NO. _____

IN THE UNITED STATES SUPREME COURT

_____ TERM

JOSEPH D. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Docket No. 20-6296 *Below*

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QUESTION PRESENTED FOR REVIEW

1. Should the courts employ a purely temporal approach or a "totality of the circumstances" test when interpreting the Career Criminal Act's phrase, "committed on occasions different from one another"?

2. In the event this Honorable Court finds the ACCA's phrase, "committed on occasions different from one another" ambiguous, should the Court remand the defendant's case for resentencing under the provisions of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of the instant petition follows:

Joseph D. Brown, Petitioner

United States of America, Respondent

LIST OF PROCEEDINGS IN UNITED STATES DISTRICT COURT AND SIXTH CIRCUIT COURT OF APPEALS WHICH ARE DIRECTLY RELATED TO THE CASE IN THE UNITED STATES SUPREME COURT

1. United States District Court for the Eastern District of Tennessee, Southern Division, Docket Number 1:19-cr-105, United States of America v. Joseph D. Brown, Judgment in a Criminal Case entered October 30, 2020.
2. United States Court of Appeals for the Sixth Circuit, Docket Number 20-6296, Order (affirming judgment of District Court)

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1. Opinion, United States Court of Appeals for the Sixth Circuit, *United States of America v. Joseph D. Brown*, Court of Appeals No. 20-6296, affirming the Judgment in a Criminal Case of the United States District Court for the Eastern District of Tennessee, Chattanooga Division, August 25, 2021.
2. Judgment in a Criminal Case, United States District Court for the Eastern District of Tennessee, Chattanooga Division, *United States of America v. Joseph D. Brown*, District Court No. 1:19-cr-00105-TRM-SKL, sentencing Petitioner Brown under the provisions of the ACCA, October 30, 2020.

JURISDICTIONAL STATEMENT

Joseph Brown was sentenced under the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e), on October 30, 2020, with the Judgment in a Criminal Case issued on October 30, 2020. He appealed timely, challenging the sentencing court's application of the ACCA and its 15-year minimum mandatory sentence on November 12, 2020. The United States Court of Appeals for the Sixth Circuit entered its opinion affirming the judgment on August 25, 2021. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1). Rule 13 of the Rules of the Supreme Court of the United States provides that a petition for writ of *certiorari* is timely-filed when it is filed with the Clerk of the United States Supreme Court within 90 days after entry of the judgment (from a judgment of a United States Court of Appeals). Accordingly, the instant Petition for Writ of *Certiorari* is timely-filed.

Pursuant to Supreme Court Rule 29(4)(a), appropriate service is made to the Solicitor General of the United States and to Assistant United States Attorney Luke A. McLauren, who authored the Sixth Circuit Court of Appeals brief on behalf of the United States Attorney's Office, a federal office which is authorized by law to appear before this Honorable Court.

Petitioner Brown respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit. In that opinion, the Sixth Circuit Court of Appeals affirmed the district court's somewhat reluctant determination that the ACCA's statutory minimum mandatory sentence of 15 years applied to Mr. Brown when it opined that he had been convicted

of three qualifying violent felonies (two aggravated burglaries and one burglary) on occasions different from one another.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 922(g)(1)

18 U.S.C. § 924(a)(2)

18 U.S.C. § 924(c)

18 U.S.C. § 3553

18 U.S.C. § 3581

28 U.S.C. § 1254(1)

*Note that, because the statutory provisions outlined above are lengthy, only citations are given on this page. However, the full text of those provisions is set out in the appendix to the instant Petition for Writ of *Certiorari.*

STATEMENT OF THE CASE AND FACTS

Following the decision in *U.S. v. Petty*, 798 F.2d 1157, vacated and remanded, 481 U.S. 1034, 107 S.Ct. 1968, 95 L.Ed. 2d 810 (1987), rev'd and remanded, 828 F.2d 2 (1987), *cert. denied*, 486 U.S. 1057, 108, S.Ct. 2827, 100 L.Ed. 2d 928 (1988), the various circuit courts of appeal have been divided in their interpretation of 18 U.S.C. § 924(e)'s, yet-to-be succinctly defined "committed on occasions different from one another" language by which Congress unsuccessfully attempted to simplify the courts' assignment of armed career criminal penalties to individuals with three previous convictions for violent felonies or serious drug offenses. While eight circuit courts of appeal erroneously have opined that crimes are committed on different occasions whenever the crimes are committed successively, rather than simultaneously, four other circuit courts of appeal correctly have held that such a showing does not preclude further analysis of that phrase as it applies to the facts of individual cases. Instead, the latter more well-reasoned analysis requires courts to consider the circumstances of individual cases to determine whether sentencing courts should impose the ACCA's harsh 15 years-to-life penalty only after a careful examination of facts comprising the totality of circumstances in each individual case. Moreover, any ambiguities in the language of the statute should be construed against the prosecution.

Joseph D. Brown signed a plea agreement on May 27, 2020, wherein he agreed to plead guilty to Count One of the indictment, which charged him with a single count of violating 18 U.S.C. § 922(g)(1), admitting that he was guilty of knowingly

possessing a firearm, that the firearm had traveled in or affected interstate commerce, that he had a previous felony conviction and that he knew that he had a previous felony conviction. [Plea Agreement, R. 30, Page ID # 59 – 65]. Assistant United States Attorney Winne signed the plea agreement the next day, May 28, 2020. *Id.* Pursuant to the plea agreement, the petitioner agreed that the punishment for his violation of 18 U.S.C. § 922(g)(1), was the following:

> If the defendant is not determined to be an Armed Career Criminal, imprisonment for a term of up to ten years; a fine of up to $250,000; supervised release for up to three years; any lawful restitution; and a $100 special assessment. If the defendant is determined to be an Armed Career Criminal, imprisonment for a term of not less than 15 years up to Life; a fine of up to $250,000; supervised release for up to five years; any lawful restitution; and a $100 special assessment.

