No. 25-_____

IN THE
SUPREME COURT OF THE UNITED STATES

MARK WILLIAM SAIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JENNIFER NILES COFFIN
Assistant Federal Defender
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, Tennessee 37929
(865) 637-7979

QUESTIONS PRESENTED

The Armed Career Criminal Act ["ACCA"] enhances the statutory penalty for a firearms offense under 18 U.S.C. § 922(g)(1) when the offender has three predicate convictions for offenses that were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). In *Erlinger v. United States*, 602 U.S. 821 (2024), this Court held that the "occasions-different" fact must be alleged in the indictment and proven to a jury beyond a reasonable doubt before the ACCA-enhanced penalty may be imposed—thereby establishing that the ACCA creates a separate, aggravated offense.

In 2022, before this Court decided *Erlinger*, Petitioner Mark Sain was charged with and pleaded guilty to the simple § 922(g) offense. At sentencing, over Mr. Sain's objection, the sentencing judge found the "occasions-different" fact by a preponderance of the evidence and based on information outside the record of the plea proceeding, including *Shepard* documents. While his appeal was pending, this Court decided *Erlinger*, establishing that the ACCA sentence violated the Fifth and Sixth Amendments.

The questions presented are:

I. When harmless-error review of *Erlinger* error requires consideration by appellate judges of facts neither intrinsic to nor relevant to the finding of guilt for the simple § 922(g)(1) offense, is *Erlinger* error structural?

II. If a preserved claim of *Erlinger* error is instead amenable to harmless-error review, what is the proper test and corresponding scope of review when the defendant has pleaded guilty only to the lesser offense under § 922(g)(1)?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Sain*, No. 4:22-cr-00013 (E.D. Tenn. Dec. 15, 2022).

(2) *United States v. Sain*, No. 22-6131 (6th Cir. Mar. 13, 2025).

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Petitioner Mark Sain respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Sixth Circuit.

OPINIONS BELOW

The unpublished opinion and judgment of the United States Court of Appeals for the Sixth Circuit affirming the district court's judgment appears at pages 1a to 6a of the appendix to this petition. The judgment of the district court appears at pages 7a to 13a of the appendix.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals'

order affirming the conviction and sentence was entered on March 13, 2025. Pet. App. 1a. On June, 2, 2025, this Court granted an application (No. 24A1181) to extend time for filing this petition to August 10, 2025.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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 . . . .

The Sixth Amendment provides:

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

18 U.S.C. § 922(g) states in relevant part:

> 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 . . . possess in or affecting commerce, any firearm or ammunition . . . .

18 U.S.C. § 924(a)(2) (2021) states in relevant part:

> Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 924(e)(1) provides:

> 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

Overview. The Armed Career Criminal Act, 18 U.S.C. § 924(e) ["ACCA"] applies to increase the penalty range for a person convicted of violating 18 U.S.C. § 922(g)(1) only if the person previously committed at least three ACCA-qualifying offenses "on occasions different from one another." The lower courts had previously operated under the view that this occasions-different requirement need not be alleged in the indictment or proved to a jury beyond a reasonable doubt but is instead a fact the district judge may find at sentencing by a preponderance of the evidence. In *Erlinger v. United States*, 602 U.S. 821 (2024), this Court held that this approach violates the Fifth and Sixth Amendments.

For cases still in the pipeline when *Erlinger* was decided, the question has emerged whether *Erlinger* error is structural, warranting automatic reversal. While this Court has held in previous cases that it is not structural error for the government to fail to allege and prove to the jury a material element of an offense, the missing occasions-different element here is distinguishable. Unlike in ordinary omitted-element cases, evidence needed to establish the harmlessness of a missing occasions-different element will virtually never appear in the trial record of the charged § 922(g) offense. In the case of a guilty plea, it will virtually never appear in the record of the guilty plea to the charged offense. The ACCA's unique impact on sentencing outcomes

further suggests that had these pipeline defendants known of the government's true burden for proving the ACCA, they may well have insisted on trial.

