No. 25-_____

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS BRADLEY,

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

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QUESTIONS PRESENTED

In 2022, Petitioner Thomas Bradley was charged with and pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). At sentencing, over his objection, the judge imposed an enhanced penalty under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1) ("ACCA"), based on its finding—by a preponderance of the evidence and based on information from *Shepard* documents outside the record of the plea proceeding—that he had at least three prior ACCA-qualifying convictions committed on "occasions different from one another."

While Mr. Bradley's appeal was pending, this Court decided *Erlinger v. United States*, 602 U.S. 821 (2024), establishing that his ACCA sentence was imposed in violation of the Fifth and Sixth Amendments. In reaching its conclusion, the Court explained why sentencing judges cannot use information from *Shepard* documents to decide whether a defendant committed his prior offenses on different occasions.

The questions presented are:

I. Because harmless-error review of *Erlinger* error typically requires appellate judges to evaluate facts outside the record of conviction for the charged § 922(g)(1) offense, is *Erlinger* error structural?

II. If harmless-error review applies to *Erlinger* error, can appellate judges rely on *Shepard* documents to decide what a hypothetical jury would find when the defendant pled guilty only to the charged § 922(g) offense?

III. Whether the Double Jeopardy Clause prohibits imposing an enhanced ACCA sentence when a defendant pleaded guilty only to the simple § 922(g) offense and jeopardy has attached to that conviction?

PARTIES TO THE PROCEEDINGS

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

RELATED CASES

(1) *United States v. Bradley*, No. 2:22-cr-00083 (E.D. Tenn. May 1, 2023).

(2) *United States v. Bradley*, No. 23-5440 (6th Cir. Apr. 17, 2025).

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Petitioner Thomas Bradley 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The unpublished order of the United States Court of Appeals for the Sixth Circuit affirming the district court's judgment appears at pages 1a to 4a of the appendix to this petition. The judgment of the district court appears at pages 5a to 11a 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 April 17, 2025. Pet. App. 1a. On July, 9, 2025, this Court granted an application (No. 25A16) to extend time for filing this petition to September 14, 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") increases 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." Lower courts previously held 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, the 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, that evidence will not appear in

the record of the guilty plea to the charged offense. The ACCA's unique impact on sentencing outcomes further suggests that if these pipeline defendants had known of the government's true burden for proving the ACCA, they would not have been irrational to insist on trial.

If a preserved *Erlinger* error is subject to harmless-error review, a second question has arisen about the proper scope of that review for those who pleaded guilty to the charged § 922(g) offense and challenged only the penalty for the aggravated ACCA enhancement. As in this case, reviewing courts replicate and compound the Sixth Amendment problem *Erlinger* sought to resolve when they evaluate non-elemental information in the same *Shepard* documents this Court explicitly rejected as proper sources of judicial factfinding. They also hold the government to differing burdens of proof, with some courts focusing on a hypothetical trial, another on the defendant's decision to plead guilty, and another on the impact of the error at sentencing. Separately, and in any event, the question arises whether the Double Jeopardy Clause prohibits the ACCA sentence for defendants who pleaded guilty to the lesser § 922(g) offense—regardless of whether the Fifth and Sixth Amendment errors were harmless.

This Court should grant certiorari to bring clarity to this area of the law. These are questions of crucial importance, as the ACCA increases the penalty range in firearms cases from a maximum of ten years to a minimum of fifteen years.[1] Absent

[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.

this Court's guidance, 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. And Mr. Bradley's case presents an ideal vehicle in which to resolve these questions.

Proceedings below. In August 2021, Thomas Bradley was arrested on outstanding warrants. He told the police he had a gun in a nearby car, that he had recently bought it, and that he knew as a convicted felon he could not lawfully possess the gun. (Factual Basis at 1, R. 13; Change of Plea Tr. at 14–15, 33–34, R. 36.) A year later, he was charged in the Eastern District of Tennessee with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (Indictment, R. 1.) The indictment did not charge an ACCA enhancement. He pleaded guilty as charged to the simple § 922(g) offense, admitting only its elements. (Presentence Report ["PSR"] ¶¶ 2, 3, R. 16; Factual Basis at 1; Change of Plea Tr. at 14–15, 33–34.)

