No. _____

IN THE
Supreme Court of the United States

DAMON L. BUFORD,
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

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

QUESTIONS PRESENTED

The Eighth Circuit, sitting en banc in *United States* v. *Stowell*, recently heard oral argument to determine whether to overrule its decisional law, like *United States* v. *Buford*, 54 F.4th 1066 (2022), which affirmed Mr. Buford's Armed Career Criminal Act sentence. In *Stowell*, the government conceded the Eighth Circuit was improperly analyzing the occasions clause of the ACCA after this Court's decision in *Wooden* v. *United States*, 142 S.Ct. 1063 (2022). Based on this procedural posture, the questions presented are:

I. Whether a defendant's Armed Career Criminal Act sentence may be affirmed when the lower court fails to properly apply this Court's occasions clause test in *Wooden* v. *United States,* 142 S.Ct. 1063 (2022)?

II. Whether a mandatory minimum sentence under the Armed Career Criminal Act, based on improper judicial factfinding regarding the occasions clause in violation of the Fifth and Sixth Amendments, ordinarily constitutes plain error?

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The Eighth Circuit concluded that Mr. Buford had at least "three qualifying predicate offenses" under the ACCA. But approximately two weeks later, the Eighth Circuit held that all four of Mr. Buford's predicate convictions under §195.211 (RSMo) for a sale of cocaine no longer qualify as a "serious drug offense" because Missouri's definition of cocaine is overbroad. *See United States* v. *Myers*, 56 F.4th 595 (8th Cir. 2022). The government has since conceded in *three* other appeals that an indistinguishable ACCA error warranted plain error relief, and the Eighth Circuit accordingly vacated those ACCA sentences. There can be no dispute that under the binding precedent of *Myers*, if Mr. Buford were sentenced today, he would not qualify as an ACCA offender. The question presented is:

III. Whether a defendant's Armed Criminal Act sentence may be affirmed when the lower court failed to apply its own decisional law that definitively and conclusively proved that the defendant is ineligible for the ACCA enhancement?

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PETITION FOR A WRIT OF CERTIORARI

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

OPINION BELOW

The opinion of the court of appeals is reported at 54 F.4th 1066 (8th Cir. 2022). App. 1a- 5a.

JURISDICTION

The decision of the Court of Appeals affirming the district court's judgment and sentence was entered on December 13, 2022. The court denied a timely petition for rehearing on February 8, 2023. App. 6a. On April 21, 2023, Justice Kavanaugh extended the time for filing a petition for writ of certiorari until July 7, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTIUTIONAL AND 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 * * *, 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 person shall be fined under this title and imprisoned not less than fifteen years.

INTRODUCTION

The Armed Career Criminal Act ("ACCA") increases the penalty range for a person convicted of violating 18 U.S.C. § 922(g)(1) only if the person previously committed at least three ACCA-qualifying offenses "on occasions different from one another." 18 U.S.C. § 924(e). In *Wooden* v. *United States*, 142 S.Ct. 1063 (2022), this Court clarified how lower courts must apply the ACCA's occasions clause test before imposing an enhanced sentence under the statute.

After *Wooden*, there are two reasons why petitioner's ACCA sentence cannot be affirmed. *First*, *Wooden* overruled the applicable occasions clause test in the Eighth Circuit (and in other circuits), with this Court now mandating a "holistic"

and "multi-factored in nature" test. *Wooden*, 142 S.Ct. at 1068-1071. But in affirming petitioner's sentence, the Eighth Circuit reviewed only one sentence of this Court's holding in *Wooden*, and thus failed to apply the proper *Wooden* test.

Second, in *Wooden*, this Court reserved the issue of "whether the Sixth Amendment requires that a jury, rather than a judge, resolve whether prior crimes occurred on a single occasion." 142 S.Ct. at 1068, at fn. 3. After the government conceded that judge-based ACCA sentencing is unconstitutional, the Eighth Circuit is on the brink of becoming the first circuit court to hold that such sentencing is unconstitutional in *United States* v. *Stowell*, No. 21-2234. If it reaches that holding, this Court should remand this case for reconsideration based on that decision.