[Plea Agreement, *supra*, Page ID # 59]. The petitioner acknowledged that he understood that the sentencing determination would be based upon the entire scope of his criminal conduct, his criminal history, and pursuant to other factors and guidelines as set forth in the Sentencing Guidelines and the factors set forth in 18 U.S.C. § 3553. *Id.* The petitioner did not waive his right to appeal. *Id.* at Page ID # 59 – 65

On June 23, 2020, Joseph D. Brown pled guilty to Count One of the indictment, agreeing that he was a felon in possession of a firearm, but retained his right to appeal. [Notice of Hearing, R. 32, Page ID # 69; Minutes of Change of Plea Hearing (Rearraignment), R. 33, Page ID # 70]. The case was referred to the United States Probation Office for the preparation of a Presentence Investigation Report. United

States Probation Officer Sean Hinton prepared the defendant's/appellant's Presentence Investigation Report on September 25, 2020 [September 25, 2020, Presentence Investigation Report (hereinafter, PSR), R. 39, Page ID # 109 – 133]; the Revised Presentence Investigation Report on October 26, 2020 [October 26, 2020, Revised Presentence Investigation Report, R. 47, Page ID # 206 – 230]; and the Addendum to the Presentence Report [Addendum, R. 46, Page ID # 201 – 205]. At issue in the instant appeal is USPO Hinton's designation of Mr. Brown as an armed career criminal, a designation which mandated a minimum mandatory prison sentence of 15 years. [PSR, *supra*, at Page ID # 115]. It is USPO Hinton's assignment of Armed Career Criminal status to Mr. Brown, with all of its attendant ramifications, and Sentencing Judge Travis R. McDonough's somewhat reluctant decision to sentence Mr. Brown to 15 years as an armed career criminal which are the subjects of the instant appeal.

Prior to sentencing, CJA Panel Attorney Paul Bergmann, III, filed objections to the Presentence Investigation Report on Brown's behalf, later filing his Correction to Notice of Objections to PSR Filed by Defendant Joseph D. Brown correcting the incorrectly-numbered Hamilton County Criminal Court docket numbers pertaining to two convictions which the petitioner argued should be merged into one predicate offense for the purpose of determining whether he should be classified as an armed career criminal. [Notice of Objections to PSR, R. 41, Page ID # 135 – 144; Correction to Notice of Objections to PSR Filed by Defendant Joseph D. Brown, R. 43, Page ID # 189 – 190]. In his Notice of Objections to PSR, the petitioner objected to his

designation as an armed career criminal on the first page of the PSR at **Offense: Count 1**: Felon in Possession of a Firearm (Armed Career Criminal), 18 U.S.C. § 922 (g)(1) and 18 U.S.C. § 924(e), 15 years to Life Imprisonment/$250,000 fine (Class A Felony), and argued (1) that he should not be classified as an armed career criminal, and (2) that since he should not be classified as an armed career criminal, he should be fined and/or sentenced pursuant to the provisions of 18 U.S.C. § 922(g), a Class C felony (18 U.S.C. § 3581), and 18 U.S.C. § 924(a)(2), for a term of not more than 10 years and a fine. At that point, he deferred argument on that objection until later in his Notice of Objections [Notice of Objections to PSR, *supra*, at Page ID # 135).

Later referencing Paragraph 21 and **Armed Career Criminal**, Paragraph 22, of the PSR, while the petitioner acknowledged the validity of the three convictions listed in subparagraphs (a), (b), and (c) of Paragraph 21 and conceded that his conviction under subparagraph (c) constituted one predicate offense under the ACCA, he also argued that the two convictions listed in subparagraphs (a) and (b) were committed within seconds of each other, indeed, virtually contemporaneously, and constituted a single continuous act. For that reason, Brown further argued that they did not constitute separate predicate convictions requiring that his punishment in the instant case be enhanced pursuant to the provisions of the ACCA. *Id.* at Page ID # 136. Attorney Bergmann reiterated that when Mr. Brown heard the business's burglar alarm on October 25, 2015, in the case listed in Paragraph 21(a) of the PSR, he fled under the pressure of hot pursuit and immediately stepped into a detached garage on the premises which were the subject of the aggravated burglary listed in

Paragraph 21(b) of the subject PSR to avoid detection and arrest and without meaningful opportunity to reflect on an effort to avoid his second crime which was a part of the same conduct committed in close temporal proximity to and in the same geographical area as the first burglary. *Id.*, at Page ID # 136 – 137. To further support his argument at sentencing that he should not be deemed an armed career criminal, the petitioner filed the entire transcript of the plea hearing in which he pled guilty to all three burglaries listed in Paragraphs 21(a), 21(b) and 21(c) of the PSR on the same day. *Id.*, at Exhibit 2 (to Notice of Objections to PSR), R. 41-2, Page ID # 154-176. Because the petitioner committed the aggravated burglary in an attempt to hide from authorities, to evade arrest for the business burglary immediately following the business burglary, that aggravated burglary arising out of his attempt to evade arrest was part of the same continuous criminal episode as the business burglary. Mr. Brown, therefore, has only two predicate convictions, not the three predicate convictions required by 18 U.S.C. § 924(e) to qualify him for designation as an armed career criminal subject to a mandatory minimum 15-year prison sentence.

