

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DARRELL ALAN THOMPSON,

Petitioner,

v.

UNITED STATES OF AMERICA and ANTONIO HAIR,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Erlinger v. United States*, 602 U.S. 821 (2024), this Court held that the Fifth and Sixth Amendments require a unanimous jury to find, beyond a reasonable doubt, that a defendant’s prior offenses were “committed on occasions different from one another” before an enhanced sentence may be imposed under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1). The courts of appeals agree that *Erlinger* errors are subject to harmless-error review, but they disagree about how harmlessness is measured when the defendant pleaded guilty. The Fourth Circuit asks whether the defendant would still have pleaded guilty and admitted the occasions element had he been properly charged and advised. Other circuits ask whether the government has proven beyond a reasonable doubt that any rational jury would have found the occasions element. And several judges have concluded that, where no trial occurred, the question is whether the error affected the sentence imposed.

The questions presented are:

- I. Whether, when a defendant pleads guilty to an indictment and plea agreement that omit the Armed Career Criminal Act’s occasions element, and the district court then imposes an enhanced sentence based on its own finding that the prior offenses were committed on different occasions, the harmlessness of the resulting *Erlinger* error is measured by asking whether the defendant would have pleaded guilty anyway, as the Fourth Circuit holds; by asking whether a rational jury would necessarily have found the occasions element, as other circuits hold; or by asking whether the error affected the sentence imposed.

II. Whether a plea-agreement provision waiving the right to have “the existence and applicability of any prior convictions” charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt waives the distinct right recognized in *Erlinger* to have a jury determine whether prior offenses were committed on different occasions—particularly where the same plea agreement fixes the defendant’s total sentencing exposure below the enhanced statutory range.

PARTIES TO THE PROCEEDING

Petitioner is Darrell Alan Thompson, who was the defendant in the district court and the appellant in the court of appeals. Respondents are the United States of America, which was the plaintiff in the district court and the appellee in the court of appeals, and Antonio Hair, who was a co-defendant in the district court and co-appellant in the court of appeals.

RELATED PROCEEDINGS

United States v. Thompson, No. 5:24-cr-00042-M-RN-1, United States District Court for the Eastern District of North Carolina. Judgment entered October 30, 2024.

United States v. Hair, No. 5:24-cr-00042-M-RN-2, United States District Court for the Eastern District of North Carolina. Judgment entered January 13, 2025.

United States v. Thompson, No. 24-4589(L), United States Court of Appeals for the Fourth Circuit (consolidated for briefing and decision with No. 25-4036). Judgment entered July 28, 2026.

United States v. Hair, No. 25-4036, United States Court of Appeals for the Fourth Circuit (consolidated for briefing and decision with No. 24-4589(L)). Judgment entered July 28, 2026.

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OPINIONS BELOW

The unpublished per curiam opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix A to the petition (App. 1a-9a) and is available at *United States v. Thompson*, Nos. 24-4589(L), 25-4036, 2026 WL 2169628 (4th Cir. July 28, 2026) (per curiam). The judgment of the United States District Court for the Eastern District of North Carolina, *United States v. Thompson*, No. 5:24-cr-00042-M-RN-1 (E.D.N.C. Oct. 30, 2024), is unreported and appears at Appendix B (App. 9a-16a). The district court's oral rulings at sentencing are unreported and appear in the transcript excerpt at Appendix C (App. 17a-24a).

The appendix is cited in this petition as "App." followed by the relevant appendix page number(s).

JURISDICTION

This petition seeks review of the Fourth Circuit's judgment affirming the sentence imposed on Petitioner Darrell Alan Thompson after he pleaded guilty to conspiracy to commit bank fraud and to possession of a firearm by a felon. App. 3a-4a, 6a-8a. The district court had jurisdiction under 18 U.S.C. § 3231. The Fourth Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The Fourth Circuit entered its judgment on July 28, 2026. App. 9a. No petition for rehearing was filed.

This petition is timely filed within ninety days after entry of the judgment. *See* S. Ct. R. 13.1, 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

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

The Sixth Amendment to the United States Constitution provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to have the Assistance of Counsel for his defence.

Section 924(e)(1) of Title 18 of the United States Code, the Armed Career Criminal Act (“ACCA”), provides in relevant part:

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

Section 924(a)(8) of Title 18 of the United States Code provides in relevant part:

Whoever knowingly violates subsection (d) or (g) of section 922 shall be fined under this title, imprisoned for not more than 15 years, or both.

Rule 52(a) of the Federal Rules of Criminal Procedure provides:

Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

STATEMENT OF THE CASE

This case presents a question that the courts of appeals have answered in conflicting ways since *Erlinger*: when a sentencing judge, rather than a jury, finds that a defendant's prior offenses were "committed on occasions different from one another," 18 U.S.C. § 924(e)(1), and the defendant pleaded guilty, what must the government show for the resulting *Erlinger* error to be deemed harmless? The Fourth Circuit asks whether the defendant would have given up the benefits of a plea bargain to contest the occasions element before a jury. Most other circuits ask whether the government has proven, beyond a reasonable doubt, that any rational jury would have found the occasions element. And a growing number of judges have questioned whether either inquiry is appropriate where no trial ever took place. The Fourth Circuit's plea-calculus test was dispositive of the alternative ground on which it affirmed Mr. Thompson's fifteen-year mandatory-minimum sentence.

A. Investigation and indictment

In 2022, the United States Postal Inspection Service and the Raleigh Police Department began investigating mail theft and check fraud in Wake County, North Carolina. JA140, JA346.¹ Investigators concluded that Mr. Thompson and others used postal "arrow keys" to take mail, including checks, from blue collection boxes; that the checks were altered and deposited; and that the proceeds were withdrawn.

¹ Citations to "JA" are to the joint appendix filed with the Fourth Circuit. Citations to "Pet'r 4th Cir. Br.," "Pet'r 4th Cir. Reply Br.," and "Gov't 4th Cir. Br." are to the parties' briefs in the Fourth Circuit, No. 24-4589(L).

JA346; *see* App. 3a. On January 20, 2023, officers arrested Mr. Thompson on related state charges and found a firearm in the car where he was sleeping. JA142, JA347.

A federal grand jury in the Eastern District of North Carolina indicted Mr. Thompson on one count of conspiracy to commit bank fraud, in violation of 18 U.S.C. §§ 1344 and 1349; two counts of bank fraud; one count of mail theft; and one count of possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924. JA19-22. The firearm count, Count Thirteen, alleged only the elements of the unenhanced § 922(g)(1) offense. JA22. It contained no allegation that Mr. Thompson had three prior convictions for violent felonies or serious drug offenses, and no allegation that any such offenses were committed on occasions different from one another. *See* JA22.

B. The plea agreement and guilty plea

On July 24, 2024, about a month after this Court decided *Erlinger*, Mr. Thompson pleaded guilty, pursuant to a written plea agreement, to the conspiracy count (Count One) and the firearm count (Count Thirteen). JA11-12, JA324-332. The government agreed to dismiss the remaining counts. JA331; App. 3a. Mr. Thompson agreed to waive his right to appeal, except for appeals based on ineffective assistance of counsel or prosecutorial misconduct not known to him at the time of the plea. JA324; App. 5a n.3.

As to Count Thirteen, Mr. Thompson admitted only the three elements of the unenhanced offense: that he knowingly possessed a firearm, that he knew at the time that he had been convicted of a crime punishable by more than one year of imprisonment, and that the possession was in or affecting commerce. JA328-329.

