No.

IN THE

Supreme Court of the United States

WILSON SERRANO-MERCADO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When a federal criminal defendant has previously been convicted under a "divisible" statute that criminalizes both violent and non-violent conduct, a district court may rely on that prior conviction as a crime of violence that enhances the defendant's sentencing range only if the court finds that the defendant was necessarily convicted of the violent form of the offense. This Court has made clear that the government bears the burden of proving the nature of the underlying conviction based on a limited set of approved judicial records. When the government makes no such showing but the defendant nevertheless fails to object and the district court proceeds incorrectly to apply a sentencing enhancement, the enhancement may be reversed on appeal only if the defendant demonstrates plain error. This petition addresses a 5-4 Circuit conflict over what is necessary to establish plain error in these circumstances.

The questions presented are:

1. Whether a district court commits plain error by enhancing a sentence based on a divisible statute without requiring the government to meet its burden of proving that the conviction arose under a qualifying prong of that statute, as five Circuits have held, or whether on plain-error review the burden instead shifts to the defendant to affirmatively show that the alleged predicate offense did *not* arise under a qualifying prong of the statute, as four Circuits have held.

2. Separately, whether the district court's additional enhancement of Petitioner's sentence based on

a second predicate offense under the crime of violence residual clause was error in this case because that clause is unconstitutionally vague.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

After pleading guilty to a federal weapons offense, Petitioner Wilson Serrano-Mercado was sentenced with enhancements for two prior felony convictions for crimes of violence. A 2005 conviction, relied upon for one enhancement, was under a divisible Puerto Rico statute that criminalized both violent and non-violent conduct. Under this Court's holding in *Shepard v. United States*, 544 U.S. 13 (2005), to support an enhancement the government was required to prove, based on a limited set of official judicial records, that Serrano-Mercado was necessarily convicted of the violent form of the offense. The government did not introduce any records to make that showing. But Serrano-Mercado's defense attorney failed to object, and the district court relied on the conviction to increase the advisory range of punishment under the Sentencing Guidelines.

Reviewing for plain error, the First Circuit refused to undo the district court's sentencing error. The court held that Serrano-Mercado could not show that he was prejudiced by the error without coming forward with affirmative proof that his prior conviction was *not* for a violent offense.

Judge Lipez, concurring with the result only because he felt bound by circuit precedent, wrote separately to emphasize the fundamental flaw in the majority's analysis: Based on the existing record, Serrano-Mercado was not eligible for the sentencing enhancement he received. He would have been eligible only if the government had met its burden of proving that his prior conviction was for a crime of violence.

Judge Lipez stressed that the majority's approach improperly shifted the burden to the defendant to prove the absence of a qualifying conviction; was in direct conflict with the approach taken by several other Courts of Appeals; and was likewise incompatible with this Court's precedents regarding plain-error review. For these reasons, Judge Lipez urged en banc review.

Serrano-Mercado sought rehearing en banc, which a divided First Circuit denied. Judge Lipez, joined by Judges Torruella and Thompson, issued a separate statement disagreeing with the denial of en banc review. They emphasized that this case "raises a question of exceptional importance that has split the circuits," Pet. App. 66a, and expressly "urge[d]" this Court "to end the injustice imposed by the misguided precedent of our court and others, and dispel the confusion created by the circuit split," *id.* at 75a. As Judge Lipez elaborated, nine Courts of Appeals have addressed the question of how a defendant may show prejudice in cases like this, where the district court applies a sentencing enhancement based on an underlying conviction that the government has not proven qualifies as a predicate offense. Four Circuits, including the First Circuit, have adopted the burden-shifting approach invoked here. Five others have recognized that a defendant necessarily suffers prejudice when his sentence is enhanced based on a prior conviction that the government did not establish actually qualifies as a predicate offense. Judge Lipez and his colleagues explicitly urged this Court to review the matter given the deep and entrenched divide among the Circuits, the conflict between the minority approach reflected here and this Court's decisions,

and the serious implications of the question presented for the fairness and integrity of federal criminal sentencing.

OPINIONS AND ORDERS BELOW

The Court of Appeals' opinion, Pet. App. 1a-52a, is reported at 784 F.3d 838 (1st Cir. 2015). The order denying rehearing and rehearing en banc, and the statement of three judges disagreeing with the denial, Pet. App. 65a-76a, is to be reported in the Federal Reporter 3d and may be found at 2016 WL 2997572 (1st Cir. 2016). The district court's sentencing order, Pet. App. 53a-64a, was issued from the bench and is not published.

JURISDICTION

The Court of Appeals entered judgment on May 1, 2015. Pet. App. 1a-52a. Petitioner timely sought rehearing and rehearing en banc, which the Court of Appeals denied on May 24, 2016. Pet. App. 65a-76a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves provisions of the Armed Career Criminal Act (ACCA), 18 U.S.C. §§ 922(g)(1) and 924(a)(2); the Puerto Rico Domestic Abuse Prevention and Intervention Act, 8 P.R.L.A. §§ 631 and 633; and U.S. Sentencing Guidelines (USSG) §§ 2K2.1(a)(2), 2K2.1(a)(3), 2K2.1(a)(4)(B), 2K2.1 cmt.1, and 4B1.2(a), which are reproduced at Pet. App. 77a-78a, 79a-80a, and 81a-85a, respectively. All citations to

the Sentencing Guidelines are to the 2012 edition, under which Petitioner was sentenced. *See* Pet. App. 58a.

STATEMENT OF THE CASE

This Court Holds That The Government Is Required To Prove Through A Limited Set Of Official Materials That A Defendant's Prior Conviction Under A Divisible Statute Qualifies As A Crime Of Violence In Order To Enhance His Sentence On That Basis

Federal criminal law establishes numerous statutory and Guidelines sentencing "enhancements" that can dramatically increase a defendant's maximum or likely punitive exposure based on his or her prior criminal record. As relevant here, the U.S. Sentencing Guidelines provide for an increase in a defendant's base offense level under the Guidelines if he has prior felony convictions for a "crime of violence." USSG § 2K2.1(a)(2). Like similar terms in other Guidelines provisions and in various federal statutes, "crime of violence" is defined to mean either (1) one of a short enumeration of specified crimes (the "enumerated offenses"), or (2) a crime that satisfies the so-called "force clause," that is, one that "has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* § 4B1.2(a)(1)-(2); *see also, e.g.*, 18 U.S.C. § 924(e)(2)(B).[1]

[1] Previously, a crime that was not an enumerated offense and did not fall within the force clause could nonetheless qualify

The question whether a prior conviction qualifies as a "crime of violence" focuses on the statutory offense that the defendant was convicted of, not on the particular facts of the crime committed. *Taylor v. United States*, 495 U.S. 575, 600 (1990); *see Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). It may not be immediately apparent whether a prior conviction falls within the relevant statutory or Guidelines definition.

For example, burglary is an enumerated offense under the ACCA. 18 U.S.C. § 924(e). But although state criminal codes tend to contain one or more provisions prohibiting a crime called "burglary," they define the elements of that offense in a range of different and inconsistent ways. *See Taylor*, 495 U.S. at 580. To maintain fairness and consistency in federal sentencing, this Court has held that the enumerated offenses must be understood by reference to a "generic" meaning based on a core set of elements. *Id.* at 598. And to test whether a particular prior conviction was for that "generic" version of the crime, "*Taylor* adopted a 'formal categorical approach': Sentencing courts may 'look only to the statutory definitions'—i.e., the elements—of a defendant's prior offenses," and then

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as a predicate offense if it "otherwise involves conduct that presents a serious potential risk of physical injury to another." USSG § 4B1.2(a)(2). But this Court has now held the identical ACCA "residual clause" unconstitutionally vague, *see Johnson v. United States*, 135 S. Ct. 2551 (2015), and the government has acknowledged that this holding applies to the Guidelines residual clause as well, *see* U.S. Brief in Opposition at 15, *Beckles v. United States* (2016) (No. 15-8544).

compare those elements to the elements of the "generic" offense. *Descamps*, 133 S. Ct. at 2283. "If the relevant statute has the same elements as the 'generic' [federal] crime, then the prior conviction can serve as a[] … predicate [offense]; so too if the statute defines the crime more narrowly, because anyone convicted under that law is 'necessarily ... guilty of all the [generic crime's] elements.'" *Id.* (quoting *Taylor*, 495 U.S. at 599). If, however, "the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as a[] … predicate, even if the defendant actually committed the offense in its generic form." *Id.*; *see also Mathis*, 136 S. Ct. at 2248. The categorical approach applies equally to the "force clause" of the Guidelines definition. *See* Pet. App. 9a. Thus, if a statute defines a crime to require physical force as an element, the offense is categorically a crime of violence; if the definition sweeps more broadly, however, the offense does not qualify under the categorical approach.

In some cases, the categorical approach does not resolve the inquiry. A state statute may define "burglary" such that the offender *could* be convicted of the crime based on generic burglary elements, but alternatively might also be convicted based on some other, non-qualifying set of elements. *See Shepard*, 544 U.S. at 16-17. Or, when considering the force clause, a state statute might define a crime by listing alternative elements, one of which amounts to physically violent force and another of which does not. In these circumstances, where the underlying statute is said to be "divisible," sentencing courts employ the "modified categorical approach" to determine whether a defendant was necessarily convicted of (or necessarily

admitted through a guilty plea) the qualifying elements. *See Descamps*, 133 S. Ct. at 2284-85.

This Court in *Shepard* defined a narrow set of materials that may assist a sentencing court in determining whether a defendant was necessarily convicted of or necessarily admitted to the elements of a crime of violence. The inquiry is "limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." 544 U.S. at 26.

Only if the government proves through "*Shepard*-approved" documents that the defendant was unequivocally convicted of a qualifying form of the offense may that conviction be counted toward a sentencing enhancement. If such documents demonstrate the contrary, if they are unavailable, or if they leave any ambiguity regarding the nature of the offense of conviction, the sentencing court may not rely on that offense as a qualifying prior conviction.

The District Court Enhances Serrano-Mercado's Sentence Based On The Unproven Assertion That He Had Been Convicted Of Two Prior Crimes Of Violence

Petitioner pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Pet. App. 2a. For sentencing purposes, the plea agreement drafted by the prosecution specified a Guidelines base offense level of 22, prem-

ised in part on Serrano-Mercado having one prior felony conviction for a crime of violence. *Id.* at 4a-5a. The agreement, however, did not identify that prior conviction. *Id.* at 5a. After accounting for Serrano-Mercado's acceptance of responsibility, the plea agreement calculated a total offense level of 19. The parties did not stipulate to Serrano-Mercado's criminal history classification, and therefore did not agree on a specific Guidelines range, but the plea agreement recommended that he receive a sentence at the low end of whichever Guidelines range applied. The highest potential recommended sentence (assuming a criminal history category of V) was 51 months in prison. *See* Pet. App. at 8a; Plea and Forfeiture Agreement at 4, *United States v. Serrano-Mercado*, No. 12-439(CCC), Dkt. 29 (D.P.R. Nov. 27, 2012).

At sentencing, the district court disregarded the recommendation in the plea agreement and instead adopted the probation officer's proposal from the Presentence Investigation Report (PSR). *Id.* at 6a-7a. The court enhanced Serrano-Mercado's sentence under USSG § 2K2.1(a)(2), assigning a base offense level of 24 predicated on two prior felony convictions for a crime of violence. *Id*. The district court did not verify that the convictions were in fact for qualifying crimes of violence, relying instead on the PSR's description of the underlying facts of each offense. *Id.* at 6a. But while Serrano-Mercado, through counsel, objected to the PSR's calculation of the overall offense level, he did not specifically object to the PSR's characterization of his prior convictions, and the district court overruled the general objection. *Id.* at 7a n.2; 54a-55a.

By applying the acceptance-of-responsibility deduction and a separate enhancement based on the characteristic of the firearm used, the court ultimately calculated a total offense level of 25. The court also determined that Serrano-Mercado had a criminal history category of V. *Id.* at 7a. The district court embraced the recommendation to apply the low end of the applicable Guidelines range, and on that basis sentenced Serrano-Mercado to 100 months in prison, the lowest sentence within the advisory range. *Id.* at 7a. This was almost *double* the maximum 51-month sentence the prosecution had recommended in the plea agreement.

Reviewing For Plain Error, The Court of Appeals Shifts The Burden To Serrano-Mercado To Prove His Prior Conviction Was Not For A Crime Of Violence—And Affirms His Sentence

Serrano-Mercado appealed his sentence, urging that the district court had improperly applied the sentencing enhancement without requiring the government to show that he had in fact been convicted of at least two qualifying predicate offenses.[2] Since Serrano-Mercado had not specifically objected to this error in the district court, the Court of Appeals applied a plain-error standard of review. Pet. App. 14a-15a.

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[2] Serrano-Mercado also argued that the district court improperly applied a four-level enhancement based on the firearm at issue having an obliterated serial number. The Court of Appeals rejected this argument. *See* Pet. App. 24a-27a.

The PSR had listed three potentially relevant prior convictions: (1) a 2004 conviction; (2) a 2005 domestic abuse conviction under Article 3.1 of Law 54, P.R. Laws Ann. tit. 8, § 631; and (3) a 2006 conviction that included a charge of aggravated battery under Article 122 of the P.R. Penal Code, P.R. Laws Ann. tit. 33, § 4750. Pet. App. 6a. The government has never argued that the 2004 conviction qualifies as a crime of violence. And the parties agreed at the time that the 2006 conviction did qualify.[3] *See id.*

Serrano-Mercado's challenge therefore focused on the 2005 conviction. Serrano-Mercado explained that he was convicted under a divisible statute—that is, a "statute [that] sets out one or more elements of the offense in the alternative." *Id.* at 10a (quoting *Descamps*, 133 S. Ct. at 2281). The relevant statute, Article 3.1 of Puerto Rico's Law 54, extends to "[a]ny person who employs physical violence *or* psychological abuse, intimidation or persecution against the person of [a domestic partner] … to cause physical harm to the person, the property held in esteem by him/her, … or to another's person, or to cause grave emotional harm…." P.R. Laws Ann. tit. 8, § 631 (emphasis added). Thus, "physical violence" may be an element

[3] After the Court of Appeals panel decision, and after Serrano-Mercado filed his petition for rehearing en banc, this Court issued its decision in *Johnson*, 135 S. Ct. 2251, holding unconstitutional the ACCA residual clause. In *Beckles v. United States*, No. 15-8544, the Court is currently considering whether the identically worded residual clause in the Guidelines' career offender definition is likewise invalid. If it is, as we explain below, Serrano-Mercado's separate 2006 conviction should not be counted as a predicate crime of violence. *See infra* 35-36.

of the offense, but alternatively, a defendant can instead be convicted under Article 3.1 based on a finding that he has employed only "psychological abuse, intimidation or persecution." Likewise, the violence can be directed at property rather than at a person. Serrano-Mercado therefore argued that a conviction under Article 3.1 would not necessarily involve the kind of "violent force 'capable of causing physical pain or injury to another person'" that this Court has held necessary to come within federal definitions of a crime of violence. Pet. App. 15a-16a; *see also Johnson v. United States*, 559 U.S. 133, 140 (2010). Therefore, for a court to determine whether a prior conviction under Article 3.1 supports an enhanced sentence, it must use the "modified categorical approach" and "consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." *Descamps*, 133 S. Ct. at 2281. Because the district court had not conducted this inquiry—and indeed the government had not supplied the documents necessary for it to do so—Serrano-Mercado urged the Court of Appeals to remand for resentencing.

The government responded that Serrano-Mercado's conviction under Article 3.1 was categorically a crime of violence because it satisfied the residual clause in USSG § 4B1.2(a)(2). Pet. App. 17a. The government did not argue, nor did it present any record of conviction showing, that Serrano-Mercado's 2005 conviction qualified as a crime of violence under the "force clause" of the Guidelines definition.

The First Circuit affirmed the district court's sentencing decision. *Id.* at 27a. Because of uncertainty

surrounding whether the residual clause was valid, *see* Pet. App. 16a n.5, the First Circuit focused only on the force clause of the Sentencing Guidelines' definition of a crime of violence, and not on the residual clause. The court acknowledged that Article 3.1 of the underlying Puerto Rico law was a divisible statute and that the court normally would apply the modified categorical approach to determine (1) the actual offense for which Serrano-Mercado was convicted, and (2) whether that offense was a crime of violence. *Id.* at 12a, 13a, 15a. But the majority was unable to perform that analysis because the government had not produced any documents related to the conviction. *Id.*

Even though this failure of proof at sentencing was the government's mistake, the majority held that the consequences fell on Serrano-Mercado based on his counsel's failure to object. Specifically, the majority held that Serrano-Mercado failed to satisfy the prejudice prong of the plain-error test, which required him to show "a reasonable probability that, but for the error, the district court would have imposed a different, more favorable sentence." *Id.* at 19a-20a. According to the majority, the failure to object to the district court's sentencing calculation meant that the substantive burden shifted to Serrano-Mercado to produce documents related to his 2005 conviction, for the first time on appeal, and to prove that the conviction was for an offense that did *not* qualify as a crime of violence. *Id.* at 19a-22a. Because Serrano-Mercado had not provided any such documents or proof to the district court or to the panel on appeal, he could not show that a proper *Shepard* analysis would have revealed that his conviction was for a non-violent offense, and therefore could not show that he was

prejudiced by the sentencing enhancement that the district court ultimately imposed. *Id.* at 20a-22a.

