No. _____

IN THE SUPREME COURT OF THE UNITED STATES

PAUL CURRY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

/s/ Kevin Joel Page

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 13, 2025
Lyle W. Cayce
Clerk

No. 22-11084

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

PAUL CURRY, JR.,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CR-396-1

Before RICHMAN, HAYNES, and DUNCAN, *Circuit Judges*.

PRISCILLA RICHMAN, *Circuit Judge*:

Paul Curry, Jr., appeals his guilty plea conviction under 18 U.S.C. § 922(g)(1) and sentence for possession of a firearm by a felon. The district court sentenced him to 262 months of imprisonment. For the first time on appeal, Curry argues that § 922(g)(1) is unconstitutional and that the district court incorrectly sentenced him as an armed career criminal under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). Because he fails to demonstrate plain error, we affirm.

I

Paul Curry, Jr., pleaded guilty to possession of a firearm by a felon. The presentence report (PSR) concluded that Curry was an armed career criminal within the meaning of the ACCA because he had four prior Texas convictions for burglary of a habitation, each committed on occasions different from one another. Applying the ACCA enhancement, the PSR determined that Curry faced a statutory minimum sentence of fifteen years, a statutory maximum of life, and a guidelines range of 210 to 262 months of imprisonment.

Curry did not object to the PSR. The district court adopted the findings and conclusions in the PSR and sentenced him within the guidelines range to 262 months of imprisonment. Curry timely appealed.

II

We first address Curry's arguments that § 922(g)(1) is unconstitutional. Curry did not challenge the constitutionality of § 922(g)(1) before the district court. Therefore, we review his constitutional challenge for plain error.[1] To establish reversible error under plain error review, Curry must show (1) an error, (2) that is clear or obvious, and (3) that affected his substantial rights.[2] Even if he makes such a showing, this court has discretion to correct the error only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[3]

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[1] *United States v. Howard*, 766 F.3d 414, 419 (5th Cir. 2014).

[2] *United States v. Brown*, 437 F.3d 450, 451 (5th Cir. 2006).

[3] *Puckett v. United States*, 556 U.S. 129, 135 (2009) (internal quotation marks omitted) (alteration in original) (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993)).

First, Curry argues that § 922(g)(1) is unconstitutional because it exceeds Congress's power under the Commerce Clause. "[W]e have consistently upheld the constitutionality of § 922(g)(1)" in the face of identical challenges.[4] This argument is foreclosed.

In a similar vein, Curry stipulated to the firearm's past movement in interstate commerce but argues that § 922(g)(1) requires more. This argument is similarly foreclosed by precedent.[5]

Second, Curry mounts a facial challenge to the constitutionality of § 922(g)(1), arguing that, applying the Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen*,[6] § 922(g)(1) violates the Second Amendment. This argument, too, is foreclosed by precedent.

"A facial challenge is an attack on a statute itself as opposed to a particular application."[7] The Supreme Court has recently confirmed that, generally speaking, in cases other than a suit based on the First Amendment, "a plaintiff cannot succeed on a facial challenge unless he 'establish[es] that no set of circumstances exists under which the [law] would be valid,' or he

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[4] *United States v. Alcantar*, 733 F.3d 143, 145 (5th Cir. 2013); *see also United States v. De Leon*, 170 F.3d 494, 499 (5th Cir. 1999) ("This court has repeatedly emphasized that the constitutionality of § 922(g)(1) is not open to question.").

[5] *See United States v. Rawls*, 85 F.3d 240, 242 (5th Cir. 1996) (per curiam) ("The 'in or affecting commerce' element can be satisfied if the firearm possessed by a convicted felon had previously traveled in interstate commerce."); *Scarborough v. United States*, 431 U.S. 563, 575 (1977) ("[W]e see no indication that Congress intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce.").

[6] 142 S. Ct. 2111 (2022).

[7] *City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015).

shows that the law lacks a 'plainly legitimate sweep.'"[8] The Court has also explained that "when assessing whether a statute meets this standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct."[9]

Section 922(g)(1) provides that "[i]t shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."[10] Our court held in *United States v. Diaz*[11] that § 922(g)(1) is not unconstitutional as applied to a person who was found in possession of a firearm following his previous felony convicted under Texas law for vehicular theft.[12] The defendant in *Diaz* was convicted under § 922(g)(1) as being a felon in possession of a firearm. The *Diaz* decision applied the Supreme Court's recent decision in *United States v. Rahimi*,[13] and, after extensive analysis of Diaz's as-applied challenge based on the Second Amendment, held that "'[t]aken together,' laws authorizing severe punishments for thievery and permanent disarmament in other cases establish that our tradition of firearm

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[8] *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024) (alteration in original) (first quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987); then quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

[9] *Patel*, 576 U.S. at 418 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

[10] 18 U.S.C. § 922(g)(1).

[11] 116 F.4th 458, 461 (5th Cir. 2024).

[12] *Id.* at 461-62.

[13] 144 S.Ct. 1889 (2024).

regulation supports the application of § 922(g)(1) to Diaz."[14] Because Diaz's conviction as a felon in possession was upheld, it follows that circumstances exist under which § 922(g)(1)'s prohibitions regarding a felon in possession of a firearm are not facially invalid. Indeed, in *Diaz* itself, this court held that Diaz's facial challenge failed because the statute was constitutional as applied to the facts of his own case.[15] Curry's argument based on the Second Amendment that his conviction was clear or obvious error fails.

III

We next address Curry's challenges to his ACCA sentence enhancement. Curry advances two arguments for why his ACCA sentence enhancement was error. First, he asserts that the district court violated his Fifth and Sixth Amendment rights by not submitting the question of whether his prior crimes occurred on separate occasions to a jury. Second, and in the alternative, Curry argues that the district court erred by solely relying on the PSR in applying the ACCA enhancement.

Before reaching the substance of Curry's challenges, we must determine the appropriate standard of review. Curry contends that he preserved his challenges to his ACCA enhancement and that review is de novo. He points to a footnote in the factual resume stating that he objected to "any sentence of imprisonment that exceeds ten years" on the grounds that "[a]ny sentence exceeding those limits would violate his rights to Due

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[14] *Diaz*, 116 F.4th at 471 (quoting *Rahimi*, 144 S.Ct. at 1901).

[15] *Id.* at 471-72 (citing *Rahimi*, 144 S.Ct. at 1898) (holding that because Rahimi's conviction under § 922(g)(8) was constitutional as applied to him, he could not sustain a facial challenge)); *see also United States v. Trevino*, ___F.4th ___, 2024 WL 5249789, at *4 (5th Cir. 2024) (reiterating the Supreme Court's continued emphasis that "laws disarming 'felons' are 'presumptively lawful'" before rejecting the defendant's facial challenge to § 922(g)(1) based on *Diaz* (first quoting *Rahimi*, 144 S.Ct. at 1902; then citing *Diaz*, 116 F.4th at 471-72)).

Process, his right to have an indictment that includes the relevant and elemental facts of the charge against him, and his right to have his guilt proven beyond a reasonable doubt." The Government disagrees, arguing that Curry's objection was not specific enough to put the district court on notice of potential issues for appeal.

We agree with the Government that Curry failed to preserve his ACCA-sentence-enhancement challenges adequately. "To preserve error, an objection must be sufficiently specific to alert the district court to the nature of the alleged error and to provide an opportunity for correction."[16] While "the objection and argument on appeal need not be identical," the objection must "'g[i]ve the district court the opportunity to address' the gravamen of the argument presented on appeal."[17]

For defendants challenging a court's failure to submit a sentence-enhancing fact to a jury, we have held that "[i]f a defendant voices [an] objection[] sufficient to apprise the sentencing court that he is raising a *constitutional claim* with respect to judicial fact-finding in the sentencing process, the error is preserved."[18] Curry's objection, however, did not apprise the district court that he was challenging its separate-occasions determination. His objection merely broadly stated his rights as a criminal defendant. The objection did not specify the ACCA's separate-occasion requirement or even mention his right to a jury. Moreover, at sentencing, Curry acknowledged that there were no pending objections to the PSR and

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[16] *United States v. Neal*, 578 F.3d 270, 272 (5th Cir. 2009).

[17] *United States v. Nesmith*, 866 F.3d 677, 679 (5th Cir. 2017) (alteration in original) (quoting *United States v. Garcia-Perez*, 779 F.3d 278, 281-82 (5th Cir. 2015)).

[18] *United States v. Rodarte-Vasquez*, 488 F.3d 316, 320 (5th Cir. 2007) (internal quotation marks omitted) (quoting *United States v. Castaneda–Barrientos*, 448 F.3d 731, 732 (5th Cir. 2006)).

he did not make any other objections. Without more specificity in the factual resume footnote, the district court did not have an opportunity to address "the gravamen" of Curry's argument on appeal that he was entitled to have a jury determine whether his prior crimes occurred on separate occasions.[19] Because Curry failed to preserve this ACCA sentence enhancement challenge, we review it for plain error.

