NO. _____

IN THE UNITED STATES SUPREME COURT

GERALD LYNN CAMPBELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

This case presents two important questions that impact countless defendants and have divided circuit judges.

After Gerald Campbell pled guilty to being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1), the district court determined, by a preponderance of the evidence, that his prior offenses qualified as different occasions under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), and accordingly sentence him to serve a mandatory minimum sentence of 15-years' incarceration.

After *Erlinger v. United States*, 602 U.S. 821 (2024), the Sixth Circuit agreed that the district court erred by making the occasions-different finding itself, but found the error was harmless by relying upon *Shepard*[1] documents presented at Mr. Campbell's sentencing.

Multiple judges in the Sixth Circuit have questioned whether applying harmless-error review to *Erlinger* error comports with the Sixth Amendment. And, the circuits are divided as to the proper analysis in a guilty plea case, should harmless-error review apply.

The questions presented here are:

(1) Does the unique ACCA occasions-different inquiry, requiring a detailed, multi-factored analysis of the facts surrounding at least three prior offenses—facts which are not intrinsic to the elements of § 922(g)(1)—render *Erlinger* error structural?

(2) If harmless-error review applies to a fully preserved *Erlinger* error, what is the proper test when the defendant pleads guilty to only the lesser offense under § 922(g)(1)?

These are questions of exceptional importance, and this case presents an ideal opportunity for the Court to provide much-needed clarity.

[1] As defined in *Shepard v. United States*, 544 U.S. 13 (2005).

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case and include:

Petitioner Gerald Campbell, who was the defendant-appellant in the court of appeal and the defendant in the district court.

Respondent is the United States of America, which was the appellee in the court of appeals, and the plaintiff in the district court.

RELATED CASE

United States v. Gerald Campbell, 1:96-cr-19 (E.D. Tenn.), is a prior, related case.

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PETITION FOR A WRIT OF CERTIORARI

Gerald Campbell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

All documents are contained in the Appendix filed contemporaneously herewith.

JURISDICTIONAL STATEMENT

The Sixth Circuit entered its amended opinion and amended judgment on November 22, 2024, and denied rehearing en banc on February 19, 2025. Justice Kavanaugh granted Mr. Campbell's application to extend the time to file this certiorari petition until July 19, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . nor be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment of the United States Constitution provides in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."

18 U.S.C. § 922(g)(1):

(g) It shall be unlawful for any person--

> (1) 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.

18 U.S.C. § 924(e)(1):

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

STATEMENT OF THE CASE

After pleading guilty to being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1), Gerald Campbell was sentenced under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), to serve a mandatory minimum sentence of 15-years' incarceration. (Pet. App'x at 16a-17a.) That was based on the district court's determination, by a preponderance of the evidence, that four of Mr. Campbell's prior convictions qualified as ACCA predicates—three of which were drug offenses that had previously been grouped together by the district court under the United States Sentencing Guidelines "relevant conduct" rules as being part of the same course of conduct or common scheme or plan. (Pet. App'x at 17a, 24a.)

At the time of Campbell's offense, being a felon in possession of a firearm typically carried a maximum penalty of ten years' imprisonment. 18 U.S.C. § 924(a)(2) (2021).[2] But, ACCA creates a mandatory sentencing enhancement, requiring a minimum 15-year sentence for a defendant with "three previous convictions" for "a violent felony or a serious drug offense," each committed on "occasions different from another." 18 U.S.C. § 924(e)(1). Prior to Mr. Campbell's sentencing, this Court issued its opinion in *Wooden v. United States*, establishing the applicable test for determining whether prior convictions constitute different

[2] In 2022, Congress increased the statutory maximum penalty for being a felon in possession from ten years to fifteen years. Stop Illegal Trafficking in Firearms Act, Pub. L. 117-159, § 12004(c), 136 Stat. 1329 (2022).

occasions, and held that "an 'occasion' means an event or episode—which may, in common usage, include temporally discrete offenses." 595 U.S. 360, 367 (2022).

The occasions-different test involves consideration of the timing, location, character, and relationship of the prior offenses, with no one circumstance predominating. *Id.* at 369-70. "[N]o particular lapse of time or distance between offenses automatically separates a single occasion from distinct ones. Often, a qualitative assessment about the character and relationship of the offenses may be required. So may an inquiry into whether the crimes shared a common scheme or purpose." *Erlinger v. United States*, 602 U.S. 821, 841 (2024) (cleaned up). Offenses committed "close in time, in an uninterrupted course of conduct, will often count as part of one occasion." *Wooden*, 595 U.S. at 369. But offenses separated by "substantial gaps in time or significant intervening events" may not. *Id.* "Proximity of location is also important; the further away crimes take place, the less likely [but not impossible that] they are components of the same criminal event." *Id.* Also, "the character and relationship of the offenses may make a difference: The more similar or intertwined the conduct giving rise to the offenses—the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion." *Id.* (emphasis added). In short, whether prior conduct amounts to a single ACCA "occasion" is a fact-laden question.

Applying, *Wooden*, Mr. Campbell argued at his sentencing that his three prior drug convictions should be counted as a single offense for ACCA. (Pet. App'x. 11a-12a.) He explained that the two Virginia offenses had previously been considered "relevant conduct" to his 1992 federal drug offense during his federal sentencing. (*Id.* at 12a.) He argued that

all three offenses were committed as part of a common drug trafficking scheme or plan with only three or four months separating each transaction, with two occurring in the same county (presumably at the exact same location), with all three involving the sale of cocaine and/or crack cocaine, and that the offenses were not separated by a significant event or intervening arrest.[3] (Campbell Appellate Brief, at 7.)

