No. _____

IN THE
Supreme Court of the United States

JAMES JOSEPH BRYANT,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, when applying the categorical approach required by the Armed Career Criminal Act (ACCA), a court determines the elements of a prior conviction based on the latest judicial interpretation of the statute of conviction, as the Eleventh Circuit holds, or based on the interpretation in place at the time of the prior conviction, as the First, Fourth, and Seventh Circuits hold and the Eighth Circuit holds in the Guidelines context.

2. Whether an error under *Erlinger v. United States*, 602 U.S. 821 (2024), is structural or instead subject to harmless-error review.

RELATED PROCEEDINGS

This case arises from these proceedings:

United States District Court (M.D. Fla.):

United States v. Bryant, No. 6:18-cr-188-PGB-TBS (M.D. Fla. May 30, 2019)

United States Court of Appeals (11th Cir.):

United States v. Bryant, No. 19-12283, 2025 WL 987735 (Apr. 2, 2025).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Joseph Bryant respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion on remand is unpublished, 2025 WL 987735, and is provided in Petition Appendix ("Pet. App.") A, 1a–11a. This Court's order granting a petition for certiorari review, vacating the judgment below, and remanding for further proceedings is reported at 145 S. Ct. 122 (2024), and is provided in Petition Appendix B, 12a–14a. The Eleventh Circuit's original opinion is unpublished, 2023 WL 9018411, and is provided in Petition Appendix C, 15a–27a.

JURISDICTION

The Eleventh Circuit issued its opinion on remand on April 2, 2025. Pet. App. 1a. Justice Thomas granted Mr. Bryant an extension until July 31, 2025, to petition for a writ of certiorari. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution (U.S. Const. amend. V) provides:

> 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 (U.S. Const. amend. VI) provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . and to be informed of the nature and cause of the accusation . . . .

Title 18, United States Code, § 922(g)(1) provides in relevant part:

> It 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 . . . possess in or affecting commerce[ ] any firearm or ammunition.

Title 18, United States Code, § 924(a)(2) (eff. Oct. 6, 2006, to Dec. 20, 2018) also provides:

> Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), provides in relevant part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection—
>
> . . .
>
> > (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that—
> >
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another . . . .

INTRODUCTION

The Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), imposes increased statutory penalties for individuals who violate the felon-in-possession-of-a-firearm statute, 18 U.S.C. § 922(g)(1), and who have three or more predicate offenses "committed on occasions different from one another." This petition presents two important issues about how and when courts apply ACCA's harsh penalty.

1. First, courts use the categorical approach to determine whether a defendant's prior conviction is an ACCA predicate offense—either a "serious drug offense" or a "violent felony." This Court has twice confirmed that ACCA requires a backward-looking approach. In determining whether a prior offense was punishable by at least 10 years in prison, and in determining whether a prior offense involved a federally controlled substance, courts must consult the law applicable at the time of the prior offense. *McNeill v. United States*, 563 U.S. 816, 825 (2011) ("[A] federal sentencing court must determine whether 'an offense under State law' is a 'serious drug offense' by consulting the 'maximum term of imprisonment' applicable to a defendant's previous drug offense at the time of the defendant's state conviction for that offense."); *Brown v. United States*, 602 U.S. 101, 123 (2024) ("[W]e hold that a state drug conviction counts as an ACCA predicate if it involved a drug on the federal schedules at the time of that offense.").

But what about changing judicial interpretations of the statute that defines the prior conviction? Often, a state (or federal) appellate court interprets a criminal statute one way, and then years or decades later, the state's highest court will

interpret the statute in a different way that affects whether the crime is an ACCA predicate. In that situation, which version of the caselaw should a federal court look to: the caselaw that was controlling when the defendant committed the prior offense, or the most recent interpretation by the state's highest court?

This petition poses that very question. Several circuits say that a proper application of the ACCA requires a court to examine judicial interpretations of the criminal statute that applied at the time of the prior offense, but the Eleventh Circuit looks at the current controlling interpretation. The Eleventh Circuit has not only created a circuit split, it has also subverted the categorical approach. By imposing an ACCA sentence based on an interpretation of a state criminal statute that contradicts the controlling interpretation at the time of the prior offense, the Eleventh Circuit closes its eyes to the conduct the state necessarily proved to convict the defendant of the prior crime. Instead, the Eleventh Circuit's approach favors a legal fiction—that the later state court decision "tells us what the law always meant"—that has no role in ACCA's backward-looking inquiry.