The Presentence Report deemed Mr. Bradley to be an Armed Career Criminal based on 28 Tennessee burglary convictions from the early 1990s when he was in his early twenties. These included three Hawkins County convictions (for which he was arrested in January 1992) and 25 Jefferson County convictions described as committed between April 1992 and December 1993 (and for which he was arrested on August 8, 1994 and "back charged" for all of them). (PSR ¶¶ 34–59.) For each of

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.

the two groups, he pleaded guilty on the same day and received concurrent sentences. (*Ibid.*)

The ACCA designation dramatically increased Mr. Bradley's penalty range. It raised his statutory penalty range from zero to ten years for the ordinary violation of § 922(g)(1), *see* 18 U.S.C. § 924(a)(2) (2020), to fifteen years to life under the ACCA. (PSR ¶ 104.) It increased his guideline range from 30 to 37 months to 188 to 235 months—a six-fold increase. (PSR ¶¶ 20, 23–24, 68–69.)

Mr. Bradley objected to the ACCA designation. He acknowledged circuit precedent but argued that because he was charged with and pleaded guilty only to the simple felon-in-possession offense under § 922(g)(1), the district court could not constitutionally make the factfinding necessary to conclude these prior offenses were committed on different "occasions" as defined for ACCA purposes in *Wooden v. United States*, 595 U.S. 360 (2022). (Def.'s Objection to PSR at 2–15, R. 24.) Rather, the Fifth and Sixth Amendments require the government to allege the ACCA's occasions-different requirement in the indictment and prove it to the jury beyond a reasonable doubt. (*Id.*) Because that did not happen, he was guilty only of the simple § 922(g) offense and could not be subject to the ACCA regardless of any evidence the government attempted to present. (*Id.* at 2, 15.) He provided supporting materials from other districts where the government had taken the position post-*Wooden* that defendants who pleaded guilty only to the simple § 922(g) offense could not be subject to the ACCA. (Doc. 24-1 at PageID #223–24, 227–28.)

Mr. Bradley also argued that under *Wooden*'s multi-factored test considering the nature, purpose, and similarity of prior offenses, the government could not prove the Jefferson County burglaries were committed on different occasions. (*Id.* at 10–16.) He admitted nothing about the dates or locations of the burglaries, insisting it was the government's burden to prove it and referring to the information in the PSR regarding dates and other details, referring to them as "purported" and "alleged" only. (*Id.* at 18.)

The government argued that separation of offenses by a single day automatically establishes different occasions and relied on *Shepard* documents to identify dates and locations. (Gov't Resp. at 2–7 & n.1, 10, R.25; *id.* at PageID #242–281, R. 25-1.) While agreeing that juries should make the occasions-different finding, it argued the court was bound by circuit precedent to decide the issue itself. (*Id.* at 9–10.) It also argued that, in any event, no jury was necessary in Mr. Bradley's case because he had waived that right by admitting that the offenses were committed on different dates. (*Id.* at 10.)

At sentencing, Mr. Bradley maintained his constitutional objection and did not admit the "occasions-different" element as *Wooden* defines it. (Sent'g Tr. at 67–68, R. 38.) His primary argument was that before the ACCA penalty may be imposed, the government must charge the occasions-different fact and submit it to a jury for a finding beyond a reasonable doubt. (*Id.* at 55.) Because that didn't happen the ACCA penalty could not be imposed no matter the information in the *Shepard* documents. (*Id.* at 55–56.) He acknowledged that "different dates alleged in the indictments" in

the *Shepard* documents but insisted dates alone in the *Shepard* documents were insufficient under *Wooden*. (*Id.* at 65–68, 71.)

The district court overruled the objection. Based on the different dates in the *Shepard* documents, it found 26 qualifying burglaries committed on different occasions—the three in Hawkins County and 23 of the burglaries in Jefferson County—and sentenced him to 210 months (*Id.* at 72–77, 103–04; Judgment, R. 31.)

Mr. Bradley appealed, preserving his *Erlinger* arguments. While his appeal was pending, this Court decided *Erlinger*, confirming that his ACCA sentence violated the Fifth and Sixth Amendments. *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. And 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. Bradley's case.

The Sixth Circuit affirmed. Pet. App. 1a–4a. It relied on *United States v. Campbell*, 122 F.4th 624 (6th Cir. 2024), in which the court held that *Erlinger* error is not structural. *Id.* at 630–31. Under *Campbell*, 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). And in a guilty plea case, the reviewing court may examine *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 (citing *Greer v. United States*, 593 U.S. 503, 510–11 (2021)).

Governed by *Campbell*, as Mr. Bradley acknowledged it was, the reviewing court examined *Shepard* documents outside the plea record in Mr. Bradley's case and found that his "predicate offenses were committed on 24 separate dates, and almost [all] were committed in separate residences over several years." Pet. App. 3a. It concluded that "the failure to have a jury consider whether Bradley's prior offenses occurred on separate occasions had no effect on his sentence, and the error was thus harmless beyond a reasonable doubt." *Id.*

REASONS FOR GRANTING THE PETITION

I. *Erlinger* error is structural.

Five circuits have held that *Erlinger* error is not structural. *United States v. Campbell*, 122 F.4th 624 (6th Cir. 2025); *United States v. Brown*, 136 F.4th 87 (4th

[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)).

