No. 24-6396

IN THE SUPREME COURT OF THE UNITED STATES

RYAN PERRIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly denied plain-error relief on petitioner's claim that his prior convictions for aggravated assault, in violation of Fla. Stat. § 784.021 (2013), were not convictions for a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

2. Whether the court of appeals correctly found that procedural sentencing error as recognized in Erlinger v. United States, 602 U.S. 821 (2024) -- an "issue" that petitioner "did not raise * * * in the district court," Pet. App. B2 -- did not warrant relief due to the absence of prejudice from that error in the circumstances of this case.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is available at 2024 WL 1954159.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2024. A petition for rehearing was denied on October 29, 2024 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on January 23, 2025. 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 Middle District of Florida, petitioner was convicted on two counts of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Pet. App. A2-A3. He 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. A1-A9.

1. In April 2017, petitioner sold a confidential informant two firearms. Pet. App. A2. Two weeks later, petitioner sold the confidential informant five firearms and 90 rounds of ammunition. Ibid. At the time, petitioner had several previous state convictions. Ibid.

A federal grand jury in the Middle District of Florida charged petitioner with two counts of possessing a firearm following a felony conviction. C.A. App. 11-12. The government subsequently filed a superseding information. Id. at 17-20. Petitioner pleaded guilty without a plea agreement. Pet. App. A3.

2. The Probation Office determined that petitioner qualified for an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). Presentence Investigation Report (PSR) ¶¶ 28, 88. At the time of petitioner's offense, the default term of imprisonment for possessing a firearm as a felon

was zero to 10 years. See 18 U.S.C. 924(a)(2) (2012).[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 ACCA defines "violent felony" to include any crime punishable by more than one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). This is often called the ACCA's "elements clause." See, e.g., Borden v. United States, 593 U.S. 420, 424 (2021) (plurality opinion).

The Probation Office determined that petitioner had three prior convictions for offenses that qualified as ACCA predicates: a conviction in 2006 for the sale or delivery of cocaine, and two convictions in 2013 for aggravated assault, in violation of Fla. Stat. § 784.021(1)(a) (2013). PSR ¶ 27; Gov't C.A. Br. 5-6. The first assault conviction stemmed from petitioner threating to fire a pellet gun at a victim on May 21, 2013. Pet. App. A7; PSR ¶ 41. The second assault conviction stemmed from petitioner's conduct three days later, when he used a knife to threaten a different victim at a different location. Pet. App. A7; PSR ¶ 42. The

[1] For Section 922(g) offenses committed after June 25, 2022, the default term of imprisonment is zero to 15 years. See Stop Illegal Trafficking in Firearms Act, Pub. L. No. 117-159, Div. A., Tit. II, § 12004(c)(2), 136 Stat. 1329 (18 U.S.C. 924(a)(8) (Supp. IV 2022)).

Probation Office further determined that petitioner committed the offenses on different occasions. PSR ¶ 27.

After the Probation Office recommended that petitioner receive an enhanced sentence under the ACCA, the United States notified petitioner that it would not object to his withdrawing his guilty plea. C.A. App. 24-26. Petitioner declined to exercise his right to a jury trial. See Pet. App. A3. Instead, he "h[e]ld the Government to [its] burden of proof to produce reliable documentation, as defined in Shepard v. United States [544 U.S. 13 (2005)], to prove that his two convictions for aggravated assault arose" on separate occasions. PSR 161 (petitioner's objections to PSR). Petitioner specifically objected to the dates of the assault offenses and sought to have the government prove the date of the offenses from "Shepard-approved sources and elemental facts." PSR 161-162; see C.A. App. 75. Petitioner did not object to the district court, rather than a jury, deciding whether he committed the assaults on different occasions. Nor did petitioner object to the assault offenses qualifying as ACCA predicates. See Pet. App. A4, B2.

