No. _____

In The Supreme Court Of The United States

Samson Diamonte

Xavior Smith,

Petitioner,

vs.

United States of America,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Question Presented for Review

Whether a reviewing court may properly rely on non-elemental facts in presentence reports and *Shepard* documents when conducting harmless-error review of preserved sentencing error under *Erlinger v. United States*, 144 S.Ct. 1840 (2024).

Proceedings Directly Related to this Case

United States vs. Samson Diamonte Xavior-Smith, 21-Cr-164 (NEB/BRT), District Of Minnesota, Judgment entered on September 20, 2022.

United States vs. Samson Diamonte Xavior-Smith, No. 22-3085, United States Court of Appeals for the Eighth Circuit, Judgment entered on May 19, 2025.

United States vs. Samson Diamonte Xavior-Smith, No. 22-3085, United States Court of Appeals for the Eighth Circuit, Order Denying Petition for En Banc Rehearing entered on July 8, 2025.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

Citations of the Opinions and Orders Entered Below

The order of the Eighth Circuit Court of Appeals denying the petition for *en banc* rehearing below is not reported but is available at 2025 WL 1879585. The panel opinion of the court of appeals is reported at 136 F.4th 1136.

Jurisdictional Statement

The judgment of the Eighth Circuit was entered in this case on May 19, 2025. A timely petition for *en banc* rehearing was denied by the court of appeals on July 8, 2025. This petition for certiorari is timely filed within the meaning of Rule 13 of the rules of this Court. This Court has jurisdiction to review the decision of the court of appeals pursuant to a writ of certiorari under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved in the Case

U.S. Constitution, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Sixth Amendment:

> 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 924(e)(1):

> 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

1. This case arises from a federal grand jury indictment charging Petitioner Smith with a single count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and subject to sentencing under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

2. Mr. Smith was convicted after trial in federal district court in the District of Minnesota. At trial, Petitioner stipulated that he had previously been convicted of a felony, and the jury was presented with no other evidence about his prior convictions.

3. After his trial, but before sentencing, this Court issued its opinion in *Wooden v. United States*, 595 U.S. 360 (2022), ruling on the nature of proof required to prove that prior offenses were committed "on occasions different from each other" under the ACCA.

4. Mr. Smith had three prior convictions in Minnesota state court

that were used as ACCA predicate offenses. One was a simple robbery conviction entered in August 2019, another was a domestic assault conviction entered in October 2019, and a third was a third-degree assault conviction entered in August 2021.

5. The government, after *Wooden*, adopted the position that the occasions question is one that must be either admitted by a defendant or found by a jury beyond a reasonable doubt. Mr. Smith agreed. Because neither of those things had occurred, the government asked the district court to impose a ten-year sentence, the maximum for a § 922(g)(1) offense without the ACCA enhancement.

6. At sentencing, the district court ruled that it was bound by Eighth Circuit precedent to make the ACCA findings by a preponderance of the evidence. Relying on the Presentence Investigation Report and non-elemental facts in *Shepard* documents[1] offered by the government, the district court found that the ACCA applied and sentenced Mr. Smith to the 180-month mandatory sentence.

[1] "*Shepard* documents" are the restricted set of materials a federal judge may examine to determine the elements of an ACCA predicate, under *Shepard v. United States*, 544 U.S. 13 (2005), and later cases.

7. Mr. Smith timely filed a notice of appeal, and the court of appeals had jurisdiction from the district court's final judgment pursuant to 28 U.S.C. § 1291. Mr. Smith argued on appeal that the district court had erred by making the ACCA "occasions" finding without an admission or a jury finding beyond a reasonable doubt. The government conceded error but argued the error was harmless. While Mr. Smith's appeal was pending, this Court decided in *Erlinger v. United States*, 602 U.S. 821 (2024), that allowing a judge to find the occasions element under the ACCA violates the Fifth Amendment's guarantee of due process of law and the Sixth's Amendment's guarantee of a jury trial.

8. In its opinion filed on May 19, 2025, the Eighth Circuit acknowledged the error but held that it was harmless. Relying on the *en banc* decision in *United States v. Stowell*, 82 F.4th 607, 610 (8th Cir. 2023), the panel observed that state-court sentencing documents admitted at the sentencing hearing showed "three different substantive offenses against 'different victims' months apart," ruling that no reasonable juror could find that the offenses were committed on the same occasion.