Plain error review requires that Curry establish an error that is clear or obvious.[20] After the parties' briefs were filed in this case, the Supreme Court decided *Erlinger v. United States*.[21] In *Erlinger*, the Court recognized a defendant's right to "have a jury resolve ACCA's occasions inquiry unanimously and beyond a reasonable doubt."[22]

Because of *Erlinger*, we need not address Curry's contention that the district court erred by relying solely on the PSR's characterization of his prior convictions. Regardless of the district court's reliance on the PSR or other materials, the district court clearly erred by not submitting the separate-occasions inquiry to a jury. In other words, there was no evidence the district court could have permissibly relied on to make the separate-occasions inquiry.

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[19] *Cf. United States v. Zarco-Beiza*, 24 F.4th 477, 482, n.4 (5th Cir. 2022) (holding that a defendant's written objection to the PSR that "he is presumed innocent of any arrests or apprehension not resulting in a conviction" did not "reasonably 'inform[] the court of the legal error at issue'—*i.e.*, improper reliance on a bare arrest record" (quoting *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766 (2020)); *United States v. Sanchez-Espinal,* 762 F.3d 425, 429 (5th Cir. 2014) ("[T]he objections raised to the PSR and at the sentencing hearing did not put the district court on notice" of defendant's argument.).

[20] *Puckett v. United States*, 556 U.S. 129, 135 (2009).

[21] 144 S. Ct. 1840 (2024).

[22] *Id.* at 1852.

Under plain error review, however, the defendant must do more than establish clear error. The defendant must also prove that the error affected his substantial rights.[23] To prove an error affected his substantial rights, a "defendant ordinarily 'must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different.'"[24] We have explained that this analysis is akin to the harmless error review for preserved challenges, except "the defendant has the burden of proving that an error *did* impact his substantial rights."[25]

It is not enough that Curry's Sixth Amendment rights were violated. The Supreme Court has clarified that even Sixth Amendment violations, such as "[f]ail[ing] to submit a sentencing factor to the jury" or "fail[ing] to submit an element to the jury," are not structural errors.[26] We have also recently applied harmless-error analysis to a district court's error under *Erlinger* in failing to afford the defendant a jury determination of the "different occasions" inquiry.[27] Consequently, Curry has the burden of showing that if the district court had correctly submitted the separate-

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[23] *United States v. Brown*, 437 F.3d 450, 451 (5th Cir. 2006).

[24] *United States v. Randall*, 924 F.3d 790, 796 (5th Cir. 2019) (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016)).

[25] *Id.* at 795.

[26] *Washington v. Recuenco*, 548 U.S. 212, 222 (2006); *see also Erlinger v. United States*, 144 S. Ct. 1840, 1860 (2024) (ROBERTS, C.J., concurring) (explaining that violations of a defendant's right "to have a jury determine beyond a reasonable doubt whether his predicate offenses were committed on different occasions for purposes of the Armed Career Criminal Act" are "subject to harmless error review").

[27] *United States v. Butler*, 122 F.4th 584, 589-90 (5th Cir. 2024) (likening an error under *Erlinger* to an error under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and thus applying harmless-error analysis to hold an error harmless based on a "straightforward" record).

occasions inquiry to the jury, there is a reasonable probability that he would not be subject to the ACCA-enhanced sentence.[28]

To determine whether Curry has met this burden, we "may consider the *entire* record."[29] That includes the supplemental record on appeal. In *Greer v. United States*,[30] the defendant argued that plain-error review of his conviction must exclusively focus on the trial record.[31] Specifically, the defendant argued that the appellate court may only review the trial record to determine whether the district court's failure to submit an element of the offense to the jury affected his substantial rights.[32] The Supreme Court disagreed, holding that "an appellate court conducting plain-error review may consider the *entire* record—not just the record from the *particular proceeding* where the error occurred."[33] Accordingly, we may consider the supplemental record submitted to us, which details Curry's prior convictions.

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[28] *See United States v. Candelario*, 240 F.3d 1300, 1310 (11th Cir. 2001) (noting that the plain-error substantial rights analysis "is akin to the harmless error analysis employed in preserved error cases, which asks whether a rational jury would have found the defendant guilty absent the error"); *cf. Greer v. United States*, 141 S. Ct. 2090, 2097 (2021) ("Greer has the burden of showing that, if the District Court had correctly instructed the jury on the *mens rea* element of a felon-in-possession offense, there is a 'reasonable probability' that he would have been acquitted." (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)).

[29] *Greer*, 141 S. Ct. at 2098; *see also Butler*, 122 F.4th at 589 ("An otherwise valid conviction will not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (quoting *United States v. Matthews*, 312 F.3d 652, 665 (5th Cir. 2002))).

[30] 141 S. Ct. 2090 (2021).

[31] *Id.* at 2098.

[32] *Id.*

[33] *Id.*

In light of the conviction documents in the supplemental record on appeal, Curry has failed to demonstrate a reasonable probability that his sentence would have been different had the district court not erred. These documents demonstrate that Curry's prior four burglaries were committed against different victims and were separated by weeks and sometimes years. Further, at least twice, the burglaries were separated by intervening convictions. First, a guilty-plea judgment reveals Curry pleaded guilty in January 1986 to a burglary that occurred in September 1985. Second, according to two different guilty-plea judgments, Curry pleaded guilty in October 1987 for two burglaries that occurred over a year after his previous burglary *conviction*, one on July 20, 1987, and one on August 2, 1987. Finally, another judgment reveals that a jury convicted Curry of burglary in July 1989 for conduct that occurred in March 1989—nearly two years after his 1987 *convictions*.

While the Supreme Court has cautioned that "no particular lapse of time or distance between offenses automatically separates a single occasion from distinct ones,"[34] the Court has also explained that "a single factor—especially of time or place—can decisively differentiate occasions."[35] Here, Curry's *convictions* were separated by years, and the underlying burglaries were often separated by an intervening conviction. Curry carries the burden to establish his substantial rights were affected, and he fails to provide any plausible explanation for how a jury may reasonably conclude these crimes were not committed on separate occasions.

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[34] *Erlinger v. United States*, 144 S. Ct. 1840, 1855 (2024).

[35] *Wooden v. United States*, 142 S. Ct. 1063, 1071 (2022).

The Supreme Court's grant of certiorari, vacatur, and remand of *United States v. Schorovsky*[36] does not alter that conclusion. In *Schorovsky*, this court held that the district court did not plainly err by treating the defendant's prior offenses as having taken place on separate occasions for ACCA purposes when he committed the offenses two days apart.[37] The Supreme Court then granted the defendant's petition for certiorari, vacated this court's opinion, and remanded the case for further consideration in light of *Erlinger*.[38]

Curry argues that the grant, vacate, and remand in *Schorovsky* shows that the Court "was evidently unwilling to assume that the deprivation of a jury trial as to the separate occasions requirement had no effect on substantial rights where the prior offenses occurred two days apart." This interpretation of the Supreme Court's decision, however, fails to take two factors into account. First, the Supreme Court's "normal practice where the court below has not yet passed on the harmlessness of any error" is to "remand" the case to the circuit court "to consider in the first instance" whether the error was harmless.[39] Because this court did not determine that any error had occurred in *Schorovsky*, we never conducted harmless error analysis, so it is in line with the Supreme Court's standard practice to direct us to do so in the first instance.

Second, in *Schorovsky*, two of the defendant's ACCA-qualifying offenses took place two days apart, a gap which this court deemed

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[36] 95 F.4th 945 (5th Cir. 2024), *cert. granted, vacated, and remanded*, ___S. Ct. ___, 2024 WL 4486342 (2024).

[37] *Id.* at 947-48.

[38] *Schorovsky v. United States*, ___S. Ct. ___, 2024 WL 4486342, at *1 (2024).

[39] *Neder v. United States*, 527 U.S. 1, 25 (1999).

"conclusive" without further information in affirming that they occurred on separate occasions.[40] Meanwhile, the three burglaries at issue in *Erlinger* took place across the span of seven days—on April 4, April 8, and April 11—yet the Court in that case nevertheless remanded the case rather than ruling that the error was harmless.[41] Given that remand was appropriate when the gaps between offenses were between three and four days, it would defy expectations for the Court not to remand a case that involves only a two-day gap between offenses, especially as smaller periods of time more strongly indicate one continuous occasion.[42] By contrast, as explained above, the record shows that gaps of weeks or even years separated Curry's prior offenses. Thus, even if the Supreme Court believed that the error in *Schorovsky* may have impacted the defendant's substantial rights because the gap between offenses was only two days, it does not follow that the district court's *Erlinger* error affected Curry's substantial rights when the gaps between his offenses were much longer.

