No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RYAN PERRIN,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. When applying the categorical approach to determine whether a prior state conviction qualifies as a predicate for the Armed Career Criminal Act (ACCA) enhancement, should courts consult authoritative state court decisions pre-dating the defendant's prior conviction (as several circuits hold), or only the most recent state court decision, even if that decision changes the conduct necessary to satisfy the offense elements (as the Eleventh Circuit holds)?[1]

II. In *Erlinger v. United States*, 602 U.S. 821 (2024), this Court held that the Fifth and Sixth Amendments require the government to prove ACCA's complex different-occasions requirement to a jury beyond a reasonable doubt. Is *Erlinger* error structural?

III. *Erlinger* also explained that sentencing courts cannot use information from *Shepard* documents to decide if a defendant committed his prior offenses on different occasions. Can appellate courts rely on that same prohibited information to affirm an ACCA sentence imposed in violation of *Erlinger*?

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[1] This question is also presented in *Harris v. United States*, No. 24-5776.

RELATED PROCEEDINGS

United States District Court (M.D. Fla.)

United States v. Perrin, Case No. 8:18-cr-480

United States Court of Appeals (11th Cir.)

United States v. Perrin, No. 20-12558

TABLE OF CONTENTS

Questions Presented i

Related Proceedings ii

Table of Authorities v

Petition for a Writ of Certiorari 1

Order and Opinion Below 1

Jurisdiction 1

Relevant Constitutional and Statutory Provisions 1

Introduction 3

Statement of the Case 5

Reasons for Granting the Writ 13

I. This Court's review is warranted on the question of whether, when deciding if a state crime is an ACCA predicate, courts should consider controlling judicial interpretations at the time of the prior offense even if later case law interprets the statute differently. 13

A. The circuits are split on whether courts should consider judicial interpretations at the time of the prior offense. 13

B. The Eleventh Circuit's decision is wrong. 17

II. This Court's review is warranted on the *Erlinger* questions. 21

A. This Court should grant review to decide whether *Erlinger* error is structural. 22

B. This Court should grant review to clarify that circuit courts cannot rely on inessential details from *Shepard* documents to affirm an ACCA sentence imposed in violation of *Erlinger*. 28

Conclusion 32

Appendices

Eleventh Circuit's Opinion ..... Appendix A

Eleventh Circuit's Order Denying Rehearing ..... Appendix B

TABLE OF AUTHORITIES

Cases **Page(s)**

Beeman v. United States,
871 F.3d 1215 (11th Cir. 2017) 19

Borden v. United States,
593 U.S. 420 (2021) 8, 19

Brown v. United States,
602 U.S. 101 (2024) 16, 17, 20

Delaware v. Van Arsdall,
375 U.S. 673 (1986) 30

Descamps v. United States,
570 U.S. 254 (2013) 27

Dupree v. State,
310 So. 2d 396 (Fla. 2d DCA 1975) 19

Erlinger v. United States,
602 U.S. 821 (2024) ..... i, 4, 12, 21, 22, 23, 24, 25, 26, 28, 29, 31, 32

Estelle v. McGuire,
502 U.S. 62 (1991) 30

Evitts v. Lucey,
469 U.S. 387 (1985) 29

Florida v. Barnum,
921 So. 2d 513 (Fla. 2005) 15

Greer v. United States,
593 U.S. 503 (2021) 30, 31

In re Winship,
397 U.S. 358 (1970) 24

Cases **Page(s)**

James v. United States,
550 U.S. 192 (2007) 20

Mathis v. United States,
579 U.S. 500 (2016) 17, 18, 27, 29

McCoy v. Louisiana,
584 U.S. 414 (2018) 24

McNeill v. United States,
563 U.S. 816 (2011) 13, 15, 17, 20

Neder v. United States,
527 U.S. 1 (1999) 25, 30

Pinkney v. State,
74 So. 3d 572 (Fla. 2d DCA 2011) 19

Rivers v. Roadway Express, Inc.,
511 U.S. 298 (1994) 18

Rose v. Clark,
478 U.S. 570 (1986) 24, 25

Shepard v. United States,
544 U.S. 13 (2005) 4

Somers v. United States,
15 F.4th 1049 (11th Cir. 2021) 8

Somers v. United States,
355 So. 3d 887 (Fla. 2022) 8

Somers v. United States,
66 F.4th 890 (11th Cir. 2023) 9, 10, 15, 16

Sullivan v. Louisiana,
508 U.S. 275 (1993) 23, 26

Cases **Page(s)**

Taylor v. United States,
495 U.S. 575 (1990) 20

Thompson v. Louisville,
362 U.S. 199 (1960) 24

United States v. Anderson,
99 F.4th 1106 (7th Cir. 2024) 14, 15, 16

United States v. Butler,
122 F.4th 584 (5th Cir. 2024) 27

United States v. Campbell,
122 F.4th 624 (6th Cir. 2024) 27, 30

United States v. Cornette,
932 F.3d 204 (4th Cir. 2019) 13

United States v. Diaz-Calderon,
716 F.3d 1345 (11th Cir. 2013) 31

United States v. Faust,
853 F.3d 39 (1st Cir. 2017) 13

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006) 23

United States v. Roblero-Ramirez,
716 F.3d 1122 (8th Cir. 2013) 14

United States v. Seabrooks,
839 F.3d 1326 (11th Cir. 2016) 18

United States v. Voltz,
No. 22-10733, 2024 WL 4891754 (11th Cir. Nov. 26, 2024) 27

