401(2)(a)(iii) for delivery or manufacture of over 50 grams of cocaine but less than 225 grams.

Before the sentencing hearing, Mr. McGee objected to the PSR's classification of him as an Armed Career Criminal. Mr. McGee noted that the drug offenses "are alleged to have occurred on or about February 17, February 25, March 2, and March 30 of 1998", and "the usage of 'on or about' relieves the prosecution of proving any specific date, and instead allows it to prove that the offense occurred within a reasonable period of time encompassing such dates." "Consequently, some or all the

prior convictions could have occurred on the same date, and constituted a single, continuous course of conduct." Ultimately, Mr. McGee objected that the district court "cannot engage in factual findings that increase a defendant's sentence without violating Mr. McGee's Sixth Amendment right to a jury finding of each element beyond a reasonable doubt."

At the sentencing hearing, the district court concluded that Mr. McGee was an Armed Career Criminal, and therefore faced a mandatory minimum sentence of 180 months' imprisonment. The court sentenced Mr. McGee to 204 months' imprisonment.

Appeal to the Eighth Circuit

Before the Eighth Circuit, Mr. McGee raised the same two issues he now raises before this Court. Mr. McGee's conviction and sentence were summarily affirmed by the Eighth Circuit, over his objections, after the government moved for summary affirmance. In its motion for summary affirmance, the government acknowledged a circuit split between the Fourth and Eighth Circuits on whether "a standalone *Rehaif* error satisfies plain error review because such an error is structural." *See* Motion, pg, 5-6, filed on August 20, 2020.

In affirming, the Eighth Circuit's judgment consisted of two sentences: "The Government's motion for summary affirmance is granted. The court has reviewed the appellant's brief and the court is satisfied that the appeal is governed by controlling Eighth Circuit precedent." (Appendix. B, pg. 1.)

REASONS FOR GRANTING THE WRIT

I. Whether omitting an essential element of the crime in both the indictment and jury instructions may be reviewed for harmlessness as held by the Eighth Circuit, or whether these are structural errors that violate a defendant's substantial rights and undermine confidence in the outcome of the trial proceedings as held by the Fourth Circuit?

This Court's holding in *Rehaif v. United States*, 139 S.Ct. 2191 (2019) took some lower courts by surprise, with the Eighth Circuit concluding that "the Supreme Court recently added an additional element [to crimes like felon in possession of a firearm], requiring that the government prove the defendant 'knew he belonged to the relevant category of persons barred from possessing a firearm.'" *United States v. Harris*, 964 F.3d 718, 724 (8th Cir. 2020), quoting *Rehaif*, 139 S.Ct. at 2200. The lower courts are at a crossroads, split on how to review trials and guilty pleas where the government did not plead or prove this *Rehaif* element.

Right now, the outcome of who receives *Rehaif* relief turns solely on the happenstance of geography. The Fourth Circuit is vacating and remanding defendants' convictions and sentences, while the Eighth Circuit is summarily affirming indistinguishable defendants' cases on direct appeal. This Court should step in to resolve this dispute, because even the government agrees this circuit split requires immediate attention from this Court. *See* government's petition for *en banc* rehearing and motion to stay mandate before the Fourth Circuit in *United States v. Gary*, 18-4578 (arguing that the Fourth Circuit's opinion, which held that *Rehaif* error is structural error as it pertains to guilty pleas, presents a "substantial question" for this Court based on "two rapidly broadening circuit splits").

1. *The Circuits are intractably divided on this important issue on how courts should resolve Rehaif error.*

All agree that the "absence of an instruction requiring the jury to find that [the defendant] knew he was a felon" is error based on *See Rehaif*. *United States v. Hollingshed*, 940 F.3d 410, 415 (8th Cir. 2019); *see also United States v. Medley*, __ F.3d __ 2020 WL 5002706, *9 (4th Cir. Aug. 21, 2020). Everyone also agrees that when the defendant does not raise the *Rehaif* error at trial, it must be reviewed for plain error, and the defendant must show "(1) an error (2) that was obvious and (3) that affected the defendant's substantial rights and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Hollingshed*, 940 F.3d at 415, citing *United States v. Olano*, 507 U.S. 725, 734 (1993); *Medley*, 2020 WL 5002706, *4 (citing *Olano* for the same four prong test). But the Fourth and Eighth circuits take remarkably different approaches in how to review this same error, which is outcome determinative as to whether the defendant receives relief.

