No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARQUISE GRAHAM,

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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QUESTION PRESENTED

What is the test for reviewing for harmlessness a preserved error in the case of a guilty plea, where the error is the government's failure to charge or prove to a jury beyond a reasonable doubt a fact necessary to the punishment, in violation of the Fifth and Sixth Amendments?

PARTIES TO THE PROCEEDINGS

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

RELATED CASES

(1) *United States v. Graham*, 1:22-cr-00063 (E.D. Tenn. July 5, 2023).

(2) *United States v. Graham*, No. 23-5618 (6th Cir. Sept. 29, 2025).

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Petitioner Marquise Graham respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court 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The unpublished order of the United States Court of Appeals for the Sixth Circuit affirming the district court's judgment appears at pages 1a to 10a of the appendix to this petition and is available at 2025 WL 2767756. The judgment of the district court appears at pages 11a to 17a 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 September 29, 2025. Pet. App. 1a. On December 18, 2025, this Court granted an application (No. 25A717) to extend time for filing this petition to February 26, 2026.

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") requires a sentence of at least 15 years to life for any person who violates 18 U.S.C. § 922(g)(1) and who has previously committed at least three ACCA-qualifying predicate offenses "on occasions different from one another." Lower courts had long 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. But in *Erlinger v. United States*, 602 U.S. 821 (2024), this Court held that this approach violates the Fifth and Sixth Amendments.

In the aftermath of *Erlinger*, questions have emerged about the proper test for evaluating whether a preserved claim of constitutional error is harmless in cases where the defendant pleaded guilty. Five circuits, the Fifth, Sixth, Seventh, Eighth, and Eleventh, hold that the focus is on a hypothetical jury. They ask whether the government has proven beyond a reasonable doubt that a reasonable jury would have found the occasions-different requirement had they been asked. The Fourth Circuit, in contrast, holds that the focus is on the defendant's decisionmaking. It asks whether the government has shown that it is clear beyond a reasonable doubt that, had the

district court correctly advised the defendant of the government's true burden, he would not have pled guilty.

Regardless of approach, all of these circuits freely consider information outside the record of the plea proceeding, such as state court records relating to the prior convictions that may or may not be admissible at trial and information contained in the presentence report, with no requirement that the government establish its admissibility.

This Court should grant certiorari to bring clarity to this area of the law. These are questions of crucial importance, as there is a critical difference in this ACCA context between requiring the government to establish a hypothetical jury verdict based on any information in the record, regardless of its admissibility at trial, and requiring the government to prove what the defendant would have done had he known of the government's true burden. Absent 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. Mr. Graham's case presents an ideal vehicle in which to resolve these questions.

Proceedings below. In 2021, police were called to the Super 8 Motel in Chattanooga, Tennessee, in response to an alleged shooting. Mr. Graham was not on the scene when officers arrived, but police located him and found inside his bag a 9-millimeter pistol and ammunition, which he admitted he possessed. Mr. Graham also admitted he knew that when he possessed the firearm and ammunition, he had

previously been convicted of a felony. (Factual Basis, R. 25; Change of Plea Tr. at 12, R. 52.)

Mr. Graham was later charged in the Eastern District of Tennessee in a single-count indictment for being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). (Indictment, R. 1.) He was not charged with having previously been convicted of three or more felony offenses committed on different occasions. (*Id.*) On November 16, 2022, he pled guilty and was adjudged guilty as charged, without a plea agreement, admitting nothing but the elements of the § 922(g) offense as charged. (Presentence Report ["PSR"] ¶¶ 2, 4, 5, R. 32; Factual Basis, R. 25; Change of Plea Tr. at 5–6, 11–12.)

