No. 24-6396

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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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. This Court's review is warranted to address the effect of *Erlinger*[1] error on direct appeal.

A. *Erlinger* error is not susceptible to harmless-error analysis.

In his petition, Mr. Perrin explained why *Erlinger* error is different: (1) "different occasions" was not charged in the indictment; (2) there is generally no trial record; (3) the only "evidence" on the sentencing record are the *Shepard*[2] documents—the very documents this Court has recognized are of limited utility, inherently unreliable, and pose serious due process problems for a court's different-occasions purpose; and (4) the nature of the multifactored different-occasions inquiry is such that reviewing courts cannot know what a hypothetical jury of peers would have found. Pet. at 22–26.

Mr. Perrin's supplemental brief further alerted the Court to the Sixth Circuit's recent decision in *United States v. Cogdill*, 130 F.4th 523 (2025), where Judge Clay persuasively explains why this Court's

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[1] *Erlinger v. United States*, 602 U.S. 821 (2024).

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

precedent compels that *Erlinger* error is structural. *See* Supp. Br. at 3; *Cogdill*, 139 F.4th at 532–40 (Clay, J., dissenting).

In response, the government cites *Neder v. United States*, 527 U.S. 1, 18 (1999), and *Washington v. Recuenco*, 548 U.S. 212 (2006), for the proposition that harmless-error analysis applies. BIO at 10–11. As Mr. Perrin noted when he preemptively distinguished *Neder* and *Recuenco*, the government relied on those same decisions to advocate for harmless-error analysis in *Erlinger*—but six justices declined to embrace the government's position. *See* Pet. at 25 & 25 n.7. The argument is no more persuasive now. *See Cogdill*, 130 F.4th at 537 (Clay, J., dissenting) ("We need not extend *Recuenco* to these facts, where there is no trial, evidence, or record for the appellate court to even conduct a harmless error analysis, and where the error is clearly ill-suited for such analysis.").

The government also tries to downplay the complexity of the different-occasions standard, arguing that the inquiry is "typically 'straightforward and intuitive.'" BIO at 11 (quoting *Wooden v. United States*, 595 U.S. 360 (2022)). But in *Erlinger*, this Court explained that under *Wooden*, "no particular lapse of time or distance between offenses automatically separates a single occasion from distinct ones." 602 U.S. at

841. Indeed, as Mr. Perrin explained in his petition, Justice Gorsuch has opined that the multifactored different-occasions standard is "unpredictable" and will lead to different results on similar facts, such that "reasonable doubts about its application will arise often." Pet. at 23; (quoting *Wooden*, 595 U.S. at 385, 397 (Gorsuch, J., concurring)).

Justice Gorsuch was prescient. Juries properly instructed as *Wooden* and *Erlinger* require have acquitted defendants of "occasions different" even when offenses appear to have occurred weeks or months apart. *See, e.g.*, *United States v. Bradshaw*, No. 8:23-cr-89, Doc. 128 (Jury Instructions) (M.D. Fla. Mar. 6, 2025); *Bradshaw*, No. 8:23-cr-89, Doc. 134 (Special Jury Verdict) (M.D. Fla. Mar. 6, 2025); *United States v. Willis*, No. 4:21-cr-548, Doc. 217 (Jury Instructions) (E.D. Mo. July 16, 2024); *Willis*, No. 4:21-cr548, Doc. 224 (Special Verdict Form) (E.D. Mo. July 16, 2024); *United States v. Pennington*, No. 1:19-cr-455, Doc. 172 (Jury Instructions) (N.D. Ga. Sept. 20, 2022); *Pennington*, No. 1:19-cr- 45, Doc. 173 (Phase Two Jury Verdict) (N.D. Ga. Sept. 20, 2022).

And the unpredictable nature of different occasions has spilled over to appellate courts attempting to apply a harmless-error analysis to similar facts. *Compare Cogdill*, 130 F.4th at 529–31 (holding there was

reasonable doubt that jury would find prior drug offenses committed three months apart were on different occasions), *with* App. Doc. 62 (Appendix B) (holding that *Erlinger* error was harmless beyond reasonable doubt, where two aggravated assaults—to which Mr. Perrin pled nolo contendere—were allegedly committed four days apart).

Finally, the government argues that no court of appeals has held that *Erlinger* error is structural. BIO at 12–13. Mr. Perrin does not disagree, but as he has explained, the circuit courts' unwillingness to follow this Court's precedent is a reason to *grant* certiorari. *See* Pet. at 28; Supp. Br. at 2.

B. Affirming an ACCA sentence based on judicial review of the *Shepard* documents violates due process and this Court's precedent.

The government does not seriously respond to Mr. Perrin's argument that a circuit court's reliance on the *Shepard* documents to affirm an Armed Career Criminal Act (ACCA) sentence imposed in violation of *Erlinger* violates due process and this Court's precedent. *See* Pet. at 28–32. Indeed, the government admits that *Erlinger* deemed judicial reliance on *Shepard* documents "fundamentally unfair" and that such documents are "prone to error." BIO at 15. And it does not refute

that the protections of due process apply on appeal. BIO at 15; *see* Pet. at 29–30.

