No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DONALD CONELIOUS VOLTZ,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where a district court has erred in sentencing a defendant under the Armed Career Criminal Act based on a judicial finding by a preponderance of the evidence that the predicate convictions occurred on separate occasions, is the error structural, such that harmless error review does not apply?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF RELATED CASES

1. *United States v. Voltz*, Case No. 4:21-cr-00011-CLM-JHE, U.S. District Court for the Northern District of Alabama. Judgment entered on February 23, 2022.
2. *United States v. Donald Conelious Voltz*, No. 22-10733, U.S. Court of Appeals for the Eleventh Circuit. Opinion entered on November 26, 2024.

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Petitioner Donald Conelious Voltz respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Eleventh Circuit's decision affirming Mr. Voltz's sentence is unpublished, but can be found at 2024 WL 4891754 (11th Cir. Nov. 26, 2024) and appears at Appendix "B" to the Petition.

JURISDICTION

The Eleventh Circuit affirmed the district court on November 26, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition is timely filed in accordance with Sup. Ct. R. 13.

The district court had original subject matter jurisdiction under 18 U.S.C. § 3231. It entered its judgment sentencing Mr. Voltz to 180 months' imprisonment on February 23, 2022. The Eleventh Circuit had appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

PROVISIONS INVOLVED

18 U.S.C. § 924(e) provides:

(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, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

STATEMENT OF THE CASE

1. Factual Background.

Mr. Voltz pleaded guilty to possessing a firearm after a felony conviction, in violation of 18 U.S.C. § 922(g)(1). At the time Mr. Voltz was sentenced, a conviction under § 922(g)(1) carried a statutory maximum sentence of ten years' imprisonment. However, under the Armed Career Criminal Act ("ACCA"), 18 US.C. § 924(e), if a defendant convicted under § 922(g) has three or more prior convictions that qualified as either violent felonies or serious drug offenses and were committed on separate occasions from one another, then the sentencing range instead shifts to 15 years' to life imprisonment.

Before sentencing, a probation officer prepared a presentence investigation report, which indicated that Mr. Voltz qualified for an enhanced sentence under the ACCA based on his criminal history. Specifically, the PSR identified the following predicate offenses: (1) a 1999 Alabama conviction for unlawful distribution of a controlled substance, (2) a 2001 Alabama conviction for first-degree unlawful possession of marijuana, and (3) a 2007 Alabama conviction for unlawful distribution of a controlled substance.

Mr. Voltz objected to his classification as an armed career criminal, in relevant part, arguing that the question of whether his prior convictions occurred on separate occasions must be submitted to a jury and established beyond a reasonable doubt. Mr. Voltz explained that the holistic and multifactored analysis required under *Wooden v. United States*, 595 U.S. 360 (2022), went far beyond merely finding the "fact" of a prior conviction. Accordingly, under this Court's precedent in *Apprendi v.*

New Jersey, 530 U.S. 466 (2000) and *Alleyne v. United States*, 570 U.S. 99 (2013)—which require that any fact, apart from the mere fact of a prior conviction, that increases a statutory range must be submitted to a jury and proven beyond a reasonable doubt—the separate occasions finding could not be made by the judge by a preponderance of the evidence.

2. The District Court's Sentence

At sentencing, Mr. Voltz reiterated that the district court could not make the factual finding by a preponderance of the evidence that his prior offenses occurred on separate occasions. The district court overruled that objection, finding that Mr. Voltz had the requisite three predicate convictions that occurred on separate occasions from one another. Thus, the court sentenced Mr. Voltz to 180 months' imprisonment under the ACCA.

3. The Eleventh Circuit's Affirmance

Mr. Voltz appealed his sentence to the Eleventh Circuit, arguing that the district court had erred in imposing an enhanced sentence under the ACCA based on a judicial finding by a preponderance of the evidence that his prior convictions occurred on separate occasions.

While Mr. Voltz's appeal was pending, this Court decided in *Erlinger v. United States*, 602 U.S. 821 (2024), that judicial factfinding that ACCA predicate convictions occurred on separate occasions violated the Fifth Amendment's guarantee of due process of law and the Sixth Amendment's guarantee of a jury trial.

The Eleventh Circuit affirmed Mr. Voltz's sentence. Although it agreed that the district court erred in relying on judicial factfinding by a preponderance of the evidence, it nonetheless concluded that harmless error analysis applied and any error here was harmless. *Voltz*, 2024 WL 4891754 at *3-*4.

The court rejected Mr. Voltz's contention that error under *Erlinger* would be structural, and thus, require automatic reversal. The court reasoned that the error "did not affect the entire proceeding or render the criminal process fundamentally unfair," and was instead a "discrete defect in the criminal process analogous to the omission of a single element from a jury instruction." *Id.* at *4 (citations omitted). Accordingly, the court determined, harmless error review applied.

The court then concluded that any error here was harmless beyond a reasonable doubt, noting that Mr. Voltz's prior convictions were separated by years and no evidence in the record indicated that the offenses shared a common scheme or purpose. *Id.* Thus, the court affirmed Mr. Voltz's sentence.

