

No. 17-7137

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL MONTEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court plainly erred in relying on the Probation Office's uncontested determination that petitioner's prior conviction for aggravated battery of a police officer, in violation of 720 Ill. Comp. Stat. Ann. § 5/12-4(b)(18) (West Supp. 2005), qualified as a "crime of violence" under Sentencing Guidelines § 4B1.2(a) (2013).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 858 F.3d 1085.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2017. A petition for rehearing was denied on July 18, 2017 (Pet. App. 14a-15a). On September 25, 2017, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including November 17, 2017. On October 27, 2017, Justice Kagan further extended the time to December 15, 2017, and the

petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). The district court sentenced petitioner to 210 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-13a.

1. Petitioner was a drug distributor for a large cocaine trafficking organization in Illinois. Pet. App. 2a-3a; see Presentence Investigation Report (PSR) ¶¶ 9-17. A federal grand jury indicted petitioner on three counts of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a. A jury found petitioner guilty on one of those counts. Id. at 3a; see Judgment 1.

2. In its presentence report, the Probation Office determined that petitioner had at least two prior convictions for "crime[s] of violence" under Sentencing Guidelines § 4B1.2(a) (2013), and that he therefore qualified as a "career offender" subject to an enhanced sentencing range under Sentencing Guidelines § 4B1.1 (2013). Pet. App. 10a; see PSR ¶ 29. Specifically, the Probation Office counted as crimes of violence petitioner's prior convictions in Illinois for murder and for

aggravated battery of a police officer. Pet. App. 10a; see PSR ¶¶ 29, 41, 48. With the career-offender enhancement, petitioner's Guidelines offense level was 32 and his criminal history category was VI, resulting in an advisory sentencing range of 210 to 240 months of imprisonment. Pet. App. 3a; see PSR ¶¶ 29, 53, 91.¹

Petitioner committed his aggravated battery offense in 2006. PSR ¶ 48. At that time, Illinois defined "aggravated battery" to include any "battery" knowingly committed against "an officer or employee of the State of Illinois [or] a unit of local government" while the victim was "engaged in the performance of his or her authorized duties." 720 Ill. Comp. Stat. Ann. § 5/12-4(b)(18) (West Supp. 2005); see Pet. App. 11a.² Illinois defined "battery" as knowingly or intentionally "(1) caus[ing] bodily harm to an individual or (2) mak[ing] physical contact of an insulting or provoking nature with an individual" without legal justification. 720 Ill. Comp. Stat. Ann. § 5/12-3(a) (West Supp. 2005); see Pet. App. 11a. Although the Probation Office did not obtain court documents indicating which type of battery petitioner had committed, it noted in the PSR that the arrest report indicated

¹ Without the career-offender enhancement, petitioner's offense level would have been 26 and his criminal history category would have been VI, see PSR ¶¶ 28, 52, resulting in an advisory sentencing range of 120 to 150 months of imprisonment, see Sentencing Guidelines Ch. 5, Pt. A (2013).

² The current version of the statute contains a substantially similar provision. See 720 Ill. Comp. Stat. Ann. § 5/12-3.05 (West 2016).

that petitioner led police on a vehicle chase, "refused to exit his vehicle" once he was finally stopped, and resisted officers' attempts to remove him by "kick[ing] an officer in the chest several times and once in the face, causing bruising and swelling." PSR ¶ 48. In an interview with the Probation Office, petitioner denied having committed the offense, ibid., but he did not object to the presentence report's description of the offense or to the Probation Office's determination that he was convicted of a version of aggravated battery that qualified as a "crime of violence" under Sentencing Guidelines § 4B1.2(a) (2013). Pet. App. 12a; see D. Ct. Doc. 938, at 1-3, 7 (Sept. 26, 2014) (Sent. Mem.).

Petitioner represented himself at sentencing and objected to treating his murder conviction as a predicate offense for purposes of the career-offender enhancement. Pet. App. 47a-48a. The district court overruled that objection. Id. at 49a. Petitioner did not otherwise object to his classification as a career offender. After considering the presentence report and the parties' arguments, the court adopted the presentence report's proposed Guidelines calculations. Id. at 61a.