Alternatively, if the Eighth Circuit holds that judge-based ACCA occasion clause sentencing remains constitutional, this Court should grant certiorari, because the merits of this issue will then be ripe for this Court's resolution after the Eighth Circuit's en banc decision in *Stowell*. Mr. Buford's petition for certiorari presents a related issue to the one being considered en banc by the Eighth Circuit in *Stowell*: how courts should resolve the constitutional issue on plain error review.

This Court should hold that an ACCA sentence, imposed in violation of the Fifth and Sixth Amendments based on improper judicial factfinding regarding the occasions clause, ordinarily constitutes plain error. Unconstitutionally increasing a defendant's sentence from a maximum of ten years — to 15 years to life — creates both "a reasonable probability of a different outcome absent the error", and demonstrates that the error had serious effect on "the fairness, integrity or public

reputation of judicial proceedings." *Rosales-Mireles* v. *United States*, 138 S.Ct. 1897, 1908 (2018). Plain error in the context of ACCA sentencing is even more troubling than Guidelines error because the ACCA implicates mandatory minimum sentences, which sentencing courts have no discretion but to follow.

A final reason exists to grant certiorari in this case: there can be no dispute that under binding Eighth Circuit precedent, if Mr. Buford were sentenced today, he would not qualify as an ACCA offender. Approximately two weeks after his appeal was denied, the Eighth Circuit held that all four of Mr. Buford's predicate convictions under §195.211 (RSMo) for a sale of cocaine no longer qualify as a "serious drug offense" because Missouri's definition of cocaine is overbroad. *See United States* v. *Myers*, 56 F.4th 595 (8th Cir. 2022). Since *Myers* was handed down, the government has conceded, in at least three appeals, that the defendant's ACCA sentence should be vacated on plain error review. There is no apparent reason why the government would take a different position in petitioner's case.

STATEMENT

1. Mr. Buford was indicted on August 7, 2019, for being a felon in possession of a firearm under 18 U.S.C. §§ 922(g)(1) and 924(e). App. 7a. The indictment alleged no facts regarding his prior convictions, other than that "he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year." *Id.* Specifically, the indictment did not allege whether he had prior convictions that were a "violent felony" or a "serious drug offense" under the Armed

Career Criminal Act, nor did it allege these offenses were committed on occasions different from one another. *Id.*

Subsequently, Mr. Buford pled guilty to the sole count in the indictment. A pre-sentence report was prepared, which alleged that the district court had to sentence Mr. Buford to no less than 15 years in prison, and up to life, under the Armed Career Criminal Act. App. 2a; *see also* App. 8a- 11a. In concluding that Mr. Buford was ACCA eligible, the PSR detailed that he had been convicted four times of sale of a controlled substance under Missouri law, §195.211 (RSMo), which it alleged was a "serious drug offense." App. 7a- 10a, paragraphs 18, 26, and 29.

Specifically, those convictions were from two different cases in Missouri. In the first case, the PSR alleged that "on or about February 21, 1996" Mr. Buford sold crack cocaine to an undercover officer in CR96-71029. App. 10a; *see also* App 2a. In the second case, the PSR alleged that Mr. Buford sold less than a gram of crack cocaine to "a detective * * * on or about April 27, 1998", "on or about April 28, 1998", and "on or about May 6, 1998" in CR98-04022. App. 11a- App. 12a; *see also* App. 2a.

Prior to the sentencing hearing, Mr. Buford objected to the PSR's recommendation of an ACCA enhanced sentence, arguing that his convictions for sale of controlled substance (cocaine) should not be qualifying predicate convictions. App.16a. At the sentencing hearing on January 6, 2021, Mr. Buford continued to object to the ACCA enhancement because "I would have to have at least three priors * * * in order to be an armed career criminal" and "those three priors would come from three convictions." App. 16a. Mr. Buford further objected that "I was arrested

one time and interviewed one time. I was never arrested after each sale. I was picked up on those sales one time and one time only." App. 17a.