In his supplemental brief, Curry also suggests that his substantial rights were affected because the Government cannot show that he would have pleaded guilty had he known he had the right to have a jury determine the separate-occasions inquiry. He also argues that perhaps the Government would not have pursued an ACCA sentence enhancement had it been aware of the jury requirement. Under plain-error review, however, the burden is

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[40] *Schorovsky*, 95 F.4th at 947-48 (quoting *United States v. Alkheqani*, 78 F.4th 707, 726 (5th Cir. 2023)).

[41] *Erlinger v. United States*, 144 S. Ct. 1840, 1862 (2024) (KAVANAUGH, J., dissenting); *id.* at 1860 (majority opinion).

[42] *See Wooden v. United States*, 142 S. Ct. 1063, 1071 (2022) ("Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events.").

on Curry to establish a reasonable probability that he would not have pleaded guilty had he known he had a right for a jury to make the separate-occasions determination.[43] Curry never argues that he would not have pleaded guilty; rather, he argues that "the scant record evidence regarding the prior convictions, combined with the open-ended nature of the *Wooden*[44] inquiry, makes trial rather than plea an entirely rational choice." However, the Supreme Court in *Greer* required more than a mere suggestion that the defendant might not have pleaded guilty in order to find plain error; rather, the Court faulted the defendant for not having "argued or made a representation that [he] would have presented evidence at trial" that would have supported his claim that his mental state did not satisfy an element of the crime.[45] Here, Curry relies on the "scant record evidence" to make this showing, but we do not view the record evidence as weak. As explained above, court documentation shows that weeks or years separated his prior offenses, and he committed them against different victims. Curry never argues that these documents are inaccurate. Rather, he argues that they may be insufficient given the "open-ended nature of the *Wooden* inquiry." But given the Supreme Court's observation that "a single factor—especially of

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[43] *See Greer v. United States*, 141 S. Ct. 2090, 2097 (2021) (explaining that the defendant had "the burden of showing that, if the District Court had correctly advised him of the *mens rea* element of the offense, there is a 'reasonable probability' that he would not have pled guilty" (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)).

[44] *Wooden v. United States*, 142 S. Ct. 1063 (2022).

[45] *Greer*, 141 S. Ct. at 2098 (observing that "[i]mportantly, on appeal, neither [defendant] has argued or made a representation that they would have presented evidence at trial that they did not in fact know they were felons when they possessed firearms," and therefore the defendant who pleaded guilty could not "show that, but for the [] error during the plea colloquy, there is a reasonable probability that he would have gone to trial rather than plead guilty").

time or place—can decisively differentiate occasions,"[46] we disagree that the time gaps and identity of the victims constitute "scant record evidence."

Moreover, in his factual resume, Curry acknowledged "that if the Government meets its burden of proving by the required competent and credible evidence that [he] had previously been convicted of, *inter alia*, at least three violent felonies," then he would be subject to the ACCA's mandatory minimum sentence. In the absence of any substantiated argument that he would not have pleaded guilty, Curry has not established that the district court's *Erlinger* error affected his substantial rights.

IV

Finally, we briefly address Curry's request that we reconsider a previously denied joint motion to remand in light of *Erlinger*. At the time of the joint motion, which was before *Erlinger*, the Government took the position that Curry was ineligible for an ACCA sentence because, in pleading guilty, he did not admit that his prior burglary offenses were committed on at least three different occasions. While the Government wanted to present this position to the district court so it could reconsider Curry's sentence, a motions panel of our court denied the motion because the movants failed to establish that the district court may have committed legal error in its sentencing. Given *Erlinger*, the motions panel's reasoning is undoubtedly no longer valid; the district court clearly erred by failing to submit the separate-occasions question to a jury. But the Government does not argue for a remand now. In both its merits briefs and supplemental brief, it argues that we should affirm Curry's conviction and sentence. The only published Fifth Circuit cases that Curry cites for this request are ones in which we remanded based on the Government's "agree[ment] that the

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[46] *Wooden*, 142 S. Ct. at 1071.

[defendant's] sentence must be vacated and the case remanded for resentencing."[47] That is not the case here. Moreover, given the absence of any evidence suggesting his prior crimes occurred on separate occasions, Curry has failed to persuade us that a remand in this case would be "just under the circumstances."[48]

* * *

For the foregoing reasons, the district court's judgment is AFFIRMED.

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[47] *United States v. Armendariz-Moreno*, 571 F.3d 490, 491 (5th Cir. 2009) (per curiam); *see also United States v. Castano*, 217 F.3d 889, 889 (5th Cir. 2000) (per curiam) ("[T]he government now confesses error and takes the position that Castano is entitled to relief.").

[48] 28 U.S.C. § 2106.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA

v.

PAUL CURRY, JR

§ **JUDGMENT IN A CRIMINAL CASE**
§
§
§ Case Number: **3:18-CR-00396-E(1)**
§ USM Number: **57633-177**
§ **Laura S Harper**
§ Defendant's Attorney

THE DEFENDANT:

☐	pleaded guilty to count(s)	
☒	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	**To Count 1s of the Superseding Indictment filed on 08/07/2019.**
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☐	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
18 USC § 922(g)(1) and 924(a)(2) & (e)(1) Possession of a Firearm by a Convicted Felon	05/20/2018	1s

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ Count(s) 1 of the original Indictment ☒ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

November 2, 2022
Date of Imposition of Judgment

Signature of Judge

ADA BROWN
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

November 3, 2022
Date

DEFENDANT: PAUL CURRY, JR
CASE NUMBER: 3:18-CR-00396-E(1)

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984 but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **Two Hundred sixty-two (262) months as to count 1s**.

It is ordered this sentence shall run **consecutively** to any sentence imposed in the pending parole revocations for Burglary of a Habitation, Case No. **F-8981140**, and Robbery, Case No. **F-9245158**, and to the pending charges for Aggravated Assault Causes Serious Bodily Injury, Case No. **1572875**, pending in the 297th Judicial District Court of Tarrant County, because they are not related to the instant federal offense.

This sentence shall run **concurrently** to any sentence imposed in the pending state criminal charges for Aggravated Assault Family Member With a Weapon Causing Serious Bodily Injury, Case No. **F-1854346**; Unlawful Possession of a Firearm by Felon, Case No. **F-1854347**; and Evading Arrest Detention With Vehicle, Case No. **F-1854348**, pending in the Dallas County Criminal District Court 5, because they are related to the instant federal offense.

☒ The court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be allowed to serve his sentence at a facility in the Dallas/Fort Worth area.

☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: PAUL CURRY, JR
CASE NUMBER: 3:18-CR-00396-E(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **Five (5) years**.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: PAUL CURRY, JR
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STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: PAUL CURRY, JR
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SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in outpatient mental health treatment services as directed by the probation officer until successfully discharged. These services may include medications prescribed by a licensed physician. You shall contribute to the costs of services rendered (copayment) at a rate of at least $25 per month.

The defendant shall have no contact with the victim (Isley Shamlin), including correspondence, telephone contact, or communication through third parties except under circumstances approved in advance by the probation officer and not enter onto the premises, travel past, or loiter near the victims' residences, places of employment, or other places frequented by the victim.

DEFENDANT: PAUL CURRY, JR
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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$100.00	$.00	$.00	$.00	$.00

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the schedule of payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: PAUL CURRY, JR
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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payments of $ _____ due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal 20 *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of $100.00 for Count 1s, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.
☐ The defendant shall pay the following court cost(s):
☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
Pursuant to the Preliminary Order of Forfeiture, the defendant shall forfeit all rights, title, and interest in all assets, which are subject to forfeiture, including a Hi Point by MKS Supply Inc., Model C9, 9 millimeter handgun, bearing serial number P1903171, and any magazine(s) and ammunition seized with the firearm

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 22-11084

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
PAUL CURRY, JR.,
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PETITION FOR REHEARING EN BANC
CRIMINAL APPEAL

JASON DOUGLAS HAWKINS
Federal Public Defender
Northern District of Texas

By:

KEVIN JOEL PAGE
Assistant Federal Public Defender
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Texas State Bar No. 24042691
Attorney for Appellant/Defendant

I. REQUIRED STATEMENT UNDER FEDERAL RULE OF APPELLATE PROCEDURE 35(b).

The panel decision conflicts with multiple decisions of this Court on the proper treatment of claims arising under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Because *Apprendi* produces periodic disruptions to settled federal criminal practice, clear and consistent precedent regarding the handling of such claims takes on an outsized importance.

