No. _____

IN THE

Supreme Court of the United States

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DANIEL NATHANIEL MCCALL,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This Court has granted certiorari in *Jackson v. United States*, No. 22-6640, and *Brown v. United States*, No. 22-6389, and consolidated the cases. This petition presents the same questions presented, respectively, in *Jackson* and *Brown*:

> Whether the "serious drug offense" definition in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(A)(ii), incorporates the federal drug schedules that were in effect at the time of the federal firearm offense, or the federal drug schedules that were in effect at the time of the prior state drug offense, and
>
> Which version of federal law should a sentencing court consult under ACCA's categorical approach?

See Petition for a Writ of Certiorari at i, *Jackson v. United States*, No. 22-6640, and Petition for a Writ of Certiorari at ii, *Brown v. United States*, No. 22-6389.[1]

2. Whether a sentencing judge may rely on non-elemental facts to conclude that a defendant's prior offenses were "committed on occasions different from one another" and impose the mandatory-minimum prison term under ACCA, § 924(e)(1), or whether such facts must be charged in an indictment and proven to a jury beyond a reasonable doubt?

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[1] This petition also presents the Solicitor General's restatement of the questions:

> Whether the classification of a prior state conviction as a "serious drug offense" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(A)(ii), depends on the federal controlled-substance schedules in effect at the time of the defendant's prior state crime, the time of the federal offense for which he is being sentenced, or the time of his federal sentencing.

Brief for the United States at i, *Jackson v. United States*, No. 22-6640; *see also* Brief for the United States at i, *Brown v. United States*, No. 22-6389 (addressing "the federal controlled-substance schedules in effect at the time of a defendant's federal sentencing").

RELATED PROCEEDINGS

This case arises from the following proceedings:

United States v. McCall, No. 6:18-cr-120-GAP-KRS (M.D. Fla. Dec. 4, 2018);

United States v. McCall, No. 18-15229 (11th Cir. Feb. 21, 2023).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daniel McCall respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion is unpublished, 2023 WL 2128304, and is provided in the Petition Appendix (Pet. App.).

JURISDICTION

The Eleventh Circuit issued its opinion on February 21, 2023. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment (U.S. Const. amend. V) provides:

> 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.

The Sixth Amendment (U.S. Const. amend. VI) provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . and to be informed of the nature and cause of the accusation . . . .

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), provides in relevant part:

> (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 person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

. . .

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law. . . .

INTRODUCTION

This Court has granted certiorari to resolve whether ACCA's definition of a "serious drug offense," § 924(e)(2)(A)(ii), incorporates the federal drug schedules in effect at the time of (i) the federal firearm offense, (ii) the federal sentencing, or (iii) the prior state drug offense. *See* Petition for a Writ of Certiorari at i, 14-40, *Jackson v. United States*, No. 22-6640 ("*Jackson* Pet."); Petition for a Writ of Certiorari at ii, 8-23, *Brown v. United States*, No. 22-6389 ("*Brown* Pet."). Because this Court's decisions in *Jackson* and *Brown* may resolve Mr. McCall's ineligibility for his ACCA sentence, he respectfully asks this Court to hold his petition pending its decisions in those cases.

Mr. McCall's petition also presents the constitutional question of whether a jury, rather than the sentencing judge, must find that a defendant's prior state offenses were "committed on occasions different from one another" under ACCA, § 924(e)(1) (the "occasions clause"). Following *Wooden v. United States*, 142 S. Ct. 1063 (2022), the Solicitor General has agreed that the Sixth Amendment jury right applies to ACCA's occasions clause. Mr. McCall accordingly requests this Court's review on this important question.

STATEMENT OF THE CASE

1. Mr. McCall entered a guilty plea to one count of possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Docs. 56, 66.[2] Mr. McCall's firearm possession allegedly occurred in November 2017. Docs. 1, 56.