The district court overruled the ACCA objection. App. 17a. At the sentencing hearing, despite Mr. Buford's ACCA objection, the government submitted no evidence before the district court regarding the prior convictions to prove that an ACCA sentence was proper.

Ultimately, the district court concluded that Mr. Buford was an Armed Career Criminal, and faced a mandatory minimum sentence of 180 months' imprisonment. The sentencing judge concluded that he "really [has] no authority over the sentence." App. 21a; *see also* App. 17a- 18a. The court sentenced Mr. Buford to the mandatory minimum sentence of 180 months' imprisonment.

2. Before the Eighth Circuit, Mr. Buford argued that his ACCA sentence was improper because the district court erred in concluding that his prior convictions occurred on separate occasions. While the appeal was pending, this Court decided *Wooden*, and Mr. Buford filed a supplemental brief explaining why he was entitled to relief after *Wooden*. In his supplemental brief, Mr. Buford raised an argument for the first time: that his ACCA sentence was improper because judicial factfinding of the occasions clause violated his constitutional rights under the Sixth Amendment.

In affirming petitioner's ACCA sentence, the Eighth Circuit held that the district court did not error in concluding that his prior drug convictions all were committed on separate occasions, notwithstanding that it "entailed selling substantially similar amounts of cocaine to the same undercover officer during a

ten-day period, with two of the sales on consecutive days." App.3a. To conclude that, the Eighth Circuit relied heavily on its case law that pre-dated *Wooden*. App. 3a-App. 4a., citing *United States* v. *McDaniel*, 925 F.3d 381, 387 (2019). The court's analysis of the multi-factored test announced by this Court garnered only one sentence of analysis: "In many cases, a single factor—especially of time or place—can decisively differentiate occasions." App. 3a., quoting *Wooden*, 142 S. Ct. at 1071.

The Eighth Circuit also rejected Mr. Buford's argument that under the ACCA the Sixth Amendment requires facts related to sentencing to be found by a jury. App.5a. Because he failed to raise it below, the Eighth Circuit reviewed for plain error, and concluded lower the court had not plainly erred based on existing Eighth Circuit case law, and because "*Wooden* is not intervening precedent." *Id*.

REASONS FOR GRANTING THE PETITION

I. Whether a defendant's Armed Career Criminal Act sentence may be affirmed when the lower court fails to properly apply this Court's occasions clause test in *Wooden v. United States,* 142 S.Ct. 1063 (2022)?

The Eighth Circuit erred in affirming petitioner's ACCA sentence because its analysis relied almost exclusively on Eighth Circuit case law that pre-dated *Wooden,* and failed to apply the "holistic" and "multi-factored in nature" test mandated by this Court in *Wooden*, 142 S.Ct. at 1068-1071.

In *Wooden,* this Court resolved a circuit split regarding the proper test for determining whether predicate offenses were committed on different occasions for purposes of the ACCA. 142 S.Ct. at 1068. In doing so, this Court overruled lower courts, like the Eighth Circuit, that improperly applied the test in concluding that "the clause [was] satisfied whenever crimes take place at different moments in time – that is, sequentially rather than simultaneously." *Wooden*, 142 S.Ct. at 1068, overruling *United States* v. *Abbott*, 794 F.3d 896, 898 (8th Cir. 2015).

The government advocated in *Wooden* an elements-based approach to determining whether two offenses occurred on different occasions, which it viewed as consistent with judicial determination of a defendant's ACCA qualification. *Id.* at 1069, 1071. This Court rejected that approach, explaining that "a range of circumstances may be relevant to identifying" whether offenses were committed on separate occasions, such as the "[t]iming" of the offenses, "[p]roximity of location," "the character and relationship of the offenses," and whether the offenses "share a common scheme or purpose." *Id.* at 1070-1071.

