NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

SHADON EDWARDS,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Issue I

Whether errors under *Erlinger v. United States,* 602 U.S. 821 (2024) are structural errors, or whether they are subject to harmless or plain error review.

Issue II

If plain error review is applicable, this Court should establish the proper method for measuring prejudice when a defendant has pleaded guilty to the simple offense of 18 U.S.C. §922(g)(1).

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

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

United States v. Shadon Edwards, No. 19-60373-Cr-Singhal (June 27, 2025)

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

United States v. Shadon Edwards, No. 22-13963 (November 3, 2022)

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Shadon Edwards respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 22-13963 in that court on June 27, 2025, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on June 27, 2025. Mr. Edwards received a 30 day extension within which to file this petition. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

Amendment V

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

Amendment VI

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

18 U.S.C. §922(g)(1)

> Title 18, United States Code, § 922(g)(1) provides in relevant part: It shall be unlawful for any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce[ ] any firearm or ammunition.

18 U.S.C. §924(a)(2) (2019)

> 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)

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

Fed. R. Crim. P. 52(b)

(b) PLAIN ERROR. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

I. Introduction

Under 18 U.S.C. §922(g)(1), defendants are prohibited from possessing a firearm knowing that they have previously sustained a felony conviction. *Id*. If that same defendant previously sustained three convictions of "violent felon[ies]" or "serious drug offense[s]," (or any combination thereof) that were "committed on occasions different from one another," that defendant is subject to the Armed Career Criminal Act, 18 U.S.C. §924(e) ("ACCA"), and the statutory penalties are significantly increased vis-à-vis an ordinary §922(g)(1) conviction. At all times relevant to Petitioner's case, the statutory penalties for a simple §922(g)(1) conviction ranged from 0-10 years, while the statutory penalties for the aggravated ACCA offense ranged from 15 years – Life.[1]

For decades, it was settled law that a court could determine whether ACCA applied at the sentencing phase of the case by a preponderance of the evidence. Specifically, the court was permitted to determine whether a defendant's prior predicate offenses were committed on different occasions. The different occasions test, moreover, was not very demanding.

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[1] Congress subsequently amended §922(g) to increase its statutory maximum penalty from 10 years up to 15 years. Bipartisan Safer Communities Act, Pub. L. 117-159, §12004(c), 136 Stat. 1313, 1329 (June 25, 2022), codified at 18 U.S.C. §924(a)(8). This amendment is not applicable to Petitioner's case, thus his statutory maximum penalty under §922(g)(1) remained at 10 years.

However, the law drastically changed when this Court issued *Wooden v. United States,* 142 S.Ct. 1063 (2022), which established a multi-factored holistic inquiry for the different occasions' element. Under *Wooden,* the court must consider the interrelationship between the defendant's prior offenses. The factors under *Wooden* that determine whether prior offenses are related or separate include: (1) the temporal proximity of the prior offenses, (2) the geographical proximity of the prior offenses, and (3) any common scheme or showing that the prior offenses are intertwined. Thus, in *Wooden,* the court found that the defendant's burglarizing 10 successive storage units in the same building – while encompassing 10 different offenses – constituted only one criminal "occasion." Even under *Wooden,* however, the courts continued to evaluate these factors at sentencing under a preponderance standard.

Shortly after *Wooden,* this Court issued *Erlinger v. United States,* 602 U.S. 821 (2024), which held for the first time that the Fifth and Sixth Amendments mandated that ACCA's "different occasions" element had to be charged in the indictment and proven to a unanimous jury beyond a reasonable doubt, or freely admitted by the defendant in a guilty plea. *Erlinger,* 602 U.S. at 828-849. Thus under *Erlinger,* it is now constitutional error for the court to make the determination of whether a defendant's prior offenses constitute different occasions. The *Erlinger* court explained that this result was required because a decision on the different occasions element involved factual findings that increased the statutory penalties of §922(g)(1)

from 0-10 years, up to a new statutory penalty under the aggravated ACCA offense to 15 years minimum – Life. *Erlinger,* 602 U.S. at 835, citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 570 U.S. 99 (2013).