At sentencing, the government introduced certified copies of judicial records showing the dates of all three offenses. See Gov't C.A. Br. 5-7. Among those records was a transcript of petitioner's state court change-of-plea and sentencing hearing for the two assaults, during which petitioner's counsel stated, "we're on the calendar for two separate in time felony causes today." D.

Ct. Doc. 60-4, at 339 (July 8, 2020); see id. at 305, 319-357; Gov't C.A. Br. 5-7. Following the admission of that transcript and other documents, the district court overruled petitioner's objection to his ACCA qualification and sentenced him to 180 months of imprisonment. C.A. App. 78, 105.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. A1-A9.

The court of appeals rejected petitioner's argument, raised for the first time on appeal, that his prior convictions for Florida aggravated assault were excluded from the ACCA's elements clause under Borden v. United States on the theory that they could be committed recklessly. See Pet. App. A5. The court explained that "in light of the Florida Supreme Court's recent answer to a certified question of state law," the court of appeals had "recently reaffirmed" in Somers v. United States, 66 F.4th 890, 892 (11th Cir. 2023), "that Florida's aggravated assault statute is a 'violent felony.'" Pet. App. A5. The court of appeals noted that the Florida Supreme Court's interpretation "'tells us what the statute always meant,'" including at the time of petitioner's prior offenses, ibid. (quoting Sommers, 66 F.4th at 896), and determined that the district court did not commit plain error when it enhanced petitioner's sentence based on his prior convictions for aggravated assault. Ibid.

The court of appeals also found that the district court had appropriately used judicial records, of the sort identified in

Shepard, to determine that petitioner committed his predicate offenses on different occasions. Pet. App. A6-A8. The court observed that those documents showed that petitioner had assaulted different victims with different weapons in different places three days apart. Id. at A7.

4. Following this Court's decision in Erlinger v. United States, 602 U.S. 821 (2024), petitioner sought panel rehearing and rehearing en banc. For the first time, petitioner contended that the district court committed structural error when it, rather than a jury, determined that petitioner committed his predicate offenses on different occasions. C.A. Doc. 54, at 15-20 (June 27, 2024). The government conceded that the district court had made an error that was plain in light of Erlinger by not convening a jury to consider whether petitioner's offenses were committed on different occasions. C.A. Doc. 59, at 10-11 (Aug. 19, 2024). But the government explained that further review was not warranted, because an Erlinger error is not structural, and here the evidence that petitioner committed the offenses on different occasions was overwhelming. Id. at 11-16.

The court of appeals denied panel rehearing. Pet. App. B1-B2. The court explained that "any Erlinger error is harmless beyond a reasonable doubt and would not have affected [petitioner's] substantial rights or seriously affected the fairness, integrity, or public reputation of the judicial proceedings." Id. at B2.

ARGUMENT

Petitioner contends (Pet. 13-21) that his prior convictions for Florida aggravated assault were not convictions for a "violent felony" under the ACCA's elements clause on the theory that they could have been committed with a mens rea of recklessness. The district court did not plainly err in determining that petitioner's prior assault convictions qualified as violent felonies. For the reasons explained in the government's brief in opposition to the petition for a writ of certiorari in Harris v. United States, No. 24-5776 (filed Oct. 15, 2024), Florida aggravated assault cannot be committed recklessly, and petitioner's contrary contentions do not warrant further review. See Br. in Opp. at 4-15, Harris, supra (No. 24-5776).

Petitioner also contends (Pet. 21-28) that the court of appeals erred in denying relief on his forfeited claim of procedural sentencing error under Erlinger v. United States, 602 U.S. 821 (2024). The court of appeals correctly evaluated whether such an error had prejudiced petitioner; looked to the sort of judicial records identified in Shepard v. United States, 544 U.S. 13 (2005), in making that evaluation; and determined that the result in his case would not have been different if a jury had been asked whether his prior convictions were for offenses committed on different occasions. The court's unpublished denial of relief implicates no conflict in the circuits, and it does not warrant this Court's review.

