No. _____

IN THE
Supreme Court of the United States

ALVIN BEASLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Alvin Beasley was indicted, tried, and found guilty of being a felon unlawfully in possession of a firearm under 18 U.S.C. § 922(g)(1). That offense carried a statutory maximum sentence of 10 years. 18 U.S.C. § 924(a)(2) (2019).[1] But at sentencing, the Government sought to punish Beasley under the Armed Career Criminal Act (ACCA), which subjects defendants to a 15-year mandatory minimum and a statutory maximum of life imprisonment if they have three prior convictions for violent felonies "committed on occasions different from one another." § 924(e)(1). Although the Government failed to charge the ACCA enhancement in the indictment and never presented evidence on the issue to the jury, over Mr. Beasley's objection the district court found for itself that Beasley qualified as an armed career criminal and sentenced him to 300 months' imprisonment.

After Beasley's sentencing, this Court decided *Erlinger v. United States*, 602 U.S. 821 (2024), which held that a jury, rather than a judge, must decide whether ACCA-predicate offenses were committed on different occasions. On appeal, the Seventh Circuit agreed that the district court violated Beasley's Fifth and Sixth Amendment rights under *Erlinger*. Yet the court ultimately affirmed his sentence, finding the *Erlinger* error was harmless.

[1] Congress amended § 924 in 2022, moving the penalty provision for violating § 922(g) from § 924(a)(2) to § 924(a)(8) and increasing the statutory maximum sentence from 10 years to 15 years. Bipartisan Safer Communities Act, Pub. L. No. 117-159, sec. 12004, 136 Stat. 1313, 1329 (2022). Beasley's case predates that change so all references to § 924 in this petition refer to the 2019 version in effect at the time of Beasley's offense.

Beasley raises two questions for review:

1. Whether a district court's decision to sentence a defendant as an armed career criminal, in violation of *Erlinger*, is subject to harmless error review.
2. If harmless error review applies, what standard should the reviewing court use to assess whether the error was harmless?

PARTIES TO THE PROCEEDING

Petitioner is Alvin Beasley, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

RELATED PROCEEDINGS

United States District Court (C.D. Ill.):

United States v. Beasley, No. 20-cr-20009 (July 26, 2023)

United States Court of Appeals (7th Cir.):

United States v. Beasley, No. 23-2489 (Dec. 19, 2025)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Alvin Beasley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

DECISIONS BELOW

The opinion of the court of appeals is reported at *United States v. Beasley*, 163 F.4th 403 (7th Cir. 2025). It is reprinted as Appendix A to this Petition. The district court's judgment and sentence is unreported and attached as Appendix B. The district court's oral ruling on Beasley's objection to the application of the ACCA penalties is unreported and attached as Appendix C.

JURISDICTION

The Seventh Circuit entered its opinion on December 19, 2025. Justice Barrett granted Mr. Beasley's application to extend the time to file this certiorari petition until May 18, 2026. 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 of 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 be informed of the nature and cause of the accusation . . . .

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 ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(a)(2) provides, in relevant part:

> Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

The Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), 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, 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

I. Legal Background

This case comes at the intersection of two lines of this Court's precedents: those empowering juries to find facts that increase a defendant's sentencing exposure, and those describing the scope of harmless error review under Federal Rule of Criminal Procedure 52(a).

A. *Apprendi* and *Erlinger*

The Fifth and Sixth Amendments limit a sentencing judge's power to find facts triggering statutory penalties. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Then, in *Alleyne v. United States*, 570 U.S. 99, 112 (2013), the Court extended the *Apprendi* principle to include facts increasing a mandatory minimum. The Court explained, "the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." *Id.* at 113. In federal prosecutions, those facts "must also be charged in the indictment." *United States v. Cotton*, 535 U.S. 625, 627 (2002).

The Court recently addressed how *Apprendi* and *Alleyne* apply in the context of the Armed Career Criminal Act (ACCA). When a defendant is found guilty of being a felon unlawfully in possession of a firearm under 18 U.S.C. § 922(g), the statutory maximum sentence is generally 10 years. 18 U.S.C. § 924(a)(2). But under

the ACCA, a defendant with three prior convictions for certain violent felonies or drug offenses "committed on occasions different from one another" is subject to a 15-year mandatory minimum. 18 U.S.C. § 924(e)(1). The different-occasions inquiry is "multi-factored in nature," taking into account timing, proximity of location, and the character and relationship of the offenses. *Wooden v. United States*, 595 U.S. 360, 369 (2022).

In *Erlinger v. United States*, 602 U.S. 821, 825 (2024), this Court considered "whether a judge may decide that a defendant's past offenses were committed on separate occasions under a preponderance-of-the-evidence standard, or whether the Fifth and Sixth Amendments require a unanimous jury to make that determination beyond a reasonable doubt." The Court concluded that determination belongs to the jury. Finding the case "nearly on all fours with *Apprendi* and *Alleyne*," the Court explained that "[t]he Fifth and Sixth Amendments placed the jury at the heart of our criminal justice system." *Id.* at 831, 835. Because classifying a defendant as an armed career criminal has the effect of increasing both their maximum and minimum possible sentence, "a jury [must] resolve ACCA's occasions inquiry unanimously and beyond a reasonable doubt." *Id.* at 835.

In reaching that decision, the Court rejected several counterarguments raised by the appointed *amicus*. First, *amicus* contended that the Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), should control the outcome. Though *amicus* suggested that case permitted a judge to find "any fact related to a defendant's past offenses," this Court explained that *Almendarez-Torres*

is a "narrow exception" allowing a judge to do "no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Erlinger*, 602 U.S. at 837 (first quoting *Alleyne*, 570 U.S. at 111 n.1, and then quoting *Mathis v. United States*, 579 U.S. 500, 511–12 (2016)).