The plea agreement listed the maximum term of imprisonment for that count as fifteen years and the minimum term as “N/A.” JA329. It then recited, in the alternative, the enhanced penalties that would apply “[i]f the Defendant’s criminal history subjects the Defendant to the sentencing enhancement of 18 U.S.C. § 924(e).” JA329. But immediately after that recitation, the plea agreement stated Mr. Thompson’s total exposure:

Total Statutory Minimum and Maximum Sentence:
maximum 45 years’ imprisonment; 5 years of supervised
release; \$1,000,000 fine, or twice the gross gain or loss from
the offense, whichever is greater; and \$200 special
assessment.

JA329. That forty-five-year total is the sum of the thirty-year maximum for the conspiracy count and the fifteen-year maximum for the unenhanced firearm count. *See* JA328-329. It includes no mandatory minimum. JA329. An ACCA sentence, by contrast, would have carried a fifteen-year mandatory minimum and a maximum of life. *See* 18 U.S.C. § 924(e)(1); JA329.

The plea agreement also contained a provision, Section 2.i, that has appeared in plea agreements in the Eastern District of North Carolina since long before *Erlinger and Wooden v. United States*, 595 U.S. 360 (2022). *See* JA327; Pet’r 4th Cir. Br. 26. In it, Mr. Thompson agreed:

To knowingly and expressly waive any and all rights, under the Fifth and Sixth Amendments to the United States Constitution and any cases interpreting them, to have the existence and applicability of any prior convictions (1) charged in the Indictment, (2) submitted to a jury, and (3) proved beyond a reasonable doubt. The Defendant hereby consents to having the existence and applicability of any such convictions decided by the sentencing judge based on a preponderance of the evidence.

The Defendant reserves the right to contest at sentencing the existence of any such prior conviction and whether such conviction qualifies to increase the statutory minimum and maximum sentence, but consents to the resolution of any such objection by the sentencing judge using a preponderance-of-the-evidence standard.

JA327. Section 2.i says nothing about ACCA's separate requirement that the predicate offenses have been "committed on occasions different from one another." *See* JA327; 18 U.S.C. § 924(e)(1).

At arraignment, the district court told Mr. Thompson that the penalties on Count Thirteen "differ depending on what your criminal history shows," and described the penalties both with and without ACCA. JA130-131. The court did not tell Mr. Thompson that he had a right to have a jury find, unanimously and beyond a reasonable doubt, any fact bearing on whether ACCA applied, or that he was giving up that right. *See* JA116-145. In its factual proffer, the government recited several of Mr. Thompson's prior convictions and their offense dates to establish that he "knew these felonies were punishable by more than a year in prison"—that is, to establish the knowledge element of the unenhanced § 922(g)(1) offense. JA143. Mr. Thompson did not admit, and was not asked to admit, that any prior offenses were committed on different occasions. *See* JA116-145. The court accepted the plea. JA144.

C. The presentence report and sentencing

The Probation Office's presentence report identified five potential ACCA predicates: a 2007 North Carolina conviction for robbery with a dangerous weapon, arising from conduct on May 25, 2006, when Mr. Thompson was seventeen years

old; three 2011 convictions for robbery with a dangerous weapon arising from conduct on July 1, August 1, and August 4, 2010; and a 2021 conviction for breaking and entering arising from conduct on October 2, 2019. JA351-353. The report concluded that Mr. Thompson was an armed career criminal. JA354, JA359. It also stated that Mr. Thompson had waived “his rights under the Fifth and Sixth Amendments.” JA345.

The ACCA designation transformed Mr. Thompson’s sentencing exposure. Without ACCA, the statutory maximum on Count Thirteen would have been fifteen years, there would have been no mandatory minimum, and the advisory guideline range would have been 100 to 125 months. JA366. With ACCA, Count Thirteen carried a mandatory minimum of fifteen years and a maximum of life, and the guideline range became 180 to 210 months. JA359.

Mr. Thompson’s sentencing counsel objected to the ACCA designation on two grounds: that the 2007 robbery conviction should not count because it predated North Carolina’s “Raise the Age” legislation, and that the July and August 2010 robberies were not committed on occasions different from one another and therefore counted as a single predicate. JA337-338, JA364. Counsel did not object that the government had failed to charge the occasions element in the indictment, had failed to prove it to a jury, and had failed to obtain Mr. Thompson’s admission of it. *See* JA336-340. Nor did counsel object that the plea agreement fixed Mr. Thompson’s maximum exposure at forty-five years with no mandatory minimum, or object to the

presentence report’s assertion that Mr. Thompson had waived his Fifth and Sixth Amendment rights. *See* JA329, JA336-340, JA345.

At the sentencing hearing on October 23, 2024, the district court overruled both objections. JA379-382. Making its own findings about the timing, location, and victims of the 2010 robberies, the court found that the August 1 and August 4 robberies—“perpetrated against employees of the same store”—“were committed three days apart with different individual victims and do not constitute an uninterrupted course of conduct.” JA381. The court found that Mr. Thompson had “five separate qualifying felonies” and was subject to ACCA. JA382. Counsel stated that she wished to preserve the Raise the Age objection “just in case . . . something happens at the Fourth Circuit.” JA380. The court announced a guideline range of 180 to 210 months, explaining that “[b]ecause the ACCA finding creates the mandatory minimum, this drives the guideline.” JA382. The court imposed concurrent sentences of 180 months’ imprisonment on each count—the ACCA mandatory minimum. JA404-405; App. 4a. In its statement of reasons, the court explained that it imposed a “[s]entence at the bottom of the range . . . due to the defendant’s designation as an armed career criminal.” JA414. The court entered judgment on October 30, 2024, JA217-224, and Mr. Thompson timely appealed, JA225.

D. The Fourth Circuit’s decision

On appeal, Mr. Thompson argued that his sentencing counsel rendered ineffective assistance by failing to object that *Erlinger* and the plea agreement precluded an ACCA sentence. Pet’r 4th Cir. Br. 15-29. Because the indictment did

not allege, and Mr. Thompson did not admit, the facts necessary to trigger ACCA, and because the plea agreement fixed his total exposure at a maximum of forty-five years with no mandatory minimum, Mr. Thompson argued that the district court could not lawfully impose an ACCA sentence based on its own findings. *Id.* 17-22. He further argued that Section 2.i of the plea agreement did not waive his right to a jury determination of the occasions question: by its terms, the provision reaches only the “existence and applicability of any prior convictions,” not the distinct, fact-intensive occasions inquiry that *Wooden* and *Erlinger* recognized; any ambiguity must be construed against the government; and reading Section 2.i to permit an ACCA sentence would nullify the plea agreement’s total-exposure term. *Id.* 22-28; Pet’r 4th Cir. Reply Br. 1-3. Mr. Thompson contended that he was prejudiced because, but for counsel’s failure to object, the district court would have sentenced him without ACCA under a substantially lower guideline range. Pet’r 4th Cir. Br. 28-29.

The government responded, among other things, that any *Erlinger* error would have been harmless under the Fourth Circuit’s decision in *United States v. Brown*, 136 F.4th 87 (4th Cir. 2025) (en banc), because, “[w]ith not three but five qualifying violent crimes, and each committed on separate days, it is inconceivable that Thompson would forego [sic] his plea agreement to challenge his ACCA status.” Gov’t 4th Cir. Br. 24. Mr. Thompson replied that the government’s harmlessness theory misconceived the error: he had pleaded guilty to a non-ACCA indictment under a plea agreement reflecting that ACCA would not apply, so there was nothing

for counsel to object to at the plea hearing; the error occurred at sentencing, when counsel failed to hold the government to its bargain. Pet’r 4th Cir. Reply Br. 3-4.