Vinson v. State,
345 So. 2d 711 (Fla. 1977) 31

Cases **Page(s)**

Washington v. Recuenco,
548 U.S. 212 (2006) 25

Wooden v. United States,
595 U.S. 360 (2022) 9, 23

Yates v. Evatt,
500 U.S. 391 (1991) 30

Statutes

18 U.S.C. § 922(g)(1) 3

18 U.S.C. § 924(e) 2, 3

28 U.S.C. § 1254(1) 1

Other Authorities

Harris v. United States, No. 24-5776 ..... i, 21, 32

United States v. Erlinger, No. 22-1926 (7th Cir.)

Doc. 40 (Gov's Circuit Rule 54 Statement) (Aug. 12, 2024) 28

Doc. 44 (Order) (Sep. 4, 2024) 28

PETITION FOR A WRIT OF CERTIORARI

Ryan Perrin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

ORDER AND OPINION BELOW

The Eleventh Circuit's unpublished opinion affirming Mr. Perrin's sentence is provided in **Appendix A**. Its order denying Mr. Perrin's timely filed petition for rehearing en banc is provided in **Appendix B**.

JURISDICTION

The Eleventh Circuit denied Mr. Perrin's petition for rehearing en banc on October 29, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution states in relevant part that "no person shall be . . . deprived of life, liberty, or property without due process of law."

The Sixth Amendment to the United States Constitution states in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

The Armed Career Criminal Act, 18 U.S.C. § 924(e), states in relevant part:

> (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 . . . .
>
> (2) As used in this subsection –
>
> . . . .
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that –
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another . . . .

INTRODUCTION

The Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), imposes heightened statutory penalties for individuals who violate the felon in possession of a firearm statute, 18 U.S.C. § 922(g)(1), and who have three or more predicate offenses "committed on occasions different from one another." This petition presents three important issues about how and when courts apply ACCA's harsh penalty.

1. First, courts use the categorical approach to determine if a defendant's prior conviction is a predicate offense—either a "serious drug offense" or a "violent felony." Does a proper application of the categorical approach require consulting controlling judicial interpretations at the time of the prior offense?

Multiple circuits say yes, but the Eleventh Circuit says no. The Eleventh Circuit has not only created a circuit split, it has also subverted the categorical approach, closing its eyes to the conduct the government necessarily proved to convict the defendant of the prior offense in favor of a legal fiction—that the later state court decision "tells us what the law always meant"—that has no role in ACCA's historical inquiry.

2. Second, last term this Court held that the government must prove ACCA's different-occasions requirement to a unanimous jury beyond a reasonable doubt. *See Erlinger v. United States*, 602 U.S. 821 (2024). In the opinion, the Court explained that it could not say what a jury presented with reliable information might find about whether the *Erlinger* defendant had committed his prior offenses on different occasions. This petition presents a question *Erlinger* left open: Is *Erlinger* error structural?

The unique features of *Erlinger* error—including the lack of a trial record or factual basis and the multi-factored, unpredictable nature of the different-occasions inquiry—demonstrate that the answer is yes. Yet the Eleventh Circuit here rejected that conclusion, applying harmless-error review in blind reliance on distinguishable case law.

3. Third, *Erlinger* held that sentencing courts may not look to alleged facts in *Shepard*[2] documents to find different occasions. Doing so would not only violate the Fifth and Sixth Amendments, this Court explained, it also would be fundamentally unfair because *Shepard* documents are unreliable, and defendants often have no incentive to

[2] *Shepard v. United States*, 544 U.S. 13, 16 (2005).

dispute inessential facts during the prior proceedings. Can appellate courts nevertheless rely on those same unreliable allegations to affirm an ACCA sentence imposed in violation of *Erlinger*?

In this case, over Mr. Perrin's objection, the district court relied on non-elemental allegations in state court charging documents—allegations that Mr. Perrin never admitted when he pled nolo contendere to the prior offenses—to find that Mr. Perrin's predicate offenses had been committed different occasions. That was error under *Erlinger*. The Eleventh Circuit then relied on those same unreliable allegations to hold that Mr. Perrin was not prejudiced by the district court's error. Doing so, he contends, violated due process and this Court's precedent.

STATEMENT OF THE CASE

1. In 2019, the federal government charged Mr. Perrin by superseding information with two counts of possessing a firearm knowing he had been convicted of a crime punishable by more than a year's imprisonment, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Doc. 26.[3] The superseding information alleged he had been convicted of the

[3] "Doc." references the district court docket entries in this case. "App. Doc." references the appellate court docket entries.

following crimes: (1) aggravated assault, on or about August 4, 2014; (2) battery of a law enforcement officer, on or about August 4, 2014; and (3) aggravated assault, on or about August 4, 2014. *Id.* Mr. Perrin pled guilty as charged. Doc. 34.