Since *Rehaif* was handed down, the Eighth Circuit has routinely concluded that defendants cannot satisfy elements three and four of the *Olano* plain error test, even when the knowledge of status element was not included in a defendant's indictment or jury instructions. *See, for example Hollingshed*, 940 F.3d at 415; *see also United States v. Gilmore*, 968 F.3d 883, 886-7 (8th Cir. 2020). In reaching that conclusion, the Eighth Circuit relies on facts that the jury did not hear at trial, like that the defendant had previously been sentenced to a term of prison. *Hollingshed*, 940 F.3d at 416; *Gilmore*, 968 F.3d at 887. Based on these facts not heard by the jury, the Eighth Circuit has concluded that the defendant cannot show a reasonable

probability that, "but for the error, the outcome of the proceeding would have been different", and thus "any error in not instructing the jury to make such a finding did not affect [Hollingshed's] substantial rights or the fairness, integrity, or public reputation of the trial." *Hollingshed*, 940 F.3d at 416; *see also Gilmore*, 968 F.3d at 887 (same).

The Fourth Circuit takes an entirely different approach to reviewing the same *Rehaif* errors, concluding that such errors not only violate a defendant's substantial rights, but also seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Medley*, 2020 WL 5002706, *4; *see also United States v. Gary*, 954 F.3d 194, 201 (4th Cir. 2020) (concluding that "a standalone *Rehaif* error satisfies plain error review because such an error is structural, which per se affects a defendant's substantial rights", and "seriously affected the fairness, integrity and public reputation of judicial proceedings.").

In reaching this conclusion in *Medley*, the Fourth Circuit first reviewed the defendant's constitutional rights at stake, namely the right to a jury trial and grand jury indictment enshrined in the Fifth and Sixth Amendments to the Constitution. *Id.* at *4-10. Based on these rights, the Fourth Circuit refused "to infer a scienter requirement", because it advances the basic principle of criminal law that courts only penalize those with "a vicious will", and also because "appellate judges are especially ill-equipped to evaluate a defendant's state of mind on a cold record." *Id.* at *11. The Fourth Circuit also concluded "it is inappropriate to speculate how Medley might have defended the element in the counterfactual scenario where he

was presented with the correct charge against him." *Id*. at *10. Ultimately, the Fourth Circuit held that while "the indictment and trial errors independently" violate a defendant's substantial rights, it also turned to the cumulative impact of these two errors because "the error was not just a single, procedural error – but a combination of errors that tainted many of the basic protections that permit us to regard criminal punishment as fundamentally fair." *Id*. at *12.

Finally, the Fourth Circuit held that "[t]here can be no question that the rights involved in this case are central to upholding the fairness, integrity, and public reputation of our jury proceedings", because "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id*. at *12-13, citing *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999); *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

The Eighth Circuit has expressly acknowledged its circuit split with the Fourth Circuit on this *Rehaif* issue, *see United States v. Coleman*, 961 F.3d 1024, 1029 fn 3 (8th Cir. 2020), and the government expressly conceded the same split of authority in this case. S*ee* Government's Motion for Summary Affirmance, pg, 5-6, filed in the Eighth Circuit on August 20, 2020. Only this Court's intervention can resolve this intractable split in the law.

