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

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION FOR PUBLIC DEFENSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

The National Association for Public Defense is a national organization uniting nearly 7,000 public defense practitioners across the 50 states. As public defense experts, NAPD's mission is to ensure strong criminal justice systems, policies and practices ensuring effective indigent defense, system reform that increases fairness for indigent clients, and education and support of public defenders and public defender leaders.

The NAPD plays an important role in advocating for defense counsel and the clients they serve and is uniquely situated to speak to issues of fairness and justice facing indigent criminal defendants. As this case presents important and unresolved questions about parties' respective burdens that trigger enhancements to the sentences of criminal defendants, NAPD offers its perspective to the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus the National Association for Public Defense urges the Court to grant Wilson Serrano-Mercado's petition for certiorari. This case presents a significant question that has caused a deep Circuit split on the

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. The parties have received at least 10 days notice and have consented to the filing of this brief. Such consents are being lodged herewith.

government's burden to establish a predicate offense for sentencing enhancement under the plain error standard. To date, five Circuits have recognized that a defendant necessarily suffers prejudice when his sentence is enhanced because of a prior conviction based on a divisible statute that the government did not establish qualifies as a predicate offense. *See* Pet. Writ Cert. at 18–22 (identifying the Second, Fourth, Fifth, Eighth, and Ninth Circuits as those that have held that a defendant suffers prejudice under such circumstances). As these Circuits have held, it is the government's burden at sentencing to produce *Shepard*-approved documents when a divisible statute is the predicate offense for a sentencing enhancement based on a crime of violence. Departing from this principle, the First Circuit has held that a defendant, not the government, bears the burden of producing *Shepard* material on appeal when his lawyer failed to object to the sentencing enhancement at the trial level. If not reviewed, this decision could endanger the rights of defendants, who may be subjected to illegal sentences without the ability to challenge them on appeal.

The harm suffered by criminal defendants as a result of the holdings on prejudice in the minority of circuits, including the First Circuit, is not theoretical. In many instances, the state court documents necessary to challenge a sentencing enhancement may be destroyed or no longer available. In fact, when the government has not come forward with *Shepard*-approved documents prior to sentencing, the reason may well be that they do not exist. In the event that the trial court imposes the enhancement despite the government's failure, the First Circuit's decision places the defendant in the untenable position of producing evidence that often has vanished. In this

circumstance, the defendant is effectively deprived of his appeal. If he is unable to access the *Shepard* documents, he cannot possibly show that a predicate offense was *not* a crime of violence.

The First Circuit's decision should be reviewed because the practical dangers of the holding on prejudice are far-reaching. First, it adversely impacts indigent defendants, who may lack the resources to ascertain whether the records of a prior state conviction still exist and, if they do exist, to physically obtain them. The holding on prejudice will also impose potentially insurmountable burdens on an already budget-strapped public defender system, by requiring lawyers and investigators to search, often in remote jurisdictions, for *Shepard*-approved documents that may no longer exist. For these and the reasons set forth in the Petitioner's petition, the Court should grant a writ of certiorari in this case.

ARGUMENT

I THE FREQUENT UNAVAILABILITY OF *SHEPARD*-APPROVED DOCUMENTS WOULD PREJUDICE DEFENDANTS IF THEY HAD THE BURDEN OF SHOWING THAT THEY WERE NOT CONVICTED OF A QUALIFYING PREDICATE CRIME.

This Court should grant certiorari to address a split among the Circuits as to the application of the "plain error" review standard where a trial court has reached a conclusion as to the existence of a predicate offense contrary to this Court's decision in *Shepard v. United States*. 544 U.S. 13, 26 (2005). This is particularly

important given that critical state court records necessary to justify a sentencing enhancement are not always maintained and may therefore be unavailable, particularly by the time a defendant has appealed his sentence.[2]

In *Shepard*, which involved a divisible statute and the Armed Career Criminal Act ("ACCA"), the Court "adhere[d] to the demanding requirement that any sentence under the ACCA rest on a showing that a prior conviction 'necessarily' involved (and a prior plea

