No. __-____

_____

IN THE SUPREME COURT OF THE UNITED STATES

_____

RICO LORODGE BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

_____

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Under 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30 of this Court, petitioner Rico Lorodge Brown respectfully requests a 60-day extension of time, up to and including September 26, 2025, in which to file a petition for a writ of certiorari in this Court. The Fourth Circuit entered final judgment against Brown on April 29, 2025. Without an extension, Brown's time to file a petition for certiorari in this Court expires on July 28, 2025. This application is being filed

more than 10 days before that date. A copy of the Fourth Circuit's published opinion in this case is attached as Exhibit 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

This case presents an issue that has divided the circuits in the wake of *Erlinger v. United States*, 144 S. Ct. 1840 (2024). Although this Court found a constitutional violation in *Erlinger*, the Court did not determine whether that error was amenable to harmless-error review and, if so, under what standard. In fact, these questions appeared to generate differing opinions among the Justices. *Compare* 144 S. Ct. at 1866-67 (Kavanaugh, J., dissenting) (arguing that the error was harmless using a "rational jury" standard) *and* 144 S. Ct. at 1860-61 (Robert, C.J., concurring) (opining that the error was "subject to harmless error review" without opining on either the proper harmless-error standard or its application) *with* 144 S.Ct. at 1856 (majority opinion, citing *Rose v. Clark*, 478 U.S. 570, 578 (1986), in which the Court opined that "harmless-error analysis presumably would not apply" to certain violations of the jury-trial right) *and* 144 S.Ct. at 1861 (noting that Justice Jackson joins Justice Kavanaugh's dissent "except as to Part III," in which he addresses harmless error).

The circuits have likewise diverged on these issues. *Compare* U*nited States v. Brown*, 136 F.4th 87, 92-100 (4th Cir. 2025) (opinion below, holding that an error was harmless while declining to apply the "rational jury" standard) *with*

United States v. Cogdill, 130 F.4th 523, 529-31 (6th Cir. 2025) (holding that an *Erlinger* error was not harmless under the "rational jury" standard) *and Cogdill*, 130 F.4th at 533-40 (Clay, J., dissenting) (concluding that the *Erlinger* error is "structural error" based on "prior Supreme Court cases that unequivocally hold that the deprivation of the jury trial right typically constitutes structural error").

The issue presented by this case is important, nuanced, and recurring. To prepare a petition that adequately presents the issue to this Court for consideration, counsel will need additional time. In addition to preparing this petition, counsel is also responsible for meeting deadlines in numerous other cases, including *United States v. King*, Fourth Circuit No. 25-4147 (opening brief filed May 20, 2025); *United States v. Jones*, Fourth Circuit No. 25-4084 (opening brief filed June 23, 2025); *United States v. Wright*, Fourth Circuit No. 18-4215 (opening brief due July 11, 2025); *United States v. Logan*, Fourth Circuit No. 24-4421 (opening brief due July 25, 2025); *United States v. McNeil*, Fourth Circuit No. 25-4224 (opening brief due July 25, 2025); *United States v. Valdez*, Fourth Circuit No. 25-4251 (opening brief due July 30, 2025); *United States v. Davis*, Fourth Circuit No. 21-4562 (opening brief due August 7, 2025); and *United States v. Fisher*, Fourth Circuit No. 24-4527 (opening brief due August 7, 2025).

For these reasons, counsel respectfully requests that an order be entered extending the time to a petition for certiorari up to and including September 26, 2025.

Respectfully submitted,

John G. Baker
FEDERAL PUBLIC DEFENDER FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

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July 3, 2025

Exhibit 1

United States
v.
Brown,
136 F.4th 87

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4253

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICO LORODGE BROWN,

Defendant - Appellant.

On Remand from the Supreme Court of the United States. (S. Ct. No. 23-6433)

Argued: December 10, 2024 Decided: April 29, 2025

Before NIEMEYER and HEYTENS, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Heytens and Senior Judge Floyd joined.

ARGUED: Joshua B. Carpenter, FEDERAL DEFENDERS OF WESTERN NORTH CAROLINA, INC., Asheville, North Carolina, for Appellant. Anthony Joseph Enright, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee. **ON BRIEF:** John G. Baker, Federal Public Defender, FEDERAL DEFENDERS OF WESTERN NORTH CAROLINA, INC., Charlotte, North Carolina, for Appellant. Dena J. King, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee.