The district court then considered the relevant statutory sentencing factors in order to determine the appropriate sentence. Pet. App. 61a-64a. The court noted that petitioner had a long history of drug trafficking and had committed "some of the most serious offenses a person can commit," including "murder, attempted murder, possession of controlled substances, battery,

aggravated battery of a police officer[,] and even * * * threatening a witness in a legal proceeding." Id. at 62a. The court observed that, despite having served "substantial periods of incarceration" in the past, petitioner had continued to commit serious crimes and had demonstrated a persistent "lack of concern for the harm and violence associated" with his activities, including by "totally refus[ing] to accept any responsibility" for his conduct in this case. Id. at 62a-63a. The court deemed it "clear" from the record that "deterrence is the most important factor in this case," and concluded that, given the "very small likelihood of any future rehabilitation," a lengthy prison sentence was needed to prevent petitioner from committing further crimes. Id. at 62a. The court therefore sentenced petitioner to 210 months of imprisonment. Id. at 64a.

3. The court of appeals affirmed. Pet. App. 1a-13a. Petitioner argued for the first time on appeal that his conviction for aggravated battery was not a "crime of violence" for purposes of the career-offender guideline because it did not categorically have "as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(a)(1) (2013); see Pet. C.A. Br. 25-33. Petitioner asserted that the Illinois aggravated-battery statute in force at the time of his offense was categorically overbroad because it incorporated the definition of simple battery, which covered both physical contact causing bodily harm and physical

contact that was merely insulting or provocative. Pet. C.A. Br. 32-33. Petitioner further argued that the statute was not divisible into separate offenses under the principles of Mathis v. United States, 136 S. Ct. 2243 (2016), and even if it was divisible, the Probation Office had improperly relied on an arrest report to conclude that he was convicted of a qualifying version of the offense. Pet. C.A. Br. 29-32.

The court of appeals rejected petitioner's arguments. Pet. App. 11a-12a. The court noted that, under its precedent, Illinois's battery statute "is divisible" and a "violation of the first clause (the bodily harm clause) is a crime of violence." Id. at 11a (citing cases). The court therefore determined that, "if [petitioner] was convicted under the statute's first clause," his classification as a career offender under Section § 4B1.1 "was proper." Id. at 11a-12a.

The court of appeals also rejected petitioner's assertion that the district court committed reversible error by adopting the presentence report's determination that his aggravated-battery conviction was based on the statute's "bodily harm" provision without requiring the government to introduce judicial documents, such as the indictment or plea colloquy, to support that conclusion. Pet. App. 12a. The court of appeals acknowledged that, under Shepard v. United States, 544 U.S. 13 (2005), a court's inquiry into whether a defendant committed a qualifying offense under a divisible statute is generally limited to "(1) admissions

made by the defendant, and (2) the charging document, plea agreement, plea colloquy, and comparable judicial records from the conviction.” Pet. App. 12a (quoting United States v. Rodriguez-Gomez, 608 F.3d 969, 973 (7th Cir. 2010)). The court explained, however, that the government has “no reason to go digging for a state-court indictment” or comparable judicial record “if the parties agree on what it says.” Ibid. (quoting United States v. Aviles-Solarzano, 623 F.3d 470, 475 (7th Cir. 2010)). In that circumstance, the court reasoned, it “isn’t error” for a district court to rely on “uncontested findings in the presentence report” that a prior offense qualified as a crime of violence. Ibid.

The court of appeals noted that, in this case, petitioner “did not contest the facts contained in the presentence report” or the Probation Office’s determination that he “was indeed convicted under the * * * bodily harm clause” of Illinois’s aggravated-battery statute. Pet. App. 12a. In light of petitioner’s failure to contest the presentence report’s findings, the court determined that the district court was not obligated to require the government to supplement those findings with Shepard documents before “applying the career-offender enhancement.” Ibid.

