No. 16-237

In the Supreme Court of the United States

WILSON SERRANO-MERCADO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
SCOTT A.C. MEISLER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, on review for plain error, a defendant who challenges the classification of a prior offense as a crime of violence under Sentencing Guidelines § 4B1.2(a) must make some showing that the offense was not, in fact, a crime of violence.

2. Whether assault, in violation of Puerto Rico law, qualifies as a crime of violence under Sentencing Guidelines § 4B1.2(a)(1).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Statutes, guidelines and rule:

In the Supreme Court of the United States

No. 16-237

WILSON SERRANO-MERCADO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 784 F.3d 838.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2015. A petition for rehearing was denied on May 24, 2016 (Pet. App. 65a-76a). The petition for a writ of certiorari was filed on August 22, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Puerto Rico, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). The court sentenced petitioner to 100 months of imprisonment, to

be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-52a.

1. On May 24, 2012, police in Ponce, Puerto Rico, conducted a traffic stop of a car in which petitioner was a passenger. Presentence Investigation Report (PSR) ¶¶ 3-6. During the stop, officers observed petitioner trying to hide something in his pants and asked him to step out of the car. PSR ¶ 6. As petitioner did so, a firearm (later identified as a loaded nine-millimeter Glock pistol with an obliterated serial number) slipped down the leg of his pants and hit the ground. PSR ¶¶ 7-8. Petitioner admitted that he had originally planned to use the gun to "shoot at the police," but said that he had "changed his mind." PSR ¶ 12.

2. A federal grand jury charged petitioner with possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1) (Count 1); possession of a firearm by an unlawful user of a controlled substance, in violation of 18 U.S.C. 922(g)(3) (Count 2); and possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k) (Count 3). D. Ct. Doc. 9, at 1-2 (June 6, 2012). Petitioner entered into a plea agreement under which he agreed to plead guilty to Count 1 in exchange for the dismissal of Counts 2 and 3. D. Ct. Doc. 29, at 1-2, 7 (Nov. 27, 2012).

The United States Sentencing Guidelines state that a defendant convicted of an offense under Section 922(g)(1) is subject to a base offense level of 22 if he possessed a qualifying type of firearm and has one prior conviction for a "crime of violence." Sentencing Guidelines § 2K2.1(a)(3). The base offense level rises to 24 if the defendant has two or more prior convictions for crimes of violence, regardless of the type of

firearm he possessed. Sentencing Guidelines § 2K2.1(a)(2). Under the version of the Guidelines in effect at the time of petitioner's offense, "crime of violence" was defined as an offense 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.

Sentencing Guidelines § 4B1.2(a) (2012). Paragraph (1) is known as the "elements clause," and the latter half of paragraph (2) (beginning with "otherwise") is known as the "residual clause." See *Welch* v. *United States*, 136 S. Ct. 1257, 1261 (2016).[1]

As part of petitioner's plea agreement, the parties proposed a base offense level of 22 under Sentencing Guidelines § 2K2.1(a)(3). D. Ct. Doc. 29, at 4. Petitioner thus implicitly conceded that he possessed a qualifying type of firearm and had one prior conviction for a crime of violence. The government further agreed to recommend a three-level reduction for acceptance of responsibility, resulting in a total offense

---

[1] On August 1, 2016, the United States Sentencing Commission (Commission) amended the "crime of violence" definition in Section 4B1.2(a) to delete the residual clause and the reference to "burglary of a dwelling" in the list of enumerated offenses. 81 Fed. Reg. 4743 (Jan. 27, 2016). The Commission also revised the list of enumerated offenses (and moved enumerated offenses from the commentary to the text) so that the list now includes murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, and certain firearm offenses. *Id.* at 4742.

level of 19. *Ibid.* The parties could not agree on the full extent of petitioner's criminal history, however, and thus the plea agreement did not propose a particular criminal history category or a specific sentencing range. *Ibid.* Petitioner also acknowledged that the district court was not bound to follow "the sentencing calculations and recommendations" contained in the plea agreement and could defer decision on whether to accept his plea until it had reviewed the Probation Office's sentencing recommendations in the PSR. *Id.* at 3.

3. In the PSR, the Probation Office concluded that, in fact, petitioner had at least two prior convictions for crimes of violence and thus was subject to a base offense level of 24 under Sentencing Guidelines § 2K2.1(a)(2). PSR ¶ 20.[2] The Probation Office did not specify which of petitioner's prior convictions qualified as crimes of violence, but it listed (as relevant here) a 2005 conviction for conjugal mistreatment and threat under Article 3.1 of Puerto Rico's domestic-abuse law, P.R. Laws Ann. tit. 8, § 631 (2003); and a 2006 conviction for assault under Article 122 of the Puerto Rico Penal Code, P.R. Laws Ann. tit. 33, § 4750 (Supp. 2006).[3] PSR ¶¶ 29-30. The Probation Office also recommended adding four levels under

---

[2] Although petitioner had implicitly admitted in his plea agreement to possessing a qualifying type of firearm, see D. Ct. Doc. 29, at 4, Sentencing Guidelines § 2K2.1(a)(3), the Probation Office did not include that fact in its Guidelines calculation. Had it done so, petitioner's base offense level would have been 26 under Sentencing Guidelines § 2K2.1(a)(1).

[3] The English-language version of Article 122 is titled "aggravated battery," but the lower courts and the Probation Office described the offense as "assault." See Pet. App. 6a-7a, 59a; PSR ¶ 30. This brief uses that description.

Sentencing Guidelines § 2K2.1(b)(4) because petitioner's firearm had an obliterated serial number. PSR ¶ 21. After subtracting three levels for acceptance of responsibility, the Probation Office calculated a total offense level of 25. PSR ¶ 25. That offense level, when coupled with petitioner's criminal history category of V, yielded an advisory sentencing range of 100 to 125 months of imprisonment. PSR ¶¶ 31, 34.