NIEMEYER, Circuit Judge:

In our prior decision in this case, we affirmed Rico Brown's 15-year sentence for the illegal possession of a firearm under 18 U.S.C. § 922(g), a sentence that was enhanced under the Armed Career Criminal Act (ACCA) by reason of Brown's three prior convictions for violent felonies "committed on occasions different from one another," as found by the sentencing judge. *United States v. Brown*, 67 F.4th 200, 201 (4th Cir. 2023) (quoting 18 U.S.C. § 924(e)(1)). We rejected Brown's contention that the "different occasions" element of the ACCA enhancement should have been alleged in his indictment and have been either subject to a jury finding beyond a reasonable doubt or admitted by him in his guilty plea. We reasoned that under *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the "different occasions" requirement was a sentencing factor to be found by the sentencing judge, rather than a jury. *Brown*, 67 F.4th at 201. From our decision, Brown filed a petition for a writ of certiorari in the Supreme Court.

After we published our decision, the Supreme Court held in *Erlinger v. United States* that because the factual finding that a defendant's prior crimes were committed on different occasions "had the effect of increasing *both* the maximum and minimum sentences" for his firearm-possession conviction, the defendant was entitled, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "to have a jury resolve ACCA's occasions inquiry," rather than the judge. *Erlinger v. United States*, 602 U.S. 821, 835 (2024). And in light of its decision in *Erlinger*, the Court granted Brown's petition for a writ of certiorari in this case, vacated our judgment, and remanded "for further consideration in light of *Erlinger*." *Brown v. United States*, 144 S. Ct. 2712 (2024).

On remand, we requested that the parties submit additional briefing on the issue of whether the *Erlinger* error was subject to harmless-error review, and we then held another oral argument. For the reasons given, we now conclude (1) that an *Erlinger* error is subject to harmless-error review, and (2) that the *Erlinger* error in this case was indeed harmless. Accordingly, we affirm the judgment of the district court, which included an ACCA-enhanced sentence of 180 months' imprisonment.

I

After Rico Brown sold a handgun to an undercover law enforcement officer on September 23, 2019, in Union County, North Carolina, he was indicted for possession of a firearm while knowing that he had previously been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). At that time, the maximum sentence for that crime, without any enhancement, was 10 years' imprisonment, *id.* § 924(a)(2) (2012) (amended 2022), but if ACCA were implicated, the sentence would have been enhanced to a mandatory minimum sentence of 15 years' imprisonment and a maximum of life, *see id.* § 924(e)(1). A defendant qualified for an ACCA sentencing enhancement if he had three previous convictions for a violent felony or serious drug offense "committed on occasions different from one another." *Id.* Because the then-governing law made the application of ACCA a sentencing factor, district courts determined at sentencing whether the defendant had three qualifying prior convictions *and* whether those convictions were for offenses committed on different occasions. *See, e.g.*, *United States v. Thompson*, 421 F.3d 278, 285–86 (4th Cir. 2005). Consequently, the government did not charge the ACCA enhancement in

Brown's indictment. Brown was, nonetheless, notified at his initial appearance of both the ten-year maximum penalty for a violation of § 922(g)(1) and the enhanced sentence that would apply if his criminal history satisfied ACCA's requirements.

Brown pleaded guilty to the firearm charge, and at the hearing conducted to determine whether his plea was knowing and voluntary, he was again advised that "the statutory punishment for a 922(g) [offense was] a maximum term of imprisonment of ten years," except that if ACCA applied, "the minimum term of imprisonment [would be] 15 years and the maximum term [would be] life." Brown confirmed that he understood this and that he nonetheless wanted to plead guilty. The court found Brown's plea to be knowing and voluntary and thus accepted it.

In the presentence report prepared for sentencing, the probation officer, using state court records, concluded that Brown was indeed subject to ACCA's enhanced sentencing range because he had three previous convictions for crimes that qualified as violent felonies and were committed on different occasions. The probation officer relied on: (1) a 2008 North Carolina conviction for robbery with a dangerous weapon arising out of a robbery committed on July 14, 2007, during which Brown used a handgun to threaten the life of Jesus Jasso; (2) a 2008 North Carolina conviction for robbery with a dangerous weapon arising out of a robbery committed on September 24, 2007, during which Brown used a shotgun to threaten the life of Tushar Mukundbhai Shah; and (3) a 2013 North Carolina conviction for common-law robbery arising out of a robbery committed on October 8, 2012, during which Brown used violence or the threat of violence to take property from

Pedro Alonso. Brown was sentenced for the first two of these prior convictions in a single proceeding conducted on May 13, 2008.