At the time of his sentencing, circuit precedent barred the parties from offering evidence outside *Shepard* documents when resolving the occasions-different question. *United States v. Hennessee*, 932 F.3d 437, 439 (6th Cir. 2019) ("[O]nly *Shepard* documents may be examined when conducting a different-occasions analysis."); *United States v. Schumaker*, 83 F.4th 1031, 1037 (6th Cir. 2023) (reaffirming *Hennessee*). (*See* Gov't Resp. to PSR Objections, R. 48, PageID #172-73; Sent. Tr., R. 63, PageID #430-33 (arguing *Hennessee* controls and the court can rely on non-elemental facts in *Shepard* documents).) However, Mr. Campbell himself, personally called into question the legitimacy of his Virginia convictions—necessarily questioning the reliability of the facts within the Virginia *Shepard* documents. (Sent. Tr., R. 63, PageID #448.)

At his sentencing he also argued that due to the fact-intensive inquiry set out in *Wooden*, the district court would violate the Fifth and Sixth Amendments if it made the occasions-different factual finding by a preponderance of evidence, instead of requiring it to

[3] The Eleventh Circuit recently remanded a case for resentencing after finding the *Erlinger* error was harmful where the defendant's four prior drug offenses were for strikingly different drugs—some sales were for heroin, others for methamphetamine. *United States v. Rivers*, 134 F.4th 1292, 1307 (11th Cir. 2025).

be charged in the indictment and submitted to a jury for a determination beyond a reasonable doubt. (Pet. App'x at 17a.) The district court overruled this objection. (*Id*. at 18a.) It relied exclusively on *Shepard* documents to conclude that Mr. Campbell had four convictions that each occurred on a different occasion: (1) an August 1985 Tennessee robbery; (2) an August 1992 federal drug trafficking offense in Tennessee; (3) a December 1992 Virginia drug trafficking offense; and (4) a March 1993 Virginia drug trafficking offense. (*See id*. at 12a.)

On appeal, Mr. Campbell continued to argue that his three drug offenses constituted a single occasion of drug trafficking and continued to assert his Fifth and Sixth Amendment rights to have that fact alleged in his indictment and proven to a jury beyond a reasonable doubt. (*Id*. at 19a.) On appeal, the government changed its position, and "agree[d] that a jury should find (or a defendant should admit) that ACCA predicates were committed on occasions different from one another." (*See id.* at 13a.) However, it asserted that the Sixth Circuit was nonetheless bound by pre-*Wooden* circuit precedent allowing a district court to decide the occasions-different fact by a preponderance of the evidence. (*Id.*) The Sixth Circuit agreed. (*Id.*)

Mr. Campbell then filed a petition for en banc rehearing, and while that petition was pending this Court decided *Erlinger v. United States*, holding "there is no doubt" that the Fifth and Sixth Amendments require ACCA's occasions-different question to be "resolved by a unanimous jury beyond a reasonable doubt." 602 U.S. 821, 834 (2024). The Court emphasized that "[j]udges may not assume the jury's factfinding function for themselves, let alone purport to perform it using a mere preponderance-of-the-evidence standard." *Id.* "To

hold otherwise," "would intrude on a power the Fifth and Sixth Amendments reserve to the American people." *Id.* at 834-35. This is true "regardless of how overwhelming the evidence may seem to a judge." *Id.* at 842 (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986) (cleaned up)); *see also Rose*, 478 U.S. at 578 ("the error in such a case is that the wrong entity judges the defendant guilty").

The Court also acknowledged the unique nature of the *Wooden* occasions-different inquiry, specifically authorizing a bifurcated trial, where the jury evaluates the relationship of one's prior offenses during a separate punishment phase and only after one's guilt of the underlying § 922(g) is established. *Erlinger*, 602 U.S. at 847; *id*. at 893-94 (Jackson, J., dissenting) (discussing the inherent difference between typical factfinding related to facts intrinsic to the offense charged, and the factfinding necessary for an occasions-different inquiry).

The Court was also clear that non-elemental facts in *Shepard* documents—such as the date and location of the offense—are not reliable sources of information and cannot form the basis of an occasions-different finding. *Id.* at 841 (explaining the "limited utility" of *Shepard* documents as they are "prone to error," which is "especially grave when it comes to facts . . . on which adversarial testing was 'unnecessary' in the prior proceeding," such as the "time or location of his offense").

After *Erlinger*, Mr. Campbell submitted supplemental briefing in support of his petition for en banc rehearing arguing that the nature of the *Wooden* inquiry rendered an *Erlinger* error structural, and that even if harmless error review applies, the error in his case

was not harmless. (*See* Pet. App's at 21a; Supp. Br., R. 56.) He argued that harmless error review is limited to the trial evidence, or in the case of a guilty plea, to the facts admitted by the defendant as part of the factual basis for his plea. (Renewed En Banc Pet., R. 62, at 17.) He argued *Erlinger* was clear that the occasions-different fact could not be determined by relying on *Shepard* documents, especially when side-stepping a jury in a harmless-error review, and especially where Mr. Campbell personally raised doubts about the accuracy of those documents during his sentencing hearing. (*See* Pet. App'x at 24a; Supp. Br., R. 56, at 8-11; Renewed En Banc Pet., R. 62 at 26.) Because Mr. Campbell did not admit that his offenses occurred on different occasions, and because there was no trial evidence for the court of appeals to look to in order to conduct harmless-error review, he argued remand was required for resentencing without ACCA's enhancement. (Supp. Br., R. 56, at 14-15.)