Finally, Attorney Bergmann argued that Sentencing Judge McDonough was not without persuasive precedent to sustain the petitioner's argument that he is not an armed career criminal. He directed the sentencing court's attention to *U.S. v. Sweeting*, 933 F.2d 962 (11th Cir. 1991), wherein the Eleventh Circuit Court of Appeals had occasion to rule that a defendant was not an armed career criminal in a scenario with facts almost identical to those in the case at bar. [Notice of Objections to PSR, *supra*, at Page ID # 138 – 139]. The petitioner argued that he should be

sentenced to a prison term of 0 to 10 years pursuant to the provisions of 18 U.S.C. § 922(g)(1), not to a term of 15 years to life under the provisions of 18 U.S.C. § 924(e). *Id.*, at Page ID # 143.

On October 30, 2020, Judge Travis R. McDonough conducted Joseph D. Brown's sentencing hearing, during which he considered the sentencing guidelines and the provisions of 18 U.S.C. § 3553, reviewed the above-referenced defense Objections to PSR, entertained the arguments of counsel, and subsequently sentenced the petitioner to 15 years in the Bureau of Prisons pursuant to the provisions of the Armed Career Criminal Act. Judgment in a Criminal Case in Mr. Brown's case was filed with the Court Clerk's Office, United States District Court for the Eastern District of Tennessee at Chattanooga, the same day. [Judgment in a Criminal Case, R. 50, Page ID # 276 – 282]. On November 12, 2020, Brown timely filed his Notice of Appeal. [Notice of Appeal, R. 52, Page ID # 287].

On appeal, Brown reiterated his argument that he should not have been sentenced pursuant to the provisions of 18 U.S.C. § 924(e), but instead should have been sentenced under the provisions of 18 U.S.C. § 922g(1) and 18 U.S.C. § 924(a)(2). He contended that, while one burglary occurring 19 hours earlier than his business burglary and his aggravated burglary constituted one predicate under the ACCA, the subsequent business burglary and aggravated burglary constituted a single continuous criminal episode for purposes of the ACCA. The petitioner argued that when he heard the business's burglar alarm on October 25, 2015, he fled under the pressure of hot pursuit and immediately stepped into a detached garage on the

premises of the aggravated burglary to avoid detection, apprehension and arrest; taking nothing in the process, assaulting no one and committing no felonies therein; and without meaningful opportunity to reflect on an effort to avoid the aggravated burglary which was a continuation of the business burglary. He further argued, *inter alia,* that the Sixth Circuit Court of Appeals in *U.S. v. Mann*, 552 F. Appx 464, 470 (6th Cir. 2014) had opined that "generally when a defendant is evading or resisting arrest for an offense immediately following that offense, we will view subsequent offenses arising out of the evasion or resistance are part of the same criminal episode." That is precisely what happened in the petitioner's case; his aggravated burglary conviction stemming from his entry into a detached garage was the kind of offense described by the *Mann*, court, *supra* – it was an unsuccessful attempt to evade apprehension for the business burglary which was part of the same continuing criminal episode. As the October 25, 2015, business burglary and the October 25, 2015, aggravated burglary were part of the same continuous criminal episode they were not committed on occasions different from one another; thus, they should have been considered one criminal offense. In the absence of the third predicate offense, he argued that he should not have been sentenced to 15 years under the provisions of the ACCA, but instead should have been sentenced pursuant to the provisions of 18 U.S.C. §§ 922g(1) and 18 U.S.C. § 924(a)(2), which prescribe a sentence of 0 – 10 years.

In affirming the district court's determination that Brown is an armed career criminal, the Sixth Circuit Court of Appeals cited with approval to *United States v.*

Wooden, 945 F.3d 498, 504 (6th Cir. 2019), *cert. granted in part*, 141 S.Ct. 1370 (2021), *inter alia*, a case for which this Honorable Court granted *certiorari* and recently heard oral argument. Although Mr. Wooden's case was one with much more egregious facts than those found in the case at bar in that Wooden burglarized ten storage units, this Honorable Court granted Mr. Wooden's petition for writ of *certiorari* to resolve a circuit split over the interpretation of 18 U.S.C. § 924(e)'s "committed on occasions different from one another" phrase, the precise issue which Brown now asks this Honorable Court to address in his petition for writ of *certiorari*. And despite Petitioner Brown's argument that his actions constituted one continuous criminal episode, the Sixth Circuit Court of Appeals disregarded the wisdom of *Mann*, *supra*, cited with approval and quoted from *United States v. Hill*, 440 F.3d 292, 297-298 (6th Cir. 2019), made short shrift of Petitioner Brown's argument and affirmed the district court's sentencing decision, somehow reasoning that since Brown was apprehended as he made his way into the detached garage with a flashlight, that action must have constituted a criminal episode separate from the business burglary from which he had just attempted to escape by hiding in the detached garage. ORDER, App. R. 16-1, Page ID # 1-4.