II. Course of Proceedings and Statement of Facts.

A. The Charges.

On December 12, 2019, a federal grand jury in the Southern District of Florida returned a one-count indictment against Shadon Edwards, charging that on October 25, 2019, he knowingly possessed a firearm and ammunition, in and affecting interstate and foreign commerce, knowing that he had previously been convicted of a felony offense, in violation of 18 U.S.C. §§922(g)(1) and 924(e)(1). Aside from the bare reference to §924(e)(1), the indictment did not state that Mr. Edwards was being charged with ACCA, none of Edward's prior offenses were listed or referred to in the indictment, and there were no allegations that Mr. Edwards had three prior offenses that were committed on occasions that were different from one another.

B. The Plea

Mr. Edwards ultimately entered a plea to the charges. Although he admitted to possessing a firearm and ammunition, he did not admit that he was an armed career criminal under 18 U.S.C. §924(e). He did admit that he had prior felony convictions for 2010 trafficking in oxycodone, 2010 aggravated battery with a deadly weapon, and 1997 robbery with a deadly weapon/aggravated battery. Other than the fact of these prior convictions, he did not admit to any facts or circumstances

about them. He did not admit that his prior offenses were committed on different occasions. He admitted that he was aware of his felon status at the time he possessed the firearm and ammunition. Edwards also agreed that the firearm and ammunition were manufactured outside the State of Florida, and had, therefore, moved in interstate and foreign commerce before he possessed them.

C. The PSI and the Sentencing

After the plea, a presentence investigation report (PSI) was prepared. The PSI first calculated the guidelines under U.S.S.G. §2K2.1 of the United States Sentencing Guidelines, giving Mr. Edwards an offense level of 26. However, the PSI subsequently pivoted over to U.S.S.G. §4B1.4, based on its finding that Mr. Edwards qualified as an armed career criminal. Under the ACCA guidelines, Edwards' offense level was increased to 33 and he was assigned criminal history category VI. With a 3-point reduction for acceptance of responsibility, the PSI found that Mr. Edwards' ACCA guideline range was 168-210 months. Under ACCA, there was a 15-year mandatory minimum penalty. Thus, the ACCA guideline range increased to 180-210 months imprisonment. Had ACCA not been applied, the statutory penalties under 18 U.S.C. §922(g)(1) would have been 0-10, and the sentencing guideline range under §2K2.1 would have been 84-105 months imprisonment, with no mandatory minimum.

The PSI set out the "circumstances" of only two of the three listed prior convictions: **(1)** the 1997 robbery/aggravated battery and **(2)** the 2010 aggravated

battery. The circumstances listed for these offenses were based on non-*Shepard* arrest affidavits. Based on these non-*Shepard* documents, the PSI stated that the 2010 aggravated battery offense occurred on October 1, 2010, and had an arrest date of December 30, 2010.

The PSI did not set out any "circumstances" relating to the 2010 oxycodone conviction, except to state that there was an arrest date of December 28, 2010 and the case was finally adjudicated on April 29, 2014. No other facts about this offense were available. No facts in the record indicated whether the 2010 oxycodone offense was circumstantially related to or separate from the 2010 aggravated battery offense. Thus, there were no facts in any part of the record before the district court – at any stage -- including the PSI -- which supported that the 2010 convictions were different from one another for purposes of the government's ACCA enhancement. At this stage of the proceedings, it was the government's burden to prove the ACCA enhancement. And due to the gaps in the government's evidence, it failed to do so.

In the instant case, Mr. Edwards was sentenced on November 3, 2022. The government did not offer any evidence in support of its ACCA enhancement. Specifically, it did not offer evidence showing that the 2010 convictions were different from one another. Mr. Edwards' attorney did not offer any objection. The district court imposed the ACCA mandatory minimum sentence of 180 months imprisonment.