ARGUMENT

Petitioner contends (Pet. 15-17) that the district court erred in relying on the presentence report’s uncontested finding that his aggravated-battery offense qualified as a “crime of violence” under Sentencing Guidelines § 4B1.2(a) (2013), without

requiring the government to produce documents identified in Shepard v. United States, 544 U.S. 13 (2005), to support that finding. Although he acknowledges (Pet. 18) that he did not preserve that claim at sentencing, and thus review is limited to plain error, he argues (Pet. 15) that the court of appeals "effectively eliminat[ed] plain error review" of his claim by holding that the district court's reliance on the presentence report in this context was not erroneous. Review of his claim is not warranted. Petitioner cannot satisfy any prong of the plain-error standard, and contrary to his assertion (Pet. 8-15), no other court of appeals would necessarily afford relief in the circumstances here. Moreover, this case is a poor vehicle for reviewing the question presented because it involves the application of a provision of the advisory Sentencing Guidelines that can be (and recently has been) revised by the United States Sentencing Commission (Commission). The petition for a writ of certiorari should be denied.

1. 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) (citations omitted). Petitioner cannot satisfy any of those requirements on the facts of this case.

a. As the court of appeals correctly determined (Pet. App. 12a), the district court did not err in relying on the Probation Office's undisputed finding that petitioner was convicted of a version of aggravated battery that qualified as a "crime of violence" under the Guidelines.

Under the "categorical approach," a court determines whether the statutory definition of a defendant's prior offense satisfies the requirements for a sentencing 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, 570 U.S. 254, 257 (2013) -- the sentencing court may apply the "modified categorical approach." See Mathis v. United States, 136 S. Ct. 2243, 2249 (2016). 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." Descamps, 570 U.S. at 257; see Shepard, 544 U.S. at 26 (listing acceptable documents).

Petitioner does not dispute the court of appeals' determination that the Illinois aggravated-battery statute at issue here was divisible into two offenses. Pet. App. 11a. That statute required proof that the defendant knowingly committed a

"battery" against a state or local "officer" who was "engaged in the performance of his or her authorized duties." 720 Ill. Comp. Stat. Ann. § 5/12-4(b)(18) (West Supp. 2005). Illinois law defined "battery" to include two alternative offenses with different elements: "(1) caus[ing] bodily harm to an individual or (2) mak[ing] physical contact of an insulting or provoking nature with an individual." Id. § 5/12-3(a) (West Supp. 2005). The court of appeals found, and petitioner does not contest, that the "bodily harm" provision is divisible from the "physical contact" provision, and that the former qualifies as a "crime of violence" under the Guidelines because it "has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(a)(1) (2013); see Pet. App. 10a-11a.

The court of appeals acknowledged that, "[g]enerally," the determination of whether a defendant was convicted of a qualifying version of a divisible offense requires a court to consult the indictment, plea agreement, or other judicial documents identified in Shepard. Pet. App. 12a. Here, however, petitioner "did not contest" that he was convicted of committing the violent version of aggravated battery and that his offense therefore qualified as a "crime of violence" under the Guidelines. Ibid. In light of "the parties['] agree[ment]" on that point, the court of appeals concluded that neither the district court nor the government had

any “reason to go digging for a state-court indictment” or other Shepard documents. Ibid. (citation omitted).

That conclusion is correct. When a defendant does not contest the presentence report’s determination that a prior conviction supports a sentencing enhancement, “neither the probation officer, the government, nor the district court ha[s] 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). That rule is consistent with the “adversarial testing contemplated by federal sentencing procedure,” Rita v. United States, 551 U.S. 338, 351 (2007), which focuses judicial resources on the issues that are in dispute while permitting the efficient resolution of those that are not. The Federal Rules of Criminal Procedure require defendants to object to aspects of the presentence report with which they disagree, Fed. R. Crim. P. 32(f), and provide that a sentencing court must resolve “any disputed portion of the presentence report or other controverted matter” at sentencing, Fed. R. Crim. P. 32(i)(3)(B). The court may, however, “accept any undisputed portion of the presentence report as a finding of fact,” without requiring further evidence or justification. Fed. R. Crim. P. 32(i)(3)(A) (emphasis added).

