No. 22-7660

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

REPLY IN SUPPORT OF PETITION FOR CERTORARI

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REPLY BRIEF

I. This Court should remand based on the third question presented.

The government does not dispute that the Eighth Circuit actually erred in affirming petitioner's ACCA sentence because "if Mr. Buford were sentenced today, he would not qualify as an ACCA offender." Pet. 4; 20. This Court should remand to the Eighth Circuit because petitioner has no qualifying ACCA predicate convictions after *United States* v. *Myers*, 56 F.4th 595 (2022).

Despite acknowledging *Myers* is likely "favorable to petitioner", the government opposes certiorari because petitioner "may be able to obtain the relief he ultimately seeks . . . by filing a motion to vacate his sentence pursuant to 28 U.S.C. § 2255." BIO, I; 15. This is not a basis to deny relief. Justice Scalia wrote for this Court that improperly "condemn[ing] someone to prison for 15 years to life" is intolerable because it "does not comport with the Constitution's guarantee of due process." *Johnson* v. *United States*, 576 U.S. 591, 602 (2015).

In the far less serious context "of a plain Guidelines error", this Court has held that such an error "ordinarily warrants relief" because "[t]he risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of the judicial proceedings." *Rosales-Mireles* v. *United States*, 138 S.Ct. 1897, 1907 (2018). Here, there is a *certainty* petitioner was sentenced five years over the statutory maximum. Were Mr. Buford resentenced within his undisputed Guidelines range — a likely proposition since he was sentenced to the ACCA mandatory minimum — he would be entitled to *immediate release today*.

There is also a certainty the Eighth Circuit is routinely remanding cases with these very ACCA errors for resentencing based on *Myers* under plain error review. Pet. 20-21 (string citing cases from Eighth Circuit). Thus, it is only logical to remand this case based on the government's repeated concessions in other cases that the same ACCA error should be corrected. *See, for example, United States* v. *Woods*, 20-2580, *Motion For Remand*, filed April 5, 2023 (conceding "since he was subjected to a mandatory minimum sentence of 180 months because of the ACCA enhancement when the maximum sentence otherwise would have been only 120 months", plain error relief was warranted based on *Myers*); *see also Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1232, (2018) (Gorsuch, J., concurring) ("normally courts do not rescue parties from their concessions, maybe least of all concessions from a party as able to protect its interests as the federal government.").

Stated another way, the government has provided no logical reason this Court wouldn't grant the petition for certiorari. The government's suggestion that petitioner should hope for post-conviction relief in the future is perplexing. "At least since Magna Carta some people have thought that to delay justice may be to deny justice." *Polizzi* v. *Cowles Mags., Inc.,* 345 U.S. 663, 671–72 (1953) (Black, J., and Jackson, J, concurring in part and dissenting in part).

That is especially true here where petitioner would be entitled to immediate release from prison if he were resentenced to a sentence within his proper Guidelines range. Mr. Buford has been incarcerated for over four years, and his proper guidelines range recommends a sentence of less than four years in prison (37

to 46 months' imprisonment). Pet. at 19. In the likely scenario the sentencing court followed that recommended range of sentencing, the Bureau of Prisons would have no choice but to immediately release him.

Finally, as already pointed out, this Court has remanded cases for further consideration based on the Eighth Circuit's own ACCA case law. Pet. 21, citing *Brown* v. *United States*, 138 S.Ct. 1545 (2018), remanding for further consideration in light of *United States* v. *Naylor*, 887 F.3d 397 (8th Cir. 2018) (*en banc*); see also *Sykes* v. *United States*, 138 S.Ct. 15544 (2018) (same). The government's attempts to distinguish *Brown* and *Sykes* from this case fall flat.

While the government maintains that the petitioner in *Brown* did not have "the opportunity to ask the court of appeals itself to hold [the appeal] in abeyance" based on *Naylor*, BIO 14, that is wrong. Mr. Brown asked for a stay on June 13, 2017, based on the grant of *en banc* rehearing in *Naylor*. The Eighth Circuit denied the stay on June 19, 2017, and his petition for rehearing on July 20, 2017. Thus, while the government insinuates that a remand based on *Myers* is unsound because the Eighth Circuit already denied that relief, that happened in *Brown,* too.

The government also maintains that the question presented in *Brown* "was outcome-determinative because [petitioner's] ACCA sentence would unquestionably be unlawful under *Naylor*." BIO, at 14. This, too, is incorrect. The ACCA predicate conviction in *Brown* concerned a different version of the Missouri burglary statute than analyzed in *Naylor*, and after this Court's GVR order the Eighth Circuit heard oral argument and issued an opinion explaining why Mr. Brown's unique burglary

conviction was also not a "violent felony", despite the government maintaining to the contrary on remand. *Brown* v. *United States*, 929 F.3d 554, 560 (2019).