Judge Lipez "reluctantly" concurred. He acknowledged that a line of First Circuit precedent bound the panel to reject Serrano-Mercado's claim. *Id.* at 27a. But he pointed favorably to an alternative approach—adopted by several other Circuits—that properly focused on the district court's error in "using the [2005] conviction to enhance Serrano's sentence without demanding proof from the government that the defendant's conviction was for a violent version of the divisible crime." *Id.* at 39a. Judge Lipez explained that the majority's approach "unfairly leap[s] over the threshold analytical error" and requires the defendant to make an affirmative evidentiary showing regarding the nature of his prior conviction. *Id.* at 40a. Judge Lipez would have held that a defendant always suffers prejudice when he or she is sentenced to an enhanced prison term that is unsupported by evidence that his underlying conviction is for a crime of violence properly triggering a sentence enhancement. *Id.* at 40a-41a. If the case were remanded to correct the error, Judge Lipez noted, the government might not be able to make the required showing: *Shepard*-approved documents might be unavailable, or they might not shed light on the nature of the underlying conviction. Either way, the defendant would not receive the sentencing enhancement. *See id.* at 40a.

The Court Of Appeals Denies Rehearing En Banc Over A Separate Statement By Three Judges Expressly Urging This Court To Hear The Case

Serrano-Mercado sought rehearing and rehearing en banc, arguing that the panel's affirmance of the district court's sentence enhancement was in conflict with First Circuit decisions, the decisions of several other Circuits, and precedent of this Court. Pet. App. 66a.

The panel denied rehearing, and a sharply divided Court of Appeals declined to rehear the matter en banc. Judges Torruella and Thompson, dissenting from the denial of en banc review, joined a statement authored by Judge Lipez expressing "deep disappointment" with the denial of Serrano-Mercado's rehearing petition, "which raises a question of exceptional importance that has split the circuits." *Id.* Judge Lipez's statement pointed to the First Circuit's "two strains of analysis for determining whether reversible plain error occurred when a sentencing court improperly used a conviction under a divisible statute as a predicate for enhancement: one in which [the Circuit] ha[s] held the government to its burden of proving the conviction's eligibility, and one in which [it] ha[s] not." *Id.* at 69a. Judge Lipez highlighted that the other Circuits similarly "have been divided on whether the defendant or government should bear the burden of production in th[is] plain error context." *Id.*

Judge Lipez also criticized the panel majority's approach to prejudice for its inconsistency with this Court's precedent. Requiring a defendant to disprove

his eligibility for a sentencing enhancement, he observed, is at odds with "[t]he animating principle of the modified categorical approach" that the government must justify the severity of the defendant's punishment. *Id.* at 70a. And this Court's most recent cases on the prejudice requirement "undermine [the First Circuit's] cases requiring the defendant, on plain error review, to produce *affirmative* evidence that he would have received a more favorable sentence." *Id.* at 66a (citing *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016)).

Judge Lipez emphasized that what is at stake is no mere "technical debate over arcane legal doctrine." *Id.* The "underlying issue—prolonged incarceration, erroneously imposed—implicates the growing national concern over excessively long imprisonment." *Id.* The First Circuit's resolution of the question presented puts at risk "years in the lives of individuals who, albeit convicted felons, are serving enhanced sentences that are unjustified on the records before the court." *Id.* And no countervailing concern balances the equation: "the burden on the court to remedy an error such as this is small," requiring only a simple resentencing proceeding where the government can attempt to provide support, if it exists, for a defendant's enhanced sentence. *Id.* at 71a (citing *Molina-Martinez*).

Judge Lipez's view fell just short of garnering a majority of the First Circuit judges. But in light of "the mounting concern over unduly harsh sentences; a circuit split; and an approach to plain error by this circuit and others that is at odds with the Supreme

Court's intent … to protect defendants from unsubstantiated, and thus unjustified, sentencing enhancements," Judge Lipez and his colleagues "urge[d] the Supreme Court" to take up the issue. *Id.* at 75a.

REASONS FOR GRANTING THE WRIT

This petition presents an acknowledged and entrenched Circuit conflict on an urgent and recurring question regarding federal criminal sentencing: how the government's burden to establish that a prior conviction under a divisible statute qualifies as a predicate crime of violence intersects with the defendant's burden on appeal to show plain error when the defendant failed to object to the district court's treatment of a prior conviction as a predicate offense. Five Courts of Appeals hold that, when a defendant is convicted on a record devoid of evidence showing the prior conviction is qualifying, the error in relying on that conviction necessarily has a detrimental effect on the defendant's sentencing and thus requires a remand for resentencing. In contrast, the First Circuit and three other Circuits hold that the plain-error context shifts the underlying burden to the defendant, who in order to obtain a remand for resentencing must make an affirmative showing that the prior conviction does *not* qualify as a crime of violence. The latter approach, which among other things may require a criminal defendant to make a showing based on records that are unavailable or do not even exist, conflicts with the core premises of *Shepard*, as well as this Court's precedents regarding plain-error review. The unfairness of that approach for defendants, as well as the confusion and disparity created by the sub-

stantial Circuit conflict, are manifest and are detrimental to the proper functioning of the federal criminal sentencing process. For all of these reasons, this case cries out for this Court's review, and the Court should grant this petition.

I. The Courts Of Appeals Are Sharply Split Over The Prejudice Analysis Governing Prior Convictions Under Divisible Statutes.

The district court in this case applied a sentencing enhancement based on a prior conviction without requiring the government to meet its burden of proving that the conviction was a qualifying predicate offense. As happened here, in many cases defense counsel will fail to recognize the error and may therefore fail to object to the district court's enhancement of a sentence without a proper record basis regarding the nature of an underlying conviction. If the defendant in such a circumstance seeks to challenge the government's failure of proof on appeal, he or she must satisfy the plain-error standard: (1) "there must be an error"; (2) "the error must be plain—that is to say, clear or obvious"; and (3) "the error must have affected the defendant's substantial rights," meaning that the defendant "must 'show a reasonable probability that, but for the error,' the outcome of the proceeding would have been different." *Molina-Martinez*, 136 S. Ct. at 1343 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)); *see* Fed. R. Crim. P. 52(b). If the plain-error standard is satisfied, the appellate court may correct the error if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936).

This petition involves the third prong of the plain-error standard: what must a defendant do to demonstrate a reasonable probability of a different outcome absent the error, i.e., prejudice? On this critical and recurring question, the Circuits are sharply and intractably divided, as the Court of Appeals here recognized and as Judge Lipez emphasized in particular. Certiorari should be granted because the standards governing plain-error review in such a consequential setting should not vary from Circuit to Circuit. *See, e.g.*, *Molina-Martinez*, 136 S. Ct. at 1345 (granting certiorari where the circuits applied different plain-error standards in reviewing miscalculated Guidelines sentences).

A. Five Circuits hold that it is prejudicial for a district court to rely on a conviction under a divisible statute where the government provides no *Shepard* materials proving that the conviction was for a qualifying offense.

A majority of the Circuits to address the issue hold that it is necessarily prejudicial for a district court to enhance a sentence based on a prior conviction under a divisible statute where the record is devoid of proof that the conviction was for a qualifying offense.

The Second Circuit holds the plain-error standard satisfied in such circumstances. In *United States v. Reyes*, 691 F.3d 453 (2d Cir. 2012), the defendant was sentenced as a career offender subject to an elevated offense level under the Guidelines based on the gov-

ernment's contention that he had two prior felony convictions for crimes of violence. One of those offenses, a state-law battery conviction, was under a divisible statute that criminalized both violent conduct as well as mere "unwanted intentional physical contact" that would not rise to the level of "physical force" necessary to satisfy the elements clause. *See id.* at 457-58 (citing *Johnson*, 559 U.S. at 138-40). And the government had "submitted no evidence demonstrating that Reyes's conviction … necessarily rested on anything but the slightest unwanted physical contact." *Id.* at 458. Although the defendant failed to object before the district court, the Second Circuit nonetheless found it clear error to rely on the conviction without *Shepard* documents showing Reyes was in fact convicted of the violent form of battery. Specifically addressing prejudice, the Court of Appeals held that "[t]he district court's error in sentencing Reyes as a career offender on this record affected his substantial rights because it resulted in an elevated offense level under the Guidelines." *Id.* at 460. Thus, a remand for consideration of any available *Shepard* documents and resentencing was required. *See also United States v. Dantzler*, 771 F.3d 137, 148 (2d Cir. 2014) (reliance on non-*Shepard* sources to find that prior offenses were committed on different occasions, as required for ACCA career-offender enhancement, affected defendant's substantial rights and required remand for resentencing despite lack of timely objection).

The Fifth Circuit takes this approach as well, as demonstrated in *United States v. Bonilla-Mungia*, 422 F.3d 316 (5th Cir. 2005). Relying on a depiction in the PSR to which the defendant did not object, the dis-

trict court in that case applied a sixteen-level enhancement to the Guidelines' base offense level based on a prior conviction for a crime of violence. *Id.* at 318. On appeal, the defendant correctly pointed out that the California sexual battery statute under which he was convicted included both forcible sex offenses, which qualified as crimes of violence under the applicable Guidelines, and lesser offenses that did not qualify. Without any record evidence from *Shepard*-approved sources of which form of the crime the defendant was convicted, the appellate court found the plain-error standard satisfied and accordingly remanded for resentencing. *Id.* at 321; *see also United States v. Sarabia-Martinez*, 779 F.3d 274, 278 (5th Cir. 2015) (finding prejudicial plain error where sentencing court relied on PSR, not *Shepard* documents, to deem prior conviction under divisible statute a qualifying drug-trafficking offense).

The Eighth Circuit embraces the same analysis. In *United States v. Pearson*, 553 F.3d 1183, 1185-86 (8th Cir. 2009), *overruled on other grounds by United States v. Tucker*, 740 F.3d 1177 (8th Cir. 2014), the defendant failed to object to the classification at sentencing, but subsequent legal developments clarified that one of his prior convictions—a federal offense for escape—should not have qualified categorically as a crime of violence. Applying plain-error review, the court determined that the record did not reveal whether Pearson was actually convicted of the violent form of escape, and that the failure to justify his sentencing enhancement "would affect his substantial rights." *Id.* at 1186. Therefore, the defendant had adequately made a showing of prejudice, and the Court of Appeals remanded for resentencing.

The Ninth Circuit, too, recognized this principle in *United States v. Pineda-Flores*, 619 F. App'x 612 (9th Cir. 2015). The district court there, without objection from the defense, had enhanced a sentence based on the defendant's prior felony conviction for a drug-trafficking offense. But the state statute underlying that conviction did "not qualify categorically as a drug trafficking offense," and no *Shepard* document showed that the conviction would qualify under the modified categorical approach. *Id.* at 614. Because "the record as it stands does not support application of the modified categorical approach"—that is, because nothing in the record proved that the defendant's conviction was for a qualifying drug-trafficking offense—"the district court committed plain error that affected Pineda-Flores's substantial rights and the fairness of the proceeding." *Id.* at 615.

As the Ninth Circuit noted, this approach demands no further showing of prejudice from the defendant. Indeed, it does not even allow the government to offer new evidence on appeal. *See id.* Where the district court enhances the defendant's sentence without record support, the Court of Appeals remands for resentencing under the modified categorical approach. *See also United States v. Castillo-Marin*, 684 F.3d 914, 927 (9th Cir. 2012) (finding plain error and remanding for resentencing where government had not produced *Shepard*-approved materials proving prior conviction to be a crime of violence).

The Fourth Circuit similarly remands for resentencing when, notwithstanding the defendant's lack

of objection, the record contains no materials establishing that prior convictions may properly serve as the basis for a sentencing enhancement. *See United States v. Boykin*, 669 F.3d 467 (4th Cir. 2012). *Boykin* did not involve a divisible statute, but it raised the same analytical issue. The district court improperly relied on the PSR, and not on any *Shepard*-approved documents, to find that the defendant's prior offenses were committed on separate occasions for purposes of the ACCA career-offender enhancement. 669 F.3d at 471-72. Without proper *Shepard* documents on that critical point, there was no basis on which to apply the sentencing enhancement, meaning that Boykin's substantial rights were affected and resentencing was required. *Id.* at 472.

B. Four Circuits improperly shift the burden to the defendant to show that the underlying conviction was *not* for a qualifying offense.

Along with the First Circuit ruling here, three other Courts of Appeals have rejected the view of the five Circuits discussed above. These courts hold that under plain-error review a defendant cannot establish prejudice from a *Shepard* error without coming forward with an affirmative showing that his prior conviction was for a *non*-qualifying offense. In other words, where plain-error review applies, the defendant must shoulder the government's burden to prove the nature of the prior conviction.

The D.C. Circuit's ruling in *United States v. Williams*, 358 F.3d 956 (D.C. Cir. 2004), marks one of the earliest and clearest articulations of the heightened

prejudice showing that the First Circuit demanded in this case. The defendant's offense level under the Guidelines there was increased by six points based on a prior robbery conviction that the district court treated as a crime of violence without objection by the defendant. On appeal, the D.C. Circuit held that the district court had "clearly erred" by applying the sentencing enhancement "without first ascertaining whether Williams' previous conviction of robbery constituted a 'crime of violence' within the meaning of the Sentencing Guidelines." *Id.* at 965. Indeed, the court's own precedent made clear that the robbery statute in question embraced both violent and non-violent conduct. But although the D.C. Circuit recognized that the plain-error prejudice requirement is somewhat "relaxed" in the sentencing context, it insisted that "the burden remains squarely on Williams to provide the court with some basis for suspecting that a reduction in his sentence is sufficiently likely to justify a remand." *Id.* at 966. The court specifically added that Williams could satisfy that burden only by offering evidence that the record of his robbery conviction would prove it was *not* violent. *See id.* at 967. Because Williams had not done so, the court declined to upset his sentence.

The Third Circuit articulated this mode of analysis in *United States v. Ransom*, 502 F. App'x 196 (3d Cir. 2012). There, the defendant's advisory Guidelines range was increased based on prior convictions for bank robbery and simple assault. Defense counsel conceded the classification of those offenses and unsuccessfully urged the district court to grant a variance. On appeal, however, the defendant argued that the assault conviction should not have been treated as

a crime of violence that could trigger a sentencing enhancement. The Court of Appeals agreed that the assault statute in question was divisible and that the district court record "was insufficient to establish that his simple assault conviction was a crime of violence." *Id.* at 200. But the court nevertheless faulted the defendant for failing to provide *Shepard* documents to rebut the PSR's characterization of his assault conviction. *See id.* at 200 & n.7. In order to show prejudice, the court said, the defendant "must offer a foundation upon which we could conclude that, had the District Court conducted the appropriate inquiry, it would have determined that his simple assault conviction was not a crime of violence." *Id.* at 200.

The Tenth Circuit applies similar reasoning. In *United States v. Zubia-Torres*, 550 F.3d 1202 (10th Cir. 2008), the defendant received a sixteen-level Guidelines enhancement for what the PSR deemed a prior drug-trafficking conviction. The defendant did not object to this characterization in the district court but challenged it on appeal. The Court of Appeals agreed with the defendant that the Nevada statute in question criminalized not only distribution of drugs but also mere possession and was therefore divisible. The Court of Appeals acknowledged that the government had not produced the necessary documents showing that the underlying conviction was for trafficking and not some lesser offense. But the Tenth Circuit nonetheless tagged the defendant with the error: "By failing to present any evidence that relevant documents would indicate his conviction was *not for drug trafficking*, the defendant has failed to meet his burden under the third prong of plain error review." *Zubia-Torres*, 550 F.3d at 1209 (emphasis added); *see*

also United States v. Manning, 635 F. App'x 404, 410 (10th Cir. 2015) (following *Zubia-Torres* and finding a lack of prejudice where the defendant had not offered evidence showing that his prior conviction under a divisible battery statute arose under a *non*-violent prong).

II. The D.C., First, Third, And Tenth Circuits' Approach To Prejudice Is Contrary To This Court's Precedent And Severely Undermines The Fairness And Integrity Of Federal Sentencing.

The Court of Appeals in this case held that defense counsel's failure to object at sentencing put the onus on Serrano-Mercado to show on appeal that his 2005 conviction under Puerto Rico Article 3.1 involved an alternative element other than physical force against a person. Serrano-Mercado, said the Court, "may not benefit from having left us completely in the dark … about what the documents relating to [his] conviction under Article 3.1 would reveal about whether he was convicted of an offense that contains the physical-force element or instead some other offense that does not require proof of that element." Pet. App. 18a. Since Serrano-Mercado did not produce *Shepard* materials on appeal showing that his 2005 conviction involved the non-qualifying "psychological abuse, intimidation or persecution" element, he could not show prejudice, and the Court of Appeals therefore left the district court's sentencing decision undisturbed.

That holding is not only at odds with the view of five other Courts of Appeals (as shown above), it is

also at odds with this Court's precedent. It eviscerates the foundation of the *Shepard* line of cases by allowing a defendant's sentence to be enhanced in the absence of certainty about the nature of a prior conviction. It has no basis in this Court's articulation of the plain-error review standard and is particularly inexplicable in light of this Court's recent discussion of that standard in *Molina-Martinez*. Ultimately, the approach reflected in the decision below and in the decisions of the other Courts of Appeals that take a similar view unfairly exposes criminal defendants to substantial sentence enhancements based on conduct of which they may never have been convicted, all due to their lawyers' failure to object in the trial court—a risk that is likely to fall most heavily on indigent defendants who need the law's protection the most.

A. The First Circuit's approach turns the modified categorical approach on its head.

As Judge Lipez recognized, the First Circuit's approach in this case "switches to defendants the obligation the Supreme Court imposed on the government to produce specific court records proving that a conviction under a divisible statute qualifies as a predicate offense." Pet. App. 28a. This burden-shifting violates the "animating principle" of this Court's modified categorical approach, which is "that enhanced sentencing is improper unless the government proves that the defendant's criminal history justifies such severe punishment." *Id.* at 70a.

Statutory and Guidelines sentencing schemes peg enhancements to prior "convictions," not what acts

the defendant has "committed." *Descamps*, 133 S. Ct. at 2287. Accordingly, this Court's categorical approach (and its modified "variant," *id.* at 2281) ensures that defendants are not punished with extra prison time—often years of additional incarceration—without proof that they were actually *convicted* of all the elements of a qualifying offense. A prior conviction may serve as a predicate offense only if it "*necessarily*" establishes the elements of the predicate offense. *Descamps*, 133 S. Ct. at 2283 (emphasis added).