Shepard is not an exception to that general rule. That decision addressed only contested district court determinations that a prior conviction qualified as a particular type of offense, and placed limits on “the scope of judicial factfinding on the

disputed generic character of a prior plea.” 544 U.S. at 26 (emphasis added). Shepard did not purport to require the government to find and introduce record documents to support a judicial determination as to the nature of a defendant’s conviction when a defendant acknowledges that the conviction qualifies him for a sentencing enhancement.

b. Even if the district court erred in not requiring the production of Shepard documents in this case, the error would not be reversible under the other prongs of the plain-error standard. The court’s approach was supported by Seventh Circuit precedent. Pet. App. 12a (citing United States v. Aviles-Solarzano, 623 F.3d 470, 475 (7th Cir. 2010)). Petitioner acknowledges (Pet. 11-14) that the law in other circuits is in accord. Under those circumstances, petitioner cannot establish that any error was so clear and obvious at the time of his 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).

Petitioner also has not demonstrated an effect on his substantial rights under the third plain-error prong. 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 v. United States, 556 U.S. 129, 142 n.4 (2009) (internal quotation marks omitted).

Petitioner has not produced any Shepard documents related to his prior conviction, nor has he asserted that those documents would show that his classification as a career offender was erroneous. Because petitioner has failed to show that his Guidelines calculation was actually wrong, he has failed to “make [the] specific showing of prejudice” necessary to obtain relief on plain-error review. Puckett, 556 U.S. at 142 (citation omitted); see Molina-Martinez v. United States, 136 S. Ct. 1338, 1345 (2016) (holding that a Guidelines error presumptively satisfies the third prong only if the defendant shows that he was “sentenced under an incorrect Guidelines range”). At most, a “silent record” on what Shepard documents would show “leaves up in the air whether an error has occurred,” and “the allocation to [the] defendant of the burdens of production and persuasion” under the plain-error standard means that a claim of plain error must fail in that circumstance. United States v. Ramirez, 606 F.3d 396, 399 (7th Cir. 2010). 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.

Finally, petitioner cannot show that any error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.” Olano, 507 U.S. at 736 (citation omitted). That prong of the plain-error standard authorizes a reviewing court to exercise its discretion to correct only “egregious errors,” United States v. Young, 470 U.S. 1, 15 (1985) (citation omitted), and must be applied on “a case-specific and fact-intensive basis,” Puckett, 556 U.S. at 142. The district court explained that a 210-month sentence was warranted for a number of reasons unrelated to the Guidelines calculation, including petitioner’s long and serious criminal history (including incidents where petitioner used a shotgun to murder a man in a drive-by shooting, kidnapped a man at gunpoint and punched him in the face with brass knuckles, kicked a police officer in the chest and face while resisting arrest, and told a witness that he would “kill [her] or get someone to kill [her] and [her] family,” PSR ¶¶ 41, 46, 48, 50); his failure to be rehabilitated despite “substantial periods of incarceration” in the past; his “total[] refus[al] to accept any responsibility” for his actions; and the “clear” need for deterrence, which the court viewed as “the most important [sentencing] factor in this case.” Pet. App. 62a-63a.

2. Petitioner does not assert in his petition that he could satisfy the plain-error standard. Instead, he contends (Pet. 15) that, by permitting the district court to accept the Probation Office’s uncontested finding that his prior conviction was a crime

of violence without requiring the production of Shepard documents, the court of appeals “pervert[ed] traditional waiver doctrine and effectively eliminat[ed] plain error review of Shepard’s constitutional protections.” That contention lacks merit.

As petitioner acknowledges (Pet. 16), the court of appeals “did not explicitly rule that [he] ‘waived’ his right to challenge the district court’s [alleged] Shepard violation.” Rather, the court reasoned that district courts are entitled to treat uncontested issues at sentencing differently from contested ones, and it “isn’t error” for a court to adopt an uncontested finding in the presentence report without requiring the government to submit the type of proof that would be necessary if the matter were contested. Pet. App. 12a. The determination that no error occurs in those circumstances is entirely consistent with the plain-error standard, which requires a defendant to establish at the threshold “that there indeed [was] an ‘error’” under the applicable standard of review. Olano, 507 U.S. at 732. The court of appeals’ decision no more “eliminat[es] plain error review,” Pet. 15, than any other decision that rejects a claim of plain error under the first prong of that standard. See, e.g., United States v. Wesley, 81 F.3d 482, 483 (4th Cir. 1996) (explaining that, where a sentencing determination is “not error at all,” it is “a fortiori not plain error”).