2. *The Eighth Circuit's approach is fundamentally flawed.*

The Eighth Circuit has repeatedly streamlined the affirmance of *Rehaif* trial error by discounting the constitutional rights involved — the right to indictment and the right to a jury trial — through omitting a discussion of what these rights mean to the accused. *See e.g., Hollingshed*, 940 F.3d at 416. The Eighth Circuit also overestimates its ability to compensate for those lack of basic fundamental protections in the criminal justice system, acting as a *de facto* factfinder in evaluating evidence never put before the jury — like imputing the scienter requirement based on the defendant's prior incarcerations. *Id*

To be sure, this Court has concluded that failing to properly instruct a jury is an error that may be reviewed for harmless error at times, but this Court has never held that such a significant swath of procedurals errors can be shrugged away by an appellate court, and certainly not without "overwhelming" evidence of guilt. *See United States v. Cotton*, 535 U.S. 625, 632 (2002) (declining to reverse under plain-error review for failure to instruct on a sentencing enhancement element when the evidence was "overwhelming"); *see also Johnson v. United States*, 520 U.S. 461, 470 (1997) (finding no plain error for failure to submit element to the jury because the trial evidence was "overwhelming").

Because of this change in the law and lack of notice in the indictment, the evidence of the omitted *Rehaif* element cannot be deemed "uncontested" and "overwhelming." *See Neder v. United States*, 527 U.S. 1, 17 (1999). Mr. McGee could not have contested an element he was not put on notice of, and the government's

evidence of knowledge of status presented at trial was not overwhelming, not to the extent that appellate judges can "usurp the role of both the grand and petit juries and engage in inappropriate judicial factfinding." *Medley*, 2020 WL 5002706, *14.

Affirming *Rehaif* error in a summary fashion, like the Eighth Circuit has done, is tempting because it is the path of least resistance. But the Fourth Circuit has the better view when it concluded *Rehaif* error is not susceptible to harmless error review simply "to avoid burdening the criminal justice system" because that would dismiss "the public faith in the integrity of our courts", and "we live in a system that upholds the rule of law even when it is inconvenient to do so." *Id.*

The government argued below that Mr. McGee was not entitled to relief because he did "not claim he was unaware of his felony status." DCD 107, pg. 7. That is incorrect, because Mr. McGee pled not guilty to the charged crime, which placed the burden of proof squarely on the government to prove this element beyond a reasonable doubt. It is not Mr. McGee's burden to offer affirmative evidence negating that element, and Mr. McGee must be presumed innocent of this element of the crime, especially because it was never pled or proven by the government beyond a reasonable doubt *to the jury*.

Furthermore, the indictment and jury instructions failed to require a jury finding of Mr. McGee's knowledge of his inclusion in a category of persons prohibited from firearm possession. By omitting this essential element, the jury instruction wrongly instructed the jury as to the law. Thus, the jurors were led to assume that the government had no obligation to prove Mr. McGee knew he

belonged to the relevant category of persons barred from possessing a firearm, which is an essential element of the offense after *Rehaif*. 139 S.Ct. at 2200. This violated the Fifth and Sixth Amendment guarantees against conviction absent a jury's unanimous finding beyond a reasonable doubt of every element of the offense. *See Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993).

What is more, existing case law during Mr. McGee's trial prohibited a defense of ignorance as to his status as a felon, and therefore *barred* Mr. McGee from presenting a defense against this element established by *Rehaif*. *See, for example United States v. Lomax*, 87 F.3d 959, 962 (8th Cir. 1996) (rejecting defendant's argument that the district court should have allowed him to present evidence to the jury of his belief that his civil rights had been restored and that his conduct was lawful, because the "knowingly" element of section 922(g) applied to his status). After *Rehaif*, this is unquestionably a proper defense because it is an element that, if not proven beyond a reasonable doubt, will result in the defendant's acquittal. *Rehaif,* 139 S.Ct. at 2200. Based on all of these unique circumstances, it is improper for appellate judges to engage in conjecture as to what petitioner's defense might or could have been to the *Rehaif* element at trial.

