

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CODY BALLINGER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JENNIFER NILES COFFIN
Appellate Chief
Federal Defender Services
of Eastern Tennessee, Inc.
605 Chestnut St., Suite 1310
Chattanooga, TN 37450
(423) 756-4349

QUESTIONS PRESENTED

In *Neder v. United States*, 527 U.S. 1 (1999), the Court held that the failure to submit to the jury an essential element of the offense charged is not structural error, but rather subject to harmless-error review. In conducting that review, appellate judges examine the trial record and decide either that the government has shown beyond a reasonable doubt that the jury verdict would have been the same absent the error or that “the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.” *Id.* at 19. Justice Scalia dissented, arguing that when “we judges” decide that the defendant “is unquestionably guilty,” the defendant has been deprived of his fundamental right to a jury trial on every element. *Id.* at 31–32 (Scalia, J., dissenting in part, joined by Souter & Ginsburg, JJ.)

The questions presented here are:

I. Should the Court overrule *Neder v. United States*, 527 U.S. 1 (1999), as inconsistent with the bedrock Fifth and Sixth Amendment principles underlying *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny?

II. If *Neder* survives, what is the proper test for harmless-error review following a guilty plea where the government failed to charge and prove to a jury a fact necessary to the punishment, in violation of the Fifth and Sixth Amendments?

PARTIES TO THE PROCEEDINGS

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is provided below:

United States of America

Cody Ballinger

RELATED CASES

- (1) *United States v. Ballinger*, 1:22-cr-00025 (E.D. Tenn. June 21, 2023).
- (2) *United States v. Ballinger*, No. 23-5579 (6th Cir. Sept. 16, 2025).

TABLE OF CONTENTS

QUESTION PRESENTED.....	ii
PARTIES TO THE PROCEEDINGS.....	iii
RELATED CASES.....	iii
TABLE OF AUTHORITIES.....	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	9
I. The Court should overrule <i>Neder</i>	11
A. <i>Neder</i> 's approach was dubious at the outset.	12
B. <i>Apprendi</i> and its progeny confirm that allowing appellate judges to find the facts necessary to determine guilt of an uncharged offense or to impose a sentence enhancement violates the Fifth and Sixth Amendments.	15
II. The lower courts are divided about the proper approach to harmless-error review following a guilty plea where the government failed to charge and prove to a jury a fact necessary to the punishment.	19
A. The lower courts are divided about the proper approach.	19
B. The Sixth Circuit is wrong.	24
1. The Sixth Circuit is wrong to focus on hypothetically admissible evidence hypothetically presented to a hypothetical jury for preserved errors.	25
2. 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.	27

III. This case presents an ideal vehicle to resolve these extremely important questions.	35
CONCLUSION	38
APPENDIX	
Sixth Circuit Order Affirming the District Court’s Judgment, <i>United States v. Ballinger</i> , No. 23-5579 (6th Cir. Sept. 16, 2025)	1a
Sixth Circuit Order Denying Rehearing En Banc <i>United States v. Ballinger</i> , No. 23-5579 (6th Cir. Sept. 16, 2025)	7a
District Court Judgment, <i>United States v. Ballinger</i> , No. 1:22-cr-00025 (E.D. Tenn. June 21, 2023)	8a

TABLE OF AUTHORITIES

CASES

<i>Alleyne v. United States</i> , 570 U.S. 99 (2013).....	15
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	ii, 14
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004).....	14, 15
<i>Chapman v. California</i> , 386 U.S. 18 (1967).....	7, 13
<i>Cunningham v. California</i> , 549 U.S. 270 (2007).....	14
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673 (1986).....	19, 20
<i>Erlinger v. United States</i> , 602 U.S. 821 (2024).....	3, 7, 11, 14, 18, 27, 28, 31, 34, 36
<i>Freeze v. State</i> , 827 N.E.2d 600 (Ind. Ct. App. 2005).....	17
<i>Greer v. United States</i> , 593 U.S. 503 (2021).....	8, 22, 25, 26, 27, 28, 30, 31, 34
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985).....	29
<i>Jeffries v. State</i> , 640 S.W.2d 854 (Tenn. Crim. App. 1979)	5
<i>Lee v. United States</i> , 582 U.S. 357 (2017).....	10, 29, 36
<i>Medina v. People</i> , 163 P.3d 1136 (Colo. 2007)	17
<i>Neder v. United States</i> , 527 U.S. 1 (1999).....	ii, 3, 7, 11, 12, 13, 17, 21, 32
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002).....	14
<i>Rose v. Clark</i> , 478 U.S. 570 (1986).....	27
<i>Shepard v. United States</i> , 544 U.S. 13 (2005).....	8
<i>Southern Union Co. v. United States</i> , 567 U.S. 343 (2012).....	15
<i>State v. Schmeal</i> , 466 P.3d 490 (Kan. Ct. App. 2020).....	17
<i>State v. Vickers</i> , 985 S.W.2d 1 (Tenn. Crim. App. 1997)	5