Second, the Court emphasized that defendants are entitled to a jury determination even when the occasions inquiry is "straightforward." *Id.* at 842. It would be inappropriate for a district court to make an ACCA decision relying on *Shepard* documents—materials like "judicial records, plea agreements, and colloquies between a judge and the defendant"—because those may be used only to determine "the fact of a prior conviction and the then-existing elements of that offense." *Id.* at 839; *Shepard v. United States*, 544 U.S. 13 (2005). In addition, *Shepard* documents are often incomplete and error-prone, frequently arising out of proceedings that lacked adversarial testing; their use to impose "life-altering consequences" through an ACCA charge would thus violate principles of fair notice. *Id.* at 841–42. So even if a defendant's past offenses are "different enough and separated by enough time and space that there is little question he committed them on separate occasions," "none of that means a judge rather than a jury should make the call." *Id.* at 842.

Finally, the Court addressed practical concerns. To avoid prejudicing defendants by allowing prosecutors to present the jury with details of the defendant's past misconduct, district courts can bifurcate the proceedings. *Id.* at 847. Under that approach, "a jury is first tasked with assessing whether the

government has proved the elements of the § 922(g) felon-in-possession charge," and then "turns to consider evidence regarding whether the defendant's prior offenses occurred on different occasions for purposes of applying ACCA's mandatory minimum sentence under § 924(e)." *Id.* at 847–48. That procedure, while perhaps not "efficient," would ensure the continued vitality of the jury trial right: "an important part of what keeps this Nation 'free.'" *Id.* at 849 (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)).

B. Harmless Error

Under Federal Rule of Criminal Procedure 52(a), "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded" as harmless. Since *Chapman v. California*, 386 U.S. 18 (1967), this Court has recognized that harmless error doctrine can apply to constitutional errors. But the Court has always categorized some constitutional rights as "so basic to a fair trial that their infraction can never be treated as harmless error." *Id.* at 23. Those errors are deemed "structural." *Arizona v. Fulminante*, 499 U.S. 279, 307 (1991).

Weaver v. Massachusetts, 582 U.S. 286, 305 (2017), laid out three rationales the Court has used to deem errors structural. The first category includes cases where "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 conduct one's own defense. *Id.* at 295. The second category includes situations where "the effects of the error are simply too hard to measure," as with the right to select one's own attorney. *Id.* Third, an error is structural "if the error always results in

fundamental unfairness," such as when a defendant is denied an attorney or a judge fails to give a reasonable-doubt instruction. *Id.* at 296. In sum, "the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Id.* at 295 (quoting *Fulminante*, 499 U.S. at 310).

Two of this Court's prior cases rejecting claims of structural error are particularly instructive. To start, in *Neder v. United States*, 527 U.S. 1 (1999), in a prosecution for tax and bank fraud, the trial judge refused to submit an element of the offense—the issue of materiality—to the jury. The Court determined that "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9. Analogizing to cases finding harmless error when a jury received improper jury instructions, the Court explained that "[i]n both cases—misdescriptions and omissions—the erroneous instruction precludes the jury from making a finding on the actual element of the offense." *Id.* at 9–10. Because the jury-instruction error "did not 'vitiat[e] *all* the jury's findings,'" *id.* at 10–11 (citations omitted), harmless error review was appropriate.

Another important case is *Washington v. Recuenco*, 548 U.S. 212 (2006). There, the trial court applied a three-year sentencing enhancement based on its own factual findings, in violation of *Blakely v. Washington*, 542 U.S. 296 (2004). The Court found the case "indistinguishable" from *Neder*, and therefore not structural, based on *Apprendi*'s holding that "elements and sentencing factors must be treated

the same for Sixth Amendment purposes." *Recuenco*, 548 U.S. at 220. The defendant argued in this Court that the fundamental flaw was a "charging error" rather than "judicial factfinding," but the Court refused to consider that argument based on how the Supreme Court of Washington had treated the case. *Id.* at 220 n.3.

These cases stand for the proposition that, at least when evidence on an issue has been presented at trial, the failure to submit an element or a sentencing factor to the jury will not be treated as a structural error. But the cases do not resolve the *Erlinger* error at issue in this case: the failure both to charge in the indictment an element and prove it to the jury.

II. Factual Background

On May 19, 2019, the Danville, Illinois, Police Department responded to a "shots fired" call at the home of Petitioner Alivn Beasley's ex-girlfriend. *United States v. Beasley*, 163 F.4th 403, 405 (7th Cir. 2025). A witness reported that a red Chevrolet Impala had driven away from the scene immediately after the shooting. *Id.* Police tracked down the Impala and saw someone toss a firearm from the passenger side of the vehicle. *Id.* The officers conducted a traffic stop and found Beasley in the driver's seat. *Id.*

A. District Court Proceedings

On February 5, 2020, a grand jury in the Central District of Illinois returned a one-count indictment against Beasley, charging him with violating 18 U.S.C. § 922(g)(1). Appendix D. The indictment alleged only that Beasley, "knowing he had been previously convicted of a crime punishable by imprisonment for a term

exceeding one year, did knowingly possess, in and affecting commerce, a firearm, that is, a Glock 9mm handgun bearing serial number TNR082." *Id*. The indictment neither cited to § 924(e) nor alleged that Beasley had three prior convictions for violent felonies committed on different occasions. *Id*.

The case went to trial in September 2021. *Beasley*, 163 F.4th at 405. The parties stipulated that Beasley knew, prior to May 23, 2019, that he had been convicted of a felony. The jury returned a verdict of guilty on the sole count of the indictment.

Before Beasley's sentencing, probation prepared a presentence investigation report (PSR). The report concluded that Beasley had three prior convictions for violent felonies: an armed robbery in 2004, an aggravated battery in 2005, and a second-degree murder in 2011. *Beasley*, 163 F.4th at 405. Based on those offenses, probation determined Beasley qualified as an armed career criminal subject to a mandatory minimum sentence of 15 years under ACCA. *Id.*

Beasley objected to the application of the ACCA mandatory minimum. In a presentencing memorandum, he argued that *Alleyne*, 570 U.S. 99, and *Apprendi*, 530 U.S. 466, required a jury—not the court—to determine whether his prior convictions qualified as ACCA predicates. *Id.* at 405–06. At sentencing, the district court overruled Beasley's objection, citing then-controlling Seventh Circuit precedent permitting the different-occasions inquiry to be conducted by the sentencing judge. Appendix C; *see United States v. Hatley*, 61 F.4th 536 (7th Cir. 2023). The judge then found Beasley had three predicate offenses committed on

different occasions and sentenced him to 300 months' imprisonment. Appendix C; Appendix B.