If anything, petitioner's case presents a more compelling case to remand than *Brown* because all of Mr. Buford's predicate convictions are an identical match to those analyzed in *Myers*, § 195.211 RSMo. Pet. i; 4-5; 20-21. If the government had a contrary argument, it would have already made it.

Brown also required the government to waive procedural defenses in his §2255 for this Court and the Eighth Circuit to grant relief. *See* Solicitor General's Brief, filed 2/12/18, pg. 15, (waiving "any timeliness or other procedural issues"); *see also Brown*, 929 F.3d at 556 (noting government waived "timeliness and other procedural" objections in granting relief). In contrast to *Brown,* where the government intentionally waived the statute of limitations defense in §2255(f)(3) that would have precluded relief, here there is no basis for the government's objections.

Finally, while the government suggests that petitioner should file a post-conviction relief proceeding under §2255 in the hopes of potentially obtaining relief sometime in the future, this same suggestion could have been made by the government in *Sykes* (and in the countless other GVR remands entered by this Court to correct specific errors by the lower circuit courts). The better route is the route justice demands: this Court's correction of the error on direct appeal.

II. Alternatively, this Court should hold this petition for certiorari until the Eighth Circuit, *en banc*, decides the occasions clause issued reserved by this Court in *Wooden v. United States* 142 S.Ct. 1063, 1068, fn 3 (2022).

The Eighth Circuit has, with the government's encouragement, granted *en banc* review on the Sixth Amendment occasions clause issue, holding oral argument in April 2023. See *United States* v. *Stowell*, 40 F.4th 882 (2022). The government concedes that a ruling for Mr. Stowell would be a seismic event, creating a circuit split, and likely warranting this Court's review on this "important and frequently recurring" issue. BIO, 7; 11-12.

The Fourth Circuit, when denying relief *en banc*, recently highlighted that the *en banc* proceedings in *Stowell* "may provide the Supreme Court a timely opportunity to consider this issue." *United States* v. *Brown*, No. 21-4253, 2023 WL 5089680, at *1 (Aug. 9, 2023), citing *Stowell*. The Fourth Circuit reasoned that while "an inferior court is poorly positioned to resolve" the issue, it hoped "the Supreme Court will step in to illuminate the path soon." *Id*.

The Eighth Circuit may grant the relief sought by petitioner *and* the government: 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). Under this scenario where the Eighth Circuit grants the relief sought by the parties in *Stowell*, petitioner's case should then be remanded based on the Eighth Circuit's decision.

If, instead, the Eighth Circuit holds that judicial factfinding for ACCA occasions clause sentencing remains constitutional (like every other circuit), 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*. It is undisputed that Mr. Stowell will file a petition for certiorari if he does not prevail before the Eighth Circuit. Pet. 13, fn 2. Mr. Buford's case would be an ideal companion case to decide the related question presented in Issue 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?

A. The question presented is incredibly important and frequently recurring.

The government concedes the question presented is "important and frequently recurring." BIO, at 7. This concession is well-grounded. The majority of judges on the Fourth Circuit, *en banc*, *agree* that "a district court may not find a defendant committed previous offenses on different occasions using the framework described in *Wooden*, and then increase the defendant's criminal penalty based on such judicial factfinding." *Brown*, No. 21-4253, 2023 WL 5089680, at *1 But the Fourth Circuit held that it cannot correct this error undermining hundreds of ACCA sentences — that is, until this Court acts. *Id*. All fourteen judges on the Fourth Circuit are unanimous in their conclusion that this issue warrants this Court's immediate review. *Id*; see also concurring and dissenting statements.

B. The uncontroverted circuit split continues to grow.

Nor has the government denied the existence of a circuit split on this issue. Specifically, the happenstance of geography is causing disparate results as to whether these unobjected errors are being corrected, and this circuit split has only grown since this petition for certiorari was filed. 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 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 (2023).

In stark contrast, the Fifth and Ninth Circuits are vacating and remanding ACCA sentences on the occasions clause issue, even when the defendant failed to object below. Just recently, the Fifth Circuit held that because the *Shephard* documents did "not conclusively show that [defendant's] predicate offenses occurred on three separate occasions", the district court's error in sentencing the defendant to an ACCA sentence after *Wooden* "affected a substantial right" on plain error review. *United States* v. *Alkheqani,* No. 21-10966, 2023 WL 5284055, at *13 (5th Cir. Aug. 17, 2023); *see also United States* v. *Man,* No. 21-10241, 2022 WL 17260489, at *2 (9th Cir. Nov. 29, 2022) (remanding issue notwithstanding that the issue "was raised for the first time on appeal"). The government's inability to address this circuit split speaks volumes as to this Court's immediate need to intervene.