2. Second, this Court held last term that the government must prove ACCA's different-occasions requirement to a unanimous jury beyond a reasonable doubt. *Erlinger v. United States*, 602 U.S. 821 (2024). In the opinion, the Court explained that it could not say what a jury presented with reliable information might have found about whether the *Erlinger* defendant had committed his prior offenses on different occasions. This petition presents a question *Erlinger* left open: Is *Erlinger* error structural?

The unique features of *Erlinger* error—including the lack of a trial record or factual basis and the multi-factored, unpredictable nature of the different-occasions inquiry—demonstrate that the answer is yes. Yet the Eleventh Circuit here rejected that conclusion, reviewing the error for prejudice based on distinguishable case law.

STATEMENT OF THE CASE

1. In February 2018, local law enforcement arrested Mr. Bryant based on three warrants issued in Volusia County, Florida. Doc. 28 at 19–20.[1] When the police apprehended him, Mr. Bryant was seated in a wheelchair and had a firearm underneath his leg. *Id.* at 20. He ultimately pleaded guilty to one count of possessing a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1). Docs. 28, 29, 73.

The Presentence Report (PSR) recommended that Mr. Bryant be sentenced under ACCA based on four prior convictions: (i) Florida aggravated battery, allegedly committed on April 29, 1988; (ii) Florida principal to aggravated assault, allegedly committed on June 8, 1993 (for which Mr. Bryant was convicted in February 1994); (iii) federal possession with intent to distribute cocaine base, allegedly committed on January 8, 1999; and (iv) federal possession with intent to distribute cocaine base, allegedly committed on January 15, 1999. Doc. 54 (PSR) ¶ 24.[2] Mr. Bryant objected to the PSR's factual narratives about the assault and federal drug offenses. *Id.* ¶¶

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[1] Mr. Bryant cites the docket entries in Case No. 6:18-cr-188-PGB-TBS (M.D. Fla).

[2] Without ACCA, the statutory maximum penalty would have been 10 years in prison. 18 U.S.C. § 924(a)(2) (eff. Oct. 6, 2006) (applicable to Mr. Bryant). When ACCA applies, the mandatory minimum becomes 15 years in prison and the maximum is life. *Id.* § 924(e)(1).

35–36. The district court determined he was an armed career criminal but sentenced him to 10 years in prison based on the Government's motion for a downward departure. *See* Docs. 60, 64.

2. On appeal to the Eleventh Circuit, Mr. Bryant challenged the validity of his ACCA sentence. *See* App. Doc. 21 at 23–33.[3] He argued (among other things) that (i) his 1994 Florida conviction for aggravated assault lacked the requisite mens rea to qualify as an ACCA "violent felony," *id.* at 23–24, and (ii) his ACCA sentence violated the Fifth and Sixth Amendments because he was sentenced above the statutory maximum based on facts not charged in the indictment and proven to a jury beyond a reasonable doubt, including whether the prior offenses were committed on different occasions, *id.* at 31–33.[4]

Before the Government filed its answer brief, Mr. Bryant moved to stay the appeal pending this Court's decision in *Borden v. United States*, 593 U.S. 420 (2021), which the court of appeals granted. App. Docs. 32, 34. This Court decided *Borden* on June 10, 2021, holding that a crime that requires only a mens rea of recklessness is not a "violent felony" under ACCA's "elements clause." 593 U.S. at 429. After *Borden* was decided, the Eleventh Circuit lifted the stay and the Government filed its answer brief. App. Docs. 50, 54.

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[3] Mr. Bryant cites the appellate docket entries in No. 19-12283 (11th Cir.).

[4] Relatedly, Mr. Bryant argued that the district court erred by sentencing him under ACCA because it relied on non-elemental facts to find that he committed the prior offenses "on occasions different from one another," § 924(e)(1), since the date of a criminal offense is not an element under Florida or federal law. App. Doc. 21 at 25–31.