The government nevertheless asserts that this Court's intervention is unwarranted because *Erlinger* did not specifically preclude the use of *Shepard* documents in reviewing an error for harmlessness. BIO at 15.[3] But although "*Erlinger* focused on problems with *Shepard* documents' utility in a jury trial context, those concerns do not melt away with the appellate gaze." *United States v. Campbell*, 122 F.4th 624, 637 (6th Cir. 2024) (Davis, J., concurring). "Otherwise we yield the bizarre result that "[t]he remedy for a constitutional violation by a trial judge (making the determination of criminal guilt reserved to the jury) is a repetition of the same constitutional violation by the appellate court (making the determination of criminal guilt reserved to the jury)." *Cogdill*, 130 F.th at 541 (Clay, J., dissenting) (quoting *Neder*, 527 U.S at 32 (Scalia, J., dissenting in part)).

[3] The government also cites *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986), to support its assertion that an appellate court can consider the "whole record" when assessing whether *Erlinger* error was harmless beyond a reasonable doubt. BIO at 14. But in *Van Arsdall*, the "whole record" was limited to the evidence admitted at trial. 475 U.S. at 681, 684; *see* Pet. at 30.

In any event, to the extent that this question is unresolved, that is a reason to grant certiorari. Jurists are struggling with this very issue. *See Campbell*, 122 F.4th at 635–37 (Davis, J., concurring); *Cogdill*, 130 F.th at 531 n.2 (noting that "[s]ome have reasonably questioned whether we ought to consider these types of documents when evaluating harmlessness in this context" but that considering them made no difference to outcome in that case); *id.* at 541 (Clay, J., dissenting). This Court's intervention is necessary to clarify the scope of the record when reviewing *Erlinger* error.

Finally, the government argues that Mr. Perrin did not "raise his *Shepard* argument until his petition for rehearing in the court of appeals, and the court did not address it." BIO at 14. This argument ignores that Mr. Perrin raised in the district court a constitutional objection to judicial reliance on the facts alleged in the *Shepard* documents and renewed that argument in his main briefs on appeal. *See* Pet. at 6–8, 26–27 & n.7 (citing Doc. 42 at 43–45; App. Doc. 15 at 16–26). *Erlinger* did not issue until after his briefing was complete and after the Eleventh Circuit's decision in his case, but before his rehearing petition.

The government's suggestion that the Eleventh Circuit "did not address" whether it was appropriate to rely on *Shepard* documents to affirm an ACCA sentence imposed in violation of the defendant's Fifth and Sixth Amendment rights is also belied by the Eleventh Circuit's denial of Mr. Perrin's rehearing petition. The only way the court of appeals could have decided that the *Erlinger* error was "harmless beyond a reasonable doubt" and did not "seriously affect the fairness, integrity or public reputation of the judicial proceedings," App. Doc. 62, was by relying—erroneously—on the same *Shepard* document allegations that Mr. Perrin objected to in the district court and that this Court held in *Erlinger* should not be relied on for a judicial different-occasions determination.[4]

[4] Thus, contrary to the government's assertion, even if plain-error review applies, BIO at 14, the Eleventh Circuit's order denying rehearing would not preclude relief. And Mr. Perrin already explained that *Greer v. United States*, 593 U.S. 503 (2021), does not control here because (1) the information the appellate court relied on to affirm his sentence was not "relevant and reliable," (2) the different-occasions inquiry is complex, and (3) Mr. Perrin objected to any potentially relevant facts at sentencing. *See* Pet. at 31–32.

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At bottom, the government's opposition to Mr. Perrin's *Erlinger* issues boils down to an assertion that *Erlinger* itself did not definitively resolve the issues and that no circuit split exists. But the unresolved questions from *Erlinger* are precisely why certiorari is warranted. Without this Court's intervention, Mr. Perrin and others like him will sit in prison for years past what the law permits.

II. This Court's review is warranted to decide the categorical approach question.

As Mr. Perrin has explained, the circuit courts are divided on both an important methodological question regarding the categorical approach and on whether pre-*Somers*[5] Florida aggravated assault is a violent felony under the ACCA. Pet. at 13–21. The government does not deny that if Mr. Perrin had possessed a firearm in Illinois, rather than Florida, he would not be subject to ACCA's enhanced penalties. Instead, the government largely relies on its response in *Harris v. United States*, No. 24-5776. *See* BIO at 8. The petitioner's reply in *Harris* explains why the government's arguments opposing certiorari in that case are

[5] *Somers v. United States*, 355 So. 3d 887 (Fla. 2022).

unsupported and inapplicable, *see* Reply in *Harris*, No. 24-5776, and Mr. Perrin incorporates the *Harris* reply rather than repeat those arguments here.