B. Appellate Court Proceedings

Beasley appealed. While the appeal was pending, this Court decided *Erlinger*, 602 U.S. at 835, which held that the Fifth and Sixth Amendments require the jury to decide whether ACCA-predicate offenses occurred on different occasions. In light of *Erlinger*, Beasley argued on appeal that the district court committed reversible error when it decided Beasley qualified as an armed career criminal under ACCA. Though the Seventh Circuit panel agreed the district court erred, it found that error harmless. *Beasley*, 163 F.4th at 406.

First, the court rejected Beasley's argument that *Erlinger* errors are structural. Citing this Court's decisions in *Neder*, 527 U.S. 1, and *Recuenco*, 548 U.S. 212, the court reasoned that structural errors are limited to those that "vitiate the jury's entire holding." *Beasley*, 163 F.4th at 407. Because "the failure to submit a sentencing factor to the jury . . . impacts only the jury's ability to make a finding on one discrete issue," the court determined the jury's substantive verdict remained "entirely intact." *Id.* Nor did it matter to the court that Beasley was convicted and sentenced on an offense the government had failed to include in the indictment. Though Beasley argued that constituted per se reversible error as a constructive amendment to the indictment, the court determined an incomplete indictment was analogous to a jury instruction error and therefore subject to harmless error analysis under *Neder*. *Id.* at 408–09.

Second, having decided harmless error analysis applied, the court concluded it was "'clear beyond a reasonable doubt' that a properly instructed jury would have found the same facts as the court." *Id.* at 409. The court based that decision on what it described as Beasley's "concessions" that the three past convictions listed in the PSR occurred more than a year apart from each other. *Id.* at 410. Because the offenses were "separated by over a year" and "differed in nature," the court determined "a properly instructed jury would have found that Beasley committed the three offenses on different occasions." *Id.* It therefore affirmed the district court.

REASONS FOR GRANTING THE PETITION

I. This Court should grant review to decide whether *Erlinger* errors are reviewable for harmless error.

Federal Rule of Criminal Procedure 52 provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded" as harmless. Harmless error review applies to most errors, including constitutional errors. *Chapman* 386 U.S. at 22 . This Court, however, has also recognized a limited category of "structural errors": those that "affect[] the framework within which the trial proceeds" and thus are not subject to harmless error review. *Fulminante*, 499 U.S. at 309–10.

Erlinger errors fall in that category. In this case, the district court sentenced Beasley as an armed career criminal, triggering a mandatory minimum sentence of 15 years and increasing the statutory maximum sentence to life imprisonment, even though the ACCA charge was neither included in the indictment nor proved to the jury. Such a grave encroachment on the jury's fundamental role in our system of justice can never be considered harmless.

The court below disagreed. Following circuit precedent, the Seventh Circuit panel applied harmless error review to this case. *Beasley*, 163 F.4th at 408–09 (citing *United States v. Johnson*, 114 F.4th 913, 917 (7th Cir. 2024)). And the Seventh Circuit is not alone: five other circuits have also held that *Erlinger* errors are not structural. *See United States v. Brown*, 136 F.4th 87, 94, 99 (4th Cir. 2025), *cert. denied*, 146 S. Ct. 391 (2025) (concluding that "under the Supreme Court's decisions in *Neder*, *Recuenco*, and *Greer*, . . . harmless-error review applies to the

Erlinger error before us"); *United States v. Butler*, 122 F.4th 584, 586, 589 (5th Cir. 2024) (explaining that the *Erlinger* error, as a variation on *Apprendi* and *Alleyne* error, was subject to harmless error analysis); *United States v. Campbell*, 122 F.4th 624, 630, 632 (6th Cir. 2024), *cert. denied*, 146 S. Ct. 248 (2025) (applying harmless error review because *Erlinger* errors are "part and parcel with the errors in *Apprendi* and *Alleyne*"); *United States v. Xavior-Smith*, 136 F.4th 1136, 1137 (8th Cir. 2025), *cert. denied sub nom. Smith v. United States*, 146 S. Ct. 831 (2025) ("[H]armless error review survives *Erlinger*."); *United States v. Rivers*, 134 F.4th 1292, 1305-06 (11th Cir. 2025) (holding that, "[j]ust like the errors in *Apprendi* and *Alleyne*, *Erlinger* error is not structural because it does not render the defendant's trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence" (cleaned up)).[2]

The Court should grant this petition because that apparent consensus is both misleading and wrong. First, the circuit courts' uniformity obscures the fact that this issue has engendered significant disagreement among lower court judges. Several judges have expressed serious concerns about the application of harmless error review to *Erlinger* errors. Second, the circuit courts are misguided. As in

[2] Other circuits have also suggested that *Erlinger* errors should be reviewed for harmlessness. *See United States v. Trahan*, 111 F.4th 185, 197–98 (1st Cir. 2024), *cert. denied*, 145 S. Ct. 1206 (2025) (favorably citing the *Erlinger* concurrence and dissent for the statement that "it is well established that *Alleyne* challenges are subject to harmless error review"); *United States v. Saunders*, No. 23-6735-CR, 2024 WL 4533359, at *3 (2d Cir. Oct. 21, 2024) (unreported) (reviewing an *Erlinger* error for harmless error); *United States v. Murphy*, No. 18-3608, 2025 WL 3084755, at *7 (3d Cir. Nov. 4, 2025) (unreported) (applying plain error review after concluding that "[a]n *Apprendi* challenge to a judge as factfinder . . . is not one of those recognized categories of structural error").