The district court sentenced Mr. McCall to ACCA's 15-year mandatory-minimum penalty. Doc. 56 at 1-2.[3] Mr. McCall's ACCA sentence is based on four Florida convictions: (i) sale of cocaine (allegedly committed "on or about" May 13, 1991); (ii) sale of cocaine (allegedly committed "on or about" May 15, 1991); (iii) aggravated assault (allegedly committed in 1996); and (iv) possession with intent to sell/deliver a controlled substance (cocaine) (allegedly committed in 1998). Doc. 40 (PSR) ¶ 22; *id.* at pp. 25-59.

Before the district court, Mr. McCall objected that the 1991 cocaine offenses are not ACCA "serious drug offense[s]" and the aggravated-assault conviction is not an ACCA "violent felony." Doc. 40 (PSR) at 122-24; Doc. 70 at 9-10, 15. The district court overruled Mr. McCall's objections. Doc. 70 at 10, 15.

Mr. McCall also objected, on Sixth Amendment grounds, to the reliance on non-elemental facts to determine whether his prior offenses were "committed on occasions different from one another." Doc. 40 (PSR) at p. 124 (citing *Descamps v. United States*, 570 U.S. 254 (2013)). Because the alleged date of the offense is not an element under Florida law, Mr. McCall argued the government could not establish that the 1991 cocaine offenses were committed on different occasions. *Id.*; Doc. 70 at 10-12. Mr. McCall further contended that (i) he had been arrested for

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[2] Mr. McCall cites the docket entries in Case No. 6:18-cr-120-GAP-KRS (M.D. Fla).

[3] Without ACCA, the statutory maximum would have been 10 years in prison. 18 U.S.C. § 924(a)(2) (2017) (applicable to Mr. McCall).

the two 1991 offenses on the same day, and (ii) had been sentenced on the same day, "which strongly suggest[ed] these offenses occurred on the same occasion." Doc. 40 (PSR) at p. 124.

In response to Mr. McCall's objection, the government and district court relied solely on the charging documents, which alleged that Mr. McCall sold or delivered cocaine "on or about" May 13, 1991, and "on or about" May 15, 1991. Doc. 50 at 7; Doc. 70 at 12-14; Doc. 40 (PSR) at pp. 25, 30. The charging documents thus alleged approximate dates. Mr. McCall entered *nolo contendere* pleas to these offenses. Doc. 40 (PSR) at pp. 26, 31.

2. On appeal to the Eleventh Circuit, Mr. McCall renewed his challenges to his ACCA sentence. *See* App. Doc. 19 at 1, 8-28.[4] While Mr. McCall's appeal was pending, this Court decided *Wooden*, its first decision interpreting ACCA's occasions clause, and the Eleventh Circuit decided that pre-July 2017 Florida cocaine offenses are not ACCA "serious drug offense[s]," *United States v. Jackson*, 36 F.4th 1294 (11th Cir. June 10, 2022) (*Jackson I*). Mr. McCall filed an unopposed motion to file a supplemental brief addressing both *Wooden* and *Jackson I*. App. Doc. 94. The Eleventh Circuit granted Mr. McCall's motion in part, permitting him to file a supplemental letter brief as to *Wooden*. App. Doc. 95.

In his supplemental letter brief, Mr. McCall maintained his Sixth Amendment-based challenges to the district court's reliance on non-elemental facts to increase his sentence under ACCA, and contended that each of ACCA's requirements, including whether the offenses were committed on different occasions, had to be charged in the indictment and proven to a jury beyond a reasonable doubt. App. Doc. 96 at 9-10. Mr. McCall further argued that the appropriate course was a remand for application of the Court's multi-factor standard in the first instance. *Id.* at 1-9. Finally, acknowledging the appellate court had not permitted supplemental briefing on *Jackson I*,

[4] Mr. McCall cites the appellate docket entries in No. 18-15229 (11th Cir.).

Mr. McCall reiterated that *Jackson I* resolved that his three Florida cocaine convictions do not qualify as ACCA predicates. *Id.* at 8 & n.5.

The Eleventh Circuit thereafter vacated its decision in *Jackson I* and issued a revised decision. *See United States v. Jackson*, 55 F.4th 846 (11th Cir. Dec. 13, 2022) (*Jackson II*). In *Jackson II*, the Eleventh Circuit held that pre-July 2017 Florida cocaine convictions qualify as ACCA predicates. *Id.* at 850-51, 861 & n.3.