Before sentencing, the United States Probation Office (Probation) prepared a presentence investigation report in which it concluded that Mr. Perrin was subject to ACCA's increased statutory penalties based on three prior Florida convictions: (1) sale and/or delivery of cocaine, allegedly committed on January 24, 2006; (2) aggravated assault, allegedly committed on May 21, 2013; and (3) aggravated assault, allegedly committed on May 25, 2013. Doc. 42 ¶ 27. Probation alleged that the cocaine offense was a "serious drug offense," that the aggravated assaults were "violent felon[ies]," and that all three had been committed on different occasions. *Id.*

Mr. Perrin objected to the assertion that he had three predicate convictions committed on different occasions. *Id.* at p. 43. He objected to the factual narratives in the criminal history portion of the PSR describing the two aggravated assaults, *id.* at pp. 43–44, and he argued that the court could not rely on any facts other than "elemental facts (i.e.,

facts derived from the elements of the offense; not from non-elemental sources like the date of an offense listed in the information)" from *Shepard*-approved sources to find different-occasions. *Id.* at pp. 43–45.

In response, the government submitted "certified judicial records"—including charging documents and judgments for the prior convictions. Doc. 51. The charging documents contained certain "facts" about the aggravated assaults such as their alleged dates, the name of the alleged victim, and the alleged type of weapon used. Doc. 51-2 at 1; Doc. 51-3 at 6. The judgments showed that Mr. Perrin entered a plea of nolo contendere to both aggravated assault charges on the same day. Doc. 51-2 at 3; Doc. 51-3 at 1. He received a single concurrent sentence. Doc. 51-2 at 6–7; 51-3 at 5.

At sentencing, the district court overruled Mr. Perrin's objections and sentenced him to 180 months' imprisonment on both counts, ACCA's mandatory minimum, to run concurrently to each other and to a previously imposed state sentence. Doc. 69 at 37.

2. On appeal, Mr. Perrin argued that his aggravated assault convictions were not "violent felon[ies]" because they could have been committed with a mens rea of recklessness. App. Doc. 15 at 10–14. He

also argued that the government failed to prove his prior offenses were committed on different occasions because the district court had engaged in judicial factfinding of non-elemental facts and that his ACCA sentence violated the Fifth and Sixth Amendments because the government did not charge or prove to a jury beyond a reasonable doubt that his offenses had been committed on "different occasions." *Id.* at 16–26.

His appeal was stayed pending this Court's decision in *Borden v. United States*, 593 U.S. 420 (2021)—which held that ACCA's "violent felony" definition requires a mens rea higher than recklessness—and then the Eleventh Circuit's resolution of *Somers v. United States*, No. 19-11484. *See* App. Docs. 23, 35. In *Somers*, the Eleventh Circuit asked the Florida Supreme Court to clarify the mens rea for the aggravated assault statute given a split among the Florida intermediate appellate courts on the issue. *See Somers v. United States*, 15 F.4th 1049, 1055–56 (11th Cir. 2021) ("*Somers I*"). The Florida Supreme Court determined that aggravated assault cannot be committed recklessly. *See Somers v. United States*, 355 So. 3d 887, 892–93 (Fla. 2022) ("*Somers II*"). The Eleventh Circuit then concluded that, based on *Somers II*, Florida aggravated

assault is a "violent felony" under ACCA. *Somers v. United States*, 66 F.4th 890, 896 (11th Cir. 2023) ("*Somers III*").

In supplemental briefing, Mr. Perrin argued that *Somers III s*hould not apply in his case because it did not resolve the "backwards looking" ACCA question of what elements he was necessarily convicted of in the prior proceeding. App. Doc. 45 at 2–3. At the time of his prior convictions, the Florida intermediate appellate courts were divided, and he had pled nolo contendere in a jurisdiction that described aggravated assault's mens rea requirement using the term "culpable negligence." *Id.* at 4. He thus maintained that his convictions rested on a mens rea no greater than recklessness and were not ACCA "violent felonies." *Id.*

Mr. Perrin also filed a supplemental authority letter, App. Doc. 48, on *Wooden v. United States*, 595 U.S. 360 (2022), which held that ACCA's different-occasions test is a multi-factored inquiry. *Wooden*, he explained, made "clear that the different occasions determination requires a consideration of facts that go beyond the elements of the prior offense" and thus supported his argument that the Constitution required a jury finding beyond a reasonable doubt that the offenses occurred on different occasions.

3. On May 3, 2024, the Eleventh Circuit issued an unpublished decision affirming Mr. Perrin's sentence. The panel held that *Somers III* foreclosed his arguments that his 2013 aggravated assault convictions were not "violent felon[ies]"—rejecting his argument that *Somers III* did not apply because at the time he was convicted, the Florida appellate courts disagreed about the mens rea required under the aggravated assault statute. App. Doc. 51 (Appendix A) at 5. *Somers III*, the Eleventh Circuit explained, had stated that the Florida Supreme Court's 2022 interpretation of the statute "tells us what the statute always meant," and he could not "'rely on earlier decisions of Florida's intermediate courts of appeal to avoid' a later holding." *Id.* (quoting *Somers III*, 66 F.4th at 696).