This "demand for certainty," *Shepard*, 544 U.S. at 21-22, is the bedrock of the doctrine. As this Court has recognized, statements about the facts of an offense that can appear in non-*Shepard* materials—and later end up in PSR narratives—"are prone to error precisely because their proof is unnecessary." *Mathis*, 136 S. Ct. at 2253. They are "likely to go uncorrected," often because the defendant has no incentive to contest what is irrelevant to his conviction or plea. *Id.* Prohibiting reliance on such sources ensures that any inaccuracies do not "come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence." *Id.* Furthermore, in the context of mandatory sentencing enhancements like the one codified in the ACCA, the strict certainty rule prevents sentencing judges from straying into improper factfinding about the nature of a prior conviction that might violate a defendant's Sixth Amendment rights. *See id.* at 2252.

The heightened prejudice showing demanded under the First Circuit's approach undoes all of this and allows for a sentencing enhancement based on the very *uncertainty* that ought to preclude it. The record

here contains no information about the nature of Serrano-Mercado's 2005 conviction save for the PSR's narrative description—the source of which is entirely unclear. On the basis of the existing record, it is unknown and unknowable whether Serrano-Mercado was *necessarily* convicted of or pleaded to the "physical force" element that would make his conviction a qualifying crime of violence. Under this Court's cases, that uncertainty should mean that the offense cannot be treated as a qualifying crime of violence and cannot be used to enhance his Guidelines offense level: "Ambiguity on this point means that the conviction did not 'necessarily' involve facts that correspond to [a predicate] offense," so "[u]nder the categorical approach," Serrano-Mercado "was *not* convicted" of a crime of violence. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1687 (2013) (emphasis added). Instead, the First Circuit faulted Serrano-Mercado for failing to resolve the uncertainty and failing to prove that he was *not* convicted of using physical force. That conclusion gets matters exactly backwards and is incompatible with this Court's precedents.

B. Plain-error review does not warrant the harsh substantive burden-shifting adopted by the First Circuit here.

The Court of Appeals purported to rest its decision on the nature of plain-error review. The Court recognized that, in an ordinary appeal, it would review de novo whether Serrano-Mercado's 2005 conviction was, in fact, for a qualifying crime of violence. *See* Pet. App. 14a. Because Serrano-Mercado had not objected to that characterization at sentencing, however, the plain-error standard—and in particular the

requirement to show prejudice—governed the court's review. But the majority's analysis is inconsistent with what the prejudice prong actually requires. It is enough to show that the government *may not* have been able to meet its burden under the modified categorical approach, and thus that the enhancement would not have applied; a defendant need not show conclusively that the government *would not* have been able to do so by offering proof that the conviction was for a non-qualifying version of the offense.

As Judge Lipez recognized, a proper understanding of the underlying error demonstrates that it was prejudicial. The error occurs "whenever a sentencing court increases a term of imprisonment based on a predicate conviction under a divisible statute in the absence of *Shepard*-approved proof that the conviction was for a qualifying variant of the crime." Pet. App. 32a. To show prejudice, therefore, a defendant need only show a sentencing enhancement and "note the absence of proof" to justify it. *Id.* That absence means that, on the existing record, the prior conviction should not have counted as a qualifying offense. Here, Serrano-Mercado's Guidelines offense level was increased by 2 points based solely on the inclusion of the 2005 conviction. That conviction made a clear and measurable difference to his sentencing range. *See Molina-Martinez*, 136 S. Ct. at 1346 ("In the usual case … the systemic function of the selected Guidelines range will affect the sentence."). Serrano-Mercado was plainly prejudiced by the sentencing court's improper reliance on that conviction, because had the district court put the government to its burden of es-

tablishing the nature of Serrano-Mercado's prior offense, the government may not have been able to meet it.

The prejudice prong of the plain-error standard requires a defendant to show only a "reasonable probability" that the district court's error affected the sentencing calculation—not even a preponderance of the evidence, meaning the requisite showing is less than a 50/50 likelihood. *Dominguez Benitez*, 542 U.S. at 83 & n.9; *see also id.* at 86 (Scalia, J., concurring in the judgment). Here, if the district court had put the government to the test of meeting its burden, there would be four possible outcomes: (1) *Shepard*-approved documents relating to the 2005 conviction might be unavailable; (2) *Shepard*-approved documents might be available but shed no light on the nature of Serrano-Mercado's conviction; (3) *Shepard*-approved documents might show that Serrano-Mercado was convicted of the non-violent version of the Article 3.1 offense; or (4) *Shepard*-approved documents might show that Serrano-Mercado was convicted of the violent version of the Article 3.1 offense. In the first three of those scenarios, the 2005 conviction would not have counted as a crime of violence, and Serrano-Mercado's Guidelines sentencing range would have been lower than the range the district court employed. In other words, three of the four possible outcomes would result in a lower sentencing range. That is surely a "reasonable probability" of a different outcome.

This Court's recent decision in *Molina-Martinez* confirms that the First Circuit's approach to plain error is erroneous. There, this Court held that a district court's use of the wrong Guidelines sentencing range

in and of itself gives rise to a sufficient showing of prejudice to satisfy plain-error review, even without any further evidence that the district court would ultimately have imposed a different sentence if it had used the correct range. This Court explained that a defendant "should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different." 136 S. Ct. at 1346. Rather, the procedural error of beginning the sentencing determination with the wrong Guidelines range suffices to establish plain error. *Id*.

Likewise, here, the First Circuit was wrong to bar Serrano-Mercado from relief simply because he did not produce affirmative evidence that he was convicted under a non-violent prong of the statute (the third scenario above). With or without such evidence, there is a "reasonable probability" his sentencing result would have been different had the district court properly required the government to satisfy its burden of proof under the modified categorical approach.

C. The First Circuit's approach undermines uniformity and fairness in federal sentencing.

In *Molina-Martinez*, this Court explained that correcting sentencing errors in cases like this one is not unduly burdensome. 136 S. Ct. at 1348-49 ("[A] remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does.") (quoting *United States v. Wernick*, 691 F.3d 108, 117-18 (2d Cir. 2012)). The costs of the First Circuit's ruling, in contrast, are substantial.

Defendants in the four Circuits with a harsher prejudice standard will face the prospect of extensive additional punishment based on requisite crimes they may not have committed. That discrepancy is inherently unfair; a federal criminal defendant should not be subject to different sentencing standards depending on whether he or she is sentenced in Maine or Minnesota.

The unfairness in those four Circuits is particularly acute given the severity of sentencing enhancements. As Judge Lipez and his colleagues recognized, "The impact on the defendant of leaving an erroneous sentence intact is often enormous and, given the modest burden of a remedy, indefensible in many cases." Pet. App. 74a. The ACCA and the Guidelines impose harsh penalties for defendants with specified criminal pasts. "Hence, when a court has improperly extended a sentence, there should be no debate about the need to choose an approach to the application of plain error that is more likely to spare individuals from unjustified additional punishment." *Id.*

That is particularly true in light of the "unfortunate reality" that many claims like Serrano-Mercado's will often arise on plain-error review. *Id.* at 43a. Judge Lipez got it exactly right: "Criminal defendants often must rely on court-appointed counsel who, faced with a myriad of trial and sentencing issues, predictably overlook some of them." *Id.* And "[t]he extremely high hurdle to post-conviction relief based on ineffective assistance of counsel means that such a remedy is uncertain at best." *Id.*; *cf. Williams*, 358 F.3d at 967 (finding that defendant failed to sat-

isfy the prejudice requirement of the ineffective assistance analysis "[f]or the same reason" that he failed to show prejudice on plain-error review). With life and liberty at stake, the misguided approach of the First Circuit and the other Courts of Appeals that follow that approach urgently merits this Court's attention.

III. This Case Is An Ideal Vehicle For Resolving The Question Presented.

Finally, this case presents a perfect vehicle for resolving the Circuit split over the prejudice showing that is required when a district court errs by relying on a prior conviction to support a sentencing enhancement without ensuring that the conviction properly qualifies as a predicate offense. The First Circuit affirmed the district court's ruling on Serrano-Mercado's crime of violence convictions solely based on its erroneous analysis of prejudice related to the 2005 conviction. There is no doubt that, had the First Circuit taken the proper approach to prejudice, it would have remanded for resentencing to determine whether the government could introduce appropriate *Shepard* documents proving the nature of Serrano-Mercado's 2005 conviction. And if the remand failed to tip the record in the government's favor, Serrano-Mercado's advisory Guidelines range (based on only one qualifying predicate crime of violence) would have been 84-105 months, rather than the 100-125 month range the district court employed, resulting in a 16-month lower sentence if the district court continued to adhere to the government's recommendation that it sentence at the low end of the Guidelines range. *See* USSG § 5A; Pet. App. 8a.

Moreover, this case arises in a virtually identical posture to *Molina-Martinez*, which also addressed a Circuit split over the plain-error standard in the context of a Guidelines case. Indeed, most of the cases giving rise to this Circuit split arise in the Guidelines context, where errors may go unnoticed at first due to the complexity of the underlying Guidelines calculations and thus may frequently present themselves in the Courts of Appeals on plain-error review.

This case is an ideal vehicle for resolving the Circuit split on the plain-error standard regardless of what action the Court may take with respect to the second question, relating to Serrano-Mercado's 2006 conviction. *See infra* 35-36. Each of these convictions has independent significance for Serrano-Mercado's sentencing calculation. Each conviction separately contributed 2 points to Serrano-Mercado's base offense level. If one conviction is eliminated as a predicate crime of violence, Serrano-Mercado's total offense level would be lowered by 2 points, to 23. If both of the convictions are eliminated as predicates, the total offense level would go down another 2 points, to 21. *See* USSG § 2K2.1(a)(2), (3), (4)(B) (specifying 2-point differences in base offense levels for at least two predicate convictions, one predicate conviction, and no predicate convictions, respectively). Accordingly, regardless of the status of the 2006 conviction, the proper treatment of the 2005 conviction will have a real and discernible effect on Serrano-Mercado's sentencing, and the Court can and should grant the petition and resolve the established Circuit split affecting the 2005 conviction.

IV. The Court Should Hold The Second Question Presented, Regarding The Separate Enhancement For Petitioner's 2006 Conviction, Pending Its Disposition Of *Beckles*.

As described above, Serrano-Mercado did not dispute at sentencing or on appeal that his other prior felony conviction—namely, a 2006 conviction under Puerto Rico's aggravated battery statute, P.R. Laws Annotated tit. 33, § 4750—counted as a crime of violence. After the First Circuit panel issued its decision, however, and after Serrano-Mercado filed his petition for rehearing and rehearing en banc, this Court ruled that the residual clause of the ACCA is unconstitutionally vague. *See Johnson*, 135 S. Ct. at 2563. The Court this Term will likewise decide in *Beckles* whether that holding applies to the identically worded residual clause contained in the Sentencing Guidelines—a proposition the government does not contest. *See supra* n.1. If the Guidelines residual clause is invalidated, then Serrano-Mercado's 2006 conviction should not have been used to enhance his sentencing range under the Guidelines either.[4]

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[4] The Puerto Rico statute underlying the 2006 conviction is not a crime of violence under the force clause of the crime of violence definition, because violent physical force is not an element of the statutory offense. *See, e.g.*, *In re Guzman-Polanco*, 26 I. & N. Dec. 713, 717 (BIA 2016) (explaining why "aggravated battery under section 4750 could be committed by means that do not require the use of violent physical force"). Nor is aggravated battery one of the specifically enumerated offenses in the definition of "crime of violence." *See* USSG § 4B1.2(a)(2) (enumerating

Serrano-Mercado did not raise this argument while the residual clause remained good law. Should the Court invalidate the clause in *Beckles*, however, Serrano-Mercado should have an opportunity to challenge the separate 2-level sentencing enhancement that was based on his 2006 conviction. Accordingly, wholly apart from the principal question presented in this petition, which independently merits this Court's review and would not be affected either way by this Court's resolution of *Beckles* or its action on this second crime of violence, the Court should hold the question of Petitioner's 2006 conviction pending its disposition in *Beckles* and then dispose of the matter as appropriate in light of that disposition.

"burglary of a dwelling, arson, or extortion"). Therefore, without the residual clause, Serrano-Mercado's 2006 conviction could not have qualified (categorically or otherwise) as an underlying crime of violence.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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August 22, 2016

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 13-1730

UNITED STATES OF AMERICA,

Appellee,

v.

WILSON SERRANO-MERCADO,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Carmen Consuelo Cerezo, U.S. District Judge]

Before

Thompson, Lipez, and Barron,

Circuit Judges.

Raul S. Mariani-Franco for appellant.

Francisco A. Besosa-Martínez, Assistant United States Attorney, with whom Rosa Emilia Rodríguez-Vélez, Unites States Attorney, and Nelson

Pérez-Sosa, Assistant United States Attorney, were on brief, for appellee.

May 1, 2015

BARRON, Circuit Judge. Wilson Serrano-Mercado contends the District Court made two mistakes in sentencing him for a federal gun crime. First, he argues the District Court erred in counting more than one of his prior convictions for Puerto Rico criminal offenses as a conviction for a "crime of violence" under the Sentencing Guidelines. Second, he contends the District Court gave too much significance under those same guidelines to the existence of an obliterated serial number on the frame of the firearm he was convicted of possessing, when the serial number on the slide was unaltered. We hold the District Court did not commit reversible error in either respect and thus affirm the sentence imposed.

I.

In District Court, Serrano pled guilty to being a felon in knowing possession of a firearm—a 9mm pistol. 18 U.S.C. §§ 922(g)(1), 924(a)(2). The Sentencing Guidelines specify a suggested sentencing range for such a conviction. U.S.S.G. §§ 2K2.1, 5A. Serrano rests his challenge to his sentence on the two errors that he claims the District Court made in identifying the proper range. And thus, it is helpful to provide some background about how, in general, such ranges

are identified, and then how, in particular, the range was identified here.

Under the guidelines, two variables provide the basis for the sentencing range. The first variable is called the offense level. It is expressed in terms of a point score. *Id.* § 5A. The score is a function, initially, of what is known as the base offense level. *Id.* § 2 introductory cmt. The base offense level is generally calculated with reference to the nature of the crime of conviction. The guidelines then add points to or subtract points from the base offense level for various enhancing or mitigating factors that may or may not be present in a defendant's case. The result is the total offense level.

The second variable is a defendant's criminal history category. *Id.* § 5A. The guidelines assign criminal sentences certain point values. *Id.* § 4A1.1. These points are then translated into one of six criminal history categories, represented by the use of a Roman numeral from I to VI. *Id.* § 5A. The more severe the criminal history a defendant has on the basis of the points assigned, the higher the category.

On the basis of these two variables, the guidelines then set forth suggested sentencing ranges in a chart. *Id.* One axis of the chart lists possible total offense levels. The other axis lists possible criminal history categories. At the intersection of every possible value for these two variables, the chart sets forth a suggested range of sentences.

Before actually imposing a sentence, a district court often receives input from various actors about

how to calculate the defendant's guidelines sentencing range. If there is a plea agreement, as there was here, the agreement will often recommend a range. And, in setting forth that recommendation, the agreement will often set forth certain facts that bear on the calculation of the base offense level, the total offense level, and the criminal history category. *See* Fed. R. Crim. P. 11(c)(1).

The district court will also have the benefit—as, again, was true here—of a probation officer's pre-sentence report, which is based on that officer's investigation. That report, too, will set forth facts bearing on the sentencing guidelines calculation. And that report may, in light of those facts, suggest a calculation different from the plea agreement. *See* Fed. R. Crim. P. 32(d).

The district court need not accept the calculations in the plea agreement or the pre-sentence report. Nor must the district court choose a sentence that falls within the range the district court's own guidelines calculation yields, though the sentence must comply with additional substantive and procedural limitations. *See* 18 U.S.C. § 3553; *United States v. Booker*, 543 U.S. 220, 245, 261 (2005). But if the district court errs in making the guidelines calculation, the sentence may be reversed even though that calculation does not directly compel the sentence. *See Gall v. United States*, 552 U.S. 38, 51 (2007); *United States v. Tavares*, 705 F.3d 4, 25 (1st Cir. 2013). And that is what Serrano argues must happen here.

In this case, the plea agreement recommended a sentencing range tied to a base offense level of 22.

The agreement made that calculation because it stated that Serrano had been convicted of one prior felony for a "crime of violence" at the time of his unlawful firearm possession. U.S.S.G. §§ 2K2.1(a)(3), 4B1.2(a). The plea agreement did not identify any of Serrano's prior convictions. The plea agreement thus did not specify which one qualified as the crime of violence that warranted that base offense level of 22. The plea agreement's calculation also did not include a four-point increase under the guidelines' enhancement that applies when the firearm involved in a felon-in-possession charge has "an altered or obliterated serial number." *Id.* § 2K2.1(b)(4).[1]

The probation officer's pre-sentence report, as amended, departed from the plea agreement's guidelines calculation. And it did so in two respects.

First, the amended pre-sentence report suggested a base offense level of 24, rather than 22. The report used that higher base offense level because it stated that Serrano actually had more than one prior felony conviction for a "crime of violence." *Id.* §§ 2K2.1(a)(2), 4B1.2(a). The report did not expressly identify which of Serrano's prior convictions qualified as a crime of violence. The report thus did not identify the ones the report relied on upon in setting the base offense level at 24.

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[1] The plea agreement also included a clause waiving Serrano's appeal rights, but only if the court accepted the plea's sentencing recommendation. Because the court did not, the government concedes that the plea agreement's appeal waiver does not apply.

