NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL HINDS,
PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the ACCA occasions-different inquiry, requiring a detailed, multi-factored analysis of the facts surrounding at least three prior offenses—facts which are not intrinsic to the elements of 922(g)(l)—render *Erlinger* errors structural and not subject to harmless-error analysis?

LIST OF PARTIES

All the parties to the proceeding are listed in the style of the case.

All cases in other courts directly related to the case in this court:

- *United States v. Hinds*, No. 18-cr-20533, U.S. District Court for the Eastern District of Michigan. Judgment entered Sept. 22, 2022.

- *United States v. Hinds,* Nos. 24-1704, 22-1848, U. S. Court of Appeals for the Sixth Circuit. Judgment entered Aug. 8, 2025.

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The Sixth Circuit opinion is available electronically at *United States v. Hinds*, 2025 WL 2268122 (6th Cir. Aug. 8, 2025). It is also submitted herewith as Appendix A.

JURISDICTION

On August 8, 2025, a three-judge panel in the Sixth Circuit Court of Appeals entered its opinion and judgment in *United States v. Hinds*, 2025 WL 2268122 (6th Cir. Aug. 8, 2025). This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

STATUTES, ORDINANCES AND REGULATIONS INVOLVED

1. **The Fifth Amendment of the United States Constitution provides in relevant part:**

> No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . nor be deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. V.

2. **The Sixth Amendment of the United States Constitution provides in relevant part:**

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 . . . . U.S. Const. amend. VI.

3. **18 U.S.C. § 922(g)(1) provides in relevant part:**

It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year. . . . to possess in or affecting commerce, any firearm or ammunition.

4. **18 U.S.C. § 924(e)(1) states:**

> 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

Mr. Hinds was indicted on three counts: possession with intent to distribute crack cocaine, 21 U.S.C. § 841(a); possession of a gun as a person with a prior felony, 18 U.S.C. § 922(g)(1); and possession of a gun in furtherance of a drug-trafficking crime, 18 U.S.C. § 924(e)(1). *Hinds*, 2025 WL 2268122 at *2-3.

A jury convicted Mr. Hinds on all counts. *Id.* at *3. At sentencing, the Presentence Report (PSR) recommended that he receive an enhanced sentence under Armed Career Criminal Act, 18 U.S.C. § 9(e)(1). *Id.* (This would mean a mandatory minimum of twenty years imprisonment—fifteen years minimum for the § 922(g)(1) conviction under ACCA, and an additional five consecutive years minimum for the § 924(c) conviction.) Hinds objected to the court making a factual determination of whether his prior convictions occurred on separate occasions for the purposes of determining ACCA predicates, arguing such a factual determination was for a jury. *Id.* But "[b]ecause *Erlinger v. United States*, 602 U.S. 821 (2024), had not yet been decided, [the Sixth Circuit's] then-binding precedent to the contrary controlled, so the district court rejected Hinds' argument," and found Mr. Hinds to be subject to a twenty-year minimum sentence. *Id.* The district court sentenced Mr. Hinds to the mandatory minimum twenty years in custody. *Id.*

This Court thereafter decided *Erlinger*, which held that the Fifth and Sixth Amendments require a jury to find the three different occasions element of an ACCA conviction. *Erlinger*, 602 U.S. 821.

Before Mr. Hinds briefed his appeal, a Sixth Circuit panel concluded that *Erlinger* errors are subject to harmless-error review. *See Campbell*, 122 F.4th at 629-31. Subsequent Sixth Circuit panels relied upon *Campbell* to apply harmless error review to a district court's failure to submit the occasions different inquiry to a jury. *See*, *e.g.*, *Cogdill*, 130 F.4th at 527 ; *United States v. Robinson* 133 F.4th 712, 723-5 (6th Cir. 2025); *United States v. Kimbrough*, 138 F.4th 473, 475 (6th Cir. 2025); *United States v. Thomas*, 142 F.4th 412 (6th Cir. 2025), deny'd cert. *Thomas v. United States*, U.S. No. 25-5650, 2025 WL 2949650 (Oct. 20, 2025).