If a preserved *Erlinger* error is nonetheless subject to harmless-error review, a second question has arisen about the proper scope of that review for those who pleaded guilty to the simple § 922(g) offense as charged and challenge only the penalty for the uncharged aggravated ACCA offense. As in this case, reviewing courts replicate and compound the Sixth Amendment problem *Erlinger* sought to resolve when they evaluate non-elemental information in *Shepard* documents that this Court explicitly disclaimed in *Erlinger* as proper sources of judicial factfinding. They also hold the government to differing burdens of proof, with some focusing on a hypothetical trial, another on the defendant's decision to plead guilty, and another on the impact of the error at sentencing.

This Court should grant certiorari to bring much-needed clarity to this area of the law. These are questions of crucial importance, as the ACCA increases the penalty range in firearms cases like this one from a maximum of ten years to a minimum of fifteen years.[1] Even if one or a few circuits later hold that *Erlinger* error is structural or that in conducting harmless-error review of a preserved claim of *Erlinger* error in a guilty plea case, the appellate court is limited to reviewing the record of the plea proceeding, the chances that all the other circuits will immediately change course and

[1] In the Bipartisan Safer Communities Act, Congress increased the maximum penalty for a violation of § 922(g) to "not more than 15 years" of imprisonment." *See* Pub. L. No. 117-159, div. A, tit. II, § 12004(c), 136 Stat. 1313, 1329 (June 25, 2022), codified at 18 U.S.C. § 924(a)(8). That amendment has no bearing on the issues in this case.

follow remain slim to none. At best, varying approaches will result in disparate outcomes. These issues will persist until this Court definitively resolves them. Only this Court can establish a uniform national rule that corrects the lower courts' errors.

Finally, Mr. Sain preserved these claims in the courts below, making his case a perfect vehicle in which to resolve these questions. His petition for a writ of certiorari should be granted.

Proceedings below. The police officer who stopped Mr. Sain for speeding in Franklin County, Tennessee, saw a gun between his leg and the center console of the car. (PSR ¶7, R. 24.) The officer examined the gun and found that it was loaded. (*Id.*) Mr. Sain explained that he kept the gun for protection, as he had been recently stabbed. (*Id.*). The officer gave Mr. Sain a verbal warning about speeding, returned the gun, and let him go. (*Id.*)

Later that day, the officer learned that Mr. Sain was a convicted felon and contacted the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). (PSR ¶8.) An ATF agent located Mr. Sain outside his apartment and asked him about the traffic stop and gun, whereupon Mr. Sain readily admitted he possessed the gun during the traffic stop. (PSR ¶9.) He went into his apartment and retrieved the gun, telling the ATF agent that he knew with his criminal history he would be prosecuted. (PSR ¶10.)

Approximately six months later, Mr. Sain was charged in the Eastern District of Tennessee with one count of being a felon in possession of a firearm and ammunition (in the car) and one count of being a felon in possession of a firearm (at the apartment), both in violation of 18 U.S.C. § 922(g)(1). (Indictment, R. 1; PSR ¶1.)

Crucially, he was not charged with having committed any previous offenses on different occasions. (Indictment, R. 1.) On July 6, 2022, he pleaded guilty to Count 1, without a plea agreement, admitting nothing but the elements of the § 922(g) offense as charged. (PSR ¶1; Factual Basis, R. 15; Change of Plea Tr. at 10, 15, R. 42.)

The probation office prepared a presentence report calculating Mr. Sain's sentencing guideline range. Under the U.S. Sentencing Guidelines, the base offense level for his conviction for being a felon-in-possession under § 922(g)(1) is 14. (PSR ¶22.) *See* U.S.S.G. § 2K2.1(a)(6). No upward adjustments or enhancements were applied, making his offense the simplest and least aggravated of felon-in-possession offenses. (PSR ¶¶23-27.)