The report did list, however, a number of prior convictions for Serrano. These convictions included a 2006 Puerto Rico conviction for assault that the parties both appear to agree does qualify as a conviction for a crime of violence. These convictions also included a 2005 Puerto Rico conviction under Article 3.1 of Law 54, Puerto Rico's Domestic Abuse Prevention and Intervention Act, P.R. Laws Ann. tit. 8, § 631, which the government on appeal now contends also qualifies but which Serrano argues does not. And, finally, the list included an earlier 2004 conviction that the government does not argue qualifies.

The second respect in which the pre-sentence report differed from the plea agreement concerned the serial-number enhancement. Unlike the plea agreement, the report concluded the enhancement did apply. The report thus increased its calculation of the total offense level by four points. U.S.S.G. § 2K2.1(b)(4).

The District Court adopted the pre-sentence report's recommendations regarding the guidelines calculation. The District Court stated Serrano had "two domestic violence convictions and one assault conviction which meet the guidelines criteria for crimes of violence." The District Court thus started from a base offense level of 24 because it had found, contrary to the representation in the plea agreement, that Serrano had been convicted of more than one offense that qualified as a crime of violence. The District Court then applied the four-point serial-number enhancement. Finally, and consistent with the plea agreement and the pre-sentence report, the District Court subtracted three points for the defendant's

acceptance of responsibility, U.S.S.G. § 3E1.1 cmt. 3, due to the plea.

The District Court thus arrived at a total offense level of 25. The District Court also determined Serrano had a criminal history category of V. These calculations then combined to set Serrano's guidelines sentencing range between 100 and 125 months. The District Court imposed a sentence at the lower bound of that range: 100 months.

On appeal, Serrano argues for the first time that his base offense level should have been 22, not 24.[2] He contends that the lower base offense level is the right one because his 2006 felony conviction for assault is the only one of his prior convictions that qualifies as a crime of violence under the guidelines.

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[2] Serrano argues on appeal that he raised an objection below, but we conclude otherwise. Serrano did object to the first pre-sentence report's "total adjusted offense level [of] 23 when the plea agreement establishes a total offense level of 19." But nothing in the record indicates that this general objection to the unamended pre-sentence report's total offense level was an objection to counting the 2005 felony under Article 3.1—or any other prior offense—as an additional crime of violence for purposes of determining the base offense level. Indeed, the pre-sentence report's addendum relates that when, following Serrano's lodging that general objection, the probation officer explained his view that Serrano had two prior convictions for crimes of violence, Serrano did not offer an objection or contrary argument. And, finally, Serrano did not object when the District Court stated at sentencing that it was applying the base offense level of 24 because Serrano had at least two prior convictions for a crime of violence, including not only one for assault but two for domestic violence.

Serrano also argues, as he did below, that the serial-number enhancement cannot apply because even though one serial number on the gun's frame was obliterated, another serial number on the slide remained unaltered. For that reason, he contends the District Court erred in adding four points to his total offense level.[3]

If the District Court had used a base offense level of 22 and had not applied the serial-number enhancement, then, after the deduction for acceptance of responsibility, Serrano's total offense level would have been 19. With his criminal history category of V, his guidelines sentencing range would have been 57 to 71 months in prison. U.S.S.G. § 5A. Under the District Court's actual guideline calculation, by contrast, the range was 100- to 125-months.

II.

Serrano's first challenge is to the District Court's conclusion that his base offense level was 24 because he had two prior felony convictions that counted under the guidelines as convictions for a "crime of violence." We start by describing how we usually decide whether a prior conviction is for a crime of violence. We then explain the problem with

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[3] Serrano's opening brief referenced a third potential ground for challenging the sentence: ineffective assistance of counsel. But Serrano raised this argument only in the statement of issues on appeal and did not advance the argument in the body of the brief. His reply brief made clear that the ineffective-assistance argument was erroneously added to the statement of issues in the first brief. We thus do not address it further.

using that same approach here, given Serrano's failure to preserve the argument by properly raising it below.

A.

Ordinarily, we use what the precedents call a "categorical approach" to decide if a defendant's prior felony conviction was for a crime of violence. *United States v. Jonas*, 689 F.3d 83, 86 (1st Cir. 2012). Under this approach, the conviction counts as one for a crime of violence if the elements of the conviction fit the guidelines' definition of a crime of violence. *Id.* at 86-87. Otherwise, the conviction does not count, no matter what the facts show the defendant actually did in committing the crime—even, that is, if those facts show he acted violently. *Id.* at 86.

This focus on the elements of the conviction—rather than the underlying conduct—fits with the text of the Sentencing Guidelines, which makes the base offense level for the felon-in-possession offense turn on prior "*convictions* of … a crime of violence," not on prior *conduct*. U.S.S.G. 2K2.1(a)(2), (3) (emphasis added); *see Descamps v. United States*, 133 S. Ct. 2276, 2287 (2013). And this approach also ensures present sentences are not based on documents that could be quite old, might be uncertain or disputed, and may contain factual allegations the defendant did not contest at the time for any of a number of reasons unrelated to the accuracy of the allegations. *Descamps*, 133 S. Ct. at 2289.

In some cases, though, this categorical approach runs into a potential obstacle. That obstacle

arises when the conviction is for a crime set forth in a statute that is "divisible." A divisible statute is one that "sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile." *Id.* at 2281. The problem such a statute poses is that these alternative elements may create distinct offenses, each of which may or may not itself be a crime of violence.

To deal with this wrinkle, we employ what the precedents call—not surprisingly—a "modified categorical approach." Under this approach, we look to limited materials, often called *Shepard* documents, from the convicting court, such as charging documents, plea agreements, plea colloquies, and jury instructions. *Id.* at 2281, 2284 (relying on *Shepard v. United States,* 544 U.S. 13 (2005)). We do so not to determine the conduct the defendant engaged in while committing an offense, as such conduct is of no relevance. We instead inspect these materials in order to identify (if such identification is possible) the actual offense of conviction from among the distinct offenses set forth in a divisible statute. *Id.* at 2281.

Once we identify the distinct offense of conviction by consulting the materials, we then return to the categorical approach. We consider whether the elements of that distinct offense meet the definition of a "crime of violence."

All of which brings us to the final stage in this process: the analysis of how the elements of the offense of conviction match up with the guidelines' definition of a "crime of violence." A conviction for an

offense qualifies as a conviction for a crime of violence if the elements of the underlying offense satisfy either (or both) of two clauses set forth in the relevant guideline and that offense is punishable by more than a year in prison. U.S.S.G. § 4B1.2(a); *see also* U.S.S.G. § 2K2.1 cmt. 1 (cross-referencing the definition in § 4B1.2 to determine the base offense level of the felon-in-possession crime).[4]

The guideline's first clause provides that a crime of violence is "any offense under federal or state law … that … has an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1). This so-called "force clause" requires that the offense of conviction include as an element "*violent* force," that is, "force capable of causing physical pain or injury to another person." *Johnson v. United States,* 559 U.S. 133, 140 (2010). If the offense of conviction does not involve the "use, attempted use, or threatened use" of such violent physical force—as may be the case with an offense of common-law battery, whose force element can "be satisfied by even the slightest offensive touching"—then that offense does not meet the requirements of the force clause. *Id.* at 139.

The guideline's second clause provides that a prior felony conviction qualifies as a crime of violence

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[4] "This definition is nearly identical to the definition of a 'violent felony' contained in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B). Recognizing this resemblance, courts consistently have held that decisions construing one of these phrases generally inform the construction of the other." *Jonas,* 689 F.3d at 86.

if it is for "any offense under federal or state law … that … is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2). Even if an offense does not fall under the force clause, therefore, that offense qualifies as a crime of violence if it matches one of these enumerated crimes or otherwise satisfies the requirements of the guideline's so-called "residual clause."

B.

In applying this framework, we begin by noting the parties agree that Serrano's 2006 conviction for assault under Puerto Rico law does count as a conviction for a crime of violence. We also note that Serrano does not dispute that the District Court counted the 2005 conviction for domestic violence under Article 3.1 in finding that Serrano had more than one conviction for a crime of violence. Serrano's challenge to the District Court's use of the base offense level of 24 can succeed, therefore, only if Serrano can show the District Court erred in counting that Article 3.1 conviction. Otherwise, there would be at least two such qualifying convictions. We thus now turn to the propriety of the District Court's finding on that point.

The first thing to note is that Article 3.1 is a divisible statute. It covers "[a]ny person who employs physical force or psychological abuse, intimidation or persecution against the person of [a domestic partner] … to cause physical harm to the person, the property held in esteem by him/her, … or to another's person, or to cause grave emotional harm …"

P.R. Laws Ann. tit. 8, § 631 (emphasis added). The statute thus sets out multiple constellations of elements in the alternative. One set of elements requires the use or threat of "physical force." The others require "psychological abuse, intimidation or persecution."

Faced with such a statute, we ordinarily would apply the modified categorical approach. Using that approach, we first would try to determine, from the relevant documents, whether Serrano's prior conviction under Article 3.1 was for an offense predicated on the "physical force" element or instead for an offense predicated on the other elements set forth in that statute. Then, after having identified the actual offense of conviction, we would determine whether that offense met the guideline's requirements for a crime of violence.

But we are frustrated in doing so here. Serrano made no specific challenge to the pre-sentence report's contention that the list of his prior convictions included two felonies that were for a crime of violence. That was so even though that list included a conviction under Article 3.1 but did not specify further the particular offense under that law that had resulted in that conviction. At sentencing, moreover, the District Court simply identified as qualifying convictions the one for assault and the two for domestic violence. Yet Serrano did not complain that the District Court, in so finding, did not consult the limited set of documents from the court of conviction that would have helped it determine the distinct elements of the offense that provided the basis for Serrano's actual 2005 conviction under Article 3.1. In consequence, we

have no such documents to review as part of the record on appeal.

As a legal matter, moreover, Serrano's failure to object in the District Court affects the standard of review. Rather than reviewing *de novo* whether the conviction under Article 3.1 counts as a conviction for a crime of violence, *see Jonas*, 689 F.3d at 86, we may review only for plain error, *United States v. Ríos-Hernández*, 645 F.3d 456, 462 (1st Cir. 2011). And that standard is strict. Serrano can satisfy it "if, and only if, [he] succeeds in showing '(1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Padilla*, 415 F.3d 211, 218 (1st Cir. 2005) *(*quoting *United States v. Duarte*, 246 F.3d 56, 60 (1st Cir. 2001)).

Of course, if it were clear or obvious that none of Serrano's prior felony convictions—save for the 2006 one for assault—could qualify as one for a crime of violence, then the defendant's task on appeal might not be so daunting, despite the strict standard of review. But because Serrano was convicted under Article 3.1, and Article 3.1 is a divisible statute, we could come to that conclusion only if we were confident that none of the distinct offenses set forth in that law would so qualify. And, as we now explain, we are not of that view, given how we interpret one portion of Article 3.1.

C.

The case for concluding that at least one offense under Article 3.1 qualifies as a crime of violence is strong. Among the divisible offenses set forth in that statute is one that covers "[a]ny person who employs physical force … to cause physical harm" to a protected person. P.R. Laws Ann. tit. 8, § 631.

In making physical force an element, the text of Article 3.1 suggests that something more than a mere non-consensual touching is required to satisfy that element. Instead, the text requires the physical force be intended to "cause physical harm." The Puerto Rico Supreme Court has also interpreted the physical-force element of Article 3.1. And consistent with the text, that court has construed that element to "prohibit[] … physical abuse," *Pueblo v. Ayala García*, 186 P.R. Dec. 196, 213 (2012) (translation provided by stipulation of parties through letter under Federal Rule of Appellate Procedure 28(j)), and stated that "any degree of force is sufficient to configure the offense if … employed with the intention of causing some damage," *id.; see also Pueblo v. Roldán López*, 158 P.R. Dec. 54, 61 (2002).

Taken together, the text of Article 3.1 and the Puerto Rico Supreme Court's interpretation of it strongly suggest the statute's physical-force element involves the kind of violent force "capable of causing physical pain or injury to another person." *Johnson*,

559 U.S. at 140.[5] And that is the kind of force required by the crime of violence sentencing guidelines' force clause. *Id.*

To the extent any uncertainty remains, moreover, we do not believe it is so great as to make it clear or obvious that the physical-force offense set forth in Article 3.1 could *not* qualify as a crime of violence under the guideline. Yet it is just such a clear or obvious exclusion from the guideline that Serrano must demonstrate given that our review is for plain error.

Serrano argues, however, that he still should win because it is at least possible he was convicted of an offense under Article 3.1 that does not qualify as a crime of violence. And that is because, he contends, that statute is divisible and the elements of "psychological abuse, intimidation or persecution" plainly do not set forth an offense that is a crime of violence.

Serrano rests that fall-back contention on more than his assertion that those particular elements, by their plain terms, do not require "physical force" or a threat of such force. He also argues those elements

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[5] We thus need not address whether the physical-force offense qualifies as a crime of violence under the guideline's residual clause, which sweeps in offenses that "involve[] conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2). We note that the Supreme Court has recently asked for briefing on the question whether identical language in a distinct criminal statute, the Armed Career Criminal Act, 18 U. S. C. §924(e)(2)(B)(ii), is unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 939 (2015).

establish distinct offenses that are too unlike the other crimes enumerated in the residual clause of the crime of violence guideline to be swept up by it. *Cf. Begay v. United States,* 553 U.S. 137, 142 (2008) (holding that the enumerated crimes preceding the residual clause "illustrate the kinds of crimes that fall within the statute's scope" and "indicate[] that the statute covers only *similar* crimes"). Serrano then closes out this argument by contending that, without documents that show which elements in Article 3.1 supported his actual conviction under that law, there is no way to know whether that conviction qualifies as one for a crime of violence. And, in the face of that claimed uncertainty, he argues, it is plain error to hold that he was convicted of such a qualifying crime.

The government responds by arguing that uncertainty about what such documents might show is beside the point. The government argues that, in fact, all offenses described in Article 3.1 are crimes of violence, or, at least, that we should view them as such on review for plain error. And the government bases that contention on the residual clause of the crime of violence guideline, which, the government contends, encompasses all of those offenses. Or, at least, the government contends, the residual clause of the guideline does not clearly or obviously exclude them, whether they include the physical-force element or not.

But we do not need to resolve this dispute over how to characterize all parts of Article 3.1. Because our review is only for plain error, it is enough that we have determined that a conviction under the physical-force element of Article 3.1 would likely qualify as a crime of

violence. For as we next explain, our precedents show that Serrano may not benefit from having left us completely in the dark (through his failure to object below) about what the documents relating to the conviction under Article 3.1 would reveal about whether he was convicted of an offense that contains the physical-force element or instead some other offense that does not require proof of that element.

D.

We confronted a situation very much like this in *United States v. Turbides-Leonardo*, 468 F.3d 34 (1st Cir. 2006). There, the defendant also challenged his sentence on appeal because it rested in part on a conviction under a divisible statute, one portion of which contained elements that qualified for a guideline enhancement—there, for drug trafficking—and another of which did not. *Id.* at 37. And there, too, the defendant had not challenged either the pre-sentence report's characterization that the conviction was for an enhancement-qualifying offense, or the district court's guideline calculation that tracked the pre-sentence report. As a result, there were no records available on appeal to show which of the divisible statute's distinct offenses was in fact the offense of conviction. *Id.* at 40.

After finding the defendant's failure to object below, in context, actually constituted waiver, *id.* at 38—a claim that the government does not advance here—we went on to consider in dicta whether the application of the drug-trafficking guideline enhancement should be reversed under the plain error standard, *id.* at 38-40. And we concluded it should

not. *Id.* We explained the District Court committed no error in accepting the unchallenged characterization, but that, even if the District Court had erred in doing so, reversal was still not justified. *Id.*

In consequence of the defendant's failure to object below, we explained, "we [we]re left to guess" the "unknown variable" of "the contents of the record of the prior conviction." *Id.* at 40. And because we were left to guess, "there [wa]s no way for the appellant to show a reasonable probability that he would be better off from a sentencing standpoint had the district court not committed the claimed … error." *Id.* For that reason, we concluded the defendant could not meet the heightened prejudice showing plain error review requires. *Id.*

We then relied on *Turbides-Leonardo*'s reasoning in holding there to be no prejudice in *United States v. Davis*, 676 F.3d 3 (1st Cir. 2012), our last binding precedent on the issue. In *Davis*, the defendant challenged his sentence as relying on a prior conviction under a divisible assault statute, one portion of which defined a crime of violence and another portion of which did not. *Id.* at 7-8. Davis did not object when the prosecutor and the pre-sentence report characterized his conviction as qualifying as a crime of violence, nor did he object when the District Court characterized the conviction similarly and relied on it in crafting the sentence. *Id.* at 5-6. And so we reviewed only for plain error.

We held that, whether or not the District Court clearly erred by not demanding the documents of conviction before making the crime-of-violence

determination, the defendant bore the burden of showing "a reasonable probability that, but for the error, the district court would have imposed a different, more favorable sentence." *Id.* at 10 (quoting *Turbides-Leonardo,* 468 F.3d at 39). We then held, relying expressly on *Turbides-Leonardo*'*s* reasoning about the need to show prejudice, that the defendant did not satisfy that burden because he failed to point to any reason to conclude that an examination of the documents would indicate the conviction was for an offense that does not qualify as a crime of violence. *Id.*

Here, just like in *Davis*, the District Court had before it a pre-sentence report that claimed the defendant had a second prior conviction that qualified for the guideline enhancement. And yet, again, like in *Davis*, the defendant did not contest that representation, even though the defendant informed the judge through counsel that he had reviewed the pre-sentence report containing that information.

Indeed, although the defendant made a general objection to the probation office regarding the total offense level used in the first version of the pre-sentence report, the record does not indicate that Serrano raised a more specific objection to the probation office regarding the base offense level and the number of his prior convictions for a crime of violence. And, the record further shows, he failed to do so even after the office clearly explained its view that Serrano had two such prior convictions.

