No. 22-7660

IN THE SUPREME COURT OF THE UNITED STATES

DAMON L. BUFORD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the lower courts erred in determining that petitioner's predicate offenses, which occurred on different days, took place on "occasions different from one another" for purposes of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1).

2. Whether the district court plainly erred in not submitting the different-occasions question to a jury.

3. Whether this Court should vacate the decision below and remand because, after the court of appeals resolved petitioner's appeal, the court issued a decision in a separate case that may be favorable to petitioner, where petitioner did not raise the issue until his petition for rehearing en banc, and the court never addressed it in petitioner's case.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Mo.):

United States v. Buford, No. 19-cr-264 (Jan. 6, 2021)

United States Court of Appeals (8th Cir.):

United States v. Buford, No. 21-1050 (Dec. 13, 2022)

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OPINION BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on December 13, 2022. A petition for rehearing was denied on February 8, 2023 (Pet. App. 6a). On April 21, 2023, Justice Kavanaugh extended the time in which to file a petition for a writ of certiorari to and including July 7, 2023. The petition for a writ of certiorari was filed on May 25, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Missouri, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Judgment 1. Petitioner was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-5a.

1. In July 2019, police officers in Kansas City, Missouri, responded to a report of a vehicular hit and run. Presentence Investigation Report (PSR) ¶ 2. The reporting individual informed the police that the suspect remained in his car and appeared "dazed." Ibid.

When they arrived, the officers found petitioner sitting in the driver's seat of a car matching the description of the suspect's; petitioner appeared "disoriented" and had a handgun sitting in his lap. PSR ¶ 2; see Gov't C.A. Br. 2; Change of Plea Tr. 16-17. Petitioner was eventually taken into custody, and the police recovered not only the handgun (a 9mm caliber pistol), but also a fully loaded magazine with 15 rounds of ammunition, from the car. PSR ¶¶ 2-3. Officers also determined, based on evidence found in the car and petitioner's statements, that he was under the influence of phencyclidine (PCP). PSR ¶ 3.

A federal grand jury returned an indictment charging petitioner with one count of possessing a firearm following a

felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Pet. App. 7a. Petitioner pleaded guilty to that count without a plea agreement. Gov't C.A. Br. 2; Judgment 1; Change of Plea Tr. 3, 20-21.

2. In preparation for sentencing, the Probation Office prepared a presentence report, in which it determined that petitioner qualified for an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). PSR ¶¶ 18, 43. At the time of petitioner's federal offense, the default term of imprisonment for possessing a firearm as a felon was zero to ten years. 18 U.S.C. 924(a)(2) (2018).[1] The ACCA prescribes a penalty of 15 years to life imprisonment if the defendant has at least "three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1).

The Probation Office determined that petitioner had four prior Missouri convictions for offenses that qualified as ACCA predicates: (1) selling cocaine base on February 21, 1996; (2) selling cocaine base on April 27, 1998; (3) selling cocaine base on April 28, 1998; and (4) selling cocaine base on May 6, 1998. PSR ¶¶ 18, 26, 29.

[1] For Section 922(g) offenses committed after June 25, 2022, the default term of imprisonment is zero to 15 years. See Bipartisan Safer Communities Act, Pub. L. No. 117-159, Div. A, Tit. II, § 12004, 136 Stat. 1313, 1329 (18 U.S.C. 924(a)(8)).

Petitioner objected to the ACCA designation. See PSR Addendum; Pet. App. 16a-17a. Petitioner primarily contended (ibid.) that his three drug offenses committed in April and May 1998 should be considered one occasion for purposes of the ACCA. Petitioner did not deny that the offenses occurred on the separate dates listed in the presentence report, but asserted that those offenses were all part of the same prior Missouri case and that he was arrested only "one time" for all three offenses. Pet. App. 16a-17a; see also PSR ¶ 29.

The district court overruled petitioner's objection, adopted the presentence report's findings, and sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Pet. App. 17a-18a; Judgment 2.

3. The court of appeals affirmed in a per curiam opinion. Pet. App. 1a-5a.

The court of appeals declined to disturb the district court's determination that petitioner's predicate offenses took place on different occasions. Pet. App. 2a-5a. The court rejected petitioner's argument that the three drug sales in April and May 1998 were in fact "one sale with three distinct delivery dates." Id. at 3a.[2] The court quoted this Court's statement in Wooden v. United States, 142 S. Ct. 1063 (2022), that "'[i]n many cases, a single factor -- especially of time or place -- can decisively

[2] The court of appeals incorrectly referred to the predicate offenses at issue as having taken place in 2018. See, e.g., Pet. App. 2a. The offenses occurred in 1998. See PSR ¶ 29.

differentiate occasions,'" and it emphasized that here, each of petitioner's prior drug sales had occurred on "'separate days.'" Pet. App. 3a (quoting Wooden, 142 S. Ct. at 1071, and United States v. McDaniel, 925 F.3d 381, 387 (8th Cir. 2019), cert. denied, 140 S. Ct. 1272 (2020)). And the court noted that "even if the April 27 and April 28 sales occurred on one occasion, [petitioner] would still have three qualifying predicate offenses occurring on separate occasions." Id. at 4a n.2.