The Eleventh Circuit also held that under then-binding precedent, the district court's resolution of the "different occasions" question involved no Sixth Amendment violation or improper judicial fact-finding. *Id.* at 6–8. And it rejected as foreclosed Mr. Perrin's argument that under

the Fifth and Sixth Amendments the "different occasions" component had to be charged and proven beyond a reasonable doubt. *Id.* at 6–9.[4]

4. Mr. Perrin filed a petition for rehearing. App. Doc. 54. He raised two issues. First, he asked whether, in determining whether a state crime is an ACCA predicate, courts should consider controlling judicial interpretations of the statue of conviction at the time of the prior offense, or whether courts could ignore that historical precedent if later state supreme court precedent interprets the statute differently. He noted that, consistent with Supreme Court precedent and ACCA's text, other circuits look backward to judicial interpretations at the time of the state offense. In fact, he explained, the Seventh Circuit had split with the Eleventh Circuit on the exact predicate at issue in Mr. Perrin's case—holding that pre-*Somers II* Florida aggravated assault was not a violent felony. Only the Eleventh Circuit had held that controlling judicial interpretations of a statute at the time of the prior offense were irrelevant if later case law interpreted the statute differently.

[4] The Eleventh Circuit considered Mr. Perrin's argument about the charging document for plain error, *id.* at 8, but acknowledged he had preserved his argument about improper judicial factfinding and the jury trial right, *id.* at 6.

Second, he asked whether, in light of this Court's intervening decision in *Erlinger v. United States*, 602 U.S. 821 (2024), the Eleventh Circuit should remand Mr. Perrin's case for resentencing because the "different occasions" requirement had not been not admitted to or proven to a jury beyond a reasonable doubt. Mr. Perrin argued that *Erlinger* error was structural and that, even if it were not structural, the error was not harmless and had prejudiced him.

5. After requesting and receiving a response from the government, App. Docs. 56, 59, the Court denied Mr. Perrin's petition for rehearing. App. Doc. 62. The order denying his petition stated:

> Ryan Perrin petitions for rehearing and rehearing en banc based on the Supreme Court's recent decision in *Erlinger v. United States*, 144 S. Ct. 1840 (2024). After carefully reviewing the petition and the government's response, panel rehearing is DENIED because Perrin did not raise the *Erlinger* issue in the district court, and any *Erlinger* error is harmless beyond a reasonable doubt and would not have affected his substantial rights or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. The petition for rehearing en banc is DENIED because no judge in regular active service on the court has requested that the court be polled on rehearing en banc.

App. Doc. 62 (Appendix B). The order did not mention Mr. Perrin's first issue.

REASONS FOR GRANTING THE WRIT

I. This Court's review is warranted on the question of whether, when deciding if a state crime is an ACCA predicate, courts should consider controlling judicial interpretations at the time of the prior offense even if later case law interprets the statute differently.

A. The circuits are split on whether courts should consider judicial interpretations at the time of the prior offense.

The Court should grant review because the circuits are split on this important issue. At least four circuits—the First, Fourth, Seventh, and Eighth—consider judicial interpretations at the time of the prior conviction rather than later decisions. Relying on *McNeill v. United States*, 563 U.S. 816 (2011), the First and Fourth Circuits hold that controlling judicial interpretations of state law at the time of the prior conviction inform the categorical analysis, not later interpretations, even if those later interpretations were by the state's highest court. *See United States v. Faust*, 853 F.3d 39, 57 (1st Cir. 2017) (concluding that, in determining whether defendant's prior Massachusetts conviction for assault and battery on a police officer was "violent felony," court had to consider elements of offense according to judicial interpretations in place at time of prior conviction); *United States v. Cornette*, 932 F.3d 204, 214–15 (4th Cir. 2019) (declining to consider 1977 and 1980 Georgia Supreme

Court decisions interpreting burglary statute because they did not inform elements of crime at time defendant was convicted of burglary; looking instead to intermediate appellate court decisions in place in 1976).

The Eighth Circuit holds the same in the context of determining whether a prior conviction is a "crime of violence" under the Sentencing Guidelines. *See United States v. Roblero-Ramirez*, 716 F.3d 1122, 1126–27 (8th Cir. 2013) (in deciding whether defendant's prior Nebraska conviction for sudden-quarrel manslaughter was "crime of violence," looking to highest state-court case law in place at time of prior conviction, not later Nebraska Supreme Court decision that manslaughter required intent because "[t]hat interpretation was not Nebraska law when Roblero-Ramirez was convicted").

Further deepening the split, the Seventh Circuit has held the exact predicate at issue here—pre-*Somers-II* Florida aggravated assault—is not a violent felony. In *United States v. Anderson*, 99 F.4th 1106, 1110–13 (7th Cir. 2024), *pet. for panel reh'g denied* Nov. 13, 2024, the Seventh Circuit expressly split from the Eleventh Circuit, holding under plain error review that Florida aggravated assault offenses pre-dating *Somers II* are not "violent felon[ies]."

Anderson started with the bedrock principle that courts must "look to the law at the time of the offense to determine whether a crime is a violent felony under ACCA." 99 F.4th at 1111 (citing *McNeill*, 563 U.S. at 820). Thus, *Anderson* explained, "the relevant inquiry is whether the law at the time of his conviction was broader than the corresponding federal law." *Id.* at 1110. And at the time of Anderson's conviction in 2001, the Seventh Circuit noted, "Florida courts were split on the breadth of the assault statute. Some appellate courts had held that assault could be committed recklessly, while others had reached the opposition conclusion." *Id.* at 1110–11 (citations omitted).