On appeal, Mr. Hinds argued that an *Erlinger* error is a form of structural error, by implication from *Erlinger* and consistent with other Supreme Court precedent, and that *Campbell* therefore was wrongly decided. Mr. Hinds requested a remand to the district judge for resentencing based on the crimes for which he was convicted by the jury, including the unenhanced 922(g)(1) offense.

Mr. Hinds' Sixth Circuit panel did not engage directly on his argument that the *Erlinger* error was structural, instead relying upon circuit precedent set by recent cases that had applied harmless error review. *Hinds*, 2025 WL 2268122 at *9 (citing *Cogdill*, 130 F.4th at 527-8); *see also Campbell*, 122 F.4th at 629-31. In applying harmless error review, the panel used a framework laid out in another recent case, *Thomas*, 142 F.4th 412. *Id.* at *9-11.

The *Hinds* panel's reliance on *Thomas* is notable here because the *Thomas* majority decision did engage with that appellant's structural error arguments, which were similar

to Mr. Hinds'. The *Thomas* majority defended the *Campbell* decision on two grounds. *Thomas*, 142 F.4th at 417. "First, most constitutional errors are not structural, and the Supreme Court has applied harmless-error review when an element is omitted from the jury instructions, so by analogy, a district judge's factfinding should also be subject to harmless error." *Id.* (citing *Campbell*, 122 F.4th at 630 (citing *Washington v. Recuenco*, 548 U.S. 212, 218 (2006) and *Neder v. United States*, 527 U.S. l, 18 (1999)). Second, because the panel found *Erlinger* was "nearly on all fours" with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), and because the Sixth Circuit had consistently reviewed such errors for harmlessness, *Erlinger*'s remedy should be the same. *Id.* at 417 (citing *Campbell*, 122 F.4th at 629-30 (quoting *Erlinger*, 602 U.S. at 835)). The *Thomas* majority saw no reason to disagree with the *Campbell* majority's logic. *Id.* at 417-18.

Thus far, this Court has denied certiorari to the defendant-petitioners in both *Campbell* and *Thomas*. Those petitioners made effectively the same arguments as Mr. Hinds here as to the structural nature of *Erlinger* errors. But Mr. Hinds raises the issue again, hoping that at some point, this issue will be taken up by this Court. As one Sixth Circuit judge has pointed out, "given our repeated application of harmless error to *Apprendi*-style errors, until we receive direction from the Supreme Court otherwise, we are bound to continue this path." *Thomas*, 142 F.4th at 430 n.1 (Nalbandian, J., concurring) (emphasis added).

REASONS FOR GRANTING THE PETITION

I. Circuit judges disagree as to whether an *Erlinger* error is structural and whether harmless-error review comports with the Sixth Amendment jury trial right at all.

While *Erlinger* does not expressly find structural error, it is implied. First, during oral argument in *Erlinger*, Justice Gorsuch—the author of the resulting majority opinion—wondered whether failure to charge in the indictment and prove to a jury the different-occasions question constitutes structural error. *See* Tr. Oral Arg. at 27-29, *Erlinger*, 602 U.S. 821 (No. 23-370); *cf. Sullivan v. Lousiana*, 508 U.S. 275 (1993) (holding deprivation of right to jury verdict beyond reasonable doubt is structural error).

Second, *Erlinger* holds that "for certain. . . the sentencing court erred in taking th[e] decision from a jury of Mr. Erlinger's peers." 602 U.S. at 835. As the Supreme Court has elsewhere explained, when the deprivation of the jury trial right has "consequences that are necessarily unquantifiable and indeterminate," it "unquestionably . . . qualifies as 'structural error.'" *Sullivan*, 508 U.S. at 281-82. The *Erlinger* Court could not say (and did not attempt to examine) whether a hypothetical jury would have found Erlinger's prior offenses were committed on different occasions. 602 U.S. at 835. It also did not remand the case with instructions to determine whether the error was harmless, as the government asked it to do and as the Court has done in cases involving an erroneous instruction about a charged element at an actual jury trial. *Compare id.* at 1860 (remanding "for further proceedings consistent with this opinion"), *with Ruan v. United States,* 597 U.S. 450, 467 (2022) (leaving "any harmlessness questions

for the courts to address on remand"); *Maslenjak v. United States*, 582 U.S. 335, 352-53 (2017) ("In keeping with our usual practice, we leave that dispute [over harmlessness] for resolution on remand."); *McFadden v. United States*, 576 U.S. 186, 197 (2015) ("Because the Court of Appeals did not address [harmlessness], we remand for that court to consider it in the first instance.").