Mr. Bryant then moved to stay the appeal pending this Court's decision in *Wooden v. United States*, 595 U.S. 360 (2022), and the Eleventh Circuit's decision in *Somers v. United States*, No. 19-11484. App. Doc. 59. The court of appeals granted that motion to the extent the appeal was stayed pending *Somers*. App. Doc. 60. In *Somers*—a follow-on case to *Borden*—the Eleventh Circuit certified a question to the Florida Supreme Court about the mens rea needed to commit aggravated assault. *Somers v. United States*, 15 F.4th 1049, 1056 (11th Cir. 2021) ("*Somers I*"). In certifying the question, the Eleventh Circuit recognized that Florida's intermediate appellate courts were divided over the required mens rea, with Florida's Fifth District Court of Appeal holding that recklessness was enough. *Id.* at 1054–56 (citing, *inter alia*, *Kelly v. State*, 552 So. 2d 206, 208 (Fla. 5th Dist. Ct. App. 1989)). The Florida Supreme Court answered the question in 2022, holding that "Florida's assault statute, section 784.011(1), requires not just the general intent to volitionally take the action of threatening to do violence, but also that the actor direct the threat at . . . another person." *Somers v. United States*, 355 So. 3d 887, 892–93 (Fla. 2022) ("*Somers II*"). Based on that answer, the Eleventh Circuit held that Florida aggravated assault is an ACCA violent felony under *Borden* because it requires more than a mens rea of recklessness. *Somers v. United States*, 66 F.4th 890, 893–95 (11th Cir. 2023) ("*Somers III*"). The stay of Mr. Bryant's appeal was then lifted. App. Doc. 61. In the meantime, this Court decided *Wooden*—its first decision interpreting ACCA's different-occasions clause.

In his reply brief, Mr. Bryant maintained that his 1994 aggravated assault conviction was not an ACCA violent felony because, at the time, the jurisdiction in which he pleaded no contest described the mens rea element in terms of recklessness. App. Doc. 66 at 2–5. Under *McNeill*, he argued, "[t]he elements the defendant was convicted of were locked in at the time of the prior state proceedings," *id.* at 3, such that the Florida Supreme Court's 2022 decision in *Somers II* could not rewrite the elements of his 1994 conviction, *id.* at 3–5. He also maintained his constitutional challenges to the district court's reliance on non-elemental facts to increase his sentence under ACCA. *Id.* at 6–8. He contended that whether his prior offenses were committed on different occasions had to be charged in an indictment and proven to a jury beyond a reasonable doubt. *Id.*

On December 29, 2023, the Eleventh Circuit affirmed Mr. Bryant's conviction and ACCA sentence. Pet. App. 15a–27a.

3. On April 26, 2024, Mr. Bryant petitioned the Court for a writ of certiorari. *Bryant v. United States*, No. 23-7345. He asked the Court to grant certiorari based on the circuit split over how evolving judicial interpretations affect the categorical approach, and based on the constitutional question pending in *Erlinger*. On October 7, 2024, this Court granted the petition for a writ of certiorari, vacated the Eleventh Circuit's original opinion, and remanded for further consideration in light of *Erlinger*, 602 U.S. 821. Pet. App. 14a.

4. On remand, the Eleventh Circuit ordered supplemental briefing and once again affirmed Mr. Bryant's sentence. Pet. App. 1a–11a. The court rejected Mr.

Bryant's argument that his 1994 Florida aggravated assault conviction was not an ACCA violent felony, relying again on the Florida Supreme Court's 2022 decision in *Somers II*. Pet. App. 10a–11a. The court also rejected Mr. Bryant's argument that his ACCA sentence should be vacated in light of *Erlinger*, concluding that an *Erlinger* error is not structural and that Mr. Bryant had not shown that the error affected his substantial rights under plain-error review. *Id.* 3a–6a.

Because of the ongoing circuit split about how evolving judicial interpretations affect the categorical approach, and because *Erlinger* left open the important question of whether an *Erlinger* error is structural, Mr. Bryant petitions this Court.