Petitioner objected to the Probation Office's calculations on the grounds that the offense level was higher than the level proposed in his plea agreement; that the PSR miscalculated his criminal history score; and that the facts of his case did not support an enhancement for an obliterated serial number. D. Ct. Doc. 48, at 1-2 (Mar. 18, 2013). Petitioner did not contend, however, that the Probation Office had erred in treating any of his prior convictions as crimes of violence when calculating the base offense level under Sentencing Guidelines § 2K2.1(a)(2). Indeed, after the Probation Office "explained" to petitioner that his offense level was higher than the level proposed in the plea agreement in part because he "ha[d] two prior criminal convictions for crimes of violence" instead of one, D. Ct. Doc. 48, at 2, petitioner elected not to renew his general objection to the offense level in his sentencing memorandum and focused solely on alleged errors in his criminal history score and the obliterated-serial-number enhancement. See D. Ct. Doc. 49, at 2-5 (Mar. 20, 2013). The district court overruled those objections. D. Ct. Doc. 54, at 1-4 (Apr. 5, 2013).

At sentencing, the district court adopted the Probation Office's recommendations and calculated an advisory sentencing range of 100 to 125 months in prison. Pet. App. 58a-59a. The court noted that peti-

tioner had four prior convictions, "among them, two domestic violence convictions and one assault conviction which meet the guidelines criteria for crimes of violence." *Id.* at 59a. Petitioner did not object to that finding. The court sentenced petitioner to 100 months of imprisonment, to be followed by three years of supervised release. *Id.* at 58a-60a, 63a-64a.

4. The court of appeals affirmed. Pet. App. 1a-27a. As relevant here, petitioner argued on appeal that the district court committed reversible plain error in not applying the "modified categorical approach" to establish whether his 2005 domestic-abuse conviction qualified as a crime of violence. Pet. C.A. Br. 19-30; see Pet. C.A. Reply Br. 3-10. Petitioner did not contend, however, that his offense would not actually have qualified as a crime of violence under that approach, nor did he dispute that his 2006 assault conviction was a crime of violence. Pet. C.A. Br. 22; see Pet. App. 12a (noting the parties' agreement that petitioner's "2006 conviction for assault * * * does count as a conviction for a crime of violence").[4]

a. The court of appeals noted that Puerto Rico's domestic-abuse statute is "divisible" because it "sets out multiple constellations of elements in the alternative," at least one of which "involves the kind of violent force" required to qualify as a crime of violence. Pet. App. 12a-13a, 15a.[5] Under the "modified categor-

---

[4] Petitioner also reasserted his challenge to the Sentencing Guidelines enhancement based on the firearm's obliterated serial number, which the court of appeals rejected. Pet. App. 24a-27a. Petitioner does not renew that argument in his petition for a writ of certiorari. See Pet. 9 n.2.

[5] The statute makes it a crime to "make[] use of physical force or psychological abuse, intimidation, or persecution against the per-

ical approach" set forth in this Court's decisions, a sentencer considering a divisible statute may consult a limited class of documents, such as the indictment or jury instructions, to resolve disputed questions concerning whether the defendant committed a qualifying version of the offense. See *id.* at 10a (citing *Shepard* v. *United States*, 544 U.S. 13, 26 (2005)).

The court of appeals concluded that petitioner had not shown that the district court's failure to apply the modified categorical approach in this case amounted to reversible plain error under Federal Rule of Criminal Procedure 52(b). Pet. App. 14a. The court noted that *Shepard* documents were not consulted or made part of the record because petitioner did not contest the classification of his domestic-abuse conviction as a crime of violence. *Id.* at 13a-14a. "[E]ven assuming the [d]istrict [c]ourt erred in not independently seeking out the records of conviction," *id.* at 21a-22a, and further assuming that the error was "clear and obvious" (a question the First Circuit and other courts of appeals had resolved differently depending on the facts), *id.* at 22a n.6, the court held that petitioner had not satisfied the prejudice requirement of the plain-error standard, *id.* at 20a-24a.

The court of appeals explained that, in the sentencing context, a defendant shows prejudice by establishing "a reasonable probability that, but for the error, the district court would have imposed a different,

---

son of [various domestic relatives] 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." Gov't C.A. Br. Addendum 1-2 (English-language translation of P.R. Laws Ann. tit. 8, § 631 (2003)).

more favorable sentence." Pet. App. 20a (citation omitted). In this case, that rule required petitioner to make some showing that the district court's Sentencing Guidelines calculation was wrong because petitioner's domestic-abuse conviction was for a variant of the "offense that does not qualify as a crime of violence." *Ibid.* The court of appeals noted that petitioner made no attempt to satisfy that burden: he did nothing in the district court to "cast doubt on either the [PSR]'s assertion that the enhancement applied or on [his own] apparent agreement with that assertion," and on appeal, he "still d[id] not assert" that he was convicted of a non-qualifying offense, "nor d[id] he request to supplement the record to include the appropriate documents of conviction on the ground that they would redound to his benefit." *Id.* at 21a. The court thus concluded that, although reversal "might be warranted" "in a related case, involving different facts," *id.* at 23a, petitioner could "not benefit from having left [the court of appeals] completely in the dark" about what the relevant documents would reveal about the basis for his conviction, *id.* at 18a.

In reaching that conclusion, the court of appeals stated that its decision "comport[ed] with" decisions of the Third, Tenth, and D.C. Circuits, but noted that four other courts had "vacated sentences and remanded after finding plain error in arguably analogous circumstances." Pet. App. 22a. The court explained, however, that the latter decisions had remanded without "address[ing] the lack-of-prejudice argument that the other circuits" had relied on and that was "determinative here." *Id.* at 22a-23a.

b. Judge Lipez filed a concurring opinion. Pet. App. 27a-52a. He acknowledged that petitioner's

claim was barred by First Circuit precedent but urged the court of appeals to revisit that precedent en banc. *Id.* at 27a. In Judge Lipez's view, a sentencing court's failure "to require the government to establish the nature of the conviction through approved sources"—even if that issue was undisputed—is a "threshold analytical error" that necessarily results in prejudice to the defendant. *Id.* at 40a. Judge Lipez recognized that his proposed rule would effectively collapse "[a]ll four prongs of the plain error inquiry" into the question of whether a clear error occurred (which, in Judge Lipez's view, would "almost always" be the case "when there are no supporting documents in the record"), thus "allowing the defendant to escape with little disadvantage from his failure to make a timely objection." *Id.* at 41a-42a. Judge Lipez nevertheless thought that result justified by the nature of the "typical remedy" ordered (a remand for resentencing) and "the potentially severe consequences of using prior convictions improperly." *Id.* at 42a.