Third, *Erlinger* took care to emphasize defendants have the right to hold the government to its burden to prove "different occasions" to a unanimous jury beyond a reasonable doubt "'regardless of how overwhelming' the evidence may seem to a judge." 602 U.S. at 842 (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986)). *Rose* explains that denying the right to a jury trial altogether by entering a directed verdict for the prosecution would be structural error because "the error in such a case is that the wrong entity judged the defendant guilty." *Rose*, 478 U.S. at 578. *Erlinger*'s reliance on *Rose* indicates the compounded "different occasions" error here is similarly not susceptible to harmless-error review.

Thus, while Justice Gorsuch did not address in his majority opinion whether the error was susceptible to harmless error review, or is instead structural, his analysis for the Court directly points toward structural error. *See generally Erlinger*, 602 U.S. at 829-35; s*ee also id.* at 1860-61 (Roberts, J., concurring) (writing only for himself that circuit court should consider on remand whether error was harmless).

Nonetheless, six circuits have held that *Erlinger* error is not structural. *See Campbell*, 122 F.4th 624; *United States v. Xavior-Smith*, 136 F.4th 1136 (8th Cir. 2025) ;

United States v. Brown, 136 F.4th 87 (4th Cir. 2025); *United States v. Rivers*, 134 F.4th 1292 (11th Cir. 2025); *United States v. Butler*, 122 F.4th 584 (5th Cir. 2024); and *United States v. Johnson*, 114 F.4th 913 (7th Cir. 2024). In reaching that conclusion almost all circuits rested their holding on *Neder*, 527 U.S. 1, and *Recuenco*, 548 U.S. 212 (2006). See, e.g., *Rivers*, 134 F.4th at 1305 (noting that these cases hold that "errors that 'infringe upon the jury's factfinding role' are 'subject to harmless-error analysis'"). But none of these cases acknowledge the marked differences between the multi-factored analysis required to find the occasions-different fact (which requires a detailed examination of the facts and circumstances surrounding at least three prior convictions) with traditional missing-element cases, such as the drug quantity involved in a drug trafficking offense, or whether a gun was carried, brandished, or discharged during a crime of violence. Those traditional omitted-element cases involve facts intrinsic to the offense itself, not a consideration of the interrelatedness of prior offenses having nothing to do with the instant crime.

As will be discussed below, the growing number of circuit judges expressing their concern that the jury trial right protected in *Erlinger* cannot be squared with application of harmless error review emphasizes the need for this Court to step in.

a. The ACCA's unique inquiry for the occasions-different element sets it apart from other *Apprendi* omitted-element errors.

There are multiple ways an *Erlinger* error is not like the traditional omitted element errors addressed in *Neder* and *Recuenco*. Traditional omitted element cases

involve facts about the instant offense. But the occasions-different element requires a wholly separate inquiry into facts surrounding prior convictions.

This Court has already recognized the importance of treating such inquiries differently. In *Erlinger*, while addressing an *Apprendi*-type error, the Court expressly acknowledged the need to try the occasions-different element in a separate, bifurcated trial. *See Erlinger*, 602 U.S. at 847. This is unlike any prior *Apprendi* omitted-element case, requiring special proceedings and distinct considerations. The acknowledgement that bifurcation is the natural and fairest approach necessarily reflects the fact that the occasions-different factors are not intrinsic to the elements of the underlying 18 U.S.C.§ 922(g)(1) offense. Instead, they set out an entirely separate consideration wholly unrelated to § 922(g)(1)'s elements. *See id.* at 893 (Jackson, J., dissenting) (detailing the inherent differences between "factfinding related to past criminality" and the "existing processes that govern [typical] jury determinations," because "a jury trial is 'confine[d] . . . to evidence that is strictly relevant to the particular offense charged").