But in affirming Mr. Buford's ACCA sentence, the Eighth Circuit failed to apply this Court's "holistic" and "multi-factored in nature" test. Rather, it focused exclusively on the timing of the offenses, because Mr. Buford's "2018 offenses entailed selling substantially similar amounts of cocaine to the same undercover officer during a ten-day period, with two of the sales on consecutive days." App.3a. Thus, the Eighth Circuit placed dispositive reliance on one sentence from this Court's opinion *Wooden*: "In many cases, a single factor—especially of time or place—can decisively differentiate occasions." App.3a.

The Eighth Circuit's opinion must be vacated because it "simply misreads" *Wooden*. *See Hughes Aircraft Co.* v. *U.S. ex rel. Schumer,* 520 U.S. 939, 950 (1997). "The ordinary meaning of the word 'occasion'—essentially an episode or event—refutes the Government's *single-minded* focus on whether a crime's elements were established at a discrete moment in time." *Wooden*, 142 S.Ct at 1069 (emphasis added). "[M]ultiple crimes may occur on one occasion even if not at the same moment." *Id*. Indeed, one of this Court's examples in *Wooden*, "the occasion of a wedding", occurs over a significant period of time yet still is "part of a single event", spanning over a day or more to hold "a ceremony, cocktail hour, dinner, and dancing." *Id*. at 1069.

The Eighth Circuit assumed, without analyzing *Wooden*'s multi-factored test, that the sale of drugs to the "same undercover officer during a ten-day period, with two of the sales on consecutive days" amounted to separate occasions. App.3a. But

the lower court failed to address why this did not amount to what *Wooden* called "a continuous stream of closely related criminal acts at one location." *Id*. at 1071.

Rather, the Eighth Circuit simply relied on its pre-*Wooden* case law that "convictions for separate drug transactions on separate days qualify as multiple ACCA predicate offenses, even if the transactions were sales to the same victim or informant." App.3a- 4a, citing *McDaniel*, 925 F.3d at 387. But this simplistic analysis engages in exactly what this Court prohibited in *Wooden*: a "*single-minded* focus on whether a crime's elements were established at a discrete moment in time." 142 S.Ct. at 1069 (emphasis added). The test applied by the Eighth Circuit contradicts *Wooden*, and thus must be vacated by this Court to ensure the Eighth Circuit (and other circuits) do not continue to make the same mistake after *Wooden*.

Undercover law enforcement officers often purchase drugs from a suspect during a period of days, waiting to arrest the offender after it has the occasion to make multiple purchases from the same defendant. The practice has been called "sentencing entrapment" because multiple successive buys drive the defendant's sentence higher. *See e.g., United States* v. *Barth*, 990 F.2d 422, 424 (8th Cir. 1993); *United States* v. *Connell*, 960 F.2d 191, 194 (1st Cir. 1992) (characterizing the practice as "sentencing factor manipulation"). This practice can have a tremendous impact on a defendant's federal sentence, because *by itself* it can cause the individual to be subject to an ACCA sentence based on one investigation.

After *Wooden*, this Court granted the petition for certiorari in *Williams* v. *United States*, and remanded to the Eighth Circuit "for further consideration in

light of *Wooden*." *Williams* v. *United States*, 142 S. Ct. 1439 (2022). *Williams* raised a similar question to the one presented here — whether an ACCA sentence may be affirmed when the basis for the ACCA sentence is when "[u]ndercover law enforcement officers purchase multiple user amounts of a controlled substance from a suspect during a short time period." *Williams* petition for certiorari, pg. 10.

Like *Williams*, this Court should summarily reverse based on *Wooden*.[1]

II. Whether a mandatory minimum sentence under the Armed Career Criminal Act, based on improper judicial factfinding regarding the occasions clause and imposed in violation of the Fifth and Sixth Amendments, ordinarily constitutes plain error?

Petitioner's case also presents an important and reoccurring question of ACCA law reserved by this Court in *Wooden*: "whether the Sixth Amendment requires that a jury, rather than a judge, resolve whether prior crimes occurred on a single occasion." 142 S.Ct. at 1068, fn 3.