Erlinger, where this Court rejected "the unanimous conclusion of the 12 Courts of Appeals" in order to safeguard Fifth and Sixth Amendment rights, 602 U.S. at 853 (Kavanaugh, J., dissenting), so too the Court must now overturn a consensus of circuits that have ignored the principles outlined in *Erlinger* itself.

A. Circuit court judges disagree on whether *Erlinger* errors may be harmless.

The circuits applying harmless error review to *Erlinger* errors have all done so by extending this Court's decisions in *Neder*, 527 U.S. 1, and *Recuenco*, 548 U.S. 212. The opinion below in this case provides a useful example of the reasoning. *See Beasley*, 163 F.4th at 406–09. The argument proceeds in four steps. First, *Neder* explained that structural errors are only those that "'vitiate' the jury's entire verdict," meaning most jury instruction errors are not structural. *Id.* at 407–08 (quoting *Neder*, 527 U.S. at 11). Second, *Recuenco* applied *Neder* to hold that an *Apprendi* error—the failure to submit a sentencing factor to the jury—was subject to harmless error review. *Id.* at 407. Third, *Erlinger* was merely a straightforward application of *Apprendi*. *Id.* at 408. Thus, *Erlinger* errors must be reviewed for harmlessness. *Id.*

Although the circuit courts have uniformly followed that logic, many judges have expressed disagreement with those rulings. Judge Clay, for example, has suggested that the apparent consensus position is at odds with *Erlinger* itself. *See United States v. Cogdill*, 130 F.4th 523 (6th Cir. 2025) (Clay, J., dissenting). He observed, "*Erlinger* repeatedly explained the Fifth and Sixth Amendments jury trial right is fundamental—and how extreme a violation it is when judges take severe

sentencing decisions out of the jury's hands." *Id.* at 536. Meanwhile, prior Supreme Court cases like *Rose v. Clark* have held that "[w]here [the Fifth and Sixth Amendments] right[s] [are] altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986)). Thus, "*Erlinger*'s reasoning, coupled with Supreme Court case law, indicate that the error *Erlinger* describes . . . is structural." *Id.* at 536–37.

Furthermore, Judge Clay explained that *Recuenco* does not require a different outcome. In *Recuenco*, "the defendant was charged with the required sentencing factor and both sides introduced evidence related to the factor at trial—the prosecution just failed to properly instruct the jury on that factor." *Id.* at 537. That scenario is a far cry from an *Erlinger* error, where there is no charge, no evidence, and no record of evidence presented to the jury for the appellate court to use for the harmless error analysis. *See id.*

Several of Judge Clay's colleagues on the Sixth Circuit have since expressed agreement with his critiques. Judge Cole, for one, signaled that he shares the concern that the application of harmless error "contravenes the Supreme Court's holding in *Erlinger*." *United States v. Thomas*, 142 F.4th 412, 423 (6th Cir. 2025) (Cole, J., concurring) (quoting *Cogdill*, 130 F.4th at 535 (Clay, J., dissenting)), *cert. denied*, 146 S. Ct. 345 (2025). Judge Nalbandian, too, has noted the apparent tension between harmless error review and the Sixth Amendment injury. "If the

Sixth Amendment is designed to protect a defendant's right to have a jury of his peers resolve the facts of his case," he wondered, "how is three judges resolving the case a permissible remedy?" *Thomas*, 142 F.4th at 430 (Nalbandian, J., concurring).

Even before *Erlinger*, some judges had expressed concerns with treating *Apprendi*-style charging errors as harmless. For example, in *United States v. Legins*, 34 F.4th 304, 317 (4th Cir. 2022), the defendant was charged with and convicted of a crime with a five-year maximum sentence but sentenced to an aggravated crime with an eight-year maximum sentence. While the Fourth Circuit panel ultimately found the error was harmless under *Neder* and *Recuenco*, the opinion noted, "there is something deeply unsatisfying about this result." *Id.* at 323. The court explained, "[a]s Justice Scalia observed in his partial dissent in *Neder*, it is bizarre that a deprivation of the jury right, which reflects a distrust of judges to adjudicate criminal guilt, can be set aside as harmless when we judges find the result sufficiently clear." *Id.* And the outcome was "particularly unsettling in this context, when the defendant, 'charged with one crime . . . was convicted of another . . . sans charge, jury instruction, or jury verdict.'" *Id.* at 323–24 (quoting *Recuenco*, 548 U.S. at 229 (Ginsburg, J., dissenting)).

Several members of the Third Circuit have also endorsed the view that charging errors are structural. In *United States v. Lewis*, 802 F.3d 449, 451 (3d Cir. 2015) (en banc), the defendant was sentenced for a crime with a seven-year mandatory minimum even though he had only been indicted for and convicted of a crime with a five-year mandatory minimum, in violation of *Alleyne*. While the

plurality decision applied harmless error review, Judges Smith, McKee, Ambro, and Jordan would have treated the error as structural. *Id.* at 458 (Smith, J., concurring). As Judge Smith explained, "[f]ew errors are more significant to the proceedings that follow than an indictment that fails to inform a defendant of the charges against him and the possible punishment he faces." *Id.* at 461. The indictment "forms the basis for the Government's proof, the accused's defense, and the trial court's rulings," and "whether a defendant decides to plead guilty or instead exercises his right to trial by jury may depend on the charges he faces and his potential punishment." *Id.* at 462. Therefore, "failing to notify a defendant of the crime of which he is accused 'infect[s] the entire trial process,'" rendering the error structural. *Id.* (quoting *Neder*, 527 U.S. at 8); *see also United States v. Lewis*, 766 F.3d 255, 276–80 (3d Cir. 2014) (Rendell, J., dissenting) ("It is hard to think of a more 'structural defect' than one affecting the indictment, which initiates and provides the foundation for a federal criminal trial."), *reh'g en banc granted, opinion vacated* (Nov. 25, 2014).