REASONS FOR GRANTING THE PETITION FOR WRIT OF *CERTIORARI*

The United States Supreme Court has not yet interpreted or defined 18 U.S.C. § 924(e)'s "committed on occasions different from one another" language, language which, in the absence of legislative history and an understanding of the case law giving rise to its inclusion in 18 U.S.C. § 924(e), is ambiguous at best. In the absence of direction from this Court, an ever-expanding circuit split has developed regarding whether sentencing courts automatically should designate crimes as separate criminal episodes when they are committed successively or whether sentencing courts should more appropriately conduct a thorough examination of the facts comprising the totality of the circumstances present in each case to analyze whether separately-charged offenses constitute one continuous criminal episode. As the circuit split continues to widen, sentencing disparities will continue to increase since the successively-charged crimes analysis tends to result in application of the 15-year minimum mandatory ACCA sentence in virtually every circumstance with a temporal gap between those charged offenses, whereas defendants sentenced in jurisdictions which require the more thorough totality of the circumstances analysis tend to be sentenced less severely to terms of imprisonment ranging between 0 and 10 years.

The Third, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh and D.C. Circuits appear to have rubber-stamped armed career criminal findings in cases where the prosecution can show any kind of temporal gap between charged offenses. Indeed, quoting from its decision in *United States v. Schoolcraft*, 879 F.2d 64, 73 (3d Cir. 1989), the Third Circuit Court of Appeals in *United States v. Torres*, 961 F. 3d 618

(3d Cir. 2020) indicated that their decision whether convictions were committed on different occasions would be made based on their analysis of whether the offenses were "distinct in time". In 2021, in *United States v. Proctor*, 2021 WL 4898427 (October 20, 2021), the Fifth Circuit Court of Appeals applied the ACCA's harshly-punitive measures to Mr. Proctor in deciding that his three prior drug convictions were committed on occasions different from one another as required by the ACCA simply because they were committed sequentially, not simultaneously. So, too, the Seventh, Eighth, Tenth, and D.C. Circuits seemingly have settled for a bright-line rule in which lapses of time between offenses appear to be the defining parameter for determining that offenses are separate for ACCA purposes. *United States v. Morris*, 821 F.3d 877, 880 (7th Cir. 2016) (opining that the passage of even a small amount of time between crimes may be enough to separate them for purposes of the ACCA); *U.S. v. Pledge*, 821 F.3d 1035, 1038 (8th Cir. 2016) [citing to and quoting from *U.S. v. Abbott*, 794 F.3d 896, 898 (8th Cir. 2015) in holding that the lapse in time between offenses is the most important ACCA determination factor]; *see also*, *U.S. v. Johnson*, 130 F.3d 1420, 1431-1432 (10th Cir. 1997); *U.S. v. Carter*, 969 F.3d 1239, 1243 (11th Cir. 2020); *U.S. v. Thomas*, 572 F.3d 945, 951 (D.C. Cir. 2009). Finally, in *United States v. Wooden*, 945 F.3d 498, 504, 505 (6th Cir. 2019), *cert. granted in part*, 141 S.Ct. 1370 (U.S. Feb. 22, 2021) (No. 20-5279), the Sixth Circuit Court of Appeals, acknowledging not only that the ACCA failed to offer a definitive definition of the phrase "committed on occasions different from one another", but also that the ACCA-determinative factors it outlined in earlier cases were not "hidebound rules",

nevertheless deemed Mr. Wooden an armed career criminal because, *inter alia*, he could not have been in multiple places at the same time.

The more well-reasoned cases, however, stop short of attempting to establish a bright-line temporal-factor rule for determining ACCA designation, instead opting for a more reasonable "totality of the circumstances" case-by-case analysis. As indicated earlier, four circuit courts of appeal have adopted this better standard. Indeed, as long ago as 2004, the First Circuit Court of Appeals ruled in *U.S. v. Stearns*, 387 F.3d 104, 108 (1st Cir. 2004) that whether two crimes occurred on separate occasions within the meaning of the ACCA, "requires a case-by-case examination of the totality of the circumstances." *See also U.S. v. Mastera*, 435 F.3d 56, 60 (1st Cir. 2006). Fourteen years later, in a very clearly-enunciated interpretation of the ACCA's "committed on occasions different from one another" language, the Second Circuit Court of Appeals in *U.S. v. Bordeaux*, 886 F.3d 189, 195 – 196. (3rd Cir. 2018) married the definition of the word "occasion" to the history and language of the ACCA and deemed the application of the ACCA appropriate only if the defendant committed the predicate offenses in "distinct criminal episodes". *See also United States v. Letterlough*, 63 F.3d 332, 335, 337 (4th Cir. 1995) (where, in noting that to be considered an ACCA predicate offense each offense must be isolated with a beginning and an end, the 4th Circuit Court of Appeals opined that one crucial factor in making the ACCA determination is a consideration of "whether the defendant had the opportunity after committing the first-in-line offense to make a conscious and knowing decision to engage in the next-in-line offense".) (Emphasis

supplied). *See also U.S. v. McElyea*, 158 F.3d 1016, 1018 (9th Cir. 1998), (where, finding the statutory language "committed on occasions different from one another" ambiguous, the Ninth Circuit Court of Appeals looked to the ACCA's legislative history for guidance on its interpretation, noting then-Senator Joe Biden's opinion that, in order to avoid future litigation and to insure that the ACCA's rigorous sentencing provisions apply only as intended in cases meriting such strict punishment, the concept of what is meant by a "career criminal" is a person who over the course of time commits three or more enumerated felonies and is convicted of those felonies.) (Emphasis supplied).