<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993).....	16, 30
<i>United States v. Beasley</i> , 163 F.4th 403 (7th Cir. 2025).....	18
<i>United States v. Benard</i> , 680 F.3d 1206 (10th Cir. 2012)	24
<i>United States v. Booker</i> , 543 U.S. 220 (2005).....	14
<i>United States v. Bowling</i> , 135 F.4th 1125 (8th Cir. 2025).....	18, 21, 22, 23, 33
<i>United States v. Bradley</i> , No. 23-5440, 2025 WL 2658388 (6th Cir. Apr. 17, 2025).....	35
<i>United States v. Brown</i> , 136 F.4th 87 (4th Cir. 2025).....	18, 22, 26, 27, 28
<i>United States v. Butler</i> , 122 F.4th 584 (5th Cir. 2024).....	18, 21, 22, 23
<i>United States v. Campbell</i> , 122 F.4th 624 (6th Cir. 2024).....	7, 8, 11, 18, 21, 22, 28, 31, 32
<i>United States v. Cogdill</i> , 130 F.4th 523 (6th Cir. 2025).....	16, 32
<i>United States v. Dominguez Benitez</i> , 542 U.S. 74 (2004).....	24, 26, 27
<i>United States v. Durham</i> , 151 F.4th 821 (6th Cir. 2025).....	8, 34
<i>United States v. Dyer</i> , 54 F.4th 155 (3d Cir. 2022)	23, 24
<i>United States v. Hansel</i> , No. 8:23-cr-6-MSS-AEP (M.D. Fla. Oct. 26, 2023)	35, 36
<i>United States v. Haymond</i> , 588 U.S. 634 (2019).....	15
<i>United States v. Johnson</i> , 114 F.4th 913 (7th Cir. 2024).....	21, 22
<i>United States v. Legins</i> , 34 F.4th 304 (4th Cir. 2022).....	15, 18
<i>United States v. Kimbrough</i> , 138 F.4th 473 (6th Cir. 2025).....	33
<i>United States v. Loines</i> , 165 F.4th 475 (6th Cir. 2026).....	27, 37
<i>United States v. Molina-Gómez</i> , 781 F.3d 13 (1st Cir. 2015).....	23
<i>United States v. Olano</i> , 507 U.S. 725 (1993).....	22, 26, 30

<i>United States v. Rivers</i> , 134 F.4th 1292 (11th Cir. 2025)	18, 21, 22
<i>United States v. Saunders</i> , No. 23-6735-cr, 2024 WL 4533359 (2d Cir. Oct. 21, 2024)	21
<i>United States v. Sosa</i> , 448 F. App'x 605 (6th Cir. 2012)	8
<i>United States v. Stowell</i> , 82 F.4th 607 (8th Cir. 2023) (en banc).....	33
<i>United States v. Thomas</i> , 142 F.4th 412 (6th Cir. 2025)	16, 32, 33
<i>United States v. Triana</i> , 468 F.3d 308 (6th Cir. 2006)	7
<i>Washington v. Recuenco</i> , 548 U.S. 212 (2006).....	7, 11, 21
<i>Wooden v. United States</i> , 595 U.S. 360 (2022).....	6, 33
<i>Yates v. Evatt</i> , 500 U.S. 391 (1991).....	20, 30