REASONS FOR GRANTING THE PETITION

I. This Court's review is warranted on the question of whether, when deciding if a state crime is an ACCA predicate, courts should consider controlling judicial interpretations at the time of the prior offense even if later case law interprets the statute differently.

A. The circuits are split on whether courts should consider judicial interpretations at the time of the prior offense.

The Court should grant review because the circuits are divided on this important issue. In determining whether a prior conviction is a "violent felony," a "serious drug offense," or the like, the First, Fourth, Seventh, and Eighth Circuits rely on judicial interpretations of the relevant statute from the time of the prior conviction. Based on *McNeill v. United States*, 563 U.S. 816 (2011), the First and Fourth Circuits hold that controlling judicial interpretations of state law at the time of the prior conviction inform the categorical analysis, not later interpretations, even if those later interpretations were by the state's highest court. *See United States v.*

Faust, 853 F.3d 39, 57 (1st Cir. 2017) (concluding that, in determining whether defendant's prior Massachusetts conviction for assault and battery on a police officer was a "violent felony," court had to consider elements of offense according to judicial interpretations in place at time of prior conviction); *United States v. Cornette*, 932 F.3d 204, 214–15 (4th Cir. 2019) (declining to consider 1977 and 1980 Georgia Supreme Court decisions interpreting burglary statute because they did not inform elements of crime at time defendant was convicted of burglary; looking instead to intermediate appellate court decisions in place in 1976).

The Eighth Circuit holds the same in the context of determining whether a prior conviction is a "crime of violence" under the Sentencing Guidelines. *See United States v. Roblero-Ramirez*, 716 F.3d 1122, 1126–27 (8th Cir. 2013) (in deciding whether defendant's prior Nebraska conviction for sudden-quarrel manslaughter was "crime of violence," looking to highest state-court case law in place at time of prior conviction, not later Nebraska Supreme Court decision that manslaughter required intent because "[t]hat interpretation was not Nebraska law when Roblero-Ramirez was convicted").

Further deepening the split, the Seventh Circuit has held that the exact predicate at issue here—a pre-*Somers* Florida aggravated assault—is not a violent felony. In *United States v. Anderson*, 99 F.4th 1106, 1110–13 (7th Cir. 2024), *pet. for panel reh'g denied* Nov. 13, 2024, the Seventh Circuit split from the Eleventh Circuit, holding under plain-error review that a Florida aggravated assault pre-dating *Somers II* is not a "violent felony."

Anderson started with the bedrock principle that courts must "look to the law at the time of the offense to determine whether a crime is a violent felony under ACCA." 99 F.4th at 1111 (citing *McNeill*, 563 U.S. at 820). Thus, *Anderson* explained, "the relevant inquiry is whether the law at the time of his conviction was broader than the corresponding federal law." *Id.* at 1110. And at the time of Anderson's conviction in 2001, the Seventh Circuit noted, "Florida courts were split on the breadth of the assault statute. Some appellate courts had held that assault could be committed recklessly, while others had reached the opposition conclusion." *Id.* at 1110–11 (citations omitted).

Anderson rejected the Eleventh Circuit's reasoning that *Somers II* "'tells us what the statute always meant.'" *Id.* at 1112 (quoting *Somers III*, 66 F.4th at 896). Under Florida's approach to statutory interpretation, *Anderson* explained, Florida Supreme Court decisions "disagreeing with a statutory construct previously rendered by a district court constitute 'changes' in the applicable law from the law at the time of the conviction.'" *Id.* (quoting *Florida v. Barnum*, 921 So. 2d 513, 528 (Fla. 2005)). Because *Somers II* disagreed with the statutory construct from some of the intermediate appellate courts, *Anderson* reasoned that *Somers II* constituted a "change" in law that was not retroactive. *Id.* Finally, *Anderson* looked to the state of the law at the time of the defendant's prior conviction and determined that the decisions of the intermediate appellate courts created a realistic probability that the defendant was convicted for reckless conduct. *Id.*