D. The Appeal

Mr. Edwards timely appealed. As pertinent to this petition, Mr. Edwards argued that his ACCA sentence was illegal. Initially, pursuant to *Wooden,* he argued the issue under the plain error standard. He stated that the indictment failed to charge ACCA, and under any view of the record, the government had failed to present sufficient evidence that Mr. Edwards' prior offenses constituted three different criminal occasions. He also argued that his ACCA sentence violated the Fifth and Sixth Amendments.

While his appeal was pending, this Court issued its decision in *Erlinger*. The parties submitted supplemental briefing and supplemental authorities regarding *Erlinger*. Mr. Edwards argued that *Erlinger* dispositively showed that his ACCA sentence was erroneous and violated the Fifth and Sixth Amendments. He also argued that the error under *Erlinger* was structural error, thus obviating the need to engage in plain error review. If the error was not structural, however, Edwards reiterated based on the entire record, that there was not sufficient evidence under plain error or any standard of review that the 2010 drug offense and the 2010 aggravated battery offense were different occasions because the only "fact" in the record regarding the 2010 drug offense was a date of arrest.

E. The Appellate Decision

After full briefing and oral argument, this Court issued a decision, *United States v. Edwards*, 142 F.4th 1270 (11th Cir. 2025), which affirmed Mr. Edwards'

conviction and sentence. The court found that the ACCA sentence was not plainly erroneous under *Erlinger*. *Edwards*, 142 F.4th at 1283. The court reasoned that *Erlinger* did not add a different-occasions "element" to ACCA. *Edwards*, 142 F.4th at 1281 n.5. Rather, the court found that *Erlinger* only resolved the "who decides" question for the ACCA "sentencing" issue. *Id.* Based on that rationale, the Eleventh Circuit maintained that *Erlinger* was only a "sentencing issue" for which plain error and "whole record" review was appropriate. *Id.* at 1283.

Based on this foundation, the Eleventh Circuit framed the plain error prejudice test for the *Erlinger* issue as requiring the defendant to show "a reasonable probability that a jury would have concluded that the defendant committed three predicate crimes on fewer than three occasions." *Id.* at 1282. The Eleventh Circuit stated it was looking at the "whole record," including PSI facts, to estimate what a theoretical jury would have concluded. Moreover, the Eleventh Circuit went one step beyond a "whole record" review by suggesting that – when there was insufficient evidence of ACCA at the trial level – that a defendant was required to prove plain error prejudice by submitting new evidence of relatedness at the appellate level through a motion to "supplement the record." *Id.* at 1284.

In its opinion, the Eleventh Circuit conceded that on its whole record review, it could not tell anything about the timing of the two 2010 offenses or their geographical proximity to each other. *Id.* at 1283. Thus, it focused on whether it deemed the two 2010 offenses to be "similar" or "intertwined." As there was no

actual evidence in the record on these issues, the court instead surmised that the "purpose and character" of the two 2010 charges appeared to be different – i.e., a drug trafficking crime versus a domestic dispute. *Id.* It also found indications of separateness in the fact that the arrest dates were two days apart, the cases had non-consecutive docket numbers and different adjudication dates, and the cases were never formally consolidated. *Id.* at 1284.

Although at oral argument one judge acknowledged that domestic violence and drug offenses could easily be related, the Eleventh Circuit's written opinion did not make any such acknowledgement. Instead, the Eleventh Circuit stated that there was no evidence in the record to indicate a connection between the two 2010 convictions. *Id*. Thus, although Mr. Edwards had argued that the lack of evidence at the district court level clearly established that a jury would not find (indeed, could not find) that the 2010 offense were committed on different occasions -- the Eleventh Circuit -- nonetheless -- concluded otherwise. Accordingly, the court affirmed Mr. Edwards' conviction and ACCA sentence. *Id.* at 1285.