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V	ii, 2, 3, 4, 10, 15, 27, 30, 31
U.S. Const. amend. VI	ii, 2, 3, 4, 7, 10, 14, 15, 16, 17, 27, 30, 31
18 U.S.C. § 922(g)	ii, 2, 3, 5, 6, 26, 35
18 U.S.C. § 924(a)(2) (2021)	2, 6
18 U.S.C. § 924(a)(8)	6
18 U.S.C. § 924(e)	3, 5
21 U.S.C. § 841(b)	37
28 U.S.C. § 1254(1)	2
Bipartisan Safer Communities Act, Pub. L. No. 117-159, div. A, tit. II, § 12004(c), 136 Stat. 1313 (June 25, 2022)	6
Tenn. Code Ann. § 40-13-207	5

OTHER AUTHORITIES

U.S. Sentencing Commission, <i>Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System</i> (2018)	36
U.S. Sentencing Commission, <i>Quick Facts — Felon in Possession of a Firearm</i> (2022)	37

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CODY BALLINGER,

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

Petitioner Cody Ballinger 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 published decision and judgment of the United States Court of Appeals for the Sixth Circuit affirming the district court's judgment appears at pages 1a to 6a of the appendix to this petition and is available at 155 F.4th 671. The order denying rehearing en banc appears on page 7a of the appendix. The judgment of the district court appears at pages 8a to 14a 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 16, 2025, Pet. App. 1a., and the order denying a petition for rehearing was entered on December 16, 2025, Pet. App. 7a. On March 9, 2026, this Court granted an application (No. 25A975) to extend time for filing this petition to May 15, 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.

Relying on this Court’s decision in *Neder v. United States*, 527 U.S. 1 (1999), the courts of appeals have held that *Erlinger* error is not structural. In conducting their harmless-error review, appellate judges examine information in the entire record—including presentence reports and *Shepard* documents, regardless of their admissibility at trial—to decide for themselves that the defendant committed three ACCA predicates on different occasions so is subject to the ACCA’s enhanced penalty. Their approach confirms what Justice Scalia recognized from the outset: *Neder*

permits unconstitutional factfinding by appellate judges. The time has come to correct *Neder*'s error. Appellate judges may not, consistent with the Fifth and Sixth Amendments, find for themselves the facts necessary to establish an uncharged element never submitted to the jury or admitted by the defendant. *Neder* should be overruled.¹

If instead *Neder* remains good law, an important question remains about the proper test in guilty plea cases for evaluating whether the government has shown beyond a reasonable doubt that a preserved claim of constitutional error is harmless. Does the reviewing court ask what a hypothetical jury would have done had the error not occurred, as the Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits hold? Or must it ask instead whether the error affected the defendant's decision to plead guilty, as the Fourth Circuit holds? And either way, may the court 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 or information contained in the presentence report, with no requirement that the government establish its admissibility?

This Court should grant certiorari to answer these questions of crucial importance. 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. Ballinger's case presents an ideal vehicle.

¹ This question is also presented in *Storey v. United States*, No. 25-7216 (pending).

Proceedings below.

1. In 2023, Cody Ballinger pleaded guilty in the Eastern District of Tennessee to a one-count indictment charging him with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). (Indictment, R. 1.) At the plea proceeding, he admitted nothing but the elements of the § 922(g) offense as charged. (Revised Presentence Report [“PSR”] ¶¶ 1, 3, R. 49; Factual Basis, R. 35; Change of Plea Tr. at 5-6, 11, R. 58.)

2. At sentencing, over Mr. Ballinger’s persistent objection, the district court followed then-binding circuit precedent and found him to be an Armed Career Criminal under 18 U.S.C. § 924(e) (“ACCA”) based on its factual determination, by a preponderance of the evidence, that he had previously been convicted of at least three “violent felonies” (Tennessee burglaries) committed on occasions different from one another. (Def.’s PSR Objection, R. 47; Sent’g Tr. at 2-4, 5-6, 8-9, R. 59.) The court relied on information in the PSR, apparently derived from *Shepard* documents or possibly other unknown documents, which set forth differing “on or about” offense dates for the burglaries,² identified the type of structure unlawfully entered for some