In the Presentence Report prepared in advance of sentencing, the Probation Office deemed Mr. Graham to be an Armed Career Criminal under 18 U.S.C. § 924(e) based on its determination that he had previously been convicted of at least three "violent felonies" "committed on different occasions." (PSR ¶¶ 20, 33.) The PSR identified as ACCA predicates a series of six convictions incurred in Hamilton County, Tennessee for conduct described as committed between the March 31, 2015 and November 9, 2015, when Mr. Graham was 17 years old, and for all of which he was arrested on the same day and later sentenced to concurrent sentences on the same day. (PSR ¶¶ 20, 42–47.) Because Mr. Graham was sentenced on the same day for all six offenses and the offenses were not separated by intervening arrests, the PSR counted all six of these offenses under the Guidelines' criminal history rules as

a single sentence, for a total of three criminal history points. (PSR ¶¶ 42–47.) *See* U.S.S.G. § 4A1.2(a)(2).

The ACCA designation had a massive effect on Mr. Graham's penalty range. It increased his statutory range from zero to ten years for the ordinary violation of § 922(g)(1), *see* 18 U.S.C. § 924(a)(2) (2020),[1] to fifteen years to life under the ACCA. (PSR ¶ 86, PageID #166.) It also catapulted his guideline range from 57 to 71 months, the range that would apply to his ordinary offense level 23 and Criminal History Category III for the § 922(g)(1) offense, (*see* PSR ¶ 32, 34, 35), to 188 to 235 months, as required by the aggravated ACCA penalty range, (PSR ¶ 87). In other words, it increased his guideline range by nearly *eleven years*.

Before sentencing, Mr. Graham objected to the ACCA designation. He acknowledged circuit precedent that (then) foreclosed his argument, but contended that because he was charged with and pled 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 in *Wooden v. United States*, 595 U.S. 360 (2022). (Def.'s Objection to PSR, R. 42.) Rather, he argued, the Fifth and Sixth Amendments require the ACCA's occasions-different requirement to be charged in the indictment and proved to the jury beyond a reasonable doubt (or admitted by Mr. Graham). (*Id.*

[1] In the Bipartisan Safer Communities Act, Congress increased the maximum penalty for violations of § 922(g) occurring after its effective date to "not more than 15 years" of imprisonment. *See* Pub. L. No. 117-159, § 12004(c), 136 Stat. 1313, 1329 (June 25, 2022), *codified at* 18 U.S.C. § 924(a)(8).

at 2–7.) Because that did not happen in his case, he argued, he could not be punished under the ACCA. (*Ibid.*)

The government did not file a response to his argument. At his sentencing hearing, Mr. Graham still did not admit that the prior burglary offenses were committed on different "occasions" as defined in *Wooden*. (*See* Sent'g Tr. at 7–10, R. 53.) He maintained 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. (*Ibid.*) He further noted, and the government confirmed as true, that the Department of Justice now agreed with Mr. Graham's position on these constitutional questions and had therefore started to charge the ACCA occasions-different fact in some cases, which had led to at least one bifurcated ACCA trial in the Eastern District of Tennessee. (*Id.* at 10–11 (AUSA: "We're very often doing that now when we know that the prior convictions constitute – most likely constitute an armed career criminal scenario.").) But it had elected not to charge the ACCA occasions-different fact in Mr. Graham's case.

The district court overruled the objection, considering itself bound by circuit precedent to do so and basing its ruling solely on the offense dates listed in the PSR. (*Id.* at 18.) It adopted the PSR's calculation of the guideline range of 188 to 235 months and sentenced Mr. Graham to a within-range ACCA sentence of 192 months' imprisonment, to be followed by five years of supervised release. (*Id.* at 19, 24–25; Judgment, R. 47.)

Mr. Graham appealed. While his appeal was pending, this Court decided *Erlinger*, confirming that his punishment under the ACCA 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").

In reaching its decision, this Court was clear that non-elemental facts contained in *Shepard* documents—such as the alleged date and location of the prior 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, the Court 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. Graham's case.

The Sixth Circuit affirmed. Pet. App. 1a–10a. In applying harmless error review, it applied its test from *United States v. Campbell*, 122 F.4th 624 (6th Cir. 2024), another case involving preserved *Erlinger* error. Pet. App. 3a–4a. Under that test, the reviewing court "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). Though *Campbell* was a guilty plea case, and though the error was preserved, the Sixth Circuit held that the reviewing court may examine information outside the record of the plea proceedings, such as *Shepard* documents and presentence reports,[2] 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 [the defendant's] sentence." *Id.* at 632–33 (citing *Greer v. United States*, 593 U.S. 503, 510–11 (2021)

[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)).