9. In *Stowell*, decided before *Erlinger*, the Eighth Circuit *en banc* had been asked to decide whether judicial factfinding on the occasions question violated a defendant's rights. *Stowell* ruled that it was unnecessary to decide that question because, even if it had been error, the error was harmless beyond a reasonable doubt. *See* 82 F.4th at 610 ("Whatever our views are on any Sixth Amendment error, we conclude that it was harmless beyond a reasonable doubt."). The presentence report in that case cited charging documents showing that Mr. Stowell's prior convictions had been committed days apart, and "no reasonable juror could find that Stowell committed his offenses on the same occasion, considering they occurred days apart and involved different victims." *Id.*

10. Four judges dissented on the Sixth Amendment issue in *Stowell*, arguing that the majority had "sidestep[ped] the important constitutional question and reache[d] a conclusion by assuming facts the jury would have no way of knowing." *Id.* at 613 (Erickson, J., dissenting). Neither the presentence report nor the state-court charging documents would have been presented to a jury, so there was "no admissible evidence on which a jury could find the [prior

offenses] occurred 'on occasions different from one another[.]'" *Id.* (quoting 18 U.S.C. § 924(e)).

11. Beyond the *Stowell en banc* opinion, Mr. Smith's panel opinion also cited in support a Sixth Circuit case, *United States v. Campbell*, 122 F.4th 624, 632–33 (6th Cir. 2024), that had found guidance in *United States v. Greer*, 593 U.S. 503, 510–11 (2021), a decision of this Court addressing the substantial rights prong of plain-error review. *See Xavior-Smith*, 136 F.4th at 1137. According to the panel, both *Campbell* and *Greer* supported the use of unchallenged facts in harmless-error review. *See id.*

12. In a brief concurrence to the panel opinion, Judge Kelly cited the *Stowell* dissent and questioned again whether it was appropriate to rely on unchallenged facts to rule this error harmless.

13. Mr. Smith timely filed a petition for *en banc* rehearing in the court of appeals. On July 8, 2025, the court of appeals issued an order denying the petition for *en banc* rehearing.

Argument in Favor of Granting the Petition

Mr. Smith seeks this Court's review of the decision of the court of appeals because the United States Court of Appeals for the Eighth Circuit has entered a decision on an important federal question that has not been, but should be, settled by this Court. Moreover, the procedure used by the Eighth Circuit misapplies this Court's precedent in *Greer v. United States*, 593 U.S. 503 (2021), by extending the record available in cases of plain error, as in *Greer*, to cases involving claims of harmless error, as here. And it does so by permitting the use of non-elemental facts in *Shepard* documents in ways that this Court has stated again and again—and stated yet again in *Erlinger* specifically—is never permissible. *See Erlinger*, 144 S.Ct. at 1844–45 ("This Court's cases hold that a sentencing judge may use the information gleaned from *Shepard* documents for the 'limited function' of determining the fact of a prior conviction and the then-existing elements of that offense. '[N]o more is allowed.'") (quoting *Mathis v. United States*, 579 U.S. 500, 511 (2016). This case presents a clear vehicle to clarify the proper scope of harmless-error review.

I. The Proper Scope of Harmless-Error Review

Mr. Smith preserved his objection before the district court that judicial fact-finding on the occasions element violated his rights under the Fifth and Sixth Amendments, the government had the burden on appeal to show that these constitutional errors were harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967). The government can make this showing only when "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder v. United States*, 527 U.S. 1, 15 (1999) (quoting *Chapman*, 386 U.S. at 24).

This Court's precedents have never permitted a reviewing court to look beyond the trial record when conducting harmless-error review of an omitted element. Rather, there has been consistent emphasis that the "whole record" refers exclusively to the trial record.

In *Delaware v. Van Arsdall*, this Court considered harmless error in the context of a confrontation violation, which required looking to whether the error "might have affected the factfinding

process at trial." 475 U.S. 673, 684 (1986). *Van Arsdall* pointed to a host of factors that might be relevant to this analysis, all of which related to the trial evidence: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.* (citations omitted).

In *Yates v. Evatt*, this Court considered whether a jury instruction placing an unconstitutional presumption on an element was harmless error. 500 U.S. 391, 401–02 (1991). The first step of this analysis required a reviewing court to ask "what evidence the jury actually considered in reaching its verdict." *Id.* at 404. "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Id.* at 403. The analysis assumes the perspective of the jurors, who, "as reasonable persons, would have considered the

entire trial record[.]" *Id.* at 406.