Accounting for his acceptance of responsibility, his total offense level as it would ordinarily be calculated under § 2K2.1 is 12. *See* U.S.S.G. § 3E1.1(b). In Criminal History Category VI due to having 22 criminal history points as calculated under the Chapter Four criminal history rules, (PSR ¶¶58, 59), Mr. Sain would have an advisory guideline range of 30 to 37 months under § 2K2.1.

However, the PSR deemed Mr. Sain to be an Armed Career Criminal under 18 U.S.C. § 924(e), based on its determination that he had previously been convicted in state court of robbery and five burglaries, at least three of which it claimed were committed on "different occasions." (PSR ¶¶16, 28.) The ACCA designation increased Mr. Sain's statutory penalty range from zero to ten years, *see* 18 U.S.C. § 924(a)(2) (2021), to fifteen years to life under the ACCA. (PSR ¶103.) The ACCA designation also increased his total offense level under the Guidelines from 12 to 30 (*see* PSR ¶¶

28–31), which catapulted his guideline range from 30 to 37 months under § 2K2.1 to 180 to 210 months under § 4B1.4, as required by the aggravated ACCA penalty. (PSR ¶104.) U.S.S.G. § 5G1.1(c)(2). The ACCA designation increased the bottom of his applicable guideline range by a *mandatory 12.5 years*.

Before sentencing, Mr. Sain objected to the ACCA designation. (Def.'s Objection to PSR at 1–6, R. 29.) He argued that, as he was charged with and pled guilty to only the simple felon-in-possession offense under § 922(g)(1), the district court could not constitutionally make the required "occasions-different" factfinding in order to impose the aggravated ACCA penalty—a finding of fact that then-circuit precedent permitted district courts to make. (*Id.* at 2–6.) He argued that in light of this Court's circumstance-specific interpretation of the term "occasion" in *Wooden v. United States*, 595 U.S. 360 (2022), the occasions-different fact is more properly viewed as an element of the enhanced ACCA offense that, in this criminal context, must be charged in the indictment and proved to the jury beyond a reasonable doubt (or admitted by Mr. Sain). (*Id.* at 2, 6.)

At sentencing, held on December 14, 2022, Mr. Sain continued to preserve his constitutional objection to the district court's factfinding, by which the district judge (not a jury) would essentially find him guilty of a greater offense than the simple § 922(g) offense to which he pleaded guilty. (Tr. Sent'g Hr'g at12–13; *id.* at 19–20, R. 43.) Because he was not charged with and did not plead guilty to the occasions-different fact, he argued, the district court could not constitutionally make that factfinding or sentence him to the aggravated ACCA offense. (*Ibid.*) As the

government framed it, the "only question then is can the Court sentence him to being an armed career criminal despite the fact that there was no allegation in the original indictment or an admission in the plea agreement." (*Id.* at 15.)

The district court overruled his objection, considering itself bound by circuit precedent. (*Id.* at 19.) The ACCA penalty therefore operated as the mandatory guideline floor of fifteen years, and the court calculated his guideline range as 180 to 210 months. (*Id.* at 20.) After Mr. Sain's attorney explained in more detail the PSR's confirmation that Mr. Sain possessed the firearm for his protection after he had been seriously wounded by a stabbing, noted his total compliance with the ATF agent, and also that his prior burglaries were mostly of unoccupied buildings when he was looking for things to pawn while he was under the stranglehold of a meth addiction, the district court sentenced Mr. Sain to the ACCA minimum sentence of 180 months, to be followed by five years of supervised release. (*Id.* at 23–25; PSR ¶ 92; Judgment, R. 37.)

While Mr. Sain's appeal was pending, this Court confirmed in *Erlinger* that he was entirely correct that the district court erred by imposing the ACCA's enhanced punishment based on its own factfinding, by a preponderance of the evidence, that he was guilty of the ACCA's aggravated offense. *Erlinger v. United States*, 602 U.S. 821, 834–35 (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.* at 834. "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 occasions-different inquiry, specifically authorizing a bifurcated trial where the jury evaluates the character of and relationship between the alleged predicate offenses during a separate punishment phase and only after guilt of the underlying § 922(g) has been established. *Erlinger*, 602 U.S. at 847. As Justice Jackson recognized, the typical factfinding relating to facts intrinsic to the felon-in-possession offense charged inherently differs from the factfinding necessary for the occasions-different inquiry relating to prior, unrelated offenses. *Id.* at 893–94 (Jackson, J., dissenting).