CERTIFICATE OF INTERESTED PERSONS
***United States v. Curry*, Case No. 22-11084**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. R. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellant:	Paul Curry, Jr.
Defense Counsel:	Federal Public Defender for the Northern Dist. of Texas AFPD Laura S. Harper (trial) (appointed) AFPD Michael Kawi (trial) AFPD Rachel Maureen Taft (trial) (appointed) AFPD Erin Brennan (trial) (appointed) AFPD Loui Itoh (appeal)(appointed) AFPD Kevin Joel Page (appeal)
Prosecutors:	AUSA Damien Marcus Diggs (trial) AUSA John J. Boyle (trial) AUSA Rebekah Perry Ricketts (trial) AUSA Ryan Raybould (trial) Hon. Bryan McKay (appeal) AUSA Stephen Gilstrap
Magistrate Judge:	**Hon. Irma C. Ramirez**
District Judge:	Hon. Ada Brown Hon. Sidney Fitzwater

/s/ Kevin Joel Page
Counsel for Appellant

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STATEMENT OF THE ISSUES MERITING EN BANC CONSIDERATION

1. Whether *Apprendi* sentencing error requires a reviewing court to determine what sentence the district court would have imposed were it limited to the sentencing range authorized by a jury verdict or the defendant's judicial admissions?

2. Whether a defendant may preserve *Apprendi* error by making clear that he objects to any sentence exceeding the range authorized by the facts placed in the indictment and either admitted by the defendant or proven beyond a reasonable doubt?

STATEMENT OF THE CASE

I. Facts and District Court Proceedings

The government obtained an indictment against Appellant Paul Curry alleging that he possessed a firearm following a single felony conviction. (ROA.60-62). It did not allege that he had three prior convictions for offenses committed on separate occasions. (ROA.60-62).

Appellant pleaded guilty, (ROA.352-380), admitting one conviction, (ROA.277-283). Although Appellant acknowledged that his sentencing range might be elevated by the Armed Career Criminal Act (ACCA), he expressly objected in writing at the time of the plea to "any sentence of imprisonment that exceeds ten years …" (ROA.279). He contended that:

> [a]ny sentence exceeding those limits would violate his right to Due Process, his right to have an indictment that includes the relevant and

> elemental facts of the charge against him, and his right to have his guilt proven beyond a reasonable doubt regarding those facts.

(ROA.279).

The Presentence Report (PSR) recommended a sentence of 262-months imprisonment, well in excess of ten years, on the ground that Appellant had sustained four "violent felonies" for crimes committed on separate occasions. (ROA.391–393, 400). Specifically, it named four burglary convictions incurred in the 1980's. (ROA.391–393, 400). The district court applied ACCA, (ROA.318), and imposed a 262-month sentence, (ROA.343). Mr. Curry appealed.

II. Proceedings in this Court

On appeal, the parties filed a joint motion for remand. *See* Joint Motion for Limited Remand in *United States v. Curry*, No. 22-11084 (5th Cir. Filed February 14, 2023). They noted that the district court had not been apprised of the government's position regarding the application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to ACCA, namely, that the defendant enjoys a right to a jury trial as to whether his prior convictions occurred on occasions different from each other. *See id*. at 2. This Court denied the motion and ordered briefing. *See* Order in *United States v. Curry*, No. 22-11084 (5th Cir. Filed February 23, 2023).

In his Initial Brief, Appellant asserted, *inter alia*, that the separate occasions requirement set forth in ACCA represented an element of his offense, and that the district court could therefore impose no more than ten years imprisonment. *See* Initial Brief in *United States v. Curry*, No. 22-11084, 2023 WL 3092039, at **28-36 (5th Cir. Filed April 17, 2023). After the briefing, the Supreme Court issued *Erlinger v. United States*, 602 U.S. 821 (2024), which vindicated Appellant's constitutional claim on the merits.

This Court ordered supplemental briefing on the merits in light of *Erlinger*. *See* Order in *United States v. Curry*, No. 22-11084 (5th Cir. Filed June 28, 2024). Appellant reiterated his *Apprendi* claim (now an *Erlinger* claim). *See* Supplemental Brief in *United States v. Curry*, No. 22-11084, 2024 WL 3624648, at **11-36 (5th Cir. Filed July 23, 2024). He contended that trial counsel had adequately preserved the issue by objecting in advance to any sentence exceeding ten years, and by couching the claim in constitutional terms that invoked *Apprendi*. *See id*. at **11-13. In support, he cited *United States v. Rodarte-Vasquez*, 488 F.3d 316 (5th Cir. 2007), *United States v. Castaneda–Barrientos*, 448 F.3d 731 (5th Cir.2006), and *United States v. Olis*, 429 F.3d 540 (5th Cir.2005).

He further contended, among other arguments, that the prejudice attendant to *Apprendi* sentencing error could be determined only by asking whether the district

court would have imposed the same sentence had it limited itself to the sentencing range authorized by the jury's verdict or the defendant's admissions. *See id.* at **15-24. In support of this proposition, he cited *United States v. Aguirre-Rivera*, 8 F.4th 405 (5th Cir. 2021), *United States v. White*, 275 F.3d 46 (5th Cir. 2001)(unpublished), and *United States v. Haines*, 803 F.3d 713 (5th Cir. 2015). *See id.* at **15-19.

The panel affirmed in a published opinion, set forth here as Appendix A. It again declined to remand the case, now because the government no longer supported the motion. *United States v. Curry*, __F.4th __, 2025 WL 80109, at *7 (5th Cir. Jan. 13, 2025). It also found Appellant's constitutional claim to be forfeited. On this point, it reasoned:

> For defendants challenging a court's failure to submit a sentence-enhancing fact to a jury, we have held that "[i]f a defendant voices [an] objection[ ] sufficient to apprise the sentencing court that he is raising a *constitutional claim* with respect to judicial fact-finding in the sentencing process, the error is preserved."[18] Curry's objection, however, did not apprise the district court that he was challenging its separate-occasions determination. His objection merely broadly stated his rights as a criminal defendant. The objection did not specify the ACCA's separate-occasion requirement or even mention his right to a jury. Moreover, at sentencing, Curry acknowledged that there were no pending objections to the PSR and he did not make any other objections.

Curry, __F.4th __, 2025 WL 80109, at *3 (citing *Rodarte-Vasquez*, 488 F.3d at 320 (internal quotation marks omitted)(quoting *United States v. Castaneda–Barrientos*, 448 F.3d 731, 732 (5th Cir. 2006), and *United States v. Zarco-Beiza*, 24 F.4th 477, 482, n.4 (5th Cir. 2022)(quoting *Holguin-Hernandez*, *supra*, and *United States v. Sanchez-Espinal*, 762 F.3d 425, 429 (5th Cir. 2014)).

The panel also concluded that Appellant could not meet his burden to show that the *Erlinger* error affected his substantial rights. *See id*. at **5-7. On this point, it noted that judicial records showed that Appellant's prior convictions arose from offenses committed at significantly different times. *See id.* And it cited *Greer v. United States*, 593 U.S. 503 (2021), for the proposition that it could consider "the entire record" to determine whether an error prejudiced the defendant. *Id*. at *5.

REASONS FOR GRANTING THE PETITION

I. This Court should grant rehearing *en banc* to resolve conflict in this Court's precedent regarding the analysis of prejudice in cases involving *Apprendi* sentencing error.

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The *Apprendi* rule has proven a fertile source of constitutional error in the

application of federal criminal statutes. An incomplete list of affected statutes would include 21 U.S.C. §841(b)(penalties for drug trafficking), *see United States v. Cotton*, 535 U.S. 625 (2002); 18 U.S.C. §3553(b)(1)(mandatory sentencing Guidelines), *see United States v. Booker*, 543 U.S. 220 (2005); 18 U.S.C. §924(c)(mandatory minimums for the brandishing or discharge of a firearm in connection with a crime of violence or drug trafficking crime), *see Alleyne v. United States*, 570 U.S. 99 (2013); 18 U.S.C. §3583(k)(mandatory minimums for certain revocations of supervised release), *see United States v. Haymond*, 588 U.S. 634 (2019), and, most recently, ACCA, insofar as it requires proof that the defendant's prior convictions occurred on separate occasions, *see Erlinger*, *supra*.

Further, because *Apprendi* addresses the treatment of sentence-enhancing facts at multiple phases of the criminal process, it may give rise to multiple errors in the same case. Among the different kinds of *Apprendi* error that may be present at the same case are: 1) indictment error, the omission of a sentence-enhancing fact from the indictment, *see United States v. Longoria*, 298 F.3d 367, 373–74 (5th Cir. 2002)(en banc); *United States v. Matthews*, 312 F.3d 652, 665 (5th Cir. 2002), 2) instructional error, the failure to instruct a jury that it must find a sentencing-enhancing fact beyond a reasonable doubt, *see United States v. Slaughter*, 238 F.3d 580, 583–84 (5th Cir. 2000); *United States v. Baptiste*, 309 F.3d 274, 277–78 (5th

Cir. 2002); *Matthews*, 312 F.3d at 665, 3) plea colloquy error, the failure to advise the defendant of his rights to have sentence-enhancing facts determined by a jury beyond a reasonable doubt, *see United States v. Schorovsky*, 95 F.4th 945, 950-951 (5th Cir. 2024), *vacated and remanded by* 2024 WL 4486342 (October 15, 2024), and 4) sentencing error, the use of a sentencing range not supported by the facts proven to a jury beyond a reasonable doubt or admitted by the defendant, *see United States v. Aguirre-Rivera*, 8 F.4th 405, 412 (5th Cir. 2021).