Brown did not object to the accuracy of any information included in the presentence report that pertained to his criminal history. Nor did he argue at the sentencing hearing that the district judge should find that the two armed robberies for which he was convicted in 2008 were part of a single criminal episode constituting one occasion, so as to render ACCA inapplicable. But he did mount a constitutional challenge to the application of ACCA. He contended that even if the court could constitutionally find *the fact* of his *three prior convictions*, *the fact* that the underlying offenses had been *committed on different occasions* should have been (1) charged in the indictment and (2) either found by a jury or admitted by him in his guilty plea. He argued that because neither had occurred, sentencing him under ACCA would violate the Fifth and Sixth Amendments, as delineated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013).

The district court overruled Brown's constitutional objections, relying on "the existing authority of the Fourth Circuit," and sentenced Brown under ACCA to 180 months' imprisonment.

On appeal, we affirmed. *United States v. Brown*, 67 F.4th 200 (4th Cir. 2023). We reasoned that the Supreme Court had held in *Almendarez-Torres v. United States* that "the facts that support a recidivism enhancement are resolved by the district court during sentencing" and that "ACCA provides just such a recidivism enhancement." *Id.* at 201 (citing 523 U.S. 224 (1998)). We further concluded that subsequent Supreme Court

decisions had "not narrowed or overruled *Almendarez-Torres*" and that "if they [had] done so by implication, the Supreme Court must say so, not a court of appeals." *Id.* When Brown filed a petition in our court for rehearing en banc, we denied it, but almost every member of our court joined an opinion urging the Supreme Court to resolve the issue. *See United States v. Brown*, 77 F.4th 301, 301–02 (4th Cir. 2023) (Heytens, J., statement concerning the denial of rehearing en banc); *id.* at 302 (Niemeyer, J., concurring in part in the statement of Heytens, J.) (joining in "urging the Supreme Court to give the courts of appeals guidance in this important matter"); *id.* at 303 (Wynn, J., dissenting from the denial of rehearing en banc) (agreeing that "the Supreme Court should take up the key question in this case"). Brown then filed a petition for a writ of certiorari in the Supreme Court.

The Supreme Court did indeed take up the issue in a similar case from the Seventh Circuit and held that a defendant is "entitled to have a jury resolve ACCA's occasions inquiry unanimously and beyond a reasonable doubt." *Erlinger v. United States*, 602 U.S. 821, 835 (2024). In light of its decision, the Court also granted Brown's petition for a writ of certiorari, vacated our decision, and remanded the case to us "for further consideration in light of *Erlinger*." *Brown v. United States*, 144 S. Ct. 2712 (2024).

On remand from the Supreme Court, we requested supplemental briefs from the parties addressing whether the *Erlinger* error was subject to harmless-error review, and thereafter we held a second oral argument to focus on that issue.

II

The *Erlinger* error committed in this case, in violation of the Fifth and Sixth Amendments, was, *first*, the government's failure to allege in the indictment that Brown's prior convictions were for offenses "committed on occasions different from one another," 18 U.S.C. § 924(e)(1), and *second*, in a similar vein, the court's failure to advise Brown during his guilty-plea hearing under Rule 11 that he had the right to have that "different occasions" element found by a jury, rather than the sentencing judge.[1] Because the failure to allege and the failure to advise are directly related, we take them collectively as "the *Erlinger* error." The issue now presented is whether that error is subject to harmless-error review.

The government contends that the *Erlinger* error is nothing more than an *Apprendi* error and that our precedents are clear that *Apprendi* errors are subject to harmless-error review. *See, e.g.*, *United States v. Legins*, 34 F.4th 304, 321–22 (4th Cir. 2022) (explaining that *Washington v. Recuenco*, 548 U.S. 212 (2006), made clear that *Apprendi* errors are subject to harmless-error review).