Interpreted differently by the various federal courts of appeal, the ACCA's ambiguous "committed on occasions different from one another" language has created great disparities in sentencing. While a felon in possession of a firearm convicted of that crime in the geographical area covered by the Sixth Circuit Court of Appeals, for example, now would receive a minimum mandatory 15-year sentence under 18 U.S.C. § 924(e) if he had committed three prior violent felony or serious drug offenses separated by any amount of time, however insignificant, a defendant convicted of the same crime with an identical criminal history but fortuitously located in an area in which the First Circuit Court of Appeals, the Second Circuit Court of Appeals, the Fourth Circuit Court of Appeals or the Ninth Circuit Court of Appeals hear cases conceivably would receive a sentence of 0 to 10 years. The instant case affords this Honorable Court the proper platform to define the scope of the "committed on occasions different from one another" language of 18 U.S.C. § 924(e), to limit

sentencing courts' reliance on strict temporal ACCA analyses and to bring sentencing decisions more in line with Congressional intent which the petitioner contends requires sentencing courts to examine the totality of the circumstances on a case-by-case basis to determine the propriety of enhancing a defendant's sentence under the provisions of the ACCA.

If the Court finds, despite the ACCA's legislative history, that the ACCA's phrase, "committed on occasions different from one another", is ambiguous, Petitioner Brown further contends, nonetheless, that the "rule of lenity" requires this Honorable Court to adopt the test advocated in the instant petition for writ of *certiorari*, i.e.: sentencing courts should be required to conduct a thorough examination of the facts comprising the totality of the circumstances present in each case to analyze whether separately-charged offenses constitute one continuous criminal episode, allowing for the application of the ACCA's harsh sentencing provisions only after finding the presence of a significant intervening event between charged offenses. When, as in the petitioner's case, the defendant is evading arrest for an offense immediately following that offense, the sentencing court should not view that subsequent offense as a separate offense, but rather as part of the same, single criminal episode since they are not offenses committed on occasions different from one another. Petitioner contends that this Honorable Court has ruled that "no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." *U.S. v. Santos*, 553 U.S. 507, 514, 128 S.Ct. 912, 2025, 170 L.Ed. 2d 912 (2008). If the Court finds the above-referenced

language ambiguous, the "rule of lenity" requires the remand of his case for resentencing under the provisions of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

ARGUMENT

I.

The "on occasions different from one another" language of 18 U.S.C. § 924(e), the ACCA, does not encompass conduct committed by a defendant to evade arrest for an offense which is committed immediately following that original offense in that both offenses are part of the same continuous criminal episode.

Upon hearing a burglar alarm while in the process of burglarizing a business, the petitioner immediately left the business premises and continued the same criminal episode when he stepped into a detached garage to evade capture, only to be captured immediately and charged with both the business burglary and the aggravated burglary of that detached garage. Those two separately-charged actions resulting in two separate convictions, the first for burglary and the second for aggravated burglary, served as two of the three predicates upon which the sentencing court sentenced the defendant to a 15-year ACCA sentence. The petitioner contends that generally when a defendant is evading or resisting arrest for an offense immediately following that offense, the sentencing court should not view subsequent offenses arising out of the evasion as separate offenses for purposes of applying the ACCA; instead, those courts should view both offenses as part of the same single, continuous, criminal episode since they are not offenses committed on occasions different from one another. *See U.S. v. Mann,* 552 Fed. Appx. 464, 470 (6th Cir. 2014).

Despite the ACCA's legislative history, the courts have had a real dilemma interpreting the "on occasions different from one another" language of the ACCA. *See, Mann, id.* While felons in possession of firearms in four of the circuits previously

named in the instant petition would serve a sentence of 0 to 10 years for possession of a firearm in many cases based on a totality of the circumstances test, those same felons in eight other circuits would serve at least a minimum mandatory 15 years for the same offense, based primarily on a temporal analysis.

Legislative history and floor debates surrounding the drafting of 18 U.S.C. § 924(e), hereinafter the "ACCA", however, make clear the intention of Congress that the "on occasions different from one another" language of the ACCA was very narrowly aimed at the hard core of criminals with lengthy records. *See* S.Rep. No. 585, 98th Cong. 2d Sess. 62-63 (1982). Indeed, in *United States v. Brady*, 988 F.2d 644 (6th Cir. 1993), a very powerful dissent cited with approval and quoted from *United States v. Towne,* 870 F.2d 880 (2d Cir. 1989) as it chronicled the history and evolution of the ACCA from its predecessor, 18 U.S.C. § 1202, which failed to expressly require that predicate offenses be committed on occasions different from one another for the ACCA to apply, to the version of the ACCA in existence at that time of that decision. Dissenting Judge Jones explained:

> In addition to the Senate report, Stephen S. Trott, Assistant Attorney General, Criminal Division, explained the policy behind the Act as follows:
>
> > These are people who have demonstrated, by virtue of their definition, that locking them up and letting them go doesn't do any good. They go on again, you lock them up, you let them go, it doesn't do any good, they are back for a third time. At that juncture, we should say, "That's it; time out; it is all over. We, as responsible people, will never give you the opportunity to do this again."

> *United States v. Towne,* 870 F.2d 880, 891 (2d Cir.) (quoting *Armed Career Criminal Act: Hearing before the Subcomm. on Crime of the House Comm. on the Judiciary,* 98th Cong., 2d Sess. 47, 64 (1984) (testimony of Assistant Attorney General Stephen S. Trott)), *cert. denied,* 490 U.S. 1101, 109 S.Ct. 2456, 104 L.Ed.2d 1010 (1989).
>
> Trott's testimony and Congress' comments plainly presuppose that the Act is intended to apply to only incorrigible, habitual criminals or, as the Second Circuit in *Towne* stated, to "recidivists ... who have engaged in violent criminal activity on at least three separate occasions, and not individuals who happen to acquire three convictions as a result of a single criminal episode." *Id.* at 891.