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").

Finally, *Erlinger* emphasized that "no particular lapse of time or distance between offenses automatically separates a single occasion from distinct ones." *Id.* at 841 (cleaned up). The Court explained that "[o]ften, 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." *Id.* (citing *Wooden v. United States*, 595 U.S. 360, 369 (2022)). Whether a prior offense amounts to a single ACCA "occasion" is a fact-laden question that must be alleged in the indictment and either be admitted by the defendant or found by a jury beyond a reasonable doubt. Neither happened in Mr. Sain's case.

The Sixth Circuit affirmed. Pet. App. 3a–5a. It relied on its published decision in *United States v. Campbell*, 122 F.4th 624 (6th Cir. 2024), in which it held that *Erlinger* error is not structural. *Id.* at 630–31. The reviewing court instead "ask[s] whether the government has made it clear beyond a reasonable doubt that the outcome would not have been different without the" *Erlinger* error. *Id.* at 630 (internal quotation marks omitted). Citing *Greer v. United States*, 593 U.S. 503, 510–11 (2021), the court in *Campbell* held that to answer that question in a guilty plea case such as this, the reviewing court is required to look at a wide range of material, including *Shepard* documents and presentence reports,[2] and to determine whether this "'record evidence shows beyond a reasonable doubt that a jury's failure to consider the different-occasions question had no effect on [Defendant's] sentence." *Id.* at 632–33.

The court here therefore looked at these materials in Mr. Sain's case—all of which lay outside the record of the plea proceeding—and concluded that his "prior

[2] *Shepard* documents include "(1) the terms of the charging document, (2) the terms of a plea agreement, (3) a transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or (4) some comparable judicial record of this information." *United States v. Sosa*, 448 F. App'x 605, 608 (6th Cir. 2012) (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005)).

convictions for robbery and five burglaries undoubtedly occurred on separate occasions." Pet. App. 4a. It reasoned that the offenses "occurred many years apart" (which Mr. Sain did not dispute though he never admitted they were committed on different occasions under *Wooden*'s test) and that the PSR "outlines that each of the offenses occurred in very different locations, ranging from a food pantry in Bedford County, Tennessee, to a Sears store in Coffee County, Tennessee." *Id.* The court further reasoned that "there is nothing in the record that demonstrates that these offenses had any connection to each other." *Id.* "It is thus apparent beyond a reasonable doubt that the failure to submit the different-occasions inquiry to a jury had no effect on Defendant's sentence. The district court's error was therefore harmless." *Id.*

Mr. Sain now seeks review of the question whether *Erlinger* error is structural, warranting automatic reversal; or if it is not, whether in a guilty plea case such as this, the court of appeals may consider for itself non-elemental facts gleaned from *Shepard* documents and outside the record of the plea proceeding to find the error harmless.

REASONS FOR GRANTING THE PETITION

I. The lower courts are wrong to hold that *Erlinger* error is not structural.

Five Circuits have held that *Erlinger* error is not structural, but rather amenable to harmless-error review. *United States v. Campbell*, 122 F.4th 624 (6th Cir. 2025); *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); *United States v. Johnson*, 114 F.4th 913, 917 (7th Cir. 2024).[3] Each circuit relies on *Neder v. United States*, 527 U.S. 1 (1999), and *Washington v. Recuenco*, 548 U.S. 212 (2006), reasoning that those cases require the conclusion that "errors that 'infringe upon the jury's factfinding role' are 'subject to harmless-error analysis.'" *Rivers*, 134 F.4th at 1305. Each court deems the occasions-different omitted-element error as "part and parcel with the [traditional omitted-element] errors in *Apprendi* and *Alleyne*," so "likewise ask[s] whether the error at issue in [the defendant's] case was harmless." *Campbell*, 122 F.4th at 630.