Brown, however, contends that an *Erlinger* error is "per se prejudicial" and "can never be harmless." In other words, he maintains that it is the type of error referred to in cases as "structural error," for which relief may be granted without regard to the error's

[1] The Fifth Amendment provides, "No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V. And the Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." *Id.* amend. VI.

effect on the case's outcome. He argues that this follows from the reasoning of *Erlinger* itself and also from our decision in *United States v. Whitfield*, 695 F.3d 288 (4th Cir. 2012), where we held that a district court's constructive amendment of an indictment to add a new offense was prejudicial per se and thus not subject to harmless-error review.

We begin by identifying the applicable legal principles. Federal Rule of Criminal Procedure 52(a), which applies when the defendant has made a timely objection before the district court, provides that any error "that does not affect substantial rights must be disregarded." Stated otherwise, even preserved error must have been "prejudicial" to be considered on review; "it must have affected the outcome of the district court proceedings." *United States v. Olano*, 507 U.S. 725, 734 (1993) (cleaned up). When "Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record — a so-called 'harmless error' inquiry — to determine whether the error was prejudicial," and the government "bears the burden of persuasion with respect to prejudice." *Id.* When the error is a constitutional one, that burden requires the government to "prove beyond a reasonable doubt that the error complained of did not contribute to the [result] obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).

While Rule 52(a) "by its terms applies to *all* errors where a proper objection [was] made," there is nonetheless "a limited class of fundamental constitutional errors that defy analysis by 'harmless error' standards" and are "so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to their effect on the outcome." *Neder v. United States*, 527 U.S. 1, 7 (1999) (cleaned up). The Supreme Court has repeatedly emphasized, however, that this class of errors — *i.e.*, structural errors — is

"very limited" and that such errors are "highly exceptional." *Greer v. United States*, 593 U.S. 503, 513 (2021) (first quoting *Neder*, 527 U.S. at 8; and then quoting *United States v. Davila*, 569 U.S. 597, 611 (2013)). Specifically, structural errors are understood to be "errors that affect the *entire conduct* of the proceeding *from beginning to end*." *Id.* (emphasis added) (cleaned up). Examples include the "denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt." *Id.* (quoting *Davila*, 569 U.S. at 611). Indeed, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis." *Recuenco*, 548 U.S. at 218 (cleaned up). Thus, "*discrete defects* in the criminal process" — even if they represent a constitutional error — "are not structural because they do not '*necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *Greer*, 593 U.S. at 513 (first emphasis added) (quoting *Neder*, 527 U.S. at 9).

Under these principles, *Apprendi* errors — those errors where a fact that increases the statutory penalty for a crime is omitted from the indictment and decided by a judge, rather than a jury — are not structural errors but discrete defects that can be reviewed on appeal for their effect on the outcome of the proceeding. This is clear from *Recuenco*. *See* 548 U.S. at 220–22; *see also Legins*, 34 F.4th at 322.

In *Recuenco*, the jury found that the defendant had committed an assault "with a deadly weapon," which would have resulted in a one-year sentence enhancement. 548 U.S. at 215. The trial judge, however, applied a mandatory three-year enhancement based on

his finding during sentencing that the deadly weapon was in fact a "firearm." *Id.* The Supreme Court of Washington concluded that the trial judge had committed an *Apprendi* error and that the error was structural. *Id.* at 216. The U.S. Supreme Court, however, reversed, concluding that the *Apprendi* error was not structural but was subject to review under the harmless-error standard. *Id.* at 221–22. In reaching its conclusion, the Court relied directly on its prior decision in *Neder*, indeed finding that the case before it was "indistinguishable from *Neder*." *Id.* at 220.

In *Neder*, the trial court did not submit to the jury the offense element of "materiality" as it related to a false statement, reserving a finding on that element for the court. 527 U.S. at 6. Even though that error amounted to a violation of the defendant's Sixth Amendment right to have the jury decide all elements of the offense, the *Neder* Court held that the error was nonetheless subject to harmless-error review. *See id.* at 8–10.