This petition follows.

REASON FOR GRANTING THE WRIT

I. This Court should resolve whether errors under *Erlinger v. United States*, 602 U.S. 821 (2024) are structural errors or whether they are subject to harmless or plain error review.

A. This Court's precedents and *Erlinger,* itself, suggest that the error is structural.

The holistic and far-reaching nature of *Erlinger* error in the different occasions context suggests that such error is structural, and therefore, not subject to harmless or plain error review. This Court's prior precedents and its opinion in *Erlinger* strongly suggest that structural error should govern.

In the *Erlinger* case, both the oral argument and the majority opinion gave strong indications that *Erlinger* error was wide-ranging and had significant impact on the framework of criminal proceedings such that it constituted structural error. During oral argument, Justice Gorsuch raised the issue outright, asking whether a failure to subject the different-occasions question to the Constitution's jury-trial requirements constituted structural error. *See* Oral Arg. Tr. at 27-29, *Erlinger,* No. 23-370 (March 27, 2023). Although the *Erlinger* majority opinion authored by Justice Gorsuch and joined by five other justices did not expressly address whether the error was structural, only three justices in concurrences and dissents suggested that harmless error review was appropriate. *See Erlinger,* 602 U.S. at 849-50 (Roberts, C.J., concurring); *id.* at 859-61 (Kavanaugh, J., dissenting). And although the government argued for harmless error review at oral argument and in its brief,

the *Erlinger* majority scrupulously avoided adopting or advocating for harmless error review.

To the contrary, the Court's strong language and reasoning in *Erlinger* indicated that structural error was appropriate. To start, the Court highlighted that the consequences of failing to have a jury to decide the "different occasions" inquiry was unquantifiable and indeterminate. Under this Court's precedent, when the deprivation of the jury trial right has "consequences that are necessarily unquantifiable and indeterminate," that deprivation "unquestionably . . . qualifies as 'structural error.' " *Sullivan v. Louisiana,* 508 U.S. 275, 281-82 (1993)*; cf., United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (holding that denial of right to counsel of choice is structural error because its consequences were 'necessarily unquantifiable and indeterminate," and "[h]armless-error analysis . . . would be a speculative inquiry into what might have occurred in an alternative universe") (quoting *Sullivan,* 508 U.S. at 282).

This Court explained that this unquantifiable and indeterminate nature was inherent in the multi-factored and holistic "different occasions" inquiry as set out in *Wooden*. Because of the nuanced factors that the jury had to consider, much would depend on the type of competent evidence that was presented and how the jury interpreted such evidence in context. *Erlinger,* 144 S.Ct. at 1855 (discussing holistic nature of different occasions test and difficulties in presenting competent evidence). These variables made *Wooden's* "different occasions" test "unpredictable," and subject

to different results on similar facts, such that "reasonable doubts about its application [would] arise often." *Wooden*, 595 U.S. at 385, 397 (Gorsuch, J., concurring); *Erlinger*, 144 S.Ct. at 1855.

These problems were compounded by problems of proof. Because the different occasions element had to be proven to the jury beyond a reasonable doubt, the evidence establishing different occasions had to pass muster at trial. The government could no longer rely on *Shepard*[2] documents which were often unreliable and questionable under due process principles. *See Erlinger,* 144 S.Ct. at 1855 (discussing problems with *Shepard* documents). Not only did such materials raise hearsay and other evidentiary problems, but such materials were not fair sources of evidence because at the time *Shepard* documents were created, defendants were generally litigating different prior offenses completely removed from the circumstances and time of a subsequent federal offense for possessing a firearm under 18 U.S.C. §922(g)(1). According, the defendants litigating those prior offenses did not have "fair notice" that the non-elemental facts of those prior offenses -- such as the date, the location, or other non-elemental circumstances – would have legal consequences at some future date in an unrelated §922(g)(1) case. *Erlinger,* 144 S.Ct. at 1856. Therefore, defendants did not have an incentive to correct any factual inaccuracies in those records, and would likely have not risked arguing about