But these courts fail to acknowledge the critical differences between the typical omitted element addressed in *Neder* and *Recuenco* and the omitted element here. In those cases, the theory of harmless-error review works because the reviewing court can plausibly find in the trial record facts intrinsic to the facts supporting the conviction for the offense charged—such as the drug quantity involved in the charged drug trafficking offense, or whether a gun was carried, brandished, or discharged during the charged crime of violence. This holds true whether the court is limited to reviewing the record of a trial or of a plea proceeding.

However, in the case of an omitted occasions-different element, the reviewing court must evaluate the character, motivation, and interrelatedness of multiple prior offenses having nothing to do with the charged crime. The facts needed to establish guilt of that element will rarely if ever present themselves at a plea proceeding on

[3] 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.

the charged § 922(g)(1) offense, where defendants generally admit only its elements and no more, and will rarely if ever present themselves at trial on the charged § 922(g) offense, where evidence of the character, purpose, and relationship between prior offenses is not intrinsic to—or relevant to—that charge.

A. The unique factual inquiry required for ACCA's occasions-different element sets it apart from other *Apprendi* inquiries.

Erlinger error is structural for several compelling reasons. First and foremost, the facts necessary for finding guilt on the aggravated occasions-different element are not intrinsic to, or generally relevant to, the facts necessary to find guilt for the simple § 922(g) offense, so will not be in the trial record or the record of the plea proceeding. Whereas a court reviewing an ordinary omitted-element error for harmlessness can find in the trial record sufficient facts to sustain a finding of guilt for the offense charged, no similar review is possible in the case of the omitted occasions-different element. This is because proof of that element requires evidence of facts surrounding prior convictions always unrelated to the § 922(g) offense, and thus always irrelevant to the charged § 922(g) offense.

Indeed, this Court has already recognized that the facts proving the occasions-different element are *not* intrinsic to the elements of the underlying 18 U.S.C. § 922(g)(1) offense. In *Erlinger*, for the first time in a case addressing *Apprendi*-type error, the Court expressly acknowledged that the fairest approach to proving the unrelated occasions-different element is in a separate, bifurcated trial. *Erlinger*, 602 U.S. at 847; *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").

It is nothing new to treat facts related to prior criminality differently from facts intrinsic to the commission of a new crime. The Court has long been clear that elements related to 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, where the occasions-different inquiry goes well beyond the existence of a single prior conviction needed for conviction under § 922(g)(1). That charge requires proof only that the defendant knew he had previously been convicted of a felony *once* and knowingly possessed a firearm. Anything else is extrinsic and inadmissible. *See Boggs v. Collins*, 226 F.3d 728, 744 (6th Cir. 2000) (explaining that the 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").

Take Mr. Sain. Had he gone to trial on the § 922(g)(1) offense *as charged*, there would be no conceivable evidentiary relevance of all his prior robbery and burglary

offenses committed over ten years ago. Except for one, the jury would have heard nothing about them, much less information about their timing, location, 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.

Erlinger error is structurally different from the omitted-element errors addressed in *Neder* and *Recuenco* for other reasons as well. In both—unlike here—the defendant was charged with the element later omitted in the jury instructions. In neither—unlike here—had jeopardy attached to a guilty plea to a lesser offense, entered with the government's consent. Instead, the defendant in both went to trial on the offense as charged, so that facts intrinsic to the proof of the offense charged and relating to the element omitted from the jury instructions made it into the trial record. In holding that the omission of an element (*Neder*) or penalty-enhancing sentencing factor (*Recuenco*) in the jury instructions was not structural error, the Court in neither case made the harmless-error determination based on evidence never admitted at trial and likely inadmissible at trial, as happened here.

Finally, in holding these instructional omissions were subject to harmless-error review, the Court in both *Neder* and *Recuenco* relied on the presumption of

harmless-error review articulated in *Rose v. Clark*, which 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). In contrast, a person seeking review of *Erlinger* error was not tried by an impartial adjudicator, much less for an offense that was charged to include the omitted element.

