No. 16-237

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This case presents a recurring question regarding plain-error review that has yielded a 5-4 Circuit split: Does the government's substantive burden to prove the nature of a prior conviction for sentencing enhancement purposes shift to the defendant on plain-error review? Or does a defendant establish prejudice by showing that there is a reasonable probability that the government could not have met its burden at sentencing? As Judge Lipez observed, that question is "of exceptional importance," Pet. App. 66a, and this Court's intervention is urgently needed to "dispel the confusion created by the circuit split," *id.* at 75a. The government acknowledges that there is at least "tension" among the Circuits, but its efforts to downplay the depth of the split rest on drawing immaterial distinctions among the cases and incorrectly asserting that they represent different exercises of "discretion" by the Courts of Appeals.

The government's chief objections to certiorari are that this case is an inadequate vehicle to resolve the split and that the First Circuit's view is correct. Those objections are misplaced. First, this case does not present a dispute about the meaning of the Sentencing Guidelines, which the Sentencing Commission could resolve. *See Braxton v. United States*, 500 U.S. 344, 348-39 (1991). Rather, it concerns the standard for plain-error review in the Courts of Appeals—a disagreement only this Court can resolve, just as in last Term's plain-error Guidelines case, *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016). Because this question arises most frequently in cases involving

Guidelines calculation errors, this case is an ideal vehicle. Second, because the First Circuit assumed that the district court committed clear error here (an assumption the government does not question), the proper approach to prejudice of plain-error review is squarely presented.

On the merits, the government errs in insisting, as did the First Circuit, that a defendant can show prejudice only by demonstrating that his prior conviction was for a non-qualifying offense. Under the modified categorical approach laid out in *Shepard v. United States*, 544 U.S. 13 (2005), a conviction under an overbroad divisible statute is non-qualifying until proven qualifying. If the available "S*hepard* documents" fail to reveal the nature of the conviction, it simply does not count for enhancement purposes.

This Court should grant the petition.

I. The Government Acknowledges "Tension" Between The Circuits And Fails To Minimize The Significance And Persistence Of The Divide.

The government acknowledges that there is "tension" among the Circuits, but attempts to argue that the split "is not as clearly defined" and not "prospectively significant." BIO 10. None of the government's attempts to paper over "the confusion created by the circuit split," Pet App. 75a, withstands scrutiny.

1. The government does not deny that the rulings of the Second, Fifth, Eighth, and Ninth Circuits directly conflict with the rulings we cited from the D.C.,

Third, and Tenth Circuits. It instead contends that the rulings in those four Circuits are distinguishable from the First Circuit's analysis in this case. But the government artificially redefines the question raised by the petition and addressed in the cited cases.

The government asserts, for example, that certain decisions by the Fifth and Eighth Circuits can be distinguished because the defendants there explicitly stated to the appellate court that their prior convictions were for non-qualifying offenses. BIO 17-19. But neither court thought that the technicality of such an explicit statement made one whit of difference to the legal analysis. Rather, the courts held that prejudice was shown and a remand required because, on the existing record, it could not be determined whether the prior conviction was for a qualifying offense. *See United States v. Pearson*, 553 F.3d 1183, 1186 (8th Cir. 2009) (district court's "failure to identify the character of [defendant's] escape conviction would affect his substantial rights"); *United States v. Bonilla-Mungia*, 422 F.3d 316, 321 (5th Cir. 2005) ("[O]n the record before us, we cannot identify with legal certainty which portion of the [divisible] statute [defendant] was convicted under."); *accord United States v. Sarabia-Martinez*, 779 F.3d 274 (5th Cir. 2015).[1] That approach is the opposite of the one the First Circuit and three other Circuits apply: if the defendant fails to object at sentencing, or to produce documents

[1] In *United States v. Ochoa-Cruz,* 442 F.3d 865, 867 (5th Cir. 2006), the defendant explicitly stated on appeal that he did *not* contend that his prior crimes were for non-qualifying offenses, and did not even argue that the statutes under which he was convicted were divisible.