On February 21, 2023, the Eleventh Circuit affirmed Mr. McCall's ACCA sentence. Pet. App. 5a-8a. This Court granted certiorari in *Jackson* (and *Brown*) on May 15, 2023, the same day as Mr. McCall's rehearing deadline. App. Doc. 106. Because the serious-drug-offense question is now pending before this Court and may resolve Mr. McCall's ineligibility for his ACCA sentence, Mr. McCall respectfully petitions this Court.

REASONS FOR GRANTING THE PETITION

I. Mr. McCall respectfully asks this Court to hold his petition pending the decisions in *Jackson*, No. 22-6640 and *Brown*, No. 22-6389

This Court has granted certiorari to resolve the circuit split on whether ACCA's definition of a "serious drug offense," § 924(e)(2)(A)(ii), incorporates the federal drug schedules in effect at the time of (i) the federal firearm offense, (ii) the federal sentencing, or (iii) the prior state drug offense. *See Jackson* Pet. i, 14-40; *Brown* Pet. ii, 8-23. The Eleventh Circuit is the lone circuit to hold that ACCA incorporates the federal drug schedules in effect at the time of the prior state drug offense. *Compare Jackson II*, 55 F.4th at 855, *with United States v. Brown*, 47 F.4th 147, 153 (3d Cir. 2022), *cert. granted*, No. 22-6389 (May 15, 2023); *United States v. Hope*, 28 F.4th 487, 504-05 (4th Cir. 2022); *United States v. Perez*, 46 F.4th 691, 699-700 (8th Cir. 2022); *and United States v. Williams*, 48 F.4th 1125, 1139-44 (10th Cir. 2022).

Mr. McCall respectfully maintains that the Eleventh Circuit's decision is incorrect and that, applying the federal drug schedules in effect at the time of his federal firearm offense or federal sentencing, his three pre-July 2017 Florida cocaine offenses are not ACCA "serious drug offense[s]." *See Jackson I*, 36 F.4th at 1299-1304. Because this Court's decisions in *Jackson* and *Brown* may resolve his ineligibility for ACCA, Mr. McCall respectfully asks the Court to hold his petition pending its decisions in *Jackson* and *Brown*. *See, e.g., Conage v. United States*, No. 22-6719; *Jones v. United States*, No. 22-6683.

II. This Court's review is needed to resolve the constitutional question presented following this Court's decision in *Wooden*

In *Wooden*, this Court interpreted ACCA's occasions clause to require a consideration of multiple factors, including the timing, location, and the character and relationship of the prior offenses. 142 S. Ct. at 1070-71. Because the Petitioner in *Wooden* had not presented a Sixth Amendment question, the Court did not address it. *Id.* at 1068 n.3. But as Justice Gorsuch observed, "[a] constitutional question simmers beneath the surface." *Id.* at 1087 n.7 (Gorsuch, J., concurring in the judgment).

This Court has held that the Fifth and Sixth Amendments require that any fact, other than the "fact of a defendant's prior conviction," that increases the statutory mandatory-minimum or maximum penalty is an "element" that must be charged in an indictment and proven to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 103 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). This Court has described the "fact of a defendant's prior conviction" as a "narrow" exception to this constitutional requirement. *See United States v. Haymond,* 139 S. Ct. 2369, 2377 n.3 (2019) (plurality) (citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)); *Apprendi*, 530 U.S. at 490.

A determination of whether a defendant's prior offenses were committed on different occasions, however, requires a consideration of facts that exceeds the mere "fact of a prior conviction." Indeed, after *Wooden*, the government has agreed that the Sixth Amendment jury right applies to the occasion's clause determination. As the government has acknowledged, the "different-occasions inquiry. . . goes beyond the 'simple fact of a prior conviction'" and therefore does not fall within the "narrow exception" to the constitutional rule. Gov't Br. Opp. 4-8, *Daniels v. United States*, No. 22-5102. The government has further agreed that this constitutional question is "important and frequently recurring" and "may eventually warrant this Court's review in an appropriate case." Gov't Br. Opp. 4, *Daniels v. United States*, No. 22-5102; Gov't Br. Opp. 6, *Reed v. United States*, No. 22-336. Mr. McCall therefore respectfully requests this Court's review.