1. The district court did not plainly err when it determined that petitioner's prior convictions for Florida aggravated assault qualify as convictions for a violent felony under the ACCA's elements clause. As petitioner recognizes (Pet. 9), his first question presented "raises the same issue" as the petition for a writ of certiorari in Harris, supra (No. 24-5776), and certiorari is likewise unwarranted here.

As the government explained in its brief in opposition in Harris, Florida aggravated assault is a violent felony under the ACCA. See Br. in Opp. at 6-9, Harris, supra (No. 24-5776). Petitioner's objection to the Eleventh Circuit's classification of that particular state offense is premised on essentially the same arguments asserted by the petitioner in Harris, and lacks merit for similar reasons. Compare Pet. 17-21, with Pet. at 24-29, Harris, supra (No. 24-5776); see Br. in Opp. at 5-10, Harris, supra (No. 24-5776). Petitioner also relies on the same set of decisions as the petitioner in Harris to assert a circuit conflict that warrants this Court's review. Compare Pet. 13-16, with Pet. at 11-18, Harris, supra (No. 24-5776). The government has previously identified the errors in that assertion. See Br. in Opp. at 10-15, Harris, supra (No. 24-5776).

Moreover, petitioner is incorrect in asserting (Pet. 18-19) that his current construction of the Florida aggravated-assault statute is supported by then-current state-court precedent in the district of his convictions in 2013. On the contrary, decisions

of the Florida Second District Court of Appeal at the time confirmed "that a specific intent to threaten another person is indeed a necessary element of simple assault." Somers v. United States, 15 F.4th 1049, 1054 (11th Cir. 2021); see id. at 1054-1055 (citing examples). In 2008, for example, the Second District reversed a conviction for aggravated assault on an officer because the evidence "did not tend to establish that [the defendant] had a specific intent to threaten [the officer]." Swift v. State, 973 So. 2d 1196, 1199. Petitioner suggests (Pet. 19) that the court later retreated from that approach in Pinkney v. State, 74 So. 3d 572 (Fla. Dist. Ct. App. 2011) (en banc). But Pinkney reaffirmed that Swift's "reasoning is ultimately correct" because the evidence had not shown that the defendant "had intentionally threatened the officer." Id. at 577 n.3.

Furthermore, this case would be a poor vehicle to review the first question presented because petitioner failed to raise the argument in the district court, and the court of appeals therefore reviewed his claim only for plain error. Pet. App. A4. The same standard of review would apply before this Court, and for the reasons explained above, he cannot demonstrate that any error was "plain" -- i.e., "clear" or "obvious," United States v. Olano, 507 U.S. 725, 734 (1993) -- let alone prejudicial.

2. Petitioner separately contends (Pet. 21-28) that the district court erred in denying relief on his Erlinger claim due to the absence of prejudice. The panel's unpublished, non-

precedential, per curiam decision denying rehearing (Pet. App. B2) does not conflict with any decision from this Court or another court of appeals. Further review is unwarranted.

a. In Erlinger, this Court extended its decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Alleyne v. United States, 570 U.S. 99 (2013), to hold that the Fifth and Sixth Amendments require that a jury determine beyond a reasonable doubt that a defendant's predicate offenses were committed on "occasions different from one another," 18 U.S.C. 924(e) -- a precondition for a sentencing enhancement under the ACCA. 602 U.S. at 829-835. Although the Court did not reach the issue, three Justices observed that the district court's error in Erlinger was subject to "harmless-error analysis." Id. at 859 (Kavanaugh, J., dissenting, joined by Alito, J., and Jackson, J.); see id. at 850 (Roberts, C.J., concurring). That view is correct.

