NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

CORNELIUS MICHAEL TURNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITON FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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 the Sixth Amendment to the United States Constitution limits a sentencing court, when determining whether a defendant's prior offenses were "committed on occasions different from one another," 18 U.S.C. §924(e), to consider only matters a jury found or a prior guilty plea necessarily admitted?

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I. PETITION FOR WRIT OF CERTIORARI

Cornelius Michael Turner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

II. OPINIONS BELOW

The opinion of the Court of Appeals is unreported and reprinted in the Appendix to the Petition. ("Pet. App.") 1a. The district court's judgment and sentence are reprinted in the Appendix to the Petition. ("Pet.App.") 2a.

III. JURISDICTION

The district court had jurisdiction under 18 U.S.C. §3231. The Eleventh Circuit had appellate jurisdiction under 28 U.S.C. §1291 and 18 U.S.C. §3742. It affirmed Mr. Turner's sentence on June 26, 2023. Pet. App. 1a. This Court has jurisdiction under 28 USC §1254(1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Jury Trial Clause of the Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

Section §924(e)(1) of the United States Code Title 18 provides:

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 serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not les than fifteen years, and, notwithstanding any other provision of the law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under §922(g).

V. 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 USC §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 the petitioner's ACCA sentence cannot be affirmed. First, Wooden overruled the applicable occasions clause test in the Eleventh Circuit with this Court now mandating a "holistic" and "multi-factored in nature" test. Wooden, 142 S.Ct. at 1068-1071. In affirming petitioner's sentence, the Eleventh Circuit reviewed only one sentence of this Court's holding in Wooden and thus failed to apply the proper Wooden test. The appellate the court did not address the second, third and fourth inquires of Wooden: '[p]roximity of

location," "the character and relationship of the offenses," and whether the offenses "share a common scheme or purpose." Id at 1070-71.

Second, because the ACCA increases a defendant's statutory sentence range, its application is subject to the Sixth Amendment principle that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Where a defendant's prior conviction resulted from a guilty plea, a sentencing court's determination of an ACCA enhancement is limited to what the plea necessarily admitted; this Court has explained that going further would take a judge past the fact of the conviction and into the jury's province. Mathis v. United States, 136 S.Ct. 2243, 2252 (2016); Descamps v. United States, 570 U.S. 254, 267-69 (2013).

The Sixth Amendment dictates that courts cannot find facts beyond those found by a jury or necessarily admitted for a guilty plea. Notwithstanding, Courts of Appels are consistently allowing district court to apply the ACCA based on their own preponderance of the evidence determination that a defendant's prior convictions were committed on different occasions. The instant case provides this Court with the opportunity to directly address these issues and provide guidance to the sentencing District Courts.

VI. STATEMENT OF THE CASE

1. Factual Background and Proceedings Below. In 2019, Petitioner Cornelius Michael Turner ["Turner"] was indicted for possession with intent to distribute cocaine, possession of a firearm during a drug trafficking crime, and possession of a firearm by a convicted felon. The first information and notice of prior convictions cited "felony drug offenses" that occurred on or about January 17, 2012. (Dist.Ct.Doc.#5). The government attached the judgment of the prior convictions; however, the judgment does not report or cite the date or times or locations of the three predicate offenses. (Dist.Ct.Doc.# 9). A superseding indictment also reported three felony offenses that occurred on or about January 17, 2012. (Dist.Ct.Doc.#25).

Mr. Turner entered into a written plea agreement to a superseding information (Dist.Ct.Doc.# 73) with predicate felony offenses on or about January 17, 2012. The plea agreement provided a factual basis which stated that on January 17, 2021, Mr. Turner had been convicted of sale of cocaine and possession of cocaine with intent to distribute. (Dist.Ct. Docket #73, page 3). There was no transcript introduced into evidence of the plea collogue. No one asked Mr. Turner or his counsel whether the dates were accurate. Mr. Turner did not concede that his prior drug convictions could be used to enhance his sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e)(1).

A Presentence Investigation Report (PSIR) reported a single document - the Florida state information -alleged a date of the three offenses. The state plea agreement does not contain any reference to a date of the three offenses. The PSIR reported that the defendant had one Florida case with three counts that were committed on January 17, 2012. (PSR paragraph 33, page 7 – 8, paragraph 45, page 11). The U.S. Probation Officer did not obtain, and the Assistant U.S. Attorney did not introduce into evidence a transcript of Mr. Turner's state sentencing hearing. The Probation Officer found Mr. Turner to be an armed career offender with three separate offenses on the same date: January 17, 2012.

Counsel for Mr. Turner objected to the findings of the U.S. Probation Officer and the application of the three predicate offenses for an enhancement under the ACCA enhancement citing United States v. McCloud, 818 F.3d 591, 595-96 (11th Cir. 2016) quoting United States v. Sneed, 600 F.3d 1326, 1329 (11th Cir. 2010) ("offenses must be "temporarily distinct" and "arising from separate and distinct criminal activity"). (Dist. Ct. Doc. 83, 87).