Brady, supra, at 672. (Emphasis supplied). Moreover, to further bolster its argument, the powerful dissent in *Brady, supra,* recognized that the United States Supreme Court in *United States v. Petty,* 798 F.2d at 1159 – 1160 (8th Cir.1986), *vacated and remanded,* 481 U.S. 1034, 107 S.Ct. 1968, 95 L.Ed.2d 810 (1987), *rev'd and remanded,* 828 F.2d 2 (1987), *cert. denied,* 486 U.S. 1057, 108 S.Ct. 2827, 100 L.Ed.2d 928 (1988), earlier had made short shrift of arguments to the contrary following the Solicitor General's concession that the sentencing court in *Petty, supra,* had misconstrued the meaning of the ACCA's predecessor when it incorrectly allowed that court to use multiple felony convictions arising out of a single criminal episode to enhance punishment. *Brady, id.*, at 672 – 673.

Following the *Petty* decision, *supra,* Congress attempted to limit the circumstances under which sentencing courts could declare defendants armed career criminals. In 1988, Congress added its phrase requiring the predicate offenses to be committed "on occasions different from one another". See, *Brady, id.*, at 673, citing

to *Minor and Technical Criminal Law Amendments Act of 1988*, Pub.L. No. 100-690, § 7056, 102 Stat. 4181, 4395, 4402. Five years after this phrase was added to the ACCA, however, the dissent in *Brady*, *supra*, recognized the difficulty the sentencing courts had experienced coming to a consensus on its meaning and opined that those courts applying only the temporal test had missed the mark in "tinkering with" that phrase recognized by Congress in its enactment as the true essence of the definition of the term "recidivism" when Congress added that limiting provision. *Brady, id.*, at 674. Citing numerous cases, the dissent observed:

> With the majority's opinion today, we have forsaken the proper understanding of what it means to commit offenses "on occasions different from each other." As stated earlier, we now know that the phrase can only be understood within the parameters the sectional analysis of the phrase provided. In trying to locate where within those parameters the phrase is best understood, the courts tinker with the concepts to show that the case before them does not involve truly "simultaneous" offenses. The courts have become masterful in using phrases and concepts such as the acts committed by the defendant were distinct in time, the defendant had successfully completed the first crime and was free to leave, there are different victims, and the locations are different, to explain why the case before them is different from the simultaneous acts in *Petty*.
>
> . . .
>
> Unfortunately, in mastering these different phrases and concepts, the courts have misconstrued the reasonable test *Petty* and Congress implicitly established. The test is not simultaneous versus non-simultaneous; same place versus different place; or same victim versus different victim. Furthermore, the test is not to merely look at those factors in total and conclude, as the majority has in this case, that all defendants whose actions fit those factors are thereby subject to the ACCA. There is no policy justification supporting that type of artificial line-drawing.

> In fact, the legislative history of the ACCA, explored earlier, refutes that type of simplistic line-drawing.
>
> Rather, the general test that *Petty* and Congress established is whether two or more acts can be best capsuled as being one occasion of activity or different occasions of activity. Under this test, the important concepts are the defendant's premeditation to commit several crimes at once and general continuity of the defendant's actions. *Cf. Schieman,* 894 F.2d at 915 (Ripple, J., concurring in part and dissenting in part). Furthermore, under this test, a defendant who, for whatever reason, did not commit the offenses simultaneously is not automatically lumped with the truly recidivist criminals. Finally, it more logically treats defendants who commit acts as part of one continuous activity or crime spree the same as the defendant who commits the acts simultaneously.
>
> With this test, the policy objective of subjecting a particular type of criminal to enhanced punishment is met. Through this test, there is a much greater likelihood of applying the ACCA to the *career* criminal. It will ensnare those who, over time, commit crimes which are random and disjunctive while not capturing those who commit crimes over a short time period and in a continuous manner.
>
> If the test is not as I have described it, it strains logic to not subject one defendant to the ACCA because one's acts are simultaneous and subject another defendant to the ACCA when one's acts are simultaneous minus one second, or five seconds, or one hour, etc. Similarly, it strains logic to hold that one defendant would be subject to the ACCA merely because the crimes were committed at two locations while another defendant would not be subject to the ACCA because the acts were committed at one location.

Brady, supra, at 674 – 675. And so, after analyzing the ACCA's purpose, the dissent concluded with its common-sense observation that the belief that a criminal can have a career in less than an hour thereby subjecting him to fifteen years of incarceration not only strains logic; it misses logic altogether. See, *Brady, supra*, at 676.