(addressing a similar but unpreserved error); *see also United States v. Durham*, 151 F.4th 821, 825, 830 (6th Cir. 2025) (per curiam).

Governed by this test, the Sixth Circuit examined non-elemental information from unknown sources (and of unknown admissibility at trial) contained in the presentence report, including dates, locations, and names of victims. Pet. App. 4a–7a. It also considered its own measure of the relative distances between the locations stated in the presentence report—information not in the record and apparently obtained through an online mapping source. Pet. App. 7a. Based on this review, the court found that "Graham's burglaries were separated by an eight-month gap and a distinct crime of robbery. This timing, combined with Graham's burglaries being at distinct locations against distinct victims, compels us to find harmless error here." *Id.* ("We conclude beyond a reasonable doubt that a reasonable jury would find that Graham's predicate crimes took place on at least three different occasions.").

REASONS FOR GRANTING THE PETITION

The lower courts are divided on the proper mode of analysis for harmless-error review in the case of a guilty plea where the constitutional error is the failure to charge and prove to a jury a fact necessary to the conviction or punishment. If the proper focus is on the hypothetical outcome of a hypothetical jury trial based on hypothetically admitted evidence, then reviewing judges replicate and compound the original constitutional error *Erlinger* forbids—by which the judge, rather than a jury, found the facts that increased the statutory penalty range. If instead the proper focus is on the defendant's decisionmaking at the plea juncture, then reviewing courts

should focus on the defendant's right to choose whether to risk trial while knowing the government's true burden. *Cf. Lee v. United States*, 582 U.S. 357, 367–68 (2017).

This Court's intervention is needed to resolve the question whether the harmless-error standard in the case of a guilty plea focuses on a hypothetical jury or instead on the defendant's decision to plead guilty, and either way, to set forth the scope of the record for review.

I. The lower courts are divided about the proper scope of harmless-error review following a guilty plea where the government failed to charge and prove to a jury a fact necessary to the punishment.

Federal Rule of Criminal Procedure 52(a) applies to preserved errors. It provides that any error "that does not affect substantial rights must be disregarded." Put another way, a preserved error must be "prejudicial" to be considered on review, which means "it must have affected the outcome of the district court proceedings." *United States v. Olano*, 507 U.S. 725, 734 (1993) (cleaned up). In the case of constitutional error, the government bears the burden of showing that the error is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). In two cases where the constitutional error was the district court's failure to instruct a jury about a required fact, this Court has held that the government meets this standard when "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder v. United States*, 527 U.S. 1, 15 (1999) (quoting *Chapman*, 386 U.S. at 24)); *Washington v. Recuenco*, 548 U.S. 212, 219–20 (2006).

The Court has not yet addressed the proper mode of analysis for harmless-error review in guilty plea cases involving an omitted element where there was no jury and no "verdict obtained." The lower courts are now divided on the proper approach to harmless-error review in these cases.

A. The Court has not addressed harmless-error review in guilty plea cases where the constitutional error is an omitted essential fact.

Up to now, this Court's explication of the harmless-error standard where the constitutional error was an omitted element (or its functional equivalent) has occurred in trial cases where harmlessness is evaluated in light of all the evidence presented at trial.

In *Neder v. United States*, the Court considered whether the omission from the jury instructions of a material element was harmless beyond a reasonable doubt. 527 U.S. 1, 18–20 (1999). There, the defendant was charged with tax fraud based on allegations of false statements of income on his tax returns (among other fraud charges) and went to trial on the offenses as charged. *Neder*, 527 U.S. at 6. The indictment also used language regarding the materiality of the false statements. *Id.* But under then-extant law, the trial court omitted the materiality element of tax fraud from the jury instructions and told the jury it need not consider the evidence of materiality presented at trial. *Id.* The jury found the defendant guilty, and on appeal, the Eleventh Circuit said the omission of the materiality element was error but applied harmless-error review and found the error harmless because the question of materiality "was not in dispute" so did not contribute to the verdict. *Id.* at 6–7. The

Supreme Court affirmed, holding that the instructional error of omitting the materiality element was subject to harmless-error review and further that the error in that case was harmless. *Id.* at 12–13, 17, 19–20. "In this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Id.* at 17.