Although *Anderson*'s analysis differed somewhat from the First, Fourth, and Eighth Circuits, it reached the same conclusion: because ACCA requires a backward-looking approach, the elements of a past conviction must be determined according to the law in effect at the time of that conviction, including judicial interpretations. *Id.* at 1111, 1112–13. Only the Eleventh Circuit has held that a subsequent state court decision can rewrite the elements of a prior conviction, erasing judicial interpretations from the time of the prior offense. *See* Pet. App. 23a–24a; *id.* 11a; *Somers III*, 66 F.4th at 896. Not only does the Eleventh Circuit stand alone, but as explained below, its reasoning contradicts ACCA's backward-looking approach as developed by this Court in *McNeill* and *Brown v. United States*, 602 U.S. 101 (2024). Accordingly, this Court should grant certiorari to resolve this important split.

B. The Eleventh Circuit's approach is wrong.

This Court's review is also warranted because the Eleventh Circuit's refusal to consider binding case law from the time of Mr. Bryant's 1994 assault conviction conflicts with precedent and ACCA's text in at least two ways. First, the categorical approach aims to discern "what a jury necessarily found to convict a defendant (or what he necessarily admitted)." *Mathis v. United States*, 579 U.S. 500, 515 (2016) (internal quotation marks omitted). Dismissing judicial interpretations from the time of the prior conviction in favor of a later interpretation subverts that purpose. Second, the text of ACCA's violent felony provision, as confirmed by the Supreme Court's decision in *McNeill v. United States* and its predecessors, requires a court to "consult the law that applied at the time of [the prior] conviction." 563 U.S. at 820;

see also Brown 602 U.S. at 111 (emphasizing that ACCA requires backward-looking analysis of law at time of prior offense). Ignoring the state law in effect at the time of Mr. Bryant's 1994 conviction directly contradicts this requirement.

Mr. Bryant acknowledges some tension in the case law between whether the Florida Supreme Court's interpretation of the aggravated assault statute in *Somers II* represents a change in law or what the statute always meant. *Compare Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."), *with Barnum*, 921 So. 2d at 528 (explaining that under Florida law, a statutory construction by the state's supreme court that disagrees with a prior interpretation by an intermediate court of appeals is considered a change in law). But any friction on that point is resolved by the fact that ACCA requires a retrospective approach.

As Judge Martin wrote in an earlier Eleventh Circuit opinion, "It's generally true that when a court interprets a statute it tells us what the statute has always meant." *United States v. Seabrooks*, 839 F.3d 1326, 1451 n.5 (11th Cir. 2016) (Martin, J., concurring in the judgment). But that principle is irrelevant in the ACCA context, where the court's "interest is not about divining the true meaning of [the state statute]. Rather, [the court's] interest is in understanding what conduct could have resulted in [the defendant's prior] convictions under the statute, even if Florida courts were misinterpreting the statute at that time." *Id*. Thus, when conducting the categorical approach that ACCA demands, courts must discern "what a jury

necessarily found to convict a defendant (or what he necessarily admitted)." *Mathis*, 579 U.S. at 515 (internal quotation marks omitted). And the only way to determine what Mr. Bryant necessarily admitted as to his 1994 aggravated assault conviction is to consult the elements of the crime as understood when he was convicted.

Measured by that rubric, Mr. Bryant necessarily admitted to having only a mens rea of recklessness. Mr. Bryant was convicted in 1994 within Florida's Fifth District Court of Appeal, *see* Doc. 54 ¶ 35, which at that time described aggravated assault as having a mens rea of culpable negligence or recklessness. *Kelly*, 552 So. 2d at 208; *see Dupree v. State*, 310 So. 2d 396, 398 (Fla. 2d Dist. Ct. App. 1975) ("[T]o sustain appellant's conviction for aggravated assault in this case, his conduct must be equivalent to culpable negligence."); *see also Pinkney v. State*, 74 So. 3d 572, 576 (Fla. 2d Dist. Ct. App. 2011) (explaining that intent element of aggravated assault statute requires only that defendant do an act that was "substantially certain" to put victim in fear; defendant's subjective intent was "irrelevant").