B. The rationales for deeming an error structural support the conclusion that *Erlinger* error is structural.

This Court has identified "at least three broad rationales" for deeming an error 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.* "Third, 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. Sain 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—as experience shows already. Some courts applying harmless-error review to *Erlinger* error in a guilty plea case focus on the likely outcome at trial and ask whether the government has shown beyond a reasonable doubt what a hypothetical jury would have done with hypothetical evidence that may or may not be admissible at trial on the charged offense, and evidence that in any event was never admitted at trial and therefore was never subjected to the rules of evidence—as the Sixth Circuit did here. *See* Part II.A, *infra*. The Fourth Circuit, in contrast, focuses on the defendant's decisionmaking and asks whether the government has shown 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*.'" *United States v. Brown*, 136 F.4th 87, 97 (4th Cir. 2025) (quoting *Greer v. United States*, 593 U.S. 503, 508 (2021) (emphasis in *Brown*), and citing *United States v. Olano*, 507 U.S. 725, 734 (1993)).[4]

[4] The differing focal points of the circuits for their harmless-error review in these pipeline cases is another reason to grant certiorari. *See* Part II.C, *infra*.

Either way, the guesswork and legal imaginings needed to determine the likely outcome in the absence of the *Erlinger* error render the error structural. If the focus is on the hypothetical outcome of the hypothetical trial based on hypothetically admitted evidence, the reviewing judges merely replicate the error of using non-elemental information in *Shepard* documents. If the focus is on the defendant's decisionmaking at the plea juncture, the reviewing judges improperly replace the defendant's right to choose whether to risk a trial with their belief about the likely outcome. *See Lee v. United States*, 582 U.S. 357, 367–68 (2017).

Had Mr. Sain known of the government's burden to prove the missing occasions-different element, it would not have been an irrational choice to insist on a trial instead of pleading guilty to the ACCA. First, due to the ACCA's 15-year mandatory minimum, he lost a substantial portion of the benefit of pleading guilty. (*See* PSR ¶104 (showing that his ACCA guideline range after pleading guilty would have been 168 to 210 months but was truncated at the bottom to 180 to 210 months due to the mandatory minimum).) This is not unusual, and a significant reason the ACCA in general has more of an impact on the decision to plead guilty or go to trial than any other mandatory minimum, with the trial rate for offenders subject to the ACCA at 13.5%—*five times* the trial rate for all federal offenders. *See* U.S. Sent'g Comm'n, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* 37 (2018) (showing trial rate for all federal offenders of 2.7% and trial rate for all subject to any mandatory minimum of 5.2%). As this Court recognizes, even "a defendant with no realistic defense to a charge carrying a 20-year

sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years." *Lee*, 582 U.S. at 367. So how could the government even begin to show beyond a reasonable doubt that Mr. Sain would not have insisted on trial? Put simply, "the efficiency costs of letting the government try to make the showing are unjustified." *Weaver*, 582 U.S. at 295–96.

Erlinger error also implicates fundamental fairness. The Fifth Amendment Due Process violations it entails—the right to notice of the aggravated ACCA charge and to a jury finding of that charge beyond a reasonable doubt—result in severe, mandatory punishment for a separate, aggravated offense for which the defendant was not charged and to which he did not plead guilty. The patent unfairness is exacerbated when the defendant pled guilty to the lesser crime (with the government's consent) and argued that the aggravated punishment for the lesser crime to which he pled guilty is unconstitutional—and this remains so 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. Judges recognize that *Erlinger* itself may demonstrate that *Erlinger* error is structural.

Some judges question 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 *Campbell*, for example, 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." *Campbell*, 122 F.4th at 637 (Davis, J., concurring); *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).

In another case, Judge Clay laid out why *Erlinger* error is structural, distinguishing *Recuenco* and explaining how *Erlinger* shows 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.

Two more judges on the Sixth Circuit recently 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*, 142 F.4th 412, 423 (6th Cir. 2025) (Cole, J., concurring). In the same case, 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 430 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)). These judges are correct.