5. On May 24, 2016, the court of appeals denied petitioner's petition for rehearing en banc. Pet. App. 65a-66a. Judge Lipez filed a statement regarding that order, joined by Judges Torruella and Thompson, in which he asserted that the court of appeals' approach to prejudice had been undermined by this Court's intervening decision in *Molina-Martinez* v. *United States*, 136 S. Ct. 1338 (2016), and that "confusion" among the circuits suggested a "need" for this Court's review. Pet. App. 75a; see *id.* at 66a-72a-73a.

ARGUMENT

Petitioner contends (Pet. 16-34) that review is warranted to resolve a circuit conflict on the prejudice analysis governing plain-error review of challenges to

Sentencing Guidelines enhancements that depend on the modified categorical approach. That contention lacks merit. The court of appeals correctly held that petitioner did not carry his burden of showing that any analytical error would likely have changed the Guidelines calculation and thus affected his substantial rights. Although the court noted some tension among the circuits in applying the prejudice prong of the plain-error standard to analogous sentencing challenges, any such tension is not as clearly defined or as prospectively significant as petitioner asserts, and this case would not be an appropriate vehicle for addressing the issue in any event. The Court has previously denied a petition for a writ of certiorari presenting a similar question and asserting a similar circuit conflict, *Castellanos-Barba* v. *United States*, 132 S. Ct. 1740 (2012) (No. 11-7103), and the same result is warranted here.

Petitioner also contends (Pet. 35-36) that the district court erred in enhancing his advisory Sentencing Guidelines range based on an assault conviction that, according to petitioner, qualified as a crime of violence only under the residual clause of Sentencing Guidelines § 4B1.2(a)(2) (2012), which petitioner argues is unconstitutionally vague under *Johnson* v. *United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*). Although the question whether *Samuel Johnson* extends to the advisory Guidelines is currently before the Court in *Beckles* v. *United States*, cert. granted, No. 15-8544 (oral argument scheduled for Nov. 28, 2016), this petition need not be held pending the decision in that case because petitioner's conviction qualifies as a crime of violence under the elements clause of Section

4B1.2(a)(1), which is not at issue in *Beckles*. The petition should be denied.

1. a. Federal courts typically apply one of two approaches in determining whether a defendant's prior conviction qualifies for a sentencing enhancement. Under the "categorical approach," a court determines whether the statutory definition of the defendant's prior offense satisfies the requirements for the enhancement, without regard to the facts underlying the conviction. See *Taylor* v. *United States*, 495 U.S. 575, 600-602 (1990). When the statute of conviction is "divisible"—that is, when it "sets out one or more elements of the offense in the alternative," and "one alternative" qualifies for an enhancement "but the other * * * does not," *Descamps* v. *United States*, 133 S. Ct. 2276, 2281 (2013)—the sentencing court may apply the "modified categorical approach." That "approach permits sentencing courts to 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." *Ibid.*; see *Shepard* v. *United States*, 544 U.S. 13, 26 (2005) (listing acceptable documents).

In this case, the court of appeals determined that Puerto Rico's domestic-abuse statute does not categorically define a crime of violence because it reaches conduct (*e.g.*, employing "psychological abuse, intimidation, or persecution") that does not involve "physical force" within the meaning of Sentencing Guidelines § 4B1.2(a)(1). Pet. App. 12a-13a; see *id.* at 15a; see also *Johnson* v. *United States*, 559 U.S. 133, 140 (2010) (*Curtis Johnson*) (interpreting identically worded clause in Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i), to require "*violent* force—

that is, force capable of causing physical pain or injury to another person"). The court further concluded that the statute is "divisible" because it "sets out multiple constellations of elements in the alternative." Pet. App. 12a-13a. As a result, petitioner's conviction would qualify as a crime of violence under the modified categorical approach if petitioner was convicted of the physical-force variant of the offense, but not if he was convicted of a version of the "offense that does not require proof of that element." *Id.* at 18a.

Petitioner, however, did not contest the PSR's determination that his prior conviction qualified as a crime of violence, Pet. App. 7a n.2, and thus "neither the probation officer, the government, nor the district court had occasion to seek production of the necessary documents," *United States* v. *Zubia-Torres*, 550 F.3d 1202, 1209 (10th Cir. 2008), cert. denied, 556 U.S. 1201 (2009). The court of appeals thus correctly required petitioner to satisfy the standards for showing plain error to obtain relief on his forfeited claim. See Fed. R. Crim. P. 52(b).

b. To establish reversible plain error, a defendant must demonstrate that (1) the district court committed an "error"; (2) the error was "plain," meaning "clear" or "obvious"; (3) the error "affect[ed] [his] substantial rights"; and (4) the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 732-736 (1993) (citation omitted). "Meeting all four prongs is difficult, 'as it should be.'" *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)).

Petitioner challenges (Pet. 18) only the court of appeals' application of the third plain-error prong. This Court has explained that an effect on substantial rights usually requires "that the error [be] prejudicial," meaning that "[i]t must have affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice" on plain-error review, *ibid.*, and "[w]hen the rights acquired by the defendant relate to sentencing, the outcome he must show to have been affected is his sentence," *Puckett*, 556 U.S. at 142 n.4 (internal quotation marks omitted); see *Dominguez Benitez*, 542 U.S. at 83 (defendant must "satisfy the judgment of the reviewing court * * * that the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding") (citation omitted).