Such a crime is not a violent felony, *see Borden*, 593 U.S. at 429, and a later judicial interpretation cannot transform it into one. *Cf. Beeman v. United States*, 871 F.3d 1215, 1224 n.5 (11th Cir. 2017) (noting, when determining whether defendant was sentenced under ACCA's residual clause, that subsequent case law holding predicate did not qualify under elements clause "casts very little light, if any on the key question of historical fact"). There would be profound implications for due process and the Ex Post Facto Clause if a state supreme court decision, rendered many years after a prior conviction became final, could retroactively turn a nonqualifying offense

into an ACCA predicate by rewriting its elements. *Rivers*, 511 U.S. at 312–13, a civil rights case, does not support such a conclusion because it did not consider the due process ramifications of retroactively imposing a judicial construction that results in a harsher criminal penalty.

McNeill also compels courts to rely on the judicial interpretation that controlled at the time of the prior offense by teaching that ACCA is "backward-looking." 563 U.S. at 820. Because ACCA deals with past convictions, determining whether a prior conviction is a predicate "can only be answered by reference to the law under which the defendant was convicted." *Id.* Thus, ACCA requires courts to "turn[ ] to the version of state law that the defendant was actually convicted of violating" to decide whether a prior conviction is a "violent felony." *Id.* at 821 (discussing *Taylor v. United States*, 495 U.S. 575 (1990), and *James v. United States*, 550 U.S. 192 (2007)).

Relying on *McNeill*, this Court recently reiterated that ACCA requires "a historical inquiry into the state law at the time of that prior offense." *Brown*, 602 U.S. at 120. And *Brown* confirms that—just as a later change in law cannot "erase" a qualifying predicate conviction—a later change in law cannot transform a non-qualifying offense into an ACCA predicate. *Id.* at 122–23 (recognizing that state crimes involving a substance that predates the substance's addition to the federal schedules are not ACCA predicates).

The Eleventh Circuit's reliance on a 2022 Florida Supreme Court decision—issued nearly three decades after Mr. Bryant's assault conviction—contradicts the

directive in *McNeill* and *Brown* regarding ACCA's backward-looking analysis. This Court should grant review to correct the Eleventh Circuit's approach.

II. This Court's review is warranted to decide whether *Erlinger* error is structural.

This petition also presents an important follow-up question to last term's *Erlinger* decision. In *Erlinger*, this Court held that under the Fifth and Sixth Amendments, a defendant cannot be subject to ACCA's increased penalties unless the government proves to a jury beyond a reasonable doubt that the defendant's three predicate convictions had been "committed on occasions different from one another." 602 U.S. at 830–35. This Court should grant review to decide whether *Erlinger* error is structural or instead subject to harmless-error review.

Erlinger suggested, but did not decide, that this type of constitutional error is structural. During oral argument, Justice Gorsuch asked whether failing to subject the different-occasions question to the Constitution's jury-trial requirements constituted structural error. *See* Oral Arg. Tr. at 27–29, *Erlinger v. United States*, No. 23-370 (Mar. 27, 2024). The *Erlinger* majority opinion, authored by Justice Gorsuch and joined by five other justices, did not expressly address whether the error was structural. *See generally Erlinger*, 602 U.S. at 825–49. But it strongly implied as much.

First, the *Erlinger* Court said that it could not determine whether a hypothetical jury would have found that the petitioner's prior offenses had been committed on different occasions. *Id.* at 835. The only thing the Court in *Erlinger* could say "for certain" is that the district court erred "in taking th[e] decision from a

jury of Mr. Erlinger's peers." *Id.* As the Court has explained, when a deprivation of the jury trial right has "consequences that are necessarily unquantifiable and indeterminate" it "unquestionably . . . qualifies as 'structural error.'" *Sullivan v. Louisiana*, 508 U.S. 275, 281–82 (1993); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (holding that denial of right to counsel of choice is structural error because its consequences were "necessarily unquantifiable and indeterminate," and "[h]armless-error analysis . . . would be a speculative inquiry into what might have occurred in an alternate universe" (quoting *Sullivan*, 508 U.S. at 282)).