II. This Court has not addressed the proper scope of harmless-error review in the case of a guilty plea to a lesser-included offense, leading to incoherence and a split in the lower courts.

If harmless-error review applies, the Court should grant review to define the proper scope of the record for that review. It has never addressed the scope of

harmless-error review in the case of an unchallenged guilty plea to a lesser-included offense. Meanwhile, judges recognize the tension inherent in allowing appellate judges to decide that a jury would find the occasions-different fact based on the same *Shepard* documents that *Erlinger* held a district court *cannot* consider in finding that fact. Moreover, circuits are split on whether harmless error review focuses on trial, the change of plea hearing, or sentencing.

A. The Court has not addressed harmless-error review of an erroneous aggravated penalty in the case of an unchallenged guilty plea to the lesser offense.

The government bears the burden to show that constitutional errors are harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). It 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)). While this Court holds that harmless-error review entails review of the "whole record," it has not explained what the "whole record" means in the case of an unchallenged guilty plea to a lesser-included offense where the constitutional errors lie in the imposition of the penalty for the greater offense.

Delaware v. Van Arsdall, 475 U.S. 673 (1986), relied on in *Neder*, 527 U.S. at 16–20, provides guidance. In *Van Arsdall*, the Court applied harmless-error review to a violation of the defendant's confrontation clause right. *Id.* at 674. The Court first explained that the point of harmless-error review is 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 held true in *Recuenco*, 548 U.S. at 218–21. After concluding that harmless-error review applied there, the Court referred only to trial evidence clearly showing that the "deadly weapon" the defendant used during his crime was the "handgun" specified in the indictment. *Id.* at 218–21.

Similarly, in *Yates v. Evatt*, 500 U.S. 391, 405 (1991) (also relied on 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). However, 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").

None of these cases involved a guilty plea. The Sixth Circuit held that it could rely exclusively on non-elemental information contained in *Shepard* documents and the PSR—information not included in any record at a trial or at the guilty plea—to find that "[i]t is thus apparent beyond a reasonable doubt that the failure to submit the different-occasions inquiry to a jury had no effect on Defendant's sentence." Pet. App. 4a. In doing so, it followed *Campbell*, where the court construed this Court's admonition in *Erlinger* against using *Shepard* documents to find the occasions-different element as merely "a reason why *Erlinger* determined that the occasions inquiry must be submitted to a jury," concluding that "*Erlinger* did not preclude the use of *Shepard* documents in reviewing an error for harmlessness." *Id.* (citing *Erlinger*, 602 U.S. at 840–41). For the proposition that "harmless error review is based on an assessment of all 'relevant and reliable information' in the 'entire record,'" *Campbell* cited this Court's decision in *Greer*. 122 F.4th at 633 (citing *Greer*, 593 U.S. at 510–11).

Greer does not define the scope of review for *preserved* claims of Fifth and Sixth Amendment errors related to an aggravated penalty after a guilty plea to a lesser-

included offense. As relevant here, *Greer* addressed an unpreserved claim of Fifth Amendment error where the defendant pled guilty to an offense that, as charged, was missing an essential element—subject to plain error review. *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 reviewing court used to find harmlessness consists of *Shepard* documents—the very 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.

B. Judges recognize the serious constitutional tension created by examining *Shepard* documents when conducting harmless-error review of *Erlinger* error.

Not all judges agree that *Erlinger* error can be found harmless based solely on *Shepard* documents. In her concurring opinion in *Campbell*, Judge Davis 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." *Campbell*, 122 F.4th at 637. She agreed that this Court's analysis in *Greer* "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.*

Similarly, Judge Clay explained in his dissenting opinion in *Cogdill* 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)).

Judge Cole shares these concerns. *Thomas*, 142 F.4th at 425. He notes that characterizing *Erlinger* 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 using *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*." (internal quotation marks omitted)).