Very importantly, the *Bordeaux* court, *supra*, married the definition of the word "occasion" to the history and language of the ACCA as it explained in pertinent parts of its well-reasoned decision:

> Under our precedents, a defendant's prior convictions are deemed convictions for offenses "committed on occasions different from one another," *id.*, only if the defendant committed the offenses in distinct "criminal episodes." *United States v. Towne*, 870 F.2d 880, 889–91 (2d Cir. 1989); *see also United States v. Rideout*, 3 F.3d 32, 34–35 (2d Cir. 1993).
>
> To apply the criminal-episode standard appropriately, we look to both the text and the history of ACCA.
>
> *Text.* We start with the ordinary meaning of the word "occasions" in the statute. *See, e.g., Hayden v. Pataki*, 449 F.3d 305, 314–15 (2d Cir. 2006) (en banc). As used in this context, "occasion" often has the sense of an occurrence that takes place at a particular time. *See, e.g., Oxford English Dictionary* v. "occasion, *n.*[1]," section (III)(b)(8) (2d ed. 1989) ("A particular casual occurrence or juncture; a case of something happening; the time, or one of the times, at which something happens; a particular time marked by some occurrence or by its special character."); *Webster's Third International Dictionary* v. "occasion," section (4)(a) (1976) ("[A] particular occurrence: happening, incident."). But the word often evokes, more broadly, the totality of circumstances giving rise to an opportunity. This broader sense is the primary definition of the word in the *Oxford English Dictionary*. *See Oxford English Dictionary*, *supra*, section (I)(a)(1) ("A falling together or juncture of circumstances favourable or suitable to an end or purpose, or admitting of something being done or effected; an opportunity."); *cf. Webster's Third International Dictionary*, *supra*, para. (1) ("[A] situation or set of circumstances favorable to a particular purpose or development: a timely chance.").
>
> *History.* The legislative and statutory history of ACCA provides additional guidance about the meaning of "occasions." *Cf. American Broadcasting Cos. v. Aereo, Inc.*, —— U.S. ——, 134 S.Ct. 2498, 2505–06, 189 L.Ed.2d 476 (2014) (using legislative history to clarify

statutory purpose). ACCA was intended, according to its sponsor, to protect the public from "career criminals"—that is to say, from "a limited number of repeat offenders" who "often have no lawful employment" and whose "full-time occupation is crime for profit." H.R. Rep. No. 98-1073, at 3 (1984) (quoting Sen. Arlen Specter), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3662–63. Despite the purpose of the statute, the original text of ACCA did not specify that the defendant had to commit multiple crimes over a lengthy career, however. Instead of requiring, as ACCA now does, that the defendant have committed several crimes "on occasions different from one another," the original statute required only that the defendant have "three previous convictions" for certain offenses. Pub. L. No. 98-473, § 1802, 98 Stat. 1837, 2185 (1984). The addition to ACCA of the phrase "committed on occasions different from one another" resulted from the original decision of the United States Court of Appeals for the Eighth Circuit in *United States v. Petty*, 798 F.2d 1157 (8th Cir. 1986), *vacated and remanded*, 481 U.S. 1034, 107 S.Ct. 1968, 95 L.Ed.2d 810 (1987), *reheard on remand*, 828 F.2d 2 (8th Cir. 1987). In *Petty*, the Eighth Circuit originally imposed ACCA's mandatory minimum sentence on a defendant who had six previous convictions for simultaneously robbing six people at a restaurant. *See* 798 F.2d at 1159–60. The Solicitor General confessed error in a petition to the Supreme Court for a writ of certiorari, arguing that Congress had intended ACCA to apply only to defendants whose convictions had arisen from distinct "criminal episodes," not to a defendant who had been convicted on several counts for the same event. 828 F.2d at 3. In response, Congress adopted the Solicitor General's construction of the statute by adding the words "committed on occasions different from one another." *See* Minor and Technical Criminal Law Amendments Act of 1988, § 7056, Pub. L. No. 100-690, 102 Stat. 4181, 4395, 4402 (1988); 134 Cong. Rec. 13,780, 13,782–83 (1988) (analysis submitted by cosponsor Sen. Robert Byrd).

In keeping with this analysis of text and history, our precedents addressing the criminal-episode standard have tried to distinguish between the

> defendant who simply commits several offenses in a connected chain of events and the defendant who is targeted by ACCA—someone who commits multiple crimes separated by substantial effort and reflection. We therefore understand "occasions" in its broader sense, as the conjuncture of circumstances that provides an opportunity to commit a crime. We consider not only whether a defendant has committed different crimes at different times, but also the other circumstances of the crimes, such as whether the defendant committed the crimes against different victims and whether the defendant committed the crimes by going to the effort of traveling from one area to another. *See United States v. Daye*, 571 F.3d 225, 237 (2d Cir. 2009), *abrogated on other grounds by Johnson v. United States*, —— U.S. —— —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015); *Rideout*, 3 F.3d at 34–35. Moreover, we consider whether the defendant had a realistic opportunity for substantial reflection between offenses "during which time he could have chosen to end his criminal activity." *Rideout*, 3 F.3d at 35.

Bordeaux, supra, at 195-196.

Petitioner Brown understands that his aggravated burglary committed on October 24, 2015, stands alone as a would-be predicate violent offense as defined by the ACCA. His two separately-charged offenses committed on October 25, 2015, however, are different because his aggravated burglary committed that night merely constituted a continuation of the business burglary, committed in an unsuccessful attempt to avoid detection for that business burglary. The petitioner contends that the aggravated burglary which he committed by stepping into a detached garage to evade arrest for the business burglary committed moments before merely constitutes a continuation of that business burglary as both the business burglary and the aggravated burglary comprised a "connected chain of events", a "conjuncture of

circumstances" that provide(d) an opportunity to commit (but) a (single) continuous crime. *See id.* at 196.