This Court has applied distinct tests for prejudice in cases involving different classes of *Apprendi* error. Where the defendant asserts indictment error, this Court tests for prejudice by asking whether a reasonable grand jury would have found probable cause of the sentencing enhancing fact. *See Matthews*, 312 F.3d at 665. Confronted with instructional error, it asks whether the jury would have found the sentence-enhancing fact beyond a reasonable doubt had it been asked to do so. *See Slaughter*, 238 F.3d at 583–84; *Baptiste*, 309 F.3d at 277–78; *Matthews*, 312 F.3d at 665. In cases involving error in the plea colloquy, it asks whether the defendant would have pleaded guilty had he been correctly advised of his *Apprendi* rights. *See Schorovsky*, 95 F.4th at 950-951, *vacated and remanded by* 2024 WL 4486342 (October 15, 2024) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)). But in cases of sentencing error, it asks whether the court would have

imposed the same sentence had it used the range supported by the jury's verdict or the defendant's admissions. *See Aguirre-Rivera*, 8 F.4th at 412.

This Court's application of separate prejudice analyses for sentencing error (as opposed to other classes of *Apprendi* error) can be seen in at least two published cases. Most recently, it can be seen in *Aguirre-Rivera.* In that drug case, a jury verdict permitted a sentence within of zero to twenty years; the district court erroneously believed the correct range to be five to forty years of imprisonment. *See id*. at 412-413. This Court asked whether the district court would have imposed the same sentence (five years) had it used the lesser statutory range. *See id.* Answering affirmatively, it remanded. *See id.*

Notably for our purposes, the *Aguirre-Rivera* panel explicitly distinguished between sentencing error and instructional error when it decided the question of prejudice. The district court had given the jury a special interrogatory, which asked, first, what quantity of controlled substances the defendant's *conspiracy* had distributed, and, second, the quantity for which the defendant was *personally* responsible. *See id*. at 408. The jury found that the defendant in fact conspired to distribute drugs, and that the conspiracy involved enough drugs to trigger a five-to-forty-year penalty range. *See id*. Yet it acquitted him of personal responsibility for that same quantity. *See id*. The district court nonetheless concluded that the

defendant could be sentenced anywhere within the range of five to forty years imprisonment. *See id*. at 408-413. Deciding the case, this Court quite explicitly distinguished between *Apprendi* sentencing error and related instructional error, applying different standards of prejudice to each. It said "[a]lthough Aguirre-Rivera's conviction was not affected by the jury's answer to the second special interrogatory, his sentence most certainly was." *Id.* at 411.

This Court applied the same distinction in *United States v. Haines*, 803 F.3d 713 (5th Cir. 2015), another case involving the use of conspiracy-wide drug quantity findings rather than personalized drug quantity findings. After finding error in the use of conspiracy-wide drug quantity findings, this Court remanded for resentencing. It held:

> [b]ecause it is undisputed that the jury did not make an individualized quantity finding with respect to either [defendant], and because such findings are necessary to increase their mandatory minimum sentences.

Haines, 803 F.3d at 741–42. This was the opinion's only discussion of harm – the Court did not ask whether the government's evidence would have led a reasonable jury to make a personalized quantity finding authorizing the sentencing range used by the district court. *See id.* Rather, it simply compared the range authorized by the jury's verdict to the range applied, and remanded due to the mismatch. *See id.*

The present case conflicts with this methodology. Here, the defendant's admissions support a range of zero to ten years imprisonment: the defendant has not admitted, and no jury has found, that his prior convictions arose from offenses occurring on different occasions. So under the method set forth in *Aguirre-Rivera* and *Haines*, this is an easy case. The defendant received a sentence in excess of the ten-year maximum; therefore, the court would have necessarily imposed a lesser sentence had it been limited to the range authorized by the defendant's admissions.

Yet the panel did not use this method, nor even cite *Aguirre-Rivera* and *Haines*, *see Curry*, __F.4th __, 2025 WL 80109, at **5-7, in spite of extensive discussion of those cases in the briefing, *see* Supplemental Brief, 2024 WL 3624648, at **15-19. Rather, the panel applied the standards of prejudice applicable to instructional and plea colloquy error. *See Curry*, __F.4th __, 2025 WL 80109, at **5-7. That is, it asked whether a jury would have found that the defendant's offenses occurred on separate occasions had there been a trial. *See id.* And it asked whether the defendant would have pleaded guilty when properly advised of his rights. *See id.* In this respect, it conflicts with this Court's prior published authority.

The panel cited *Greer v. United States*, 593 U.S. 503 (2021), for the proposition that it could consider "the entire record" to determine whether an error prejudiced the defendant. *Id*. at *5. *Greer*, of course, is not an *Apprendi* case, and

accordingly could not have set forth the standard for analyzing an *Apprendi* sentencing error.

Further, it doesn't follow from the appellate court's ability to *review* the entire record that the entire record will be *relevant* to the harm inquiry. Again, in cases of *Apprendi* sentencing error, this Court asks whether the sentence would have been the same had the district court used the range actually authorized by the verdict or the defendant's admissions. *See Aguirre-Rivera*, 8 F.4th at 412. The strength of the government's potential evidence on the separate occasions question is just not relevant to that question, at least in a case where the true and erroneous sentencing ranges do not overlap. If *Greer* is relevant to the issue at hand, it certainly does not amount to a case that "unequivocally overrules" the prior panel opinions regarding *Apprendi* sentencing error. *In re Bonvillian Marine Serv., Inc*., 19 F.4th 787, 792 (5th Cir. 2021). At best, it is "merely illuminating." *Bonvillian Marine Serv., Inc*., 19 F.4th at 792. Under this Cout's precedent, or meta-precedent, the prior panel opinions (*Aguirre-Rivera* and *Haines*) remain controlling. *See id.*

This conflict in the Court's precedent is worth the scarce resource of *en banc* review. Even assuming that the panel opinion (or *United States v. Butler*, 122 F.4th 584, 589-90 (5th Cir. 2024), cited by the panel, *see Curry*, __F.4th __, 2025 WL 80109, at *4, n.27), will be regarded as controlling in the *Erlinger* context, this

Court can expect the conflict to fester until resolved. *Apprendi*, after all, is nothing if not prolific in its ability to create federal sentencing error. *Erlinger* came 14 years after *Apprendi*, and represented the first federal appellate opinion holding ACCA's separate occasion provision unconstitutional in the absence of a jury trial. There is no reason whatsoever to think that it will represent the last case recognizing a new set of *Apprendi* errors, requiring yet another analysis of the prejudice inquiry for the resulting sentencing errors. Further, precisely because *Apprendi* errors are unpredictable and disruptive to settled practice, each new class of errors has the potential to affect many cases at once. There is therefore an unusually large benefit in establishing and enforcing a clear, coherent, standard for determining prejudice in this area of the law.

II. This Court should grant rehearing en banc to address conflict in its precedent regarding the standards for preservation of *Apprendi* error.

Federal Rule of Criminal Procedure 51(b) says that an appealing party in a criminal case may preserve error by "informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Subsection (a) of the same Rule abolishes the practice of exceptions, so parties may anticipate

possible errors without constantly repeating their objections. Fed. R. Crim. P. 51(a); *see also Holguin-Hernandez v. United States*, 589 U.S. 169, 174 (2020).

Following the issuance of *United States v. Booker*, 543 U.S. 220 (2005), which required review of hundreds or thousands of pending *Apprendi* claims, this Court enunciated a particular standard for the preservation of *Apprendi* error. As the panel opinion here correctly observed "[i]f a defendant voices [an] objection[] sufficient to apprise the sentencing court that he is raising a constitutional claim with respect to judicial fact-finding in the sentencing process, the error is preserved." *Curry*, 2025 WL 80109, at *3 (quoting *United States v. Rodarte-Vasquez*, 488 F.3d 316, 320 (5th Cir. 2007)(internal quotation marks omitted)(quoting *United States v. Castaneda–Barrientos*, 448 F.3d 731, 732 (5th Cir. 2006)).