Anderson rejected the Eleventh Circuit's reasoning that *Somers II* "'tells us what the statute always meant.'" *Id.* at 1112 (quoting *Somers III*, 66 F.4th at 896). Under Florida's approach to statutory interpretation, *Anderson* explained, Florida Supreme Court decisions "disagreeing with a statutory construct previously rendered by a district court constitute 'changes' in the applicable law from the law at the time of the conviction.'" *Id.* (quoting *Florida v. Barnum*, 921 So. 2d 513, 528 (Fla. 2005)). Because *Somers II* disagreed with the statutory construct from some of the intermediate appellate courts, *Anderson* reasoned that

Somers II constituted a "change" in the law that was not retroactive. *Id.* Finally, *Anderson* looked to the state of the law at the time of the defendant's prior conviction and determined that the decisions of the intermediate appellate courts created a realistic probability that the defendant could have been convicted for reckless conduct. *Id.*

Although *Anderson*'s analysis differed slightly from the First, Fourth, and Eighth Circuits, it reached the same basic conclusion: because ACCA requires a backward-looking approach, the elements of a past conviction must be determined according to law in effect at the time of that conviction, including judicial interpretations. *Id.* at 1111, 1112–13. Only the Eleventh Circuit has held that judicial interpretations in place at the time of the prior conviction are erased by subsequent state court decisions interpreting the statute differently. *See* App. Doc. 51 at 5; *Somers III*, 66 F.4th at 896. As explained below, the Eleventh Circuit not only stands alone, its reasoning is contrary to the principles underlying the categorical approach and ACCA's backward-looking analysis as applied by this Court in *McNeill* and *Brown v. United States*, 602 U.S. 101 (2024). Accordingly, this Court should grant certiorari to resolve this important split.

B. The Eleventh Circuit's decision is wrong.

This Court's review is also warranted because the Eleventh Circuit's refusal to consider binding state court case law from the time of Mr. Perrin's prior convictions conflicts with this Court's precedent on the categorical approach and ACCA's text in at least two ways. First, the categorical approach aims to discern "what a jury necessarily found to convict a defendant (or what he necessarily admitted)." *Mathis v. United States*, 579 U.S. 500, 515 (2016) (internal quotation marks omitted). Dismissing judicial interpretations from the time of the prior conviction in favor of a later interpretation subverts that purpose. Second, the text of ACCA's violent felony provision, as confirmed by the Supreme Court's decision in *McNeill v. United States* and its predecessors, requires a court to "consult the law that applied at the time of [the prior] conviction." 563 U.S. at 820; *see also Brown* 602 U.S. at 111 (emphasizing that ACCA requires backward-looking analysis of law at time of prior offense). Ignoring the state law in effect at the time of Mr. Perrin's convictions directly contradicts this requirement.

Mr. Perrin acknowledges some tension in the case law between whether the Florida Supreme Court's statutory interpretation in *Somers*

II is considered a change in law or represents what the statute always meant. *Compare Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994), *with supra* at 15–16 (explaining that under Florida law, statutory construction by state supreme court that disagrees with prior interpretation by intermediate court of appeals is considered change in law). But any friction on that point is inconsequential when it comes to ACCA's categorical analysis.

As Judge Martin wrote in an earlier Eleventh Circuit opinion, "It's generally true that when a court interprets a statute it tells us what the statute has always meant." *United States v. Seabrooks*, 839 F.3d 1326, 1451 n.5 (11th Cir. 2016) (Martin, J., concurring in the judgment). But that principle is irrelevant in the ACCA context, where the court's "interest is not about divining the true meaning of [the state statute]. Rather, [the court's] interest is in understanding what conduct could have resulted in [the defendant's prior] convictions under the statute, even if Florida courts were misinterpreting the statute at that time." *Id.*

Thus, when conducting the categorical approach that ACCA demands, courts must discern "what a jury necessarily found to convict a defendant (or what he necessarily admitted)." *Mathis*, 579 U.S. at 515

(internal quotation marks omitted). And the only way to determine what Mr. Perrin necessarily admitted is to consult the elements of the crime as understood when he was convicted. Measured by that rubric, Mr. Perrin necessarily admitted to having only a mens rea of recklessness. Mr. Perrin was convicted in 2013 within Florida's Second District Court of Appeal, *see* Docs. 51-2, 51-3, which at that time described aggravated assault as having a mens rea of culpable negligence. *See Dupree v. State*, 310 So. 2d 396, 398 (Fla. 2d DCA 1975); *see also Pinkney v. State*, 74 So. 3d 572, 476 (Fla. 2d DCA 2011) (explaining that intent element of aggravated assault statute requires only that defendant do an act that was "substantially certain" to put victim in fear; defendant's subjective intent was "irrelevant").

Such a crime is not a violent felony, *see Borden*, 593 U.S. at 429, and no later judicial interpretation can transform it into one. *Cf. Beeman v. United States*, 871 F.3d 1215, 1224 n.5 (11th Cir. 2017) (noting, when determining whether defendant was sentenced under ACCA's residual clause, that subsequent case law holding predicate did not qualify under elements clause "casts very little light, if any on the key question of historical fact").