The original panel issued an amended opinion, this time acknowledging Mr. Campbell's right to have the occasions-different fact charged in the indictment and presented to a jury for determination beyond a reasonable doubt. (Pet. App'x at 19a-20a.) But it upheld his ACCA sentence nonetheless. (*Id*. at 27a.) It first found that *Erlinger* error is not structural by concluding that the occasions-different element is the same as any other traditional omitted element, and then concluded—based only on *Shepard* documents submitted during Mr. Campbell's sentencing—that the error was harmless. (*Id*. at 20a-21a, 23a-24a.)

However, in her concurrence, Judge Davis addressed "the conundrum occasioned by the use of *Shepard* documents as part of the evaluation of the district court's different-occasions inquiry." (*Id*. at 28a.) She detailed the tension between *Erlinger's* "cautionary

guidance concerning the use of potentially unreliable *Shepard* documents," and the Court's holding in *United States v. Greer*, 593 U.S. 503 (2021) (a plain error—not harmless error—case) which allows review of the entire record when conducting plain error review of a traditional omitted-element error. (Pet. App'x at 30a-31a.) "The *Erlinger* majority's strong warning speaks in contrast to the *Greer* majority's invitation to review the whole record when conducting the plain-error substantial-rights prong inquiry." (*Id.* at 30a (citation omitted).) She explained that while *Greer's* expansive approach to the record "makes sense in the context of plain error review where the burden is on the defendant," it "g[a]ve [her] pause in extending [*Greer's*] logic here," to harmless-error review of a preserved constitutional error. (*Id.*) She concluded: "given *Erlinger*'s caution, we should well consider whether the jury right we seek to protect in calling out an *Erlinger* error is best served through harmless error review reliant on *Shepard* documents." (*Id.* at 31a.)

Mr. Campbell sought en banc rehearing of the amended panel opinion, but that was denied. Accordingly, he is currently serving a 15-year sentence under ACCA's enhancement. Absent ACCA, his incarceration range under the United States Sentencing Guidelines would be 57 to 71 months' incarceration (*i.e.*, approximately five to six years). (Presentence Investigation Report ("PSR"), R. 31, PageID #73, 75, 83-84, ¶¶ 18-19, 31-32, 53-55 (evidencing a total offense level of 21 and a criminal history category of IV absent ACCA's enhancement)).

REASONS FOR GRANTING OF THE WRIT

I. Circuit judges disagree as to whether *Erlinger* error is structural and whether harmless-error review comports with the Sixth Amendment jury trial right at all.

Five Circuits have held that *Erlinger* error is not structural. *United States v. Campbell*, 122 F.4th 624 (6th Cir. 2025) (included in the Appendix at Pet. App'x 16a-31a); *United States v. Brown*, 136 F.4th 87 (4th Cir. 2025); *United States v. Rivers*, 134 F.4th 1292, 1305–06 (11th Cir. 2025), *United States v. Butler*, 122 F.4th 584, 589 (5th Cir. 2024); and *United States v. Johnson*, 114 F.4th 913, 917 (7th Cir. 2024).[4] However, in reaching that conclusion each circuit rests its holding on *Neder v. United States*, 527 U.S. 1 (1999), and *Washington v. Recuenco*, 548 U.S. 212 (2006), noting that these cases hold that "errors that 'infringe upon the jury's factfinding role' are 'subject to harmless-error analysis.'" *Rivers*, 134 F.4th at 1305. And, since each court deemed the occasions-different element as "part and parcel with the [traditional omitted-element] errors in *Apprendi* and *Alleyne*," the courts "likewise ask whether the error at issue in [the defendant's] case was harmless." (Pet. App'x 21a.)

But none of these cases acknowledge the marked differences between the multi-factored analysis required to find the occasions-different fact (which requires a detailed examination of the facts and circumstances surrounding at least three *prior* convictions) with traditional missing-element cases, such as the drug quantity involved in a drug trafficking

[4] In *Johnson*, 114 F.4th 913, the Seventh Circuit applied harmless error review at the government's request, without supplemental briefing after *Erlinger* and without objection by the defendant.

offense, or whether a gun was carried, brandished, or discharged during a crime of violence. Those traditional omitted-element cases involve facts intrinsic to offense itself, not a consideration of the interrelatedness of prior offenses having nothing to do with the instant crime.

A growing number of Court of Appeals judges are questioning whether treating *Erlinger* error as subject to harmless error review "contravenes the Supreme Court's holding in *Erlinger*." *United States v. Kimbrough*, 138 F.4th 473, 477 (6th Cir. 2025). In Mr. Campbell's case, the concurring judge emphasized that "given *Erlinger's* caution, we should well consider whether the jury right we seek to protect in calling out an *Erlinger* error is best served through harmless error review reliant on *Shepard* documents." (Pet. App'x 31a.); *see also United States v. Harvin*, No. 20-14497, 2024 WL 4563684, at *2 (11th Cir. Oct. 24, 2024) (suggesting that *Erlinger* error could be structural, but declining to decide the question because the *Erlinger* error there was clearly harmful, so the case would have been remanded for resentencing under either test).

And, in a different case out of the Sixth Circuit Judge Clay issued a dissenting opinion laying out why *Erlinger* error is structural, distinguished *Recuenco*, and explained how *Erlinger* evidences that *Neder* is no longer good law. *United States v. Cogdill*, 130 F.4th 523, 538 (6th Cir. 2025) (Clay, J., dissenting) (explaining that in the context of *Erlinger* error "the preconditions for harmless error—a trial of a jury's peers and a record for the reviewing court to analyze—have not been satisfied"); *id*. at 539 ("the very act of the judge, and not the jury, deciding this question is what violates the Sixth Amendment jury trial right," and "to hypothesize a guilty verdict that was never in fact rendered—no matter how

inescapable the findings to support that verdict might be—would violate the jury-trial guarantee" (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993))). Judge Clay further explained that "though *Recuenco* postdates *Apprendi* and *Alleyne*, it is difficult to square its reliance on *Neder* with the Supreme Court's evolution in its thinking on sentencing jurisprudence, particularly in cases like *Erlinger*." *Id*. at 537 n.2.