The Fourth Circuit affirmed in an unpublished per curiam opinion, without oral argument. App. 1a-8a. The court first concluded that the record did not “conclusively” show ineffective assistance, reasoning that “it is likely that Thompson’s lawyer . . . did not object to Thompson’s designation under the ACCA because Thompson had waived his rights—as announced in the Supreme Court’s 2024 *Erlinger* decision—to have a jury decide whether his five predicate convictions each occurred on ‘separate occasions.’” App. 6a. The court then held, in the alternative:

Even if we agreed with Thompson that his lawyer made an error pertaining to the *Erlinger* precedent, Thompson fails to overcome the government’s invocation of harmless error. *See, e.g., United States v. Brown*, 136 F.4th 87, 94 (4th Cir. 2025) (recognizing that harmless error review applies to *Erlinger* errors). That is, Thompson had not three—but five—qualifying violent crimes that were each committed on separate days. As the government rightly contends, “it is inconceivable that Thompson would forego [sic] his plea agreement to challenge his ACCA status.”

App. 6a-7a (citation omitted). The court supported that conclusion with *Brown*’s statement that, “given 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 [the defendant] would have traded the benefit of pleading guilty for such long odds.” App. 7a (quoting *Brown*, 136 F.4th at 99). The court did not address Mr. Thompson’s argument that the plea agreement’s total-

exposure term excluded an ACCA sentence, and it did not analyze the scope of Section 2.i. *See* App. 6a-7a.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted where “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter,” or “has decided an important question of federal law that has not been, but should be, settled by this Court.” S. Ct. R. 10(a), (c). Both criteria are present here.

In *Erlinger*, this Court held that the Fifth and Sixth Amendments entitle a defendant “to have a jury resolve ACCA’s occasions inquiry unanimously and beyond a reasonable doubt,” and “decide[d] no more than that.” 602 U.S. at 835. The Court did not decide what follows when that right is violated. In the two years since, every court of appeals to consider the issue has held that *Erlinger* errors are not structural and are subject to harmless-error review. *See United States v. Beasley*, 163 F.4th 403, 407 & n.1 (7th Cir. 2025) (collecting cases). But the courts of appeals have divided sharply on the question that actually disposes of *Erlinger*-based appeals: *how* harmlessness is measured when, as in the great majority of federal criminal cases, the defendant pleaded guilty and no jury ever heard any evidence. The en banc Fourth Circuit has adopted a test different from every other circuit’s test. The Fourth Circuit asks whether the defendant would have given up the benefits of his plea to contest the occasions element before a jury. Most other circuits ask whether the government has proven beyond a reasonable doubt that any rational jury would have found the occasions element on reliable record

evidence. And judges on several courts have questioned whether either hypothetical inquiry is appropriate in a case that never went to trial, urging instead that the question is whether the error affected the sentence actually imposed.

The Fourth Circuit’s plea-calculus test produced the alternative holding below. Its effect is particularly stark in cases like this one, where the government chose not to charge ACCA, the defendant pleaded guilty under an agreement fixing his exposure below the ACCA range, and the *Erlinger* error occurred only at sentencing. The Court should grant review to resolve the conflict among the circuits.

Certiorari review is also appropriate because the petition presents an important recurring question about whether boilerplate plea-agreement language waiving jury rights as to the “existence and applicability of any prior convictions” reaches the distinct occasions inquiry recognized in *Wooden* and *Erlinger*. The Fourth Circuit erred to the extent it treated that waiver as encompassing the occasions element.

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CIRCUIT SPLIT OVER HOW TO MEASURE THE EFFECT OF AN *ERLINGER* ERROR WHEN THE DEFENDANT PLEADED GUILTY.

A. The Fourth Circuit Has Split from Other Circuits on the Harmless-Error Standard for an *Erlinger* Error After a Guilty Plea.

As a general matter, the courts of appeals that have addressed *Erlinger* errors in guilty-plea cases have asked whether the government has shown, beyond a reasonable doubt, that a properly instructed, rational jury would have found that the defendant’s prior offenses were committed on different occasions. The Fourth

Circuit’s plea-calculus test is a departure from the majority of circuits’ hypothetical-jury test. Some judges have questioned whether either test makes sense, suggesting that the appropriate standard is to consider the *Erlinger* error’s effect on the sentence.

1. The Second, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits ask whether a hypothetical jury would have found the occasions element, despite the absence of a trial record.

The Sixth Circuit’s decisions illustrate the majority position: in a guilty-plea case, an *Erlinger* error is harmless if a hypothetical jury would have found the occasions element. In *United States v. Campbell*, the defendant pleaded guilty, and the court rejected his argument that harmless-error review after a plea “would just invite speculation about how a hypothetical jury would have considered the ACCA enhancement.” 122 F.4th 624, 631 (6th Cir. 2024). The court determined that “a jury’s failure to consider the different-occasions question had no effect on Campbell’s sentence,” examining the record evidence of the timing and location of his offenses. *Id.* at 631-33. In *United States v. Cogdill*, another guilty-plea case, the court stated the test directly: “the government must show, beyond a reasonable doubt, that any rational jury would have found that all three of Cogdill’s predicate offenses were ‘committed on occasions different from one another.’” 130 F.4th 523, 529 (6th Cir. 2025) (quoting 18 U.S.C. § 924(e)(1)). Applying that standard, the court held that the error was *not* harmless and vacated the ACCA sentence. *Id.* at 529-30; *see also United States v. Kimbrough*, 138 F.4th 473, 477-79 (6th Cir. 2025) (concluding, in guilty-plea case, that *Erlinger* error was not harmless under

rational-jury standard); *United States v. Ballinger*, 155 F.4th 671, 673-76 (6th Cir. 2025) (affirming ACCA sentence in guilty-plea case after asking whether “a reasonable jury could have reasonable doubt”); *United States v. Durham*, 151 F.4th 821, 825 (6th Cir. 2025) (per curiam) (“[A]n appellate court may affirm a district court’s different-occasions finding if the court can conclude beyond a reasonable doubt that the jury would have found the defendant’s offenses occurred on different occasions.”).

The Fifth, Seventh, and Ninth Circuits apply the same standard in guilty-plea cases. See *United States v. Butler*, 122 F.4th 584, 588-90 (5th Cir. 2024) (after guilty plea, holding error harmless because the whole record showed beyond a reasonable doubt that the prior offenses occurred on different occasions); *United States v. Johnson*, 114 F.4th 913, 917 (7th Cir. 2024) (after guilty plea, error “harmless only if it is ‘clear beyond a reasonable doubt’ that a properly instructed jury would have found the same facts as the court,” and holding error not harmless); *United States v. Patterson*, 183 F.4th 1093, 1100-01 (9th Cir. 2026) (after guilty plea, applying “overwhelming” and “uncontroverted” evidence standard from *Neder v. United States*, 527 U.S. 1 (1999)). The Second and Eleventh Circuits likewise frame the inquiry around what a rational jury would have found. See *United States v. Saunders*, No. 23-6735, 2024 WL 4533359, at *2-3 (2d Cir. Oct. 21, 2024) (summary order) (in guilty-plea case, asking whether “a rational jury would find” that the offenses occurred on separate occasions); *United States v. Rivers*, 134 F.4th

1292, 1306 (11th Cir. 2025) (government “bears the burden of showing beyond a reasonable doubt that a rational jury would have found” the occasions element).