² Under Tennessee law, the offense date is not an element. Tenn. Code Ann. § 40-13-207. When an indictment alleges that a crime occurred “on or about” a specific date, the proof at trial can show that the crime in fact occurred on a different date months or even a year away from the alleged date. The only requirement is that the date alleged in the indictment and the date revealed by the evidence at trial both occurred prior to the filing of the indictment. *State v. Vickers*, 985 S.W.2d 1, 9 (Tenn. Crim. App. 1997) (conviction upheld where indictment alleged a taking “on or about April 18, 1990,” but evidence at trial showed taking occurred in August 1990, because “[i]t is immaterial whether the taking occurred in April or August, both dates being prior to the filing of the indictment”); *Jeffries v. State*, 640 S.W.2d 854, 856 (Tenn. Crim. App. 1979) (conviction upheld where indictment alleged crime occurred “on the 12th day

(e.g., garage, outbuilding, carport, workshop, chicken house), and identified different victims by name. (PSR ¶¶ 35, 36.)³ For all but one of the burglaries, Mr. Ballinger was convicted and sentenced on the same day. (PSR ¶¶ 29, 35, 36.)

Mr. Ballinger pointedly did not admit that the PSR's descriptions of the prior offenses established that they were committed on different occasions, which under *Wooden v. United States*, 595 U.S. 360 (2022), is governed by a multi-factored, fact-laden test assessing the offenses' character, purpose, and relationship to one another. (Sent'g Tr. at 4, 5, R. 59.) He maintained that before the ACCA penalty may be imposed, the government must charge the occasion-different fact and submit it to a jury for a finding beyond a reasonable doubt. (*Id.* at 2-4.) Because that had not occurred, he insisted, the ACCA penalty could not be imposed based on the judge's factfinding under *Wooden*.

3. The ACCA designation increased the statutory penalty range from zero to ten years for the ordinary violation of § 922(g)(1), 18 U.S.C. § 924(a)(2) (2021),⁴ to fifteen years to life under the ACCA. (PSR ¶ 99.) It also tripled the effective guideline range from 63 to 78 months (PSR Addendum, R. 48) to 180 to 210 months, as required

of February 1978,” but evidence established that it occurred on February 12, 1977, because “the error of substituting ‘1978’ for ‘1977’ is inconsequential” to the conviction).

³ There was no information in the PSR about the locations of the burglaries or their relative distance from one another.

⁴ 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).

by the aggravated ACCA penalty range. (PSR ¶ 63.) The district court sentenced Mr. Ballinger to the ACCA minimum sentence of 180 months, to be followed by five years of supervised release. (Judgment, R. 53.)

4. Mr. Ballinger appealed. While Mr. Ballinger’s appeal was pending, the Supreme Court decided *Erlinger v. United States*, 602 U.S. 821 (2024), holding that the ACCA’s occasions-different fact must be charged in the indictment and proven to the jury beyond a reasonable doubt—just as Mr. Ballinger had argued. He argued on appeal that the error was structural, or if instead harmless-error review applied, the government could not show that the error in his case was harmless beyond a reasonable doubt. He pointed to *United States v. Triana*, 468 F.3d 308 (6th Cir. 2006), in which the Sixth Circuit, applying the harmless-error standard in *Chapman v. California*, 386 U.S. 18, 24 (1967), determined that a preserved claim of Sixth Amendment error was not harmless when the sentence was based on the judicial factfinding at issue. He further argued that the reviewing court could not find the error harmless based on information inadmissible under the rules of evidence, and that any non-elemental information in the *Shepard* documents was likely inadmissible hearsay.

5. In a published decision, the Sixth Circuit affirmed. Pet. App. 1a–6a. Relying on *United States v. Campbell*, 122 F.4th 624 (6th Cir. 2024), the lower court reiterated its earlier holding that *Erlinger* error is not structural. Pet. App. 2a. *Campbell*, in turn, relied on *Neder v. United States*, 527 U.S. 1 (1999), and *Washington v. Recuenco*, 548 U.S. 212 (2006), reasoning that the error of omitting the

occasions-different element from the indictment and guilty plea is “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.” *Id.* at 630–31.