At the sentencing hearing, the Government introduced into evidence, over defense objection, the Florida state information that reports three counts: Sale of Cocaine on October 20, 2011; sale of Cocaine on November 9, 2011; and possession with intent to sell cocaine on November 15, 2011. (Sentencing Hearing Exhibit #2, Gov. Exhibit #1 Doc. #89). The government tied the statutory

requirement of three "occasions" exclusively to the three dates cited in the Florida §state information. FN#1 The defense objected to the ACCA enhancement and submitted that the three counts occurred on one occasion citing the Petition for Writ of Certorari granted by this Court in Wooden v. United States, Case No. 19-5189 (Dec. 19, 2019). The District Court rejected the defense's multi-factor definition of the word "occasion", overruled the ACCA objection, and sentenced Mr. Turner to a minimum mandatory sentence of 180 months' imprisonment. (Dist. Ct. Doc. #90).

FN#1 Appellant notes that the Government accepts the implications from a state information as to the timing of the offenses for purposes of an ACCA enhanced sentence, however, disregards the fact that the State prosecutor brought the three cocaine offenses in a single information pursuant to Rule 3.150, Fla.R.Cr.P. The fact that the prosecutor has the discretion to bring three cocaine charges together if "they are based on the same act or transaction or on two or more connected acts or transactions" Id., emphasizes the argument that Turner's three predicate cocaine offenses were part of the same criminal event or occasion. The rules governing the proper joinder of offenses for trial in Florida include whether the crimes in question are linked in some significant way. This can include the fact that they occurred during a "crime spree" interrupted by no significant period of respite or the fact that one crime is causally related to the other, even though there may have been a significant lapse of time. Ellis v. State, 622 So.2d 991, 1000 (Fla. 1993). See also, Solomon v. State, 596 So. 2d 789, 790 (Fla. 3d DCA 1992) (concluding that "where the crimes occurred during the course of an ongoing investigation, within a limited period of time and in a limited geographical area, and are clearly connected in an episodic sense, they may be tried together"). The state prosecutor chose to bring the three cocaine offenses in one information based on connected acts or transaction. A federal prosecution should not be allowed to deviate from that position.

2. Affirmance by the Eleventh Circuit. In affirming petitioner's ACCA sentence, the Eleventh Circuit held the offenses, separated by twenty and six days – were sufficiently temporally distinct to constitute separate occurrences under the ACCA. The Eleventh Circuit relied heavily on its case law that pre-dated Wooden, citing United States v. Longoria, 874 F.3 1278 (11th Cir. 2017); United States v. Sneed, 600 F.3d 1326 (11th Cir. 2010) ("Distinctions in time and place are usually sufficient to separate criminal episodes from one another even when the gaps are small"); and United States v. Dudley, 5 F.4th 1249 (11th Cir. 2021), cert. denied, 142 S.Ct. 1376 (2022). The appellate court's analysis of the multi-factored test announced in Wooden was limited to only one element: the time between the offenses. The appellate court summarily reported that courts "have nearly always treated offenses as occurring on separate occasions if a person committed them a day or more apart, or at a 'significant distance. Wooden, Id." Opinion at p.6. The appellate court did not address the second, third and fourth inquires of Wooden: '[p]roximity of location," "the character and relationship of the offenses," and whether the offenses "share a common scheme or purpose." Id at 1070-71.

The Eleventh Circuit also rejected Mr. Turner's argument that the sixth amendment requires facts relating to sentencing to be found by a jury based on existing eleventh circuit case law.

VII. REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit Court of Appeals failed to properly apply this Court's occasions clause tests in Wooden v. United States, 142 S.Ct. 1063 (2022) to hold that Mr. Turner's prior offenses were "committed on occasions different from one another," 18 U.S.C. §924(e).

The ACCA imposes one of the most severe punishments in federal criminal law. The lower courts are allowing judicial factfinding in the different-occasions context. There is no transcript of Mr. Turner's prior state proceeding. The district court's analysis utilizes a single document: the state court information alleging offenses that occurred on different dates. The Eleventh Circuit erred in affirming Petitioner's ACCA sentence because its analysis relied exclusively on Eleventh 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. In doing so, this Court overruled lower courts 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). This Court explained 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 1070-71.

In affirming Mr. Turner's ACCA sentence, the Eleventh Circuit failed to apply this Court's "holistic" and "multi-factored in nature" test. The Eleventh Circuit focused exclusively on the timing of the offenses: that Mr. Turner committed his Florida drug offenses on 20 October, 9 November, and 15 November 2011. (App.a at 5). The Eleventh Circuit placed dispositive reliance on one sentence from the Wooden decision: "In many cases, a single factor – especially of time or place – can decisively differentiate occasions." Id. at 6. The appellate court did not address the second inquiry: "proximity of location or the third inquiry, on character, "[t]he more similar . . . the conduct" constituting the crimes, "the more apt they are to compose one another." Wooden at 1070-1971.