The *Recuenco* Court recognized *Neder*'s distinguishing circumstances. In *Neder*, the jury purportedly convicted the defendant of a crime without actually finding all the crime's elements. *See Recuenco*, 548 U.S. at 220–21. Conversely, in *Recuenco*, the jury did find all the elements of one offense, but the defendant was sentenced as if the jury had also found the sentencing factor that was necessary for his enhanced sentence. *Id.* Yet, the Court reasoned that the distinction was of no "constitutional significance," relying on *Apprendi*'s recognition that "elements and sentencing factors [are] treated the same for Sixth Amendment purposes." *Id.* at 220. Thus, the Court concluded that "[f]ailure to submit *a sentencing factor* to the jury, like failure to submit *an element* to the jury, is not structural error." *Id.* at 222 (emphasis added).

Just as the failure to submit a sentencing factor or an element to the jury is not structural error, neither is the closely related "failure to charge" error, in violation of the Fifth Amendment, structural error. *See Legins*, 34 F.4th at 322–23. It is not an error so fundamental as to have "affected the entire conduct of the proceeding from beginning to end." *Greer*, 593 U.S. at 513 (cleaned up). And similarly, the *Greer* Court recently recognized that "[t]he omission of [an] element from a plea colloquy" "is likewise not structural" because it "does not affect the entire framework within which the proceeding occurs." *Id.* at 513–14 (citing *Neder* 527 U.S. at 8). All are subject to harmless-error analysis.

Therefore, under the Supreme Court's decisions in *Neder*, *Recuenco*, and *Greer*, as well as our decision in *Legins*, we conclude that harmless-error review applies to the *Erlinger* error before us — *i.e.*, to both (1) the indictment's failure *to allege* that Brown committed ACCA predicate offenses on at least three different occasions and (2) the district court's failure *to inform* Brown during his plea colloquy that he had the right to have a jury find that fact beyond a reasonable doubt.

In so holding, we join all other courts of appeals that have decided the issue. *See United States v. Butler*, 122 F.4th 584, 589 (5th Cir. 2024) (rejecting defendant's argument that the *Erlinger* error presented "falls within the limited class of constitutional errors that require automatic reversal" and relying instead on its prior recognition "that *Apprendi* errors are subject to a harmless-error analysis"); *United States v. Campbell*, 122 F.4th 624, 630 (6th Cir. 2024) (same); *United States v. Johnson*, 114 F.4th 913, 917 (7th Cir. 2024) (applying harmless-error analysis).

Brown nonetheless argues that *Erlinger* itself "implicitly rejected" using the harmless-error analysis for the failure to submit the "different occasions" element of the ACCA sentencing enhancement to a jury. He relies on the statement in *Erlinger* where the Court explained that a criminal defendant has the right to require the government to prove to a jury that he committed his prior predicate offenses on different occasions "'regardless of how overwhelmin[g]' the evidence may seem to a judge." 602 U.S. at 842 (alteration in original) (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986)). In that quote, however, the Court was simply explaining that it was error for the judge, not a jury, to have made the "different occasions" finding, noting that such is true even in the "many" "straightforward" cases where the "defendant's past offenses" were "separated by enough time and space that there is little question he committed them on separate occasions." *Id.* The Court did not, however, address *how* such an error should be treated once it has occurred. Indeed, Chief Justice Roberts made this point explicit in a concurring opinion, in which he emphasized that the error identified would be "subject to harmless error review." *Id.* at 850 (Roberts, C.J., concurring). Had the *Erlinger* Court provided otherwise, the Chief Justice, who joined the Court's opinion in full, could not have contributed that observation.

Moreover, Brown's argument overlooks the Court's observation that an *Erlinger* error is merely a type of *Apprendi* error. *See Erlinger*, 602 U.S. at 848 (characterizing its holding as a "straightforward application of *Apprendi* to ACCA's different-occasions requirement" (cleaned up)). And, of course, *Recuenco* established that *Apprendi* errors of the type found in *Erlinger* are subject to harmless-error review. *Recuenco*, 548 U.S. at 221–22. Nothing in *Erlinger* purported to change or undermine that holding. *See*

Campbell, 122 F.4th at 631 (rejecting the argument that *Erlinger* had "implicitly view[ed] the underlying error at issue there as structural").