The court of appeals correctly held that petitioner failed to carry his burden of showing an effect on substantial rights because he provided "no basis for concluding it is reasonably probable that" the records of his domestic-abuse offense "would show [that he] was convicted" of a version of the offense "that would not qualify as a crime of violence." Pet. App. 21a. Not only did petitioner fail to submit any records from his state conviction, he did not even "assert" to the court of appeals that his 2005 domestic-abuse conviction had involved the non-qualifying variant of the offense. *Ibid.* Instead, petitioner merely argued "that it cannot be certain on this record whether he was so convicted," *ibid.*, and that a "reasonable probability" existed that his sentence would have been lower if the district court had concluded that his domestic-abuse

conviction was not for a crime of violence and applied a lower base offense level as a result. Pet. C.A. Reply Br. 13 (citation omitted); see Pet. C.A. Br. 30.

Therefore, as the matter stood before the court of appeals, petitioner did not deny that he had been convicted of an offense qualifying as a crime of violence and he did not assert that the government would have been unable to establish that fact by relying on appropriate documents. Rather than attempt to show a "reasonable probability" that he was *not* convicted of a crime of violence, petitioner merely argued that the district court's "lack of proper analysis" affected his substantial rights. Pet. C.A. Reply Br. 13. As Judge Lipez candidly acknowledged, under that position, a district court's failure to apply the modified categorical approach would necessarily affect the defendant's substantial rights regardless of what the relevant documents of conviction would actually show, and thus regardless of whether the court's error actually "affected * * * his sentence." *Puckett*, 556 U.S. at 142 n.4; see Pet. App. 41a-42a (Lipez, J., concurring); *id.* at 70a (Lipez, J., statement regarding denial of rehearing en banc) (opining that "[r]esentencing should virtually always occur in [these] cases"). This Court's decisions do not support that dilution of the prejudice requirement. See *Puckett*, 556 U.S. at 142 (reaffirming, in the sentencing context, "that a defendant normally 'must make a specific showing of prejudice' in order to obtain relief") (quoting *Olano*, 507 U.S. at 735).

c. Petitioner's contrary arguments (Pet. 25-31) lack merit. He contends (Pet. 26, 30-31) that this Court's decision in *Molina-Martinez* v. *United States*, 136 S. Ct. 1338 (2016), undermines the court of ap-

peals' prejudice analysis. That is incorrect. *Molina-Martinez* held that, when a defendant shows that he was "sentenced under an incorrect Guidelines range," that "error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Id.* at 1345. Given the "central role" of the Guidelines in sentencing, the Court explained, a defendant can demonstrate that starting from an erroneous range likely affected his sentence without pointing to "additional evidence" in the record. *Id.* at 1345, 1347.

Petitioner's rule, by contrast, would allow a defendant to establish prejudice without making the very showing—"that the district court used an incorrect [Guidelines] range," 136 S. Ct. at 1346—that was central to this Court's conclusion in *Molina-Martinez*. Petitioner provides no basis for extending the Court's holding to circumstances in which use of an incorrect range has not been established. To the contrary, just as a mistaken criminal-history calculation that has no effect on the ultimate Sentencing Guidelines range is insufficient to demonstrate prejudice under *Molina-Martinez*, see *United States* v. *Kruger*, No. 15-3203, 2016 WL 5799689, at *6 (7th Cir. Oct. 5, 2016), so too is an "analytical error" under the modified categorical approach, Pet. App. 40a (Lipez, J., concurring), that the defendant has not shown to have actually affected the Guidelines calculation.

Petitioner also asserts (Pet. 27-28) that the court of appeals' analysis runs counter to the modified categorical approach's "demand for certainty," *Shepard*, 544 U.S. at 21-22, by denying relief based on "*uncertainty*" in the record, Pet. 27. That is incorrect. At sentencing, the government bears the burden of per-

suasion and loses if it fails to meet it. See *Mathis* v. *United States*, 136 S. Ct. 2243, 2257 (2016). As the court of appeals correctly recognized, however, the burden shifts to the defendant when he forfeits an objection and seeks to establish reversible plain error on appeal. See *Molina-Martinez*, 136 S. Ct. at 1348. The defendant consequently loses when the evidence on the relevant point is "uncertain." *Jones* v. *United States*, 527 U.S. 373, 395 (1999). Far from "turn[ing] the modified categorical approach on its head," Pet. 26, that result makes particular sense in a case, like this one, where the evidentiary gap that causes the uncertainty is directly attributable to the appealing party's failure to object. See Pet. App. 18a.

Finally, petitioner argues (Pet. 30) that a defendant in his position has necessarily established "a 'reasonable probability' of a different outcome" because, of the four possible outcomes of a hypothetical remand to review *Shepard* documents, "three * * * would result in a lower sentencing range." That argument rests on the dubious assumption that each of the four scenarios that petitioner describes is equally probable. Yet petitioner provides no basis for concluding, for example, that the probability that cognizable conviction documents are unavailable equals the probability that they would be available and would prove that petitioner "was convicted of the violent version of the" domestic-abuse offense. Pet. 30. Petitioner's speculation about the outcome of a hypothetical remand, in short, is insufficient to show an effect on his substantial rights. See *Jones*, 527 U.S. at 395 (when the effect of an error is "uncertain," "indeterminate," or requires the court to engage in "speculation," "a defendant cannot meet his burden of showing that the error actually affected his

substantial rights"); see also *United States* v. *Turbides-Leonardo*, 468 F.3d 34, 40 (1st Cir. 2006) ("With no articulation, let alone substantiation, of what the record of conviction might reveal, there is 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 *Shepard* error."), cert. denied, 551 U.S. 1170 (2007).