demonstrating the nature of the prior conviction, then the appellate court has "no basis for concluding" that the error was prejudicial—notwithstanding the lack of record proof that the prior conviction was for a qualifying offense. Pet. App. 21a. As the Tenth Circuit has recognized, this approach to prejudice sharply "contrasts with" the Fifth Circuit's approach in *Bonilla-Mungia*. *United States v. Castellanos-Barba*, 648 F.3d 1130, 1133 (10th Cir. 2011).[2]

Similarly, the government cannot explain away the Second and Ninth Circuits' rulings. In *United States v. Reyes*, 691 F.3d 453 (2d Cir. 2012), the Second Circuit unambiguously addressed the prejudice prong of plain error, holding that "the district court's error … affected [the defendant's] substantial rights because it resulted in an elevated offense level under the Guidelines." *Id.* at 460. The "error" was "reliance on the PSR's uncontested description" of a prior crime to enhance a sentence without determining from *Shepard*-approved documents whether the prior "conviction *necessarily* rested on the" qualifying prong of a divisible statute. *Id.* at 459-60. The conflict with the First Circuit and its three sister Circuits is palpable.

Likewise, the Ninth Circuit ruling in *United States v. Castillo-Marin*, 684 F.3d 914 (9th Cir. 2012),

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[2] The government notes that this Court several years ago denied Castellanos-Barba's *in forma pauperis* petition. BIO 10 (citing 132 S. Ct. 1740 (2012) (No. 11-7103)). Since that time, however, the Circuit split has deepened substantially, with the Second, Third, Fourth, and Ninth Circuits staking out their opposing positions.

cannot be written off as addressing a "materially different posture," BIO 19. On the contrary, the Ninth Circuit found prejudice from the simple fact—equally present here—that the district court enhanced the defendant's sentence without determining whether his prior conviction under a divisible statute was necessarily for a crime of violence. 684 F.3d at 927. The court then held that this prejudice was not cured by the government's proffer of certain new documents on appeal, *see id.*, but that additional fact does not change the basis for the prejudice analysis.

That some of the cases arose in different contexts merely shows the breadth of the issue and split. For example, the government notes that cases we cite from the Second and Fourth Circuits addressed whether prior offenses were committed on different occasions, as required for ACCA career-offender enhancement, rather than (as here) whether a prior offense was for a qualifying violent form of a crime under a divisible statute. *See United States v. Dantzler*, 771 F.3d 137, 148 (2d Cir. 2014); *United States v. Boykin*, 669 F.3d 467, 471-72 (4th Cir. 2012). The relevant legal issue is, however, the same: *Shepard* applies in both settings (as the government concedes), and the question is whether a defendant shows prejudice by noting the absence of proper *Shepard* documents in the record, or whether he must go further and bear the government's substantive burden of proof on plain-error review—a burden that, as a practical matter, will often be impossible to meet. Pet. 22.

2. The government suggests that the broad Circuit split we detail is simply a product of discretion

exercised by the Courts of Appeals. BIO 21-22. Appellate courts do not, however, exercise discretion when deciding the legal question of whether a plain error prejudiced a defendant. The only discretionary step in the plain-error test is the fourth one: determining whether to remedy a prejudicial plain error based on whether it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Puckett v. United States*, 556 U.S. 129, 135 (2009). The analytical step relevant to the question presented—and the legal question on which the Circuits are divided—is the prejudice prong, not the discretionary fourth step. The government's cited cases are not to the contrary but instead confirm the split. BIO 21-22 n.7; *see, e.g.*, *United States v. Gonzalez-Jaquez*, 566 F.3d 1250, 1253 (10th Cir. 2009) (acknowledging conflict between Tenth and Fifth Circuit precedent). That certain panels allowed supplementation of the record on appeal, rather than directing a remand for supplementation, does not change the legal rule those panels applied in assessing prejudice.