Nor did the defendant raise an objection in his sentencing memorandum, or inform the District Court at sentencing that it believed it had erred in

concluding—as it plainly stated in announcing the sentence—that, in addition to the 2006 conviction for assault, there was another qualifying conviction that was for domestic violence. The District Court thus had no *Shepard* documents before it—nor any request that it obtain and review such documents—that might cast doubt on either the pre-sentence report's assertion that the enhancement applied or on the defendant's apparent agreement with that assertion. Accordingly, we have no such *Shepard* documents before us now. And thus, as *Davis*—by incorporating *Turbides-Leonardo's* reasoning—instructs, we have no basis for concluding it is reasonably probable that those documents would show Serrano was convicted of an offense under Article 3.1 that would not qualify as a crime of violence.

In fact, even now, on appeal, Serrano still does not assert he was not convicted under Article 3.1 of the offense involving physical force, nor does he request to supplement the record to include the appropriate documents of conviction on the ground that they would redound to his benefit. *See United States v. Zubia-Torres,* 550 F.3d 1202, 1209 n.3 (10th Cir. 2008) (declining to consider "the effect if counsel had proffered the relevant documents on appeal"). He contends only that it cannot be certain on this record whether he was so convicted and that, in any event, the "physical force" offense clearly or obviously does not qualify—a contention we have already rejected.

Therefore, as in *Turbides-Leonardo* and *Davis*, we conclude Serrano has not shown the necessary prejudice, even assuming the District Court erred in

not independently seeking out the records of conviction.[6] This conclusion comports with the decisions of several sister circuits in similar plain-error cases. *See Zubia-Torres*, 550 F.3d at 1208-10; *United States v. Williams*, 358 F.3d 956, 966-67 (D.C. Cir. 2004); *United States v. Ransom*, 502 F. App'x 196, 198-201 (3d Cir. 2012) (unpublished). And while we are aware that other circuits have vacated sentences and remanded after finding plain error in arguably analogous circumstances, they did not, in so doing, address the lack-of-prejudice argument that the other

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[6] Because we rely on the defendant's failure to show the necessary prejudice in this case, we need not address whether it was clear and obvious error for the District Court to fail *sua sponte* to demand and evaluate documents relating to the conviction. Other circuits have addressed this issue. *Compare United States v. Aviles-Solarzano,* 623 F.3d 470, 475 (7th Cir. 2010) (characterizing lack of objection as factual stipulation, and finding no error), *with, e.g.*, *United States v. Castillo-Marin,* 684 F.3d 914, 921 (9th Cir. 2012) (finding clear and obvious error). We have held that a failure to demand and evaluate such documents was not clear and obvious error where the defendant not only failed to object but also "apparent[ly] acquiesce[d]" in his sentencing memorandum "to the characterization of the prior convictions as crimes of violence" by stating that he "technically qualifies" for the enhancement. *Ríos-Hernández*, 645 F.3d at 463. But we held that it was clear and obvious error in the circumstances addressed by *United States v. Torres-Rosario*, 658 F.3d 116 (1st Cir. 2011), and we came to a similar conclusion in dicta in our recent opinion in *United States v. Ramos-González*, 775 F.3d 483, 507 (1st Cir. 2015), on which Serrano relies. We note that we also suggested in *Ramos* that we would have found prejudice to the defendant, but in doing so we did not address the contrary holding on that point of *Davis* (based on the reasoning of *Turbides-Leonardo*), *id.*, which, as we have explained, controls this case.

circuits just mentioned have relied upon and that *Davis* requires us to find determinative here. *See United States v. Reyes,* 691 F.3d 453, 460 (2nd Cir. 2012) (concluding, without explanation, that the district court's failure to *sua sponte* investigate the documents of conviction led to an erroneously elevated offense level); *United States v. Castillo-Marin,* 684 F.3d 914, 927 (9th Cir. 2012) (same); *United States v. Pearson*, 553 F.3d 1183, 1186 (8th Cir. 2009) (same), *partially overruled on other grounds by United States v. Tucker*, 740 F.3d 1177, 1184 (8th Cir. 2014); *United States v. Bonilla-Mungia*, 422 F.3d 316, 321 (5th Cir. 2005) (vacating and remanding without discussing prejudice).

We do not say, however, that there are no circumstances in which reversal in a related case, involving different facts, might be warranted. In *United States v. Torres-Rosario*, 658 F.3d 110 (1st Cir. 2011), we held the District Court committed prejudicial plain error in characterizing the conviction at issue in that case as a crime of violence, *id.* at 116. But there, under First Circuit precedent, binding at the time of sentencing, it was clear from the charging documents in the record that the conviction qualified categorically as a crime of violence. *Id.* at 115. The defendant thus understandably did not contest the characterization or assert that the other documents of conviction would be relevant to whether the conviction was in fact qualifying, and indeed stipulated that his convictions qualified. *Id.* at 115-16.

By the time of the appeal, however, the First Circuit had changed course in response to a recent case from the Supreme Court. We had made clear that

the type of conviction at issue did not necessarily qualify categorically as a crime of violence and, therefore, that further inquiry into the documents of conviction under the modified categorical approach would be appropriate. *Id.* at 115. For that reason, the un-objected-to characterization of the conviction in *Torres-Rosario* could not have been understood as an unchallenged agreement to a factual characterization of the conviction.

Here, by contrast, as in *Turbides-Leonardo,* no First Circuit precedent, last overruled, established at the time of sentencing that the conviction for the underlying offense categorically qualified as a crime of violence. And so the defendant's failure to contest the pre-sentence report's and the District Court's characterization of those prior convictions is, as *Davis* held in applying *Turbides-Leonardo,* key to our assessment that he has not met his burden of showing prejudice. And while *Davis* is itself a case with facts like *Torres-Rosario*, that does not make its express adoption of *Turbides-Leonardo's* prejudice analysis any less controlling in a case like this one, which mirrors the facts in *Turbides-Leonardo* rather the facts in *Torres-Rosario*. We thus do not address how *Davis* and *Torres-Rosario's* analysis of the prejudice issue should be reconciled in a case presenting the distinct facts presented in those cases.

III.

Under the Sentencing Guidelines, the offense level increases by four points if the firearm involved in a felon-in-possession conviction "had an altered or obliterated serial number." U.S.S.G. § 2K2.1(b)(4)(B).

Serrano's pistol had an obliterated serial number on the frame and an unaltered serial number on the slide. The District Court therefore applied the four-point serial-number enhancement.

Serrano argues, however, that the District Court erred because the serial number, though obliterated in one place, remained unaltered elsewhere on the gun. He contends that the guideline could not have been intended to apply in such circumstance because the serial number itself remains perfectly visible, albeit in only one place rather than two.

Whether Guideline § 2K2.1(b)(4)(B)'s four-point serial-number enhancement may apply in this type of case is a question of law (and, apparently, a question of first impression). Because Serrano properly preserved this argument below, our review is *de novo*. *See United States v. Maldonado*, 614 F.3d 14, 17 n.1 (1st Cir. 2010) ("Abstract legal issues under the guidelines are reviewed *de novo* …").

Like the District Court, we conclude the enhancement does apply in Serrano's case. The text of the guideline requires only "*an* altered or obliterated serial number," U.S.S.G. § 2K2.1(b)(4)(B) (emphasis added). The guideline's text does not require that *all* of the gun's serial numbers be so affected. And here, the complete defacement of the serial number on the frame of the firearm resulted in the required obliteration.

Moreover, this plain reading of the text—that the obliteration of "a[]" serial number is enough—accords with the intent of Guideline § 2K2.1(b)(4),

which is "to 'discourag[e] the use of untraceable weaponry.'" *United States v. Carter*, 421 F.3d 909, 914 (9th Cir. 2005) (alteration in original) (quoting *United States v. Seesing*, 234 F.3d 456, 460 (9th Cir. 2001)). Applying an enhancement for firearms that have a single totally obscured serial number may serve as a deterrent to tampering, even when incomplete. And, relatedly, the single-obliteration rule could facilitate tracking each component that bears a serial number, given that various parts of firearms may be severable.

And precedent is not to the contrary. We have held the mere alteration of a serial number violates 18 U.S.C. § 922(k), a related criminal statute, without regard to whether such alteration is severe enough to prevent that same serial number from being read, *United States v. Adams*, 305 F.3d 30, 34 (1st Cir. 2002); *see also Carter*, 421 F.3d at 915-16 (applying *Adams* to interpret Guideline § 2K2.1(b)(4)(B)). So, too, we conclude the text of this guideline is best construed—consistent with the plain meaning of its words—to trigger the enhancement when the serial number on the frame of a firearm is obliterated even if other serial numbers on the firearm, like the one left intact on the slide of this weapon, are unaltered.[7]

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[7] We do not need to reach the further issue whether the guideline would apply if the serial number on the frame were unaltered but a serial number on the slide or other part of the firearm were altered or obliterated. *See United States v. Romero-Martinez*, 443 F.3d 1185 (9th Cir. 2006) (holding the guideline applicable in such a case).

We thus do not believe the District Court erred in applying the four-point enhancement.

IV.

For these reasons, we affirm the District Court's sentence against the challenges raised in this appeal.

— Concurring Opinion Follows —

LIPEZ, *Circuit Judge*, concurring. A defendant whose sentence is enhanced because of violent crimes he committed in the past will face substantially more time in prison than someone without a record of violence. Although I do not question sentencing enhancements for defendants with violent criminal histories, we must ensure that aggravated penalties are imposed only when the criminal histories justify them. Here, appellant challenges the district court's unsupported assumption that his conviction under a "divisible" statute was in fact for a crime of violence. I reluctantly agree with my colleagues that First Circuit precedent requires us to reject appellant's claim. However, our case law on how to evaluate plain error in this context is inconsistent, and it cannot be reconciled with the Supreme Court's decision in *Shepard v. United States*, 544 U.S. 13 (2005). I therefore urge our court to rehear this case *en banc* so that we may closely examine, and fairly resolve, an important and complex question of law: how does the government's burden to establish that a conviction under a divisible statute qualifies as a predicate offense intersect with a defendant's burden to show plain error?

Under the analysis described in the majority opinion, appellant can satisfy the prejudice prong of the plain error test only if he proves that, but for the sentencing court's improper reliance on his Article 3.1 conviction, it is reasonably probable that he would have received a lesser sentence. As a practical matter, that approach switches to defendants the obligation the Supreme Court imposed on the government to produce specific court records proving that a conviction under a divisible statute qualifies as a predicate offense. In so doing, the approach creates a real risk of longer prison terms than are justified by defendants' criminal histories. As other circuits have recognized, however, that potential harm can be easily avoided, with minimal burden on the sentencing court. When the court erroneously relies on a conviction whose character cannot be determined without *Shepard*-approved documents, the defendant's sentence must be vacated and the case remanded for resentencing. The government will then ordinarily have the opportunity to substantiate that the conviction was for an offense that qualifies as a predicate for enhancement. If the government cannot do so, the enhancement is impermissible.

As I explain below, this modest relief follows as a matter of logic and fairness from correct application of the plain error test in this context. Indeed, with a full understanding of the underlying principles, one can only conclude that the prejudice analysis articulated in our precedent—requiring the defendant to *disprove* his eligibility for a sentence enhancement—is misguided. Our court should convene *en banc* to remedy this serious problem.

I.

A. Legal Background

As my colleagues explain well, when a court seeks to enhance a defendant's sentence based on a prior conviction under a "divisible" statute—i.e., where the statute criminalizes different types of conduct, only some of which may support the enhancement—the court applies the so-called modified categorical approach to determine which version of the crime underlies the defendant's conviction. *Descamps v. United States*, 133 S. Ct. 2276, 2283-84 (2013); *see also United States v. Ramos-González*, 775 F.3d 483, 505 (1st Cir. 2015) (describing a "divisible statute" as one that "sets forth one or more elements of a particular offense in the alternative" (quoting *United States v. Fish*, 758 F.3d 1, 6 (1st Cir. 2014)). Frequently, as in this case, the enhancement depends on whether the challenged prior conviction was for a "crime of violence."[8] *See, e.g.*, *Ramos-González*, 775 F.3d at 504-05. If a statute criminalizes both violent and non-violent conduct, "the sentencing court is permitted to consult a limited set of 'approved records' to determine which … provided the basis for the conviction." *Id.* at 505. (quoting *United States v. Carter*, 752 F.3d 8, 19 (1st Cir. 2014)). The permissible records

[8] An offense qualifies as a crime of violence if it is punishable by more than one year of imprisonment and either "(1) has as an element the use, attempted use, or threatened use of physical force against the person of another," or (2) is one of several enumerated crimes not relevant here, "or otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a).

consist primarily of charging documents, plea agreements, transcripts of plea colloquies, jury instructions, and verdict forms. *Id.*; *see also Shepard,* 544 U.S. at 26 (describing the acceptable records, often described as "*Shepard* materials"). If the records show that the defendant was not convicted of a crime containing the requisite elements of violence—or if the records do not reveal the nature of the crime—the conviction may not be used to enhance his current federal sentence. *See United States v. Dávila-Félix*, 667 F.3d 47, 57 (1st Cir. 2011).

At sentencing, the burden to produce the documents that reveal (or not) the nature of the proffered conviction is on the government. *Dávila-Félix*, 667 F.3d at 55 ("The Government bears the burden of establishing that a prior conviction qualifies as a predicate offense for sentencing enhancement purposes."). Hence, if the government does not demonstrate that the defendant's conviction was for a variant of the crime that satisfies the crime-of-violence definition, it is error for the court to treat that conviction as a predicate for sentencing enhancement purposes. This is so whether the documents show the crime to be of the non-violent type or if the documents do not reveal the particular version of the crime underlying the conviction. *See United States v. Davis*, 676 F.3d 3, 8 (1st Cir. 2012) ("If, after examination of these permissible documents, 'it is impossible to tell whether the defendant was convicted of a violent or non-violent offense,' the conviction may not serve as a predicate offense." (quoting *United States v. Holloway*, 630 F.3d 252, 257 (1st Cir. 2011)).

The complexity arises if the defendant fails to challenge the sentencing court's reliance on such a conviction, and raises an objection for the first time on appeal. We treat such a claim as forfeited and give it only plain error review.[9] Under that standard, the defendant "bear[s] the 'heavy burden' of showing that the error was clear or obvious, and that it both affected his substantial rights and 'seriously impaired the fairness, integrity, or public reputation of judicial proceedings.'" *Ramos-González*, 775 F.3d at 499 (quoting *United States v. Ramos-Mejía*, 721 F.3d 12, 14 (1st Cir. 2013)).

To perform this inquiry, we need to identify the "error" before we can determine if it is clear or obvious, and prejudicial. Focusing on the Puerto Rico statute under which the defendant was convicted, my colleagues explain that we may find plain error only if we are "confident that none of the distinct offenses set forth in that law" would qualify as a crime of violence. *Slip op.* at 16. Otherwise, they say, an error in

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[9] Although the terms "waiver" and "forfeiture" are sometimes used interchangeably, "[w]hether an objection has been waived or simply forfeited affects the scope of our appellate review." *United States v. Gaffney-Kessell*, 772 F.3d 97, 100 (1st Cir. 2014). Waiver occurs when a litigant intentionally relinquishes or abandons a known right, and we ordinarily will not consider a waived issue on appeal. *Id.* (citing *United States v. Olano*, 507 U.S. 725, 733 (1993)). Forfeiture refers to "a 'failure to make the timely assertion of a right.'" *Id.* (citing *Olano*, 507 U.S. at 733). "A forfeited issue still may be reviewed on appeal, albeit for plain error." *Id.* This distinction is important and consequential in cases like the one before us.

using the conviction as a predicate for enhancement would not be clear or obvious. Moreover, drawing on our precedents, they conclude that the defendant cannot satisfy the prejudice prong of the plain error inquiry unless he shows "'a reasonable probability that, but for the error, the district court would have imposed a different, more favorable sentence.'" *Slip op*. at 21 (quoting *Davis*, 676 F.3d at 10, which in turn quoted *United States v. Turbides-Leonardo*, 468 F.3d 34, 39 (1st Cir. 2006)). To accomplish this showing of prejudice, the defendant, in effect, is required to produce *Shepard* materials revealing that his conviction was for a non-violent offense.

The animating principle of the modified categorical approach, however, is that enhanced sentencing is improper unless the government proves that the defendant's criminal history justifies such severe punishment. Error occurs, therefore, whenever a sentencing court increases a term of imprisonment based on a predicate conviction under a divisible statute in the absence of *Shepard*-approved proof that the conviction was for a qualifying variant of the crime. For that reason, the defendant's burden in the trial court is simply to note the absence of proof, not to proffer the supporting documents to *disprove* his eligibility for an enhancement. Under the approach my colleagues draw from prior cases, Serrano's failure to

make that simple objection to the lack of proof transferred the duty of production to him on plain error review.[10]

Although my colleagues understandably follow a path set out in prior cases, this dramatic shift of responsibility is unfair and wrong. I therefore first review why I view our precedent as flawed and incompatible with Supreme Court precedent before elaborating on what I believe is the proper analysis.

B. The Varying Paths of our Prior Cases

Our cases do not present a uniform approach for analyzing plain error in the context of a claim that the district court improperly lengthened a sentence based on the defendant's prior conviction under a divisible statute. In some instances, we have held the government accountable for the absence of evidence in the record. *See, e.g.*, *Ramos-González*, 775 F.3d at 506-08 (vacating sentence that included career offender status because the records submitted by the government did not show the nature of defendant's conviction under a divisible statute); *Dávila-Félix*, 667 F.3d at 57 (concluding that, "on the record before us, the Government has not met its burden of proving that [defendant's] prior drug conviction qualified as a career offender predicate"); *United States v. Torres-Rosario*, 658 F.3d 110, 117 (1st Cir. 2011) (noting

[10] Likewise, even if a defendant insists that the crime of conviction is not a crime of violence, he does not have to prove that assertion.

that, "[on] remand, the government remains entitled to establish the [basis for the sentencing enhancement] by showing that one of the assault and battery convictions was a crime of violence" (citation omitted)). In the latter two cases, however, the courts identified reasons why the defendants understandably failed to make an earlier challenge to the depiction of their convictions as qualifying predicates, thereby articulating justifications for remanding the case for resentencing notwithstanding the defendant's heavy burden on plain error review.[11] In *Ramos-González*, the government already had had multiple opportunities to prove career-offender status, and the panel declined to give the government a third chance. 775 F.3d at 508.