These various opinions demonstrate that judges have hotly debated whether *Erlinger* errors should be considered structural. This Court should step in to clear up the confusion and ensure lower courts are faithfully applying precedent.

B. The decision below is incorrect.

The Seventh Circuit's decision is inconsistent with this Court's precedents. The error at issue in this case—an *Erlinger* violation in which the ACCA separate-

occasions element was neither included in the indictment nor submitted to the jury—is structural and therefore not subject to harmless error review.

Recall that *Weaver* set out the three rationales the Court has used for finding errors to be structural: (1) cases where "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," (2) situations where "the effects of the error are simply too hard to measure," and (3) "if the error always results in fundamental unfairness." *Weaver*, 582 U.S. at 295–96. *Erlinger* errors are structural under all three rationales.

First, the Court has made clear that the jury rights implicated by *Erlinger* serve interests other than protecting the defendant from erroneous conviction. The Fifth and Sixth Amendments "placed the jury at the heart of our criminal justice system" as part of a "'fundamental reservation[] of power' to the American people." *Erlinger*, 602 U.S. at 831–32 (quoting *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004)). The Amendments "seek to mitigate the risk of prosecutorial overreach and misconduct" and "seek to constrain the Judicial Branch, ensuring that the punishments courts issue are not the result of a judicial 'inquisition' but are premised on laws adopted by the people's elected representatives and facts found by members of the community." *Id.* at 832. For that reason, even when the occasions inquiry is "straightforward" or the evidence is "overwhelming," this Court directed that "none of that means a judge rather than a jury should make the call." *Id.* at 842.

Because this *Erlinger* error involves a failure to charge the ACCA occasions element in the indictment, due process interests are also at stake. This Court has long recognized that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States*, 361 U.S. 212, 217 (1960). The entire purpose of the indictment and grand jury requirements is to limit criminal jeopardy to charges approved by "a group of [one's] fellow citizens acting independently of either prosecuting attorney or judge." *Id.* at 218. For those reasons, constructive amendments to an indictment have never received harmless error review: "[d]eprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Stirone*, 361 U.S. at 217. The *Erlinger* charging error in this case should be treated no differently.

Second, *Erlinger* errors occur in situations where it is often difficult to measure the error's effects. Though the Seventh Circuit believed it was "clear beyond a reasonable doubt that a properly instructed jury would have found that Beasley committed the three offenses on different occasions," that conclusion ignores complexity of the occasions inquiry. For one, it is not at all clear the Government would have been able to present admissible evidence to the jury to prove the ACCA enhancement in this case. Indeed, over the past few years, at least two ACCA trials have ended in judgments of acquittal because the Government could not find admissible evidence to prove the different-occasions factor.[3] So it is

[3] *See, e.g.*, Judgment, *United States v. Hansel*, No. 8:23-cr-00006 (M.D. Fla. Oct. 24, 2023), ECF No. 50 (directing judgment to be entered in defendant's favor because the Government

improper for a reviewing court to conduct a harmless error analysis based on only hypothetical, inadmissible evidence.

Furthermore, even if there were adequate evidence, it is not obvious that a jury in this case would have reached the same conclusion as the court. *Wooden* requires juries to conduct a "multi-factored" analysis, taking into account factors as varied as timing, proximity of location, and the character and relationship of the offenses. *Wooden*, 595 U.S at 369. And despite the Seventh Circuit's confidence in how a jury would have resolved this case, the reality on the ground proves otherwise. In many ACCA trials throughout the country, properly instructed juries have concluded that ACCA-predicate offenses did not occur on different occasions even when the defendant committed the crimes months or years apart.[4]

The failure to charge the ACCA enhancement in the indictment makes it even more difficult to assess the effect of the error. The indictment directly affects a

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was unable to provide "competent evidence" proving the ACCA enhancement); Order Granting Judgment of Acquittal, *United States v. Martin*, No. 24-cr-20065 (S.D. Fla. Mar. 27, 2025), ECF No. 104 (granting judgment of acquittal on the ACCA charge after the Government failed to present sufficient evidence at trial).

[4] *See, e.g.*, Special Verdict Form, *United States v. Williams*, No. 1:24-cr-00311 (N.D. Ga. Dec. 18, 2025), ECF No. 127 (acquittal where defendant committed six offenses over more than a decade); Special Verdict Form, *United States v. Bates*, No. 2:23-cr-20230 (W.D. Tenn. Mar. 27, 2025), ECF No. 73 (acquittal where defendant committed two burglaries within six days of each other in 2011 and two assaults within ten days of each other in 2020); Special Finding, *United States v. Bradshaw*, No. 8:23-cr-00089 (M.D. Fla. Mar. 6, 2025), ECF No. 134 (acquittal where defendant committed cocaine delivery offenses in March 1997, November 1997, August 1999, and February 2009); Special Findings, *United States v. Crews*, No. 8:24-cr-00309 (M.D. Fla. May 21, 2025), ECF No. 82 (acquittal where defendant committed three cocaine distribution offenses over a two-month period); Phase Two Verdict, *United States v. Pennington*, No. 1:19-cr-00455 (N.D. Ga. Sept. 20, 2022), ECF No. 173 (acquittal where prior convictions occurred in January 2005, June 2013, and October 2013); and Special Verdict Form, *United States v. Willis*, No. 4:21-cr-00548 (E.D. Mo. July 16, 2024), ECF No. 224 (acquittal where defendant committed robberies on July 15, 2010, August 1, 2010, and August 19, 2010).

defendant's decisions about, for example, whether to plead guilty, when to cooperate with the government, and how to strategize for trial. *See Lewis*, 802 F.3d at 462–63 (Smith, J., concurring). In other words, because "[a]ll parties to a criminal proceeding, including the judge, the jury, the defendant, defense counsel, witnesses, and prosecutors, are guided by the charges in the indictment," "if that indictment charges a crime different than the one for which a defendant is sentenced, determining 'what might have been' is an exercise in rank speculation." *Id.* at 463. That makes a charging error very similar to the deprivation of the right to counsel of choice—which this Court held to be a structural error in *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). In both situations, "[i]t is impossible to know what different choices the [defense] would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." *Id.*