This recognition that facts related to prior criminality are different than facts intrinsic to the commission of a new crime is nothing new, as this Court has long been clear that elements related to one's prior convictions are uniquely different from other trial facts. *See Old Chief v. United States*, 519 U.S. 172, 191 (1997) ("[P]roof of the defendant's [felony] status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense," and accordingly a defendant can stipulate that he has a prior felony during trial because

the fact of a prior conviction is wholly unrelated to the facts necessary to prove the commission of the current offense). That difference matters even more here.

The occasions-different question is not just about the singular fact that a prior conviction exists—it's about the relationship of multiple prior convictions to each other. And the details and relationships of a defendant's prior convictions will almost certainly never be admitted in a trial on the underlying felon-in-possession charge. To do so would be to allow a full-blown mini trial on the relatedness of prior offenses in a trial solely about whether the defendant knowingly possessed a firearm. *See Boggs v. Collins*, 226 F.3d 728, 744 (6th Cir. 2000) (Federal Rules of Evidence excluding extrinsic evidence are "designed to prevent distracting mini-trials on collateral matters"); *United States v. Riddle*, 193 F.3d 995, 998 (8th Cir. 1999) (the Federal Rules of Evidence aim to "avoid holding mini-trials on peripheral or irrelevant matters"). In other words, this is not a run-of-the-mill, missing-element case. Unlike other *Apprendi* omitted-element errors, this one involves a factual inquiry that was not fully developed at trial, and thus the facts necessary to evaluate harmlessness are not in the trial record.

Neder and *Recuenco* are distinguishable. In both, the defendant was *charged* with the offense at issue, including the omitted element; and in neither case did the harmlessness determination depend on evidence *not* admitted at trial (and possibly inadmissible at trial), as the government would have the Court do here. Most significant, in subjecting these instructional omissions to harmless-error review, the Court in both *Neder* and *Recuenco* quoted *Rose* as establishing the governing rule that the presumption

of harmless-error analysis applies only "'[i]f the defendant . . . was tried by an impartial adjudicator.'" *Neder*, 527 U.S. at 8 (quoting *Rose*, 478 U.S. at 579) (emphasis added); *see also Recuenco*, 548 U.S. at 218. Given the defendants in both *Neder* and *Recuenco* were tried by an impartial adjudicator (the jury), the presumption of harmless-error review applied. Under this logic, then, if the defendant was *not* tried by an impartial adjudicator, the presumption of harmless-error review does not apply.

Here, Mr. Hinds was not charged with the ACCA aggravated offense and was denied entirely a trial on the ACCA aggravated offense because then-binding precedent said he had no right to trial on it. He was thus deprived altogether of the opportunity to be tried by an impartial adjudicator on the ACCA aggravated offense, rendering the error one of the rare few that are structural. *See Rose*, 478 U.S. at 578 n.6 (describing the examples of structural error as involving cases where "the basic trial process" was "aborted," or "denied [] altogether"). It can be no accident *Erlinger* quoted and cited only that portion of *Rose* describing structural error, without mentioning the word "harmless" or citing *Neder* or *Recuenco*. *Erlinger*, 602 U.S. 821.

In stark contrast, harmless-error review of an *Erlinger* error hinges on a court's evaluation of information related to an uncharged element about prior offenses—often committed years or even decades earlier—that would never be presented at trial on the unenhanced 922(g)(1) offense. When Mr. Hinds went to trial in this case, the jury heard nothing about the timing, purpose, or relationship of his prior offenses to each other. See *Hinds*, 2025 WL 2268122 at *9 ("Here, the district court appeared to rely exclusively

on the criminal history outlined in Hinds' PSR.") Looking at the trial record, therefore, there is nothing upon which this Court could base a harmlessness determination. The non-trial-record information that was used by the district court to evaluate ACCA's occasions-different element essentially turned the process into a directed verdict on an uncharged, enhanced offense. This approach is constitutionally faulty. *See Rose*, 478 U.S. at 578 ("[A] trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction." (quotations and citations omitted)), *quoted in Erlinger*, 602 U.S. at 842.

b. The broad rationales underlying this Court's structural error jurisprudence strongly caution against extending the rationales of *Neder* and *Recuenco* to the unique context of *Erlinger* errors.