The Eleventh Circuit's opinion must be vacated because it "simply misreads" Wooden. See, Hughes Aircraft Co., v. United States 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. Similar to this Court's examples in Wooden, "the occasion of a wedding", whereby events occur over a significant period of time yet is considered "part of a single event" or occasion, spanning over a day or more to hold "a ceremony, cocktail hour, dinner, and dancing," Id., at 1069, Turner's counsel argued at the sentencing hearing before the District Court that going to the mall, looking for parts and shopping at different stores within the mall, then driving to another mall and shopping at different stores, would be part of an occasion and not multiple events.

The Eleventh Circuit assumed, without analyzing Wooden's multi-factored test, that the sale of same type of drugs to the same undercover officer at the request of the undercover officer during this twenty-six-day period amounted to separate occasions. The Eleventh Circuit simply relied on its pre-Wooden case law that predicate offenses are considered to have been committed on different occasions under the ACCA if the offenses are "temporally distinct" and arise from 'separate and distinct criminal episodes", citing, United States v. Dudley, 5 F.4th at 1259; United States v. Sneed, 600 F.3d 1326, 1329-30 (11th Cir. 2010).

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 often drive the

defendant's sentence higher. See, e.g., United States v. Barth, 990 F.3d 422, 424 (8th Cir. 1993); United States v. Connell, 960 F.2d 191, 194 (1st Cir. 1992). This sentencing factor manipulation provides a significant impact on a federal sentence because by itself it can cause the individual to be subject to an ACCA sentence based on one investigation.

The test announced by the Eleventh Circuit as to Mr. Turner's conviction contradicts Wooden and must be vacated by this Court to ensure all circuits do not continue to make the same mistake after Wooden. See, United States v. Williams, 976 F.3d 781, 787 (8th Cir. 2020), vacated, 142 S.Ct. 1439 (2022) (judgment vacated and remanded "for further consideration in light of Wooden v. United States," Williams, 2022 WL 1510779, at *1. This Court should grant the petition for certiorari, reverse the judgment and sentence, and remand to the Eleventh Circuit for further consideration.

II. The time has come for this Court to address the Sixth Amendment concerns with regards to judicial factfinding in the different-occasions context for sentencing under the Armed Career Criminal Acts.

The Sixth Amendment to the United States Constitution requires any fact that increases the statutory maximum or minimum penalty for a crime to be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt. See, United States v. Haymond, 588 U.S. ___, 139 S.Ct. 2369, 2046 L.Ed.2d. 897 (2019); Alleyne v. United States, 139 S.Ct. 2369, 204 L.Ed.2d 897

(2019) (plurality opinion), Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct.. 2348, 147 L.Ed.2d (2000). The determination of whether prior convictions were offenses "committed on occasions different from one another" requires finding facts about the prior convictions and not the single fact of a prior conviction. It calls for wide ranging factual findings that are not necessarily elements of the prior offense. Therefore, these facts fit within the rule of Apprendi, Id. They must be charged in the indictment and proved to the jury beyond a reasonable doubt.

Despite this Court's mantra that judicial factfinding beyond the fact of a prior conviction violates the Sixth Amendment, the lower courts are not limiting the different-occasions inquiry. Descamps v. United States, 570 U.S. 254 (2013) and Mathis v. United States, 136 S.Ct. 2243 (2016), have specifically applied the Sixth Amendment limits on judicial factfinding in the ACCA context. In Descamps, the Court explained that "[t]he Sixth Amendment contemplates that a jury – not a sentencing court – will find [facts about the defendant's conduct], unanimously and beyond a reasonable doubt." Descamps, 570 U.S. at 269. In Mathis v. United States, 136 S.Ct. 2243, 2252-57 (2016), the Court again noted the Sixth Amendment problems with sentencing courts conducting factfinding for application of the ACCA and reiterated that a judge "can do no more, consistent with the Sixth Amendment, that determine what crime, with what elements, the defendant was convicted of." 136 S.Ct. at 2252. In the case at bar, the Eleventh

Circuit rejected the Petitioner's Sixth Amendment argument based on prior precedent of United States v. Dudley, 5 F.4th at 1260, 1260 n.10.

This Court's intervention is needed because Mr. Turner's case is not an isolated instance of judicial fact-finding in the different-occasions context. The instant case provides this Court with the opportunity to directly address whether judicial factfinding in the different-occasions context presents Sixth Amendment problems. Issues about the application of the ACCA retain exceptional important because the ACCA imposes one of the more severe punishments in federal law, converting a firearms possession offense punishable by a maximum of ten years into a mandatory minimum of fifteen years, with a potential sentence of life.

VII. CONCLUSION AND PRAYER FOR RELIEF

The petition for certiorari should be granted.

Respectfully Submitted.

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