2. State court record retention rules vary widely by state, and by courts within a state. *See, e.g.*, Court Retention Schedules, National Center for State Courts, http://www.ncsc.org/Topics/Technology/Records-Document-Management/State-Links.aspx?cat=Court%20Retention%20Schedules (last visited Sept. 21, 2016). Even for felonies, they may require the retention of case files, including *Shepard* documents, for less time than a prior conviction might be counted for purposes of a sentencing enhancement. *Compare* U.S. Sentencing Guidelines Manual § 4A1.2(e) (U.S. Sentencing Comm'n 2015) (setting forth a time period of fifteen years under the Sentencing Guidelines during which time prior sentences exceeding one year and one month may be considered, and a time period of ten years for all other sentences), *with* Mass. Supreme Judicial Ct. R. 1:11, http://www.mass.gov/courts/docs/lawlib/docs/sjc-rules.pdf (permitting destruction of criminal case files ten years after disposition in Superior Court and five years after disposition in District Court, and permitting destruction of transcripts two years after disposition in both courts); Supreme Ct. of Pa. Record Retention & Disposition Schedule with Guidelines § 5.2, http://www.pacourts.us/assets/files/setting-850/file-173.pdf?cb=36cae5 (mandatory retention of "Original Papers in Misdemeanor and Felony Cases" limited to three years); Utah State Ct. Records Retention Schedule § B(5), https://www.utcourts.gov/resources/rules/ucja/append/f_retent/appf.htm (last visited Sept. 21, 2016) (setting retention period for third degree felonies at ten years following completion of a sentence, and three to five years for other misdemeanors).

necessarily admitted) facts equating" to a qualifying predicate offense. 544 U.S. at 24. The Court further held that a sentencing judge's inquiry into whether the required elements under the ACCA were "necessarily admitted" in the prior conviction 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." *Id.* at 26.

The Court explicitly considered an argument by prosecutors that relied on the "happenstance of state court record-keeping practices and the vagaries of state prosecutors' charging practices." *Id.* at 22 (citing Brief for United States at *48, *Shepard v. United States*, 544 U.S. 13 (2005) (No. 03-9168) ("Limiting the permitted inquiry to plea colloquies and written plea agreements, as the district court did, would frequently make it impossible for the government to pursue enhancements . . . ."). In fact, the government noted in its *Shepard* briefing that in Massachusetts "recordings of plea colloquies are routinely destroyed after only a brief retention period." Brief for United States at *48, *Shepard v. United States*, 544 U.S. 13 (2005) (No. 03-9168) (citing Mass. Special R. of Dist. Ct. 211(A)(4) as "requiring retention of recordings of guilty pleas for two and a half years"). The Court nevertheless held that to "avoid serious risks of unconstitutionality," a sentence could be enhanced under the ACCA only with the support of these essential documents. *Shepard*, 544 U.S. at 25–26.

Five years after its *Shepard* decision this Court again recognized—in *Johnson v. United States*, 559 U.S.

133, 143–45 (2010)—that the unavailability of *Shepard*-approved documents may stand in the way of a sentence enhancement, in that case the firearm disability in Section 922(g)(9). In *Johnson*, the government again brought to the Court's attention that "in many cases state and local records from battery convictions will be incomplete." *Id.* at 145. The Court nevertheless affirmed the "modified categorical approach," under which a court reviews *Shepard*-approved documents relating to the predicate conviction, while noting that the "absence of records will often frustrate application of the modified categorical approach—not just to battery but to many other crimes as well." *Id.*

In applying *Shepard* and *Johnson*, appellate courts have noted the unavailability of *Shepard*-approved documents. *See, e.g.*, *United States v. Colson*, 683 F.3d 507, 510 (4th Cir. 2012) (limiting review in the context of a 15-year mandatory minimum under 18 U.S.C. § 2252A(b)(1), where "all of the court records of Colson's prior conviction had been destroyed due to the age of the conviction, and thus the government presented no documents acceptable under *Shepard*" (citation omitted)); *United States v. White*, 606 F.3d 144, 145–46, 155 (4th Cir. 2010) (vacating conviction under Section 922(g)(9), which makes it a felony to own a firearm following a predicate crime, where the only record of the predicate crime was an arrest warrant because general district courts of Virginia are not courts of record).

Similarly, the unavailability of *Shepard*-approved documents has been noted at the trial level. *See, e.g.*, *Damon v. United States*, No. 1:08-cr-00157-JAW-3, 2012 U.S. Dist. LEXIS 176484, at *32 & n.4 (D. Me. Dec. 13,

2012) (in the context of a *Johnson*-based habeas petition challenging an enhancement under § 2K2.1(a)(2), "it would be surprising if any of the *Shepard*-sanctioned documents existed for this criminal case"); *see also* Reply to Government's Response to Motion to Correct Sentence Under 28 U.S.C. § 2255 at Ex. A, *Turner v. United States of America*, No. 1:03-cr-10166-PBS (D. Mass. Mar. 30, 2016), ECF No. 213 (declaring that audio recordings of proceedings in Massachusetts district court had been destroyed); United States' Answer to Defendant's 28 U.S.C. § 2255 Motion at 4–5, *United States v. Smith*, No. 07-CR-00282-REB-1 (D. Colo. Feb. 16, 2016), ECF No. 49 ("Efforts to obtain the terms of the charging document, the plea agreement, or a transcript of the plea colloquy have proven fruitless.").

