

No. _____

In the Supreme Court of the United States

Javier Francisco Perez,
Petitioner,

v.

United States of America,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Whenever a probationer or supervised releasee faces revocation, the Guidelines Manual assigns a grade to the violation “conduct.” The violation grade affects the suggested sentencing range, and the applicable policy statement reserves the highest grade for felony “crime[s] of violence” and “controlled substance offense[s].” Does the policy statement’s text require the categorical approach?

PARTIES TO THE PROCEEDING

Petitioner, Javier Perez, was the Defendant-Appellant before the Court of Appeals. Respondent, the United States of America, was Plaintiff-Appellee. No party is a corporation.

RELATED PROCEEDINGS

- *United States v. Javier Francisco Perez*, No. 3:13-CR-173-L, U.S. District Court for the Northern District of Texas. Judgment entered on December 12, 2023.
- *United States v. Javier Francisco Perez*, No. 23-11245, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on October 11, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Javier Francisco Perez seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Fifth Circuit's unreported opinion is reprinted at Pet.App.a1-a2.

JURISDICTION

The Court of Appeals issued its panel opinion on October 11, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

This Petition involves the revocation policy statement in the U.S. Sentencing Guidelines Manual. The policy statement defines "Grade A Violations" as:

[C]onduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years.

U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 7B1.1(a)(1) (Nov. 1, 2023). The policy statement's commentary includes the following rules about violation grading:

The grade of violation does not depend upon the conduct that is the subject of criminal charges or of which the defendant is convicted in a criminal proceeding. Rather, the grade of the violation is to be based on the defendant's actual conduct.

USSG § 7B1.1 cmt. n.1.

STATEMENT OF THE CASE

Upon revocation of supervised release, Mr. Perez received a 30-month term of imprisonment. A petition filed in advance of the revocation hearing identified an alleged assault as a Grade A violation under the Guidelines Manual’s applicable policy statement. The petition classified the alleged assault as a felony “crime of violence,” and the policy statement categorizes such violations as Grade A. Mr. Perez held the government to its burden, and the district court found by a preponderance of the evidence that Mr. Perez had committed the assault alleged in the petition. Based on this finding, the policy statement suggested a term of imprisonment somewhere between 24 and 30 months. The district court imposed a 30-month sentence and repeatedly justified that decision with reference to the Grade A violation.

On appeal, Mr. Perez advanced a plain-error challenge to the district court’s classification of the assault as a “crime of violence.” The Fifth Circuit Court of Appeals had previously held that the assault offense identified in the petition did not have as an element use, attempted use, or threatened use of force and would not otherwise qualify as a “crime of violence” under the Guidelines Manual. *United States v. Greer*, 20 F.4th 1071, 1075 (5th Cir. 2021). Mr. Perez argued that this authority rendered the district court’s error clear and obvious. On substantial rights, Mr. Perez pointed out the district court’s justification of the 30-month sentence with repeated reference to the policy statement’s suggested sentencing range. Had the district court correctly characterized the violation conduct as a

Grade B violation, Mr. Perez pointed out, his suggested range would have been twelve to 18 months.

The Fifth Circuit affirmed the revocation sentence on plain error's second prong. In challenging the district court's classification, Mr. Perez had assumed a categorical comparison between the elements of the assault offense identified in the petition and the elements-based definition for "crime of violence" set out in the Guidelines Manual. Pet.App.a1-a2. The Fifth Circuit, however, had not yet determined whether the policy statement required the categorical approach, and the other circuit courts of appeals had reached conflicting decisions on that point. Pet.App.a2. (citing *United States v. Patel*, 2022 WL 17246941, at *1 n.1 (5th Cir. Nov. 28, 2022)). "Because this circuit's law remains unsettled and other circuits have reached divergent conclusions," the Fifth Circuit reasoned, the error alleged on appeal was neither clear nor obvious. Pet.App.a2 (citing *United States v. Salinas*, 480 F.3d 750, 759 (5th Cir. 2007)).

REASONS FOR GRANTING THIS PETITION

I. This petition presents a circuit split involving an important provision of the Guidelines Manual.

Whenever a probationer or supervised releasee faces revocation, the Guidelines Manual assigns a grade to the violation "conduct." *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 7B1.1(a)(1)-(3) (Nov. 1, 2023). The suggested term of imprisonment depends on the resulting violation grade. USSG § 7B1.4(a). The applicable policy statement defines "Grade A Violations"—the most serious classification—to include any "conduct constituting (A) a federal, state, or local

offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, [or] (ii) is a controlled substance offense.” USSG § 7B1.1(a)(1). The Guideline Manual defines the terms “crime of violence” and “controlled substance offense” with reference to “offense[s] under federal or state law,” USSG § 4B1.2(a)-(b), but the circuit courts of appeals are split over whether the policy statement’s incorporation of these terms requires a categorical analysis in the revocation context.

a. In the First and Ninth Circuits, the violation grade at revocation depends upon a categorical assessment of the defendant’s offense “conduct.”

Two Circuit Courts of Appeals have applied the categorical approach to the Guidelines Manual’s revocation policy statement. In the First Circuit, the violation grade depends upon a categorical comparison between the elements of some identified “crime of violence” or “controlled substance offense” and the defendant’s violation conduct. *United States v. Garcia-Cartagena*, 953 F.3d 14, 21 (1st Cir. 2020). If the defendant’s “actual conduct” establishes the commission of a “covered offense,” the resulting violation is classified as Grade A. *Id.* at 24. The Ninth Circuit has adopted the same approach. There, district courts must first “determine by a preponderance of the evidence that the defendant’s conduct constituted a federal, state, or local offense,” and from there, must use the “categorical approach to determine whether that offense criminalizes the same or less conduct than the federal generic offense” identified in the policy statement. *United States v. Willis*, 795 F.3d 986, 994 (9th Cir. 2015).