2. The Fourth Circuit’s plea-calculus standard departs from other circuits and the law of this Court and ignores the sentencing impact of *Erlinger* errors.

The Fourth Circuit stands apart from other circuits in its review of *Erlinger* errors in guilty-plea cases. In *Brown*, both parties argued harmlessness under the framework of *Neder*—asking whether the evidence on the occasions element was so overwhelming and uncontroverted that a rational jury would necessarily have found it. *Brown*, 136 F.4th at 96-97. The Fourth Circuit rejected that framework as “misdirect[ed].” *Id.* at 97. Because “there was no trial in this case,” the court reasoned, “the harmless-error burden is different.” *Id.* Drawing on *Greer v. United States*, 593 U.S. 503 (2021), the court held that the government must show “beyond a reasonable doubt that if [the defendant’s] indictment had alleged the ‘different occasions’ element of ACCA and if [he] had been correctly advised at his plea hearing that he ‘was entitled to have a jury resolve [that issue] unanimously and beyond a reasonable doubt,’ he would have nonetheless waived that right and admitted as part of his guilty plea that his prior offenses were committed on different occasions.” *Brown*, 136 F.4th at 97 (quoting *Erlinger*, 602 U.S. at 835; third alteration in *Brown*).

The Fourth Circuit’s analysis in *Brown* thus focused on the defendant’s plea calculus: that he chose to plead guilty after being advised that ACCA’s penalties “would apply if the judge found its requirements satisfied,” that he did not object to the presentence report’s account of his criminal history, that he never sought to withdraw his plea, and that he “sought the benefits of the plea,” including a

reduction for acceptance of responsibility. *Id.* at 97-98. The strength of the occasions evidence mattered only indirectly, as a reason the court “cannot fathom that [the defendant] would have traded the benefit of pleading guilty for such long odds.” *Id.* at 99.

The Fourth Circuit’s test departs from the approach of other circuits, *see supra* section I.A.1, and misapplies this Court’s precedents. First, the test rests on a mismatch. *Greer* addressed plain-error review of an unpreserved error under *Rehaif v. United States*, 588 U.S. 225 (2019), where the defendant who pleaded guilty to an insufficient indictment bears the burden of showing a reasonable probability that he would not have pleaded guilty if the district court properly advised him of the elements of the offense. *Greer*, 593 U.S. at 508. That inquiry makes sense where the claimed error goes to the validity of the plea or conviction itself. But an *Erlinger* error is a violation of the jury-trial right with respect to a fact that increases the statutory sentencing range. *Erlinger*, 602 U.S. at 834-35. Where, as here, the defendant does not seek to withdraw his plea but challenges an enhanced sentence that his plea did not authorize, the question is not whether he would have pleaded guilty, but whether the enhanced sentence can stand without the jury finding or admission the Constitution requires.

Second, the Fourth Circuit’s test cannot be squared with *Erlinger*’s explanation of the right at stake. The Court emphasized that “[t]here is no efficiency exception to the Fifth and Sixth Amendments.” *Id.* at 842. Rather, a defendant “enjoys the right to hold the government to the burden of proving its case

beyond a reasonable doubt to a unanimous jury of his peers ‘regardless of how overwhelmin[g]’ the evidence may seem to a judge.” *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986); alteration in *Erlinger*). A test that excuses the denial of that right whenever a court concludes that the defendant would not have thought it worth exercising inverts the constitutional inquiry: it treats the strength of the government’s evidence and the attractiveness of the plea bargain—matters that *Erlinger* held cannot substitute for a jury finding—as reasons to deny relief.

Third, the test shifts the consequences of the government’s charging decision onto the defendant. After *Erlinger*, the government controls whether ACCA is in play. The government may charge the occasions element and seek a plea or verdict on it, or it may charge only the unenhanced offense. *See Brown*, 136 F.4th at 96. Here, the government chose the latter course and memorialized that choice in a plea agreement capping Mr. Thompson’s exposure at a non-ACCA maximum. JA22, JA329. The Fourth Circuit’s test nonetheless permitted an ACCA sentence on the theory that Mr. Thompson would have accepted a hypothetical plea agreement—one he was never offered—that included the occasions element. That approach rewrites the bargain the parties actually struck. *Cf. Puckett v. United States*, 556 U.S. 129, 137 (2009) (plea agreements are “essentially contracts”).

Brown makes no sense when applied to a defendant like Mr. Thompson, who pleaded guilty after *Erlinger*. Mr. Brown pleaded guilty before *Erlinger*, when the occasions question was universally treated as a sentencing matter, and after being “twice informed that ACCA’s mandatory minimum of 15 years and its maximum of

life would apply if the judge found its requirements satisfied.” 136 F.4th at 98. Because *Erlinger* had not been decided at that time, the court reasoned, the defendant “would not have inferred anything from the omission of ACCA from his indictment,” and the error amounted to “misadvice about a discrete procedure.” *Id.* at 96. Mr. Thompson, in contrast, pleaded guilty *after Erlinger*, when the government knew that it must charge and prove the occasions element if it intended to seek an ACCA sentence. *See id.* (“[F]ollowing *Erlinger*, the government must allege ACCA’s ‘different occasions’ element in the indictment when it intends to argue that ACCA is applicable.”). The government did not do so, suggesting an intentional exercise of charging discretion. JA22. Mr. Thompson admitted only the elements of the unenhanced offense. JA328-329. And the plea agreement that the government drafted fixed his “Total Statutory Minimum and Maximum Sentence” at a maximum of forty-five years with no mandatory minimum—an exposure that excludes an ACCA sentence. JA329. The *Erlinger* error therefore did not occur at the plea hearing as it did in *Brown*; it occurred at sentencing, when the district court imposed a mandatory minimum that neither the indictment, the facts admitted at the plea stage, nor the plea agreement authorized. *See* Pet’r 4th Cir. Reply Br. 3-4.

Asking whether Mr. Thompson “would forego [sic] his plea agreement to challenge his ACCA status,” App. 7a, is the wrong question. Mr. Thompson did not need to forgo anything: the plea agreement he signed already reflected a non-ACCA sentence. The relevant question is whether the government can obtain an ACCA

sentence that it never charged and that the defendant never admitted, on the basis of judicial factfinding at sentencing—and, if not, whether the resulting error affected the sentence. *Erlinger* answers the first question in the negative; on the second question, it is clear that the error did affect Mr. Thompson’s sentence. The ACCA finding raised Mr. Thompson’s guideline range from 100 to 125 months to 180 to 210 months and imposed a fifteen-year mandatory minimum, JA359, JA366, and the district court expressly tied the sentence to the ACCA designation, JA382, JA414.

The sentencing impact in Mr. Thompson’s case was not unique. Except in cases where a defendant received an equivalent or higher sentence due to other charges, whenever there is an *Erlinger* error, there is a clear sentencing impact: the defendant faces an increased mandatory minimum and maximum and generally receives a higher sentence than would have been imposed without the *Erlinger* error. Neither *Brown* nor the majority position accounts for this reality.