Brown also contends that our decision in *Whitfield*, where we held that a judge's constructive amendment of an indictment was prejudicial per se, is "indistinguishable" and therefore controls this case. In *Whitfield*, the district court, through instructions given to the jury over the defendant's objection, added *a new crime* for consideration by the jury — "an offense not charged" in the indictment. 695 F.3d at 306. And the jury, following the court's instruction, convicted the defendant of that new offense. By being convicted of a charge not included in the indictment, the defendant was denied all the benefits of an indictment guaranteed by the Constitution — notice, an opportunity to defend, and protection against a second prosecution on the same charge. *See id.* at 308. Unsurprisingly, we held that the district court's constructive amendment of the indictment denied the defendant his Fifth Amendment rights and that the error was "fatal and reversible per se." *Id.* at 307 (cleaned up). Importantly, however, we distinguished the constructive amendment of an indictment from the situation where the error was "the failure of an indictment to allege *an element* of a charged offense." *Id.* at 308 (emphasis added) (quoting *United States v. Higgs*, 353 F.3d 281, 306 (4th Cir. 2003)). As to that type of error, we noted that it would be subject to harmless-error review. *Id.* As we explained:

> Although the distinction between a constructive amendment and a *Higgs*-type indictment error [involving an omitted element] may be nuanced, the difference is appreciable in this case. Here, there was substantially more than a simple neglect to allege an element of a charged offense. . . . The error arose not from the indictment's omission of an element of a charged offense but from the district court's instructions on an element of an *uncharged offense* . . . on which Whitfield was ultimately convicted and sentenced.

Id. (cleaned up).

Clearly, the circumstances here do not involve the addition of *a new offense* to the indictment; it was, rather, the failure to allege in the indictment *but one element* of the ACCA sentencing enhancement to be decided by the jury. And, as we stated in *Whitfield*, such an error of omission is subject to harmless-error review. 695 F.3d at 308. Indeed, such an omission falls squarely within the holding of *Recuenco* that *Apprendi* errors are subject to harmless-error review. *See Recuenco*, 548 U.S. at 221–22; *see also Legins*, 34 F.4th at 322 ("The takeaway from *Recuenco* is clear: The Government's failure to include a sentence-enhancing factor in the indictment and jury charge . . . like its failure to include any other element of an offense" is subject to "harmless-error analysis").

Whitfield is made yet more inapplicable because it did not arise in the context of a guilty plea, where the defendant was, at every stage of the proceedings, advised that he could be sentenced under ACCA's enhanced sentencing range, notwithstanding the indictment's silence as to ACCA and its "different occasions" requirement. To be sure, following *Erlinger*, the government must allege ACCA's "different occasions" element in the indictment when it intends to argue that ACCA is applicable. But because that was not the case when Brown's indictment was returned, Brown and his lawyer would not have inferred *anything* from the omission of ACCA from his indictment. Thus, the error here does not involve a failure of notice or ability to defend — benefits provided by an indictment — but misadvice about a discrete procedure. And such misadvice is typically subject to harmless-error review. *See Greer*, 593 U.S. at 508, 513–14 (holding that the

district court's failure to advise the defendant of an element of the offense at his plea hearing was subject to plain-error review, which also requires a showing as to prejudice).

In short, *Whitfield* hardly provides Brown with support for his claim that the *Erlinger* error in this case — *i.e.*, omitting an element of the ACCA sentencing enhancement from the indictment and failing to advise him that such element is subject to a jury finding — is structural error.

At bottom, we reject Brown's argument that an *Erlinger* error is "per se prejudicial" and instead conclude that it is subject to harmless-error review.

III

Brown contends that even under the harmless-error standard of review, the government has not met its burden of showing beyond a reasonable doubt that the *Erlinger* error was harmless. He notes that the harmless-error analysis requires deciding whether proof of the missing fact or element was *overwhelming* and *uncontroverted* so as to be able to determine conclusively that a jury would have found the fact or element beyond a reasonable doubt. *See Neder*, 527 U.S. at 17–18; *Legins*, 34 F.4th at 322–23. And he argues that the government has not demonstrated that the *Erlinger* error was harmless because it has not advanced overwhelming and uncontroverted evidence that the jury would have found that his previous convictions were for offenses committed *on different occasions*. He contends that the Supreme Court's decision in *Wooden v. United States*, 595 U.S. 360 (2022), requires "a qualitative assessment about the character and relationship of the offenses, including an inquiry into whether the crimes shared a common scheme or

purpose." (Cleaned up). And because, as he maintains, there is a controversy over whether Brown's two 2007 North Carolina robberies shared a common purpose, the government cannot show beyond a reasonable doubt that the jury would have concluded — also beyond a reasonable doubt — that the offenses were committed on different occasions.