McNeill also compels this conclusion by teaching that ACCA is "backward-looking." 563 U.S. at 820. Because ACCA deals with past convictions, determining whether a prior conviction is a predicate "can only be answered by reference to the law under which the defendant was convicted." *Id.* Thus, ACCA requires courts to "turn[ ] to the version of state law that the defendant was actually convicted of violating" to decide whether a prior conviction is a "violent felony." *Id.* at 821 (discussing *Taylor v. United States*, 495 U.S. 575 (1990), and *James v. United States*, 550 U.S. 192 (2007)).

Relying on *McNeill*, this Court recently reiterated that ACCA requires "a historical inquiry into the state law at the time of that prior offense." *Brown*, 602 U.S. at 120. And *Brown* confirms that—just like a later change in law cannot "erase" a qualifying predicate conviction—a later change in law also cannot transform a non-qualifying offense into an ACCA predicate. *Id.* at 122–23 (recognizing that state crimes involving a substance that predates the substance's addition to the federal schedules are not ACCA predicates).

The Eleventh Circuit's reliance on a 2022 Florida Supreme Court decision—issued nearly a decade after Mr. Perrin's prior convictions—

contradicts the directive in *McNeill* and *Brown* regarding ACCA's backward-looking, historical analysis. This Court should grant review to correct the Eleventh Circuit's approach, or, alternatively, hold this case for the resolution of *Harris v. United States*, No. 24-5776, which raises the same issue.[5]

II. This Court's review is warranted on the *Erlinger* questions.

This petition also presents two important follow-up questions to last term's *Erlinger* decision. In *Erlinger*, this Court held that under bedrock Fifth and Sixth Amendment principles, a defendant cannot be subject to ACCA's increased penalties unless the government proves to a jury beyond a reasonable doubt that the defendant's three predicate convictions had been "committed on occasions different from one another." 602 U.S. at 830–35. In reaching this holding, the Court also rejected the argument that a sentencing court could rely on *Shepard* documents to make the different-occasions finding itself. *Id.* at 839–40. This Court should grant review to decide whether *Erlinger* error is structural and whether *Erlinger*'s disapproval of judicial reliance on

[5] The Court requested a response from the Solicitor General on this issue in *Harris* on November 4, 2024. The deadline to file a response is currently February 3, 2025.

Shepard documents to find the different-occasions requirement extends to appellate review of the prejudicial effect of *Erlinger* error.

A. This Court should grant review to decide whether *Erlinger* error is structural.

Erlinger suggested, but did not decide, that the constitutional error is structural. During oral argument, Justice Gorsuch asked whether failing to subject the different-occasions question to the Constitution's jury-trial requirements constituted structural error. *See* Oral Arg. Tr. at 27–29, *Erlinger v. United States*, No. 23-370 (Mar. 27, 2024). The *Erlinger* majority opinion, authored by Justice Gorsuch and joined by five other justices, did not expressly address whether the error was structural. *See generally Erlinger*, 602 U.S. at 825–49. But it strongly implied as much.

First, the *Erlinger* Court stated that it could not say whether a hypothetical jury would have found that the petitioner's prior offenses had been committed on different occasions. *Id.* at 835. The only thing the Court in *Erlinger* could say "for certain" is that the district court erred "in taking th[e] decision from a jury of Mr. Erlinger's peers." *Id.* As the Supreme Court has explained, when deprivation of the jury trial right has "consequences that are necessarily unquantifiable and indeterminate" it "unquestionably . . . qualifies as 'structural error.'"

Sullivan v. Louisiana, 508 U.S. 275, 281–82 (1993); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (holding that denial of right to counsel of choice is structural error because its consequences were "necessarily unquantifiable and indeterminate," and "[h]armless-error analysis . . . would be a speculative inquiry into what might have occurred in an alternate universe" (quoting *Sullivan*, 508 U.S. at 282)).

The impact of the "different occasions" constitutional error is inherently unquantifiable. As an initial matter, *Wooden*'s multifactored test is "unpredictable"; it will lead to different results on similar facts, such that "reasonable doubts about its application will arise often." *Wooden*, 595 U.S. at 385, 397 (Gorsuch, J., concurring); *accord Erlinger*, 602 U.S. at 821 (discussing holistic nature of different-occasions test). Moreover, there generally will be no trial record on any of ACCA's requirements, only *Shepard* documents introduced at sentencing, which are of limited utility, inherently unreliable, and pose serious due process problems. *See Erlinger*, 602 U.S. at 841–42 (discussing problems with

Shepard documents); Oral Arg. Tr. at 28 (Justice Gorsuch asking, "How do you do harmless error review when you don't have a trial record?").[6]

Second, and relatedly, *Erlinger* recognized that using *Shepard* documents to find "different occasions" violates the basic principle of "fair notice." 602 U.S. at 841. Imposing ACCA based on *Shepard* documents is thus fundamentally unfair, suggesting structural error. *Accord McCoy v. Louisiana*, 584 U.S. 414, 427 (2018) ("An error might also count as structural . . . where the error will inevitably signal fundamental unfairness.").