And just earlier this month two additional judges on the Sixth Circuit expressed similar concerns. Judge Cole noted that he shares the concern laid out in Judge Clay's *Cogdill* dissent that *Campbell's* resort to harmless error review "contravenes the Supreme Court's holding in *Erlinger*." *United States v. Thomas*, ---F.4th----, 2025 WL 1823124, *8 (July 2, 2025) (Cole, J., concurring). And, in the same opinion Judge Nalbandian explained that "harmless-error review can sometimes be in tension with the Sixth Amendment injury itself: if the Sixth Amendment is designed to protect a defendant's right to have a jury of *his peers* resolve the facts of his case, how is three *judges* resolving the case a permissible remedy?" *Id.* at *14 n.1 (Nalbandian, J., concurring). As support for that position, Judge Nalbandian cited Justice Scalia's partial dissent in *Neder*, where he explained that "depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged—which necessarily means his commission of *every element* of the crime charged—can never be harmless." *Id.* (*quoting Neder*, 527 U.S. at 30 (Scalia, J., dissenting in part).

The growing number of circuit judges expressing their concern that the jury trial right protected in Erlinger cannot be squared with application of harmless error review amplifies the need for this Court to step in.

a. The unique inquiry required for ACCA's occasions-different element sets it apart from other *Apprendi* omitted-element errors.

Erlinger error is unlike the traditional omitted element errors addressed in *Neder* and *Recuenco* in multiple ways, but most notably because the facts necessary to decide the occasions-different element are not intrinsic to the rest of the elements of guilt. Traditional omitted element cases involve facts about the instant offense. But the occasions-different element requires a wholly separate inquiry into facts surrounding prior convictions.

This Court has already recognized the importance of treating such inquiries differently, as in *Erlinger* the Court—for the first time in a case addressing *Apprendi*-type error—expressly acknowledged the need to try the occasions-different element in a separate, bifurcated trial. *Erlinger*, 602 U.S. at 847. This is unlike any prior *Apprendi* omitted-element case, requiring special proceedings and distinct considerations. The acknowledgement that bifurcation is the natural and fairest approach necessarily reflects the fact that the occasions-different factors are *not* intrinsic to the elements of the underlying 18 U.S.C. § 922(g)(1) offense. Instead, they set out an entirely separate consideration wholly unrelated to § 922(g)'s elements. *See id*. at 893 (Jackson, J., dissenting) (detailing the inherent differences between "factfinding related to past criminality" and the "existing processes that govern [typical] jury determinations," because "a jury trial is 'confine[d] . . . to evidence that is strictly relevant to the particular offense charged").

This recognition that facts related to prior criminality are of a different kind than facts intrinsic to the commission of a new crime is nothing new, however, as the Court has long been clear that elements related to one's prior convictions are uniquely different from

other trial facts. *Old Chief v. United States*, 519 U.S. 172, 191 (1997) ("[P]roof of the defendant's [felony] status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense," and accordingly a defendant can stipulate that he has a prior felony during trial because the fact of a prior conviction is wholly unrelated to the facts necessary to prove the commission of the current offense). That difference matters even more here.

The occasions-different question is not just about the singular fact that a prior conviction exists—it's about the relationship of multiple prior convictions to each other. And the details and relationships of a defendant's prior convictions will almost certainly never be admitted in a trial on the underlying felon-in-possession of a firearm charge. To do so would be to allow a full-blown mini trial on the relatedness of prior offenses in a trial solely about whether the defendant knowingly possessed a firearm. *See Boggs v. Collins*, 226 F.3d 728, 744 (6th Cir. 2000) (Federal Rules of Evidence excluding extrinsic evidence are "designed to prevent distracting mini-trials on collateral matters"); *United States v. Riddle*, 193 F.3d 995, 998 (8th Cir. 1999) (the Federal Rules of Evidence aim to "avoid holding mini-trials on peripheral or irrelevant matters"). Simply put, this is not a run-of-the-mill missing-element case. Unlike other *Apprendi* omitted-element errors, this one involves a factual inquiry that *could never* have been fully developed at trial, and thus the facts necessary to evaluate harmlessness will never be in the trial record.

Moreover, *Recuenco* and *Neder* are both otherwise readily distinguishable. In both, the defendant was indicted with the element omitted in the jury instructions, and in neither had jeopardy attached to a guilty plea to a lesser offense. Instead, in both the Court held that

the omission of an element (*Neder*) or penalty-enhancing sentencing factor (*Recuenco*) *in the jury instructions* was not structural error. In both cases, the defendant was *charged* with the offense at issue, including the omitted element, and *went to trial* on the offense as charged. And in neither did the harmless-error determination depend on evidence never admitted at trial, as would be required here.

Significantly, in subjecting these instructional omissions to harmless-error review, the Court in both *Neder* and *Recuenco* quoted none other than *Rose v. Clark* as establishing the governing rule that the presumption of harmless-error analysis applies only "'*[i]f* the defendant . . . was tried by an impartial adjudicator.'" *Neder*, 527 U.S. at 8 (quoting *Rose*, 478 U.S. at 579)); *Recuenco*, 548 U.S. at 218 (quoting *Neder* quoting *Rose*) (emphasis added). Given that the defendants in both *Neder* and *Recuenco* were tried by an impartial adjudicator, the presumption of harmless error applied.