In assessing harmlessness, the lower court applied the test it has applied in several guilty-plea cases involving *Erlinger* error, beginning with *Campbell*, and which focuses on a hypothetical jury: “Errors are harmless only ‘if the court can conclude beyond a reasonable doubt that the jury would have found the defendant’s offenses occurred on different occasions.’” Pet. App. 2a (quoting *United States v. Durham*, 151 F.4th 821, 825, 830 (6th Cir. 2025) (per curiam)); see *Campbell*, 122 F.4th at 630. In conducting this review, the reviewing judges examine the entire record in the case, including information outside the record of the plea proceedings, such as *Shepard* documents and presentence reports,⁵ 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.” 122 F.4th at 632–33 (citing *Greer v. United States*, 593 U.S. 503, 510–11 (2021) (addressing a similar but unpreserved error); see also *Durham*, 151 F.4th at 825, 830.

⁵ *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)).

6. Governed by this test, the appellate judges below examined non-elemental information recited in the PSR (again, derived from unknown sources and of unknown admissibility at trial), including the “on or about” offense dates and names of victims. Pet. App. 2a. Despite that Mr. Ballinger explicitly pointed to Tennessee law confirming the non-elemental variability of the “on or about” offense dates, the court said that “Ballinger has provided no reason to doubt the dates and locations of his previous offenses laid out in the PSR. . . . [T]he district court was entitled to rely on the PSR to inform itself of the basic facts relating to his predicate crimes.” Pet. App. 2a. After evaluating the information in the record, the appellate judges found that Mr. Ballinger “burglarized nine different people who have no apparent connection to one another,” and that there was “a large gap in time between offenses.” Pet. App. 4a-5a. As a result, they concluded that “no reasonable jury could conclude” that he did not commit three ACCA predicates on different occasions. Pet. App. 5a.

7. Mr. Ballinger sought rehearing on the proper focus of harmless-error review in guilty plea cases, in light of differing views and emerging questions in the Sixth Circuit and others about the propriety of the hypothetical-jury test in guilty plea cases. The petition was denied.

REASONS FOR GRANTING THE PETITION

In the quarter century since *Neder* was decided, this Court’s repeated, insistent, and broad-ranging application of *Apprendi*’s rule proves that *Neder* was wrongly decided. Today, appellate judges rely on *Neder* to scour the entire record and

find for themselves a fact the government failed to charge or to submit to the jury, deeming these errors harmless beyond a reasonable doubt. In doing so, they repeat the original deprivation of defendants' Fifth and Sixth Amendment rights. Because their approach is no different from when a trial judge unconstitutionally directs a guilty verdict based on his own view of the evidence and the defendant's culpability, the Court should correct course and overrule *Neder*.

If *Neder* survives, 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. 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 repeat 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). Either way, this Court's review is needed to set forth the scope of the record for review.

I. The Court should overrule *Neder*.

This case presents an important question following the Court’s recent *Erlinger* decision: Whether to overrule *Neder v. United States*, 527 U.S. 1 (1999), which the courts of appeals have uniformly relied on to hold that the failure to charge and prove to a unanimous jury an element, including the ACCA’s occasions-different element, is subject to harmless-error review.

The Sixth Circuit rejected Mr. Ballinger’s argument that *Erlinger* error is structural and applied harmless-error review based on its decision in *United States v. Campbell*, 122 F.4th 624 (6th Cir. 2024) (holding that *Erlinger* error is subject to harmless-error review). *Campbell*, in turn, relied on this Court’s decisions in *Neder* and *Washington v. Recuenco*, 548 U.S. 212 (2006). *Campbell*, 122 F.4th at 630–31. *Neder* held that jury instructions that omit an element are not structural error but rather subject to harmless-error review. *Neder*, 527 U.S. at 8–9. *Recuenco* relied conclusively on *Neder* to hold that the same rule applies to the failure to prove a sentencing factor to a jury. *Recuenco*, 548 U.S. at 18–22.

In its *Erlinger* briefing in this Court, the government argued for harmless-error review, likewise relying on *Neder* and *Recuenco*. See U.S. Br. at 27–28, U.S. Reply Br. at 14, *Erlinger*, 602 U.S. at 821. But *Erlinger* cited neither decision, and only three justices endorsed harmless-error review. See *Erlinger*, 602 U.S. at 849–50 (Roberts, J., concurring); *id.* at 859–61 (Kavanaugh, J., joined by Alito, J., dissenting).