3. Several judges have questioned the wisdom of the majority approach and suggested a sentence-focused inquiry.

Several judges have concluded that neither a hypothetical-jury nor a hypothetical-plea inquiry fits a case in which the defendant never went to trial. Judge Berzon has urged the Ninth Circuit to reconsider en banc its application of *Neder* to guilty-plea cases, explaining that “*Neder*’s reasoning collapses where . . . there has been no jury trial,” and that, “[w]here . . . the defendant waived a jury trial, there is no pre-conviction factual record at all,” so that “[t]o create one after

the fact is not only to undermine *Apprendi* but to broaden the defendant’s waiver.” *Patterson*, 183 F.4th at 1108-09 (Berzon, J., concurring) (quotation omitted). She noted that the Ninth Circuit previously reviewed preserved *Apprendi* errors “by analyzing only the error’s effect on the sentence received, not combing the record for overwhelming, uncontroverted evidence of the sentence-enhancing fact.” *Id.* at 1109 (quotation omitted).

In the Sixth Circuit, Judge Clay has argued that an *Erlinger* error is structural, reasoning that “the preconditions for harmless error—a trial of a jury’s peers and a record for the reviewing court to analyze—have not been satisfied” when a defendant pleads guilty, and that, “even if a harmless error analysis applied . . . , the question we should ask is whether the sentence would remain the same without the error.” *Cogdill*, 130 F.4th at 538, 541 (Clay, J., dissenting). Judge Davis of the Sixth Circuit has likewise cautioned that reliance on the “entire record” in *Erlinger* harmlessness review may “compound the effect of the initial *Erlinger* error because of the grave reliability problems associated with the *Shepard* documents” that *Erlinger* itself warned against. *Campbell*, 122 F.4th at 637 (Davis, J., concurring). And within the Fourth Circuit itself, a panel before *Brown* deemed an *Erlinger* error reversible without applying any plea-calculus inquiry, because the error “increased [the defendant’s] sentence . . . beyond the statutory maximum sentence that could be imposed without the ACCA enhancement.” *United States v. Billings*, No. 22-4311, 2024 WL 3633571, at *6 (4th Cir. Aug. 2, 2024), *vacated on reh’g*, 2025 WL 636307 (4th Cir. Feb. 27, 2025).

These opinions illustrate a realistic, sentence-focused approach to *Erlinger* errors after guilty pleas.

B. The Question of the Correct Harmless-Error Standard Affects a Significant Number of Federal Sentences.

The question presented arises in every ACCA case in which the defendant pleaded guilty after *Erlinger* was decided, to an indictment with no ACCA allegations, and a judge rather than a jury resolved the occasions inquiry. ACCA's fifteen-year mandatory minimum is among the most consequential sentencing enhancements in federal law, and the overwhelming majority of federal convictions result from guilty pleas. The volume of published appellate decisions addressing *Erlinger* harmlessness in the two years since *Erlinger* confirms how frequently the question arises. *See, e.g., Beasley*, 163 F.4th at 407 n.1 (collecting decisions from the Second, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits); *Ballinger*, 155 F.4th at 676 (collecting cases). This Court has already granted, vacated, and remanded multiple cases for further consideration in light of *Erlinger*, leaving the harmlessness inquiry to the courts of appeals in the first instance. *See, e.g., Brown v. United States*, 144 S. Ct. 2712 (2024); *Schorovsky v. United States*, 145 S. Ct. 368 (2024). The courts of appeals have now addressed that inquiry and have reached conflicting answers.

The question also has no natural endpoint. The Fourth Circuit's test applies not only to *Erlinger* errors but, by its logic, to any error under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), following a guilty plea. *See Brown*, 136 F.4th at 95-97 (deriving test from *Greer* and *Apprendi* line of cases). Whether a defendant who

pleaded guilty can be sentenced to an enhanced term on the strength of a court's prediction about his plea incentives, rather than a jury's finding or his own admission, is a question of exceptional importance to the administration of federal criminal justice.

C. This Case Is an Appropriate Vehicle for Certiorari Review.

This case squarely presents the harmlessness question. The Fourth Circuit expressly assumed an *Erlinger*-related error and held that it was harmless under *Brown*'s plea-calculus test, which it applied to conclude that Mr. Thompson would not have forgone his plea agreement. App. 6a7a. That holding was an independent basis for the judgment. And because the Fourth Circuit resolved Mr. Thompson's ineffective-assistance claim on direct appeal by applying that harmlessness standard, the standard was necessarily dispositive of whether he could show prejudice from counsel's failure to object. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984); *see also Molina-Martinez v. United States*, 578 U.S. 189, 192 (2016) (incorrect guideline range ordinarily establishes reasonable probability of different outcome). The record is fully developed. It contains the indictment, plea agreement, plea colloquy, presentence report, sentencing transcript, and statement of reasons, and the facts relevant to the question presented are undisputed. JA19-22, JA116-145, JA324-332, JA336-414.

Mr. Thompson recognizes that the Fourth Circuit's decision is unpublished and that the question arises here in the posture of an ineffective-assistance claim. Neither consideration diminishes the case's suitability. The unpublished decision

faithfully applied binding en banc precedent, *Brown*, which governs every *Erlinger* case in the Fourth Circuit. And the ineffective-assistance posture does not alter the harmlessness question; it simply means that the Fourth Circuit’s answer to that question controlled the outcome. At a minimum, should the Court grant review in another case presenting the proper harmless-error standard for *Erlinger* errors following a guilty plea, Mr. Thompson respectfully requests that the Court hold this petition pending that decision and then grant, vacate, and remand for further consideration.

II. CERTIORARI SHOULD ALSO BE GRANTED TO RESOLVE AN IMPORTANT AND LIKELY RECURRING QUESTION ABOUT WHETHER STANDARD PLEA-AGREEMENT LANGUAGE WAIVES THE *ERLINGER* RIGHT.

Certiorari review is also appropriate to address the Fourth Circuit’s primary rationale for affirmance: that counsel “likely” did not object because Mr. Thompson “had waived his rights . . . to have a jury decide whether his five predicate convictions each occurred on ‘separate occasions.’” App. 6a. That rationale rests on the incorrect premise that Section 2.i of Mr. Thompson’s plea agreement waived his rights under *Erlinger*. That premise presents an important question that warrants certiorari review.

Section 2.i of Mr. Thompson’s plea agreement waives jury rights as to “the existence and applicability of any prior convictions.” JA327. This Court has explained that ACCA “contains *both* a three-offense requirement *and* a three-occasion requirement,” and that the occasions inquiry is a distinct, “multi-factored” one that may turn on the timing, location, character, and relationship of the

offenses. *Wooden*, 595 U.S. at 368-69. In *Erlinger*, the Court distinguished between the narrow inquiry into “the fact of a prior conviction” that a judge may undertake and the occasions inquiry, which requires finding facts about the defendant’s past conduct that only a jury may find. 602 U.S. at 838-40. Section 2.i’s language tracks the former, not the latter. *See* Pet’r 4th Cir. Br. 24-26.

At a minimum, the provision is ambiguous as to the occasions inquiry—it was drafted long before *Wooden* and *Erlinger* recognized that inquiry as distinct, *id.* 26—and ambiguities in a plea agreement are construed against the government. *See United States v. Harvey*, 791 F.2d 294, 300-01 (4th Cir. 1986). Moreover, reading Section 2.i to authorize an ACCA sentence would nullify the plea agreement’s separate term fixing Mr. Thompson’s total exposure at a non-ACCA maximum, contrary to the settled principle that a plea agreement must be read as a whole, giving effect to each of its terms. *See United States v. Johnson*, 119 F.4th 343, 349 (4th Cir. 2024); *United States v. Craig*, 142 F.4th 192, 197 (4th Cir. 2025).