In general, "a constitutional error does not automatically require reversal of a conviction." Greer v. United States, 593 U.S. 503, 513 (2021) (quoting Arizona v. Fulminante, 499 U.S. 279, 306 (1991)). And errors "infring[ing] upon the jury's factfinding role," in particular, are "subject to harmless-error analysis." Neder v. United States, 527 U.S. 1, 18 (1999). For example, this Court held in Neder that the failure to submit an offense element to the petit jury does not constitute structural error. Id. at 8-15. And in Washington v. Recuenco, 548 U.S. 212 (2006), this Court reached the same determination with respect to a sentence-

enhancing fact not submitted to the jury. See id. at 220-222. It follows that Erlinger errors, like other Apprendi-type errors, are also not structural.

The court of appeals thus correctly understood that relief for the district court's Erlinger error depended on whether petitioner was prejudiced by it. Pet. App. B2. The government observed below that petitioner had forfeited his claim by not raising the issue in the district court, see Gov't C.A. Br. 10-15, and the court of appeals applied a mix of standards of review, in which it found that "any Erlinger error is harmless beyond a reasonable doubt," Pet. App. B2. The judicial records of petitioner's prior convictions conclusively show that he committed the two assaults days apart, using different weapons, in different locations, against different victims. See Wooden v. United States, 595 U.S. 360, 370 (2022) (explaining factors in different-occasions inquiry).

b. Petitioner's claim that Erlinger error is structural lack merit. Petitioner contends (Pet. 22-23) that Erlinger error is structural because the different-occasions inquiry is "unpredictable" and may lead to "different results on similar facts." But, as this Court has explained, the different-occasions inquiry is typically "straightforward and intuitive." Wooden, 595 U.S. at 369. Petitioner also contends (Pet. 24-25) that this Court implicitly endorsed the notion that Erlinger error is structural when the majority opinion in Erlinger quoted Rose v. Clark, 478

U.S. 570 (1986), a structural-error case. But petitioner overreads this Court's reliance on Rose. The Court quoted Rose only for the general principle that "a criminal defendant enjoys the right to hold the government to the burden of proving its case beyond a reasonable doubt to a unanimous jury of his peers 'regardless of how overwhelming' the evidence may seem to a judge." Erlinger, 602 U.S. at 842 (brackets and citation omitted). The Court did not mention structural error.

The treatment of the Erlinger error in this case as nonstructural in the unpublished decision below does not conflict with any decision from this Court or a court of appeals. Before Erlinger, courts of appeals held that failing to submit the different-occasions question to the jury was harmless. See, e.g., United States v. Stowell, 82 F.4th 607, 610 (8th Cir. 2023) (en banc), cert. denied, 144 S. Ct. 2717 (2024); United States v. Golden, No. 21-2618, 2023 WL 2446899, at *4 (3d Cir. Mar. 10, 2023); United States v. Rodriguez, No. 21-2544, 2022 WL 17883607, at *2 (7th Cir. Dec. 23, 2022). And after Erlinger, the circuit courts have continued to consistently hold that any error in failing to submit the different-occasions question to a jury is subject to harmless-error review. See United States v. Saunders, No. 23-6735, 2024 WL 4533359, at *2 (2d Cir. 2024) (unpublished); United States v. Butler, 122 F.4th 584, 586, 589 (5th Cir. 2024); United States v. Campbell, 122 F.4th 624, 629-631 (6th Cir. 2024); United States v. Johnson, 114 F.4th 913, 917 (7th Cir. 2024);

United States v. Voltz, No. 22-10733, 2024 WL 4891754, at *4 (11th Cir. Nov. 26, 2024) (per curiam (unpublished).[2]