Not only does it strain logic to consider the above-referenced business burglary and the above-referenced aggravated burglary as separate crimes for purposes of the imposition of the ACCA's harshly-punitive 15-year minimum mandatory prison sentence, it defies logic altogether. The events of that one night do not a career make. Perhaps the dissent in *Brady, supra*, explained it best at Footnote 6 of its opinion when it noted:

> Defining the common meaning of the word "career", the dissent provided a common-sense analysis of the meaning of that term at Footnote 6 to its dissent:
>
> "Career" has been defined as "an occupation or profession followed as a *life's* work." Merriam-Webster Dictionary 117 (1974) (emphasis added). That definition implies a lengthy, time-consuming undertaking which consumes a good portion of one's life. In this context, any use of the word "career" to signify any short period of time is probably being so used in a joking way only to highlight a particular grand accomplishment. For example, when it is mentioned in sports (e.g., "that person had a career night") because of some grand accomplishment (e.g., Francisco Cabrera propelling the Atlanta Braves to the World Series in 1992 by driving in the tying and winning runs with the bases loaded and two outs in the bottom of the ninth inning), it is not expected that, based on one night's performance, she or he will be placed in some shrine that honors "career" or "lifetime" achievers (e.g., the Baseball Hall of Fame).

Brady, supra, at 676, n.6. The events of October 25, 2015, do not define Mr. Brown as a career criminal. They comprise only a single continuous crime, a single occasion, under a totality of the circumstances test.

Mr. Brown respectfully requests that this Honorable Court grant *certiorari* to resolve a circuit split between those circuit courts of appeal employing a somewhat strict 'temporal" test and those circuit courts of appeal employing a "totality of the circumstances" test to determine criminal defendants' exposure for treatment as armed career criminals under the provisions of the ACCA.

II.

If the Court finds the ACCA's language, "committed on occasions different from one another" ambiguous, the "rule of lenity" requires remand for resentencing pursuant to the provisions of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

If, after employing all of the traditional tools of statutory construction, this Honorable Court finds the ACCA's language "committed on occasions different from one another" ambiguous, the Court should remand the petitioner's case for re-sentencing pursuant to the provisions of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) based on the "rule of lenity". *See Shular v. United States*, ____U.S. ____, 140 S.Ct. 779, 787, 206 L.Ed. 2d 81 (2020). As noted previously in the instant petition for writ of *certiorari,* the circuit courts of appeal have been divided in their application of that phrase in their sentencing decisions. When the language of a statute is not so clear as to enable the ordinary citizen to understand its meaning, the court should construe that language in the light most favorable to defendants who, like Petitioner Brown, effectively are penalized by its ambiguity. See, *e.g., Santos*, *supra.*

Indeed, in the *Santos* case, *supra,* this Honorable Court held that "it interpret(ed) ambiguous statutes in favor of defendants, not prosecutors". *Id.* at 519, 128 S.Ct. 2028, 170 L.Ed. 2d 912. Moreover, the *Santos* court, *supra*, took great pains

to explain that it is the province of Congress, not the courts, to author the laws by which we all must abide. That Court held in pertinent part:

> Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. See *United States v. Gradwell,* 243 U.S. 476, 485, 37 S.Ct. 407, 61 L.Ed. 857 (1917); *McBoyle v. United States,* 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1931); *United States v. Bass,* 404 U.S. 336, 347–349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

Santos, supra. And, in stressing the importance of adherence to that principle protecting criminal defendants against language those defendants cannot understand, the Court concluded:

> If anything, the rule of lenity is an additional reason to remain consistent, lest those subject to the criminal law be misled. And even if, as Justice STEVENS contends, *post,* at 2031, statutory ambiguity "effectively" licenses us to write a brand-new law, we cannot accept that power in a criminal case, where the law must be written by Congress. See *United States v. Hudson,* 7 Cranch 32, 34, 3 L.Ed. 259 (1812).

If this Honorable Court finds ambiguity in the aforementioned language, the rule of lenity provides protection to Petitioner Brown, who respectfully requests that this Honorable Court remand his case for resentencing pursuant to the provisions of 18 U.S.C. §922 (g)(1) and 18 U.S.C. § 924(a)(2).

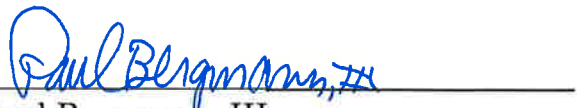
CONCLUSION

The circuit courts of appeal are divided in their application of the ACCA regarding whether to employ strictly a "temporal" test or whether to employ a case-by-case "totality of the circumstances" test to interpret the ACCA's phrase "committed on occasions different from one another". Defendants sentenced in areas employing a strict "temporal" test more often than not receive no less than the minimum mandatory 15-year sentence dictated by the ACCA for armed career criminals, while defendants sentenced in areas employing the "totality of the circumstances" test in cases with virtually identical facts often receive no more than 10 years' incarceration. The enunciation of a single, workable, standard definition of that phrase will foster uniform nationwide sentencing and provide clear, comprehensible notice to would-be criminals concerning their exposure to the enhanced penalty provisions of the ACCA. The petitioner maintains that sentencing courts should employ the "totality of the circumstances" when deciding whether to sentence defendants with multiple prior violent offenses or multiple serious drug felony convictions as armed career criminals.

Because the circuit courts of appeal are divided in their interpretation of the phrase, "committed on occasions different from one another", the petitioner urges this Honorable Court to grant *certiorari* review in order to resolve that conflict. Additionally, if this Honorable Court deems the language "committed on occasions different from one another" ambiguous, Petitioner Brown respectfully submits that the instant petition for writ of *certiorari* should be grant. Under either scenario, the

petitioner respectfully requests that the judgment of the Sixth Circuit Court of Appeals be vacated and the case remanded for resentencing.

Respectfully submitted,

By: 

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