C. This case is an ideal vehicle to resolve the circuit split, illustrating why the Eighth Circuit's plain error review of these *Wooden* errors is grievously wrong.

While the government argues that petitioner's case is "an unsuitable vehicle for considering the Sixth Amendment question", it fails to address petitioner's arguments as to why this case would be ideal to resolve the question presented in the unique context of plain error. BIO, at 12. Petitioner argued below that his *Wooden* constitutional claim was meritorious based on plain error review, and the Eighth Circuit squarely resolved that very legal question under the Sixth Amendment. App. 5a. Thus, the government appropriately concedes that the plain error standard of review "would not necessarily itself warrant declining review of the question presented." BIO, at 12. And the government does not dispute this Court can decide this question presented simultaneously — along with question presented in *Stowell* — assuming the Eighth Circuit denies relief as it pertains to the occasions clause issue in *Stowell* (which was preserved below).

The decision below was grievously wrong for the reasons already explained by petitioner, which will not needlessly be repeated because the government largely fails to engage that analysis as to why there errors ordinarily constitute plain error. Pet. 15-19. The government instead argues that any error here regarding the occasions clause was "harmless", or that "prejudice" will be "lacking". BIO, at 12. It can only do so by assuming that all of petitioner's predicate convictions took place on different occasions. But this assumption is unwarranted because the government *agrees* that "any 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). None of these constitutional safeguards occurred in petitioner's case before the imposition of his fifteen-year mandatory minimum sentence.

While the government argues that "[p]etitioner has not disputed that his predicate offenses occurred on different days", BIO, at 12, Mr. Buford said something altogether different: that the only evidence was what "the PSR alleged." Pet. 5. Relying on the PSR goes to the heart of the question presented, and why courts cannot sentence individuals to unconstitutional mandatory minimums sentences in violation of *Apprendi* even under a plain error standard of review. *Mathis* v. *United States*, 579 U.S. 500, 512 (2016), citing *Apprendi*, 530 U.S. at 490 (holding a judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of").

In granting plain error relief, the Fifth Circuit recently rejected the government's argument that "post-*Wooden*, *Shepard* documents are no longer required to establish ACCA predicate offenses", because "a district court errs when it solely relies upon the PSR's characterization of a defendant's prior offenses for enhancement purposes." *Alkheqani,* No. 21-10966, 2023 WL 5284055, at *11, citing *Shepard* v. *United States*, 125 S.Ct. 1254 (2005); also citing *United States* v. *Wright*,

No. 21-60877, 2022 WL 3369131, at *1 (5th Cir. Aug. 16, 2022) ("[U]nder *Shepard*, a district court is not permitted to rely on the PSR's characterization of a defendant's prior offense for enhancement purposes" post-*Wooden*).

Here, it is undisputed that neither the district court nor the Eighth Circuit relied on any *Shepard* document prior to concluding that petitioner should be sentenced to an ACCA sentence. Indeed, in affirming petitioner's ACCA sentence, the Eighth Circuit was unambiguous that it was relying solely on what the "presentence investigation report indicated." App. 2a.

This error was also plain because before *Wooden*, multiple judges—including a member of the Eighth Circuit—concluded the ACCA's occasions clause requirement turns on facts that cannot be determined by ascertaining the elements of the offense from the PSR or *Shepard* documents, 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 government ignores that the dates of prior offenses are readily susceptible to erroneous conclusions, as repeatedly highlighted by this Court's

ACCA jurisprudence. "Statements of 'non-elemental fact' in the records of prior convictions are prone to error precisely because their proof is unnecessary." *Mathis*, 579 U.S. at 512, quoting *Descamps* v. *United States*, 570 U.S. 254, 270 (2013). "At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he 'may have good reason not to'—or even be precluded from doing so by the court." *Id*.

When affirming petitioner's ACCA sentence based on the occasions clause, the government points out that the Eighth Circuit made this very mistake by "incorrectly refer[ing] to the predicate offense at issue as having taken place in 2018", when the "offenses occurred in 1998." BIO, 4. If the lower court of appeals cannot get these facts straight in this specific ACCA context where they are heavily scrutinized by a panel of federal judges, why should this Court assume state courts got it right over 25 years ago when the dates were irrelevant to the elements of offense? The answer is this Court should not, because its prior precedents hold that due process and fundamental fairness requires far more before imposing lengthy mandatory minimum sentences.

CONCLUSION AND PRAYER FOR RELIEF

The petition for certiorari should be granted.

Respectfully submitted.

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