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.

However, these courts fail to acknowledge the critical differences between the typical omitted element addressed in *Neder* and *Recuenco* and the omitted element here. They also miss that *Erlinger* error implicates each of the Court's rationales for structural error. Several judges who question whether harmless-error review applies to *Erlinger* error are correct.

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

Erlinger error is structural for several compelling reasons. Most importantly, the theory of harmless-error review in *Neder* and *Recuenco* works only because the reviewing court can expect to find in the trial record facts intrinsic to the conviction for the offense charged—such as the drug quantity involved in the charged drug

[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.

trafficking offense, or whether the defendant knew he was a felon, or whether a gun was carried, brandished, or discharged during the charged crime of violence. This holds true whether the court reviews the record of a trial or a plea proceeding.

For an omitted occasions-different element, the reviewing court must evaluate the character, motivation, and interrelatedness of multiple prior offenses unrelated to the charged crime and often occurring decades earlier. The facts needed to establish guilt of that element will rarely if ever present themselves at a plea proceeding on the charged § 922(g)(1) offense, where defendants generally admit only its elements, 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.

Indeed, this Court has 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 an *Apprendi*-type case, 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 to his prior felony status 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").

For example, had Mr. Bradley gone to trial on the § 922(g)(1) offense *as charged*, all his prior burglary offenses committed decades earlier would have no evidentiary relevance. 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. Under the lower court's

approach to harmless-error review, the only way to make that determination would be for the appellate court to evaluate non-trial-record information—including non-elemental information contained in *Shepard* documents—essentially turning 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 cases—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, both defendants 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 on the charged offense, 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 a preserved *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. Bradley 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]

Either way, the guesswork and legal imaginings needed to determine the likely outcome in the absence of *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

[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*.

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. Bradley known of the government's burden to prove the missing occasions-different element, it would not have been irrational to insist on a trial instead of pleading guilty to the ACCA. The ACCA increased by his guideline range by six-fold—150 months on the low end. This is not unusual, and one reason the prospect of the ACCA's mandatory penalty has more of an effect 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. The government cannot show beyond a reasonable doubt that Mr. Bradley 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 unfairness is exacerbated when the defendant pled guilty to the lesser crime (with the government's consent) and argued that the aggravated punishment 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 reviewing *Erlinger* error for harmlessness "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 explained 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. If harmless error review allows appellate judges to rummage through non-elemental and inadmissible information to decide for themselves—over the persistent objections of the defendant—that the defendant committed an uncharged, aggravated crime, then *Neder* was wrongly decided.

II. The proper scope of harmless-error review following a guilty plea to a lesser-included offense remains undefined, creating a circuit split and incoherent results.

If harmless-error review applies, the Court should grant review to define the proper scope for that review. This Court has never addressed the scope of harmless-error review following a guilty plea to a lesser-included offense (with the government's consent) where the defendant later objected to judicial factfinding of the omitted aggravating fact. 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 following 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 following a guilty plea to a lesser-included offense where the constitutional errors lie in the imposition of the penalty for the greater offense over the defendant's objection.

In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), relied on in *Neder*, 527 U.S. at 16–20, the Court applied harmless-error review to a violation of the defendant's right to confrontation at trial. *Id.* at 674. The Court 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, reviewing courts must look to the "whole record," which was limited there to evidence admitted at trial. *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* likewise conducted harmless-error review based only on the evidence in the trial record. 527 U.S. at 16–20. And in *Recuenco*, 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. 548 U.S. 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. Yet, the Sixth Circuit held that it could rely exclusively on non-elemental information contained in *Shepard* documents—information not included in any record of a trial or of the guilty plea—to find that "the failure to have a jury consider whether Bradley's prior offenses occurred on separate occasions had no effect on his sentence, and the error was thus harmless beyond a reasonable doubt." Pet. App. 3a. 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).

The problem is that *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. *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 in this very context, and in some cases viewing that evidence in the most inculpatory manner possible. *See, e.g.*, *United States v. Durham*, __ F.4th __, 2025 WL 2355998, at *11, 12–14 (6th Cir. Aug. 14, 2025) (No. 23-5162) (Moore, J., dissenting in part). 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 worst view of the facts is 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 articulated the government's burden as 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. Bradley'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. Because the defendant pleaded guilty to the underlying § 922(g)(1) offense, it holds that "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 rather than 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. The Court should grant review either in this case or one of the others raising these same issues.[5]

III. The Double Jeopardy Clause prohibits enhanced ACCA sentences when defendants pled guilty only to the simple § 922(g) offense.