Indeed, the impact of an *Erlinger* error is inherently unquantifiable. For starters, *Wooden*'s multifactored test is "anything but predictable"; it will lead to different results on similar facts, such that "reasonable doubts about its application will arise often." *Wooden*, 595 U.S. at 385, 397 (Gorsuch, J., concurring); *accord Erlinger*, 602 U.S. at 821 (discussing holistic nature of different-occasions test). Moreover, for defendants sentenced before *Erlinger*, there generally is no trial record on any of ACCA's requirements, only *Shepard* documents introduced at sentencing. But *Shepard* documents are of limited utility, inherently unreliable, and pose serious due process problems. *See Erlinger*, 602 U.S. at 841–42 (cataloguing the problems with *Shepard* documents); Oral Arg. Tr. at 28 (Justice Gorsuch asking, "How do you do harmless error review when you don't have a trial record?").[5]

[5] Without a trial record or admission at the plea hearing, there is no evidentiary support for the different-occasions finding, let alone proof beyond a reasonable doubt. *See Thompson v. Louisville*, 362 U.S. 199, 204, 206 (1960) (holding that conviction based on record devoid of evidentiary support violates due process); *Erlinger*, 602 U.S.

Underscoring that unpredictability, real-world juries have returned not-guilty verdicts on the different-occasions question under a wide array of circumstances. These include where the defendant's prior robberies occurred weeks apart and in different jurisdictions, *United States v. Willis*, No. 4:21-cr-548, Doc. 217 (Jury Instructions); Doc. 224 (Verdict Form) (E.D. Mo. July 16, 2024), and where a defendant was convicted of delivering cocaine on August 14, 1997, followed by committing three more deliveries on November 14, 1997, August 9, 1999, and February 11, 2009, *United States v. Bradshaw*, No. 8:23-cr-89-VMC-AEP, Doc. 128 (Jury Instructions); Doc. 134 (Special Verdict) (M.D. Fla. Mar. 6, 2025). Juries are taking to heart *Erlinger*'s instruction that "no particular lapse of time or distance between offenses automatically separates a single occasion from distinct ones," and instead are undertaking "a qualitative assessment about the 'character and relationship' of the [prior] offenses" and whether they "shared 'a common scheme or purpose.'" *Erlinger*, 602 U.S. at 841 (quoting *Wooden*, 595 U.S. at 369–70). That the effect of an *Erlinger* error can be so unpredictable confirms it is structural. *See Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017) ("[A]n error has been deemed structural if the effects of the error are simply too hard to measure.").

Second, and relatedly, *Erlinger* recognized that using *Shepard* documents to find "different occasions" violates the basic principle of "fair notice." 602 U.S. at 841. As this Court explained, a defendant may have had no incentive to quarrel about, and

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at 830 (discussing "ancient rule" that government must prove each of its charges "beyond a reasonable doubt"); *In re Winship*, 397 U.S. 358, 364 (1970).

good reason not to dispute, the date or location of a past offense when "fine details like those might not have mattered a bit to his guilt or innocence," and "[c]ontesting them needlessly . . . might have risked squandering the patience and good will of a jury or the judge." *Id.* Yet those very details, irrelevant so many years ago, can come back to haunt the defendant with "life-altering consequences." *Id.* Imposing an ACCA sentence based on *Shepard* documents is thus fundamentally unfair, suggesting structural error. *Accord McCoy v. Louisiana*, 584 U.S. 414, 427 (2018) ("An error might also count as structural . . . where the error will inevitably signal fundamental unfairness.").

Third, *Erlinger* held that defendants have the right to hold the government to its burden to prove "different occasions" to a unanimous jury beyond a reasonable doubt, "'regardless of how overwhelming' the evidence may seem to a judge." 602 U.S. at 842 (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986)). That quoted portion of *Rose* explains that a directed verdict for the prosecution, regardless of the evidence presented, would be structural error because the Sixth Amendment jury trial right would have been "all together denied" and the "wrong entity" would have "judged the defendant guilty." 478 U.S. at 578. *Erlinger*'s reliance on *Rose* suggests that the "different occasions" error is akin to a directed verdict for ACCA and thus not susceptible to harmless-error review.

In its briefing before this Court in *Erlinger*, the government argued that harmless-error review applied and cited in support *Washington v. Recuenco*, 548 U.S. 212 (2006), and *Neder v. United States*, 527 U.S. 1 (1999). *See* U.S. Br. at 27–28, U.S.