REASONS FOR GRANTING THE PETITION

Mr. Voltz's petition provides this Court with an ideal vehicle to resolve an important and recurring question regarding the standard of review for errors under this Court's precedent in *Erlinger*. The question is an important one because federal district courts have long imposed enhanced sentences under the ACCA based on judicial factfinding that offenses occurred on separate occasions—a process this Court has now made clear violates a defendant's Fifth and Sixth Amendment rights. Many

defendants are in the process of appealing their unlawfully enhanced sentences, and whether harmless error applies will in many cases, like this one, control the outcome.

II. The Eleventh Circuit's ruling conflicts with *Erlinger* and *Wooden*, in which this Court's analysis made clear that judicial factfinding by a preponderance of the evidence that ACCA predicate offenses occurred on "separate occasions" is a structural error requiring remand.

In *Erlinger*, the majority of the Court did not address whether judicial factfinding of separate occasions by a preponderance of the evidence would be structural error or subject to harmless error review. *See Erlinger*, 602 U.S. at 849 (generally remanding the case to the Seventh Circuit for "further proceedings consistent with this opinion"); *id.* at 849-50 (Roberts, C.J. concurring) (noting that the Seventh Circuit should consider whether the error was harmless); *id.* at 859 (Kavanaugh, J. dissenting) (reasoning that any error was harmless). Nonetheless, the analysis in *Erlinger* and *Wooden* show that, contrary to the Eleventh Circuit's reasoning, [1] this error is structural, and thus, not subject to harmless error review.

A. This Court's analysis in *Erlinger* and *Wooden* reflect that the different-occasions analysis is a fact-intensive and holistic analysis that renders denial of the right "unquantifiable and indeterminate."

This Court has recognized that certain constitutional errors may be harmless. *See Neder v. United States*, 527 U.S. 1, 5 (1999). Under harmless error review, a court may affirm a lower court's decision, despite an error, where "it is clear beyond a

[1] The Sixth Circuit has also held that errors under *Erlinger* are subject to harmless error review. *United States v. Campbell*, 122 F.4th 624 (6th Cir. 2024).

reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 18.

Some errors, however, known as structural errors, fall outside the scope of harmless-error review. *See Weaver v. Massachusetts*, 582 U.S. 286, 299 (2017) ("Thus, in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'" (quoting *Neder*, 527 U.S. at 7)). For example, the denial of the right to a jury trial is a structural error. *See Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993). And that is because "the jury guarantee being a 'basic protectio[n]' *whose precise effects are unmeasurable*, but without which a criminal trial cannot reliably serve its function." *Id.* at 281 (alterations in original, emphasis added). The denial of the right to a jury trial thus has "consequences that are necessarily unquantifiable and indeterminate" and so "unquestionably qualifies as 'structural error.'" *Id.* at 281-82. Similarly, the denial of right to counsel of choice is a structural error because its consequences are also "unquantifiable and indeterminate." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006).

In *Wooden*, the Supreme Court explained that the analysis of whether offenses occurred on different occasions includes questions regarding the timing of the offenses, the proximity of location, and the character and relationship of the offenses. 595 U.S. at 369. Thus, the effects of failing to submit this question to the jury are "simply too hard to measure." *Weaver*, 582 U.S. at 295.

B. Unlike other errors where this Court has held that harmlessness review applies, an appellate court reviewing an *Erlinger* error will not have the benefit of a trial record and instead will be forced to rely on *Shepard* documents, which this Court has repeatedly recognized have limited utility and are error prone.

Errors under *Erlinger* necessarily mean there is no trial record for an appellate courts conducting harmless error analysis to review. Instead, courts will have to rely on *Shepard*[2] documents for this analysis, which raises a series of issues.

First, the documents likely lack the details needed to conduct the fact-intensive analysis required under *Wooden*, such as the exact times and locations of prior offenses. *Erlinger*, 602 U.S. at 840-41. Indeed, even where they do contain that granular detail, still more may be required to support a qualitative assessment of relevant factors, like the "character and relationship" of offenses, or whether they "shared a common scheme or purpose." *Id.* at 841.

Furthermore, reliance on *Shepard* documents violates the principle of fair notice, as "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 841-42 (internal quotations omitted). Thus, errors under *Erlinger* are distinguishable from the errors found subject to harmless error review in *Washington v. Recuenco*, 548 U.S. 212 (2006), and *Neder*, 527 U.S. 1, which involved the failure to submit single elements to a jury. In both of these cases, the reviewing court had an entire trial record to assess whether an error was harmless,

[2] *Shepard v. United States*, 544 U.S. 13 (2006).

whereas courts reviewing *Erlinger* errors will necessarily have to rely on error-prone documents of limited utility.

C. This case provides an ideal vehicle to address this issue.

This case provides the ideal vehicle to resolve the question presented. The issue was preserved in the district court and briefed before the Eleventh Circuit. Moreover, the issue presented, the standard of review for this claim, is often outcome-determinative. Accordingly, this Court should grant Mr. Voltz's request for a writ of *certiorari* to resolve the issue.

CONCLUSION

The petition should be granted.

Respectfully Submitted,

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