This Court has announced "at least three broad rationales" for deeming an error as structural. *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017). "First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest [such as the right to represent oneself]." *Id.* "Second, an error has been deemed structural if the effects of the error are simply too hard to measure [such as] when a defendant is denied the right to select his or her own attorney." *Id.* "Third, an error has been deemed structural if the error always results in fundamental unfairness [such as denying an indigent defendant an attorney or failing to give a reasonable-doubt instruction]." *Id.* at 296. However, "[t]hese categories are not rigid," and "more than one of these rationales

may be part of the explanation for why an error is deemed to be structural." *Id.* Moreover, "one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case." *Id.* (citing *United States v. Gonzales-Lopez*, 548 U.S. 140 (2006)).

An *Erlinger* error meets each of these rationales. First, the jury-trial right at issue is not designed solely to protect individuals like Mr. Hinds from erroneous application of the ACCA enhancement. Instead, it protects "fundamental reservations of power to the American people. . . . the right to a jury trial has always been an important part of what keeps this Nation free." *Erlinger*, 602 U.S. at 832, 849. Second, the effects of the error are too hard to measure, due to the nature of the occasions-different inquiry. Applying harmless-error review to the *Erlinger* error in this case required the court of appeals to decide what a jury would have done with hypothetical evidence. In other words, the court of appeals had to concoct an imaginary jury. The difficulties in determining the likely outcome had there been no *Erlinger* error render the error structural because "the efficiency costs of letting the government try to make the showing are unjustified." *Weaver*, 582 U.S. at 295-96. In short, there is no efficiency benefit when the determination requires a thought experiment based in pure abstracts—we cannot know what the outcome would have been, because we do not

know if the evidence that would have been presented to the jury would have swayed them to find the prior offenses were committed on different occasions.[1]

Finally, there is fundamental unfairness implicated by *Erlinger* errors. The very nature of the error—a Fifth Amendment due process violation for failing to charge or prove the enhancement beyond a reasonable doubt, evinces the unfairness of punishing Mr. Hinds, and those like him, for an aggravated version of his offense when he was charged with and found guilty of only the elements of § 922(g)(1). This unfairness remains true even if some defendants have prior convictions that, to some, plainly amount to different occasions. *Erlinger*, 602 U.S. at 842 ("Often, a defendant's past offenses will be different enough and separated by enough time and space that there is little question he committed them on separate occasions. But none of that means a judge rather than a jury should make the call."). Indeed, the Fifth and Sixth Amendments "ensure that a judge's power to punish would derive wholly from, and remain always controlled by, the jury and its verdict." *Id.* at 831-32.

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[1] The Sixth Circuit seemed to find it obvious that "a jury would also conclude that Hinds committed [his] offenses on different occasions," noting that his drug offenses were separated by almost a year, involved different drugs, and he was punished and sentenced (in different neighboring jurisdictions) for one before he committed the other. *Hinds*, 2025 WL 2268122 at *10-11. But that conclusion is <u>not</u> obvious. On the contrary, as pointed out by Mr. Hinds in his Sixth Circuit briefing, at least two post-*Erlinger* federal juries have found the government did not meet its burden in proving separate occasions for prior drug dealing offenses committed months and years apart, with intervening prosecutions and sentences, and in different jurisdictions constituted. *See* Doc. 173, Phase Two Verdict Form, *United States v. Pennington*, N.D. Ga. Cr. No. 19-00455; Doc. 224, Jury Verdict for Phase II, *United States v. Willis*, E.D. Mo. Cr. No. 21-00548.

c. The Sixth Circuit's majority opinions are wrong in applying harmless-error analysis to *Erlinger* errors.