Reply Br. at 14, *Erlinger*, No. 23-370. But the *Erlinger* majority did not mention harmless error or cite either decision. Instead, it cited *Rose*'s discussion of structural error.[6]

Recuenco and *Neder* do not resolve the structural error question because *Erlinger* error is different. As an initial matter, *Recuenco* and *Neder* each involved trials where relevant evidence was presented to the jury and neither considered the impact of a charging error. *Compare Recuenco*, 548 U.S. at 215, 220 n.3, and *Neder*, 527 U.S. at 6, *with Erlinger*, 602 U.S. at 830–31. Here, the government did not charge the "different occasions" requirement and the jury's role under ACCA was entirely usurped by the district judge. And perhaps most important of all, the nature of the different-occasions inquiry is such that reviewing courts (1) simply cannot know what a hypothetical jury would have found and (2) have only unreliable, unfair *Shepard* documents to conduct their review. Harmless-error review would thus be fundamentally unfair and require "appellate speculation," *Sullivan*, 508 U.S. at 280–81, which the Constitution does not countenance.

Despite these signs that *Erlinger* error is structural, the Eleventh Circuit affirmed Mr. Bryant's erroneous ACCA sentence, stating that "even if Bryant could show an error that is plain under *Erlinger*, he fails to meet his burden under plain

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[6] Only three justices endorsed harmless-error review. *See Erlinger*, 602 U.S. at 849–50 (Roberts, J., concurring); *id.* at 859–61 (Kavanaugh, J., joined by Alito, J.).

error review because he cannot show a 'reasonable probability that the result would have been different.'" Pet. App. 6a (citation omitted).[7]

The Eleventh Circuit thus rejected Mr. Bryant's argument that *Erlinger* errors are structural. *See also United States v. Rivers*, 134 F.4th 1292, 1305–06 (11th Cir. 2025) (holding that *Erlinger* errors are not structural). The Eleventh Circuit is not alone; the Fifth and Sixth Circuits have also held that *Erlinger* errors are subject to harmless-error analysis. *See United States v. Butler*, 122 F.4th 584, 589 (5th Cir. 2024); *United States v. Campbell*, 122 F.4th 624, 630–31 (6th Cir. 2024); *but see United States v. Cogdill*, 130 F.4th 523, 532–42 (6th Cir. 2025) (Clay, J., dissenting) (contending that *Erlinger* errors are structural).

Yet in *Erlinger* itself, on remand from this Court, the Seventh Circuit rejected the government's request to affirm Mr. Erlinger's ACCA sentence based on harmlessness. *See United States v. Erlinger*, No. 22-1926, Doc. 40 (Government's Circuit Rule 54 Statement) (7th Cir. Aug. 12, 2024); *United States v. Erlinger*, No. 22-1926, Doc. 44 (Order) (7th Cir. Sep. 4, 2024).

In sum, *Erlinger* errors are not amenable to review for harmless error or prejudice. Unless and until this Court clarifies that they fall within the limited class of structural errors, defendants like Mr. Bryant may be subject to a harsh mandatory minimum sentence despite a complete denial of their jury trial right on the ACCA

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[7] Mr. Bryant objected to the factual narratives concerning the principal-to-aggravated-assault and federal drug convictions, Doc. 54 ¶¶ 35–36, but the Eleventh Circuit found the objections to have been withdrawn and applied plain error review, Pet. App. 5a.

enhancement—and often based on insufficient and unreliable allegations in documents from decades-old proceedings. The Court should grant review on this important issue.

CONCLUSION

Had Mr. Bryant's federal firearm offense occurred in the First, Fourth, Seventh, or Eighth Circuits, his 1994 Florida conviction for aggravated assault would not be an ACCA violent felony. But because he was convicted in the Eleventh Circuit, a 2022 state court decision transformed his 1994 conviction into an ACCA predicate. The imposition of an onerous sentencing enhancement should not depend on geographical happenstance. This petition also presents the important and unresolved question of whether an *Erlinger* error is structural. Mr. Bryant thus asks the Court to grant his petition to review the decision below.

Respectfully submitted,

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