Third, *Erlinger* held that defendants have the right to hold the government to its burden to prove "different occasions" to a unanimous jury beyond a reasonable doubt, "'regardless of how overwhelming' the evidence may seem to a judge." 602 U.S. at 842 (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986)). That quoted portion of *Rose* explains that a directed verdict for the prosecution, regardless of the evidence presented,

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[6] Without a trial record or admission at the plea hearing, there is no evidentiary support for the different-occasions finding, let alone proof beyond a reasonable doubt. *See Thompson v. Louisville*, 362 U.S. 199, 204, 206 (1960) (holding that conviction based on record devoid of evidentiary support violates due process); *Erlinger*, 602 U.S. at 830 (discussing "ancient rule" that government must prove each of its charges "beyond a reasonable doubt"); *In re Winship*, 397 U.S. 358, 364 (1970).

would be structural error because the Sixth Amendment jury trial right would have been "all together denied" and the "wrong entity" would have "judged the defendant guilty." 478 U.S. at 578. *Erlinger*'s reliance on *Rose* suggests that the "different occasions" error is akin to a directed verdict for ACCA and thus not susceptible to harmless-error review.

In its *Erlinger* briefing to the Supreme Court, the government argued that harmless-error review applied and cited in support *Washington v. Recuenco*, 548 U.S. 212 (2006), and *Neder v. United States*, 527 U.S. 1 (1999). *See* U.S. Br. at 27–28, U.S. Reply Br. at 14, *Erlinger*, 602 U.S. at 821. But the *Erlinger* majority did not mention harmless error or cite either decision. Instead, it cited *Rose*'s discussion of structural error.[7]

Recuenco and *Neder* do not resolve the structural error question because *Erlinger* error is different. As an initial matter, *Recuenco* and *Neder* involved trials where relevant evidence was presented to the jury and did not consider the impact of a charging error. *Compare Recuenco*, 548 U.S. at 215, 220 n.3, and *Neder*, 527 U.S. at 6, *with Erlinger*, 602

[7] Only three justices endorsed harmless-error review. *See Erlinger*, 602 U.S. at 849–50 (Roberts, J., concurring); *id.* at 859–61 (Kavanaugh, J., joined by Alito, J.).

U.S. at 830–31. Here, the government did not charge "different occasions" and the jury's role under ACCA was completely usurped by the district judge. Perhaps most critically, the nature of the different-occasions inquiry is such that reviewing courts (1) simply cannot know what a hypothetical jury would have found and (2) have only unreliable, unfair *Shepard* documents to conduct their review. Harmless-error review would thus be fundamentally unfair and require "appellate speculation," *Sullivan*, 508 U.S. at 280–81, which the Constitution does not countenance.

Despite these clear signs that *Erlinger* error is structural, the Eleventh Circuit affirmed Mr. Perrin's erroneous ACCA sentence, stating that any error was "harmless beyond a reasonable doubt and would not have affected his substantial rights or seriously affected the fairness, integrity, or public reputation of the judicial proceedings." But if *Erlinger* error is structural, as Mr. Perrin contends, then a prejudice review is inapplicable.[8]

[8] In its order denying rehearing, the Eleventh Circuit stated that Mr. Perrin had not raised the *Erlinger* issue in the district court, and then recited the mix of harmless-error and plain-error review standards quoted above. App. Doc. 62.

The Eleventh Circuit thus rejected Mr. Perrin's argument that *Erlinger* errors are structural. *See also United States v. Voltz*, No. 22-10733, 2024 WL 4891754, at *3 (11th Cir. Nov. 26, 2024) (unpublished) (holding that *Erlinger* errors are not structural). The Eleventh Circuit is not alone; the Fifth and Sixth Circuits have also held that *Erlinger* errors are subject to harmless-error analysis. *See United States v. Butler*, 122 F.4th 584, 589 (5th Cir. 2024); *United States v. Campbell*, 122 F.4th 624, 630–31 (6th Cir. 2024), *pet. for rehearing en banc pending*.

Yet in *Erlinger* itself, on remand from this Court, the Seventh Circuit rejected the government's request to affirm Mr. Erlinger's ACCA

Of course, Mr. Perrin was convicted and sentenced years before *Erlinger*. He did, however, object that the government could not prove his prior offenses had been committed on different occasions and argued that the government could rely on only the elements established by the *Shepard* documents (and not non-elemental facts like dates) to prove different occasions to the sentencing court. *See* Doc. 42 at pp. 43–44. That is a constitutional objection that comes from the Sixth-Amendment-based-decisions in *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis*, 579 U.S. at 500. And in its opinion, the Eleventh Circuit rightly treated Mr. Perrin's jury-trial right argument as preserved. *See* App. Doc. 51 at 6.

But even if his *Erlinger* issue is on plain error, it affected his substantial rights and seriously affected the fairness, integrity, and public reputation of the proceedings for the reasons explained in Mr. Perrin's two *Erlinger* issues raised in this petition.

sentence based on harmlessness. *See United States v. Erlinger*, No. 22-1926, Doc. 40 (Government's Circuit Rule 54 Statement) (7th Cir. Aug. 12, 2024); *United States v. Erlinger*, No. 22-1926, Doc. 44 (Order) (7th Cir. Sep. 4, 2024).

In sum, *Erlinger* errors are not amenable to harmless-error review. But unless and until this Court clarifies that they fall within the limited class of structural errors, defendants like Mr. Perrin may be subject to a harsh mandatory minimum sentence despite a complete denial of their jury trial right on the ACCA enhancement—and often based on insufficient and unreliable allegations in documents from decades-old proceedings. The Court should grant review on this important issue.