The Sixth Circuit fundamentally errs by overlooking the dramatic differences between traditional omitted-element cases and the occasions-different element. An *Erlinger* error is distinguishable from traditional omitted-element cases including *Neder* and *Recuenco*, as the facts supporting an omitted occasions-different element are not intrinsic to the felon-in-possession of a firearm crime itself, and instead require a detailed, multi-factored analysis of facts surrounding at least three prior offenses. That difference makes clear that failure to charge and prove the occasions-different element is structural error. Certiorari is needed to protect the public's jury trial right, and to prevent the impermissible expansion of harmless-error review into contexts not well suited for its remedy.

In Mr. Hinds' case, the district court and the reviewing panel relied exclusively on non-elemental information contained in the PSR to find beyond a reasonable doubt that a jury's failure to consider the different-occasions question had no effect on his sentence. *See Hinds*, 2025 WL 2268122 at *9-10. The panel brushed aside concerns about the reliability of PSRs to meet the standards demanded by *Erlinger* because Mr. Hinds, according to the panel, only challenged the constitutionality of the occasions-different inquiry and not the contents of the PSR. *Id.* at *10. Finding no reason to doubt the information in the PSR, the panel held it could rely the upon it to affirm his sentence. *Id.* (citing *Thomas*, 142 F.4th at 426 (Cole, J., concurring)).

But in applying a harmless-error review to evidence never presented (nor even admissible as evidence to) a jury, the Sixth Circuit extends the doctrine to territory this Court never intended. Justice Sotomayor has emphasized that it would be "patently unfair" for an appellate court applying harmless-error review to look to "inculpatory evidence the Government never put before the jury (like [a defendant's] presentence report)" to find that the jury would have found the defendant guilty. *United States v. Greer*, 593 U.S. 503 (2021) (Sotomayor, J. concurring) (emphasis added). This logic applies with even more force when the extra-trial evidence the court looks to are *Shepard* documents—the exact documents this Court expressly disavowed in *Erlinger*, 602 U.S. at 839-41.

Indeed, a growing number of Court of Appeals judges are questioning whether treating an *Erlinger* error as subject to harmless error review "contravenes the Supreme Court's holding in *Erlinger*." *Cogdill*, 130 F.4th at 535 (Clay, J., dissenting); *Thomas*, 142 F.4th at 423 (Cole, J., concurring) (quoting Judge Clay); *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*'"). "Given *Erlinger*'s caution, we should well consider whether the jury right we seek to protect in calling out an *Erlinger* error is best served through harmless error review reliant on *Shepard*[2] documents." *Campbell*, 122 F.4th at 627 (Davis, J., concurring); *see also United States v.*

[2] *Shepard v. United States*, 544 U.S. 13 (2005).

Harvin, 2024 WL 4563684, at *2 (11th Cir. Oct. 24, 2024) (suggesting that an Erlinger error could be structural, but declining to decide the question because the case would be remanded for resentencing under either structural or harmless error test).

In her concurrence in *Campbell*, Judge Davis addressed "the conundrum occasioned by the use of *Shepard* documents as part of the evaluation of the district court's different occasions inquiry." *See Campbell*, 122 F.4th at 635 (Davis, J., concurring). She detailed the tension between Erlinger's "cautionary guidance concerning the use of potentially unreliable *Shepard* documents," and this Court's holding in *Greer*, which allows review of the entire record when conducting plain error review of a traditional omitted-element error. *Id.* at 636. (citing *Greer*, 593 U.S. at 511). "The *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." *Id.* at 637. She explained that while *Greer's* expansive approach to the record "makes sense in the context of plain error review where the burden is on the defendant," it "g[a]ve [her] pause in extending [*Greer*'s] logic "to harmless-error review of a preserved constitutional error." *Id.* at 636-637.

> Use 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. . . . [G]iven *Erlinger*'s caution, we should well consider whether the jury right we seek to protect in calling out an *Erlinger* error is best served through harmless error review. . . .