[2] *Shepard v. United States,* 554 U.S. 13 (2005).

irrelevant matters while seeking the favor of prosecutors and judges in the prior proceedings. Consequently, the imposition of ACCA convictions years later based on such facts found in *Shepard* documents raised the issue of fundamental unfairness and due process concerns and of deficient evidentiary records which could not support a jury verdict. Under *Erlinger*, such problematic evidence could no longer be the centerpiece of the government's ACCA prosecutions, and the prohibition of such murky evidence would undoubtedly impact the trial record and make harmless error review difficult, if not impossible, in many cases. *Id.; See also* Oral Arg. Tr. at 28, *Erlinger,* No. 23-370 (March 27, 2023) (Justice Gorsuch asking, "How do you do harmless error review when you don't have a trial record?).

The *Erlinger* decision further suggested structural error because allowing a judge to make the "different occasions" determination affected interests that transcended the defendant's case and also raised due process and fundamental fairness concerns. This Court in *Erlinger* made clear that this was not some minor error in trial procedure, rather it was error that affected the whole framework of the criminal proceedings. Failure to charge or prove ACCA's different occasions element meant that the defendant was sentenced for an aggravated ACCA offense that was not charged in the indictment, proven to a jury, or admitted to by the defendant. *See Alleyne v. United States,* 570 U.S. 99, 115 (2013) (where a fact "aggravates the legally prescribed range of allowable sentences, it constitutes an element of a separate, aggravated offense). The error, thus, was not a simple case of a court failing to

instruct a jury on an element of a charged offense, but rather of failing to require formal charges or proof of an aggravated offense in its entirety.

This Court in *Erlinger* made clear that the failure to allege the essential elements of ACCA was an error that began with a defective indictment, noting:

> Should an "indictment or 'accusation . . . lack[] any particular fact which the laws ma[k]e essential to the punishment,' it [the indictment or accusation] was treated as 'no accusation' at all." *Haymond*, 588 U. S., at 642, 139 S. Ct. 2369, 204 L. Ed. 2d 897 (quoting 1 J. Bishop, Criminal Procedure §87, p. 55 (2d ed. 1872)

Erlinger, 602 U.S. at 831 (cleaned up).

Accordingly, without specifically charging ACCA's essential elements such as the different occasions element in the indictment, jeopardy could only attach to the lesser charge that was set out in the indictment, i.e., a simple 18 U.S.C. §922(g)(1) offense. *Cf., Stirone v. United States,* 361 U.S. 212, 218 & n.3 (1960).

This Court also made clear that the error continued throughout the proceedings because the judges that resolved ACCA's different occasions element usurped the jury's function – not just by failing to instruct on an element – but by actually deciding the element in lieu of the jury, and using the wrong burden of proof while doing so. "Judges may not assume the jury's factfinding function for themselves, let alone purport to perform it using a mere preponderance-of-the-evidence standard." *Erlinger,* at 1851-52. The Court further likened a judge's decision on the issue to a directed verdict because such error completely denied the Sixth Amendment jury trial right as to that element which is impermissible structural error. The Court explained:

> There is no efficiency exception to the Fifth and Sixth Amendments. In a free society respectful of the individual, a criminal defendant enjoys the right to hold the government to the burden of proving its case beyond a reasonable doubt to a unanimous jury of his peers " 'regardless of how overwhelmin[g]' " the evidence may seem to a judge.

Erlinger, at 1856*, citing Rose v. Clark,* 478 U.S. 570, 578 (1986).

The Court's strong language alluding to fundamental errors at every stage of the criminal proceedings is doubly significant given that the Court could have avoided such discussions altogether and simply remanded the case for harmless error review pursuant to *Washington v. Recuenco,* 548 U.S. 212 (2006) or *Neder v. United States,* 527 U.S. 1 (1999) – both cases argued and briefed by the government. But as mentioned earlier, conspicuously absent from the *Erlinger* opinion was acceptance of the harmless error standard.