In stark contrast, harmless-error review of an *Erlinger* error hinges on a court's evaluation of information related to an uncharged element about prior offenses—often committed years or even decades earlier—that would never be presented at trial on the unenhanced § 922(g)(1) offense. For example, take Mr. Campbell. Had he gone to trial on the § 922(g)(1) offense *as charged*, there is no conceivable evidentiary relevance of his prior robbery and drug offenses committed decades ago, so the jury would have heard nothing about them, much less information about their timing, purpose, or relationship to each other. When looking at the whole trial record, there would be nothing upon which this Court could base a harmlessness determination. The entirely distinctive nature of ACCA's omitted occasions-different element, along with the non-trial-record information that must be

evaluated in every case to determine whether the outcome would be different, essentially turns the process into a directed verdict on an uncharged, enhanced offense. This approach is constitutionally intolerable. *Rose*, 478 U.S. at 578, *quoted in Erlinger*, 602 U.S. at 842.

b. The broad rationales underlying this Court's structural error jurisprudence strongly caution against extending the rationales of *Neder* and *Recuenco* to the unique context of *Erlinger* error.

This Court has announced "at least three broad rationales" for deeming an error as structural. *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017). "First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest [such as the right to represent oneself]." *Id.* "Second, an error has been deemed structural if the effects of the error are simply too hard to measure [such as] when a defendant is denied the right to select his or her own attorney." *Id.* And, "[t]hird, an error has been deemed structural if the error always results in fundamental unfairness [such as denying an indigent defendant an attorney or failing to give a reasonable-doubt instruction]." *Id.* at 296. However, "[t]hese categories are not rigid," and "more than one of these rationales may be part of the explanation for why an error is deemed to be structural." *Id.* Moreover, "one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case." *Id.* (citing *United States v. Gonzales-Lopez*, 548 U.S. 140, 149 (2006)).

Erlinger error meets each of these three rationales. First, the jury-trial right at issue is not designed solely to protect individuals like Mr. Campbell from erroneous application of the ACCA enhancement, but to protect "fundamental reservations of power to the American people." *Erlinger*, 602 U.S. at 832; *id*. at 849 ("the right to a jury trial has always

been an important part of what keeps this Nation free"). Second, the effects of the error are too hard to measure, due to the nature of the occasions-different inquiry. Applying harmless-error review to an *Erlinger* error will always require the court of appeals to decide what a jury would have done with hypothetical evidence that it was never subjected to the rule of evidence. And, in the context of a guilty plea, the court of appeal will first have to concoct a imaginary jury. The difficulties in determining the likely outcome had there been no *Erlinger* error render the error structural because "the efficiency costs of letting the government try to make the showing are unjustified." *Weaver*, 582 U.S. at 295-96. In short, there is no efficiency benefit when the determination requires a thought experiment based in pure abstracts—we cannot know what the outcome would have been, because we don't know what evidence would have been presented to a jury that was never convened.

And finally, there is fundamental unfairness implicated by *Erlinger* errors. The very nature of the error, a Fifth Amendment due process violation for failing to charge or prove the enhancement beyond a reasonable doubt, evidences the unfairness of punishing Mr. Campbell, and those like him, for an aggravated version of his offense when he pled guilty to only the elements of § 922(g)(1)—being a felon in possession of a firearm—particularly when he insisted that the occasions-different element must be put to a jury at his sentencing, and when his prior drug offenses we previously consolidated (in a way that enhanced his sentencing range) as a single course of conduct or common scheme or plan. This unfairness remains true even if some defendants have prior convictions that plainly amount to different occasions. *Erlinger*, 602 U.S. at 842 ("Often, a defendant's past offenses will be different enough and separated by enough time and space that there is little question he committed

them on separate occasions. But none of that means a judge rather than a jury should make the call."). Indeed, the Fifth and Sixth Amendments "ensure that a judge's power to punish would derive wholly from, and remain always controlled by, the jury and its verdict." *Id.* at 831-32.

c. The Sixth Circuit got it wrong.

The Sixth Circuit fundamentally erred by overlooking the dramatic differences between traditional omitted-element cases and the occasions-different element. *Erlinger* error is distinguishable from traditional omitted-element cases including *Neder* and *Recuenco*, as the facts supporting an omitted occasions-different element are not intrinsic to the felon-in-possession of a firearm crime itself, and instead require a detailed, multi-factored analysis of facts surrounding at least three prior offenses. That difference makes clear that failure to charge and prove the occasions-different element is structural error. Certiorari is needed to protect the public's jury trial right, and to prevent the impermissible expansion of harmless-error review into contexts not well suited for its remedy.

II. If harmless-error review applies, the circuits are split as to how to apply that review in a guilty plea case, as this Court has never defined the harmless-error standard for judge-found enhancements applied after a guilty plea to a lesser offense.

If harmless-error review applies, the Sixth Circuit nonetheless improperly expanded the reach of that doctrine. Because Mr. Campbell objected in the district court that judicial fact-finding of the uncharged occasions-different ACCA element was improper under the Fifth and Sixth Amendments, the government would bear the burden to show these constitutional errors were harmless beyond a reasonable doubt. *See Chapman v. California*,

386 U.S. 18, 24 (1967). The government can prove an error is harmless under this standard only when "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder*, 527 U.S. at 15 (quoting *Chapman*, 386 U.S. at 24).

This Court has never approved of a court of appeals looking beyond the trial record when conducting harmless-error review of an omitted-element error. To the contrary, its prior cases consistently demonstrate that the "whole record" in the context of harmless-error review refers exclusively to the whole *trial* record. And, in the context of a guilty plea, the trial record would be the facts admitted at the change of plea hearing as part of the factual basis for the plea.