In other cases involving divisible statutes, panels of this court have held the defendants accountable for the absence of supporting documents in the record despite the government's burden to produce such records. *See, e.g.*, *Davis*, 676 F.3d at 9-10; *Turbides-Leonardo*, 468 F.3d at 39-40. In these cases, the panels bypassed explicit identification of the error and—ostensibly addressing the prejudice prong of the plain error standard—articulated the requirement relied on by my colleagues: a defendant must show that, absent the error, he probably would have received a

[11] In *Dávila-Félix*, the court noted that the drug convictions at issue "were only briefly referenced and were not discussed or relied upon at sentencing." 667 F.3d at 57. In *Torres-Rosario*, the panel excused a concession that the defendant fell within the armed career criminal statute (an arguable waiver) because of a change in First Circuit law prompted by new Supreme Court precedent. *See* 658 F.3d at 116.

shorter sentence. *Davis*, 676 F.3d at 10; *Turbides-Leonardo*, 468 F.3d at 39.

As I explain below, the failure to confront the nature of the error is a threshold flaw in the *Turbides-Leonardo* and *Davis* assessments of plain error, and the mistake results in a misdirected prejudice analysis. As my colleagues recognize, the plain error analysis in *Turbides-Leonardo* was dicta, given the panel's statement that, "[a]ll things considered, we think that what transpired here amounted to waiver." 468 F.3d at 38.[12] In *Davis*, the panel followed the *Turbides-Leonardo* dicta without analyzing its legal foundation, perhaps because the defendant's conduct there manifested waiver.[13] Davis complained that he should not be sentenced as a career offender, but he

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[12] In my view, the circumstances described in *Turbides-Leonardo* do not show waiver. Waiver should be reserved for cases in which the defendant explicitly agrees that particular listed crimes qualify as predicates, and it should not be inferred from silence. *See Torres-Rosario*, 658 F.3d at 116 ("At least where a party makes an explicit and specific concession, practical reasons favor holding a party to such a concession …"). In *Turbides-Leonardo*, the defendant simply failed to object, both to the Presentence Investigation Report ("PSR") and at sentencing, which is forfeiture. *See* 468 F.3d at 37. Nonetheless, the decision incorporates an assumption that waiver occurred, and I will do likewise. In the case now before us, Serrano did object to the PSR's guidelines calculation, albeit on other grounds. The government does not argue waiver, and I agree that Serrano's failure to object specifically on the predicate-crime issue is properly characterized as forfeiture.

[13] Indeed, the scenario in *Davis* is more aptly labeled a waiver than were the circumstances described in *Turbides-Leonardo*.

never argued that career-offender status was improper because the district court failed to determine the nature of the pertinent predicate conviction. *See* 676 F.3d at 6 n.2, 7, 10 n.7. In fact, appellate counsel twice sought to withdraw on the ground that he "'could not discern a non-frivolous basis for appeal.'" *Id.* at 6 n.2 (quoting counsel's brief). The panel refused those requests and directed counsel to address the plain error standard. Counsel, however, did not submit briefing on plain error and, "when questioned at oral argument regarding any potential prejudice to Davis based on the district court's failure to undertake the categorical approach or to examine the character of Davis's 2006 assault and battery conviction, Davis's counsel could not point to any." *Id.* at 10 n.7.

In these circumstances, I can understand how the *Davis* panel came to rely on the *Turbides-Leonardo* approach to plain error without closely examining it or explicitly acknowledging it as dicta. Treating Davis's claim as forfeited rather than waived was generous and, given that Davis did not raise the district court's failure to apply the modified categorical approach even on appeal, the panel had no reason to probe deeply into the *Turbides-Leonardo* articulation of the inquiry. Here, by contrast, Serrano develops his claim that the district court erred by counting his domestic violence offense as a predicate crime of violence, asserting, inter alia, that some crimes under Article 3.1 "clearly do not involve the use of violent force." Br. at 23. Nonetheless, because *Davis* applies the plain error test to a scenario it labels as forfeiture, it appears to be binding precedent on the application of the plain error test where, as

here, there are no distinguishing facts like those in *Ramos-González*, *Dávila-Félix*, or *Torres-Rosario.*

The fact remains, however, that our cases fail to deal consistently with the government's initial burden of proof in the plain error context. Where the government was required to retain the burden to prove the nature of the defendant's conviction, the courts relied on particular circumstances—a change in the law, the convictions' non-essential role in the prior sentencing, or the government's multiple prior attempts—to explain the defendants' default or find the burden unmet. In the two instances where the burden was switched from the government to the defendant, the courts dealt explicitly or de facto with an intentional relinquishment of the defendant's rights—a waiver—and avoided the question of what error the court committed. We have not examined how, or if, these cases may be reconciled with each other and whether they achieve the objectives of the modified categorical approach. Furthermore, the uneven treatment within our own circuit is reflected in a conflict among the circuits. *Compare, e.g.*, *United States v. Dantzler,* 771 F.3d 137, 149 (2d Cir. 2014) ("The absence of an objection will not relieve the Government of its burden of proving through *Taylor*- and *Shepard*-approved sources that the ACCA enhancement applies."), *with, e.g.*, *United States v. Zubia-Torres*, 550 F.3d 1202, 1209 (10th Cir. 2008) ("By failing to present any evidence that relevant documents would indicate his conviction was not for [a qualifying predicate offense], the defendant has failed to meet his burden under the third prong of plain error review.").

In sum, we lack a thoughtful, uniform analysis for assessing plain error when a defendant claims that his sentencing enhancement was improperly based on an unexamined conviction under a divisible statute. Our court, *en banc*, should take the opportunity to develop such an analysis in this case.

C. The Correct Approach

To properly conduct the plain error inquiry, a court must have a correct understanding of the error at issue. As described above, some of our cases have sidestepped the question of error to focus on the question of prejudice. In so doing, however, those courts performed an analysis premised on a misidentification of the error, which leads them to cast aside the government's burden of proving the basis for an enhancement. In *Turbides-Leonardo* and *Davis,* the panels focus on the enhanced sentence, and consequently evaluate prejudice by asking the usual question we ask when sentences are reviewed for plain error: is it reasonably probable that, but for the error, the defendant would have received a lower sentence? The length of the sentence—though ultimately our concern—is not the "plain" error. Because the government initially bears the burden to prove that a conviction represents a crime of violence, *Dávila-Félix*, 667 F.3d at 55, the error occurs when the district court enhances a sentence based on a prior conviction under a divisible statute without first confirming that the conviction qualifies as a predicate offense. That confirmation may be achieved in various ways: through documentary evidence (i.e., the *Shepard* materials), by concession of the defendant, or by means of an interpretation of the predicate criminal

statute—i.e., a legal ruling by the court—that every variant of the offense qualifies as a crime of violence.

Here, where the statute on its face appears to encompass alternatives that neither involve physical force against a person nor present a "serious potential risk of physical injury to another," U.S.S.G. § 4B1.2(a),[14] the court erred by using the conviction to enhance Serrano's sentence without demanding proof from the government that the defendant's conviction was for a violent version of the divisible crime. It is possible that the enhancement is also erroneous because the conviction at issue was not, in fact, a crime of violence. But to find that the sentencing judge erred in applying the modified categorical approach, an appellate court need not reach the nature of the conviction. Error has occurred when the court relies on a conviction under a divisible statute without confirming, through approved sources provided by the government, that the conviction represents a crime of violence.[15]

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[14] Article 3.1 applies to "[a]ny person who employs physical force or psychological abuse, intimidation or persecution against the person of [a domestic partner] … to cause physical harm to the person, the property held in esteem by him/her, … or to another's person, or to cause grave emotional harm …." P.R. Laws Ann. tit. 8, § 631.

[15] I address in this concurrence only the treatment of predicate convictions under a divisible statute, where the statute on its face provides notice to the government and the court that a conviction is unusable as a predicate offense without further inquiry under the modified categorical approach. I therefore do not consider the nature of plain error review for challenges to

The failure to recognize this error is what led the *Turbides-Leonardo* panel astray. Its approach looks beyond the district court's erroneous reliance on an unelaborated conviction under a divisible statute and asks whether the defendant has shown that the proper analysis would have revealed that the conviction was erroneously used as a predicate for enhancement. Even if the district court had performed the proper analysis, however—involving the scrutiny of *Shepard*-approved documents—the inquiry may not have shed light on the predicate conviction. The government may not have been able to produce appropriate records of the targeted conviction—the documents may be inaccessible or no longer exist, meaning that the conviction could not be used to enhance the defendant's sentence. Hence, by focusing on the possibility that the defendant was convicted of a qualifying crime, and requiring him to prove that he was not, we unfairly leap over the threshold analytical error, i.e., the sentencing court's failure to require the government to establish the nature of the conviction through approved sources.

If that error were properly acknowledged, the plain error analysis here would unfold unequivocally in the defendant's favor. Given the broad language of Article 3.1, and the dearth of evidence indicating whether the defendant was convicted of a crime of violence, the court's error in relying on the unexamined

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predicate convictions under "'indivisible' statute[s]." *Descamps*, 133 S. Ct. at 2281; *id.* at 2282 (holding that "sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements").

conviction was sufficiently "plain" to satisfy the second prong. The gap in the record should have been obvious to the court. The remaining two elements are equally straightforward. A defendant inescapably suffers prejudice when he receives an extended term of imprisonment without the evidentiary support necessary to justify it,[16] and an unsupported, prolonged incarceration must be deemed a miscarriage of justice. *See Ramos-González*, 775 F.3d at 507 & n.29; *Torres-Rosario*, 658 F.3d at 117.[17]

Admittedly, this plain error analysis has the feel of allowing the defendant to escape with little disadvantage from his failure to make a timely objection. All four prongs of the plain error inquiry effectively

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[16] In the career offender context, the error technically results in an elevated base offense level, which can be presumed to lead the district court to impose a longer sentence than would otherwise apply. *See Turbides-Leonardo,* 468 F.3d at 37 (noting that a lower Guidelines sentencing range "presumably [will result in] a more lenient sentence"). In the context of the Armed Career Criminal Act ("ACCA"), the erroneous reliance on predicate convictions may trigger improper mandatory minimum sentences. *See, e.g.*, *Shepard*, 544 U.S. at 15 (noting that the ACCA mandates a minimum 15-year sentence after three convictions for serious drug offenses or violent felonies). We have long treated precedent on the ACCA and the Guidelines career offender enhancement interchangeably with respect to the modified categorical approach. *Ramos-González*, 775 F.3d at 504 n.24.

[17] My discussion presumes that the defendant's PSR does not list other predicates that categorically qualify as crimes of violence and could be substituted for the one on which the district court erroneously relied. The prejudice assessment obviously would be different if that were the situation.

turn on the finding that the error was plain, and the error will almost always be plain when there are no supporting documents in the record. Importantly, however, the typical remedy for a finding of prejudicial plain error in this context is simply a remand for development of the sentencing record. In many instances, the government on remand will be able to produce the necessary documents to substantiate the qualifying predicate offense, and the defendant's "victory" will be short-lived. This is the approach taken by a number of circuits. *See, e.g.*, *United States v. Reyes,* 691 F.3d 453, 459-60 (2d Cir. 2012) (*per curiam*) (finding plain error requiring remand where the district court relies on the PSR to characterize an offense as a "crime of violence," "even where the defendant does not object to the PSR's description"); *United States v. Castillo-Marin*, 684 F.3d 914, 919, 927 (9th Cir. 2012) (same); *United States v. Boykin,* 669 F.3d 467, 469-72 (4th Cir. 2012) (finding plain error and remanding for resentencing where the district court relied on the PSR to conclude that the defendant had the requisite number of violent felonies for ACCA enhancement); *United States v. McCann*, 613 F.3d 486, 502 (5th Cir. 2010) ("When a court … relies on the PSR alone [to characterize an offense as a crime of violence], it makes an error that is clear and obvious.").

Moreover, we must acknowledge the potentially severe consequences of using prior convictions improperly—substantially prolonged terms of incarceration.[18]

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[18] For example, in *Shepard*, which involved the ACCA, the government stated that Shepard's prior convictions "raised his

Undoubtedly, that harsh impact underlies the Supreme Court's carefully circumscribed list of acceptable records for confirming that a conviction under a divisible statute may be used to enhance a sentence. At the same time, it is an unfortunate reality that many claims such as Serrano's come to us on plain error review. Criminal defendants often must rely on court-appointed counsel who, faced with a myriad of trial and sentencing issues, predictably overlook some of them. The extremely high hurdle to post-conviction relief based on ineffective assistance of counsel means that such a remedy is uncertain at best.

In short, there is simply no reason to apply plain error in a way that will leave intact lengthy, possibly unjustified terms of imprisonment when the cost of ensuring fairness—a resentencing proceeding—is minimal. We should not be comfortable with an "easy" showing of plain error, even recognizing the high bar that the plain error standard ordinarily represents. Indeed, the fourth prong of the plain error test requires us to consider "'the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Mercado,* 777

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sentencing range from between 30 and 37 months (under the United States Sentencing Guidelines) to the 15-year minimum required by [the statute]." 544 U.S. at 16. In *United States v. Martin,* 749 F.3d 87 (1st Cir. 2014), we described as "significant" the difference in sentence between career offender status and non-career offender status: a career offender range of 188 to 235 months compared with an otherwise applicable sentencing range of 27 to 33 months. *Id.* at 91. *See also, e.g.*, *United States v. Castillo-Marin*, 684 F.3d 914, 927 (9th Cir. 2012) (comparing Guidelines range of 46-57 months with enhancement based on crime of violence to range of 0-6 months absent the enhancement).

F.3d 532, 536 (1st Cir. 2015) (quoting *United States v. Duarte,* 246 F.3d 56, 60 (1st Cir. 2001)). The plain error approach we apply in this case is incompatible with those concerns.

D. The Role of the PSR

The mistaken approach to plain error adopted in *Turbides-Leonardo* reflects the confusion in our law about when it is appropriate to rely on an unobjected-to PSR to prove a defendant's criminal history. Courts may accept the PSR's representation of the existence of a prior conviction in the absence of objection. *See, e.g.*, *United States v. Jimenez*, 512 F.3d 1, 7 (1st Cir. 2007) (stating that, where an offense listed in a presentence report "is not disputed before the sentencing court, the report itself is competent evidence of the fact stated and, thus, is sufficient proof of that fact"); *United States v. Brown,* 510 F.3d 57, 74 (1st Cir. 2007) (describing the government's burden of proving a predicate conviction for sentencing purposes as "modest," and noting that it can be satisfied by, inter alia, "introducing a certified copy of the judgment, or by a statement in the PSR").

However, courts are not permitted to rely on the PSR to establish the character of a conviction under a divisible statute. A decision to accept the PSR as adequate evidence of the nature of a defendant's prior crimes would conflict with the Supreme Court's directive that the particular offense committed in violation of a divisible statute be determined through examination of *Shepard*-approved documents. Indeed, police reports are a typical source of the facts reported in a PSR, *see, e.g.*, *Davis*, 676 F.3d at 8-9

(noting that the PSR's summary of a prior crime was based on a police report), and police reports are expressly excluded from the list of approved documents, *see, e.g.*, *Ramos-González*, 775 F.3d at 506 (noting that we "may not rely on the police reports related to the earlier conviction" (quoting *Carter*, 752 F.3d at 20 (citing *Shepard*, 544 U.S. at 16))). Although the PSR will commonly include the details of the defendant's criminal conduct, it will not necessarily reveal the pertinent information for the modified categorical approach, i.e., the specific elements of the crime underlying the listed convictions. *See, e.g.*, *Descamps*, 133 S. Ct. at 2283. ("The key [in determining whether a prior conviction can serve as an ACCA predicate] … is elements, not facts."); *id.* at 2289 (noting that a defendant may have pled guilty to a less serious version of the crime than reflected in factual statements "found in the record").

Thus, although our cases unequivocally allow a sentencing court to rely on the PSR to confirm the *existence* or *validity* of convictions in the absence of an objection, other cases properly recognize that such deference cannot extend to the question whether convictions under a divisible statute represent qualifying predicates for sentencing enhancements. *See, e.g.*, *Dávila-Félix*, 667 F.3d at 56-57 (rejecting government's reliance "primarily upon the facts as recounted in the presentence investigation report," despite the defendant's failure to object to the PSR's analysis); *Jimenez*, 512 F.3d at 7 (stating that sufficient proof of the two prior convictions "does not necessarily end our inquiry" because "[i]n some circumstances, the question would remain whether the underlying offenses

qualify as controlled substance offenses within the meaning of the applicable sentencing guideline").

Yet, in *Turbides-Leonardo*, the panel cited a single Eighth Circuit case for the proposition that a PSR "may be a permissible source of information about a prior conviction for sentence enhancement purposes" to bolster its conclusion that the district court acted "reasonabl[y]" in relying on the uncontroverted PSR to enhance the defendant's sentence based on a conviction under a divisible statute. 468 F.3d at 39 (citing *United States v. Arrieta-Buendia*, 371 F.3d 953, 955-56 (8th Cir. 2004)). In the Eight Circuit case, however, the defendant had admitted his conviction for a type of crime that qualifies as a predicate offense. *See Arrieta-Buendia*, 372 F.3d at 955 (stating that the defendant "told the district court he was not guilty of the California felony of transporting methamphetamine, but was forced to plead guilty to that crime"). *Arrieta-Buendia* is not only an out-of-circuit precedent, but it also is inapt where, as here, the PSR does not reveal whether a conviction under a divisible statute is an eligible predicate offense and the defendant has not waived or conceded the point.