Likewise, in *Neder*, the Court's harmless-error analysis for an omitted element looked only to the facts presented at trial. *See* 527 U.S. at 16–17. Mr. Neder tried to argue that the analysis should only look to evidence the instructions required the jury to consider, because relying on "overwhelming record evidence of guilt the jury did not *actually* consider" would effectively permit directed verdicts of guilt. *Id.* at 17. This Court rejected that argument, permitting reviewing courts to review the entire trial record and assess whether evidence presented by the government was countered by contrary evidence presented by the defendant. *See id.* at 18–19.

This Court's precedents have never looked beyond the trial record to assess harmless error. *Greer*, cited by *Stowell* and *Campbell*, did not expand the scope of harmless-error review in its consideration of plain error. Plain error deals with unpreserved errors, and so fundamental fairness does not apply in the same way. *See Greer*, 593 U.S. at 512 ("Consistent with the text of Rules 51 and 52, this Court's precedents have long drawn a bright line

between harmless-error and plain-error review based on preservation.").

As Justice Sotomayor emphasized in her separate opinion, "[o]n harmless-error review, defendants have not forfeited any of their rights, including their right to have a jury decide whether there is reasonable doubt as to any element of the crime charged." *Id*. at 517 (Sotomayor, J., concurring in part, dissenting in part). "[A] constitutional error is harmless only if there is no reasonable doubt about whether it affected the jury's actual verdict in the actual trial," and "[i]ncriminating evidence the jury never considered is irrelevant to that inquiry." *Id*. at 518 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) and *Yates*, 500 U.S. at 404–06).

Justice Sotomayor's opinion also emphasized that placing the burden on the defendant to prove his innocence, as the majority did for plain-error review, would be inappropriate in harmless-error review. In plain-error review, the defendant bears the burden of persuasion; in harmless-error review, the burden of proof beyond a reasonable doubt always remains on the

government. *See id.*; *see also United States v. Olano*, 507 U.S. 725, 734–35 (1993) (discussing this difference in burden-shifting). So "if the Government fails to carry its burden, over the defendant's objection, appellate courts cannot correct that shortcoming by looking to incriminating evidence the Government never submitted to the jury or by relying on the defendant's failure to demonstrate his own innocence on appeal." *Greer*, 593 U.S. at 518 (Sotomayor, J., concurring in part, dissenting in part) (citing *In re Winship,* 397 U.S. 358, 364 (1970)).

II. The Eighth Circuit's harmless-error analysis improperly expanded the scope of harmless-error review established by this Court.

The scenario Justice Sotomayor warned about is exactly what happened here. Not only did the Eighth Circuit look to evidence the government never submitted to the jury to find an *Erlinger* error harmless, it did so by using evidence *Erlinger* itself expressly deemed unreliable.

This Court's opinion in *Erlinger* emphasized that the *Wooden* inquiry could not be made using *Shepard* documents. Amicus in that case tried to argue that *Shepard* documents would be

sufficient to establish at a minimum the dates on which offenses were committed, which would in many cases be enough to decide occasions questions. *See Erlinger*, 144 S.Ct. at 1854. Indeed, in the Eighth Circuit's *Stowell* opinion, the dates alone were used to find harmless error.

Erlinger rejected that proposed use of unreliable *Shepard* documents out of hand: "[A] judge ***may not*** use information in *Shepard* documents to decide 'what the defendant ... actually d[id],' or the 'means' or 'manner' in which he committed his offense in order to increase the punishment to which he might be exposed." *Id.* (emphasis added) (quoting *Mathis*, 579 U.S. at 504).

The reason for this prohibition is simple: *Shepard* documents are inherently unreliable. "*Shepard* documents will not contain all the information needed to conduct a sensible ACCA occasions inquiry, such as the exact times and locations of the defendant's past crimes." *Erlinger*, 144 S.Ct. at 1855. "Even when *Shepard* documents do contain that kind of granular information, more still may be required. After all, this Court has held that no particular lapse of time or distance between offenses automatically separates

a single occasion from distinct ones." *Id.* (citing *Wooden*, 595 U.S. 360 at 369–70). And "[n]ot only are *Shepard* documents of limited utility, they can be prone to error." *Id.* (citing *Mathis*, 579 U.S. at 512). "The risk of error may be especially grave when it comes to facts recounted in *Shepard* documents on which adversarial testing was 'unnecessary' in the prior proceeding." *Id.* (citation omitted). "At the time of his prior conviction, a defendant might not have cared if a judicial record contained a mistake about, say, the time or location of his offense," but "years later and faced with an ACCA charge, those kinds of details can carry with them life-altering consequences." *Id*.