This approach is a faithful application of the policy statement's substantive text. The Guidelines Manual defines the terms "crime of violence" and "controlled substance offense" with reference to the elements of statutory crimes, not a defendant's real-world conduct. *See USSG § 4B1.2(a)-(b).* Whether a defendant's violation "conduct constitut[es]" a "crime of violence" or "controlled substance offense" thus depends upon a comparison between elements. The elements underlying the offense the defendant committed are compared to the elements-based definitions from the Guidelines Manual for "crime of violence" and "controlled substance offense." The "conduct constituting" the identified felony offense "is a crime of violence" if the elements line up. *See USSG § 7B1.1(a)(1).* The same is true for "controlled substance offense[s]." *See USSG § 7B1.1(a)(1).*

The policy statement's commentary supports this approach. "[A] mandatory condition of probation and supervised release," the commentary points out, "is that the defendant not commit another federal, state, or local crime." USSG § 7B1.1 cmt. n.1 (citing 18 U.S.C. §§ 3563(a)(1), 3583(d)). "A violation of this condition," the commentary continues, "may be charged whether or not the defendant has been the subject of a separate federal, state, or local prosecution for such conduct." USSG § 7B1.1 cmt. n.1. The commentary specifies that the violation grade "is to be based on the defendant's actual conduct," not "the conduct that is the subject of criminal charges or of which the defendant is convicted in a criminal proceeding." USSG § 7B1.1 cmt. n.1. The reference to "the defendant's actual conduct" is contrasted with "criminal charges" or a conviction, and in context, underscores the categorical

analysis required by the substantive text. The commentary allows district courts to identify an offense the defendant committed based on what the defendant actually did, but whether that offense falls within either category of crimes singled out for Grade A classification under the policy statement still depends on a comparison of elements.

b. In the Second, Seventh, and Eighth Circuits, the violation grade depends upon an assessment of the defendant’s real-world “conduct.”

The Second, Seventh, and Eighth Circuit Courts of Appeals have avoided the categorical analysis required by the policy statement’s substantive text. In *United States v. Cawley*, the Second Circuit directly compared the defendant’s conduct to the Guidelines Manual’s definition for the term “crime of violence” but without addressing the applicable policy statement’s substantive text or commentary. *See* 48 F.3d 90, 93 (2d Cir. 1995). The Seventh and Eighth Circuits, by contrast, have blessed the same comparison by elevating the commentary’s final sentence to supreme importance. After a defendant advanced a categorical argument about whether a battery committed while under supervision qualified as a “crime of violence,” the Seventh Circuit declared “that approach . . . squarely foreclosed . . . by the Guidelines themselves.” *United States v. Golden*, 843 F.3d 1162, 1166 (7th Cir. 2016). For support, it cited the commentary’s reference to “the defendant’s actual conduct.” *Id.* (quoting USSG § 7B1.1 cmt. n.1). In an unpublished opinion, the Eighth Circuit did the same to support a direct comparison between the defendant’s real-world conduct and the Guidelines Manual’s definition for the term “crime of

violence.” *United States v. Pitts*, 739 F. App’x 353, 355 (8th Cir. 2018) (quoting USSG § 7B1.1 cmt. n.1).

II. The Court should grant this petition and resolve the circuit split.

This petition provides the Court with an opportunity to resolve a pending circuit split on an important question of federal law. The disputed policy statement applies at every revocation hearing, USSG § 7B1.1(a), and the resulting violation grade affects the suggested sentencing range, USSG § 7B1.4(a). The policy statement’s plain text necessitates an apples-to-apples comparison between the elements of an identified offense and the elements-based definition from the Guidelines Manual for the terms “crime of violence” and “controlled substance offense.” The commentary appropriately focuses the district court’s attention on the crime the defendant actually committed, rather than the charges the defendant faced, but the ultimate analysis remains categorical. The First and Ninth Circuits have faithfully applied the policy statement’s substantive text and have relied on the available context to harmonize the text and commentary. The Second, Seventh, and Ninth Circuits have overlooked the plain meaning of the substantive text and divorced the commentary’s guidance from the surrounding context to arrive at a conflicting rule.

This Court should step in and resolve the split. Doing so would regularize the interpretation of a policy statement applied at every federal revocation hearing, and a faithful interpretation of the policy statement’s text would simplify revocation proceedings by requiring the familiar comparison between readily available

elements. By contrast, the apples-to-oranges comparison now required in the Second, Seventh, and Eighth Circuits incentivizes complex litigation about a defendant’s real-world conduct. That approach finds no support in the policy statement’s text and depends upon a misreading of the relevant commentary.

This petition provides an excellent vehicle to resolve the pending circuit split. Mr. Perez lost at the Fifth Circuit based on the uncertain state of the law, and an opinion from this Court in his favor would render the error alleged on appeal clear and obvious. This Court could then remand to allow the Fifth Circuit an opportunity to decide the third and fourth prongs of plain-error review in the first instance. Mr. Perez also received a lengthy revocation sentence, which he will not discharge until January 7, 2026. That should provide this Court enough time to grant the petition and resolve the case on the merits before Mr. Perez’s release from imprisonment.

CONCLUSION

Petitioner respectfully submits that this Court should grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted January 8, 2025.

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