Mr. Ballinger urges the Court to grant certiorari to reconsider *Neder*.⁶

⁶ And, correspondingly, *Recuenco*.

A. *Neder*'s approach was dubious at the outset.

In *Neder*, 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, but under then-extant law, the trial court omitted the materiality element of tax fraud from the jury instructions. *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. This 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.

This approach, the Court explained, appropriately balances “society’s interest in punishing the guilty” against the need to “safeguard[] the jury guarantee.” *Id.* at 18, 19 (internal quotation marks omitted). Regarding the latter, the Court explained that harmless-error review “will often require that a reviewing court conduct a thorough examination of the record.” *Id.* at 19. For example, if the defendant “contested the omitted element and raised evidence sufficient to support a contrary

finding[,] [the reviewing court] should not find the error harmless.” *Id.* According to the Court, this factual inquiry by appellate judges is not equivalent to a second jury, but rather “serve[s] a very useful purpose insofar as [it] block[s] setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.” *Id.* at 19 (quoting *Chapman*, 386 U.S. at 22).

The decision was criticized from the start as allowing unconstitutional judicial factfinding in the guise of harmless-error review. As Justice Scalia explained in his dissent:

The Court . . . acknowledges that the right to trial by jury was denied in the present case, since one of the elements was not—despite the defendant’s protestation—submitted to be passed upon by the jury. But even so, the Court lets the defendant’s sentence stand, *because we judges can tell that he is unquestionably guilty.*

Even if we allowed (as we do not) other structural errors in criminal trials to be pronounced “harmless” by judges . . . it is obvious that we could not allow judges to validate *this* one. The constitutionally required step that was omitted here is distinctive, in that the basis for it is precisely that, absent voluntary waiver of the jury right, *the Constitution does not trust judges to make determinations of criminal guilt.*

Neder, 527 U.S. at 31–32 (Scalia, J., dissenting in part, joined by Souter & Ginsburg, JJ.). *Neder* effectively allows appellate judges to speculate about what the jury would find about the omitted element *if they had been asked* and, based on the judges’ reading of the record, essentially direct a verdict of guilt. Yet ordinarily a judge cannot direct a verdict of guilt “no matter the defendant’s culpability” and “no matter how overwhelming the unfavorable evidence.” *Id.* at 33–34 (Scalia, J., dissenting in

part, joined by Souter & Ginsburg, JJ.). Justice Scalia further observed that “[t]he Court’s decision today is the only instance I know of (or could conceive of) in which the 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.* at 32. In Justice Scalia’s view, the Court’s rule in *Neder* amounted to “depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged—which necessarily means his commission of *every element* of the crime charged,” which “can never be harmless.” *Id.* at 30 (Scalia, J., dissenting in part, joined by Souter & Ginsburg, JJ.).

Shortly after *Neder* came *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a landmark decision marking a new era when it comes to judicial factfinding. The Court held that under the Sixth Amendment, any fact that increases a defendant’s statutory penalty must be proven to a unanimous jury beyond a reasonable doubt. *Id.* at 468. In other words, a *judge* may not make the factfinding necessary to increase the otherwise applicable penalty. The Court has since repeatedly reaffirmed this constitutional bedrock principle, striking down “a variety of other recent sentencing innovations” that permitted criminal penalties based on judicial factfinding, most recently the ACCA’s occasions-different factfinding. *Erlinger*, 602 U.S. at 833; *see Ring v. Arizona*, 536 U.S. 584 (2002) (death penalty); *Blakely v. Washington*, 542 U.S. 296 (2004) (mandatory state sentencing guidelines); *Cunningham v. California*, 549 U.S. 270 (2007) (same); *United States v. Booker*, 543 U.S. 220 (2005) (mandatory

federal sentencing guidelines); *Southern Union Co. v. United States*, 567 U.S. 343 (2012) (criminal fines); *Alleyne v. United States*, 570 U.S. 99 (2013) (increased federal statutory minimum); *United States v. Haymond*, 588 U.S. 634 (2019) (minimum revocation penalty for certain supervised release violations).

