No. 16-1188

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	) Appeal from the United States
	) District Court for the Northern District
Plaintiff–Appellee,	) of Illinois, Eastern Division
v.	)
	) Case No. 1:12-CR-0755-8
DANIEL MONTEZ,	)
	)
Defendant–Appellant.	) Hon. Ronald A. Guzman

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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DISCLOSURE STATEMENT

I, the undersigned counsel for the Defendant-Appellant, Daniel Montez, furnish the following list in compliance with Fed. R. App. P. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case:
DANIEL MONTEZ.

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court:

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4. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear in this Court:

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Dated: July 6, 2017

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Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF REASONS FOR REHEARING

Panel rehearing is warranted to correct a factual misinterpretation of the record. The panel ignored that Montez challenged—in the PSR—the version of the crime that the probation officer extracted from a police report in order to count it as a crime of violence. As a result, the panel incorrectly concluded that Montez "did not contest the facts contained in the [PSR]," and further erred in deeming Montez's failure to raise the issue anew during the sentencing hearing as an admission to the crime-of-violence conviction, precluding plain-error review on appeal. *United States v. Montez*, No. 16-1188, slip op. at *12 (7th Cir. 2017).

Additionally, en banc review is warranted for three reasons. First, the panel's decision is contrary to Supreme Court precedent in *Shepard v. United States*, 544 U.S. 13 (2005). Specifically, the panel has for the first time blessed the reliance on a police report to support a career-offender enhancement—a mistake that nearly mirrors what led the Supreme Court to reverse the First Circuit in *Shepard*.

Second, the panel's decision places this Court at odds with the Second, Fourth, Fifth and Ninth Circuits, which all hold that plain-error review is available to a defendant on appeal when he is sentenced as a career offender in the absence of proper *Shepard* documents. Third, the panel decision is inconsistent with this Court's own precedent because it at once glosses over the firmly established fact that crimes of violence must be proven with prior judicial records of "conclusive significance," *Kirkland v. United States*, 687 F.3d 878 (7th Cir. 2012); *United States v. Ngo*, 406 F.3d 839 (7th Cir. 2005), while simultaneously extending what constitutes a judicial admission to a negligent failure, rather than a knowing and intentional act, *United States v. Jaimes-Jaimes*, 406 F.3d 845, 848 (7th Cir. 2005). Montez therefore respectfully requests rehearing or rehearing en banc to maintain uniformity of this Court's decisions, to explicitly

delineate its position within the circuit split, and to address this question of exceptional importance under Rule 35 of the Federal Rules of Appellate Procedure.

BACKGROUND

Following a trial where the jury acquitted him of two of three charges of possession with intent to distribute cocaine, the district court sentenced Daniel Montez to 210 months' imprisonment on the remaining single count. (Sentencing Tr. 49.) The government sought, and the district court assigned, Montez career-offender status under U.S.S.G § 4B1.1, (Sentencing Tr. 33–34); without that enhancement, Montez's sentencing range could have been as low as 30 to 37 months. Specifically, the government posited that a 1984 attempted murder conviction and a 2006 aggravated battery conviction qualified as crimes of violence for purposes of the enhancement. (Sentencing Tr. 33.)

During sentencing, Montez, who appeared pro se (with standby counsel), objected to the use of the 2006 conviction on the ground that "the enhancement should not apply . . . because [Montez's] rights were restored" when he completed his parole. (Sentencing Tr. 32.) In response to the objection, the government drew the district court's attention to page nine of Montez's Presentence Report ("PSR"). (Sentencing Tr. 33.) That portion of the report summarily stated that the 1984 and 2006 convictions were qualifying offenses and directed the reader to the following page, which contained additional details. (PSR at 9.)

On that next page, the actual descriptions of Montez's criminal convictions start with the following disclaimer:

> Pursuant to [Cook County Circuit Court] cost containment measures . . . the United States Probation Office is unable to obtain copies of criminal court documents (such as copies of charging documents and disposition orders) from Cook County . . . . As a result, unless otherwise noted, conviction and disposition information listed below was obtained from the clerk's office

> computer printout and corroborated by information presented on the defendant's Chicago, Illinois, Police Department and/or Illinois State Police RAP sheets.

(PSR at 10.)

The PSR then describes the 2006 aggravated battery conviction by drawing solely on Montez's "arrest report," which itself was never made part of the record on appeal. (PSR at 15.) The PSR related that Montez attempted to "defeat arrest by kicking and refusing to allow officers to handcuff him." (PSR at 15.) The very next paragraph then outlined Montez's dispute with the allegations in the police report. (PSR at 16.) Montez stated in the PSR that he noticed he was being pulled over by a Chicago Police officer known to harass and assault civilians, that the officer seriously injured Montez and then claimed that Montez was the aggressor, and that Montez only pleaded guilty because he was promised leniency and could not afford an attorney. (PSR at 16.) Following this in-court review of the PSR, the district court overruled Montez's objection to the 2006 conviction and sentenced Montez as a career offender. (Sentencing Tr. 33, 49.)