Section 2.i is standard language in plea agreements in the Eastern District of North Carolina, and the government has repeatedly invoked it at sentencing to obtain ACCA sentences based on judicial factfinding after *Erlinger*. *See* Pet’r 4th Cir. Br. 22 n.3, 26; *United States v. White*, No. 7:19-CR-125-FL-1, 2025 WL 1592938, at *2 (E.D.N.C. June 5, 2025). Whether such language effects a knowing waiver of the distinct right this Court recognized in *Erlinger* affects every defendant who signed a plea agreement with similar language. The Fourth Circuit has now relied on the waiver to sustain an ACCA sentence without examining and construing the

waiver language. Should the Court grant review on the first question, it should also grant review on the second, which bears directly on the Fourth Circuit's primary rationale.

CONCLUSION

For the foregoing reasons, Mr. Thompson respectfully requests that the Court grant the petition for a writ of certiorari. In the alternative, Mr. Thompson requests that the Court hold this petition pending its disposition of any case presenting the proper harmless-error standard for *Erlinger* errors following a guilty plea, and then grant the petition, vacate the judgment of the Fourth Circuit, and remand for further proceedings.

Respectfully submitted, this the 14th day of October, 2026.

/s/ Kelly Margolis Dagger
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APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-4589

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

DARRELL ALAN THOMPSON,

Defendant – Appellant.

No. 25-4036

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

ANTONIO RASHEED HAIR,

Defendant – Appellant.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. Richard E. Myers II, Chief District Judge. (5:24-cr-00042-M-RN-1; 5:24-cr-00042-M-RN-2)

Submitted: May 20, 2026

Decided: July 28, 2026

Before KING and GREGORY, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Kelly Margolis Dagger, ELLIS & WINTERS LLP, Raleigh, North Carolina, for Appellant Darrell Alan Thompson. Chiege O. Kalu Okwara, Charlotte, North Carolina, for Appellant Antonio Rasheed Hair. W. Ellis Boyle, United States Attorney, Lucy Partain Brown, Assistant United States Attorney, Jake D. Pugh, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

In these consolidated appeals from the Eastern District of North Carolina, defendants Darrell Alan Thompson and Antonio Rasheed Hair (collectively, the “defendants”), challenge various aspects of the respective prison sentences imposed by the district court. Underlying their sentences, in the Summer of 2024, the defendants each pleaded guilty to criminal offenses stemming from their participation in a conspiracy that involved breaking into United States Post Office blue collection boxes to steal checks. Those checks were then modified by the defendants and cashed into various accounts, totalling approximately \$100,000 in losses to the victims of their scheme. As explained herein, we reject each of the defendants’ appellate contentions and affirm their sentences.

I.

As background, in July 2024, Thomspson pleaded guilty — by way of a written plea agreement — to one count of bank fraud conspiracy, in violation of 18 U.S.C. § 1344 (1) and (2), and to one count of possession of a firearm and ammunition as a convicted felon, in contravention of 18 U.S.C. §§ 922(g)(1) and 924(a)(8). The remaining counts against Thompson, as charged by the grand jury in the indictment, were otherwise dismissed. Meanwhile, in August 2024, Hair pleaded guilty “straight up” — i.e., without any plea agreement, *see, e.g., United States v. Brewer*, 157 F.4th 332, 336 (4th Cir. 2025) (observing that “straight up” guilty plea means pleading guilty “without a plea agreement”) — to five counts of bank fraud and aiding and abetting, in violation of 18 U.S.C. §§ 1344(1) and (2).

At Thompson’s sentencing in October of 2024, the district court imposed on Thompson a mandatory minimum sentence of 180 months in prison, after the court had determined that Thompson had committed five separate and qualifying felonies, pursuant to the Armed Career Criminal Act (the “ACCA”). Meanwhile, Hair’s sentencing was conducted in January of 2025, and the court — over Hair’s objection — applied a two-level upward adjustment for Hair’s role in the criminal conspiracy,¹ as well as a two-level upward adjustment because Hair’s offense conduct involved the possession of a dangerous weapon.² On that basis, the court imposed on Hair a prison sentence of 51 months.

II.

On appeal, the defendants raise a panoply of challenges related to the sentencing proceedings. For his part, Thompson primarily maintains that he received ineffective assistance of counsel at sentencing because: (1) his lawyer’s “fail[ure] to object to the application of ACCA on the ground that Supreme Court authority and the plea agreement rendered it inapplicable to Thompson” was objectively unreasonable, *see* Br. of Appellants

¹ Guidelines section 3B1.1(a) authorizes a four-level upward adjustment if “the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive.” *See* U.S.S.G. § 3B1.1(c). Meanwhile, section 3B1.1(b) supplies a three-level upward adjustment if the defendant was a “manager or supervisor” in criminal activity with five or more participants. Pertinent here, section 3B1.1(c) authorizes a two-level upward adjustment for an “organizer, leader, manager, or supervisor in any criminal activity other than described in subsection (a) or (b).”

² Guidelines section 2B1.1(b)(16)(B) provides for a two-level upward adjustment to a defendant’s base offense level “[i]f the offense involved . . . possession of a dangerous weapon (including a firearm) in connection with the offense.” U.S.S.G. § 2B1.1(b)(16)(B).

17; and (2) that “Section 2.i [of the written plea agreement] does not waive a defendant’s rights under *Erlinger v. United States*, 602 U.S. 821 (2024),” *id.* at 24 (citation modified).³

Meanwhile, Hair maintains — as he did in the underlying proceedings — that the two-level upward adjustment under the Sentencing Guidelines for being an organizer, leader, or supervisor of criminal activity, *see* U.S.S.G. § 3B1.1(c), and the two-level upward adjustment under the Guidelines for possessing a dangerous weapon, *see* U.S.S.G. § 2B1.1(b)(16)(B), were each improperly applied to him. As to the former, Hair argues there “is simply no evidence in the record to support any finding that Hair was an organizer, leader, manager[,] or supervisor” in the conspiracy. *See* Br. of Appellants 36. And Hair asserts that “the [g]overnment did not establish the necessary temporal and spatial proximity linking the firearm to Hair and the fraudulent scheme,” such that the district court erred in applying the two-level dangerous weapon upward adjustment. *Id.* at 53.

A.

In this light, we review an ineffective assistance of counsel claim made on direct appeal — such as the one interposed by Thompson — under the *de novo* standard, and “we will reverse only if it conclusively appears in the trial record itself that the defendant was

³ We observe that Thompson’s appellate contentions regarding the purported ineffectiveness of his lawyer during the sentencing proceedings fall outside the scope of the appeal waiver in his written plea agreement. *See* J.A. 324 (specifying that “[t]he [d]efendant agrees . . . [t]o waive knowingly and expressly the right to appeal the conviction and whatever sentence is imposed on any ground, including any appeal pursuant to 18 U.S.C. § 3742 . . . *excepting* an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the [d]efendant at the time of the [d]efendant’s guilty plea” (emphasis added)). Furthermore, citations herein to “J.A. ____” refer to the contents of the Joint Appendix filed by the parties in this appeal.

not provided effective representation.” *See United States v. Freeman*, 24 F.4th 320, 326 (4th Cir. 2022) (citation modified). As to Hair’s various sentencing-related contentions, we “review all sentences under a deferential abuse-of-discretion standard.” *See Gall v. United States*, 552 U.S. 38, 41 (2007) (citation modified). “[I]n assessing whether a sentencing court properly applied the Guidelines, ‘we review the court’s factual findings for clear error and its legal conclusions de novo.’” *See United States v. Dennings*, 922 F.3d 232, 235 (4th Cir. 2019) (quoting *United States v. Allen*, 446 F.3d 522, 527 (4th Cir. 2006)).