Petitioner further contends (Pet. 5, 17) that he gave the Probation Office a different account of the events underlying his

aggravated-battery conviction. See PSR ¶ 48 (noting petitioner's unsupported claim that he was framed for aggravated battery by a corrupt police officer and that he pleaded guilty to that offense because the judge "offered him leniency"). He argues (Pet. 18) that a remand for further "consideration of the plain error standard" would be "likely to lead to proper consideration of whether" those statements constituted "a reasonably well-understood objection in the first instance." That factbound contention does not warrant review.

To the extent petitioner is suggesting that his prior statements to the Probation Office should have been construed as an objection to classifying his aggravated-battery offense as a crime of violence, he is incorrect. As petitioner acknowledges (Pet. 17), he made those statements in an interview with a probation officer "before the Probation Office completed the PSR," and they were incorporated in the presentence report. Petitioner, in both his counseled and pro se submissions after reviewing the report, never objected to the Probation Office's description of his offense or, more importantly, its determination that the offense qualified as a crime of violence. And petitioner's statements to the Probation Office would not undermine that determination even if they were taken into account. Petitioner did not deny the nature of the charges or the conviction itself; instead, he simply denied culpability and suggested that his guilty plea had been strategic. PSR ¶ 48.

In any event, petitioner did not make this argument in the district court or in the court of appeals. It is not, therefore, presented for review. See United States v. Williams, 504 U.S. 36, 41 (1992) (noting this Court's "traditional rule" precluding review of issues that were "not pressed or passed upon below") (citation omitted); see also Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

3. Petitioner contends (Pet. 8-15) that the courts of appeals have adopted varying approaches to the question of whether sentencing courts may rely on a presentence report's uncontested determination that a prior conviction warrants a sentencing enhancement without requiring sua sponte that the government produce Shepard documents to support that determination. This Court has previously denied review in cases presenting similar questions and asserting a similar circuit conflict. See, e.g., Serrano-Mercado v. United States, 137 S. Ct. 812 (2017) (No. 16-237); Castellanos-Barba v. United States, 565 U.S. 1263 (2012) (No. 11-7103); Barrett v. United States, 558 U.S. 992 (2009) (No. 09-5016). The same result is appropriate here.

Some courts of appeals, like the court below, have held that a district court may appropriately rely on a presentence report's uncontested classification of a prior conviction for sentence-enhancement purposes. See, e.g., United States v. Siegel, 477 F.3d 87, 93-94 (3d Cir.) (crime of violence under Guidelines), cert. denied, 550 U.S. 951 (2007); United States v. Bennett, 472

F.3d 825, 833-834 (11th Cir. 2006) (per curiam) (violent felony under Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)). Other courts, addressing the issue in the context of plain-error review, have concluded that a district court's failure to consult Shepard documents in that circumstance is not reversible error where, as here, the defendant does not demonstrate that those documents would support a finding that the conviction was not for a qualifying offense. See, e.g., United States v. Serrano-Mercado, 784 F.3d 838, 847-848 (1st Cir. 2015), cert. denied, 137 S. Ct. 812 (2017); Zubia-Torres, 550 F.3d at 1209-1210 (10th Cir.); United States v. Ochoa-Cruz, 442 F.3d 865, 867 (5th Cir. 2006) (per curiam); United States v. Williams, 358 F.3d 956, 966-967 (D.C. Cir. 2004). Far from "turn[ing] [Shepard] on its head," Pet. 12, those decisions appropriately recognize that the plain-error standard -- which petitioner acknowledges is applicable here, Pet. 18 -- places the burden on the defendant to show that a sentencing enhancement was actually erroneous and prejudicial.