Finally, in the context of a case resolved by a plea, *Erlinger* error interfered with the defendant's fundamental rights to control his defense and to make a knowing and voluntary plea to an aggravated offense. The problems arising from *Erlinger* error meant that the defendant was not given notice of the aggravated charges in his indictment, and he was not required to admit to elemental facts that supported the aggravated offense. Such interference with the defendant's autonomy and decision-making abilities is recognized as structural error. *See McCoy v. Louisiana,* 584 U.S. 414, 427 (2018) ("Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural.' ").

Thus at every turn, *Erlinger* error runs contrary to the bedrock principles of the justice system as guaranteed by the Fifth and Sixth Amendments, and it obscures what the proceedings are about, rather than providing fair notice. Such errors produce unfair proceedings "from beginning to end" -- the very definition of structural error. *See Arizona v. Fulminante*, 499 U.S. 279, 209 (1991); *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1907 (2017), quoting *Fulminante*, 499 U.S. at 310 (structural error " 'affect[s] the framework within which the trial proceeds,'" rather than being "'simply an error in the trial process itself.'"); *Id.* at 1908 (setting out the three basic categories of structural error: 1) errors that implicate broad interests concerning the criminal justice system; 2) errors that have effects that are difficult to measure; and 3) errors that result in fundamental unfairness). Given the breadth of *Erlinger* errors, this Court should grant the petition for writ of certiorari to make clear that such errors are structural.

B. Although the circuits have ruled that *Erlinger* error is not structural, an increasing number of judges recognize otherwise.

In spite of the clear signals that *Erlinger* error is structural, several circuits have ruled otherwise. *United States v. Brown*, 136 F.4th 87 (4th Cir. 2025) (*en banc*), *cert. petition pending*, Case No. 25-5743 (conferenced for Nov. 7, 2025); *United States v. Butler,* 122 F.4th 584 (5th Cir. 2024); *United States v. Campbell,* 122 F.4th 624 (6th Cir. 2025); *United States v. Cogdill*, 130 F.4th 523 (6th Cir. 2025); *United States v. Johnson*, 114 F.4th 913 (7th Cir. 2024); *United States v. Rivers*, 134 F.4th 1292 (11th

Cir. 2025). Each court relied on *Neder v. United States,* 527 U.S. 1 (1999) and *Washington v. Recuenco,* 548 U.S. 212 (2006), to find that *Erlinger* error was on par with the typical trial error that "'infringe[d] upon the jury's factfinding role' and was 'subject to harmless-error analysis.'" *Rivers,* 134 F.4th at 1305. Each court equated the omission of ACCA's different occasions element in *Erlinger*, with other scenarios where courts have omitted different elements of an offense from jury instructions under traditional analyses under *Apprendi*, 530 U.S. 466 and *Alleyne*, 570 U.S. 99. However, these courts failed to acknowledge the unique characteristics of *Erlinger* error as explained above.

Moreover, these decisions are not without their critics. At least one circuit judge has spoken on this issue specifically in the context of *Erlinger* error. *Cogdill,* 130 F.4th 523 (6th Cir. 2025). In *Cogdill*, the defendant pled guilty to one count under 18 U.S.C. §922(g)(1). He was sentenced by a judge under ACCA. No jury ever decided whether his prior criminal offenses were committed on occasions that were different from one another. And he did not admit to any such facts. He was sentenced to 15 years imprisonment, which was 5 years above the maximum penalty he should have received for a simple §922(g)(1) conviction. Although at first affirming the sentence, after *Erlinger,* the Sixth Circuit reversed, finding that the *Erlinger* error was harmful.