Erlinger establishes that the ACCA enhancement requires proof of elements not contained in the basic § 922(g)(1) offense, making the ACCA a distinct offense for Double Jeopardy purposes. *Cf. Alleyne v. United States*, 570 U.S. 99, 115–16 (2013). When a defendant pleads guilty to the lesser § 922(g)(1) offense—as Mr. Bradley did—jeopardy attaches to that conviction. The Double Jeopardy Clause then prohibits punishment for the greater ACCA offense without a separate guilty plea or jury verdict on the additional elements.

This Court has long held that the Double Jeopardy Clause forbids successive prosecution and cumulative punishment for both a greater and lesser included offense. *Brown v. Ohio*, 432 U.S. 161, 169 (1977). The Sixth Circuit in *United States v. Bell*, 37 F.4th 1190, 1198 (6th Cir. 2022), applied this principle to hold that jeopardy attached when the district court accepted Bell's guilty plea to a lesser drug offense,

[5] *E.g.*, *Campbell v. United States*, No. 25-5179; *Sain v. United States,* No. 25-5333. It may also wish to hold this case pending disposition of the petition for certiorari to be filed in the leading case on *Erlinger* error arising out of the Fourth Circuit, due by September 26, 2025. *Brown v. United States*, No. 25A31.

and that any "subsequent reindictment for the greater included offense implicates double jeopardy concerns under the Fifth Amendment."

Other courts have likewise recognized the serious constitutional problems this creates. The First Circuit in *United States v. Pena*, 742 F.3d 508, 518–19 (1st Cir. 2014), noted that empaneling a second jury after *Alleyne* error to support an enhanced sentence after the defendant had been convicted only of the lesser offense would "raise[ ] a thicket of potential and thorny double jeopardy issues, into which it is wiser not to enter." The First Circuit avoided these issues by remanding for resentencing without the enhancement.

The Sixth Circuit has rejected this reasoning in this *Erlinger* context. In *United States v. Thomas*, 142 F.4th 412, 422–23 (6th Cir. 2025), it held that no Double Jeopardy violation occurred when applying harmless error review to permit ACCA sentencing after an *Erlinger* error. Judge Nalbandian reasoned that because the legal requirements changed while the case was pending, the government "never got its first bite at the apple to prove that element." *Id.* at 431 (Nalbandian, J., concurring). The majority suggested that *Pena* is distinguishable because the error there was harmful, implying that harmless *Erlinger* errors raise no Double Jeopardy concerns. *Id.* at 423 n.2.

This analysis fundamentally misunderstands Double Jeopardy protection. The constitutional violation occurs when a defendant is punished for a greater offense without having been properly charged, tried, and convicted of it—regardless of whether appellate judges believe the evidence would have supported a conviction.

Double Jeopardy protects the defendant's right to finality based on what was actually charged and proven, not what could have been proven. Harmless error review cannot cure this violation because it would allow courts to bootstrap any conviction into punishment for a greater offense simply by conducting post-hoc speculation about hypothetical jury findings.

Under the Sixth Circuit's logic, Double Jeopardy would protect only defendants with weak evidence against them, while those with strong evidence would lose constitutional protection entirely. This creates an unprincipled exception that eviscerates the Clause's core purpose. Once jeopardy attaches to a guilty plea for § 922(g)(1), any punishment for the enhanced ACCA offense violates Double Jeopardy—regardless of how "obvious" the enhancement elements might seem to reviewing courts.

IV. This case presents an ideal vehicle to resolve these extremely important questions.

This is an excellent vehicle to decide the questions presented. Mr. Bradley's case perfectly illustrates the ACCA's severity, as it increased his guideline range from 30 to 37 months to 188 to 235 months. The legal issues are cleanly presented and were preserved in the district court and the court of appeals. The court of appeals rejected Mr. Bradley's arguments about harmless error 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. Though in his case, the panel believed plain error review applied to his Double Jeopardy argument, the Sixth Circuit has since held that a defendant in the same posture and raising the same

arguments as Mr. Bradley had not forfeited his same Double Jeopardy argument and in another case addressed the issue on the merits. *Kimbrough,* 138 F.4th at 479–80 (holding issue preserved); *Thomas*, 142 F.4th at 420–23 (addressing the merits).

The questions presented are outcome determinative for Mr. Bradley. 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 a guilty plea case like this one may not consider evidence beyond the record of the plea proceeding, Mr. Bradley is likewise entitled to reversal and remand for resentencing for the § 922(g)(1) offense.

These issues are 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 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 examining 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 correct this approach to harmless-error review in these cases. This is an ideal case for doing so.

CONCLUSION

The petition for a writ of certiorari should be granted.

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September 12, 2025