The facts of this case demonstrate the faulty nature of *Shepard* documents. Petitioner's name is Samson Diamonte Xavior Smith, but he was indicted in this case as if his second middle name and his last name were a hyphenated surname. The *Shepard* documents submitted by the government for one offense list Mr. Smith's name consistently as "Samson Di Amonte Smith." (*See* R.Doc. 102-9 at 1 (complaint), 7 (register of actions), 12 (plea petition), 16 (warrant of commitment).) For another, his name is listed as "Samson Diamonte

Xavier Smith." (*See* R.Doc. 102-7 at 1.) The *Shepard* documents can't even be relied upon to get Mr. Smith's name right, and all the more they cannot establish other non-elemental facts beyond a reasonable doubt.

Nor is the Eighth Circuit alone in this improper use of *Shepard* documents. Courts of appeal have freely relied on *Shepard* documents to find harmless error. *See*, *e.g.*, *Campbell*, 122 F.4th at 632 (concluding that *Erlinger* error was harmless beyond a reasonable doubt based on *Shepard* documents); *United States v. Brown*, 136 F.4th 87, 97–98 (4th Cir. 2025) (finding *Erlinger* error harmless based on facts in the presentence report). Despite this Court's clear statement that "[t]here is no efficiency exception to the Fifth and Sixth Amendments," *Erlinger*, 144 S.Ct. at 1856, Mr. Smith and many others like him have been deprived of relief by judges conducting the exact inquiry that *Erlinger* forbade.

Shepard documents cannot be overwhelmingly persuasive evidence of harmless trial error when those documents would not even have been admitted at trial. Unlike sentencing hearings, where

the rules are looser and the burden is mere preponderance, at trial the Federal Rules of Evidence share the same concerns about records of judgments that this Court expressed in *Erlinger*. The records are hearsay, if not hearsay-upon-hearsay to multiple levels, and no rule permits their admission. Under Fed.R.Evid. 803(22), a sentencing judgment is admissible only "to prove any fact essential to the judgment." *Compare Mathis*, 579 U.S. at 510 ("Statements of 'non-elemental fact' in the records of prior convictions are prone to error precisely because their proof is unnecessary."). No other rule of evidence would allow the government to sidestep the general rule against hearsay for *Shepard* documents. *Cf. United States v. Bowling*, 135 F.4th 1125, 1127 (8th Cir. 2025) (Kelly, J., concurring) (expressing concern that "[t]he government bears the burden of proving harmlessness beyond a reasonable doubt, yet it has failed to explain what evidence it would permissibly submit to a jury on the factors outlined in [*Wooden*,] instead relying on information contained in the presentence report. This leaves us '[w]ith ... no confidence about what a jury might have found.'") (citing *Stowell,* 82 F.4th at 613 (Erickson, J., dissenting)).

The circuit courts' approach to reviewing *Erlinger* errors is inconsistent with *Erlinger* itself and leads to a situation where "the remedy for a constitutional violation by a trial judge (making the determination of criminal guilt reserved to the jury) is a repetition of the same constitutional violation by the appellate court (making the determination of criminal guilt reserved to the jury)." *See Neder*, 527 U.S. at 32 (Scalia, J., concurring in part and dissenting in part). Granting review of Mr. Smith's case will permit this Court to correct this erroneous application of harmless-error review, one that will affect many defendants across the country.

This case presents an excellent vehicle for the Court to address this issue. Mr. Smith exercised his right to a jury trial, and he had a right under the Fifth and Sixth Amendments to have all elements found by that jury beyond a reasonable doubt. He properly preserved his objection to the constitutional violation. Indeed, the government joined in his objection. Nonetheless, based on judicial factfinding by a preponderance and entirely reliant on *Shepard* documents, what would have been a 10-year statutory maximum became instead a 15-year mandatory-minimum prison sentence. The impact could not be

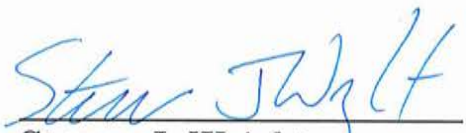
more stark, for Mr. Smith and for many others, as the proper resolution of ACCA cases means no less than five additional years in prison. This Court's guidance is urgently needed not only to preserve the jury trial right that is reserved to the people, but to resolve the circuit split as to the proper test for harmless-error review of preserved omitted-element claims.

Conclusion

For the foregoing reasons, Petitioner Samson Diamonte Xavior Smith respectfully requests that the Court grant this petition for certiorari.

Dated: October 6, 2025

Respectfully submitted,



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