A. <u>This Court should hold this petition for certiorari in abeyance until the Eighth Circuit completes its en banc review of this issue.</u>

On April 11, 2023, the Eighth Circuit heard en banc oral arguments on this Sixth Amendment issue reserved by this Court in *Wooden*, and whether its prior case law "conflicts with *Wooden*." *United States* v. *Stowell*, 21-2234, judge order, issued February 23, 2023. In *Stowell*, the government conceded "the Sixth

[1] On May 19, 2023, the government filed a motion to remand Mr. William's appeal for resentencing without the ACCA sentence based on a different ACCA issue — because the "Missouri cocaine convictions no longer qualify as ACCA predicates." *See* No. 22-3272, at pg. 2, citing *Myers*, 56 F.4th at 595. This is the same *Myers* issue presented in third Question Presented in this petition for certiorari (*see infra*), which the government has repeatedly conceded warrants plain error relief.

Amendment requires the separate occasions' determination to be made by a jury or admitted by the defendant." *Stowell*, 21-2234, government's supplemental brief, pg. 5 (filed March 22, 2023).

The Eighth Circuit, *en banc,* therefore, may grant the relief sought by Mr. Stowell (and by Mr. Buford) to "overrule its cases holding that a judge may determine whether a defendant's predicate ACCA offenses were committed on different occasions", and instead hold that "this fact must be charged in an indictment, and * * * determined by a jury beyond a reasonable doubt." *Stowell*, 21-2234, appellant's supplemental brief, pg. 22 (filed March 27, 2023).

In Mr. Buford's case, the Eighth Circuit refused to reach the merits of petitioner's argument that his ACCA sentence violated the Sixth Amendment based on its conclusion that "*Wooden* is not intervening precedent because the Court declined to weigh in on the Sixth Amendment question." App. 5a. But that is precisely the issue that the Eighth Circuit is currently reconsidering in *Stowell*.

It is not unusual for this Court to hold a petition for certiorari while it awaits the outcome of other proceedings. *See Diemer* v. *United States*, 17-9378 (holding petition for certiorari on ACCA sentencing issue after parties agreed the question presented was related to an issue pending before this Court). This Court has also held petitions for certiorari pending *en banc* proceedings in the Eighth Circuit, only to grant the petition for certiorari based on the Eighth Circuit's subsequent *en banc* opinion. *See Sykes* v. *United States*, 138 S. Ct. 1544 (2018) (judgment vacated, and case remanded to the Eighth Circuit for further

consideration in light of that court's opinion in *United States* v. *Naylor,* 887 F.3d 397 (CA8 2018)); *see also Brown* v. *United States,* 138 S. Ct. 1545 (2018) (same).

This Court should do the same in this case: hold Mr. Buford's petition for certiorari pending the outcome in *Stowell*, and then remand this case if the Eighth Circuit, *en banc*, holds that judge-based occasions clause findings are no longer constitutional under the occasions clause.

B. Alternatively, if the Eighth Circuit does not alter its ACCA sentencing law, this Court should hear the question presented on its merits.

If the Eighth Circuit holds that judge-based ACCA occasions clause sentencing remains constitutional, this Court should grant the petition for certiorari because this constitutional issue will then be ripe for this Court's resolution after the Eighth Circuit's en banc decision in *Stowell*.[2] Mr. Buford's petition for certiorari presents a related issue to the one being considered *en banc* by the Eighth Circuit in *Stowell*: how courts should resolve the constitutional ACCA occasions clause issue on plain error review. This case is an excellent vehicle to decide the question because in affirming Mr. Buford's ACCA sentence, the Eighth Circuit held that the "district court did not plainly err by not having a jury find facts related to Buford's ACCA sentencing." App. 5a.