B.

In these circumstances, having carefully assessed the record on appeal — as well as the various appellate submissions of the parties — we discern no reversible error. Accordingly, we are satisfied to reject the defendants’ appellate contentions and affirm.

1.

Starting with Thompson’s ineffective assistance of counsel claim, we are of opinion that the record on appeal does not “conclusively” show that Thompson’s “counsel did not provide effective assistance.” *See United States v. Galloway*, 749 F.3d 238, 241 (4th Cir. 2014). Rather, it is likely that Thompson’s lawyer at the sentencing in July of 2024 did not object to Thompson’s designation under the ACCA because Thompson had waived his rights — as announced in the Supreme Court’s 2024 *Erlinger* decision — to have a jury decide whether his five predicate convictions each occurred on “separate occasions.”

Even if we agreed with Thompson that his lawyer made an error pertaining to the *Erlinger* precedent, Thompson fails to overcome the government’s invocation of harmless error. *See, e.g., United States v. Brown*, 136 F.4th 87, 94 (4th Cir. 2025) (recognizing that

harmless error review applies to *Erlinger* errors). That is, Thompson had not three — but five — qualifying violent crimes that were each committed on separate days. As the government rightly contends, “it is inconceivable that Thompson would forego his plea agreement to challenge his ACCA status.” *See* Br. of Appellee 23; *see Brown*, 136 F.4th at 99 (“[G]iven 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 [the defendant] would have traded the benefit of pleading guilty for such long odds.”).

2.

Turning to Hair’s sentencing-related appellate contentions, we also discern no reversible error in that respect. Regarding Hair’s contention that the sentencing court erred in applying a two-level upward adjustment for Hair’s leadership in the conspiracy, there is no merit whatsoever to Hair’s position. As our Court has long recognized, the upward adjustment set forth in Guidelines section 3B1.1(c) applies when a defendant directed the activities of codefendants, *see, e.g., United States v. Bengali*, 11 F.3d 1207, 1212-13 (4th Cir. 1993), or when a defendant recruits participants into a criminal conspiracy, *see, e.g., United States v. Jones*, 356 F.3d 529, 538 (4th Cir. 2004). And here, Hair did both — that is, Hair recruited approximately 10 other participants to act as so-called “money mules” for the criminal conspiracy, and Hair had those individuals deposit the stolen checks. *See, e.g., J.A.* 247 (specifying that Hair had at least 10 “money mules operating for him”); *id.* at 451-52 (recognizing that Hair recruited “money mules” to deposit stolen checks).

Lastly, as to Hair’s appellate contention that the district court erred by applying the two-level upward adjustment for the underlying offense conduct involving the possession

of a firearm, we also reject that contention as meritless. To be sure, although Hair and his codefendant, Thompson, were each involved in a wide-ranging criminal conspiracy for mail and bank fraud, Hair sent multiple text messages and photos in which he offered to sell — and did, in fact, sell — Thompson a firearm. *See, e.g.*, J.A. 237 (text message from Hair to Thompson: “You gave me 36k in [checks] for that last pistol. LOL.”). Because a firearm need only have “some purpose or effect” with the underlying offense conduct, we cannot say that the court abused its discretion in applying the two-level upward firearm adjustment as to Hair. *See United States v. Jenkins*, 566 F.3d 160, 162 (4th Cir. 2009).

III.

Pursuant to the foregoing, we are satisfied to reject each of the defendants’ appellate contentions and affirm the district court. Furthermore, we dispense with oral argument because the facts and legal contentions are adequately presented in the materials before our Court, and because an argument would not aid in the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT

Eastern District of North Carolina

UNITED STATES OF AMERICA

v.

DARRELL ALAN THOMPSON

JUDGMENT IN A CRIMINAL CASE

Case Number: 5:24-cr-42-M-1

USM Number: 03001-511

Monique Kreisman

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 and 13 of Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1349, 18 U.S.C. § 1344	Conspiracy to Commit Bank Fraud	1/31/2023	1
18 U.S.C. § 922(g)(1), 18 U.S.C. § 924(e)(1)	Possession of a Firearm and Ammunition by a Felon	1/20/2023	

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 9,10,12 ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

10/23/2024

Date of Imposition of Judgment

Richard E. Myers II
Signature of Judge

Richard E. Myers II, Chief United States District Judge
Name and Title of Judge

10/30/2024
Date

DEFENDANT: DARRELL ALAN THOMPSON
CASE NUMBER: 5:24-cr-42-M-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

180 months (180 months on Count 1 and 180 months on Count 13; to run concurrently)

- ☒ The court makes the following recommendations to the Bureau of Prisons:
The court recommends: Most intensive substance abuse treatment, Vocational training/educational opportunities, Mental health assessment and treatment, Physical health evaluation and treatment, Placement at FCI Butner - facility closest to family.
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ ☐ a.m. ☐ p.m. on _____
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on _____
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DARRELL ALAN THOMPSON

CASE NUMBER: 5:24-cr-42-M-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

5 years (5 years on count 1 and 5 years on count 13; to run concurrently)

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: DARRELL ALAN THOMPSON
CASE NUMBER: 5:24-cr-42-M-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: DARRELL ALAN THOMPSON
CASE NUMBER: 5:24-cr-42-M-1

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions. The court notes that Fourth Circuit precedent may require that a probation officer have some particularized suspicion to render certain searches lawful, and the court imposes lawful searches.

The defendant shall support his dependent.

The defendant shall participate in a program of mental health treatment, as directed by the probation office.

The defendant must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution.

If the defendant has any unpaid amount of restitutions, fines, or special assessments, the defendant shall notify probation office of any material change in economic circumstances that might affect the defendant's ability to pay.

The defendant shall not incur new credit charges or open additional lines of credit without approval of the probation office.

The defendant shall provide the probation office with access to any requested financial information.

The defendant shall participate as directed in a program approved by the probation office for the treatment of narcotic addiction, drug dependency, or alcohol dependency which will include urinalysis testing or other drug detection measures and may require residence or participation in a residential treatment facility.