Id. at 637.

In *Cogdill*, Judge Clay went further, arguing in his dissent that an *Erlinger* error is structural. 130 F.4th at 538 (Clay, J., dissenting). "It distorts *Apprendi*'s logic—which, again, repeatedly emphasizes the necessity of a jury deciding certain sentencing factors—to hold that where a jury does not do so, such an error is harmless." *Id.* at 537. Judge Clay distinguishing *Recuenco*, and explaining how *Erlinger* means that *Neder* is no longer good law: "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.

> In the context of an *Erlinger* error, "the preconditions for harmless error—a trial of a jury's peers and a record for the reviewing court to analyze—have not been satisfied. . . . [T]he very act of the judge, and not the jury, deciding this question is what violates the Sixth Amendment jury trial right. . . . 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.

Id. at 538-9 (quoting *Sullivan,* 508 U.S. at 279). Judge Clay argued that "*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." *Id.* at 541. 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., concurring in part and dissenting in judgment)).

In his *Thomas* concurrence, Judge Cole shared Judge Clay's concern "whether Campbell 'contravenes the Supreme Court's holding in *Erlinger*.'" *Thomas*, 142 F.4th at 423 (Cole, J., concurring) (quoting *Cogdill*, 130 F.4th at 535 (Clay, J., dissenting)). He observed that the *Thomas* majority "understates the Supreme Court's skepticism of the use of *Shepard* documents to conduct the different occasions analysis." *Id.* at 425. He warned that "[t]o proceed with harmless error review without accounting for *Erlinger*'s cautions [about utilizing *Shepard* documents] risks reproducing the same infringements on a defendant's constitutional rights the Supreme Court sought to guard against." *Id.* at 425-6.

Also in *Thomas*, Judge Nalbandian warned 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 <u>his peers</u> resolve the facts of his case, how is three <u>judges</u> resolving the case a permissible remedy?" *Id.* at 430 n.l (Nalbandian, J., concurring) (emphasis in original). Judge Nalbandian noted a declaration made by Justice Scalia: "I believe that depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged—which necessarily

means his commission of every element of the crime charged—can never be harmless." *Id.* (quoting *Neder,* 527 U.S. at 30 (Scalia, J., concurring in part and dissenting in judgment)) (emphasis in original).

II. The question presented is extremely important.

In *Erlinger*, this Court emphasized the importance of the jury trial right to the foundation and function of our democracy. That right is important not just to ensure fair outcomes for defendants, but to maintain the power of the people to check government overreach. Sentencing a person to a mandatory 15-year prison sentence when he was neither charged with the aggravated version of the offense, nor allowed to submit those aggravating facts to a jury directly undermines the basic concepts of liberty that define what it means to be American. That sort of harm cannot be corrected by a subsequent set of judges deciding for themselves that the aggravated facts exist—the harm is in the absence of the jury, and in elevating a judge's opinion over the people's right to decide. *Erlinger* errors are structural.

Instead of accepting that conclusion, the Sixth Circuit has taken an approach that pushes harmless-error review beyond the reach of this Court's prior pronouncements and thereby erodes the jury trial right in a new and increasingly imposing way. The Sixth Circuit has permitted appellate judges to rely not just on the entire district court record, but upon the same evidence this Court has expressly found to be unreliable. In other words, the Sixth Circuit has permitted appellate judges to step into the shoes of hypothetical jurors, and decide whether they would have found the

occasions-different fact beyond a reasonable doubt by looking to evidence that may not have been admissible under the rules of evidence, and which this Court has already disavowed. That takes harmless-error review too far. Reliance on untested evidence never submitted to a jury to guess what imaginary jurors might decide stretches harmless-error review beyond constitutional bounds. This Court should correct the Sixth Circuit's overreach, and clarify proper review standard for *Erlinger* errors. Indeed, this Court has yet to define the applicable standard. Now is the time for guidance.

CONCLUSION

For the forgoing reasons, Mr. Hinds respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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