To some extent, the panel in *Davis* recognized the difference between using a PSR to prove the fact of a conviction under a divisible statute and relying on the report to establish the specific elements of the crime underlying that conviction. At issue in *Davis* was whether a conviction for assault and battery was a predicate offense for career offender status. 676 F.3d at 7. The panel noted that the only evidence in the record indicating the violent nature of the offense

was in the PSR, with details drawn from police reports. *Id.* at 5, 8-9. The defendant, however, did not object to the PSR's characterization of the offense as a crime of violence, and he did not contest the government's characterization of him as a career offender at the sentencing hearing. *Id.* at 6. On appeal as discussed above, the panel found that the defendant had failed to satisfy the prejudice prong of the plain error inquiry: "[Defendant] has made no argument that the assault and battery was anything other than the harmful type, doing nothing, even on appeal, to question the description provided in the PSR or to argue that appropriate *Shepard* materials would prove that he committed a non-harmful battery." *Id.* at 10.

The *Davis* panel, however, directly confronted the adequacy of the PSR to show the requisite violent conduct. It first quoted the assertion in *Torres-Rosario* that "'treating a Massachusetts assault and battery conviction as a [career offender] predicate, *without further evidence of violence*, is now plain error.'" *Id.* at 9 (quoting *Torres-Rosario*, 658 F.3d at 116) (alteration and emphasis in *Davis*). The *Davis* panel then went on to speculate that "the description in the PSR might constitute such further evidence," and, for that reason, "this case does not neatly fall within the plain error standards we set in *Torres-Rosario.*" *Id.* In an immediately following footnote, the panel observed that "[w]e have never squarely addressed whether reliance on a PSR under these circumstances is proper," but noted prior dicta indicating that, even though police records are not "permissible *Shepard* materials," "we would approve of the use of a PSR's summary of police reports to support the characterization of a

predicate offense when the defendant did not object to the PSR." *Id.* at 9 n.6.

This arguable approval in *Davis* of unchallenged police reports in a PSR to establish the character of a predicate offense is weakly grounded in our precedent and contrary to *Shepard*. The precedent cited for this proposition is *Jimenez*, where the panel's primary focus was on whether challenged predicate crimes listed in the PSR were adequately verified, not on the convictions' character for the modified-categorical inquiry. *See Jimenez*, 512 F.3d at 6 (noting appellant's argument that "the district court erred when it relied on the PSI Report for proof of these prior convictions"). Jimenez did not argue that either of the challenged convictions was "for an offense that falls outside the contemplation of the career offender provisions." *Id.* at 5 n.3; *see also id*. at 7 (observing that "appellant has made no argument, either in the lower court or in this court, that his prior convictions, if properly substantiated, do not qualify as convictions for controlled substance offenses").[19]

Davis thus contemplates disregarding the Supreme Court's explicit restriction on what documents

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[19] The precedent cited by the *Jimenez* panel further demonstrates that the issue addressed there was whether the convictions were properly included in the PSR, not whether the convictions were eligible predicates for enhancement. To support its statement that the PSR provides "competent evidence of the fact stated and, thus, is sufficient proof of that fact," the court cited *United States v. Pelletier*, 469 F.3d 194, 202-03 (1st Cir. 2006), and *United States v. Cordero*, 42 F.3d 697, 701 (1st Cir. 1994), which involved challenges to the fact (*Pelletier*) or constitutionality (*Cordero*) of a conviction. 512 F.3d at 7.

may be consulted to determine the nature of a predicate conviction under a divisible statute, allowing reliance on materials (i.e., police reports) that have been expressly designated as unacceptable for this purpose. *See Shepard*, 544 U.S. at 16. In my view, however, we are not free to depart from the Supreme Court's methodology for determining the eligibility of a predicate offense, even in the context of plain error.

That methodology, designed to ensure that prolonged sentences are justified, has substantive importance. *See Dantzler*, 771 F.3d at 149 (stating that the defendant's failure to object did not "render the PSR's description more reliable in establishing the requisite" predicate). That is why, when a sentencing judge errs by failing to demand *Shepard*-approved proof that the defendant's conviction under a divisible statute was for a predicate offense, a sentencing enhancement cannot stand if its only foundation is the defendant's PSR, at least when the report is not drawn from approved sources. *Accord Reyes*, 691 F.3d at 459 ("We have little trouble concluding that a sentencing court may not rely on a PSR's description of a defendant's pre-arrest conduct that resulted in a prior conviction to determine that the prior offense constitutes a 'crime of violence' under U.S.S.G. § 4B1.2(a)(1), even where the defendant does not object to the PSR's description.").[20]

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[20] In *Dantzler*, the Second Circuit reserved judgment on whether a PSR may be a permissible source of evidence of the nature of a predicate conviction if the report "was derived in whole, or in large part," from *Shepard*-approved materials. 771 F.3d at 147. I likewise intimate no view on that scenario. *But see,*

The *Turbides-Leonardo* approach, however, indirectly gives Serrano's PSR dispositive weight by rejecting his claim that the record does not support classifying his Article 3.1 offense as a crime of violence. The district court accepted the base offense level calculation recommended in the PSR, which was premised on multiple prior convictions—including under Article 3.1—for crimes of violence. In failing to require proof of the actual basis for Serrano's convictions, the district court necessarily deferred to the PSR's depiction of his offenses. By leaving the district court's reliance on the PSR undisturbed (unless the defendant comes forward with contrary evidence), we are sanctioning that deference. Yet, as I have shown, any suggestion in our cases that such deference may be permissible developed from inapplicable precedent and, more importantly, contravenes the Supreme Court's specific delineation in *Shepard* of the records that may substantiate the eligibility for enhancement of a conviction under a divisible statute.

In light of this analysis, the district court plainly erred in deferring to the PSR—or, as described above, in failing to demand acceptable forms of proof from the government. The defendant's failure to make a timely objection imposes on him the burden to show that he suffered from the court's error. We should conclude that his burden is easily met—and a

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e.g., *Boykin*, 669 F.3d at 469 (stating that a PSR may be used for enhancement purposes if it "'bears the earmarks of derivation from *Shepard*-approved sources,'" at least where the defendant "'never raised the slightest objection either to the propriety of its source material or to its accuracy'" (quoting *United States v. Thompson*, 421 F.3d 278, 285 (4th Cir. 2005)).

resentencing required—if the court relied on such convictions to enhance his sentence.

II.

In examining a claim of plain error in the context of the modified categorical approach, we cannot lose sight of the courts' obligation to ensure that extended incarceration is imposed only when the government has proven that it is justified by a defendant's criminal history. We can, and should, meet this obligation by adopting the Second Circuit's (and other courts') approach that a "defendant's failure to object d[oes] not cure the Government's failure to submit the proper evidence." *Dantzler*, 771 F.3d at 149 (describing the holding in *Reyes*, 691 F.3d at 459). As I have explained, requiring the government to retain its burden to justify a sentencing enhancement does not result in excusing the defendant's default. Nor will a finding of prejudicial plain error and the required relief—at most, a new sentencing proceeding—impose undue burden on the court. Although few sentences may be changed through this process, "the fairness, integrity, [and] public reputation of judicial proceedings" will be enhanced. *Mercado*, 777 F.3d at 536 (internal quotation marks omitted).

In this case, where variants of Article 3.1 do not include the requisite element of violence, we should not reject appellant's claim on the ground that some offenses under the statute would qualify as predicate crimes of violence. The district court committed plain error when it relied on Serrano's conviction under that divisible statute to justify an increased term of

imprisonment in the absence of approved forms of evidence of the nature of his particular crime. The court should have insisted that the government shoulder its burden to substantiate that Serrano's conviction was in fact a qualifying predicate. Hence, on *en banc* review, this court should hold that Serrano is entitled to a new sentencing proceeding where the government may seek to show that his conviction was for crime of violence.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,
Plaintiff, Case No.
vs.
WILSON SERRANO-MERCADO,
Defendant.

SENTENCING HEARING

BEFORE THE HONORABLE CARMEN CONSUELO CEREZO
HATO REY, PUERTO RICO
TUESDAY, MAY 7, 2013, 4:50 P.M.

APPEARANCES:

FOR THE PLAINTIFF:	VICTOR ACEVEDO ASSISTANT U.S. ATTORNEY
FOR THE DEFENDANT:	ROSA BONINI, ESQ.
COURT REPORTER:	Zulma M. Ruiz, RMR 159 Chardon Avenue Hato Rey, PR 00918 (787) 772-3375

THE CLERK: Criminal No. 12-439, United States of America versus Wilson Serrano-Mercado for sentence.

On behalf of the Government, Assistant U.S. Attorney Victor Acevedo.

On behalf of the Defendant, attorney Rosa Bonini.

Defendant is present in court and he is being assisted by the official court interpreter.

THE COURT: Good afternoon, Mr. Acevedo. Is the United States ready?

MR. ACEVEDO: We are ready to proceed, Your Honor.

THE COURT: Thank you. Ms. Bonini, good afternoon, is the defense ready?

MR. BONINI: Good afternoon, Your Honor, Rosa Bonini on behalf of Wilson Serrano-Mercado, we are ready to proceed.

THE COURT: Mr. Serrano, good afternoon. Please state your full name for the record.

THE DEFENDANT: Wilson Serrano-Mercado.

THE COURT: The Court in this case entered an Order on April 5, 2013, addressing two objections

which were raised by the defendant, Serrano Mercado, to his amended presentence report which is docket entry 44.

Have the parties read that Order; the United States?

MR. ACEVEDO: Yes, Your Honor.

THE COURT: Defendant?

MR. BONINI: Yes, Your Honor, we received it, docket 49. We received it and we read it and we explained it to the defendant.

THE COURT: All right, fine.

Now, Ms. Bonini, did you discuss the presentence report, the amended presentence report in its full content in Spanish with your client?

MR. BONINI: Yes, Your Honor, we did.

THE COURT: And Mr. Serrano, did you understand what your attorney explained to you regarding what the probation officer informed in your case?

THE DEFENDANT: Yes.

THE COURT: Is there any reason, Ms. Bonini, why your client should not be sentenced at this time?

MR. BONINI: We have no reason to believe that he should not be sentenced.

THE COURT: Mr. Serrano, you are here today to be sentenced. Is there any reason why I should postpone it?

THE DEFENDANT: No.

THE COURT: You may address the Court on his behalf, Ms. Bonini.

MR. BONINI: Yes, Your Honor. We have here Wilson Serrano-Mercado, which, Your Honor, pleaded guilty at an early stage. He has accepted his responsibility.

Your Honor, since he was very young, he has been in problems.

THE COURT: Could you speak closer to the microphone.

MR. BONINI: Okay. Since he was very young, he has been in problems, since he was 13 years old. There is a conviction which, when he was a minor in school, he was convicted of a juvenile offense. When he was brought back to court that he was revoked, his probation, he was already an adult and he was sentenced as an adult.

Your Honor, we know that Mr. Serrano has had problems with drugs, has had problems with the authorities, but at this stage, Your Honor, in this court, this is the first time he comes to federal court. We have met with the AUSA and we have entered into a plea agreement. Mr. Serrano has accepted and he has been very repentant of his actions.

Sometime in his life, I don't know if it was now in federal court, he has spoken to me many times of his desire to try to make up his life. He has accepted full responsibility of his offense. He would ask the Court that the Court recommend him to a drug course, to take vocational studies.

And Your Honor, after all his life and after many considerations and many conversations with him, we know that this time he has opened his eyes and now he wants to do something with his life, Your Honor.

Well, we abide by the plea agreement.

THE COURT: Thank you.

Mr. Serrano, you may now address the Court yourself. If there's any information that you wish to share with me, whether it be in mitigation of punishment or anything that is important to you, you may so state now.

THE DEFENDANT: No, it's okay.

THE COURT: Are you sure you do not wish to state anything?

THE DEFENDANT: No.

THE COURT: Mr. Acevedo for the U.S.

MR. ACEVEDO: Your Honor, the Government stands by the plea.

THE COURT: Thank you. Mr. Serrano, this is the sentence of the Court: On November the 27th, 2012, defendant, Wilson Serrano-Mercado, pled guilty to Count 1 and he admitted the forfeiture allegation of the Indictment filed in Criminal No. 12-439 (CCC), charging him with a violation to Title 18, U.S. Code, Section 922(g)(1) and Section 924(a)(2) involving possession of a firearm by a convicted felon, a class "C" felony.

The November 1, 2012, Edition of the U.S. Sentencing Guidelines has been used to determine the applicable guideline adjustments under Guideline Section 1B1.11(a).

The following are the applicable advisory guidelines in this case: As defendant committed the instant offense subsequent to at least two felony convictions of a crime of violence, a base offense level of 24 has been determined under Guideline Section 2k2.1(a)(2).

The firearm had an obliterated serial number, therefore the base offense level is increased four levels under Guideline Section 2k2.1(b)(4).

The defendant has accepted responsibility for his involvement in the offense, therefore, he is entitled to a three-level decrease under Guideline Section 3E1.1(a) and (b). There are no other applicable guideline adjustments.

Based on a total offense level of 25 and a Criminal History Category of V, the guideline imprisonment range in this particular case is from

100 to 125 months, with a fine range of 10,000 to 100,000, plus a supervised release term of at least one but not more than three years.

Before the Court is a 30-year-old male defendant, single, who has been involved in three consensual relationships and he has three minor children. Defendant has a ninth grade education, he has four criminal convictions; among them, two domestic violence convictions and one assault conviction which meet the guidelines criteria for crimes of violence.

The defendant reported a history of marijuana, cocaine, crack cocaine and heroin use. However, on March the 29th, 2012, a urine sample was collected at the U.S. Probation Office which yielded negative to all of the drugs tested.

The U.S. probation officer has reported to the Court, was able to confirm with the defendant's consensual partner that a few months prior to his arrest she assisted the defendant in detoxifying himself and remaining drug free.

The guidelines, although advisory adequately reflect the nature of the offense, the history and the characteristics of this defendant. Taking into consideration all factors set forth in 18 U.S. Code, Section 3553(a), particularly, the nature of the offense and the defendant's prior criminal record, the Court finds that a sentence of imprisonment within the applicable guideline range is sufficient but not greater than necessary to meet objectives of punishment and of deterrence in this particular case.

Therefore, it is the judgment of the Court that defendant be and is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 100 months.

Upon release from confinement, defendant shall be placed on supervised release for a term of three years under the following terms and conditions:

One, defendant shall not commit another federal, state or local crime, and he shall observe the standard conditions of supervised release recommended by the U.S. Sentencing Commission and adopted by this Court.

Two, defendant shall not unlawfully possess controlled substances.

Three, defendant shall refrain from possessing firearms, destructive devices, and other dangerous weapons.

Four, defendant shall refrain from the unlawful use of controlled substances and he shall submit to a drug test within 15 days of his release. Thereafter, defendant shall submit to random drug testing, not less than three samples during the supervision period and not to exceed 104 samples per year under the coordination of the U.S. probation officer. If any such samples detect substance abuse, defendant shall participate in an inpatient or an outpatient substance abuse treatment program for evaluation and/or for treatment as arranged by the U.S. probation officer until he is duly discharged. Defendant is required to contribute to the cost of services rendered in an

amount arranged by the U.S. probation officer based on the ability to pay or on the availability of third party payments.

Five, defendant shall submit his person, property, house, residence, vehicle, papers, computers as defined in 18 U.S. Code, Section 1030(e)(1), other electronic communications or data storage devices or media, to a search conducted by a U.S. probation officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of his release. Failure to submit to a search may be grounds for revocation of defendant's release. The defendant shall warn any other occupants or residents that the premises may be subject to searches pursuant to this condition.

Six, defendant shall provide the U.S. probation officer access to any financial information upon request and he shall produce evidence to the probation officer to the effect that income tax returns have been duly filed within his place of residence as is required by law.

Seven, defendant shall participate in vocational training and/or a job placement program recommended by the U.S. probation officer.

And eight, defendant shall cooperate in the collection of DNA samples as directed by the U.S. probation officer pursuant to the Revised DNA Collection Requirements and 18 U.S. Code, Section 3563(a)(9).

The defendant shall forfeit to the United States of America all of his rights, title and interest in the property described in the Indictment and agreed to in the plea agreement; specifically, the Glock pistol, model 26, caliber 9mm, serial number obliterated, two ammunition magazines and 9mm caliber ammunition.

Having considered the defendant's financial condition, a fine is not imposed. A special monetary assessment in the amount of $100 is imposed as mandated by the law.

Mr. Serrano, although you pled guilty and pursuant to the terms of your plea agreement, you waived your right to appeal the judgment and the sentence imposed in this case, you are nonetheless advised that you can appeal your conviction if you understand that your plea of guilty was unlawful or was involuntary, or if there's some other fundamental defect in the proceedings that was not waived by your plea agreement.

The Notice of Appeal must be filed within 14 days after entry of judgment in your case. If you are unable to pay the cost of appeal, you may request leave to appeal as an indigent person, and if you so request, the Clerk of the court will prepare and will file a Notice of Appeal on your behalf.

Transcript of this sentencing hearing shall be sent within 30 days to the Probation Office, the Sentencing Commission, and the U.S. Bureau of Prisons.

The Court recommends to the Bureau of Prisons that the defendant, if eligible, be allowed to

participate in a drug rehabilitation treatment program and that he be allowed to participate in a vocational training program.