Start with *Delaware v. Van Arsdall,* 475 U.S. 673 (1986), which was relied upon in *Neder*, 527 U.S. at 16-20. There, the Court applied harmless-error review to a constitutional violation of the defendant's confrontation clause right. *Id.* at 674. The Court first explained that the point of harmless-error review was to consider whether an error (even a constitutional one) was nonetheless "'harmless' in terms of [its] effect on the factfinding process at trial." *Id.* at 681. To make this assessment, it explained that reviewing courts must look to the "whole record," which was limited to evidence admitted at trial—it looked to nothing else. *Id.* at 681, 684 (describing the factors relevant to harmless-error analysis as "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.").

After citing *Van Arsdall,* the Court in *Neder* conducted harmless-error review based only on the evidence in the trial record. 527 U.S. at 16-20. The same is true with *Recuenco*, 548 U.S. at 218-221. When the Court found that harmless-error review applied, it referenced only trial evidence which clearly show that the "deadly weapon" utilized by the defendant during his crime was the "handgun" specified in the indictment. *Id.* at 218-221.

Similarly, in *Yates v. Evatt,* 500 U.S. 391, 405 (1991) (also relied upon in *Neder*, 527 U.S. at 7), the Court reaffirmed that the "entire record" referenced in harmless-error cases is limited to the entire *trial* record. *Id.* at 405-07. Addressing erroneous jury instructions that applied an unconstitutional presumption, the Court explained that harmless-error review requires determining whether the error "did not contribute to the verdict," which requires assessing its significance "in relation to everything else the jury considered" at trial. *Id.* at 403. Importantly, the Court explained that it is permissible to review the "entire record," because we assume "jurors, as reasonable persons, would have considered the entire *trial* record." *Id.* at 406 (emphasis added). But, when that assumption is undermined, appellate courts must narrow their review to a subset of trial evidence. *Id.* ("it is crucial to ascertain from the trial court's instructions that the jurors, as reasonable persons, would have considered the entire trial record, before looking to that record to assess the significance of the erroneous presumption").

The phrase "whole record" serves to distinguish the entire trial record from narrower subsets of evidence admitted at trial. It does not authorize courts to consider contested facts never submitted to a jury nor admitted by a defendant at his guilty plea. Because there is no

trial record (or factual basis) here on which harmless-error review can operate, that should conclude the analysis.

But, in Mr. Campbell's case, the Sixth Circuit relied exclusively on non-elemental information contained in *Shepard* documents to find "beyond a reasonable doubt that a jury's failure to consider the different-occasions question had no effect on Mr. Campbell's sentence. (Pet. App'x at 23a-24a.) It construed this Court's admonition against utilizing *Shepard* documents in the occasions-different inquiry as merely "a reason why *Erlinger* determined that the occasions inquiry must be submitted to a jury," but concluded that "*Erlinger* did not preclude the use of *Shepard* documents in reviewing an error for harmlessness." *Id.* (*citing Erlinger*, 144 S. Ct. at 1855). It then cited *Greer*, 593 U.S. at 510–11, for the proposition that "harmless error review is based on an assessment of all 'relevant and reliable information' in the 'entire record.'" (Pet. App'x at 24a.)

But, *Greer* does not define the scope of review of Mr. Campbell's preserved *Erlinger* claim, as *Greer* was a case applying plain error. *Greer* itself acknowledged that "[c]onsistent with the text of Rules 51 and 52, this Court's precedents have long drawn a bright line between harmless-error and plain-error review based on preservation." *Greer*, 593 U.S. at 512 (citing *United States v. Olano*, 507 U.S. 725, 731 (1993)). Unlike plain-error review, "[o]n harmless-error review, defendants have not forfeited any of their rights, including their right to have a jury decide whether there is reasonable doubt as to any element of the crime charged." *Greer*, 593 U.S. at 517 (Sotomayor, J., concurring). "For that reason, a constitutional error is harmless only if there is no reasonable doubt about whether it affected

the jury's actual verdict in the actual trial." *Id.* (citing *Sullivan*, 508 U.S. at 279, and *Yates*, 500 U.S. at 404-06).

Justice Sotomayor emphasized that it would be "patently unfair" for an appellate court applying harmless-error review to look to "inculpatory evidence the Government never put before the jury (like [a defendant's] presentence report])" to find that the jury would have found the defendant guilty. *Id.* at 517-18. Moreover, because "defendants on harmless-error review [have not] forfeited their right to require the Government to prove its case beyond a reasonable doubt," reviewing courts cannot "put [great] weight on a defendant's failure to make an affirmative case" demonstrating his own innocence. *Id.* at 518.

This logic applies with even more force when the extra-trial evidence the court looks to are *Shepard* documents—the exact documents this Court expressly disavowed in *Erlinger*. 602 U.S. at 839-41. Indeed, relying on *Shepard* documents to decide whether offenses were committed on separate occasions is "exactly what the Fifth and Sixth Amendments forbid." *Id*. at 840.

a. Circuit judges are divided over whether the whole district court record can be utilized when conducting harmless-error review of an *Erlinger* error.

While the Sixth Circuit held an *Erlinger* error can be found harmless based solely on *Shepard* documents, that holding has caused considerable consternation amongst other Circuit Court judges. Judge Davis's concurrence below explained that "[t]he *Erlinger* majority's strong warning [against relying upon *Shepard* documents to make factual determinations as to when and where a prior offense occurred] speaks in contrast to the *Greer* majority's invitation to review the whole record." (Pet. App'x at 30a-31a.) She further

agreed that "the Court's analysis in *Greer's* case does not extend to the distinct context of harmless-error review." (*Id*. (*quoting Greer*, 593 U.S. at 515 (Sotomayor, J., concurring)). Indeed, Judge Davis cautioned that "[u]se of the whole record could compound the effect of the initial *Erlinger* error because of the grave reliability problems associated with the *Shepard* documents often used during a judge-made different-occasions inquiry." (*Id.* at 30a.)