In *Washington v. Recuenco*, 548 U.S. 212 (2006), the defendant was charged with "assault in the second degree, i.e., 'intentiona[l] assault . . . with a deadly weapon, to-wit: a handgun.'" *Id.* at 215. In addition to charging the elements of intentional assault, the trial court charged the jury to specifically find whether the defendant committed assault while "armed with a deadly weapon," though omitting from the instruction the "handgun" specified in the indictment. *Id.* at 216. The jury found the defendant guilty of the assault and answered yes to the special verdict question. *Id.* At sentencing, the court found for itself that the "deadly weapon" proven at trial was a handgun and imposed an additional three-year mandatory sentence enhancement based on that finding, whereas the special jury verdict for an unspecified "deadly weapon" only permitted a one-year enhancement. *Id.* There was no suggestion that the evidence supporting the factual finding that the defendant used a handgun came from somewhere other than the trial record, much less potentially inadmissible evidence. The Court held that the error of omitting the aggravating sentencing factor in that jury trial was, like the omission of the

materiality element in *Neder*, subject to harmless-error review. *Id.* at 218–20.

These cases built on this Court's decision in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). There, 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, it held, reviewing courts must look to the "whole record," which meant the evidence admitted at trial. *Id.* at 681, 684. It described 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." *Ibid.*

Similarly, in *Yates v. Evatt*, 500 U.S. 391, 405 (1991), the Court reaffirmed that the "entire record" referenced in harmless-error cases means 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").

B. The lower courts are deeply divided about the proper test for harmless-error review in guilty plea cases involving an omitted element.

The lower courts are now deeply divided about the proper approach to harmless error review in guilty plea cases. The Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits focus on a hypothetical jury. In varying formulations, they hold that the reviewing court asks whether the government has shown beyond a reasonable doubt that a properly instructed jury's failure to consider the different-occasions question had no effect on the defendant's sentence. *United States v. Butler*, 122 F.4th 584, 589 (5th Cir. 2024) ("Butler's sentence should be affirmed if, after careful review of the whole record . . . any rational petit jury, when presented with a proper jury instruction, would have found beyond a reasonable doubt that her prior serious drug offenses occurred on different occasions.") (cleaned up); *United States v. Campbell*, 122 F.4th 624, 632 (6th Cir. 2024) (concluding that "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"); *United States v. Johnson*, 114 F.4th 913, 917 (7th Cir. 2024) ("[I]t is not clear beyond a reasonable doubt that a properly instructed jury would have found that Mr. Johnson's January 22, 2009 robberies were

committed on different occasions."); *United States v. Bowling*, 135 F.4th 1125, 1127 (8th Cir. 2025) ("The record here shows that no reasonable jury could have found that Bowling sustained fewer than three convictions for violent felonies that were committed on occasions different from one another."); *United States v. Rivers*, 134 F.4th 1292, 1306 (11th Cir. 2025) ("The government bears the burden of showing beyond a reasonable doubt that a rational jury would have found that the defendant's prior drug offenses all were 'committed on occasions different from one another.'").[3]

These courts rely 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. They deem 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; *see also Butler*, 122 F.4th at 589; *Johnson*, 114 F.4th at 917; *Bowling*, 135 F.4th at 1126.

The Fourth Circuit, in contrast, focuses on the defendant's decision to plead guilty. In that circuit, the government must show that, "'if the District Court had correctly *advised* him of the [missing] element of the offense,'" so that he understood the government's burden at trial on the occasions-different element, "it is clear

[3] In an unpublished decision, the Second Circuit has taken the same approach. *United States v. Saunders*, No. 23-6735-cr, 2024 WL 4533359, at *3 (2d Cir. Oct. 21, 2024) ("We conclude that the district court's error was harmless because the record makes clear beyond a reasonable doubt that a rational jury would find that Saunders committed the three prior violent offenses on separate occasions.").