Petitioner notes that the Seventh Circuit in an unpublished order vacated and remanded Erlinger's sentence without addressing harmlessness. Pet. 27-28 (citing United States v. Erlinger, No. 22-1926, Doc. 44 (7th Cir. Sept. 4, 2024)). But that unpublished order does not establish that the Seventh Circuit has disclaimed harmless-error review altogether. And in any event, this case would be a poor vehicle to address the question presented. As the government explained below, petitioner's Erlinger claim is subject to plain-error review because he "did not raise the Erlinger issue in the district court," Pet. App. B2; see Gov't C.A. Br. 11-22. And in applying an amalgam of plain- and harmless-error review, the court of appeals not only found the error "harmless beyond a reasonable doubt" but also that it did not "seriously affect[] the fairness, integrity, or public reputation of the judicial proceedings." Pet. App. B2. The latter finding would preclude relief even if the error were structural. See United States v. Cotton, 535 U.S. 625, 632-633 (2002); Johnson v. United States, 520 U.S. 461, 469-470 (1997).

c. Petitioner additionally asserts (Pet. 28-32) that prejudice review of Erlinger claims cannot include the sort of

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[2] Cases concerning whether Erlinger error is harmless are pending before the Fourth Circuit. See United States v. Brown, No. 21-4253 (argued Dec. 10, 2024); United States v. Jaqu, No. 21-4677 (government brief filed Dec. 16, 2024).

judicial records that this Court's decision in Shepard approved a district court to consult in classifying a crime under the ACCA. See 544 U.S. at 16. That assertion is not a sound basis for certiorari. Petitioner did not raise his Shepard argument until his petition for rehearing in the court of appeals, and the court did not address it. This Court is one "of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), and any review would moreover be impeded by the plain-error standard that would necessarily apply, see Olano, 507 U.S. at 734.

In any event, while the court of appeals' one-paragraph denial of rehearing en banc does not indicate whether it looked to Shepard documents, it would not have been out of bounds to do so. Courts look to "the whole record" to assess whether an error was harmless beyond a reasonable doubt, Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986), or affected a defendant's substantial rights under the plain-error standard, Greer, 593 U.S. at 511 (collecting cases). On appeal, a defendant "may urge" an appellate court to "discount" "particular information" that the defendant believes is "irrelevant or unreliable." Ibid. "But concerns about relevance and reliability should be addressed through case-by-case adjudication rather than through a categorical bar against considering evidence outside the trial record." Ibid.

Petitioner nonetheless contends (Pet. 30) that courts of appeals are limited to "a review of the evidence the jury considered." But this Court has recognized, for example, that a

court conducting plain-error review may consider "information contained in a pre-sentence report." Greer, 593 U.S. at 511. Petitioner also contends (Pet. 29) that Erlinger itself answers the question presented because it reasoned that using Shepard documents is "fundamentally unfair." But the issue here was not presented, much less decided, in Erlinger. Erlinger did note that Shepard documents could be "prone to error" in the context of explaining why the different-occasions inquiry must be sent to a jury. 602 U.S. at 841 (citation omitted). But "Erlinger did not preclude the use of Shepard documents in reviewing an error for harmlessness." Campbell, 122 F.4th at 632.

Here, the government introduced judicial records at sentencing, including an information charging petitioner for the May 21, 2013 assault; a judgment indicating that a court adjudicated him guilty for that May 21st assault; an information charging petitioner for the May 24, 2013 assault; a judgment indicating that a court adjudicated him guilty for that May 24th assault; a plea agreement for both assaults; and a transcript for the change-of-plea and sentencing hearing. Gov't C.A. Br. 5-7; see D. Ct. Doc. 60, at 305. Those documents were thus part of the whole record and the court of appeals panel appropriately considered them as part of its review for harmlessness and plain error. And as noted above, see pp. 4-5, supra, they show (inter alia) that petitioner's own counsel acknowledged the separateness of his convictions in the state sentencing proceedings.

Petitioner does not identify any conflict in the lower courts concerning the use of Shepard documents in prejudice review for an Erlinger error. Nor does he meaningfully argue that the ultimate outcome of his case would be any different if the court of appeals had declined to consider the Shepard documents, or if the different-occasions issue had been submitted to a jury. In particular, he has not suggested that he has evidence showing that the separate offenses were, in fact, committed on the same occasion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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