Similarly, Judge Clay explained in his *Cogdill* dissent that even if harmless-error review applies to *Erlinger* errors, that review cannot encompass *Shepard* documents. *Cogdill*, 130 F.4th at 541 ("*Erlinger* prevents district courts from reviewing *Shepard* documents—such as judicial records, plea agreements, and colloquies between a judge and the defendant—in the context of the occasions inquiry," so "[a] three-judge panel of this Court cannot do what the Supreme Court has forbidden district courts themselves from doing.") He explained that allowing a court of appeals to find non-elemental facts in *Shepard* documents would "yield the bizarre result that '[t]he remedy for a constitutional violation by a trial judge (making the determination of criminal guilt reserved to the jury) is a repetition of the same constitutional violation by the appellate court (making the determination of criminal guilt reserved to the jury).'" *Id.* (citing *Neder*, 527 U.S. at 32 (Scalia, J., dissenting in part)).

And, Judge Cole shares these concerns. *Thomas*, ---F.4th----, 2025 WL 1823124, *10. He notes that characterizing the *Erlinger* opinion as containing "harsh words about *Shepard* documents" "understates the Supreme Court's skepticism of the use of *Shepard* documents to conduct the different occasions analysis." *Id.* Thus, he cautions, "[t]o proceed

with harmless error review without accounting for *Erlinger*'s cautions [about utilizing *Shepard* documents] risks reproducing the same infringements on a defendant's constitutional rights the Supreme Court sought to guard against." *Id.* He further noted that while "*Erlinger* discusses these concerns in the context of sentencing judges, not appellate courts' review for harmless error . . . . it is unlikely that the Supreme Court views appellate judges as less immune than trial judges to the risks presented by *Shepard* documents when conducting the wide-ranging factual inquiry required to establish beyond a reasonable doubt that a defendant committed his offenses on different occasions." *Id.*; *see also Kimbrough*, 138 F.4th at 477 ("Thoughtful jurists, including members of this court, have questioned whether *Campbell* 'contravenes the Supreme Court's holding in *Erlinger*.'").

These concerns are more than just valid—they reflect the very real problem with allowing the courts of appeals to rely upon evidence outside the trial record when conducting harmless error review. It is even more concerning, as these judges emphasize, because the Sixth Circuit has permitted appellate judges to rely not just on the entire district court record, but upon the same evidence this Court expressly found to be unreliable. In other words, the Sixth Circuit has permitted appellate judges to step into the shoes of hypothetical jurors, and decide whether they would have found the occasions-different fact beyond a reasonable doubt by looking to evidence that may not have been admissible under the rules of evidence, and which this Court has already disavowed. That takes harmless-error review too far.

b. The Circuits are divided as to which proceeding the harmless error analysis should focus on—change of plea, trial, or sentencing.

In Mr. Campbell's case the Sixth Circuit explained that "most constitutional errors are subject to a harmless error analysis," and so the relevant question is whether "the government has made it clear 'beyond a reasonable doubt that the outcome would not have been different' without the constitutional violation." (Pet. App'x 20a (citing *Untied States v. Mack*, 729 F.3d 594, 608 (6th Cir. 2013).) Thus, it focused on whether "the record evidence shows beyond a reasonable doubt that a jury's failure to consider the different-occasions question had no effect on Campbell's sentence." (*Id.* at 24a.) Applying this test, it focused on evidence it believed would have been submitted to a jury, had there been a trial on the occasions-different element, but also expressly noted that "consideration of the entire record is not limited to admissible evidence." (*Id.* at 23a, 24a.) The Fifth, Seventh, and Eleventh Circuits take the same approach. *Butler*, 122 F.4th at 589; *Johnson*, 114 F.4th at 917; *Rivers*, 134 F.4th at 1306.

The Fourth Circuit, however, sees things differently. It explained its belief that since the defendant had pled guilty to the underlying § 922(g)(1) offense "the harmless-error burden is different, requiring that the government show that, 'if the District Court had correctly *advised* him of the [missing] element of the offense,' it is clear beyond a reasonable doubt that '*he would not have pled guilty.*'" *Brown*, 136 F.4th at 97 (quoting *Greer*, 593 U.S. at 508, (emphasis in *Brown*); and citing *Olano*, 507 U.S. at 734). Accordingly, the Fourth Circuit focused on whether Brown would nonetheless have waived his right to an occasions-different trial had his indictment alleged the occasions-different element, and "had he been

correctly advised at his plea hearing that he 'was entitled to have a jury resolve [that issue] unanimously and beyond a reasonable doubt." *Brown*, 136 F.4th at 97 (quoting *Erlinger*, 602 U.S. at 835).

The Third Circuit takes a third approach, characterizing a mandatory minimum imposed when the defendant was not indicted with the enhancement element, and the element was imposed based on judge-found facts at sentencing as "a pure sentencing error." *United States v. Lewis*, 802 F.3d 449, 457 (3rd Cir. 2015) (en banc) (addressing an enhanced mandatory minimum under 18 U.S.C. § 924(c) for "brandishing" instead of "using or carrying" a firearm in furtherance of a robbery that was imposed after a trial). The en banc Third Circuit held that on harmless-error review a court of appeals should "ask whether the *Alleyne* error . . . contributed to [the defendant's] sentence." *Id.* Thus, the Third Circuit focused on "whether [the defendant's] sentence would have been different had he been sentenced for using or carrying, rather than brandishing" a firearm." *Id.* at 458. Because the defendant received an 84-month, mandatory minimum sentence for brandishing, whereas the mandatory minimum for using or carrying was only two years, it held that "[o]bviously [the defendant's] sentence would have been different" absent the *Alleyne* omitted-element error. *Id.*