Just five years after *Neder*, Justice Scalia was now writing for the majority in *Blakely*. There, he wrote that “[w]hen a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment and the judge exceeds his proper authority.” *Blakely*, 542 U.S. at 304 (internal quotation marks and citation omitted). Justice Scalia’s opinion in *Blakely* echoes and proves correct his insistence in *Neder* that punishments inflicted based on judicial factfinding offend the Constitution’s fundamental structure. *Id.* at 306 (“*Apprendi* carries out [the Framers’] design by ensuring that the judge’s authority to sentence derives wholly from the jury’s verdict. . . . As *Apprendi* held, every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment.”).

B. *Apprendi* and its progeny confirm that allowing appellate judges to find the facts necessary to determine guilt of an uncharged offense or to impose a sentence enhancement violates the Fifth and Sixth Amendments.

Apprendi and its progeny confirm that *Neder* was wrongly decided. *Neder* is impossible to reconcile with Fifth and Sixth Amendment principles dictating those bedrock decisions. As Judge Richardson, joined by Judge Diaz and Judge Floyd wrote, “there is something deeply unsatisfying” about applying harmless-error review to *Apprendi*-type errors. *United States v. Legins*, 34 F.4th 304, 323 (4th Cir. 2022). “It

is bizarre that a deprivation of the jury right, which reflects a distrust of judges to adjudicate criminal guilt, can be set aside as harmless when we judges find the result sufficiently clear.” *Id.* Or as Judge Clay more recently wrote in a case applying harmless-error review to the type of *Erlinger* error at issue in this case, “the very act of the judge, and not the jury, deciding this question is what violates the Sixth Amendment jury trial right,” and “to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.” *United States v. Cogdill*, 130 F.4th 523, 539 (6th Cir. 2025) (Clay, J., dissenting) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)). Judge Clay further explained that “though *Recuenco* postdates *Apprendi* and *Alleyne*, it is difficult to square its reliance on *Neder* with the Supreme Court’s evolution in its thinking on sentencing jurisprudence, particularly in cases like *Erlinger*.” *Id.* at 537 n.2.

Two more judges on the Sixth Circuit have expressed similar concerns. Judge Cole noted that he shares the concern laid out in Judge Clay’s *Cogdill* dissent that *Campbell*’s resort to harmless-error review “contravenes the Supreme Court’s holding in *Erlinger*.” *United States v. Thomas*, 142 F.4th 412, 423 (6th Cir. 2025) (Cole, J., concurring). In the same case, Judge Nalbandian explained that “harmless-error review can sometimes be in tension with the Sixth Amendment injury itself: if the Sixth Amendment is designed to protect a defendant’s right to have a jury of *his peers* resolve the facts of his case, how is three *judges* resolving the case a permissible remedy?” *Id.* at 430 n.1 (Nalbandian, J., concurring). As support for that position,

Judge Nalbandian cited Justice Scalia’s partial dissent in *Neder*. *Id.* (quoting *Neder*, 527 U.S. at 30 (Scalia, J., dissenting in part)).

State court judges, too, have long observed the irreconcilable tension between *Neder* and “the seismic shift in the Supreme Court’s Sixth Amendment jurisprudence since 1999” when it comes to unconstitutional judicial factfinding, with at least one predicting *Neder* would be short lived and others finding reasons not to apply it. *Freeze v. State*, 827 N.E.2d 600, 605–06 (Ind. Ct. App. 2005); *see also, e.g., Medina v. People*, 163 P.3d 1136, 1141 (Colo. 2007) (holding that *Neder* review of judge-found increased sentence inapplicable where greater offense was neither charged nor submitted to jury, instead holding the error structural); *State v. Schmeal*, 466 P.3d 490 (Kan. Ct. App. 2020) (Atchison, J., concurring in part and dissenting in part) (arguing that applying *Neder* goes “at least one giant step over the line between reasoned judicial analysis and ungirded speculation akin to impermissibly directing a verdict in a criminal case” when “there was no real-life jury trial, no real-life evidence, and no real-life defenses presented to the jury”).

These judges are correct. If harmless error review allows appellate judges to rummage through non-elemental and potentially inadmissible information in *Shepard* documents and presentence reports to decide for themselves that the defendant committed an uncharged, aggravated crime—as they have freely done in this and other cases involving *Erlinger* error (*see* Part II.B.2, *infra*)—then *Neder* was wrongly decided.