Here, the panel found the error unpreserved for three reasons. First, it described the objection as one that "merely broadly stated [Appellant's] rights as a criminal defendant." *Id.* In fact, however, the defendant did not simply reserve his rights generally – he objected specifically to any sentence exceeding ten years, claiming that any such sentence would violate his right to indictment and proof beyond a reasonable doubt. (ROA.279). Accordingly, the panel's true concern seemed to be that Appellant did not reiterate the objection at sentencing. *See Curry*,

2025 WL 80109, at *3 ("…at sentencing, Curry acknowledged that there were no pending objections to the PSR and he did not make any other objections."). Rule 51(a), however, expressly dispenses with any need to reiterate an objection already made. And the Supreme Court has unanimously cautioned this Court against resurrecting exceptions in the guise of a specificity requirement. *See Holguin-Hernandez*, 589 U.S. at 174. Indeed, this conflict between the panel's preservation analysis and the Supreme Court's unanimous decision in *Holguin-Hernandez* alone merits further review by this Court.

Second, the panel said that the objection failed to reference the separate occasions requirement. *See Curry*, 2025 WL 80109, at *3. The objection did, however, reference all "elemental facts," which includes the separate occasions requirement, as *Erlinger* held. More importantly, the standard recited by the panel simply does not require the defendant to name the particular sentence-enhancing fact to which he has a right to a jury trial. It requires, generally, that the defendant "apprise the sentencing court that he is raising a constitutional claim *with respect to judicial fact-finding in the sentencing process*, the error is preserved." *Rodarte-Vasquez*, 488 F.3d at 320. This language speaks to the general process by which the court assesses sentence, not to any particular fact decided by a judge.

Third, the panel said that the objection did not mention "judicial fact-finding." *See Curry*, 2025 WL 80109, at *3. Yet the objection certainly mentioned two other *Apprendi* rights: the right to an indictment that contains all facts affecting the mandatory sentencing range, and the right to proof beyond a reasonable doubt. (ROA.279). The panel does not explain why the right to a jury trial should be afforded a privileged place among the three *Apprendi* rights (right to a jury trial, right to proof beyond a reasonable doubt, and right to indictment). Indeed, references to a heightened standard of proof have been held adequate to invoke *Apprendi*. *See Rodarte-Vasquez*, 488 F.3d at 321 (citing *United States v. Olis*, 429 F.3d 540, 544 (5th Cir. 2005), for the proposition that "*Booker* error (is)preserved where defendant 'repeatedly objected ... to both the district court's [factual finding] *and the burden of proof utilized by the court*.")(emphasis added by *Rodarte-Vasquez*).

Again, consistency in this area is critical. *Apprendi* periodically disrupts the settled practices of federal criminal law, and it can be expected to do so again. This Court should adhere to a common set of precedent for dealing with such claims of error. It shouldn't invent new standards every time the Supreme Court of this Court recognizes *Apprendi*'s effect on a new statute. That is unfair to the parties, and it is burdensome for the Court.

CONCLUSION

For these reasons, Appellant respectfully prays that this Court vacate the panel opinion and rehear the case *en banc*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kevin Joel Page, hereby certify that on this the 27th day of January, 2025, the Appellant's Petition for Rehearing *En Banc* was served via ECF and by separate email to counsel for the Plaintiff-Appellee, Assistant U. S. Attorney Stephen Gilstrap at stephen.gilstrap@usdoj.gov . I further certify that: 1) all privacy redactions have been made pursuant to 5th Cir. Rule 25.2.13; 2) the electronic submission is an exact copy of the paper documents pursuant to 5th Cir. Rule 25.2.1; and 3) the document has been scanned for viruses with the most recent version of Norton Anti-virus and is free of viruses. Further I certify that I will send a paper copy via regular mail to Mr. Curry.

/s/ Kevin Joel Page
Kevin Joel Page

CERTIFICATE OF COMPLIANCE

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/s/ Kevin Joel Page
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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 13, 2025
Lyle W. Cayce
Clerk

No. 22-11084

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

PAUL CURRY, JR.,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CR-396-1

Before RICHMAN, HAYNES, and DUNCAN, *Circuit Judges*.

PRISCILLA RICHMAN, *Circuit Judge*:

Paul Curry, Jr., appeals his guilty plea conviction under 18 U.S.C. § 922(g)(1) and sentence for possession of a firearm by a felon. The district court sentenced him to 262 months of imprisonment. For the first time on appeal, Curry argues that § 922(g)(1) is unconstitutional and that the district court incorrectly sentenced him as an armed career criminal under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). Because he fails to demonstrate plain error, we affirm.

I

Paul Curry, Jr., pleaded guilty to possession of a firearm by a felon. The presentence report (PSR) concluded that Curry was an armed career criminal within the meaning of the ACCA because he had four prior Texas convictions for burglary of a habitation, each committed on occasions different from one another. Applying the ACCA enhancement, the PSR determined that Curry faced a statutory minimum sentence of fifteen years, a statutory maximum of life, and a guidelines range of 210 to 262 months of imprisonment.

Curry did not object to the PSR. The district court adopted the findings and conclusions in the PSR and sentenced him within the guidelines range to 262 months of imprisonment. Curry timely appealed.

II

We first address Curry's arguments that § 922(g)(1) is unconstitutional. Curry did not challenge the constitutionality of § 922(g)(1) before the district court. Therefore, we review his constitutional challenge for plain error.[1] To establish reversible error under plain error review, Curry must show (1) an error, (2) that is clear or obvious, and (3) that affected his substantial rights.[2] Even if he makes such a showing, this court has discretion to correct the error only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[3]

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[1] *United States v. Howard*, 766 F.3d 414, 419 (5th Cir. 2014).

[2] *United States v. Brown*, 437 F.3d 450, 451 (5th Cir. 2006).

[3] *Puckett v. United States*, 556 U.S. 129, 135 (2009) (internal quotation marks omitted) (alteration in original) (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993)).

First, Curry argues that § 922(g)(1) is unconstitutional because it exceeds Congress's power under the Commerce Clause. "[W]e have consistently upheld the constitutionality of § 922(g)(1)" in the face of identical challenges.[4] This argument is foreclosed.

In a similar vein, Curry stipulated to the firearm's past movement in interstate commerce but argues that § 922(g)(1) requires more. This argument is similarly foreclosed by precedent.[5]

Second, Curry mounts a facial challenge to the constitutionality of § 922(g)(1), arguing that, applying the Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen*,[6] § 922(g)(1) violates the Second Amendment. This argument, too, is foreclosed by precedent.

"A facial challenge is an attack on a statute itself as opposed to a particular application."[7] The Supreme Court has recently confirmed that, generally speaking, in cases other than a suit based on the First Amendment, "a plaintiff cannot succeed on a facial challenge unless he 'establish[es] that no set of circumstances exists under which the [law] would be valid,' or he

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[4] *United States v. Alcantar*, 733 F.3d 143, 145 (5th Cir. 2013); *see also United States v. De Leon*, 170 F.3d 494, 499 (5th Cir. 1999) ("This court has repeatedly emphasized that the constitutionality of § 922(g)(1) is not open to question.").

[5] *See United States v. Rawls*, 85 F.3d 240, 242 (5th Cir. 1996) (per curiam) ("The 'in or affecting commerce' element can be satisfied if the firearm possessed by a convicted felon had previously traveled in interstate commerce."); *Scarborough v. United States*, 431 U.S. 563, 575 (1977) ("[W]e see no indication that Congress intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce.").

[6] 142 S. Ct. 2111 (2022).

[7] *City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015).

shows that the law lacks a 'plainly legitimate sweep.'"[8] The Court has also explained that "when assessing whether a statute meets this standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct."[9]

Section 922(g)(1) provides that "[i]t shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."[10] Our court held in *United States v. Diaz*[11] that § 922(g)(1) is not unconstitutional as applied to a person who was found in possession of a firearm following his previous felony convicted under Texas law for vehicular theft.[12] The defendant in *Diaz* was convicted under § 922(g)(1) as being a felon in possession of a firearm. The *Diaz* decision applied the Supreme Court's recent decision in *United States v. Rahimi*,[13] and, after extensive analysis of Diaz's as-applied challenge based on the Second Amendment, held that "'[t]aken together,' laws authorizing severe punishments for thievery and permanent disarmament in other cases establish that our tradition of firearm

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[8] *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024) (alteration in original) (first quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987); then quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

[9] *Patel*, 576 U.S. at 418 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

[10] 18 U.S.C. § 922(g)(1).

[11] 116 F.4th 458, 461 (5th Cir. 2024).

[12] *Id.* at 461-62.