Judge Clay dissented from the court's harmfulness finding. *Cogdill,* 130 F.4th at 536 (Clay, J., dissenting). Instead, he argued that *Erlinger* compelled the

conclusion that the error of having the judge, rather than the jury, make the different occasions determination was structural error. *Id.* Judge Clay found that the *Erlinger* opinion clearly indicated structural error, and he further distinguished the *Erlinger* error in a plea context from other *Apprendi* errors where the defendant had a jury trial and there was a record of proof that was presented, but the court simply failed to properly instruct the jury on the element of a charged offense. *Cogdill,* 130 F.4th at 537, distinguishing *Washington v. Recuenco,* 548 U.S. 212 (2006). Judge Clay found that plea scenarios were different because in a plea case, a reviewing court would literally have to "'hypothesize a guilty verdict that was never in fact rendered.'" *Codgill*, at 539. Such hypothetical speculation was too far removed from the criminal proceedings that actually occurred, and thus, "'would violate the jury-trial guarantee.'" *Id.* Accordingly, Judge Clay, found that the error was structural and automatic reversal was required. *Cf., United States v. Lewis,* 766 F.3d 255, 278-80 (3d Cir. 2014) (Rendell, J., dissenting) (finding that error in failing to charge or have jury determine §924(c) brandishing element was structural error), *vacated and rev'd by United States v. Lewis,* 802 F.3d 449 (3d Cir. 2015) (en banc) (Smith, J.,concurring) (joined by Judges McKee, Ambro, and Jordan) (same).

These dissenting and concurring judges understand the gravity of the error that was presented in the *Erlinger* case, just as Justice Gorsuch did. Allowing harmless and plain error to replace such foundational Fifth and Sixth Amendment protections is incompatible with the framework of the justice system. The issues

presented here are of great weight, and they warrant this court's intervention. This Court should grant the petition to make clear that the Fifth and Sixth Amendment errors committed in *Erlinger* specifically with reference to ACCA's different occasions element constitute structural error which requires automatic reversal.

II. If this Court finds that structural error is not applicable, it should establish the proper method for measuring prejudice for plain error when a defendant has pleaded guilty to the simple offense of 18 U.S.C. §922(g)(1).

In the alternative, if this Court does not find that *Erlinger* errors are structural, the Court should establish the proper test for measuring prejudice on plain error review when a defendant has pleaded guilty to the simple offense of 18 U.S.C. §922(g)(1).[3] At present, there are divergent approaches in the circuits. Under a harmless error review, the Sixth Circuit has articulated the burden as whether the record evidence shows that a jury's failure to consider the different occasions question had no effect on the sentence. *Campbell,* 122 F.4th at 632. Applying this test, the Sixth Circuit considers the whole record, including *Shepard* documents. *Id.* The Eleventh Circuit follows this approach for harmless error review, and as demonstrated in Mr. Edwards' case on plain error, it reverses the burden of proof to the defendant, but essentially asks the same question:

> [W]e ask whether the sentence would be different but for the erroneous sentencing enhancements or an inaccurate sentencing guideline range. . . . [whether] there is a reasonable probability that [the defendant]

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3 The issue in petitioner's case was limited to the prejudice prong of the plain error test.

> would have received a lighter sentence but for the error. . . . . [whether there is] a reasonable probability that a jury would have concluded that he committed the three predicate crimes on fewer than three occasions.

Edwards, 142 F.4th at 1281-82.

In contrast, the Third Circuit applies a different test. It labels the error as a "pure sentencing error" when a mandatory minimum has been imposed even though 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*). The court further asks if the error "contributed" to the sentence, and it focuses on whether the defendant's sentence would have been different if he had not been sentenced with the enhancement. *Id.* at 457, citing *Parker v. Dugger*, 498 U.S. 308, 319 (1991).