B. This Court should grant review to clarify that circuit courts cannot rely on inessential details from *Shepard* documents to affirm an ACCA sentence imposed in violation of *Erlinger*.[9]

In *Erlinger*, the Court rejected the argument that sentencing courts could rely on *Shepard* documents to make the different-occasions finding. Doing so, the Court explained would be "exactly what the Fifth and Sixth

[9] If this Court holds that *Erlinger* error is structural and agrees with Mr. Perrin that he preserved his Sixth Amendment objection, it need not decide this issue.

Amendments forbid." 602 U.S. at 840. This Court also explained that *Shepard* documents are "of limited utility" and "can be 'prone to error.'" *Id.* at 841 (quoting *Mathis*, 579 U.S. at 512).

This is especially true for facts inconsequential to the original conviction that a defendant "may have no incentive to contest" or even "'have good reason not to'" dispute. *Id.* (quoting *Mathis*, 579 U.S. at 512). "As a matter of fair notice alone," this Court concluded, "old recorded details, prone to error, sometimes untested, often inessential, and the consequences of which a defendant may not have appreciated at the time, 'should not come back to haunt him many years down the road by triggering a lengthy mandatory sentence.'" *Id.* at 842 (quoting *Mathis*, 579 U.S. at 512).

If the use of *Shepard* documents is fundamentally unfair, it's hard to understand why an appellate court could use those same documents to find the error harmless. *Cf. Evitts v. Lucey*, 469 U.S. 387, 393 (1985) ("[T]he procedures used in deciding appeals must comport with the demands of the Due Process [Clause] . . . ."). Yet despite this Court's warning, the Eleventh Circuit relied on old details from *Shepard* documents to affirm Mr. Perrin's ACCA sentence. *See* App. Doc. 59 at 15–

16 (government's reliance on information from *Shepard* documents to argue that Mr. Perrin was not prejudiced by *Erlinger* error); App. Doc. 62 (order denying rehearing petition). Doing so runs afoul of *Erlinger* and violated Mr. Perrin's due process rights.[10]

Reliance on those documents also violated this Court's precedent explaining that the harmless-error inquiry is limited to a review of the evidence the jury considered. *See Yates v. Evatt*, 500 U.S. 391, 404–06 (1991), *overruled on other grounds by Estelle v. McGuire*, 502 U.S. 62, 71 n.4 (1991); *Greer v. United States*, 593 U.S. 503, 517–18 (2021) (Sotomayor, J., concurring); *see also Delaware v. Van Arsdall*, 375 U.S. 673, 681, 684 (1986) (assessing whether violation of confrontation clause right was harmless by reviewing "whole record"—which was limited to evidence admitted at trial); *Neder*, 527 U.S. at 16–20 (citing *Van Arsdall* and conducting harmless-error review based only on evidence in trial record). Here, the *Shepard* documents were not submitted to a jury, nor did Mr. Perrin admit to them during his guilty plea.

Finally, even if plain-error review applies, the circuit court still

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[10] The Sixth Circuit, over a strong cautionary message from Judge Davis, has also relied on details from *Shepard* documents to hold *Erlinger* error harmless. *See Campbell*, 122 F.4th at 635–37 (Davis, J. concurring).

should not have relied on the information in the *Shepard* documents. This is not a case like *Greer*, where "relevant and reliable information" from the record was unobjected to in the district court. 593 U.S. at 511. To the contrary, Mr. Perrin never admitted the facts about his prior aggravated assaults in the earlier proceedings, which were resolved by nolo contendere pleas. And he received a concurrent sentence for both offenses. Doc. 51-2 at 3; Doc. 51-3 at 1; Doc. 51-2 at 6–7; 51-3 at 5; *see United States v. Diaz-Calderon*, 716 F.3d 1345, 1351 & n.31 (11th Cir. 2013) (recognizing that "Florida expressly provides . . . that a defendant may plead nolo contendere because he feels it to be in his best interest even though he does not admit guilt") (citing *Vinson v. State*, 345 So. 2d 711, 715 (Fla. 1977)). Mr. Perrin therefore lacked any incentive to contest, and may have had every reason to contest, the alleged non-elemental facts. *Erlinger*, 602 U.S. at 841. In the instant case, however, he vigorously disputed those facts. *See* Doc. 42 at 43–45.

And unlike the knowledge of felon status element at issue in *Greer*, the different-occasions inquiry is complex and unpredictable. *Compare Greer*, 593 U.S. at 508 ("[I]f a person is a felon, he ordinarily knows he is a felon), *with Erlinger*, 602 U.S. at 841 ("After all, this Court has held

that no particular lapse of time or distance between offense automatically separates a single occasion from distinct ones.").

Taking from Mr. Perrin's peers a complex decision that carries the "life-altering consequences" of a 15-year mandatory minimum based on disputed, unreliable, and unproven allegations is inconsistent with "a free society respectful of the individual." *Erlinger*, 602 U.S. at 841–42. And doing so under the guise of appellate review seriously affects the fairness, integrity, and public reputation of the proceedings.

CONCLUSION

The Court should grant the petition for a writ of certiorari. Alternatively, the Court should hold the petition pending its decision in *Harris*, No. 24-5776.

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