2. Petitioner contends (Pet. 17-25) that review is warranted to resolve a purported circuit conflict over the application of the plain-error prejudice standard to cases implicating the modified categorical approach. That claim rests on a misreading of circuit decisions, including the decision below.

a. Contrary to petitioner's claim (Pet. 25), the court of appeals did not state that it would never recognize an effect on substantial rights unless a defendant "produce[s] *Shepard* materials on appeal." In concluding that petitioner had not carried his plain-error burden in this case, the court emphasized that petitioner had not sought "to supplement the record to include the appropriate documents of conviction" *and* failed even to "assert [that] he was not convicted under" the qualifying variant of the domestic-abuse statute. Pet. App. 21a. The court noted that it had remanded in other circumstances without requiring a defendant to produce *Shepard* documents, see *id.* at 23a (discussing prior decision in *United States* v. *Torres-Rosario*, 658 F.3d 110 (1st Cir. 2011), cert. denied, 132 S. Ct. 1766 (2012)), and explained that reversal "might be warranted" "in a related case, involving different facts," *ibid.*

That narrow holding does not conflict with the decisions of other circuits that petitioner cites. For

example, in *United States* v. *Bonilla-Mungia*, 422 F.3d 316, cert. denied, 546 U.S. 1070 (2005), the Fifth Circuit considered whether the district court plainly erred in concluding that the defendant's prior conviction for sexual battery under a California statute that "list[ed] three discrete methods of committing" the offense qualified as a "crime of violence." *Id.* at 320; see *id.* at 320 n.5. The court of appeals remanded to the district court for "the Government to supplement the record with documents that might establish which elements [the defendant] pleaded guilty to." *Id.* at 321. The court did so, however, because the defendant asserted not only that the government had not produced documents proving which alternative offense he committed, but also that his conviction was not for a qualifying offense. *Ibid.*; see Br. for Appellant at 11-13 & n.6, *Bonilla-Mungia*, *supra* (No. 03-41751) (arguing that the statutory subsection under which the defendant was convicted did not contain the requisite force element). By contrast, in a plain-error case where the defendant "fail[ed] to argue that his convictions d[id] not constitute crimes of violence," the Fifth Circuit held that the defendant did not meet his burden of proving that any error "affected his substantial rights." *United States* v. *Ochoa-Cruz*, 442 F.3d 865, 867 (2006) (per curiam). Accordingly, in a case like petitioner's where the defendant never denied that he had been convicted of a qualifying offense, the Fifth Circuit reached the same result as the decision below.

Likewise, in *United States* v. *Pearson*, 553 F.3d 1183 (2009), overruled on other grounds, *United States* v. *Tucker*, 740 F.3d 1177 (8th Cir. 2014) (en banc), the Eighth Circuit remanded for the district court to apply the modified categorical approach in

the first instance after an intervening decision of this Court overruled circuit precedent treating the defendant's escape conviction as a categorical crime of violence. *Id.* at 1185-1186. As in *Bonilla-Mungia*, the defendant in *Pearson* argued that his prior conviction was for a non-qualifying offense. *Id.* at 1186 n.3. The *Pearson* court was not presented with a situation where, as here, the defendant claimed reversible plain error based on a district court's failure to consult *Shepard* documents without making any showing, or even arguing, that the challenged sentencing enhancement would have been inapplicable had the court applied the correct legal framework.

The only precedential decision of the Ninth Circuit that petitioner cites—*United States* v. *Castillo-Marin*, 684 F.3d 914 (2012)—does not conflict with the decision below because it arose in a materially different posture. In *Castillo-Marin*, the government did not dispute that the district court had enhanced the defendant's sentence based on a conviction that did not categorically qualify as a crime of violence, and in fact asked the court of appeals to take judicial notice of conviction records so that it could analyze the conviction under the modified categorical approach in the first instance. *Id.* at 922, 925. The court concluded, however, that one of the documents the government submitted was not properly subject to judicial notice and that the other was insufficient to establish the basis for the defendant's prior conviction. *Id.* at 927. Unlike the scenario before the court of appeals here, therefore, the court in *Castillo-Martin* found an effect on substantial rights where the government's own factual proffer called into question whether the con-

viction could qualify for enhancement under the modified categorical approach.

Petitioner notes (Pet. 18-19), and the court of appeals acknowledged (Pet. App. 22a-23a), that the Second Circuit remanded for resentencing under analogous circumstances in *United States* v. *Reyes*, 691 F.3d 453 (2012) (per curiam). But the Second Circuit in *Reyes* stated without further analysis that the error it identified "resulted in an elevated offense level under the Guidelines," *id.* at 460, and therefore it did not consider "the lack-of-prejudice argument that" the court found "determinative here." Pet. App. 22a-23a. Accordingly, *Reyes* did not address the prejudice analysis conducted by the court of appeals in this case and by courts in the other precedential decisions petitioner cites, much less authoritatively reject it. See Pet. 22-24 (citing *Zubia-Torres*, 550 F.3d at 1208-1210 (10th Cir.); *United States* v. *Williams*, 358 F.3d 956, 966-967 (D.C. Cir. 2004)).[6]

---

[6] The decision below does not conflict with *United States* v. *Dantzler*, 771 F.3d 137 (2d Cir. 2014) (cited at Pet. 19), or *United States* v. *Boykin*, 669 F.3d 467 (4th Cir. 2012) (cited at Pet. 22), for a different reason. Those decisions address whether a defendant's prior offenses were "committed on occasions different from one another," as required by the ACCA, 18 U.S.C. 924(e)(1). They do not involve claims of plain error in applying a recidivist enhancement under the categorical approach. Although courts of appeals generally consult *Shepard* documents to determine whether crimes were committed on different occasions for ACCA purposes, see *Dantzler*, 771 F.3d at 145 n.3, that inquiry—under a provision whose language requires at least some consideration of the factual circumstances underlying the prior convictions—remains distinct from the categorical approach's focus on the elements of prior crimes. Cf. *Taylor*, 495 U.S. at 600 (deriving categorical approach in part from ACCA's focus on "a person who . . . has three previous convictions," rather than "a person who has committed" cer-

b. Even if there were tension among the decisions of the courts of appeals, however, it would not present the pressing need for this Court's review that petitioner and his amici assert.