These concerns reflect the incoherence of allowing appellate judges to rely on evidence outside the record of the plea proceeding—the only proceeding in which guilt is established in the case of a guilty plea—when conducting harmless-error review. More troubling, these appellate judges are relying on the same evidence this Court expressly found to be unreliable. The result is that the burden of shouldering the cost of the constitutional errors here shifts from the government to the defendant, even though the defendant objected in the district court. All that matters is that the prosecutor, the sentencing judge, and at least two appellate judges personally believe that the facts are so overwhelming that they speak for themselves—and speak *over* the defendant's right to decide for himself whether to put the government to its burden at trial. *Erlinger* rejected this approach. 602 U.S. at 842.

C. Lower courts are divided about the government's burden for showing harmless error in these cases.

In *Campbell*, the Sixth Circuit's articulation of the government's burden is 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." 122 F.4th 624, 632 (6th Cir. 2024). 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 633. Following *Campbell*'s lead, the court in Mr. Sain's case focused on the *Shepard* documents and the PSR (though without considering whether they would be admissible at trial) and held that it was "apparent beyond a reasonable doubt that the failure to submit the different-occasions inquiry to a jury had no effect on Defendant's sentence." Pet. App. 4a. 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, views the matter differently. Its view is that since the defendant pleaded 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 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 as a "pure sentencing error" a mandatory minimum imposed when the defendant was not charged with the enhancing element, and the penalty was imposed based on judge-found facts at sentencing." *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. Thus, 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 *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).

Review is needed to resolve these vastly divergent approaches to the harmless-error test in this guilty plea context, where the defendant does not challenge the guilty plea itself, but the penalty imposed for an uncharged aggravated crime to which he did not plead guilty and that was not proven to a jury beyond a reasonable doubt.

III. This case presents the perfect vehicle to resolve this extremely important question.

This is an excellent vehicle to decide the question presented. Mr. Sain's case perfectly illustrates the ACCA's severity, as it increased his guideline range from 30 to 37 months to 180 to 210 months and resulted in the loss of a full year of the benefit from pleading guilty. *See supra* at 7. The legal issues are cleanly presented and raised in the district court and in the court of appeals. The court of appeals rejected Mr. Sain's arguments on the merits, relying on a published post-*Erlinger* decision in which the court of appeals ultimately denied rehearing en banc after considering these same arguments.

The questions presented are outcome determinative for Mr. Sain. If *Erlinger* error is structural, he is entitled to reversal and remand for resentencing for the § 922(g)(1) offense to which he pled guilty. If instead the error is amenable to harmless error review, but the Court holds that the reviewing court in an unchallenged guilty plea case like this one may not consider evidence beyond the

record of the plea proceeding, Mr. Sain is likewise entitled to reversal and remand for resentencing for the § 922(g)(1) offense.

This issue is exceptionally important. In the year that *Wooden* was decided, hundreds of federal defendants were sentenced under the ACCA. *See, e.g.*, U.S. Sent'g Comm'n, *Quick Facts – Felon in Possession of a Firearm* 1 (2022) (showing that 260 offenders were sentenced under the ACCA in fiscal year 2021). The effect of the ACCA is generally severe. In fiscal year 2021, for example, the average increase in the sentence imposed was 126 months longer than for those sentenced without the ACCA—over a decade longer. *Quick Facts* at 2. In most if not all instances, a district judge found the fact that the predicate offenses were committed on different occasions by rummaging through the record of the prior conviction and discerning non-elemental facts. In the time between *Wooden* and *Erlinger*, those sentenced under the old regime had every reason to appeal and to hold their appeals until *Erlinger* was decided. But in applying harmless-error review, the courts of appeals have only replicated what *Erlinger* forbids district courts from doing, thereby compounding the initial error. This Court should step in and correct their erroneous approach to harmless-error review in these cases. This is the perfect case for doing so.

CONCLUSION

The petition for a writ of certiorari should be granted.

JENNIFER NILES COFFIN
Assistant Federal Defender
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, Tennessee 37929
(865) 637-7979

Counsel for Mark William Sain

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