This Court should hold that a mandatory minimum sentence, based on improper judicial factfinding, ordinarily constitutes plain error. Unconstitutionally

[2] If Mr. Stowell does not prevail before the Eighth Circuit *en banc*, there can be no doubt that he will file a petition for certiorari before this Court on this very issue. Michael Dreeben argued before the *en banc* Eighth Circuit in *Stowell*, and has argued over a hundred cases before this Court.

increasing a defendant's sentence from a maximum of ten years — to 15 years to life — creates both "a reasonable probability of a different outcome absent the error", and demonstrates that the error had a serious effect on "the fairness, integrity or public reputation of judicial proceedings." *Rosales-Mireles* v. *United States*, 138 S.Ct. 1897, 1908 (2018). That conclusion stems directly from this Court's precedents analyzing plain error review when courts miscalculate the Sentencing Guidelines, and how these errors "most often will, be sufficient to show a reasonable probability of a different outcome." *Molina-Martinez* v. *United States*, 136 S.Ct. 1338, 1345 (2016).

This issue is both exceptionally important and reoccurring. Each year, hundreds of federal defendants are subjected to ACCA sentences. See U.S. Sent'g Comm'n, Quick Facts – Felon in Possession of a Firearm 1 (2022) (showing that 260 offenders were sentenced under the ACCA in fiscal year 2021). Numerous defendants have failed to timely object to judicial fact finding under the Fifth and Sixth Amendments, because the government changed its litigating position regarding the constitutionality of judge-based occasions clause sentencing abruptly. And because plain errors in ACCA sentencing will continue to frequently occur in the future, this Court's intervention is necessary.

The happenstance of geography is causing disparate results as to whether these unobjected errors are being corrected. The Eleventh Circuit, like the Eighth Circuit, has held that a defendant categorically "cannot prevail on his belated constitutional challenge because there is no precedent from the Supreme Court or

this Court directly resolving the issue", and thus "[w]hatever the merits of the underlying argument, [the defendant] cannot establish plain error." *United States* v. *Penn*, 63 F.4th 1305, 1318 (11th Cir. 2023). But other circuits, like the Ninth Circuit, are remanding the issue of whether the district court erred in deciding the prior convictions were committed on separate occasions, notwithstanding that the issue "was raised for the first time on appeal." *United States* v. *Man*, No. 21-10241, 2022 WL 17260489, at *2 (9th Cir. Nov. 29, 2022).

Rule 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." To establish eligibility for plain-error relief, a defendant must satisfy three threshold requirements. *Rosales-Mireles*, 585 U.S 138 S.Ct. at 1904–1905. *First*, there must be an error. *Second*, the error must be plain. *Third*, the error must affect "substantial rights," which generally means there must be "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Id.* at 1904–1905. If those three requirements are met, an appellate court may grant relief if it concludes that the error had a serious effect on "the fairness, integrity or public reputation of judicial proceedings." *Id.*

In this case, the government conceded before the Eighth Circuit that the Sixth Amendment requires "a jury to find (or a defendant to admit) that he committed his ACCA-predicate offenses on separate occasions", and that *Wooden* "abrogated . . . precedent holding that [w]hether prior offenses were committed on different occasions is among the recidivism related facts covered by the rule of

Almendarez-Torres.'" Government's Rule 28(j) letter, filed September 21, 2022. Based on the government's concession, Mr. Buford satisfied the first two prongs of the plain error test. Here, the indictment alleged none of the occasions clause facts, and the judge made the factual findings over Mr. Buford's objection as to the ACCA enhancement.

"[A]ny fact," "[o]ther than the fact of a prior conviction, . . . that increases the penalty for a crime beyond the prescribed statutory maximum"—or that increases the mandatory minimum—"must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000); *see Alleyne* v. *United States*, 570 U.S. 99 (2013) (applying *Apprendi* to mandatory minimums). "In federal prosecutions, such facts must also be charged in the indictment." *United States* v. *Cotton*, 535 U.S. 625, 627 (2002).

This Court has recognized only a single exception to its jury-trial protective holding in *Apprendi*: a judge may determine at sentencing *only* the "fact of a prior conviction." *Apprendi*, 530 U.S. at 490; *Alleyne*, 570 U.S. at 103; *Almendarez-Torres* v. *United States*, 523 U.S. 224, 230 (1998). Apart from that narrow exception, the right to a jury trial, with the government bearing the burden of proof beyond a reasonable doubt, attaches to such sentence-enhancing facts.