The Fourth Circuit also has a different test for prejudice if the case is resolved by way of a plea, rather than a trial. *Brown*, 136 F.4th 87. Under the Fourth Circuit's test, the court asks whether the defendant would have pleaded guilty even if the error had not occurred. Thus, in the context of *Erlinger* error, the court asks whether the defendant would have nonetheless pleaded guilty if the indictment had properly charged the ACCA offense. *Brown*, 136 F.4th 97 (quoting *Greer v. United States,* 593 U.S. 503, 508 (2021) and citing *United States v. Olano*, 507 U.S. 725, 734 (1993).

Although harmless error and plain error standards are different due to the burden of proof, these divergent tests impact the plain error analysis because each

test takes a different underling approach on how to measure the prejudice. Moreover, as seen in *Brown*, there is some overlap in these approaches that impacts both harmless and plain error standards.

In the context of *Erlinger* error on plain error review, moreover, the courts must also give due respect to the fact that this Court characterized Erlinger error as impacting foundational constitutional errors in unquantifiable and indeterminate ways. Thus the plain error burden on the defendant must be tempered by similar foundational and indeterminant interests affecting plain error principles. See *Molina-Martinez v. United States,* 578 U.S. 189, 200 (2016) (finding that erroneous guideline calculations had an indeterminate impact on foundational rights, therefore, the guideline error itself in most instances "suffice[d] to show an effect on the defendant's substantial rights"); *accord Rosales-Mireles v. United States,* 585 U.S. 129, 141-142 (applying similar reasoning for correcting a guideline error under the fourth prong of plain error review).

Accordingly, if this Court finds that *Erlinger* errors are subject to plain error review, it should grant the petition for writ of certiorari and resolve the issue of how to measure prejudice for the plain error standard.

III. The questions presented are important and recurring.

The *Erlinger* issue was pressed below by Petitioner after this Court issued the *Erlinger* decision. In pressing the issue, Petitioner argued plain error and structural error in his post-*Erlinger* supplemental filings. The Eleventh Circuit did not discuss the possibility that *Erlinger* error was structural, but instead proceeded on the assumption that plain error review applied. Given the state of the law, this Court should grant the writ to resolve the important federal question of which standard of review applies. If it finds that *Erlinger* errors constitute structural error, then it need go no further, but simply remand to the lower court for a summary reversal. If this Court applies plain error review to *Erlinger* errors, then it should resolve the circuit split that exists concerning how to measure prejudice in the *Erlinger* context, given that the petitioner pleaded guilty to an indictment that only charged the lesser 18 U.S.C. §922(g) offense.

These questions are important going forward. The question regarding the standard of review will arise frequently, and as it did here, it will often decide whether a defendant will receive relief for a fundamental constitutional violation. The Court's guidance will also have a material effect on the instant proceedings. A decision by this Court that structural error applies would entitle the Petitioner to summary reversal of his ACCA offense. Resolving the various legal issues pertaining to plain error review and prejudice, would likewise, lead to a probable

determination that the *Erlinger* errors here were harmful, necessitating vacatur of Petitioner's ACCA offense and sentence.

At the present time, another case is pending that raises the question of whether *Erlinger* error is structural. *United States v. Brown*, 136 F.4th 87 (4th Cir. 2025) (*en banc*), *cert. petition pending*, Case No. 25-5743 (conferenced for Nov. 7, 2025). That case had preserved *Erlinger* error, and thus, does not address plain error review. However a decision in the *Brown* case would impact the resolution of the issues raised herein. Thus, Petitioner requests that this Court hold the instant petition pending resolution of the *Brown* case, or alternatively, grant the instant petition to directly rule on the plain error issue.

CONCLUSION

Based upon the foregoing petition, the Court should hold this case pending resolution of *United States v. Brown*, 136 F.4th 87 (4th Cir. 2025) (*en banc*), *cert. petition pending*, Case No. 25-5743 (conferenced for Nov. 7, 2025), or alternatively, grant the instant petition for writ of certiorari to review the decision of the Eleventh Circuit in this matter.

Respectfully submitted,

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