Although decisions of some other courts of appeals are in tension with the reasoning of the court below, none would require relief on the facts of this case. In United States v. McCann, 613 F.3d 486 (2010), for example, the Fifth Circuit held that the district court erred by relying on an uncontested factual summary in the presentence report to support a Guidelines sentencing enhancement, id. at 502, and it granted relief under the plain-error standard based on the government's acknowledgment that all

of the relevant Shepard documents had been destroyed before the defendant's sentencing, which the court viewed as effectively a concession that his prior offense could not support the enhancement as a categorical matter, id. at 503. In the absence of such a concession in this case, however, the Fifth Circuit would likely deny relief in light of petitioner's failure to establish "that the crime of violence enhancement was ultimately wrong." Ochoa-Cruz, 442 F.3d at 867.

The Ninth Circuit's decision in United States v. Castillo-Marin, 684 F.3d 914 (2012), likewise presented circumstances different from those here. In that case, 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 of appeals 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 in this case, therefore, the court in Castillo-Martin found that the defendant was entitled to relief on plain-error review where the government's own factual proffer called into question whether the conviction could qualify for enhancement under the modified categorical approach.

The other decisions on which petitioner relies likewise present no conflict that might warrant this Court's review. The decisions in United States v. Dantzler, 771 F.3d 137 (2d Cir. 2014), and United States v. Boykin, 669 F.3d 467 (4th Cir. 2012), address whether a defendant's prior offenses were "committed on occasions different from one another," as required by the sentence-enhancement provisions of the ACCA, 18 U.S.C. 924(e)(1). Neither involves a claim of plain error in applying a recidivist enhancement under the modified categorical approach, and a court would not be obligated to handle the two situations in identical ways.³ And to the extent intracircuit disagreements exist in the Sixth Circuit and Eighth Circuit about the correct approach to district courts' reliance on uncontested findings in presentence reports, see Pet. 14-15, those courts are better positioned to resolve any inconsistency. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

³ The Second Circuit has held, in a case petitioner does not cite, that a district court may not rely on uncontested findings in a presentence report to support a career-offender enhancement under the Guidelines. See United States v. Reyes, 691 F.3d 453, 458-459 (2012) (per curiam). The court in Reyes, however, granted relief based on a summary finding, without further analysis, that the error it identified "resulted in an elevated offense level under the Guidelines." Id. at 460. Accordingly, Reyes did not address the prejudice analysis conducted by other courts of appeals in the plain-error context, much less authoritatively determine that a defendant like petitioner would be entitled to relief in such circumstances.

Given the plain-error posture of petitioner's case, and his failure to demonstrate that his classification as a career offender was actually incorrect, petitioner cannot show that he would be afforded relief by any other court of appeals. His claim of a circuit conflict therefore does not warrant review.

4. Even if this Court were inclined to review the question presented, it should not do so in the context of this case, which involves only 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 warrant Guidelines enhancements, the Commission is not bound to continue that practice. Taylor and Shepard are decisions interpreting the ACCA, and Taylor relies in significant part on evaluations of congressional intent concerning the sentencing process in that context. 495 U.S. at 600-602. The Commission remains free to adopt a different approach under the Guidelines.

Indeed, the Commission recently amended the heavily litigated illegal-entry guideline -- which was at issue in one of the cases petitioner cites as evidence of a conflict, see Castillo-Marin, 684 F.3d at 919-920 -- in a manner that substantially reduces the

need for courts to apply the categorical and modified categorical approaches. See Sentencing Guidelines App. C, Amend. 802 (Nov. 1, 2016) (amending Section § 2L1.2). The Commission has also significantly revised the crime-of-violence definition in Section 4B1.2(a), deleting the “residual clause” of that definition and the reference to “burglary of a dwelling” in the list of enumerated offenses and moving the list of enumerated offenses from the commentary to the text. See id. Amend. 798 (Aug. 1, 2016).

This Court has never granted plenary review of a question involving the modified categorical approach in a Guidelines case. See, e.g., Mathis, 136 S. Ct. at 2250 (ACCA); Descamps, 570 U.S. at 258 (ACCA); Shepard, 544 U.S. at 16 (ACCA); cf. 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.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2018