On appeal, Montez challenged the district court's decision to sentence him in the absence of proper *Shepard* documents.[1] The government argued that Montez had not carried his burden

[1] *Shepard v. United States*, 544 U.S. 13, 16 (2005) held that "a later court determining the character of an [earlier, divisible conviction] is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented" in order to determine which version of a crime an individual was convicted of. Here, the crucial question is whether or not Montez was convicted of the "offensive touching" version of aggravated battery, which would mean the conviction was not a crime of violence. Indeed, this Court in *United States v. Evans*, 576 F.3d 766 (7th Cir. 2009) vacated a career-offender enhanced sentence when it was based on "offensive touching" battery. *See also United States v. Ngo*, 406 F.3d 839, 843 (7th Cir. 2005) (remanding for a new sentencing where the district court made career-offender-related factual determinations based on documents that lacked the "'conclusive significance' of a prior judicial record" because such findings ran afoul of the Sixth Amendment.).

of showing prejudice, a question that divides the circuits.[2] (Gov't Br. 56–57.) A panel of this Court affirmed. Although recognizing the absence of *Shepard* documents below, the panel found that Montez had not disputed the accuracy of the facts reported in the PSR and that, therefore, he had judicially admitted to committing a crime of violence in 2006. *United States v. Montez*, No. 16-1188, slip op. at **1, 12 (7th Cir. June 5, 2017) (citing *United States v. Aviles-Solarzano*, 623 F.3d 470, 475 (7th Cir. 2010)).

[2] *Compare United States v. Serrano-Mercado*, 784 F.3d 838 (1st Cir. 2015); *United States v. Ransom*, 502 F. App'x 196 (3d Cir. 2012); *United States v. Zubia-Torres*, 550 F.3d 1202 (10th Cir. 2008); *United States v. Johnson*, 634 F. App'x 227 (11th Cir. 2015); *United States v. Williams*, 358 F.3d 956 (D.C. Cir. 2004) *with United States v. Dantzler*, 771 F.3d 137 (2d Cir. 2014); *United States v. Boykin*, 669 F.3d 467 (4th Cir. 2012); *United States v. McCann*, 613 F.3d 486 (5th Cir. 2010); *United States v. Pearson*, 553 F.3d 1183 (8th Cir. 2009); *United States v. Castillo-Marin*, 684 F.3d 914 (9th Cir. 2012).

DISCUSSION

The panel decision is at odds with the record. *See* Section I, *infra*. Moreover, key factual differences between Montez's case and prior precedent now place this Court in direct contravention of Supreme Court precedent, its own prior precedent, and alone at the extreme end of a split of circuit authority. *See* Sections II and III, *infra*.

I. The panel erred in finding that Montez "did not contest" the factual basis for the conviction used to support the career offender enhancement applied at sentencing.

The probation officer relied on a police report to describe Montez's supposed conduct: kicking an officer in an attempt to avoid arrest. (PSR at 15.) The probation officer then explicitly included Montez's own description of the incident, which disputes the version in the police report:

> By way of explanation, the defendant stated that he continued driving after noticing police because the officer who was attempting to pull him over was "known to harass people to turn over drugs or guns, or be assaulted." After the officer struck the back of his car, Defendant Montez stopped in front of a church. The defendant said that the arresting officer claimed the defendant had repeatedly kicked him; however, the defendant suffered "serious injuries" during the traffic stop. The defendant related that the presiding judge was a retired Chicago police officer, who offered him leniency if he entered a plea of guilty. The defendant did so because he had no money to hire an attorney.

(PSR at 16.) Although the probation officer's write-up is vaguely worded, it cannot be disputed that Montez challenged the implication that he was the aggressor during the arrest. (PSR at 16) ("The defendant said that the arresting officer *claimed* the defendant had repeatedly kicked him; *however*, the defendant suffered 'serious injuries' during the traffic stop.") (emphases added). Similarly, by discussing the colloquy with the judge, Montez indicated in the PSR that he may

not have pled guilty to a violent version of battery. (PSR at 16) (Montez reporting that the judge presiding over the case "offered him leniency if he entered a plea of guilty.").