Petitioner's case demonstrates why the Eighth Circuit's approach should not be adopted nationwide. After trial, Mr. McGee filed a motion for new trial, arguing that his indictment was fundamentally flawed and that the district court improperly instructed the jury by omitting the knowledge of his status element based on *Rehaif*. Although the district court *conceded* trial error, the Eighth Circuit

summarily affirmed, concluding, merely "[t]he court has reviewed the appellant's brief and the court is satisfied that the appeal is governed by controlling Eighth Circuit precedent." Appendix B, pg. 1. It is impossible to discern how such a large swath of constitutional rights can be so breezily swept aside on direct appeal, without the circuit court applying the facts of Mr. McGee's case to the plain error test of *Olano*. Justice does not allow such rubber stamping of flawed convictions after trial, ones that will cause defendants to be incarcerated, like in this case, anywhere from fifteen years to life.

3. *This case presents an ideal vehicle to resolve this important issue.*

This case is an ideal vehicle to resolve this conflict in the law, because the *Rehaif* errors in the indictment and jury instructions were raised and ruled on in the district court below. The district court conceded trial error, and therefore the only issue precluding Mr. McGee from receiving relief from his conviction and sentence is *which standards to apply to this error* — the approach taken by the Fourth Circuit or the Eighth Circuit. Had his case arisen in the Fourth Circuit, Mr. McGee's case would have been reversed and remanded based on how that circuit reviews *Rehaif* trial error. Stated another way, there are no vehicle issues in petitioner's case that would preclude this Court from reaching the substantive issue of determining which circuit's approach to *Rehaif* error is the just and correct one.

This case is also an excellent vehicle to resolve this circuit split, because it demonstrates how glaringly different the two approaches are. The approach adopted by the Eighth Circuit is to streamline affirming lower court *Rehaif* error through a

harmless error analysis, and no case is a better example than this one, where the Eighth Circuit affirmed without analyzing the indictment, any of the facts before the jury in Mr. McGee's case, or the district court's rationale for finding the error harmless. *Rehaif* error review cannot be done in such a cursory fashion, based on this Court's precedents.

This issue is also vitally important to determine how plain errors — *Rehaif* error and other types of error — should be reviewed by appellate courts. "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907–08 (2017), citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Structural errors are "defects in the constitution of the trial mechanism which defy analysis by 'harmless-error' standards," *Fulminante*, 499 U.S. at 309, and "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair.'" *Neder*, 527 U.S. at 8–9, quoting *Rose v. Clark*, 478 U.S. 570, 577–78 (1986).

Rehaif error of this magnitude — implicating all phases of the criminal prosecution infecting both the indictment and jury instructions — should not be affirmed by appellate courts in a wholesale fashion. This Court explained why in *Rehaif* because Congress applied the word "knowingly" to the defendant's status in §922(g), and "[w]ithout knowledge of that status, the defendant may well lack the

intent needed to make his behavior wrongful." *Rehaif*, 139 S.Ct. at 2197. For the holding in *Rehaif* to have meaning, this Court must ensure that criminal defendants are provided a meaningful avenue of relief, when this element is not pled in the indictment or proven to a jury beyond a reasonable doubt.

II. Whether the judicial determination of crimes "committed on occasions different from one another" under the Armed Career Criminal Act violates the Sixth Amendment right to a jury trial?

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.

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).

Here, the Eighth Circuit improperly affirmed Mr. McGee's ACCA sentence because the lower court necessarily referred to *Shepard* documents (or worse just the PSR) to determine that his prior predicate convictions occurred on different dates. 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).

But 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*, 570 U.S. at 258-59 (disputed fact was whether the defendant entered a store unlawfully or entered legally with the intent to commit larceny).

Supreme Court precedent holds that state court criminal proceedings cannot be factually re-litigated in federal court years later, like what happened in this case and countless others, 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." *Mathis*, 136 S.Ct. at 2250.

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

The petition for certiorari should be granted.

Respectfully submitted,

/s/ Dan Goldberg
DAN GOLDBERG
Counsel of Record
Federal Public Defender's Office
Western District of Missouri
1000 Walnut, Suite 600
Kansas City, Missouri 64106
Dan_Goldberg@fd.org
(816) 471-8282

APPENDIX

Appendix A – District court's order denying the motion for new trial

Appendix B – Judgement of the Eighth Circuit Court of Appeals