3. Finally, the government tries to downplay the importance of the Circuit split by speculating that the issue may come up less frequently going forward in light of *Johnson v. United States*, 135 S. Ct. 2251 (2015), and *Mathis v. United States*, 136 S. Ct. 2243 (2016). BIO 22-24. But the elimination of the *residual* clause from ACCA and the Guidelines does not affect the many cases, like this one, where the *elements* clause is at issue. *See also, e.g.*, *Reyes*, 691 F.3d at 457-58. The question presented continues to arise with substantial frequency, including in the short time since Petitioner sought certiorari. *See, e.g.*, *United*

States v. Cordova-Portillo, --- F. App'x ----, 2016 WL 6819702, at *1 (9th Cir. Nov. 18, 2016).

II. The Government's Defense Of The First Circuit's Approach Fails.

The government focuses primarily on the merits of the question presented. *See* BIO 11-17. In doing so, the government fundamentally misapprehends the nature of the error at issue.

As the petition explained, the "animating principle" of the modified categorical approach is that an enhanced sentence is improper unless the government proves that the defendant was actually convicted of all elements of a qualifying offense. Pet. 26-27 (quoting Pet. App. 70a). When a defendant's prior conviction was under a divisible statute, and not all forms of the offense qualify for the enhancement, the starting presumption is that the defendant was not convicted of the qualifying form of the offense and may not have his sentence enhanced on that basis—it is up to the government to prove that he *was* convicted of a qualifying offense. *See* Pet. 26-28; *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

Thus, the government (like the First Circuit) is wrong to fault Petitioner for failing to offer proof "that he was *not* convicted of a crime of violence." BIO 14. Petitioner need not make such a showing to demonstrate "use of an incorrect range," BIO 15. The sentencing range was incorrect because the record contained no actual proof, much less proof from *Shepard*-approved sources, that Petitioner's 2005 conviction under an admittedly divisible statute was for a

violent form of the crime. *See* Pet. 28. Petitioner does not need to affirmatively demonstrate that, if some hypothetical *Shepard* documents had been put in the record, they would show that his conviction was for a non-violent offense.

Nor is it a "dilution of the prejudice requirement" (BIO 14) to recognize that Petitioner's substantial rights were affected. Plain-error review puts the burden on Petitioner to show a reasonable probability that, but for the district court's error in enhancing the sentence without the requisite proof, the applicable sentencing range would have been lower. *See* Pet. 30. It does not, as the government suggests, shift the underlying substantive burden to the defendant and require him "to show a 'reasonable probability' that he was *not* convicted of a crime of violence." BIO 14. The government mistakenly relies on *Molina-Martinez*, 136 S. Ct. 1338. *See* BIO 16. The Court there stated—not controversially—that plain-error review saddles the defendant with the burden of persuasion *as to prejudice*. 136 S. Ct. at 1348. The Court did not state that demonstrating prejudice means demonstrating the opposite of what the government was required to prove. To do so would be to improperly transform the prejudice requirement from a "reasonable probability" standard into a virtual certainty standard—a defendant would have to show not only that an error likely affected his or her sentencing range, but that it *definitely* did.

The government resists this conclusion by suggesting that there is no basis to believe that, in cases like Petitioner's, a remand for resentencing would likely lead to a lower sentencing range. BIO 16. The

government does not dispute that three of the four possible remand scenarios would do so, *see id.*; Pet. 30, but instead calls it a "dubious assumption that each of the four scenarios that petitioner describes is equally probable." BIO 16. But this Court has already recognized that absence of *Shepard* documents will "often" be a problem for the government in proving the nature of a prior conviction. *Johnson v. United States*, 559 U.S. 133, 145 (2010). And two different amici curiae supporting the petition provided evidence against the government's position. One demonstrated the significant reductions obtained on resentencing in Circuits that follow the correct approach to prejudice. *See* National Association of Criminal Defense Lawyers Amicus Br. 8-12. The other demonstrated the frequent unavailability of *Shepard* documents, citing varying state record-retention practices and observations by federal trial and appellate courts. *See* National Association for Public Defense Amicus Br. 3-7. The government responds to neither showing.