First, the differing remand rulings noted by the court of appeals (Pet. App. 22a-23a) are attributable in part to differences in how appellate panels exercise their discretion, rather than any disagreement over the legal standards for plain error established by this Court's precedents. The courts of appeals agree that a defendant challenging the application of a Guidelines enhancement on plain-error review has the burden of showing a reasonable probability that, absent the error, his sentence would have been different. See, *e.g.*, *Reyes*, 691 F.3d at 457; Pet App. 20a. Yet appellate panels, including panels within the same circuit, have sometimes taken different approaches to evaluating this prong of plain-error review where the record in the district court does not include the relevant judicial documents necessary to establish whether, under the correct legal standard, the enhancement would have applied.[7] Cf. Pet. App. 23a (noting fact-specific nature of remand determination).

---

tain offenses) (citation omitted); *Nijhawan* v. *Holder*, 557 U.S. 29, 38 (2009) (identifying provisions using the term "committed" that called for a "circumstance-specific" rather than categorical approach).

[7] Compare, *e.g.*, *United States* v. *Gonzalez-Jaquez*, 566 F.3d 1250, 1253-1254 (10th Cir. 2009) (affirming sentence without remanding where record did not show particular subsection under which defendant was convicted and defendant "proffered no evidence from which" court could conclude "that his sentence was actually in error"), and *United States* v. *Gonzales*, 484 F.3d 712, 715-716 & n.2 (5th Cir.) (per curiam) (allowing parties to supplement record with indictment and jury instructions from defend-

When presented with an incomplete record on plain-error review, an appellate court's decision whether to take judicial notice of relevant documents, allow the parties to supplement the record on appeal, remand to allow supplementation of the record in the district court, or deny relief is often a case-specific judgment that is based on the nature of the parties' claims, the relief they request, and considerations of judicial economy, informed by the court of appeals' sound discretion. The existence of variations in appellate approaches with respect to this narrow issue does not warrant review. Cf. *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993) (noting that courts of appeals may "vary considerably" in their exercise of supervisory authority).

Second, the plain-error prejudice question at issue arises in a narrow set of circumstances that are unlikely to recur with the same frequency in light of recent decisions of this Court and actions by the United States Sentencing Commission (Commission). Specifically, the question presented arises only when (1) a defendant receives a recidivist-based sentencing enhancement; (2) he fails to argue at sentencing that his prior conviction does not qualify for the enhancement; (3) the court of appeals, addressing the defendant's forfeited claim on appeal, concludes that the relevant

---

ant's prior conviction and finding plain error based on review of those documents), cert. denied, 551 U.S. 1156 (2007), with *Pearson*, 553 F.3d at 1186 (remanding where record on appeal did not permit court of appeals to apply modified categorical approach in first instance), *United States* v. *Gonzalez-Chavez*, 432 F.3d 334, 339 (5th Cir. 2005) (same), and *United States* v. *Pimental-Flores*, 339 F.3d 959, 969 (9th Cir. 2003) (remanding in light of defense counsel's proffer at oral argument that defendant's statute of conviction was not a violent felony).

statute does not qualify categorically but is divisible and therefore subject to the modified categorical approach; and (4) the record does not contain *Shepard* documents that shed light on the nature of the prior conviction.

Since most of the cases cited by petitioner were decided, this Court has invalidated the residual clause in the ACCA, 18 U.S.C. 924(e)(2)(B)(ii), see *Samuel Johnson*, 135 S. Ct. at 2563; the Commission has deleted the identically worded clause in the Guidelines' crime-of-violence definition, 81 Fed. Reg. 4743 (Jan. 27, 2016); and the Commission has amended the heavily litigated illegal-entry guideline—which was at issue in some of the cases petitioner cites as evidence of a conflict, see, *e.g.*, *Castillo-Marin*, 684 F.3d at 923; *Zubia-Torres*, 550 F.3d at 1204; *Bonilla-Mungia*, 422 F.3d at 320—in a manner that substantially reduces the need for application of the categorical and modified categorical approaches.[8] This Court has also issued decisions that further restrict the circumstances in which statutes may be subject to the modified categorical approach in the first place. See *Mathis*, 136 S. Ct. at 2248-2249 (holding that statutes drafted in the alternative are divisible only if the alternatives are elements, not means); *Descamps*, 133 S. Ct. at 2281-2283 (adopting divisibility limitation).

The Eighth Circuit's decision in *Pearson* illustrates the significance of these recent decisions. The court

---

[8] See U.S. Sent. Comm'n, *Amendments to the Sentencing Guidelines* 26 (Apr. 28, 2016), http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160428_RF.pdf ("With respect [to] an offender's prior felony convictions, the amendment eliminates the use of the categorical approach, which has been criticized as cumbersome and overly legalistic.").

in *Pearson* remanded for application of the modified categorical approach after an intervening decision of this Court established that the escape conviction at issue did not categorically qualify as a crime of violence. 553 F.3d at 1186. Following this Court's decision in *Descamps*, however, the Eighth Circuit held that decisions such as *Pearson* had improperly applied the modified categorical approach to statutes that covered multiple types of conduct, as opposed to ones containing alternative elements that effectively create separate crimes. *United States* v. *Tucker*, 740 F.3d 1177, 1184 (2014) (en banc) (overruling *Pearson*). Thus, even apart from the elimination of the residual clause from the crime-of-violence definition, a defendant convicted under a statute such as the one in *Pearson* would now prevail on plain-error review on the threshold ground that the statute is overbroad and indivisible, without any need to inquire into the availability or content of *Shepard* documents. See Pet. App. 14a (explaining that petitioner's burden on plain-error review would "not be so daunting" if his prior conviction were not under "a divisible statute").

3. Even if this Court were inclined to grant review on the first question presented, this case would not be an appropriate vehicle in which to do so, for three reasons.