The ACCA increases the imprisonment range for violating 18 U.S.C. § 922(g) by mandating a fifteen-year prison term and elevating the maximum to life. *See* 18 U.S.C. § 924(e)(1). Here, the ACCA enhancement increased Mr. Buford's sentencing range from a maximum of ten years' imprisonment, to at least fifteen years up to a

life imprisonment. That increase is authorized only if the three prior qualifying felonies were "committed on occasions different from one another." *Id.*

Even before *Wooden*, multiple judges—including a member of the Eighth Circuit—recognized that the ACCA's "occasions different from one another" requirement turns on facts that cannot be determined by ascertaining the elements of the offense from a prior judgment of conviction, so *Apprendi* requires that this issue be resolved by a jury. *See, e.g.*, *United States* v. *Perry*, 908 F.3d 1126, 1134 (8th Cir. 2018) (Stras, J., concurring) (court's treatment of different-occasions issue "is a departure from fundamental Sixth Amendment principles"); *United States* v. *Thompson*, 421 F.3d 278, 294 (4th Cir. 2005) (Wilkins, J., dissenting) (facts "about a crime underlying a prior conviction," including dates, are beyond the "fact of a prior conviction" exception); *see also United States* v. *Dudley*, 5 F.4th 1249, 1275 (11th Cir. 2021) (Newsom, J., dissenting) ("[W]hy doesn't judicial factfinding involving ACCA's different-occasions requirement itself violate the Sixth Amendment?).

The exception to the rule articulated in *Apprendi* for the fact of a prior conviction does not apply to the occasions clause inquiry. Multiple judges have recognized this point. *See*, *e.g.*, *Perry*, 908 F.3d at 1135 (Stras, J., concurring) (noting that "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"). *Almendarez-Torres* held that a court (rather than a jury) may find the *fact* of a prior conviction. 523 U.S. at 226. But this exception is limited: it reaches only the fact of the conviction itself and the elements of the offense. *See*

Mathis v. *United States*, 579 U.S. 500, 511-12 (2016). A judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Id.* (citing *Apprendi*, 530 U.S. at 490).

The error in this case was also plain because, as highlighted above, numerous judges have warned that prior Supreme Court case law mandated this conclusion. Nearly five years ago, Judge Stras concluded in the Eighth Circuit that "[w]e have missed more than a few bread crumbs leading away" because "[t]he Supreme Court has all but announced that an expansive view of the prior-conviction exception is inconsistent with the Sixth Amendment." *Perry,* 908 F.3d at 1135.

Finally, the error, increasing Mr. Buford's sentence from a maximum of ten years — to 15 years to life — creates both "a reasonable probability that, but for the error, the outcome of the proceeding would have been different", and demonstrates that the error had a serious effect on "the fairness, integrity or public reputation of judicial proceedings." *Rosales-Mireles*, 138 S.Ct. at 1908. That conclusion flows directly from this Court's precedents. Although the Guidelines are only advisory, this Court held that a Guidelines error ordinarily constitutes plain error, and "the risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error." *Rosales-Mireles*, 138 S. Ct. at 1907–08.

Plain error in the context of the ACCA is even more troubling than Guidelines error, because courts must sentence defendants to ACCA mandatory minimum sentences. Justice Scalia concluded that "condemn[ing] someone to prison

for 15 years to life does not comport with the Constitution's guarantee of due process." *Johnson* v. *United States*, 576 U.S. 591, 602 (2015). Thus, improper ACCA sentences ordinarily warrant plain error correction.

