No. 16-237

IN THE

Supreme Court of the United States

WILSON SERRANO-MERCADO,
Petitioner,

v.

UNITED STATES,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in this case because it is concerned that the burden-shifting rule adopted by four of the nine circuits to consider the issue in this case will result in unfairly lengthened

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[1] In accordance with Supreme Court Rule 37, *amicus curiae* states that no counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. Petitioner and Respondent have consented to the filing of this brief. Letters reflecting such consent have been filed with Clerk.

prison sentences to defendants whose defense attorneys fail to make a highly technical objection related to documentation of past convictions, thus penalizing defendants represented by overburdened and underfunded defense attorneys.

SUMMARY OF THE ARGUMENT

This case implicates a deep divide among the circuits that has serious consequences for defendants—namely, significantly longer prison terms. Federal sentencing, always a complex process, is further complicated when a prior-crime-of-violence enhancement is at stake and is yet more difficult when the purported prior crime of violence came under a divisible statute. Under such circumstances, mistakes like the one at issue here will happen. The courts of appeals disagree on how to handle those mistakes on appeal: should the prosecution retain its burden to show that the prior conviction was for a crime of violence, or should that burden shift to the defendant to show that it was not?

NACDL writes to emphasize two aspects of this case. First, the First Circuit applied plain-error review in this case, a common context in which this issue arises. To fully preserve his client's rights on appeal, a defense attorney must flawlessly navigate a particularly difficult area of law on a short timeline, often while juggling many other cases simultaneously. One misstep, including making a general objection where a more specific one should have been made, will result (in four circuits) in the shifting of the burden to put forth *Shepard* evidence regarding past convictions from the prosecution to the defendant. That shift is both against the weight of precedent and difficult to justify given the relatively low cost of resentencing.

Second, the 5-4 split among circuits has real and grim consequences for defendants. In the circuits that come out on the opposite side of the issue from the First (the Second, Fourth, Fifth, Eighth, and Ninth), experience shows that resentencing upon remand is no mere formality. To the contrary, defendants afforded the opportunity to hold the prosecution to its proof of past crimes of violence frequently succeed in obtaining reduced sentences—reduced, sometimes, by many years. Defendants in the First, Third, Tenth, and D.C. Circuits receive no such chance.

ARGUMENT

1. Federal sentencing law is dense. As this Court noted last Term, the United States Sentencing "Guidelines are complex, and so there will be instances when a district court's sentencing of a defendant within the framework of an incorrect Guidelines range goes unnoticed." *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1342–43 (2016). The stakes and complexity of sentencing increase when a sentencing enhancement for a prior crime of violence is on the table, and when an alleged past crime of violence came under a divisible statute, the complexity rises to the point that even seasoned defense attorneys and judges may have difficulty pinpointing all proper objections to sentencing documents in the first instance. *Id.* at 1345–46 ("A district court that improperly calculates a defendant's Guidelines range . . . has committed a significant procedural error.") (internal quotations marks, alteration, and citation omitted). In fact, merely "[d]etermining whether a statute is divisible may be difficult sometimes." *United States* v. *Estrella*, 758 F.3d 1239, 1246 (11th Cir. 2014) (citing *Descamps* v. *United States*, 133 S. Ct. 2276, 2285 n.2 (2013)). Unsurprisingly, therefore,

this case—and others presenting similar issues—arises in the plain-error context.

Petitioner's case provides an apt illustration of such complications. Petitioner, who pleaded guilty to a federal weapons charge, had three prior convictions—from 2004, 2005, and 2006—and a plea agreement that, among other things, stated that one of those convictions was for a crime of violence. Pet. App. 5a–6a. The Presentence Investigation Report (PSR) prepared by the probation office, however, stated that two of petitioner's convictions were for crimes of violence and, as a result, recommended a higher base offense level under the Guidelines than the plea agreement did. *Id.* Neither the plea agreement nor the PSR specified which convictions were for crimes of violence. *Id.* And, critically, the prosecution put forth no evidence showing that any individual conviction—including one, from 2005, that came under a divisible statute and thus did not necessarily involve violence—was for a crime of violence. *Id.* at 12a–14a.

Petitioner's attorney objected to the higher adjusted offense level recommended by the PSR "when the plea agreement establishe[d]" a lower offense level. *Id.* 7a n.2. The district court nonetheless relied on the PSR to enhance petitioner's sentence for two past crimes of violence—despite the fact that a PSR is not one of the documents this Court expressly recognized as permissible documentation of whether a conviction under a divisible statute qualified as a basis for a sentencing enhancement in *Shepard* v. *United States*, 544 U.S. 13, 25 (2005).