Instead, the government insists that the evidentiary gap in these cases is "directly attributable to the appealing party's failure to object." BIO 16. That again misses the point. The error is attributable to the government's failure to meet its burden of proof—and the district court's failure to insist that it do so. The defendant's lack of objection has consequences: It obligates him or her to demonstrate clear error on appeal and to show some probability that it made a difference (i.e., that the Guidelines range would have been different without including the "crime of vio-

lence" that the government had not properly established). But it does not flip the burden of proof on the underlying merits.

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

Notwithstanding the government's contrary arguments, this case is a highly suitable vehicle to resolve the Circuit split concerning the prejudice analysis for sentencing enhancements based on divisible statutes. The government first argues that the First Circuit did not decide whether there was a clear error before addressing prejudice. BIO 25. The First Circuit noted inconsistency on this point in its case law and saw no need to resolve the inconsistency because of its dispositive prejudice ruling. *See* Pet. App. 22a n.6. But the error is clear: There is no serious dispute that the modified categorical approach applies to the domestic abuse statute under which Serrano-Mercado was convicted, or that the sentencing record contained no *Shepard* sources revealing the nature of that conviction. *See* BIO 7, 11-12. Moreover, the government does not explain what difference it makes that the First Circuit assumed without deciding that an error existed, when the question presented concerns the prejudice inquiry.

The government next cites *Braxton*, 500 U.S. at 348-39, and asserts that this case is a poor vehicle because it involves the Sentencing Guidelines. BIO 27-28. *Braxton*, however, has no application here. It says that this Court will not resolve Circuit conflicts over the meaning and implementation of the Guidelines where the Sentencing Commission can address those

disagreements. This case, however, involves something quite different: a conflict over the plain-error standard of review applied by the Courts of Appeals. That is a conflict about the structure of appellate judicial proceedings that only this Court, not the Commission, can resolve. This Court heard a case last Term, *Molina-Martinez*, involving a similar conflict over the plain-error standard of review, notwithstanding that it was a Guidelines case. As the petition explains, the question presented here is much more likely to arise in Guidelines cases than in ACCA cases, so this case, not an ACCA case, is the more representative vehicle. *See* Pet. 34. Again, the government offers no response.

Finally, the government suggests that the Puerto Rico statute under which Petitioner was convicted might not be truly divisible following this Court's decision in *Mathis*, 136 S. Ct. 2243. *See* BIO 28-29. That suggestion, however, cannot be taken seriously. Indeed, the government itself is currently arguing to the First Circuit that the statute remains divisible post-*Mathis*. *See* Corrected Sur-Reply Br. for United States at 21, *United States v. Alvarez-Rodriguez*, No. 15-1816 (1st Cir. filed Sept. 6, 2016).

IV. The Court Should Hold The Second Question Presented For *Beckles*.

The petition urged the Court to hold the second question presented—regarding the separate enhancement for Petitioner's 2006 conviction—pending its disposition of *Beckles v. United States*, No. 15-8544. Pet. 35-36. The government responds by faulting Pe-

titioner for not previously challenging the classification of his 2006 conviction. BIO 29-30. As the petition explains, this challenge is prompted by a potential change in law—invalidation of the Guidelines residual clause—that, even now, has not yet occurred. Pet. 36.

Next, the government asserts that the 2006 conviction qualifies as a violent form of the offense under the elements clause of the applicable crime-of-violence definition. The Board of Immigration Appeals, however, held otherwise (Pet. 35 n.4), and its decision has not, as the government suggests (BIO 30-31), been undermined by either this Court or the First Circuit. This Court in *United States v. Castleman*, 134 S. Ct. 1405 (2014), expressly distinguished its interpretation of "physical force" in the domestic violence context from the definition of "physical force" in the ACCA (and Guidelines) elements clause. *Id.* at 1410-12. And the First Circuit has rightly adhered to that distinction. *See Whyte v. Lynch*, 807 F.3d 463, 470 (2015) (*Castleman* inapplicable outside domestic violence context), *reh'g denied*, 815 F.3d 92 (1st Cir. 2016) (rejecting the government's new argument regarding *Castleman*).

In any event, Questions 1 and 2 are independent, and the Court should grant certiorari on Question 1 regardless of its disposition of Question 2.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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