Mr. BONINI: Also, Your Honor, before the Court ends this hearing, we would just like to say to the Court, for the record, the defendant, when he made his plea of guilty, in the Statement of Facts of the Government, it did not include the obliterated weapon, the firearm, he did not agree to that, that was not part of the agreement. Count 2 or 3 is specifically in relation to the obliterated firearm, and we have read the Order from the Court, document number 54, which was filed on May 5th. We have read it, Your Honor, but we still reiterate that he did not enter into a plea agreement knowingly accepting the obliterated firearm.

We just want it for the record because it was not part of the plea agreement. We had eliminated it from the plea agreement, it was not part of the Government's Statement of Facts. So when he pleaded guilty, that was not part of the agreement.

Also, Your Honor —

THE COURT: Let me address that matter before you go into another one. This is a restatement—

MR. BONINI: I know, Your Honor.

THE COURT: — of the objections that you raised to the four-level upward adjustment under Guideline Section 2K2.1(b)(4) for the firearm involving an offense having an obliterated serial number,

and the Court notes those arguments again. If it is presented today as a motion for reconsideration, as such it is denied.

MR. BONINI: Your Honor, and he also asked me that if the Court would designate him to Miami or, in the alternative, to New York Bureau of Prisons, Miami or New York.

THE COURT: The Court will so recommend.

Anything else?

MR. BONINI: Nothing else, Your Honor.

THE COURT: The United States.

MR. ACEVEDO: Your Honor, the Government requests a dismissal of the remaining counts in the Indictment.

THE COURT: So ordered, thank you.

The Court adjourns.

(Whereupon at 5:05 p.m. this hearing was concluded.)

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 13-1730

UNITED STATES OF AMERICA,

Appellee,

v.

WILSON SERRANO-MERCADO,

Defendant, Appellant

Before

Howard, Chief Judge,
Torruella, Lynch, Lipez, Thompson, Kayatta and Barron,
Circuit Judges.

ORDER OF COURT
Entered: May 24, 2016

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the

judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

TORRUELLA and THOMPSON, Circuit Judges, dissent from denial of en banc rehearing.

LIPEZ, Circuit Judge, joined by TORREULLA and THOMPSON, Circuit Judges. Statement Re Denial of En Banc Review. I write to record my deep disappointment that a majority of the active judges of this court have denied appellant's compelling petition for en banc review, which raises a question of exceptional importance that has split the circuits. Their refusal to reconsider this case en banc is all the more disconcerting in light of the Supreme Court's recent decision in *Molina-Martinez* v. *United States,* No. 14-8913 (U.S. Apr. 20, 2016), which significantly changes the precedential landscape on plain error in sentencing. As appellant argues, *Molina-Martinez* undermines this court's cases requiring the defendant, on plain error review, to produce affirmative evidence that he would have received a more favorable sentence.

Importantly, the underlying issue—prolonged incarceration, erroneously imposed—implicates the growing national concern over excessively long imprisonment. This is not a technical debate over arcane legal doctrine. At stake are years in the lives of individuals who, albeit convicted felons, are serving enhanced sentences that are unjustified on the records before the court. I had hoped that even those colleagues who question the view of the law expressed

in my concurrence, *see United States* v. *Serrano-Mercado,* 784 F.3d 838, 850-61 (1st Cir. 2015), would have acknowledged the need for the en banc process to consider the views of other courts, now including the Supreme Court's decision in *Molina-Martinez,* so that we could—at a minimum—clarify the inconsistencies in our own precedent concerning the proper plain error analysis for sentencing errors such as occurred in this case. Because my colleagues have rejected that deliberation, the defendant must now look to the Supreme Court for relief.

The question presented by the petition arises when a sentencing judge relies on a defendant's past convictions as a basis for enhancing his current sentence, pursuant to the Armed Career Criminal Act ("ACCA") or the United States Sentencing Guidelines.[1] If a past conviction was under a "divisible" statute—i.e., a statute that criminalizes different types of conduct, only some of which may trigger the enhancement — the sentencing court must apply the so-called modified categorical approach to determine the particular version of the crime that underlies the defendant's conviction. *Descamps* v. *United States,*

[1] Under the ACCA, predicate convictions may trigger mandatory minimum sentences. *See, e.g., Shepard* v. *United States,* 544 U.S. 13, 15 (2005) (noting that the ACCA mandates a minimum 15-year sentence after three convictions for serious drug offenses or violent felonies). Under the Guidelines, a defendant may be designated a career offender, subjecting him to an elevated offense level and the likelihood of greater punishment, if he has two prior felony convictions for a violent crime or controlled substance offense. *See* U.S.S.G. §§ 4B1.1, 4B1.2.

133 S. Ct. 2276, 2283-84 (2013). If the prior conviction is not shown to rest on qualifying conduct—in this instance, violence—it may not be used as a sentencing "predicate."[2] To determine the nature of the conviction, the court may consult a limited set of approved records, including charging documents, plea agreements, jury instructions, and verdict forms. *United States* v. *Ramos-González,* 775 F.3d 483, 505 (1st Cir. 2015); *see also Shepard* v. *United States,* 544 U.S. 13, 26 (2005) (listing the acceptable records, often described as *"Shepard* materials").[3]

Indisputably, the government bears the burden of establishing the nature of a predicate conviction under a divisible statute before the offense may be used for aggravated punishment. *See United States* v. *Dávila-Félix*, 667 F.3d 47, 57 (1st Cir. 2011). If the government does not make that showing, and the sentencing court nonetheless relies on the conviction, the court has erred. If the defendant did not object to use of the conviction when he was sentenced, plain error review will apply if he challenges the enhancement on appeal. The nature of that review is the question

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[2] The conviction is off limits when inquiry reveals that the crime was not of the violent type or if the court is unable to ascertain the variant of the crime underlying the conviction. *See United States* v. *Davis,* 676 F.3d 3, 8 (1st Cir. 2012).

[3] As noted in my concurrence, the prior conviction also may be confirmed as an eligible predicate by concession of the defendant or through a legal interpretation that classifies every variant of the crime as qualifying. *See Serrano-Mercado*, 784 F.3d at 855.

raised by appellant's petition: How does the government's burden to establish that a conviction under a divisible statute qualifies as a predicate offense intersect with the defendant's burden to show plain error?

Our circuit's law contains two strains of analysis for determining whether reversible plain error occurred when a sentencing court improperly used a conviction under a divisible statute as a predicate for enhancement: one in which we have held the government to its burden of proving the conviction's eligibility, *see, e.g., id.* at 57, and one in which we have not, *see, e.g., United States v. Turbides-Leonardo*, 468 F.3d 34, 39-40 (1st Cir. 2006). The circuits also have been divided on whether the defendant or government should bear the burden of production in the plain error context. *See Serrano-Mercado*, 784 F.3d at 848-49 (panel opinion) (listing decisions by the Third, Tenth, and D.C. Circuits as consistent with the panel approach, and decisions by the Second, Fifth, Eighth, and Ninth Circuits as consistent with the concurrence's proposed approach), 856 (Lipez, J., concurring) (also noting Fourth Circuit case as consistent with concurrence's view).

The focus of our precedent is on the prejudice prong of the plain error analysis. In this case, the panel shifted the burden to the defendant to prove that, but for the sentencing judge's improper reliance on the specified conviction, it is reasonably probable that he would have received a lesser sentence. *Id.* at 851 (Lipez, J., concurring). Hence, in effect, this precedent conditions a finding of prejudice on the

defendant's ability to produce *Shepard* materials revealing that his conviction was for a non-violent offense.

The animating principle of the modified categorical approach, however, is that enhanced sentencing is improper unless the government proves that the defendant's criminal history justifies such severe punishment. As I have explained, requiring the defendant to disprove his eligibility for an enhancement creates a serious risk of a longer prison term than is justified. *See id.* at 856 (Lipez, J., concurring) (noting that *Shepard* materials revealing the nature of the conviction may be inaccessible or no longer exist, and thus would be unavailable to a defendant). It is an unnecessary risk. As other circuits have concluded, the simple, fair alternative is a remand for resentencing once the defendant shows that the court improperly lengthened his sentence in reliance on a conviction under a divisible statute without determining whether that conviction qualifies as an aggravating predicate on the basis of the appropriate documentation.

Resentencing should virtually always occur in such cases because the court's unsupported assumption that a conviction under a divisible statute qualifies as a predicate constitutes error that easily satisfies all four prongs of the plain error inquiry. *See id.* at 856-57 (Lipez, J., concurring) (stating the requirements: (1) error that is (2) plain and (3) prejudicial, resulting in (4) a miscarriage of justice). The error is plain because the law is clear that a conviction under a divisible statute, unelaborated by the government with approved records, is unusable for

enhancement purposes if the statute criminalizes both qualifying and non-qualifying conduct. *See Descamps,* 133 S. Ct. at 2283. The prejudice and miscarriage of justice are inescapable: the defendant has received additional prison time without a proper foundation.

Moreover, as the Supreme Court has now expressly recognized, the burden on the court to remedy an error such as this is small. *See Molina-Martinez,* slip op. at 15 ("[E]ven when a Court of Appeals does decide that resentencing is appropriate, 'a remand for resentencing, while not costless, does not invoke the same difficulties as a remand for retrial does.'" (quoting *United States v. Wernick,* 691 F.3d 108, 117-118 (2d Cir. 2012), and *United States v. Sabillon-Umana,* 722 F.3d 1328, 1334 (10th Cir. 2014) (stating that the "cost of correction is … small" because "[a] remand for sentencing … doesn't require that a defendant be released or retried"). The government will have the opportunity on remand to produce supporting documents and seek reinstatement of the enhancement. If the government cannot do so, the enhancement cannot—and should not—be applied. *See Davis,* 676 F.3d at 8 ("If, after examination of the[] permissible documents, it is impossible to tell whether the defendant was convicted of a violent or non-violent offense, the conviction may not serve as a predicate offense." (internal quotation marks omitted)).

Yet, under the approach applied by the panel, and supported by First Circuit precedent, a defendant must serve years of additional prison time unless he comes forward with proof that his conviction does not

qualify as a triggering predicate. This shift of responsibility, allowing an enhanced sentence to remain in place if a defendant cannot disprove its correctness, turns on its head the Supreme Court's modified categorical approach, a methodology specifically "designed to ensure that prolonged sentences are justified." *Serrano-Mercado,* 784 F.3d at 860 (Lipez, J., concurring).

Indeed, the Supreme Court's discussion of plain error in *Molina-Martinez*, also focusing on the prejudice prong of the inquiry, implicitly rejects this line of First Circuit law. In *Molina-Martinez*, the Court confronted a Fifth Circuit rule requiring a defendant who belatedly identifies a Guidelines error, and whose sentence is nonetheless within the correct Guidelines range, to produce "additional evidence"—i.e., more than the error itself—to show that the error in fact affected his sentence. *Molina-Martinez,* slip op. at 1. Striking down this "rigid" rule, the Court stated that, "when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used." Slip op. at 2, 11. The Court acknowledged the possibility that the government could produce evidence showing that the sentence, in fact, would not have differed. But the significant holding with respect to the case before us is that certain types of plain error entitle the defendant to a remand for resentencing without any affirmative showing of probability of changed outcome required of the defendant, beyond the error itself.

The error here inescapably falls within that category. When a court treats a conviction under a divisible statute as a predicate offense without proof that the conviction qualifies as a predicate, thereby elevating the Guidelines range (or triggering the ACCA mandatory minimum) without the requisite evidentiary support, an obvious and prejudicial error has occurred. Because the enhancement cannot be applied without proof of a qualifying prior conviction, the defendant's obligation in the trial court is simply to note the absence of proof, not to proffer documents proving the conviction is inapplicable. Under the approach used by the panel in this case, Serrano's failure to make that simple objection transferred the duty of production to him on plain error review. It does not follow, however, that the defendant should acquire what is in effect a substantive obligation—proving the nature of the conviction—as a result of his failure to object. Likewise, he should have no obligation on appeal to come forward with proof—or even argument—about the particulars of the challenged conviction. Although this approach to plain error "has the feel of allowing the defendant to escape with little disadvantage from his failure to make a timely objection," the benefit to the defendant will be short-lived if the government on remand is able to produce the necessary documentation. *Id.* at 857 (Lipez, J., concurring).

Given the severe consequences of sentencing error, it is incumbent on courts to examine carefully the justification for allowing improperly imposed sentences to stand. The national debate over the wisdom of lengthy sentences that are properly imposed by statute and under the Sentencing Guidelines adds to

the urgency of that examination. There must be recognition at the threshold that a "defendant's failure to object d[oes] not cure the Government's failure to submit the proper evidence." *United States v. Dantzler*, 771 F.3d 137, 149 (2d Cir. 2014). The simplicity of the remedy means there is no practical reason for letting the government off the hook and reallocating to the defendant the burden of proving the nature of a predicate conviction.

As the Supreme Court has made clear, the plain error standard is not diminished if we take a balanced view of the interests at stake when a court confronts the belated claim of a criminal defendant whose sentence was flawed. The impact on the defendant of leaving an erroneous sentence intact is often enormous and, given the modest burden of a remedy, indefensible in many cases. The ACCA and Guidelines enhancement provisions are harsh—deliberately so. Hence, when a court has improperly extended a sentence, there should be no debate about the need to choose an approach to the application of plain error that is more likely to spare individuals from unjustified additional punishment.

We also must acknowledge the "unfortunate reality" that a defendant's initial failure to raise objections to the lack of documentation is too often the result of lawyer ineptitude, not strategic planning, and unlikely to be remedied through a claim of ineffective assistance of counsel. *See Serrano-Mercado,* 784 F.3d at 857 (Lipez, J., concurring). When the issue thus arises for the first time on appeal, we cannot simply shrug our shoulders and say "too bad."

In sum, for the reasons I have described, if a defendant objects for the first time on appeal to a sentencing enhancement that was improperly based on a conviction under a divisible statute, his sentence ordinarily must be vacated and a resentencing ordered. Such a clear rule would place the government and court on notice that, without waiting for an objection from the defendant, the government should produce the supporting documents at the original sentencing proceeding or face a possible remand for resentencing. With that notice, most errors should be avoidable.

Even before *Molina-Martinez*, every marker pointed to the need for Supreme Court attention to this issue: the mounting concern over unduly harsh sentences; a circuit split; and an approach to plain error by this circuit and others that is at odds with the Supreme Court's intent, as reflected in *Shepard* and its progeny, to protect defendants from unsubstantiated, and thus unjustified, sentencing enhancements. With *Molina-Martinez*, our law requiring defendants to disprove the eligibility of a prior conviction for predicate status cannot stand. I urge the Supreme Court to end the injustice imposed by the misguided precedent of our court and others, and dispel the confusion created by the circuit split on who bears the burden to produce the documents showing the nature of a past conviction under a divisible statute.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Hon. Carmen Consuelo Cerezo
Frances Rios de Moran, Clerk, U.S. District Court
for the District of Puerto Rico
E. Joshua Rosenkranz
Raul S. Matiani-Franco
Robert Mark Loeb
Brian Philip Goldman
Wilson Serrano-Mercado
Victor O. Acevedo-Hernandez
Myriam Yvette Fernandez-Gonzalez
Nelson Jose Perez-Sosa
Francisco A. Besosa-Martinez

APPENDIX D

United States Code
Title 18. Crimes and Criminal Procedure

18 U.S.C. § 922

§ 922. Unlawful acts

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

to 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.

APPENDIX E

United States Code
Title 18. Crimes and Criminal Procedure

18 U.S.C § 924

§ 924. Penalties

(a)(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (*o*) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

APPENDIX F

Laws of Puerto Rico Annotated Currentness
Title 8. Public Welfare and Charitable Institutions
Chapter 29. Domestic Abuse Prevention and Intervention Act
Subchapter III. Delinquent Conduct; Penalties, and Other Measures

8 L.P.R.A. § 631

§ 631 Abuse

Any person who employs physical force or psychological abuse, intimidation or persecution against the person of his/her spouse, former spouse, or the person with whom he/she cohabits, or has cohabited, or the person with whom he/she has, or has had a consensual relationship, or the person with whom he/she has procreated a son or daughter, to cause physical harm to the person, the property held in esteem by him/her, except that which is privately owned by the offender, or to another's person, or to cause grave emotional harm, shall incur a felony in the fourth degree in its superior half.

The court may impose the penalty of restitution besides the established penalty of imprisonment.

APPENDIX G

Laws of Puerto Rico Annotated Currentness
Title 8. Public Welfare and Charitable Institutions
Chapter 29. Domestic Abuse Prevention and Intervention Act
Subchapter III. Delinquent Conduct; Penalties, and Other Measures

8 L.P.R.A. § 633

§ 633 Abuse by threat

Any person who threatens his/her spouse, former spouse, or the person with whom he/she cohabits or has cohabited, or with whom he/she has or has had a consensual relationship, or with whom he/she has procreated a son or daughter, to cause specific harm to that person, to the property held in esteem by him/her, except that which is privately owned by the offender, or to another person, shall incur a felony in the fourth degree in its superior half.

The court may impose the penalty of restitution besides the established penalty of imprisonment.

APPENDIX H

United States Sentencing Commission
Guidelines Manual, Nov. 2012
Chapter Two – Offense Conduct
Part K – Offense Involving Public Safety

2. FIREARMS

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

(2) **24,** if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) **20, if** —

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)-(p), (r)-(w), (x)(1), 924(a), (b), (e)-(i), (k)-(o), 2332g; 26 U.S.C. § 5861(a)-(l). For additional statutory provisions, see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Ammunition" has the meaning given that term in 18 U.S. C. § 921(a)(17)(A).

"Controlled substance offense" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

"Crime of violence" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

"Destructive device" has the meaning given that term in 26 U.S.C. § 5845(f).

"Felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to

age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

"Firearm" has the meaning given that term in 18 U.S.C. § 921(a)(3).

APPENDIX I

United States Sentencing Commission
Guidelines Manual, Nov. 2012
Chapter Four – Criminal History and Criminal Livelihood
Part B – Career Offenders and Criminal Livelihood

§4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.