DEFENDANT: DARRELL ALAN THOMPSON
CASE NUMBER: 5:24-cr-42-M-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$ 200.00	\$ 87,476.15	\$	\$	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Bank of America	\$79,292.80	\$79,292.80	
JP Morgan Chase	\$8,183.35	\$8,183.35	

TOTALS	\$	<u>87,476.15</u>	\$	<u>87,476.15</u>
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DARRELL ALAN THOMPSON
CASE NUMBER: 5:24-cr-42-M-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☐ Lump sum payment of \$ _____ due immediately, balance due
- ☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
The special assessment in the amount of \$ 200.00 shall be due in full immediately. Payment of restitution shall be due and payable in full immediately. However, if the defendant is unable to pay in full immediately, the special assessment and restitution may be paid through the Inmate Financial Responsibility Program (IFRP). The court orders that the defendant pay a minimum payment of \$25 per quarter through the IFRP, if available. The court, having considered the defendant's financial resources and ability to pay, orders that any balance still owed at the time of release shall be paid in installments of \$100 per month to begin 60 days after the defendant's release from prison. At the time of the defendant's release, the probation officer shall take into consideration the defendant's ability to pay the restitution ordered and shall notify the court of any needed modification of the payment schedule.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
Darrell Alan Thompson 5:24-cr-42-M-1	87,476.15	87,476.15	

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

The defendant shall forfeit to the United States the defendant's interest in the property specified in the Preliminary Order of Forfeiture entered on July 24, 2024.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTa assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

DEFENDANT: DARRELL ALAN THOMPSON
CASE NUMBER: 5:24-cr-42-M-1

ADDITIONAL DEFENDANTS AND CO-DEFENDANTS HELD JOINT AND SEVERAL

Case Number Defendant and Co-Defendant Names (including defendant number)	<u>Total Amount</u>	<u>Joint and Several Amount</u>	<u>Corresponding Payee, if appropriate</u>
Antonio Rasheed Hair 5:22-CR-257-M-2	\$87,476.15	\$87,476.15	
Michael James Pasea 5:22-CR-257-M-3	\$87,476.15	\$87,476.15	

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

Case No. 5:24-CR-42-M-RN-1

DARRELL ALAN THOMPSON,

Defendant.

PUBLIC TRANSCRIPT OF SENTENCING HEARING
OCTOBER 23, 2024

**(Pursuant to Standing Order 22-SO-1, portions of all
guilty plea and sentencing transcripts are restricted.)**

THE HONORABLE CHIEF JUDGE RICHARD E. MYERS II
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

On Behalf of the Government

**ADAM F. HULBIG
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On Behalf of the Defendant

**MONIQUE KREISMAN
Kreisman Law Firm
226 North Front Street, Suite 196
Wilmington, North Carolina 28401**

USPO: Abby Waser

Risa Kramer, RMR, CRR
Official Court Reporter
United States District Court
Wilmington, North Carolina

1 loss-related guideline paragraphs in the PSR.

2 So I guess my point of -- is that we can get
3 to the loss range even if we start with his -- the point
4 that he concedes, which is he is at least responsible
5 for 99,000. We can find readily the additional losses
6 even if we go outside to the text messages.

7 THE COURT: How does this affect restitution
8 amounts in the plea regarding restitution?

9 MR. HULBIG: It does not, to my knowledge,
10 Your Honor, affect restitution.

11 THE COURT: All right. The Court finds the
12 compromise reached by the parties to be adequately
13 supported by the facts before the Court.

14 The Court finds it to be an appropriate
15 concession on both sides.

16 The objection that's going to drive the
17 guideline -- let's see. So objection 3, the defendant
18 objects to receiving a two-level enhancement for being
19 an organizer, leader, manager, supervisor -- sustained.
20 It doesn't affect the advisory guideline range as the
21 defendant's guideline range is being designated -- is
22 being driven by having been designated as an armed
23 career criminal.

24 So the final -- so the final objection,
25 then, becomes the objection 4. That has a potential to

1 enhance -- or affect the guidelines. Thompson objects
2 to the enhanced sentence applied under Title 18, United
3 States Code, Section 924(e), the Armed Career Criminal
4 Act. The defendant contends he does not have three
5 predicate convictions.

6 First, there's an objection to conviction
7 for robbery with a dangerous weapon and conspiracy to
8 commit robbery with a dangerous weapon and possession of
9 a stolen firearm in case number 06crs57303. They were
10 committed when the defendant was not yet 18, but he was
11 charged and convicted as an adult under North Carolina
12 law. The Raise the Age law from 2019 was not
13 retroactive. I haven't seen any -- I did a search. I
14 haven't found any published cases to the -- addressing
15 what the retroactivity effect should be here.

16 But these cases are driven by the
17 application of state law, and state law at the time it
18 constitutes an adult felony under North Carolina law at
19 the time of commission, at the time of conviction, and
20 there's nothing -- and it was not made retroactive. It
21 was -- explicitly states it's for cases going forward
22 and not retroactive, which I believe controls this
23 Court's ruling as to that offense.

24 So that's my ruling there, based on the
25 Court's legal conclusion.

1 To the extent you wish to make any
2 additional argument, Ms. Kreisman, to preserve it, I'll
3 hear you.

4 MS. KREISMAN: Your Honor, I don't have any
5 arguments besides what was already made in writing. I
6 would like to preserve our objection just in case --

7 THE COURT: It's preserved.

8 MS. KREISMAN: -- something happens at the
9 Fourth Circuit and it does become retroactive. I think
10 it would be ineffective of me not to make these
11 arguments and not to preserve these objections.

12 THE COURT: I understand.

13 MS. KREISMAN: But I don't have additional
14 oral argument besides what was submitted in writing for
15 Your Honor.

16 THE COURT: Okay. The second one is the
17 extent to which the three convictions for robbery with a
18 dangerous weapon -- case number 10crs59522, 10crs59682,
19 and 10crs63210 -- constitute three separate offenses or
20 should be treated as one occurrence.

21 The Court notes that, based on the materials
22 provided to the Court, they occurred on separate
23 occasions. The one that was -- there was one store that
24 was robbed twice, but days apart, with two different
25 victims at the store. One appears to have taken place

1 inside the store. The second appears to have taken
2 place in the parking lot, based on the descriptions.

3 Nevertheless, the -- Wooden, Linnie, and
4 Curtis, the cases in each of those, the question is
5 whether or not they were part of an uninterrupted course
6 of conduct. In each of those cases, the offenses
7 occurred on the same day. In Wooden, it was ten
8 burglaries, but they were ten burglaries of storage
9 units in a single building. That is, break into one,
10 break into the next one, break into the next one. And
11 the Supreme Court found that that constituted a single
12 course of events.

13 The Court finds that a robbery on August 1st
14 and a robbery on August 4th, while perpetrated against
15 employees of the same store, were committed three days
16 apart with different individual victims and do not
17 constitute an uninterrupted course of conduct. There
18 was a sufficient break between the August 1st robbery
19 and the August 4th robbery for the defendant to stop,
20 return to a place of repose, and come back. There's
21 nothing to suggest that he was at a single location for
22 the entirety of that time and engaged in a single
23 ongoing spree.

24 July 1st is a month separated from August
25 1st, and there's not a reasonable argument that those

1 would be a single offense.

2 So the Court finds that the three 2010
3 robbery convictions should be considered three separate
4 violent felonies for purposes of determining whether or
5 not the Armed Career Criminal Act applies. And I don't
6 believe there's any dispute regarding the application of
7 the statute in the 2019 breaking and entering larceny
8 after breaking and entering conviction. The Court notes
9 United States versus Mungro which finds that North
10 Carolina General Statute 14-54(a) sweeps no more broadly
11 than the generic elements of burglary and constitutes an
12 independent offense under the Act.

13 Court finds that the defendant has been
14 convicted of five separate qualifying felonies and
15 therefore qualifies under the Act. None of this is to
16 any -- without prejudice to your preservation of all of
17 your arguments, Ms. Kreisman.

18 Based on the record and governing law, the
19 Court calculates the advisory guideline range applicable
20 to the defendant's case as follows:

21 Total offense level is 30. Criminal history
22 category is VI. The advisory guideline range is 180 to
23 210 months, with a mandatory minimum sentence of 180
24 months on count 13. Because the ACCA finding creates
25 the mandatory minimum, this drives the guideline.