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*, 593 U.S. at 508 (emphasis in *Brown*), and citing *Olano*, 507 U.S. at 734).

Though these courts differ on the proper test, in reviewing *Erlinger* error they uniformly deem themselves free to consider information outside the record of the plea proceeding. They do so without regard to whether the information would be admissible at trial and consider such non-elemental information such as dates and locations contained in *Shepard* documents or recited in presentence reports—or, as here, information about the distance between offenses apparently gleaned on its own from an online map of some sort. *Campbell*, 122 F.4th at 633; *Butler*, 122 F.4th at 589; *Johnson*, 114 F.4th at 917; *Bowling*, 135 F.4th at 1127; *Rivers*, 134 F.4th at 1306. In *Campbell*, for example, the Sixth Circuit 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." 122 F.4th 633. In *Bowling*, over the objections of one of the judges, the Eighth Circuit considered offense dates set forth in the presentence report. 135 F.4th at 1127.

This freewheeling approach to evaluating the harmlessness of an *Erlinger* error in guilty plea cases stands in notable contrast to the lower courts' more careful approach in other contexts where the defendant pleaded guilty and the constitutional error related to the evidence a jury would consider. For example, when the question is whether the defendant would have pled guilty had certain challenged evidence

been properly suppressed, the harmless error standard is universally described as "whether the government has proved beyond a reasonable doubt that the erroneously denied suppression motion did not contribute to the defendant's decision to plead guilty." *United States v. Dyer*, 54 F.4th 155, 160 (3d Cir. 2022) (cleaned up) (collecting cases). Within this framework, the scope of review differs, but even the broadest scope focuses on the remaining admissible evidence and the impact of the improperly admitted evidence on the sentence imposed.

The First Circuit holds that even if the reviewing court believes it is "highly unlikely" that the improperly admitted evidence would have affected the defendant's decision to plead guilty, given "the remaining admissible evidence" against him, "a court has no right to decide for a defendant that his decision [to plead guilty] would have been the same had the evidence the court considers harmless not been present." *United States v. Molina-Gómez*, 781 F.3d 13, 25 (1st Cir. 2015); *see also United States v. Benard*, 680 F.3d 1206, 1213, 1214 (10th Cir. 2012) ("[A]n appellate court will rarely, if ever, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision [to plead guilty], unless at the time of the plea he states or reveals his reason for pleading guilty." (internal quotation marks omitted)).

While then-Judge Gorsuch disagreed with the court's "no-right-to-decide" approach, his proposed alternative of an objective assessment still focused on the remaining *admissible* evidence at trial and the impact of the error on the sentence the defendant faced. *Id.* at 1216 (Gorsuch, J., concurring in part and dissenting in

part) (citing *United States v. Dominguez Benitez*, 542 U.S. 74, 81 (2004)). He suggested that when the record contains ample admissible evidence to support a guilty verdict, the defendant might need to offer a reason, "rational or even irrational," why the improper admission of the evidence was "at all relevant to him in making his plea decision." *Id.* at 1217.

The Third Circuit more recently rejected the approaches of the First and Tenth Circuits and adopted then-Judge Gorsuch's objective approach. *United States v. Dyer*, 54 F.4th 155, 162 (3d Cir. 2022). Crucially, however, the court still confines itself to an objective evaluation of remaining admissible evidence. *Id.*

II. The Sixth Circuit is wrong.

The Sixth Circuit is wrong in two ways. It is wrong to focus on a hypothetical jury, and it is wrong to evaluate a preserved error the same way it evaluates an unpreserved error.

A. The Sixth Circuit is wrong to focus on hypothetically admissible evidence hypothetically presented to a hypothetical jury for preserved errors.