The government argues the flipside, contending that the factual circumstances contained in the presentence report about the two 2007 robberies show uncontroversially and overwhelmingly that Brown committed them on different occasions, such that we can be sure that a jury would have so found beyond a reasonable doubt. Therefore, it contends, the error was harmless.

We believe, however, that both Brown and the government misdirect their arguments in the context of this case. While the harmless-error analysis that the parties invoke applies *when a defendant went to trial* and was convicted by the jury, there was no trial in this case. Brown waived his right to go to trial and instead pleaded guilty. In this context, 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*." *Greer*, 593 U.S. at 508 (emphasis added); *see also Olano*, 507 U.S. at 734 (explaining that the prejudice prong of the plain-error test mirrors prejudice for harmless error, except as to which party bears the burden on the issue of prejudice); *United States v. Heyward*, 42 F.4th 460, 466 (4th Cir. 2022) (discussing *Greer*'s two standards and explaining that the showing for a defendant who pleaded guilty differs for one who is convicted by a jury "because the decision whether

to plead guilty always belongs to the defendant").[2] Thus, the government's harmless-error burden is to show beyond a reasonable doubt that if Brown's indictment had alleged the "different occasions" element of ACCA and if Brown had been correctly advised at his plea hearing that he "was entitled to have a jury resolve [that issue] unanimously and beyond a reasonable doubt," *Erlinger*, 602 U.S. at 835, he would have nonetheless waived that right and admitted as part of his guilty plea that his prior offenses were committed on different occasions. *See Greer*, 593 U.S. at 508; *Heyward*, 42 F.4th at 466. If the government were unable to meet that burden, the remedy would be to vacate Brown's conviction and remand for further proceedings. *See United States v. Hairston*, 522 F.3d 336, 342 (4th Cir. 2008).

In the circumstances presented, we have little difficulty concluding that the *Erlinger* error — both the failure to charge the "different occasions" element of the ACCA sentencing enhancement in the indictment and the failure to inform Brown of his right to have that element found by a jury — was indeed harmless.

We begin by noting that Brown chose to plead guilty to the firearm-possession offense *after* having been twice informed that ACCA's mandatory minimum of 15 years and its maximum of life would apply if the judge found its requirements satisfied. At his

[2] Nonetheless, we note that some courts continue to formulate the same burden regardless of whether the defendant went to trial or pleaded guilty. *See United States v. Cogdill*, 130 F.4th 523, 525, 529 (6th Cir. 2025) ("Cogdill pleaded guilty to being a felon in possession of a firearm . . . . To prove that the *Erlinger* error here was harmless, the government must show, beyond a reasonable doubt, that any rational jury would have found that all three of Cogdill's predicate offenses were committed on occasions different from one another" (cleaned up)); *Johnson*, 114 F.4th at 914, 917 (same).

initial appearance, Brown was specifically advised of the ACCA enhancement, and before he pleaded guilty, he was again so advised, confirming that he understood and nonetheless wanted to plead guilty. When the presentence report showed that ACCA's requirements were indeed satisfied by Brown's criminal history, Brown did not object to the qualifying data supporting that conclusion, nor did he argue that two of his ACCA predicate offenses were, in fact, committed on a single occasion. And during all of these stages, he was represented by counsel.

While Brown was not told that he was entitled to have a jury, rather than a judge, determine whether his previous offenses had been committed on different occasions, that misadvice apparently played no role in his guilty plea. Even after he raised the *Apprendi* issue before the district court, he did not seek to withdraw his plea. To the contrary, he sought the benefits of the plea, which included a three-level reduction of his offense level for accepting responsibility. Had he instead gone to trial and been found guilty of both the offense and the "different occasions" element of the ACCA enhancement, he likely would have had an advisory Guidelines range of 235 to 293 months' imprisonment. But under the guilty plea, his Guidelines range was 180 to 210 months' imprisonment, and he received a 180-month sentence.