This Court’s intervention is needed. The courts of appeals have uniformly relied on *Neder* and *Recuenco* to hold that *Erlinger* errors are amenable to harmless-error review. *See United States v. Beasley*, 163 F.4th 403, 406–09 (7th Cir. 2025); *United States v. Brown*, 136 F.4th 87, 93–95 (4th Cir. 2025); *United States v. Butler*, 122 F.4th 584, 589 (5th Cir. 2024); *United States v. Campbell*, 122 F.4th 624, 630–31 (6th Cir. 2024); *United States v. Bowling*, 135 F.4th 1125, 1126 (8th Cir. 2025); *United States v. Rivers*, 134 F.4th 1292, 1305–06 (11th Cir. 2025).

The problem is not limited to *Erlinger* errors. Absent action by this Court, *Neder* will continue to give the courts of appeals permission to sit not as a court of review but as a finder of guilt in the first instance, evaluating information never admitted at a trial (and possibly inadmissible at trial) and convicting defendants of crimes and aggravated penalties that the government never charged and a jury of the defendant’s peers never found beyond a reasonable doubt. *See Legins*, 34 F.4th at 324 (expressing concern that this practice “diminishes the jury’s historic” role but stating that it was “bound by” *Neder* and *Recuenco* to apply harmless error review to the omission of “all elements, including sentencing factors” (internal quotation marks omitted)).

In recent years, this Court has “overruled several decisions inconsistent with” the “principles *Apprendi* and *Alleyne* discussed.” *Erlinger*, 602 U.S. at 833–34. *Neder* should make one more.

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

If *Neder* survives and appellate judges may constitutionally engage in harmless-error review of *Apprendi* error, this Court should clarify the scope of that review. 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 in these cases.

A. The lower courts are divided about the proper approach.

In *Neder* and *Recuenco*, this Court’s explication of the harmless-error standard where the constitutional error was an omitted element (or its functional equivalent) occurred in trial cases where harmlessness was evaluated in light of all the evidence presented at trial. 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”).

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.’”).⁷

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-

⁷ 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.”).

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 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 that 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. *Dyer*, 54 F.4th at 162. Crucially, however, the court still confines itself to an objective evaluation of remaining admissible evidence. *Id.*

B. 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.

1. 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).⁸

2. 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*, 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

⁸ 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.

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).

The Fourth Circuit likewise considers information in the presentence report 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. *Brown*, 136 F.4th 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”).

This approach is also wrong. The proper mode of analysis in a guilty plea case involving failure to charge and prove an essential element would more appropriately 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 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 365.⁹

These courts’ reliance on *Greer* is misplaced. *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

⁹ 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 and suffered severe consequences because he was wrongly denied.

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 harmless-ness 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, 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 size of the gaps in time between prior offenses when the record contains only non-elemental “on or about” dates that have never been tested by admissible evidence in any forum. The judges even faulted Mr. Ballinger for not casting doubt on the information in the PSR.

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 that the worst view of the facts that happen to be available (but might have been irrelevant to the prior conviction itself) 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 these extremely important questions.

This is an excellent vehicle to decide the questions presented. Mr. Ballinger's case perfectly illustrates the ACCA's severity, as it tripled his guideline range from 63 to 78 months to 180 to 210 months. In a published decision, the lower court addressed and rejected on the merits Mr. Ballinger's argument that *Erlinger* error is structural and about harmless error, 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. Ballinger. If the Court overrules *Neder*, or holds that the proper standard is whether the government has proven beyond a reasonable doubt that Mr. Ballinger 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. Ballinger 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 or go to trial and face the same 15-year minimum if he loses but a far lower guideline range if he wins, a defendant's choice to go to trial 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).

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, these issues 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 whether and how to engage in 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.

CONCLUSION

The petition for a writ of certiorari should be granted.

JENNIFER NILES COFFIN
Appellate Chief
Federal Defender Services
of Eastern Tennessee, Inc.
605 Chestnut St., Suite 1310
Chattanooga, TN 37450
(423) 756-4349

Counsel for Cody Ballinger

May 11, 2026