In *Greer v. United States*, 593 U.S. 503 (2021), the Court explicitly applied differing standards for plain error review in a jury trial case versus a guilty plea case. For the defendant who went to trial, his burden on review for plain error was to "show that, but for the [] error in the jury instructions, there is a reasonable probability that a jury would have acquitted him." *Id.* at 510. For the defendant who pleaded guilty, in contrast, his burden was to show that "but for the [] error during the plea colloquy, there is a reasonable probability that he would have gone to trial

rather than plead guilty." *Id.* For both, the focus of the inquiry was the actual proceeding in which the error occurred (trial versus plea proceeding)—not a hypothetical proceeding. And for both, it was the *unpreserved* nature of the error that allowed consideration of information outside the record of the trial or plea colloquy. *Id.* at 511. As the Court explained, it would be illogical to categorically assume that had the government known of its burden, it would not have introduced (or attempted to introduce) evidence of the omitted element at trial. *Id.* Rather, the defendant could have preserved the error and offered reasons why any evidence outside the record proceeding would have been irrelevant or unreliable at trial (i.e., inadmissible under the rules of evidence). *Id.*

Importantly, Justice Sotomayor took care to make clear that the test is different for the defendant who *preserved* the error. In that case, the burden shifts to the government to show beyond a reasonable doubt that the error is harmless. *Id.* at 518 (Sotomayor, J., concurring). In a trial case, this means the government must show beyond a reasonable doubt that the jury would have found the omitted element, and further that the harmless-error review is limited to the evidence at trial. *Id.* (Sotomayor, J., concurring) ("[I]f the Government fails to carry its burden, over the defendant's objection, appellate courts cannot correct that shortcoming by looking to incriminating evidence the Government never submitted to the jury.") While Justice Sotomayor did not expressly articulate the harmless-error test for the defendant who pleaded guilty, this same logic dictates that the government must prove beyond a reasonable doubt that the defendant would still have pleaded guilty had he been

charged with the omitted element and been advised of the government's burden to prove it. *Cf. United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004).

Unlike the Sixth Circuit, the Fourth Circuit correctly tracks this logic. It held that in the case of *Erlinger* error where the defendant pleaded guilty to the underlying § 922(g)(1) offense, "the harmless-error burden is different, requiring that the government show that, 'if the District Court had correctly *advised* him of the [missing] element of the offense,' it is clear beyond a reasonable doubt that '*he would not have pled guilty*.'" *United States v. Brown*, 136 F.4th 87, 97 (4th Cir. 2025) (quoting *Greer*, 593 U.S. at 508 (emphasis in *Brown*), and citing *United States v. Olano*, 507 U.S. 725, 734 (1993)). Accordingly, the Fourth Circuit focused on whether the defendant 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).[4]

[4] More recently, the Sixth Circuit has acknowledged that it has perhaps gone the wrong way. In *United States v. Loines*, 165 F.4th 475 (6th Cir. 2026), the court suggested that the proper test in a similar omitted-element analysis "may well" be whether the government has shown "beyond a reasonable doubt that [the] defendant still would have pleaded guilty if the district court had 'correctly' explained that the defendant had a jury-trial right for the facts that triggered the statutory enhancement." *Id.* at 483 (citing *Greer*, 593 U.S. at 508); *see also United States v. Bradley*, No. 23-5440, 2025 WL 2658388, at *2 (6th Cir. Apr. 17, 2025), *cert. denied*, No. 25-5654 (U.S. Oct. 20, 2025) (citing *Greer*, 593 U.S. at 508 (quoting in turn *Dominguez Benitez*, 542 U.S. at 83)). The possibility of a future course-correction by the Sixth Circuit, however, will not resolve the split that would remain.