[13] 144 S.Ct. 1889 (2024).

regulation supports the application of § 922(g)(1) to Diaz."[14] Because Diaz's conviction as a felon in possession was upheld, it follows that circumstances exist under which § 922(g)(1)'s prohibitions regarding a felon in possession of a firearm are not facially invalid. Indeed, in *Diaz* itself, this court held that Diaz's facial challenge failed because the statute was constitutional as applied to the facts of his own case.[15] Curry's argument based on the Second Amendment that his conviction was clear or obvious error fails.

III

We next address Curry's challenges to his ACCA sentence enhancement. Curry advances two arguments for why his ACCA sentence enhancement was error. First, he asserts that the district court violated his Fifth and Sixth Amendment rights by not submitting the question of whether his prior crimes occurred on separate occasions to a jury. Second, and in the alternative, Curry argues that the district court erred by solely relying on the PSR in applying the ACCA enhancement.

Before reaching the substance of Curry's challenges, we must determine the appropriate standard of review. Curry contends that he preserved his challenges to his ACCA enhancement and that review is de novo. He points to a footnote in the factual resume stating that he objected to "any sentence of imprisonment that exceeds ten years" on the grounds that "[a]ny sentence exceeding those limits would violate his rights to Due

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[14] *Diaz*, 116 F.4th at 471 (quoting *Rahimi*, 144 S.Ct. at 1901).

[15] *Id.* at 471-72 (citing *Rahimi*, 144 S.Ct. at 1898) (holding that because Rahimi's conviction under § 922(g)(8) was constitutional as applied to him, he could not sustain a facial challenge)); *see also United States v. Trevino*, ___F.4th ___, 2024 WL 5249789, at *4 (5th Cir. 2024) (reiterating the Supreme Court's continued emphasis that "laws disarming 'felons' are 'presumptively lawful'" before rejecting the defendant's facial challenge to § 922(g)(1) based on *Diaz* (first quoting *Rahimi*, 144 S.Ct. at 1902; then citing *Diaz*, 116 F.4th at 471-72)).

Process, his right to have an indictment that includes the relevant and elemental facts of the charge against him, and his right to have his guilt proven beyond a reasonable doubt." The Government disagrees, arguing that Curry's objection was not specific enough to put the district court on notice of potential issues for appeal.

We agree with the Government that Curry failed to preserve his ACCA-sentence-enhancement challenges adequately. "To preserve error, an objection must be sufficiently specific to alert the district court to the nature of the alleged error and to provide an opportunity for correction."[16] While "the objection and argument on appeal need not be identical," the objection must "'g[i]ve the district court the opportunity to address' the gravamen of the argument presented on appeal."[17]

For defendants challenging a court's failure to submit a sentence-enhancing fact to a jury, we have held that "[i]f a defendant voices [an] objection[] sufficient to apprise the sentencing court that he is raising a *constitutional claim* with respect to judicial fact-finding in the sentencing process, the error is preserved."[18] Curry's objection, however, did not apprise the district court that he was challenging its separate-occasions determination. His objection merely broadly stated his rights as a criminal defendant. The objection did not specify the ACCA's separate-occasion requirement or even mention his right to a jury. Moreover, at sentencing, Curry acknowledged that there were no pending objections to the PSR and

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[16] *United States v. Neal*, 578 F.3d 270, 272 (5th Cir. 2009).

[17] *United States v. Nesmith*, 866 F.3d 677, 679 (5th Cir. 2017) (alteration in original) (quoting *United States v. Garcia-Perez*, 779 F.3d 278, 281-82 (5th Cir. 2015)).

[18] *United States v. Rodarte-Vasquez*, 488 F.3d 316, 320 (5th Cir. 2007) (internal quotation marks omitted) (quoting *United States v. Castaneda–Barrientos*, 448 F.3d 731, 732 (5th Cir. 2006)).

he did not make any other objections. Without more specificity in the factual resume footnote, the district court did not have an opportunity to address "the gravamen" of Curry's argument on appeal that he was entitled to have a jury determine whether his prior crimes occurred on separate occasions.[19] Because Curry failed to preserve this ACCA sentence enhancement challenge, we review it for plain error.

Plain error review requires that Curry establish an error that is clear or obvious.[20] After the parties' briefs were filed in this case, the Supreme Court decided *Erlinger v. United States*.[21] In *Erlinger*, the Court recognized a defendant's right to "have a jury resolve ACCA's occasions inquiry unanimously and beyond a reasonable doubt."[22]

Because of *Erlinger*, we need not address Curry's contention that the district court erred by relying solely on the PSR's characterization of his prior convictions. Regardless of the district court's reliance on the PSR or other materials, the district court clearly erred by not submitting the separate-occasions inquiry to a jury. In other words, there was no evidence the district court could have permissibly relied on to make the separate-occasions inquiry.

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[19] *Cf. United States v. Zarco-Beiza*, 24 F.4th 477, 482, n.4 (5th Cir. 2022) (holding that a defendant's written objection to the PSR that "he is presumed innocent of any arrests or apprehension not resulting in a conviction" did not "reasonably 'inform[] the court of the legal error at issue'—*i.e.*, improper reliance on a bare arrest record" (quoting *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766 (2020)); *United States v. Sanchez-Espinal,* 762 F.3d 425, 429 (5th Cir. 2014) ("[T]he objections raised to the PSR and at the sentencing hearing did not put the district court on notice" of defendant's argument.).

[20] *Puckett v. United States*, 556 U.S. 129, 135 (2009).

[21] 144 S. Ct. 1840 (2024).

[22] *Id.* at 1852.

Under plain error review, however, the defendant must do more than establish clear error. The defendant must also prove that the error affected his substantial rights.[23] To prove an error affected his substantial rights, a "defendant ordinarily 'must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different.'"[24] We have explained that this analysis is akin to the harmless error review for preserved challenges, except "the defendant has the burden of proving that an error *did* impact his substantial rights."[25]

It is not enough that Curry's Sixth Amendment rights were violated. The Supreme Court has clarified that even Sixth Amendment violations, such as "[f]ail[ing] to submit a sentencing factor to the jury" or "fail[ing] to submit an element to the jury," are not structural errors.[26] We have also recently applied harmless-error analysis to a district court's error under *Erlinger* in failing to afford the defendant a jury determination of the "different occasions" inquiry.[27] Consequently, Curry has the burden of showing that if the district court had correctly submitted the separate-

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[23] *United States v. Brown*, 437 F.3d 450, 451 (5th Cir. 2006).

[24] *United States v. Randall*, 924 F.3d 790, 796 (5th Cir. 2019) (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016)).

[25] *Id.* at 795.

[26] *Washington v. Recuenco*, 548 U.S. 212, 222 (2006); *see also Erlinger v. United States*, 144 S. Ct. 1840, 1860 (2024) (ROBERTS, C.J., concurring) (explaining that violations of a defendant's right "to have a jury determine beyond a reasonable doubt whether his predicate offenses were committed on different occasions for purposes of the Armed Career Criminal Act" are "subject to harmless error review").

[27] *United States v. Butler*, 122 F.4th 584, 589-90 (5th Cir. 2024) (likening an error under *Erlinger* to an error under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and thus applying harmless-error analysis to hold an error harmless based on a "straightforward" record).

occasions inquiry to the jury, there is a reasonable probability that he would not be subject to the ACCA-enhanced sentence.[28]

To determine whether Curry has met this burden, we "may consider the *entire* record."[29] That includes the supplemental record on appeal. In *Greer v. United States*,[30] the defendant argued that plain-error review of his conviction must exclusively focus on the trial record.[31] Specifically, the defendant argued that the appellate court may only review the trial record to determine whether the district court's failure to submit an element of the offense to the jury affected his substantial rights.[32] The Supreme Court disagreed, holding that "an appellate court conducting plain-error review may consider the *entire* record—not just the record from the *particular proceeding* where the error occurred."[33] Accordingly, we may consider the supplemental record submitted to us, which details Curry's prior convictions.

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[28] *See United States v. Candelario*, 240 F.3d 1300, 1310 (11th Cir. 2001) (noting that the plain-error substantial rights analysis "is akin to the harmless error analysis employed in preserved error cases, which asks whether a rational jury would have found the defendant guilty absent the error"); *cf. Greer v. United States*, 141 S. Ct. 2090, 2097 (2021) ("Greer has the burden of showing that, if the District Court had correctly instructed the jury on the *mens rea* element of a felon-in-possession offense, there is a 'reasonable probability' that he would have been acquitted." (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)).

[29] *Greer*, 141 S. Ct. at 2098; *see also Butler*, 122 F.4th at 589 ("An otherwise valid conviction will not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (quoting *United States v. Matthews*, 312 F.3d 652, 665 (5th Cir. 2002))).

[30] 141 S. Ct. 2090 (2021).

[31] *Id.* at 2098.