The court of appeals also rejected petitioner's contention, raised for the first time on appeal, that the Sixth Amendment requires the facts relating to the different-occasions inquiry to be found by a jury (or admitted by the defendant). Pet. App. 5a. The court explained that petitioner's claim was subject to review only for plain error. Ibid. The court observed that this Court "declined to weigh in on the Sixth Amendment question" in Wooden. Ibid. And the court observed that "any error committed by the district court in failing to submit facts related to [petitioner]'s ACCA sentencing is not obvious at the time of [the court of appeals'] review." Ibid.

On the same day that the court of appeals issued its opinion, the court denied petitioner's motion for a stay pending its en banc consideration of United States v. Stowell, No. 21-2234, 2022 WL 16942355 (8th Cir. Nov. 15, 2022) (granting rehearing en banc). See 12/13/22 Order. Stowell raises the question whether the Sixth Amendment requires that the "separate occasions" determination be

made by a jury (or admitted by the defendant). See 2/23/23 Order, Stowell, supra.

4. Petitioner subsequently filed a petition for rehearing en banc, in which he again asked that his case be held pending the outcome of Stowell. Pet. for Reh'g 16. He also relied on a circuit decision issued two weeks after the panel decision in his own case -- United States v. Myers, 56 F.4th 595 (8th Cir. 2022) -- to argue for the first time that "none of his four prior controlled substance offenses under Missouri Revised Statute § 195.211 (sale of cocaine) are a 'serious drug offense' that could serve as predicate for sentence enhancement under ACCA." Pet. for Reh'g 1-2. In Myers, the court of appeals had concluded that conviction for the sale of cocaine under Mo. Rev. Stat. § 195.211 (2000) does not constitute a "serious drug offense" under the ACCA because the state statute defines "cocaine" more broadly than federal law. 56 F.4th at 597-600.

The court of appeals denied the petition for rehearing. Pet. App. 6a.

ARGUMENT

Petitioner renews his contention (Pet. 8-11) that the three offenses he committed in April and May 1998 constitute a single occasion for purposes of the ACCA. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals and does not warrant further review.

Petitioner also renews his contention (Pet. 11-19) that the Sixth Amendment requires a jury to find (or a defendant to admit) that predicate offenses were committed on different occasions under the ACCA. As explained in the government's brief in opposition in Daniels v. United States, 143 S. Ct. 749 (No. 22-5102) (filed Nov. 21, 2022), the government agrees that in light of this Court's decision in Wooden v. United States, 142 S. Ct. 1063 (2022), the different-occasions inquiry requires a finding of fact by a jury or an admission by the defendant.[3] The issue is important and frequently recurring, and it may eventually warrant this Court's review in an appropriate case. But lower courts have not yet had adequate time to react to Wooden, and this case would be an unsuitable vehicle for further review in any event.[4]

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[3] We have served petitioner with a copy of the government's brief in opposition in Daniels.

[4] A similar question is also presented in Hunley v. United States, No. 22-7758 (filed June 8, 2023); Jackson v. United States, No. 22-7772 (filed June 8, 2023); Lovell v. United States, No. 23-5081 (filed July 10, 2013); and Williams v. United States, No. 23-5085 (filed July 10, 2023). This Court has recently denied several petitions raising the Sixth Amendment question. See, e.g., Wheeler v. United States, cert. denied, No. 22-7455 (June 5, 2023); Williams v. United States, cert. denied, No. 22-947 (April 24, 2023); Hucks v. United States, cert. denied, No. 22-7014 (April 17, 2023); Cook v. United States, cert. denied, No. 22-6925 (April 3, 2023); Atkinson v. United States, cert. denied, No. 22-6867 (March 27, 2023); Barrera v. United States, cert. denied, No. 22-6843 (March 20, 2023); Haynes v. United States, cert. denied, No. 22-6682 (March 6, 2023); Daniels v. United States, cert. denied, No. 22-5102 (Jan. 23, 2023); Reed v. United States, cert. denied, No. 22-336 (Jan. 23, 2023); Enyinnaya v. United States, cert. denied, No. 22-5857 (Jan. 23, 2023).

Finally, petitioner argues (Pet. 20-21) that this Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand in light of the Eighth Circuit's decision in United States v. Myers, 56 F.4th 595 (2022). The Court need not do so. Petitioner did not raise a claim that his prior convictions were not "serious drug offenses" on the theory that the Missouri statute was overbroad until his petition for rehearing, in which he was able to rely on Myers, and the court of appeals accordingly did not address the argument in petitioner's direct appeal proceedings. Petitioner may seek relief on that ground in a motion to vacate his sentence under 28 U.S.C. 2255. Further review by this Court is therefore unwarranted.