Third, *Erlinger* errors always result in fundamental unfairness. An omission from the indictment "infect[s] the entirety of a criminal case" because it not only "obliterate[s] a defendant's grand jury rights . . . , it also raises notice and due process concerns while limiting a defendant's ability to prepare for trial." *United States v. Belcher*, 92 F.4th 643, 650 (6th Cir. 2024). By "fundamentally alter[ing]" the criminal proceeding, then, an *Erlinger* error "undermines any confidence that the sentence imposed reflects a just outcome." *Lewis*, 802 F.3d at 462 (Smith, J., concurring). And a circuit court's harmlessness inquiry only compounds the harm, as it requires appellate courts to rely on the very *Shepard* documents this Court cautioned were of limited utility and prone to error. *Erlinger*, 602 U.S. at 841

(recognizing that "[a]s a matter of fair notice alone," *Shepard* documents with old, unreliable details should not be permitted to trigger a lengthy sentence). Thus, under this Court's precedents, *Erlinger* errors must be structural.

The Seventh Circuit did not engage with any of those concerns. Instead, the panel—as with every other circuit to consider the question—reached the conclusion that *Erlinger* errors are not structural by extending this Court's decisions in *Neder* and *Recuenco*. That extension was misguided because *Erlinger* errors are different in significant ways.

To start, *Neder* and *Recuenco* both involved trials where the Government presented relevant evidence to the jury. *See Neder*, 527 U.S. at 16–17; *Recuenco*, 548 U.S. at 215. Harmless error review is appropriate in those and most other *Apprendi*-style cases because the element omitted from the jury instructions involves facts about the offense at issue. That means the reviewing court can conduct the harmless error inquiry based on the trial record, considering the evidence that was actually presented to the jury. *Erlinger* errors are different because the omitted element—the ACCA occasions requirement—is entirely unrelated to the underlying § 922(g)(1) charge. As a consequence, the trial record in *Erlinger* cases is devoid of any evidence supporting the ACCA enhancement. *See, e.g.*, *Beasley*, 163 F.4th at 405, 409–10. Thus, a reviewing court could only find an *Erlinger* error to be harmless by relying on *Shepard* documents or other unreliable, incomplete evidence that was not—and often could not be—admitted in front of a jury. Harmless error review is not appropriate under those circumstances.

In addition, neither *Neder* nor *Recuenco* required the Court to assess the applicability of harmless error to a failure to charge an element of the offense in the indictment. *See Neder*, 527 U.S. at 6; *Recuenco*, 548 U.S. at 220 n.3. As Justice Stevens recognized in his *Recuenco* dissent, that decision was expected to "have a limited impact on other cases" because it did not "address the strongest argument in respondent's favor" that charging errors were structural because "they deprive criminal defendants of sufficient notice regarding the charges they must defend against." *Recuenco*, 548 U.S. at 223 (Stevens, J., dissenting). Indeed, this Court later granted certiorari to answer the question left open by *Recuenco* but ultimately resolved the case on different grounds. *See United States v. Resendiz-Ponce*, 549 U.S. 102, 103 (2007) (noting that the question presented was "whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error").

Nor was this issue resolved in *Erlinger* itself. Only three members of the Court endorsed the prospect of subjecting *Erlinger* errors to harmless error review. *Erlinger*, 602 U.S. at 850 (Roberts, C.J., concurring) ("[V]iolations of that right are subject to harmless error review."); *id.* at 859 (Kavanaugh, J., joined by Alito, J., dissenting) ("[A]ny error was harmless."). The majority opinion, in contrast, never mentioned harmless error, leaving the question in this petition unanswered.

This case presents the opportunity to answer that question cleanly. Beasley challenged his indictment's omission of the ACCA charge, describing his sentencing on the aggravated offense as a constructive amendment to the indictment. *See*

Beasley, 163 F.4th at 408–09. And that charging error is structural because it "bears directly on the 'framework within which the trial proceeds.'" *Gonzalez-Lopez*, 548 U.S. at 150; *see also Resendiz-Ponce*, 549 U.S. at 117 (Scalia, J., dissenting) ("I would find the error to be structural."). The Court should therefore grant Beasley's petition for a writ of certiorari and reverse the Seventh Circuit's decision.

C. This is a recurring and exceptionally important question.

The Court previously granted certiorari to "answer the question of whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error" but resolved the case on other grounds. *Resendiz-Ponce*, 549 U.S. at 103. The question is still worthy of this Court's review, especially in light of *Erlinger*. The Court's intervention is necessary because the rights at stake are so important. As the Court recognized in *Erlinger*, the right to a jury trial is "at the heart of our criminal justice system." 602 U.S. at 831. Defendants have a right to a jury trial even when the evidence against them is overwhelming because "[t]here is no efficiency exception to the Fifth and Sixth Amendments." *Id.* at 842. Yet harmless error review turns the guarantees of the Fifth and Sixth Amendments into nothing more than empty promises. Few issues can be more important than whether the government can send a citizen to prison for committing a crime he was not charged with and not found guilty of beyond a reasonable doubt by a jury of their peers.

This case presents an excellent vehicle to resolve the question. Beasley's objection was fully preserved in the district court, and the Seventh Circuit

considered (and rejected) arguments about both the uniqueness of *Erlinger* errors and the significance of the omission from the indictment. The Court can thus cleanly address the issues at stake, providing much-needed clarity to the courts of appeals while reaffirming the right to trial by jury.

II. Assuming harmless error review applies to *Erlinger* errors, the Court should grant the petition to decide the proper standard for assessing harmlessness.