[32] *Id.*

[33] *Id.*

In light of the conviction documents in the supplemental record on appeal, Curry has failed to demonstrate a reasonable probability that his sentence would have been different had the district court not erred. These documents demonstrate that Curry's prior four burglaries were committed against different victims and were separated by weeks and sometimes years. Further, at least twice, the burglaries were separated by intervening convictions. First, a guilty-plea judgment reveals Curry pleaded guilty in January 1986 to a burglary that occurred in September 1985. Second, according to two different guilty-plea judgments, Curry pleaded guilty in October 1987 for two burglaries that occurred over a year after his previous burglary *conviction*, one on July 20, 1987, and one on August 2, 1987. Finally, another judgment reveals that a jury convicted Curry of burglary in July 1989 for conduct that occurred in March 1989—nearly two years after his 1987 *convictions*.

While the Supreme Court has cautioned that "no particular lapse of time or distance between offenses automatically separates a single occasion from distinct ones,"[34] the Court has also explained that "a single factor—especially of time or place—can decisively differentiate occasions."[35] Here, Curry's *convictions* were separated by years, and the underlying burglaries were often separated by an intervening conviction. Curry carries the burden to establish his substantial rights were affected, and he fails to provide any plausible explanation for how a jury may reasonably conclude these crimes were not committed on separate occasions.

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[34] *Erlinger v. United States*, 144 S. Ct. 1840, 1855 (2024).

[35] *Wooden v. United States*, 142 S. Ct. 1063, 1071 (2022).

The Supreme Court's grant of certiorari, vacatur, and remand of *United States v. Schorovsky*[36] does not alter that conclusion. In *Schorovsky*, this court held that the district court did not plainly err by treating the defendant's prior offenses as having taken place on separate occasions for ACCA purposes when he committed the offenses two days apart.[37] The Supreme Court then granted the defendant's petition for certiorari, vacated this court's opinion, and remanded the case for further consideration in light of *Erlinger*.[38]

Curry argues that the grant, vacate, and remand in *Schorovsky* shows that the Court "was evidently unwilling to assume that the deprivation of a jury trial as to the separate occasions requirement had no effect on substantial rights where the prior offenses occurred two days apart." This interpretation of the Supreme Court's decision, however, fails to take two factors into account. First, the Supreme Court's "normal practice where the court below has not yet passed on the harmlessness of any error" is to "remand" the case to the circuit court "to consider in the first instance" whether the error was harmless.[39] Because this court did not determine that any error had occurred in *Schorovsky*, we never conducted harmless error analysis, so it is in line with the Supreme Court's standard practice to direct us to do so in the first instance.

Second, in *Schorovsky*, two of the defendant's ACCA-qualifying offenses took place two days apart, a gap which this court deemed

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[36] 95 F.4th 945 (5th Cir. 2024), *cert. granted, vacated, and remanded*, ___S. Ct. ___, 2024 WL 4486342 (2024).

[37] *Id.* at 947-48.

[38] *Schorovsky v. United States*, ___S. Ct. ___, 2024 WL 4486342, at *1 (2024).

[39] *Neder v. United States*, 527 U.S. 1, 25 (1999).

"conclusive" without further information in affirming that they occurred on separate occasions.[40] Meanwhile, the three burglaries at issue in *Erlinger* took place across the span of seven days—on April 4, April 8, and April 11—yet the Court in that case nevertheless remanded the case rather than ruling that the error was harmless.[41] Given that remand was appropriate when the gaps between offenses were between three and four days, it would defy expectations for the Court not to remand a case that involves only a two-day gap between offenses, especially as smaller periods of time more strongly indicate one continuous occasion.[42] By contrast, as explained above, the record shows that gaps of weeks or even years separated Curry's prior offenses. Thus, even if the Supreme Court believed that the error in *Schorovsky* may have impacted the defendant's substantial rights because the gap between offenses was only two days, it does not follow that the district court's *Erlinger* error affected Curry's substantial rights when the gaps between his offenses were much longer.

In his supplemental brief, Curry also suggests that his substantial rights were affected because the Government cannot show that he would have pleaded guilty had he known he had the right to have a jury determine the separate-occasions inquiry. He also argues that perhaps the Government would not have pursued an ACCA sentence enhancement had it been aware of the jury requirement. Under plain-error review, however, the burden is

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[40] *Schorovsky*, 95 F.4th at 947-48 (quoting *United States v. Alkheqani*, 78 F.4th 707, 726 (5th Cir. 2023)).

[41] *Erlinger v. United States*, 144 S. Ct. 1840, 1862 (2024) (KAVANAUGH, J., dissenting); *id.* at 1860 (majority opinion).

[42] *See Wooden v. United States*, 142 S. Ct. 1063, 1071 (2022) ("Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events.").

on Curry to establish a reasonable probability that he would not have pleaded guilty had he known he had a right for a jury to make the separate-occasions determination.[43] Curry never argues that he would not have pleaded guilty; rather, he argues that "the scant record evidence regarding the prior convictions, combined with the open-ended nature of the *Wooden*[44] inquiry, makes trial rather than plea an entirely rational choice." However, the Supreme Court in *Greer* required more than a mere suggestion that the defendant might not have pleaded guilty in order to find plain error; rather, the Court faulted the defendant for not having "argued or made a representation that [he] would have presented evidence at trial" that would have supported his claim that his mental state did not satisfy an element of the crime.[45] Here, Curry relies on the "scant record evidence" to make this showing, but we do not view the record evidence as weak. As explained above, court documentation shows that weeks or years separated his prior offenses, and he committed them against different victims. Curry never argues that these documents are inaccurate. Rather, he argues that they may be insufficient given the "open-ended nature of the *Wooden* inquiry." But given the Supreme Court's observation that "a single factor—especially of

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[43] *See Greer v. United States*, 141 S. Ct. 2090, 2097 (2021) (explaining that the defendant had "the burden of showing that, if the District Court had correctly advised him of the *mens rea* element of the offense, there is a 'reasonable probability' that he would not have pled guilty" (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)).

[44] *Wooden v. United States*, 142 S. Ct. 1063 (2022).

[45] *Greer*, 141 S. Ct. at 2098 (observing that "[i]mportantly, on appeal, neither [defendant] has argued or made a representation that they would have presented evidence at trial that they did not in fact know they were felons when they possessed firearms," and therefore the defendant who pleaded guilty could not "show that, but for the [] error during the plea colloquy, there is a reasonable probability that he would have gone to trial rather than plead guilty").

time or place—can decisively differentiate occasions,"[46] we disagree that the time gaps and identity of the victims constitute "scant record evidence."

Moreover, in his factual resume, Curry acknowledged "that if the Government meets its burden of proving by the required competent and credible evidence that [he] had previously been convicted of, *inter alia*, at least three violent felonies," then he would be subject to the ACCA's mandatory minimum sentence. In the absence of any substantiated argument that he would not have pleaded guilty, Curry has not established that the district court's *Erlinger* error affected his substantial rights.

IV

Finally, we briefly address Curry's request that we reconsider a previously denied joint motion to remand in light of *Erlinger*. At the time of the joint motion, which was before *Erlinger*, the Government took the position that Curry was ineligible for an ACCA sentence because, in pleading guilty, he did not admit that his prior burglary offenses were committed on at least three different occasions. While the Government wanted to present this position to the district court so it could reconsider Curry's sentence, a motions panel of our court denied the motion because the movants failed to establish that the district court may have committed legal error in its sentencing. Given *Erlinger*, the motions panel's reasoning is undoubtedly no longer valid; the district court clearly erred by failing to submit the separate-occasions question to a jury. But the Government does not argue for a remand now. In both its merits briefs and supplemental brief, it argues that we should affirm Curry's conviction and sentence. The only published Fifth Circuit cases that Curry cites for this request are ones in which we remanded based on the Government's "agree[ment] that the

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[46] *Wooden*, 142 S. Ct. at 1071.

[defendant's] sentence must be vacated and the case remanded for resentencing."[47] That is not the case here. Moreover, given the absence of any evidence suggesting his prior crimes occurred on separate occasions, Curry has failed to persuade us that a remand in this case would be "just under the circumstances."[48]

* * *

For the foregoing reasons, the district court's judgment is AFFIRMED.

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[47] *United States v. Armendariz-Moreno*, 571 F.3d 490, 491 (5th Cir. 2009) (per curiam); *see also United States v. Castano*, 217 F.3d 889, 889 (5th Cir. 2000) (per curiam) ("[T]he government now confesses error and takes the position that Castano is entitled to relief.").

[48] 28 U.S.C. § 2106.

APPENDIX D

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 21, 2025
Lyle W. Cayce
Clerk

No. 22-11084

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

PAUL CURRY, JR.,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CR-396-1

ON PETITION FOR REHEARING EN BANC

Before RICHMAN, HAYNES, and DUNCAN, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 40 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 40 and 5TH CIR. R. 40), the petition for rehearing en banc is DENIED.