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Honorable Scott S. Harris, Clerk
Supreme Court of the United States
Washington, DC 20543

Re: Damon Buford v. United States of America
Case No. 22-7660

Dear Mr. Harris:

Petitioner respectfully submits this supplemental brief letter, to alert this Court that the Eighth Circuit issued its *en banc* opinion today in *United States v. Stowell*, 21-2234 (slip op., September 22, 2023). In a deeply divided 7 to 4 decision, the majority opinion refused to reach the Sixth Amendment occasions clause issue, holding "[w]hatever our views are on any Sixth Amendment error, we conclude that it was harmless beyond a reasonable doubt." *Id.* at 3.

Judges Erickson, Kelly, Graz, and Stras dissented, concluding the majority was improperly relying on the "PSR and the original charging documents" to make the occasions clause determination. *Id.* at 8. "The lack of evidence [was] key" to the dissent because, amongst other things, the government failed "to show that it is 'clear beyond a reasonable doubt that a rational jury would have found' the missing element." *Id*, quoting *Neder v. United States*, 527 U.S. 1, 18 (1999). "With no admissible evidence in the record, we can have no confidence about what a jury might have found." *Id.*

The dissent reasoned that with "no admissible evidence in the record to shed light on what a jury might have found, it seems to us there is no way to avoid resolving the question of whether letting judges make the different-occasions determination violates the Sixth Amendment." *Id.* "Post-*Wooden*, which directs the consideration of "non-elemental facts," it is more plain—and something the government has acknowledged in a number of cases—that a jury finding, or a defendant's admission, is mandated by the Sixth Amendment." *Id.*

As already highlighted, there is a similar evidentiary problem in petitioner's case, where the Eighth Circuit relied exclusively on what the "presentence investigation report indicated" to conclude the prior conviction occurred on separate occasions. App. 2a. And the circuit split on this very issue continues to grow, as already pointed out by petitioner, where the Fifth Circuit has granted plain error relief because "a district court errs when it solely relies upon the PSR's characterization of a defendant's prior offenses for enhancement purposes.". See reply, pg. 7; 9-10, quoting *United States v. Alkheqani*, No. 21-10966, 2023 WL 5284055, at *13 (5th Cir. Aug. 17, 2023); also citing *United States v. Wright*, 10 No. 21-60877, 2022 WL 3369131, at *1 (5th Cir. Aug. 16, 2022).

If this Court were not inclined to grant relief based on Question Presented III of the petition for certiorari, it should hold this case for Mr. Stowell's petition for certiorari, which will invariably be filed in the coming weeks. The petition for certiorari should then be granted on Question Presented II regarding plain error, to be heard along with *Stowell*.

Sincerely,

s/ Daniel P. Goldberg
Daniel P. Goldberg

DPG\ss

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