First, this case reaches the Court in a markedly different posture than other cases in which the Court addressed prejudice in the context of plain (or harmless) error. Those recent cases have come to the Court after a lower court found error or the government expressly conceded such error. See *United States* v. *Molina-Martinez*, 588 Fed. Appx. 333, 334 (5th Cir. 2015) (per curiam) (noting and accepting

government's concession of a plain Sentencing Guidelines calculation error), rev'd, 136 S. Ct. 1338 (2016); see also *United States* v. *Davila*, 133 S. Ct. 2139, 2147-2148 (2014) (noting government's concession of error and finding "no room for doubt on that score"); *Puckett*, 556 U.S. at 140 n.2 (expressing doubt that government had breached plea agreement but noting that government had "conceded the breach" and that Court "analyze[s] the case as it comes to us"); cf. *United States* v. *Marcus*, 560 U.S. 258, 263-264 (2010) (correcting defendant's characterization of the error at issue, but proceeding on the understanding that there did exist a trial "error * * * in th[at] case").

In this case, by contrast, the court of appeals did not decide whether the district court committed an error at all, let alone a "clear and obvious error" that could warrant relief. Pet. App. 22a n.6; see *id.* at 21a-22a. And there are strong indications that no such clear or obvious error occurred. *Shepard* addressed a *contested* district court determination on the classification of the defendant's prior offenses, see 544 U.S. at 16, and it placed limits on "the scope of judicial factfinding on the *disputed* * * * character of a prior" conviction, *id.* at 26 (emphasis added). *Shepard* did not address the government's duty, if any, to find and introduce documents to support a judicial determination about the nature of a defendant's prior conviction where the parties do not dispute that the conviction was for a qualifying predicate offense.

The First Circuit has held that, when "the characterization of an offense contained 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. *Jimenez*, 512 F.3d 1, 7 (2007) (rejecting "claim of *Shepard* error" where defendant did not object to PSR's classification of prior convictions as controlled substance offenses), cert. denied, 553 U.S. 1100 (2008); see *Turbides-Leonardo*, 468 F.3d at 39 (noting that it would be "difficult to find any error" in such circumstances). That approach is consistent with the rules governing sentencing, see Fed. R. Crim. P. 32(i)(3)(A) (permitting district court to "accept any undisputed portion of the presentence report as a finding of fact" without requiring parties to produce evidence to support it), and with decisions of other courts of appeals, see, *e.g.*, *United States* v. *Harris*, 447 F.3d 1300, 1306 (10th Cir. 2006) (defendant's "failure to object to the PSR created a factual basis for the court to enhance his sentence under the ACCA"); cf. *United States* v. *Stafford*, 258 F.3d 465, 475 (6th Cir. 2001) ("[T]he prosecution has no burden to establish at sentencing a factual issue which is not in dispute.") (citation and internal quotation marks omitted), cert. denied, 535 U.S. 1006 (2002).[9]

---

[9] Some circuits have held that a PSR's description of the facts underlying a prior offense, even if uncontested, does not provide a basis for concluding that the offense qualifies for a sentencing enhancement. See, *e.g.*, *United States* v. *Garza-Lopez*, 410 F.3d 268, 273-275 (5th Cir.), cert. denied, 546 U.S. 919 (2005); *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1212-1213 (9th Cir. 2002) (en banc). Those decisions do not necessarily conflict with the approach of the First Circuit and other courts of appeals, which permit district courts to rely on the Probation Office's uncontested conclusion that a prior offense meets the requirements for a relevant enhancement without the need to locate and consult *Shepard* documents, but do not suggest that the underlying facts of the offense are themselves sufficient to support the enhancement. See *Jimenez*, 512 F.3d at 7 (permitting district court to rely on PSR's

It is not, therefore, evident that the district court's failure to request and inspect *Shepard* documents in this case was an error, much less a clear and obvious one. See, *e.g.*, *United States* v. *Ramirez*, 606 F.3d 396, 399 (7th Cir. 2010) (noting that, at most, "a silent record" about a divisible statute "leaves up in the air whether an error has occurred," and "the allocation to [the] defendant of the burdens of production and persuasion" means that a claim of plain error must fail). The existence of these threshold questions makes this case an unsuitable vehicle for reviewing the application of the plain-error prejudice requirement.

Second, this case is an unsuitable vehicle because it involves a claimed error in applying the advisory Sentencing Guidelines. This Court ordinarily does not review decisions interpreting the Guidelines because the Commission can amend the Guidelines and accompanying commentary to eliminate a conflict or correct an error. See *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991). Although the courts of appeals have generally applied the categorical and modified categorical approaches in analyzing whether prior convictions trigger Guidelines enhancements, the Commission is not bound to continue that practice. *Taylor*, *Shepard*, and *Descamps* are all decisions interpreting the ACCA, and *Taylor* relies in significant part on evaluations of congressional intent concerning the sentencing process. 495 U.S. at 600-602.[10] The Com-

---

uncontested "characterization of [the] offense" as a particular type of predicate crime). But even if the circuits did disagree on this point, it would at most indicate the possibility of error; it would not establish that such an error was clear and obvious.

[10] Moreover, in the ACCA context, this Court has emphasized "the categorical approach's Sixth Amendment underpinnings," be-

mission remains free to adopt a different approach. Indeed, as explained, the Commission recently amended one of the Guidelines at issue in some of petitioner's cited cases to substantially reduce the need for courts to apply the categorical and modified categorical approaches, see p. 23 & n.8, *supra*, and has significantly revised the crime-of-violence definition, see p. 3 n.1, *supra*. This Court has never granted plenary review of a question involving the modified categorical approach in a Guidelines case. See *Mathis*, 136 S. Ct. at 2250 (ACCA); *Descamps*, 133 S. Ct. at 2282 (ACCA); *Shepard*, 544 U.S. at 16 (ACCA); see also *United States* v. *Castleman*, 134 S. Ct. 1405, 1414 (2014) (conducting modified categorical analysis under a different federal statute). No reason exists for the Court to deviate from that practice here.