Counsel did not explicitly object to the PSR's characterization of the 2005 conviction as a crime of violence. Pet. App. 7a n.2. Thus, although the attorney's broad objection challenged the *result* of the PSR's characterization of the 2005 conviction (that is,

a higher offense level), the First Circuit brushed it aside and applied plain-error review on appeal because petitioner had not 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." *Id.* at 20a.

While the prosecution bore the burden in the first instance to prove that petitioner's 2005 conviction was for a crime of violence, the First Circuit shifted the burden to petitioner on appeal to show that it was not. *Id.* 20a–21a. Because petitioner did not put forth *Shepard* documents that would have shown that his 2005 conviction came under the nonviolent branch of the relevant statute—documents that pertained to a decade-old conviction, that are sometimes difficult to obtain even for the government (let alone a defense attorney),[2] and that are often too unclear to establish the facts necessary to enhance a sentence even when available[3]—the court of appeals upheld his sentence. *Id.* at 21a–22a.

As petitioner's case shows, a defense attorney attempting to fully preserve her client's rights to appeal his sentence must successfully plot a course through several complicated and interrelated issues. After first recognizing that a crime-of-violence sentencing enhancement is on the table, she must fully analyze all of her client's past convictions to determine which

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[2] *See, e.g.*, *United States* v. *McCann*, 613 F.3d 486, 503 (5th Cir. 2010) (noting that the relevant records had been lost due to Hurricane Katrina).

[3] *See, e.g.*, *United States* v. *Dantzler*, 117 F. Supp. 3d 198, 204 (E.D.N.Y 2015) (holding that *Shepard* documents, while properly proffered by the prosecution, did not make clear whether multiple crimes committed on the same day "were 'committed on occasions different from one another' for ACCA purposes").

convictions might be characterized as violent. She must then determine whether any of those convictions came under a divisible statute. If so, she must determine whether the prosecution has set forth proper evidence under *Shepard* to show that the conviction was for the violent branch of the statute—and she must then determine whether any *Shepard* documents produced actually say what the prosecution claims they do. If she discovers any missteps, she must object with specificity to the government's proof of past convictions. And, if an error in characterizing a past conviction arises in the PSR (as it did in this case), she must make that nuanced objection within just 14 days. Fed. R. Crim. P. 32(f)(1).

The complexity of sentencing and sentencing enhancements under the Guidelines is exacerbated by the realities facing overburdened defense attorneys. Some 60% of all federal defendants are represented by federal public defenders,[4] who regularly manage extreme caseloads on tight timelines and with comparatively little funding.[5]

All of this increases the likelihood that errors like the one in this case will arise in the plain-error context, resulting in a de facto requirement in the

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[4] Ron Nixon, *Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts*, N.Y. Times (Aug. 23, 2013), http://www.nytimes.com/2013/08/24/us/public-defenders-are-tightening-belts-because-of-steep-federal-budget-cuts.html.

[5] *See, e.g.*, Letter from Marjorie A. Meyers, Fed. Pub. Defender, S.D. Tex., to Hon. Kathleen Cardone, Chair, Ad Hoc Committee to Review Criminal Justice Act Program, at 2 (Feb. 8, 2016), https://cjastudy.fd.org/sites/default/files/hearing-archives/birmingham-alabama/pdf/margymeyersbirminghamwrittentestimony-done.pdf (noting that her office of fewer than 60 attorneys opened over 37,000 cases, including over 7,500 felonies, in fiscal year 2013).

First, Third, Tenth, and D.C. Circuits that defendants, not the prosecution, put forth *Shepard* documents on appeal. That burden shift stands directly opposed to the "animating principle of the modified categorical approach . . . that enhanced sentencing is improper unless the government proves that the defendant's criminal history justifies such severe punishment." Pet. App. 70a. And, of course, shifting the burden results in significantly longer sentences for defendants.

Requiring defendants to affirmatively prove that they were not previously convicted of the violent branch of a divisible statute is even more difficult to justify when the cost of resentencing is small compared to the cost of imprisonment. The error in sentencing can deprive the defendant of years of his life and cost the taxpayers many thousands of dollars—it costs nearly $100 per day to incarcerate someone after sentencing.[6] By contrast, the cost of resentencing is relatively minor: "even 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.'" *Molina-Martinez*, 136 S. Ct. at 1348–49 (quoting *United States* v. *Wernick*, 691 F.3d 108, 117–18 (2d Cir. 2012)).