But the Fourth Circuit, like the Sixth Circuit, went on to consider information in the presentence report about the defendant's criminal history to conclude for itself that the defendant would still have pleaded guilty, with that determination influenced by the fact that the defendant did not object to the factual "data" about the prior convictions in the presentence report and by its view of what a jury would have found. *Id.* at 98. The court reasoned that "the possibility of a favorable verdict on the 'different occasions' issue would have been so exceedingly remote as to be practically irrelevant, we cannot fathom that Brown would have traded the benefit of pleading guilty for such long odds." *Id.* at 99 (concluding that "there is no doubt that Brown would have pleaded guilty if the indictment had alleged that he committed his prior robberies on three different occasions and if he had been informed that he was entitled to have a jury find that fact beyond a reasonable doubt").[5]

The proper mode of analysis in a guilty plea case involving failure to charge and prove an essential element would better track the approach to assessing prejudice due to erroneous advice of counsel at the plea stage. That scenario is most like the one here: the error concerns erroneous advice about the consequences of conviction after pleading guilty, and the question is whether the defendant would have opted for trial had he known of those consequences. In these circumstances, "[r]ather than asking how a hypothetical trial would have played out absent the

[5] While the Fourth Circuit is right about the standard, it is wrong to decide for itself what a given person would do at the guilty plea stage, especially when it is based on information whose admissibility the defendant contests and that has never been established. *Cf. Greer*, 593 U.S. at 511. *See* Part II.B, *infra*.

error," the Court considers "whether there was an adequate showing that the defendant, properly advised, would have opted to go to trial." *Lee v. United States*, 582 U.S. 357, 365, 367–68 (2017) (citing *Hill v. Lockhart*, 474 U.S. 52, 60 (1985)). This is because "[t]he decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea," where even the most improbable chance of success may not be reason enough to plead guilty. *Id.* at 367 ("When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive."); *id.* ("[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."). When a court is not asking what a hypothetical jury would have done but "instead asking what an individual defendant would have done, the possibility of even a highly improbable result may be pertinent to the extent it would have affected his decisionmaking." *Id.* at 368. Even a defendant whose "prospects of acquittal were grim" can show that an error at the plea stage affected his decisionmaking. *Id.* at 365.

The difference here is that the burden would be on *the government* to show that the error at the plea stage would not have affected the defendant's decisionmaking. This higher burden is appropriately commensurate with the fact that the defendant asserted his constitutional rights but because he was wrongly denied, suffered severe consequences.

B. The Sixth Circuit is wrong to consider any information in the entire record, regardless of its admissibility, when evaluating a preserved constitutional error relating to an omitted element.

In *Erlinger v. United States*, 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." 602 U.S. 821, 834 (2024). "To hold otherwise," "would intrude on a power the Fifth and Sixth Amendments reserve to the American people." *Id.* at 835. 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)). 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, standing alone, form the basis of an "occasions different" finding. *Id.* at 841–42 (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").

The Sixth Circuit construes 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." *Campbell*, 122 F.4th at 632. In its view, "*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,'" regardless of

admissibility, the court cited this Court's decision in *Greer*. *Id.* at 632–33 (citing *Greer*, 593 U.S. at 510–11).

But *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 v. Louisiana*, 508 U.S. 275, 279 (1993), 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 greater 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.

For this reason, not all judges agree that *Erlinger* error can be found harmless based solely on *Shepard* documents (or on information in presentence reports presumably derived from them). 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 plain-error analysis in *Greer*, allowing consideration of information outside the record of the plea proceeding, "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)).

Elsewhere, Judge Kelly in the Eighth Circuit recognizes that a "defendant's decision not to challenge certain facts contained in a presentence report says nothing about whether evidence of those same facts would be admissible at a trial." *United States v. Bowling*, 135 F.4th 1125, 1127 (8th Cir. 2025) (Kelly, J., concurring). She would not permit reliance on information in the presentence report, even if uncontested, but instead would require the government "to explain what evidence it would permissibly submit to a jury on the factors outlined in *Wooden v. United States*, 595 U.S. 360, 369 (2022)." *Id.* Without that proof, the court is left "'[w]ith . . . no confidence about what a jury might have found.'" *Id.* (quoting *United States v. Stowell*, 82 F.4th 607, 613 (8th Cir. 2023) (en banc) (Erickson, J., dissenting)).