Third, the court of appeals addressed the divisibility of Puerto Rico's domestic-abuse statute in this case before this Court clarified the contours of divisibility analysis in *Mathis*, 136 S. Ct. at 2248-2249. The court of appeals therefore did not "determine whether [the statute's] listed items are elements or means" under the law of the relevant jurisdiction, as *Mathis* requires. *Id.* at 2256. Petitioner does not contest that the domestic-abuse statute is divisible, and thus has waived any challenge to the court's decision under *Mathis*. The likelihood that the First Circuit will revisit the question of the statute's divisibility following *Mathis*, however, is a further reason not to grant

---

cause the prior conviction enhances the statutory maximum or the mandatory minimum sentence. *Descamps*, 133 S. Ct. at 2288. Under *United States* v. *Booker*, 543 U.S. 220 (2005), such constitutional concerns are not presented by the advisory Sentencing Guidelines.

review of petitioner's claim, which depends entirely on a threshold finding of divisibility. Cf. Gov't Surreply Br. at 20-22, *United States* v. *Alvarez-Rodriguez*, No. 15-1816 (1st Cir. filed Sept. 6, 2016) (addressing whether *Mathis* rendered the Puerto Rico domestic-abuse statute "clearly or obviously indivisible" for purposes of plain-error review).

4. Petitioner contends (Pet. 10 n.3, 35-36), for the first time in this Court, that the district court committed an additional error in concluding that his 2006 conviction for assault under Puerto Rico law qualified as a crime of violence. According to petitioner, the only portion of the Sentencing Guidelines' crime-of-violence definition that might support the court's decision is the residual clause in former Sentencing Guidelines § 4B1.2(a)(2) (2012), the constitutionality of which is currently before the Court in *Beckles* v. *United States*, cert. granted, No. 15-8544 (oral argument scheduled for Nov. 28, 2016). Petitioner therefore requests that review of this question be held pending the decision in *Beckles*.

That request should be rejected. First, petitioner did not challenge the classification of his assault conviction in the district court or in the court of appeals, and thus the issue is not properly presented for review. This Court has repeatedly emphasized that it is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), whose "traditional rule * * * precludes a grant of certiorari" on a question that "was not pressed or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). See *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) (declining to review claim "without the benefit of thorough lower court opinions to guide

our analysis of the merits"). Adherence to that rule is particularly appropriate here, where petitioner implicitly acknowledged in his plea agreement and in his plea colloquy that he had at least one prior conviction for a crime of violence and was thus subject to an enhanced base offense level under Sentencing Guidelines § 2K2.1(a)(3). D. Ct. Doc. 29, at 4; D. Ct. Doc. 32, at 5 (Dec. 3, 2012); cf. *Johnson* v. *United States*, 318 U.S. 189, 201 (1943) (noting that a defendant may not "elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him").

Second, and regardless, petitioner's assertion that his assault conviction could only be a crime of violence under the residual clause—a claim that would at most be reviewable for plain error, see *Olano*, 507 U.S. at 733-734—is incorrect. Puerto Rico's assault statute qualifies as a crime of violence under the elements clause of Sentencing Guidelines § 4B1.2(a)(1). As explained above, this Court has interpreted the identically worded elements clause of the ACCA to require "*violent* force—that is, force capable of causing physical pain or injury to another person." *Curtis Johnson*, 559 U.S. at 140. Petitioner's statute of conviction satisfies that test: it requires not only that the offender illegally "inflicts injury to the bodily integrity of another" person, P.R. Laws Ann. tit. 33, § 4749 (Supp. 2006), but also that the injury be serious enough to "require[] medical attention," *id.* § 4750. Acts that cause bodily injury serious enough to require medical attention necessarily involve the use of "*violent* force" under *Curtis Johnson*, 559 U.S. at 140. See *United States* v. *Rice*, 813 F.3d 704, 706 (8th Cir.),

cert. denied, No. 15-9255 (Oct. 3, 2016). Because the elements clause is not at issue in *Beckles*, the Court's decision in that case will not affect the classification of petitioner's crime. See *Samuel Johnson*, 135 S. Ct. at 2563 (invalidation of ACCA's residual clause "does not call into question * * * the remainder of the Act's definition of a violent felony").

Petitioner's only cited authority (Pet. 35 n.4)—the Board of Immigration Appeals' (Board) decision in *In re Guzman-Polanco*, 26 I. & N. Dec. 713 (2016)—did not hold that the assault statute at issue lacks the degree of force required under *Curtis Johnson*. Instead, the Board concluded that a conviction under that statute does not necessarily involve the "use" of violent force, because an offender could theoretically "injur[e] another person through the use of poison." *Id.* at 717-718. But that reasoning is contrary to this Court's decision in *Castleman*, 134 S. Ct. at 1410. Interpreting a statute with an analogous use-of-force provision, *Castleman* concluded that "use of force" includes both the direct and indirect causation of physical harm. *Id.* at 1415. And it explicitly rejected the argument that intentionally poisoning someone does not involve the "use" of force. *Ibid.*[11]

In any event, in light of *Curtis Johnson* and *Castleman*, any error in classifying petitioner's assault

---

[11] In reaching a contrary conclusion, the Board followed the First Circuit's decision in *Whyte* v. *Lynch*, 807 F.3d 463 (2015), which held that a conviction under a Connecticut assault statute did not qualify as a crime of violence under the similar elements clause of 18 U.S.C. 16(a). The First Circuit later explained, however, that it had not considered whether its reasoning was consistent with *Castleman* and declined to do so on rehearing because the argument was waived. *Whyte* v. *Lynch*, 815 F.3d 92, 92-93 (2016).

conviction as a crime of violence would not have been so clear and obvious at the time of petitioner's sentencing or on appeal that the courts below "were derelict in countenancing it, even absent the defendant's timely assistance in detecting it," as would be necessary to satisfy the second prong of plain-error analysis. *United States* v. *Frady*, 456 U.S. 152, 163 (1982). Review of petitioner's second question presented should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
SCOTT A.C. MEISLER
Attorney

NOVEMBER 2016