Although this Court denied review in *Harris*, it should grant certiorari here because Mr. Perrin's case presents an ideal vehicle for the Court to consider this issue. The petitioner in *Harris* never argued in the Eleventh Circuit that the categorical approach requires a backwards look to controlling judicial opinions at the time of the prior offense, nor did he alert the Eleventh Circuit to the circuit split on that question or the specific circuit split on Florida aggravated assault. Instead, he made those arguments for the first time in his petition for certiorari. *Compare* Appellant's Brief, *United States v. Harris*, No. 22-11533, 2022 WL 3369272, at *21–27 (11th Cir. Aug. 10, 2022), *and Harris*, No. 22-11533, 2024 WL 3042686, at *2 (11th Cir. June 18, 2024), *with* Pet. for Cert., *Harris v. United States*, No. 24-5776.

Unlike the petitioner in *Harris*, Mr. Perrin squarely raised these arguments and circuit splits, and the Eleventh Circuit considered and rejected them. *See* App. Doc. 45 at 2–3 (arguing in supplemental brief that *Somers* did not resolve "backwards looking" ACCA question of what

elements he was necessarily convicted of in prior proceeding); App. Doc. 51 at 5 (Eleventh Circuit decision rejecting Mr. Perrin's argument regarding ACCA's backwards-looking requirement); App. Doc. 54 (Mr. Perrin's petition for rehearing en banc raising circuit splits); App. Doc. 62 (Eleventh Circuit's order denying rehearing petition).

The government argues that review in Mr. Perrin's case is nevertheless unwarranted because, it claims, his 2013 aggravated assault convictions satisfy the mens rea requirement for an ACCA violent felony. In support of this claim, the government asserts that at the time of his convictions, the Florida Second District Court of Appeal (the jurisdiction where Mr. Perrin was charged and convicted) required "specific intent to threaten another person" as an element of assault. BIO at 9. The government is wrong: at the time of Mr. Perrin's state convictions, the governing law did not require "active employment of force against another person," *Borden v. United States*, 593 U.S. 420, 445 (2021), nor did it require "an intentional act[ ] designed to cause harm," *id. at* 466 (Thomas, J., concurring in the judgment).[6]

[6] *See also* Brief for the United States, *Borden v. United States*, No. 19-5410, 2020 WL 4455245, at *20 n.5 (June 8, 2020) (government relying

Two years before Mr. Perrin's state convictions, the en banc Florida Second District Court of Appeal clarified that Florida assault does not require to specific intent to do violence. In *Pinkney v. State*, the court held that to satisfy assault's "intentional threat" element, the state must "prove that the defendant did an act that was substantially certain to put the victim in fear of imminent violence, not that the defendant had the intent to do violence to the victim." 74 So. 3d 572, 576 (Fla. 2d DCA 2011). The person's "subjective intent to cause the particular result," the en banc court continued, "is irrelevant." *Id.* In so holding, the en banc court receded from an earlier decision, *Shorette v. State*, 404 So. 2d 816 (Fla. 2d DCA 1981), which had held that Florida assault required proof of the specific intent to do violence to the victim, explaining that *Shorette* was "not an accurate statement of the law." 74 So. 3d at 573, 575.

Perhaps recognizing that it cannot rely on *Shorette*, the government instead relies on another pre-*Pinkney* decision, *Swift v. State*, 973 So. 2d 1196 (Fla. 2d DCA 2008). BIO at 9. But *Swift*, the en banc court explained in *Pinkney*, "relies upon the erroneous language from *Shorette* regarding

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on Florida Second District Court of Appeal decision to argue to this Court that Florida defined aggravated assault "in recklessness terms").

'a specific intent to do violence.'" 74 So. 3d at 577 n.3. True, the *Pinkney* court affirmed *Swift*'s reasoning that a jury needed a basis to conclude that the defendant "intentionally threatened the officer." *Id.* But as explained above, under *Pinkney* an "intentional threat" simply means an act "substantially certain to put the victim in fear of imminent violence, not that the defendant had the intent to do violence to the victim." *Id.* at 576. The defendant's subjective intent is "irrelevant." *Id.*[7]

Finally, the government notes that Mr. Perrin's aggravated assault argument was raised for the first time in the court of appeals. BIO at 9. But in *United States v. Anderson*, 99 F.4th 1106 (7th Cir. 2024), *pet. for panel reh'g denied* Nov. 13, 2024, the Seventh Circuit found it was plain under this Court's precedent that pre-*Somers* Florida aggravated assault is not a violent felony. And the government's suggestion that Mr. Perrin

[7] In any event, what controlling state law held at the time of Mr. Perrin's prior convictions is irrelevant to the methodological question presented in the petition. *See* Pet. at i. The Eleventh Circuit never reached the question of what the controlling state law held at the time of Mr. Perrin's aggravated assault convictions, holding instead that the meaning of state law at the time of the conviction was irrelevant under its methodological approach. App. Doc. 51 at 5. If the Court has any question about what the elements of aggravated assault were at the time of Mr. Perrin's convictions, the Eleventh Circuit can address it on remand.

cannot show the error is "prejudicial" borders on frivolous—if his 2013 Florida aggravated assault convictions are not violent felonies, Mr. Perrin would not be subject to the ACCA enhancement and would face a 10-year statutory maximum, rather than a 15-year mandatory minimum.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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