The Sixth Amendment right here is not just an abstraction — the designation of a defendant under the ACCA has a profound impact on the applicable sentencing range. The average sentence for offenders convicted of violating § 922(g) but not sentenced under the ACCA was 55 months. U.S. Sent'g Comm'n, Quick Facts – Felon in Possession of a Firearm FY 2021, at 2. By contrast, the average sentence for offenders convicted of violating § 922(g) and sentenced under the ACCA was 186 months—over a decade longer. *Id.*

Petitioner's case is an excellent example of why these types of plain errors should not go uncorrected because they are outcome determinative at sentencing. Mr. Buford was sentenced to 15 years' imprisonment, because the court believed it had to sentence him to the ACCA mandatory minimum. App. 17a- 18a, 21a. Without the ACCA enhancement, Mr. Buford's guidelines range would have changed dramatically from a mandatory minimum of 180 months' imprisonment to 37 to 46 months' imprisonment. But for the happenstance of geography, petitioner's sentence would have received a different type of plain error review, which would have permitted him to be resentenced without the ACCA enhancement.

III. Whether a defendant's Armed Criminal Act sentence may be affirmed when the lower court failed to apply its own decisional law that definitively and conclusively proved that the defendant is ineligible for the ACCA enhancement?

The petition for certiorari should be granted because, under binding Eighth Circuit precedent, if Mr. Buford were sentenced today he would not qualify as an ACCA offender. About two weeks after his appeal was decided, the Eighth Circuit held that convictions under §195.211 (RSMo) for a sale of cocaine no longer qualify as a "serious drug offense" because Missouri's definition of cocaine is overbroad. *See United States* v. *Myers*, 56 F.4th 595 (8th Cir. 2022). Thus, *none* of Mr. Buford's prior convictions qualify as a "serious drug offense", or a "violent felony."

The "ACCA kicks in only if (1) a § 922(g) offender has previously been convicted of three violent felonies [or serious drug offenses], and (2) those three felonies were committed on 'occasions different from one another.'" *Wooden*, 142 S. Ct. at 1070. "In other words, the statute contains *both* a three-offense requirement *and* a three-occasion requirement." *Id*. (emphasis original). Mr. Buford has no prior convictions that qualify as a "violent felony" or "serious drug offense." Thus, he was improperly sentenced to an ACCA sentence.

The government has since conceded *three times* before the Eighth Circuit that the sentencing court's error in this regard constituted plain error, and the ACCA sentence should be vacated. *See United States* v. *Herbert*, No. 22-3188, *Government's Motion To Remand For Resentencing,* filed March 15, 2023 (requesting remand because prior conviction under §195.211 (RSMo) was not a "serious drug offense" after *Myers*); *United States* v. *Woods*, No. 20-2580, *Joint*

Motion For Remand, filed April 5, 2023 (requesting remand because prior convictions under §195.211 (RSMo) were not a "serious drug offense" after *Myers*); *United States* v. *Williams*, No. 22-3272, *Joint Motion For Remand*, filed May 19, 2023 ("following *Myers*, Williams's Missouri cocaine conviction no longer qualify as ACCA predicates"). Based on these concessions, the Eighth Circuit has vacated those ACCA convictions and remanded for resentencing. *See Herbert*, No, 22-3188, judgment (May 10, 2023); *Woods*, 20-2580, judgment (April 20, 2023).

Previously, this Court has summarily remanded based on an Eighth Circuit case. See, for example, *Brown* v. *United States*, 138 S.Ct. 1545 (2018), remanding for further consideration on light of *United States* v. *Naylor*, 887 F.3d 397 (8th Cir. 2018); see also *Sykes* v. *United States*, 138 S.Ct. 15544 (2018) (same). Like in *Brown* and in *Sykes*, the petition for certiorari should be summarily granted, and the matter remanded to the Eighth Circuit for reconsideration based on *Myers*.

CONCLUSION AND PRAYER FOR RELIEF

The petition for certiorari should be granted.

Respectfully submitted.

LAINE CARDARELLA
Federal Public Defender
DANIEL P. GOLDBERG
Assistant Federal Public Defender
Counsel of Record
OFFICE OF THE FEDERAL PUBLIC DEFENDER
Western District of Missouri
1000 Walnut, Suite 600
Kansas City, Missouri 64106
Dan_Goldberg@fd.org
(816) 471-8282