When an error is subject to harmlessness review, a new question arises: how should the reviewing court conduct the harmlessness inquiry? As Justice Scalia once observed in *Carella v. California*, 491 U.S. 263, 267 (1989) (Scalia, J., concurring), the "mode of analysis" depends on the type of error. In *Neder*, the Court assessed the failure to submit an element to the jury by asking "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" 527 U.S. at 15 (quoting *Chapman*, 386 U.S. at 24). But other types of errors have been treated differently. In *Parker v. Dugger*, 498 U.S. 308, 319 (1991), the Court described the appropriate inquiry in the sentencing context as asking whether the absence of the sentencing error "would have made no difference to the sentence."

This Court has never specified the proper test for assessing the harmlessness of *Apprendi*-type errors. *See, e.g.*, *Cogdill*, 130 F.4th at 540 (Clay, J., dissenting) ("*Recuenco* never specified what that harmless error review entails."). The circuits are split on the answer. The majority of courts—including the Seventh Circuit—apply *Neder*'s test, asking if a properly instructed jury would have found the same

facts as the court. *See, e.g.*, *Beasley*, 163 F.4th at 409. The Third Circuit, however, sometimes uses *Parker*'s test, looking at the impact of the error on the sentence. *Lewis*, 802 F.3d at 451. The Eighth Circuit has occasionally used another variation, asking whether "the court used a sentencing range that was not applicable to the crime of conviction." *United States v. Lara-Ruiz*, 721 F.3d 554 (8th Cir. 2013).

This Court should step in to resolve the conflict. The majority approach cheapens the right to a jury trial, allowing defendants to be sentenced for crimes they were never found guilty of committing. *Erlinger* errors should be treated as sentencing errors and assessed for their impact on the defendant's actual sentence.

A. The circuits disagree on the appropriate legal standard when assessing the harmlessness of *Erlinger* errors.

The circuit courts have developed three different approaches to assessing the harmlessness of *Erlinger* errors after a jury trial.

1. The majority of the circuits review *Erlinger* errors—as with all other *Apprendi* errors—under the test described in *Neder*. That inquiry asks, "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Neder*, 527 U.S. at 18. The Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits have all adopted this approach,[5] and the Second Circuit has

[5] *See Brown*, 136 F.4th at 96 ("[T]he harmless-error analysis requires deciding whether proof of the missing fact or element was overwhelming and uncontroverted so as to be able to determine conclusively that a jury would have found the fact or element beyond a reasonable doubt."); *Butler*, 122 F.4th at 589 (describing the inquiry as whether, "[a]fter a careful review of the whole record . . . any rational petit jury, when presented with a proper jury instruction, would have found beyond a reasonable doubt" that the offenses occurred on different occasions); *Campbell*, 122 F.4th at 632 ("[T] the record evidence shows beyond a reasonable doubt that a jury's failure to consider the different-occasions question had no effect on [the] sentence."); *Xavior*-Smith, 136 F.4th at 1137 ("[N]o reasonable juror could

used the same test in an unpublished opinion.[6]

For example, in this case, the Seventh Circuit considered "if it is 'clear beyond a reasonable doubt' that a properly instructed jury would have found the same facts as the [district] court." *Beasley*, 163 F.4th at 409. In conducting that inquiry, the panel purported not to rely on *Shepard* documents. Instead, it pointed to Beasley's statements at the sentencing hearing, where he acknowledged that the prior convictions included "an armed robbery on March 21st, 2004; an aggravated battery on June 11th of [2005]; and [] a homicide on December 23rd of 2011." *Id.* at 410. Because the court could "think of 'no colorable argument' for treating offenses separated by over a year as having been committed on the same occasion," it found the *Erlinger* error harmless. *Id.*

2. The Third Circuit applies a different test for *Apprendi*-style charging errors like the *Erlinger* error in this case. In *Lewis*, 802 F.3d at 451, the defendant was sentenced for brandishing a firearm during a crime of violence—which carried a seven-year mandatory minimum—despite the fact that he had been convicted of just "using or carrying" a firearm during a crime of violence—which had a five-year mandatory minimum. Though the parties agreed the error violated Lewis's Sixth

find that [the defendant] committed his offenses on the same occasion."); *Rivers*, 134 F.4th at 1306 ("[O]n harmless-error review, the government bears the burden of showing beyond a reasonable doubt that a rational jury would have found that the defendant's prior . . . offenses all were 'committed on occasions different from one another.'").

[6] *Saunders*, 2024 WL 4533359, at *3 ("We conclude that the district court's error was harmless because the record makes clear beyond a reasonable doubt that a rational jury would find [the defendant] committed the three prior violent offenses on separate occasions.")

Amendment rights under *Alleyne*, they disputed the proper way to frame the harmless error analysis.

The court concluded the error was a "pure sentencing error" rather than a "trial error" because "nothing was wrong with Lewis's indictment or trial." *Id.* at 455. Lewis was properly indicted, tried, and convicted of an offense: using or carrying. *Id.* The error came only at the sentencing stage, when the district court sentenced Lewis for a different offense: brandishing. *Id.* Lewis's case was distinguishable, then, from cases involving the trial error of merely omitting an element from the jury instructions. *Id.* There was no problem with Lewis's indictment or trial; just his sentence.

Because the case involved a sentencing error, the Third Circuit applied this Court's test for harmlessness from *Parker*, 498 U.S. at 319. That case directs courts to ask whether the error "would have made no difference to the sentence." Applying that test was simple. Lewis was sentenced to the mandatory minimum for brandishing, whereas the mandatory minimum for using or carrying was two years less. *Id.* at 458. Thus, the court concluded, "Lewis has been sentenced to an extra two years as a result of this *Alleyne* error." *Id.* The government was unable to prove the error made no difference to the sentence, so the court vacated and remanded for resentencing. *Id.*

The same is true for Beasley. Beasley was properly indicted, tried, and convicted of violating § 922(g)(1). But the district court sentenced him for an aggravated crime under § 924(e)(1). Because, under the Third Circuit's approach,

the error occurred only at the sentencing stage, that court would label this a sentencing error and ask whether the error made no difference to the sentence. And this error clearly had a significant effect: whereas the statutory maximum for violating § 922(g)(1) was 10 years, § 924(e)(1) imposed a mandatory minimum sentence of 15 years and a maximum sentence of life. Beasey was ultimately sentenced to 25 years' imprisonment. He is therefore serving a sentence that is 15 years longer than what he could have received under the crime of conviction. The Third Circuit, then, would have vacated Beasley's sentence.