To be sure, a defendant's evaluation of the likelihood of a jury's finding that his prior predicate offenses were not committed on at least three different occasions could be a significant factor when deciding whether to plead guilty to that fact. But, in this case, that factor could hardly be meaningful. Brown was fully aware of his criminal history, and whether the jury or the judge assessed that history, the outcome in this case would have

been the same, even under the jury's higher standard of proof. As summarized in the presentence report, state court records showed that Brown committed the *first* of his North Carolina robberies on July 14, 2007; that the robbery involved his threatening Jesus Jasso; and that he was arrested for that offense on July 17, 2007. The records also showed that Brown committed a *second* robbery on September 24, 2007 — *i.e.*, *more than two months* after he was arrested for the first robbery — and that the robbery involved his threatening Tushar Mukundbhai Shah. Finally, they showed that Brown committed a *third* robbery on October 8, 2012, *more than five years* after the second offense. Brown had every incentive to dispute the accuracy of the report's information at his sentencing hearing if it were mistaken, yet he did not do so. He did not even argue to the district court that it should find that the first two robberies were part of a single criminal episode, which would have avoided the ACCA sentencing enhancement altogether. In these circumstances, we can conclude that whether the court or the jury decided the "different occasions" fact, the outcome would have been the same — and that Brown and his lawyer would have appreciated that practical reality at the time of his guilty plea.

Nonetheless, at oral argument, Brown maintained that he would have concluded that he had a reasonable jury argument that the two 2007 robberies were committed on the same occasion because they shared a common scheme or purpose, relying on the Supreme Court's analysis in *Wooden*. We cannot agree.

In *Wooden*, the Supreme Court held that the word "occasion" in ACCA should be given its "ordinary meaning" — that is, "essentially an episode or event." 595 U.S. at 366. In that case, the defendant, "[i]n the course of one evening," "burglarized ten units in a

single storage facility," such that giving "occasion" its ordinary meaning made all the difference. *Id.* at 362. The Court explained that an ordinary person, "using language in its normal way," would say, "On one occasion, Wooden burglarized ten units in a storage facility," not "On ten occasions, Wooden burglarized a unit in the facility" or "On one occasion, Wooden burglarized a storage unit; on a second occasion, he burglarized another . . . and so on." *Id.* at 367. It noted that "given what 'occasion' ordinarily means, . . . a range of circumstances *may* be relevant to identifying" whether multiple criminal offenses were committed on one occasion or separate ones. *Id.* at 369 (emphasis added). Key among the factors recognized by the Court as relevant was *the timing* of the offenses — specifically, "[o]ffenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events." *Id.* at 369. Indeed, the Court expressly recognized that the timing factor "can decisively differentiate occasions," and it noted with approval that offenses "have nearly always" been treated "as occurring on separate occasions if a person committed them *a day or more apart*." *Id.* at 370 (emphasis added). The *Wooden* Court concluded that, "[f]or the most part, applying this approach will be straightforward and intuitive," *id.* at 369, a point echoed by the *Erlinger* Court, *see* 602 U.S. at 842.

Brown's case is certainly one of the straightforward ones. Absolutely no one would say, "On one occasion, Brown robbed a person at gunpoint and *on the same occasion*, more than two months later, he robbed a different person at gunpoint." Instead, the person would say, "On one occasion, Brown robbed someone, and on another occasion, he robbed someone else." And that, under *Wooden*, ends the matter. Thus, there is no question as to

how a properly instructed jury would have resolved the "different occasions" inquiry in this case.

Of course, as we have noted, when a defendant's conviction resulted from a guilty plea, the question for our harmless-error analysis is not how a jury would have ruled, but whether the government has shown, beyond a reasonable doubt, that the defendant would have still pleaded guilty. But given that the possibility of a favorable verdict on the "different occasions" issue would have been so exceedingly remote as to be practically irrelevant, we cannot fathom that Brown would have traded the benefit of pleading guilty for such long odds. Thus, we conclude that there is no doubt that Brown would have pleaded guilty if the indictment had alleged that he committed his prior robberies on three different occasions and if he had been informed that he was entitled to have a jury find that fact beyond a reasonable doubt.

At bottom, while an *Erlinger* error was committed in failing to charge Brown with the ACCA element of "different occasions" and in failing to advise him of the right to have that element decided by a jury, we are confident, beyond a reasonable doubt, that this error had no effect on his substantial rights and hence must be "disregarded." Fed. R. Crim. P. 52(a). Accordingly, the judgment of the district court in accepting Brown's guilty plea and in sentencing him to 180 months' imprisonment, as enhanced by ACCA, is affirmed.

AFFIRMED