Defendants like petitioner are forced to pay in months and years of their lives for inadvertent oversights by their attorneys in a particularly complex area of law. The Court should act to ensure that the prosecution not be permitted to slough off its burden

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[6] U.S. Courts, *Did You Know? Imprisonment Costs 8 times More Than Supervision* (June 18, 2015), http://www.uscourts.gov/news/2015/06/18/did-you-know-imprisonment-costs-8-times-more-supervision.

to set forth appropriate documentation of past convictions on appeal.

2. A defendant who receives an erroneously enhanced sentence for a purported previous crime of violence in the First, Third, Tenth, or D.C. Circuit can expect his sentence to be affirmed. But if he were sentenced in the Fourth, Second, Eighth, Ninth, or Fifth Circuit, his sentence would be thrown out, and the case remanded for resentencing.

Upon remand, the government will sometimes be able to produce the requisite *Shepard* materials and the defendant will be resentenced to the same term of imprisonment as he received originally. But the government's ability to submit the proper evidence on remand is far from a matter of course. As noted, such documents can be difficult for any party to obtain. Thus, in some cases, the government is unable to put forth the required evidence, and the circuit in which a defendant is sentenced therefore has a significant effect on the number of years' imprisonment a defendant receives. This is what happened to Walter Boykin—by virtue of being sentenced in the Fourth Circuit rather than, say, the Third, his sentence was reduced by nearly 12 years.

Boykin pleaded guilty to being a felon in possession of a firearm and making false statements to a federally licensed firearms dealer. *United States* v. *Boykin*, 669 F.3d 467, 468 (4th Cir. 2012). In the PSR prepared for the court, the probation officer determined that the defendant qualified as an armed career criminal based on Boykin's three prior violent-felony convictions. *Id.* at 468–69. The two violent-felony convictions that were disputed both occurred on the same day in 1980. *Id.* The district court relied on the PSR in deciding that the offenses which resulted in the two 1980 convictions, even though

they arose out of the same incident, were committed on "occasions different from one another" and thus could each serve as a predicate offense under the Armed Career Criminal Act (ACCA). *Id.* at 469. The district court sentenced the defendant to prison for 180 months, the mandatory minimum because of the ACCA enhancement. *Id.*

The Fourth Circuit remanded for resentencing, holding that it was plain error for the district court to use the PSR's factual details of the prior convictions to apply the ACCA enhancement "without having first satisfied itself that the PSR bore the earmarks of derivation from *Shepard*-approved sources." *Id.* at 472 (internal quotation marks omitted). It further noted that "[s]uch improper factfinding as occurred here strikes at the core of our judicial system's protections for criminal defendants." *Id.* Unconstrained by ACCA's mandatory minimum, the district court substantially reduced Boykin's sentence on remand from 180 to 37 months. Amended Judgment, *United States* v. *Boykin*, No. 5:10-cr-27-1-D (E.D.N.C. Nov. 21, 2012), ECF No. 56.

United States v. *Dantzler*, from the Second Circuit, shows a similarly stark reduction in sentence. There, the defendant pleaded guilty to possession of a firearm as a felon. 771 F.3d 137, 139 (2d Cir. 2014). The PSR stated that he had been convicted of three previous robberies, rendering him an armed career criminal. *Id.* As in *Boykin*, two of the prior crimes were committed on the same day, but, relying on the PSR's characterization of the crimes, the district court held that they were separate occurrences for purposes of the ACCA enhancement. *Id.* at 141. The defendant was sentenced to the mandatory minimum of 180 months' imprisonment—significantly higher

than his Guidelines range would have been without the enhancement. *Id.*

On appeal, the Second Circuit reversed and remanded, holding that "[i]n determining that ACCA predicate offenses were committed on separate occasions, it is plain error for the sentencing court to draw relevant facts from materials that were neither condoned by the Court in *Taylor* or *Shepard* nor determined to be either derived from approved materials or analogs of approved materials."[7] *Id.* at 149. The court of appeals affirmed that the "defendant's failure to object did not cure the Government's failure to submit the proper evidence" in the first instance. *Id.* The defendant's sentence was reduced by 60 months on remand. Amended Judgment, *United States* v. *Dantzler*, No. 1:12-cr-00568 (E.D.N.Y. Aug. 11, 2015), ECF No. 68.