These judges' concerns reflect the incoherence of allowing appellate judges to rely on evidence of unknown admissibility outside the record of the plea proceeding when conducting harmless-error review in omitted-element cases. 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*, 151 F.4th 821, 837–40 (6th Cir. 2025) (Moore, J., dissenting in part). Or, as in this case, they are engaging in independent factfinding about the relative distances between prior offenses by plugging addresses identified in the presentence report into an online mapping service, when the record contains no information about distance. The result is that the burden of shouldering the cost of the constitutional errors shifts from the government to the defendant, at pain of new judicial factfinding by the appellate court, even though the defendant objected to the judicial factfinding at every turn. All that matters is that the prosecutor, the sentencing judge, and at least two appellate judges personally believe, perhaps after a look at a Google map, 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.

Not only did *Erlinger* reject this approach, 602 U.S. at 842, but it cannot be squared with the Court's suggestion in *Greer* about the proper approach. It suggested there that when the defendant has preserved the error, evidence outside the record of the plea proceeding must be relevant and admissible under the rules of evidence. 593 U.S. at 511. And there are valid questions about whether non-elemental information contained in *Shepard* documents is admissible. *See United States v. Hansel*, No. 8:23-cr-6-MSS-AEP (M.D. Fla. Oct. 26, 2023) (Doc. 50) (judgment of acquittal entered on ACCA charge after finding *Shepard* documents inadmissible).

III. This case presents an ideal vehicle to resolve this extremely important question.

This is an excellent vehicle to decide the question presented. Mr. Graham's case perfectly illustrates the ACCA's severity, as it increased his guideline range from 57 to 71 months to 188 to 235 months. The court of appeals rejected Mr. Graham'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.

The questions presented are outcome determinative for Mr. Graham. If the Court holds that the proper standard is whether the government has proven beyond a reasonable doubt that Mr. Graham would still have pleaded guilty, or holds that the reviewing court in a guilty plea case like this one may not consider non-elemental information in *Shepard* documents or presentence reports, or both, Mr. Graham is entitled to reversal and remand for resentencing for the § 922(g)(1) offense.

By any measure, a defendant charged under the ACCA and advised of the government's burden to prove the occasions-different element would not be irrational to insist on a trial rather than plead guilty to the ACCA. As in this case, the ACCA can drastically increase the guideline range by ten or more years. Its outsized impact on sentencing is not unusual and is one reason the prospect of the ACCA's mandatory penalty has more influence on the decision to plead guilty or go to trial than any other mandatory minimum. The trial rate for offenders subject to the ACCA is 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. When the choice is to plead guilty to an offense carrying a 15-year mandatory minimum and guideline minimum of 188 months, the choice to go to trial instead may be entirely rational.

A person properly charged and advised under the ACCA also would have considered the possibility that the non-elemental information in the *Shepard* documents would be deemed inadmissible at trial, as they have been in other cases. *E.g.*, *United States v. Hansel*, No. 8:23-cr-6-MSS-AEP (M.D. Fla. Oct. 26, 2023) (Doc. 50) (after finding *Shepard* documents inadmissible, entering judgment of acquittal on the ACCA enhancement "because the Government was unable to provide competent evidence of the same"); *see also Erlinger*, 602 U.S. at 894 (Jackson, J., dissenting) (outlining potential difficulties in amassing sufficient reliable evidence to prove different occasions). In the court below, for example, Mr. Graham maintained that the government could not prove to a jury the information in the *Shepard* documents, which he argued undermined any conclusion of harmlessness. He argued that the information regarding the purported locations, objects identified as stolen, and victims' names, to the extent they came only from *Shepard* documents such as indictments, are not elements of his prior offenses so would likely be inadmissible

hearsay, Fed. R. Evid. 802, 803(22), as well as a potential Confrontation Clause violation.

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.

Finally, the issue will not go away with the resolution of pipeline *Erlinger* cases. Courts will continue to face in other contexts preserved claims about whether a given fact must be pled and proven to a jury. *E.g.*, *Loines*, 165 F.4th at 483–84 (considering fact required for enhanced punishment under 21 U.S.C. § 841(b)).

This Court should clarify the approach to harmless-error review in guilty plea cases where the error is the failure to plead and prove to a jury a fact essential to the punishment. This is an ideal case for doing so.

CONCLUSION

The petition for a writ of certiorari should be granted.

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