App. No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARK WILLIAM SAIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Petitioner, Mark Sain, by his counsel, respectfully requests pursuant to Supreme Court Rule 13.5 and Rule 22 that the time for a petition for writ of certiorari in this matter be extended for 60 days to and including August 11, 2025. The United States Court of Appeals for the Sixth Circuit issued its judgment and unpublished opinion affirming the judgment in his case on March 13, 2025 (*see* Appendix). Mr. Sain's time to petition for writ of certiorari in this Court would therefore expire on June 11, 2025, absent an extension. Mr. Sain files this application at least ten days before that date, and supports his request as follows:

1. Mr. Sain pled guilty to the simple offense of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). At the time of his offense, that crime carried a maximum penalty of 10 years' imprisonment. 18 U.S.C. § 924(a)(2) (2021). But the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), established a 15-year mandatory minimum sentence for individuals with "three previous convictions" for "a violent felony or a serious drug offense," each committed "on occasions different from one another." 18 U.S.C. § 924(e)(1). In *Wooden v. United States*, 595 U.S. 360 (2022), this Court established a multi-factored, fact-laden test for determining whether prior offenses count as a single occasion, or multiple ones.

2. At his sentencing hearing, held on December 14, 2022, Mr. Sain argued that under the combined reasoning of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Wooden*, the occasions-different fact must be charged in the indictment and found by a jury beyond a reasonable doubt (or admitted by a defendant as part of his guilty plea), rendering the ACCA a distinct, aggravated offense. Because none of that occurred in his case, he argued that the district court could not sentence him for the greater ACCA offense, but only for the simple § 922(g) offense to which he pled guilty.

3. The district court disagreed, considering itself bound by precedent to decide the occasions-different fact for itself, by a preponderance of evidence. Concluding that Mr. Sain's prior offenses occurred on separate occasions, the district court sentenced Mr. Sain to 15 years' imprisonment, the mandatory minimum for the greater ACCA offense.

4. While Mr. Sain's case was on appeal and after he had filed his opening brief, this Court decided *Erlinger v. United States*, 144 S. Ct. 1840 (2024), in which it held that ACCA's occasions-different fact must be charged in the indictment and proven to a jury beyond a reasonable doubt (or admitted by a defendant as part of his guilty plea). *Erlinger* thereby established the true relationship between the simple § 922(g) offense and the greater ACCA offense, and also that the district court erred in Mr. Sain's case.

5. The Sixth Circuit nevertheless affirmed. It rejected Mr. Sain's argument that this *Erlinger* error is structural, relying on the court's recent holding in *United States v. Campbell*, 122 F.4th 624, 630-31 (6th Cir. 2024), and applied harmless error review. (*See* App. at 3-4.) To find the error harmless, it considered—over Mr. Sain's objection—all the information in the record, not just the record of the plea proceeding and including documents presented only at sentencing where the Rules of Evidence do not apply. (*Id.* at 4.) Relying on documents never submitted to a jury, and in the absence of any admission by Mr. Sain that he committed the prior offenses on different occasions for purposes of the greater ACCA offense, the panel determined the *Erlinger* error in Mr. Campbell's case was harmless and affirmed his ACCA sentence. (*Id.*)

6. The lower court also rejected Mr. Sain's double-jeopardy challenge to district court's imposition of the ACCA punishment, even though had been charged with and pled guilty (with the government's consent) only to the simple § 922(g) offense. The court reasoned that by raising a double jeopardy challenge only after

Erlinger was decided, after his opening brief, he had waived that argument. (*Id.* at 4-5). The Sixth Circuit has since held in a published decision that an identical double jeopardy claim raised in a supplemental brief after and in light of *Erlinger* was neither waived nor forfeited. *United States v. Kimbrough*, __ F.4th __, 2025 WL 1453274 (6th Cir. May 21, 2025).

7. Good cause supports granting an extension of time. In the time since the lower court issued its judgment, undersigned counsel has been responsible for a large number of briefs and other filings. Despite due diligence on the part of counsel, the press of these and other responsibilities past and upcoming has left insufficient time in which to prepare the petition.

Mr. Sain therefore asks this Court to extend the time to file a petition for a writ of certiorari in this appeal by 60 days, up to and including August 11, 2025.

Respectfully submitted,

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