1. Petitioner first contends (Pet. 8-11) that the court of appeals misapplied this Court's decision in Wooden in holding that his prior offenses were committed "on occasions different from one another" for purposes of the ACCA, 18 U.S.C. 924(e)(1). That contention lacks merit and does not warrant this Court's review.

a. In Wooden, this Court held that ten burglaries committed over the course of a single night in adjoining storage units were not committed on different occasions under the ACCA. 142 S. Ct. at 1069-1074. In so holding, the Court rejected a rule that offenses committed sequentially necessarily occur on different occasions. Id. at 1070-1071. Instead, this Court concluded that the different-occasions inquiry "is more multi-factored in nature"

and "a range of circumstances may be relevant to identifying episodes of criminal activity." Ibid.

The Court explained that "[o]ffenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events." Wooden, 142 S. Ct. at 1071. The Court further observed that "[p]roximity of location" and "the character and relationship of the offenses" also would factor into the analysis. Ibid.

The Court emphasized that "applying this approach will be straightforward and intuitive." Wooden, 142 S. Ct. at 1071. The court explained that, among other things, "[i]n many cases, a single factor -- especially of time or place -- can decisively differentiate occasions." Ibid. And the Court observed that courts applying the approach that it described "have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart." Ibid.

b. The court of appeals correctly applied Wooden and rejected petitioner's assertion that his offenses for selling cocaine base on April 27, April 28, and May 6, 1998, all occurred on a single occasion. The court specifically quoted this Court's statement that "[i]n many cases, a single factor -- especially of time or place -- can decisively differentiate occasions." Pet. App. 3a (quoting Wooden, 142 S. Ct. at 1071).

The court of appeals also observed that, even assuming arguendo that the drug sales that took place on April 27 and April 28 were one occasion, petitioner would still need to establish that the sale on May 6 -- eight days later -- was part of that same single occasion. Pet. App. 4a n.2. The court properly declined to make such a finding and instead made the "straightforward and intuitive," Wooden, 142 S. Ct. at 1071, determination that petitioner's 1998 predicate offenses did not occur on a single occasion.

Petitioner does not contend that the decision below conflicts with any decision of another court of appeals -- and for good reason. As this Court acknowledged in Wooden, courts "have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart." 142 S. Ct. at 1071.[5] Petitioner's case fits well within that precedent.

2. Petitioner's Sixth Amendment claim likewise does not warrant this Court's review.

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[5] Petitioner briefly suggests (Pet. 10-11) that this Court should grant the petition, vacate the judgment, and remand for further consideration in light of Wooden. No such action is warranted. Petitioner relies on this Court's vacatur and remand in Williams v. United States, 142 S. Ct. 1439 (2022), but there, the court of appeals addressed the different-occasions inquiry before this Court's decision in Wooden. See United States v. Williams, 976 F.3d 781 (8th Cir. 2020). Here, in contrast, the panel had the benefit of this Court's decision in Wooden (and a supplemental brief from petitioner on the issue, see Pet. C.A. Supp. Br. 2-11) and, for the reasons explained above, correctly applied Wooden to the facts of this case.

a. As explained in the government's brief in opposition in Daniels, given the Court's articulation of the standard in Wooden, the government now agrees that the ACCA requires a jury to find, or a defendant to admit, that prior offenses occurred on different occasions. Gov't Br. at 4-8, Daniels, supra (No. 22-5102). The government's updated position, and the question whether the Sixth Amendment requires a jury to find (or a defendant to admit) that crimes occurred on different occasions, are actively percolating in the lower courts.

Before Wooden, the courts of appeals had uniformly held that sentencing courts could undertake the different-occasions inquiry. See Gov't Br. at 8-9, Daniels, supra (No. 22-5102). Following Wooden, several courts of appeals have adhered to that precedent, noting that Wooden declined to address the Sixth Amendment question. See id. at 9-10; Pet. App. 5a; see also, e.g., United States v. Valencia, 66 F.4th 1032, 1032 (5th Cir. 2023) (per curiam); United States v. Hatley, 61 F.4th 536, 541-542 (7th Cir. 2023), petition for cert. pending, No. 22-1190 (filed July 2, 2023); United States v. McCall, No. 18-5229, 2023 WL 2128304, at *7 (11th Cir. Feb. 21, 2023), petition for cert. pending, No. 22-7630 (filed May 22, 2023).