The Eighth Circuit has applied a similar analysis and has seen at least one major sentence reduction as a result. In *United States* v. *Pearson*, the defendant pleaded guilty to possession with intent to distribute five grams or more of cocaine base. 553 F.3d 1183, 1884 (8th Cir. 2009), *overruled on other grounds by United States* v. *Tucker*, 740 F.3d 1177 (8th Cir. 2014). Because of the defendant's prior convictions for escape and possession with intent to distribute more than fifty grams of cocaine base, the district court determined that the defendant was a career offender

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[7] "Where the relevant facts described in a PSR were not derived from sources consistent with *Taylor* and *Shepard*, a sentencing court may not rely upon the PSR in determining whether crimes were committed "on occasions different from one another," even where a defendant does not object to the PSR's factual content about the ACCA predicate offenses, or relies upon such facts in his submissions and argument to the sentencing court." *Id.* at 149-50.

under the Guidelines. *Id.* The district court sentenced the defendant to 188 months' imprisonment. *Id.*

After subsequent legal developments revealed that the escape conviction should not have qualified categorically as a crime of violence, the Eighth Circuit held that the district court erred by failing to apply the modified categorical approach. *Id.* at 1186. Thus, although the defendant failed to object to its characterization as a crime of violence in the first instance, it was plain error "not to consider whether [the defendant's] conviction . . . was a career-offender-qualifying escape from custody, or a non-qualifying failure to return or report to custody." *Id.* On remand for resentencing, the district court reduced the defendant's term of imprisonment by over a decade, to 60 months. Amended Judgment, *United States* v. *Pearson*, No. 4:07-cr-00353-RWS (E.D. Mo. Apr. 8, 2009), ECF No. 63.

The Ninth Circuit has also held that a district court's reliance on the facts set forth in a PSR without proper *Shepard* documents is plain error. In *United States* v. *Castillo-Marin*, the defendant pleaded guilty to being a deported alien found in the United States. 684 F.3d 914, 917 (9th Cir. 2012). The PSR recommended an enhancement because of a prior crime-of-violence conviction, "[a]ttempted [a]ssault 2nd degree," which the PSR described. *Id.* at 917–18. The court relied on this description and sentenced the defendant to 46 months' imprisonment. *Id.* The defendant appealed the judgment, contending that the district court plainly erred when it relied solely on the characterization in the PSR. *Id.* After the Ninth Circuit agreed with the defendant and remanded for resentencing, the district court reduced the defendant's sentence by over two-thirds,

to time already served: 13 months and one day. Amended Judgment, *United States* v. *Castillo-Marin*, No. 2:10-cr-00094-JCM-PAL (D. Nev. Oct. 25, 2012), ECF No. 44.

Finally, the Fifth Circuit's decision in *United States* v. *McCann*, 613 F.3d 486 (5th Cir. 2010) aligns with the cases described above and, similarly, resulted in a significant sentence reduction. There, the defendant was convicted of being a felon in possession of a firearm. *Id.* at 490. Relying solely on the PSR to conclude that one prior conviction was for a crime of violence, the district court imposed a sentence of 100 months. *Id.* Although the defendant failed to object, the Fifth Circuit held that when a court relies on a PSR alone in characterizing a prior conviction as a crime of violence under the modified categorical approach, "it makes an error that is clear and obvious." *Id.* at 502. On remand, the defendant's sentence was reduced by 22 months. Amended Judgment, *United States* v. *McCann*, No. 2:08-cr-00218 (E.D. La. Oct. 7, 2010), ECF No. 97.

In the handful of cases described above, defendants saw their terms of imprisonment reduced by a combined 386 months, or about 77 months per case. At an average cost to house an inmate of over $30,621 per year, those sentence reductions represent a savings to taxpayers of nearly $1 million[8]—to say nothing, of course, of the incalculable benefit of not unfairly sentencing five defendants to an additional three decades behind bars.

If petitioner had been convicted in any of the five circuits discussed above, his sentence would have been vacated on appeal and he would have been

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[8] *See supra Did You Know? Imprisonment Costs 8 times More Than Supervision.*

granted a new sentencing hearing. He was not, and was thus deprived of the chance to get years of his life back. Defendants in the Third, Tenth, and D.C. Circuits face the same outcome. The stark difference in analyzing the type of error at issue in this case has lead to disparate sentences for the same set of facts as a result of to geography. The Court should grant the Petition and unify the law.

CONCLUSION

For the foregoing reasons, *amicus curiae* National Association of Criminal Defense Lawyers requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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