3. The Eighth Circuit has also departed from the majority approach. Like the Third Circuit, it sometimes distinguishes failure-to-charge errors from other types of *Apprendi*-style errors. But it articulates the standard differently. When a defendant alleges a charging error, that court has asked whether "the court used a sentencing range that was not applicable to the crime of conviction." *Lara-Ruiz*, 721 F.3d at 558. In *Lara-Ruiz*, for example, the defendant (as in *Lewis*) was indicted for and found guilty of "using" a firearm—triggering the five-year mandatory minimum. *Id.* at 559. But at sentencing, the court applied the seven-year mandatory minimum for "brandishing." *Id.* at 556. Because the defendant was "sentenced for a statutory crime different from that which the jury found him guilty" under "a sentencing range that was not applicable to the crime of conviction," the error affected his substantial rights. *Id.* at 558; *see also United States v. Shaw*, 751 F.3d 918, 923 (8th Cir. 2014) (applying *Lara-Ruiz* to find an *Alleyne* error not harmless).

Notably, this articulation of the test is more defendant-friendly than the test in the Third Circuit. In the Third Circuit, a sentencing judge's inoculating statement can protect against reversal. *See Lewis*, 802 F.3d at 458 ("There may be a case where the sentencing court makes it clear that it is not sentencing the defendant based on the mandatory minimum. In such a case, we could conclude that the *Alleyne* error did not impact the sentence."). In *Lara-Ruiz*, however, the Eighth Circuit found the error was not harmless despite the fact that the "the sentencing court expressly stated that even if the five-year mandatory minimum was applied, . . . the ultimate sentence would be the same." 721 F.3d at 558.

In other cases, however, the Eighth Circuit has assessed harmlessness under the majority approach, asking if "there is no reasonable possibility that [the error] contributed to the sentence." *United States v. Stowell*, 82 F.4th 607, 610 (8th Cir. 2023) (en banc); *see also Xavior-Smith*, 136 F.4th 1136. The court does not appear to have reconciled the inconsistencies between *Lara-Ruiz* and those other cases.

B. The decision below is wrong.

The Seventh Circuit's decision to apply the *Neder* test to *Erlinger* errors is mistaken. *Neder*'s test assesses the harmlessness of trial errors—defects that occur, for example, due to erroneous jury instructions. In those situations, *Neder* requires circuit courts to review the trial record to determine if a jury would have found the defendant guilty in the absence of the error. *Neder*, 527 U.S. at 18. But the *Erlinger* error here is fundamentally different. There were no defects in Beasley's trial; he was properly charged and convicted of violating 18 U.S.C. § 922(g)(1). The error occurred, instead, solely at the sentencing stage, when the district court sentenced

Beasley for an entirely different crime: being an armed career criminal. That is a sentencing error.

Because Beasley suffered from a sentencing error, the proper harmlessness test should ask whether the error "would have made no difference to the sentence." *Parker*, 498 U.S. at 319; *see also Sochor v. Florida*, 504 U.S. 527, 540 (1992) (phrasing the harmlessness inquiry as whether the error "did not contribute to the [sentence] obtained"). Beasley's crime of conviction carried a maximum sentence of only 10 years, yet he was sentenced to 25 years' imprisonment. The error, then, was not harmless.

The Seventh Circuit's test raises serious fairness concerns. As the Third Circuit explained in *Lewis*, "[l]ooking back to the trial record would run directly contrary to the essence of *Apprendi* and *Alleyne*," which held that "judges must not decide facts that change the mandatory maximum or minimum; juries must do so." *Lewis*, 802 F.3d at 456. When a reviewing court affirms merely because it believes the evidence is overwhelming, it "perform[s] the very task that *Apprendi* and *Alleyne* instruct judges not to perform." *Id.* The *Lewis* court also noted the "Kafkaesque" consequences of the Government's position, which the Government even conceded at oral argument: "if a defendant were charged and convicted of manslaughter, but the judge were to find evidence of premeditation to be overwhelming and uncontroverted, a sentence for the aggravated offense of murder would be permissible." *Id.* at 456 n.7. That is an intolerable result.

C. This is exceptionally important but unsettled question.

The proper standard for assessing the harmlessness of *Erlinger* errors is critically important but unresolved. Lower courts have repeatedly recognized that this Court has never clarified the appropriate harmlessness inquiry for *Apprendi*-style errors—and particularly not charging errors. *See, e.g.*, *Cogdill*, 130 F.4th at 540 (Clay, J., dissenting) ("*Recuenco* never specified what that harmless error review entails."); *United States v. Guerrero-Jasso*, 752 F.3d 1186, 1201 (9th Cir. 2014) (Berzon, J., concurring) ("[*Recuenco*] did not mandate any particular method for conducting that review."); *Lewis*, 802 F.3d at 457 ("Importantly, at no point did the Supreme Court explain what harmless-error review should consist of."); *Legins*, 34 F.4th at 321 ("[*Recuenco*'s] top-line holding does not, of course, resolve how to perform the harmless-error analysis.").

This case presents a good vehicle to answer the question because the legal test is dispositive to the outcome. If *Neder*'s standard for trial errors applies, the Seventh Circuit's decision applied that test correctly. But if *Erlinger* errors should properly be treated as sentencing errors, there is no doubt the error was not harmless, and Beasley would be entitled to resentencing.

Finally, the harmlessness standard matters because fundamental liberty interests are at stake. The error in this case led the district court to impose a sentence 15 years longer than the statutory maximum sentence for his crime of conviction. This Court must grant certiorari to ensure the Fifth and Sixth Amendment protections this Court lauded in *Erlinger* can be effectively enforced.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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