The Eighth Circuit (the court below here) has -- with the government's acquiescence -- granted en banc review on the issue, and it held oral argument in April 2023. See United States v. Stowell, 40 F.4th 882 (8th Cir. 2022) (No. 21-2234). The

government also recently acquiesced to rehearing en banc in the Fourth Circuit, but rehearing was denied. See United States v. Brown, No. 21-4253, 2023 WL 5089680 (Aug. 9, 2023). No circuit conflict has yet developed.

b. In any event, this case would be an unsuitable vehicle for considering the Sixth Amendment question. While petitioner objected at sentencing to his ACCA classification, his objection was based on the assertion that his offenses occurred on one occasion. See Pet. App. 16a-17a. He did not raise a Sixth Amendment claim before the district court or request a sentencing jury. Thus, although petitioner suggests that any error would be plain, see, e.g., Pet. 13, the issue at a minimum lacks the sort of case-specific development that would be beneficial to this Court's consideration.

In addition, regardless of the standard of review, any error here was also harmless. Petitioner has not disputed that his predicate offenses occurred on different days. And as discussed above, the court of appeals correctly determined that the drug sales occurred on different occasions -- and that even if the two sales that occurred on successive days counted as one occasion, petitioner would still qualify for an ACCA sentence. See Pet. App. 2a-4a & n.2. Because prejudice will be similarly lacking in most other cases as well, its absence would not necessarily itself warrant declining review of the question presented. But it is

another reason why further review is not warranted in this particular case.

c. Petitioner further contends (Pet. 11-13) that this Court should hold his petition "in abeyance until the Eighth Circuit completes its en banc review of [the Sixth Amendment] issue" in Stowell, supra. The Court should decline to do so.

The court of appeals already considered and rejected petitioner's request to stay his appeal pending the en banc decision in Stowell. See 12/13/22 Order; see also Pet. App. 7a (denying rehearing after petitioner argued, among other things, that the Eighth Circuit should hold his rehearing petition pending the en banc decision in Stowell); Pet. for Reh'g 16. That rejection might have been based on the immateriality of the issue to the outcome of his case. See pp. 12-13, supra. At a minimum, it is consistent with the lack of prejudice here.

There is no sound basis for this Court to nevertheless require the court of appeals to reconsider petitioner's case if the Eighth Circuit recognizes a jury-trial right for the ACCA different-occasions inquiry in Stowell. This case differs from the ones cited by petitioner, that this Court ultimately remanded for further consideration in light of an en banc decision (United States v. Naylor, 887 F.3d 397 (8th Cir. 2018)), that disqualified certain Missouri offenses as potential ACCA predicates, id. at 406-407; see Sykes v. United States, 138 S. Ct. 1544 (2018) (No. 16-9604); Brown v. United States, 138 S. Ct. 1545 (2018) (No. 17-

6344). Unlike petitioner here, the petitioners in those cases had properly preserved the claim that was resolved by the en banc court in Naylor, but had not had the opportunity to ask the court of appeals itself to hold their cases in abeyance, and the issue was outcome-determinative because their ACCA sentences would unquestionably be unlawful under Naylor. See United States v. Sykes, 844 F.3d 712 (8th Cir. 2016) (court of appeals decision issued more than five months before the grant of rehearing en banc in Naylor); Brown v. United States, No. 17-1420, 2017 WL 3747309 (8th Cir. June 12, 2017) (court of appeals denied a certificate of appealability and dismissed appeal roughly three weeks after it granted rehearing en banc in Naylor). None of those factors is present here.

3. Finally, petitioner contends (Pet. 20-21) that this Court should grant the petition, vacate the judgment below, and remand for further consideration in light of the Eighth Circuit's decision in United States v. Myers, 56 F.4th 595 (2022). The Court need not do so.

Myers was decided more than two weeks after the court of appeals decided petitioner's case. Compare Pet. App. 1a, with Myers, 56 F.4th at 595. In Myers, the Eighth Circuit held that a defendant's prior Missouri conviction for sale of cocaine was not a "serious drug offense" under the ACCA "because at the time of [the defendant's] conviction in 2003, Missouri law defined 'cocaine' as encompassing its 'isomers' without limiting the

definition of 'isomers' to optical and geometric isomers as the federal statute did, meaning that Missouri's definition of cocaine was categorically broader than the federal definition." 56 F.4th at 597 (internal quotation marks omitted).

Petitioner did not claim that his Missouri statute of conviction is similarly overbroad until his petition for rehearing en banc. See Pet. for Reh'g 1-2, 5, 15-16. The court of appeals declined to rehear petitioner's case based on Myers. See, e.g., Christopherson v. Bushner, 34 F.4th 1123, 1124 (8th Cir. 2022) (per curiam) (court ordinarily will not consider issues first raised in petition for rehearing or rehearing en banc). But petitioner may be able to obtain the relief he ultimately seeks -- application of Myers to his own predicate Missouri drug offenses -- by timely filing a motion to vacate his sentence pursuant to 28 U.S.C. 2255. Action by this Court is therefore unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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