The en banc Third Circuit emphasized that in *Recuenco* this Court held that "the [f]ailure to submit [the] sentencing factor [at issue there, *i.e.*, whether a deadly weapon used during the offense was in fact a firearm] to the jury, like failure to submit an element to the jury" is subject to harmless-error review, but that this Court did not "explain what harmless-error review should consist of." *Id.* at 457. So, it found itself free to consider the mandatory

minimum as a sentencing error as opposed to a trial error. *Id.* at 457; *see also Cogdill*, 130 F.4th at 541-42 (Clay, J., dissenting) (arguing that if harmless error review applies to an *Erlinger* error following a guilty plea, the focus should be on the sentencing hearing, and that when judge-found facts trigger a mandatory minimum, the error is not harmless because it impacts the sentence applicable to the defendant, and therefore changes the outcome of the sentencing).

These are vastly divergent approaches to the harmless-error test, particularly in the guilty plea context, when a sentencing enhancement is neither charged in an indictment nor submitted to a jury to be proved beyond a reasonable doubt. Those differences require direction from this Court.

c. The Sixth Circuit got it wrong.

Even if harmless-error review applies to *Erlinger* errors, the Sixth Circuit impermissibly conflated this Court's plain error precedents with harmless-error review, and relied solely upon *Shepard* document despite this Court's clear repudiation of looking to those documents to determine the dates and locations of prior offenses. Reliance on untested evidence never submitted to a jury to guess what imaginary jurors might decide stretches harmless-error review beyond constitutional bounds.

At the same time, the circuits are split as to what the proper analysis is when applying harmless-error review to a mandatory minimum sentence imposed on judge-found facts, particularly after a guilty plea to the lesser offense. This Court has never defined the applicable standard. Now is the time for guidance.

III. The questions presented are extremely important.

In *Erlinger* this Court emphasized the importance of the jury trial right to the foundation and function of our democracy. That right is important not just to ensure fair outcomes for defendants, but to maintain the power of the people to check government overreach. Sentencing a person to a mandatory 15-year prison sentence when he was neither charged with the aggravated version of the offense, nor allowed to submit those aggravating facts to a jury directly undermines the basic concepts of liberty that define what it means to be American. That sort of harm cannot be corrected by a subsequent set of judges deciding for themselves that the aggravated facts exist—the harm is in the absence of the jury, and in exalting a judge's opinion over the people's right to decide. *Erlinger* error is structural. Instead of accepting that conclusion the Sixth Circuit has taken an approach that pushes harmless-error review beyond the reach of this Court's prior pronouncements and thereby erodes the jury trial right in a new and ever-imposing way. That government overreach must be corrected by this Court.

This overreach is true even if *Erlinger* error is subject to harmless-error review. The Sixth Circuit improperly conflated plain-error review with harmless-error review, thereby treating Mr. Campbell the same as if he had failed to preserve his jury trial right. And that overstep applies not just to individuals facing an ACCA enhancement, or any other federal enhancement, but it applies to all criminal defendants who preserve errors before the trial court. The Sixth Circuit's approach fundamentally changes—and impermissibly expands—harmless error review in a way that harms individuals who fully preserved their objections to constitutional harms. The Sixth Circuit's reliance on unreliable information in *Shepard*

documents underscores this overreach and the resulting fundamental unfairness it causes for defendants. This Court must intervene.

This Court has never defined the harmless-error analysis applicable to an omitted-element error after a guilty plea to only the lesser offense. Given that absence of guidance, the courts of appeals are divided over the relevant inquiry, particularly in guilty plea cases. But roughly 90% of federal defendants plead guilty,[5] and many timely raise omitted-element objections. When considering the vast numbers of people charged with state crimes, the number of individuals directly impacted ballons. The proper test for harmless-error review is of the utmost importance to countless defendants.

Guidance is needed from this Court to rein in the Sixth Circuit's approach and to resolve the split between the circuits.

IV. This case is an excellent vehicle to resolve these questions.

Gerald Campbell fully preserved his right to put the occasions-different fact to a jury. The issue was fully litigated before the district court, and before the Sixth Circuit. And, after *Erlinger* was decided, the parties fully briefed both the structural error and harmless-error arguments. Accordingly, the Sixth Circuit opinion below addresses both issues head on, setting out clear legal questions for this Court to resolve.

Moreover, the outcome of these questions will directly impact the outcome in Mr. Campbell's case. If the *Erlinger* error is structural, he will no longer be subjected to ACCA's

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[5] *See* John Gramlich, Fewer than 1% of federal criminal defendants were acquitted in 2022, Pew Rsch. Ctr. (June 14, 2023), https://www.pewresearch.org/short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022/ (last visited July 19, 2025).

15-year mandatory minimum and instead will be subject to a United States Sentencing Guidelines range of only 57 to 71 months' incarceration (*i.e.*, five to six years). The same is true if harmless-error applies. When properly limited to the facts admitted by Mr. Campbell at his guilty plea hearing (and without reliance on non-elemental facts in *Shepard* documents) there is nothing to support the finding of the occasions-different element. That is all the more impactful here, where the district court had previously treated his three prior drug offenses as a single course of conduct or common scheme or plan and aggregated them into a single offense for sentencing purposes, and where Mr. Campbell personally called into question the validity of the Virgina convictions during his sentencing.

This Court's guidance is urgently needed not only to preserve the jury trial right that is reserved to the people, but to resolve the circuit split as to the proper test for harmless-error review of preserved, omitted-element claims, after a guilty plea to the lesser offense.

CONCLUSION

For the forgoing reasons, Gerald Campbell respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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