Appeals of erroneous enhancement determinations without a specific objection, *i.e.*, without support from *Shepard*-approved documents, have reached the Courts of Appeals in nine Circuits. Consistent with the fundamental Constitutional concerns underlying this Court's determination in *Shepard*, a majority of the Circuits found that it was necessarily prejudicial to enhance a sentence based on a prior conviction under a divisible statute where the record below contains no proof that the conviction was for a qualifying offense. *See* Pet. Writ Cert. at 18–22. By comparison, the First Circuit below and three other Circuits improperly shifted the burden to defendants to show that the underlying conviction was *not* for a qualifying offense. *See id.* at 22–25. A Constitutional flaw in these decisions is that if *Shepard* documents are unavailable, the defendant's burden of proof is insurmountable, and the defendant effectively has no right of appeal. This is so even if the documents were also unavailable to the prosecutor prior to

sentencing and there was therefore no supportable basis for an enhancement by the trial court in the first instance.

The First Circuit's decision shifts blame to defendants for the lack of supporting documentation when they fail to object below. *United States v. Serrano-Mercado*, 784 F.3d 838, 846 (1st Cir. 2015) ("Serrano may not benefit from having left us completely in the dark (through his failure to object below) . . . ."); *see also United States v. Turbides-Leonardo*, 468 F.3d 34, 38–42 (1st Cir. 2006). Such finger-pointing does not take into account the very real possibility that *Shepard* documents are simply unavailable to both the prosecution and the defense. By requiring the defendant to produce the *Shepard*-approved documents on appeal if he did not object at trial, the First Circuit is imposing an impossible burden on the party with the fewest resources.

Public defenders representing indigent defendants lack the resources of their government counterparties. The limited budget for hiring investigators and local counsel to search in court houses around the country for *Shepard*-approved documents is currently being expended on compiling these documents for *Johnson* habeas petitions. In that context, public defenders are finding that sometimes the crucial documents no longer exist. While this unavailability is obviously unfortunate for prisoners seeking habeas review of their sentence, it is devastating for a defendant seeking to appeal an erroneously imposed sentence under the holding on prejudice in the First Circuit decision. The Court should grant certiorari to address these very real consequences.

II. SHIFTING THE BURDEN TO DEFENDANTS TO PRODUCE *SHEPARD*-APPROVED DOCUMENTS IN ORDER TO DEMONSTRATE PREJUDICE IS CONTRARY TO PLAIN ERROR JURISPRUDENCE.

In addition to requiring a defendant to produce documents that may not exist, the First Circuit's decision also contravenes existing case law, from both the Court and other Circuits, as to the impact of the plain error standard on sentencing appeals. For example, just last term, the Court rejected a construction of the plain error standard that would have required a defendant to produce "additional evidence" to show an effect on his substantial rights. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1347–48 (2016). Buttressing the Court's ruling was its observation that the lower court failed "to take into account the dynamics of federal sentencing." *Id.* at 1347. Just as *Shepard*-approved documents may frequently be unavailable, "[i]n a significant number of cases the sentenced defendant will lack the additional evidence the Court of Appeals' rule would require, for sentencing judges often say little about the degree to which the Guidelines influenced their determination." *Id.* Because the evidence may well be unavailable, the defendant "should not be barred from relief on appeal simply because there is no evidence that the sentencing outcome would have been different had the correct range been used." *Id*. at 1346.

Courts interpreting the plain error standard in other contexts have displayed similar reluctance to impose too high a bar on criminal defendants. *See, e.g.*, *United States v. Luepke*, 495 F.3d 443, 451–52 (7th Cir. 2007)

(holding that a defendant denied his right of allocution at sentencing suffered prejudice where the right "*could have* had" an influence on the defendant's sentence); *United States v. Flyer*, 633 F.3d 911, 917 (9th Cir. 2011) (noting that "plain-error review of a sufficiency-of-the-evidence claim is only 'theoretically more stringent' than the standard for a preserved claim" (quoting *United States v. Cruz*, 554 F.3d 840, 844 (9th Cir. 2009))); *United States v. Garcia-Guizar*, 160 F.3d 511, 517 (9th Cir. 1998) ("[W]e have expressed our reluctance, regardless of the standard of review, 'to affirm a conviction and send a defendant to prison . . . if the record clearly showed that the evidence was insufficient.'" (quoting *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1010 (9th Cir. 1995))); *United States v. Gaydos,* 108 F.3d 505, 511 (3d Cir. 1997) (reversing conviction on plain error review upon holding that "government could not prove beyond a reasonable doubt" one of the elements of the crime).

Given the development of the Court's plain error jurisprudence with regard to criminal sentencing, which is at odds with the First Circuit's ruling here, the Court should accept Serrano-Mercado's case for review.

CONCLUSION

For the reasons stated above, the National Association for Public Defense respectfully urges the Court to grant Mr. Serrano-Mercado's petition for a writ of certiorari.

Respectfully submitted,

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