In the decision below, the Eleventh Circuit applied *Wooden* to Mr. McCall's case in the first instance, affirming based on its own judicial determination and under a lower preponderance-of-evidence standard that Mr. McCall's two 1991 cocaine offenses were committed on occasions different from one another. Pet. App. 16a-20a. To reach this conclusion, the Eleventh Circuit relied on non-elemental "facts"—i.e., that Mr. McCall was charged in two informations (charging documents) with cocaine offenses allegedly occurring "on or about" May 13, 1991, and "on or about" May 15, 1991. *Id.* at 19a-20a; *see Tingley v. Florida*, 549 So. 2d 649, 650-51 (Fla. 1989) (holding that the date "is not a substantive element" of the offense and therefore "there may be a variance" between the date alleged and proved at trial). Mr. McCall entered *nolo contendere* pleas to these offenses. Doc. 40 (PSR) at pp. 26, 31; *see United States v. Diaz-Calderone*, 716 F.3d 1345, 1351 & n.31 (11th Cir. 2013) (quoting *Vinson v. State*, 345 So. 2d 711, 715 (Fla. 1977)).

Mr. McCall's case thus presents the constitutional question arising after *Wooden*. As Mr. McCall contended below, the non-elemental dates alleged in the charging documents are not reliable and should not have been used to increase his statutory penalties. App. Doc. 19 at 17-22; App. Doc. 96 at 5-6, 9 & n.2. The Eleventh Circuit nonetheless relied on the non-elemental dates alleged in the state charging documents to conclude that Mr. McCall's offenses "were discrete drug transactions that occurred on different days," which "indicates that the offenses occurred on different occasions." Pet. App. 17a; *see id.* at 18a ("McCall's offenses were separate drug transactions that took place days apart."). But, as this Court has explained, that is "the constitutional rub. The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts [as to the underlying conduct], unanimously and beyond a reasonable doubt." *Descamps*, 570 U.S. at 270; *accord Mathis v. United States*, 579 U.S. 500, 511 (2016) ("[A] judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. . . . He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.").

Mr. McCall accordingly maintains that the Eleventh Circuit erred in affirming the different-occasions determination. Whether Mr. McCall's prior offenses were "committed on occasions different from one another" was not charged in his indictment or proven to a jury beyond a reasonable doubt. *See* Docs. 1, 70. Moreover, it is the government that bore the burden under ACCA, but it did not meet this burden here. *See Pereida v. Wilkinson*, 141 S. Ct. 754, 765 (2021) (emphasizing that the government bears the burden under ACCA).[5] Finally, a jury could have

[5] The Eleventh Circuit states that Mr. McCall "didn't present the district court with any evidence" that was "contrary" to the government's evidence (the non-elemental dates alleged in the charging documents). Pet. App. 17a. But Mr. McCall put the government to its burden of proof. *See* Doc. 40 (PSR) at p. 124; Doc. 70 at 10-11; App. Doc. 96 at 5, 7. Thus, any

rightly concluded that Mr. McCall's prior offenses—two allegedly close-in-time sales made to the same undercover officer for which Mr. McCall was arrested on the same day (and later sentenced on the same day)—were not committed on different occasions.[6] Mr. McCall therefore respectfully requests this Court's review on this constitutional question.

CONCLUSION

For the foregoing reasons, Mr. McCall respectfully requests that this Court hold his petition pending the Court's decisions in *Jackson*, No. 22-6640, and *Brown*, No. 22-6389. Alternatively, Mr. McCall respectfully requests that the Court grant his petition.

Respectfully submitted,

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"evidentiary gaps" to which the Eleventh Circuit points, *see* Pet. App. 16a-20a, "work against the government." *Pereida*, 141 S. Ct. at 766.

[6] Indeed, a jury concluded the government had failed to prove that two drug offenses, for which the defendant was convicted in two different counties and in different months (June and October 2013), were committed on different occasions. *See* Verdict (Doc. 173), *United States v. Pennington*, No. 1:19-cr-455-WMR (N.D. Ga. Sept. 20, 2022).