Montez's challenges to the factual accounting in the PSR are significant because they mean the panel erred in rejecting Montez's *Shepard* argument by likening his case to its prior decision in *United States v. Aviles-Solarzano*, 623 F.3d 470 (7th Cir. 2010). Slip op. at *12 (finding "the government's failure to rely on *Shepard* documents isn't error where the defendant 'didn't question the accuracy of the summary in the presentence investigation report.' *United States v. Aviles-Solarzano*, 623 F.3d 470, 475 (7th Cir. 2010)"). The *Aviles-Solarzano* decision turned on several specific factual findings that simply are not present in Montez's case:

Aviles-Solarzano	**Montez**
Summary of indictment used as basis for PSR. 623 F.3d at 475.	Summary of police report used as basis for PSR. (PSR at 15–16.)
Reasoning that there "is no reason to go digging for a state-court indictment if the parties agree on what it says." *Id.* at 475; see also *United States v. Thompson*, 421 F.3d 278, 285 (4th Cir. 2005) (citing approvingly out-of-circuit precedent stating "[the defendant] never raised the slightest objection either to the propriety of its source material or to its accuracy.").	No indictment referenced at sentencing and Montez explicitly contested the accuracy of the police report used in its stead, thus raising an issue within the PSR itself with respect to the "propriety of its source material."
Stating "[t]he judge was entitled to assume that the parties agreed that the summary of the indictment was accurate. At sentencing, the court may accept any undisputed portion of the presentence report as a finding of fact." 623 F.3d at 475 (internal citations and quotation marks omitted).	Given absence of agreement to facts in the PSR, the court could not credit as a finding of fact this portion of the PSR.
Stating "[t]he defendant's lawyer didn't question the accuracy of the summary in the presentence investigation report, even though she had access to the indictment." *Id. See also id.* at 474 (citing *United States v. Rodriguez-*	Probation officer averring that it was "unable to obtain copies of criminal court documents (such as copies of charging documents and disposition orders)," including the indictment, due to cost-cutting measures in Cook County.

Gomez, 608 F.3d 969, 973 (7th Cir. 2010), for proposition that a proper admission occurs when counsel "acknowledged receipt of the [indictment]" and did not claim error in sentencing court's crime-of-violence finding).	(PSR at 10.) An incarcerated Montez appeared pro se at sentencing (with standby counsel). (Sentencing Tr. 2.)

In short, Montez did contest the accuracy of the PSR's summary of the police report, which is wholly unlike both *Aviles-Solarzano* and its precursor case *Rodriguez-Gomez*. Far from the intentional and unequivocal decision to ignore or even affirmatively accept a crime's characterization that would qualify as a stipulation or judicial admission, *Medcom Holding Co. v. Baxter Travenol Labs., Inc.*, 106 F.3d 1388, 1404 (7th Cir. 1997), the pro se Montez highlighted in the PSR the problems with the police report's characterization of his crime. This, in turn, should have flagged for the court that it could not accept it as a finding of fact, *cf. United States v. Kelly*, 519 F.3d 355, 366 (7th Cir. 2008) ("nothing on the face of the PSR gave reason to question its accuracy"), and told the government that it might need to do more to meet its burden of proving its preferred enhancement, *Shepard*, 544 U.S. at 8–9. Yet the panel's erroneous view of the facts closed the door on Montez's *Shepard*-based argument, discussed below, that otherwise would have been grounds for reversal. At a minimum, this Court should correct the erroneous factual assumptions underlying its decision and reverse for a remand in accordance with *Shepard*.

II. The panel decision is contrary to the Supreme Court's decision in *Shepard.*

The panel decision violates Supreme Court precedent. To justify enhancing Montez's sentence below, the government needed to show by a preponderance of acceptable evidence that Montez's aggravated battery conviction rested on the crime-of-violence prong of Illinois simple battery. If it rested on the other prong, then Montez is not a career offender. In *Shepard v. United States*, 544 U.S. 13 (2005), the Supreme Court considered the question whether "a

sentencing court can look to police reports or complaint applications to determine whether an earlier guilty plea necessarily admitted, and support a conviction for, generic burglary." *Id* at 16. The Court held it could not. *Id.*

In the panel opinion, this Court held for the first time that a sentencing court, in the absence of corroborating *Shepard* documents, can look to a police report to determine which prong of a divisible statute supports a defendant's sentencing enhancement under the career-offender provisions of the U.S. Sentencing Guidelines. This result is flatly contrary to *Shepard*, which unequivocally held that police reports were improper evidence to be considered by the sentencing judge in determining whether a conviction for Massachusetts burglary constituted a "generic" burglary (and therefore counted as an Armed Career Criminal Act predicate offense). *Shepard*, 544 U.S. at 17–19, *see also United States v. Shepard*, 125 F. Supp. 2d 562, 569 (D. Mass. 2000) (initial issue at sentencing: how far beneath the plea a judge could "peek" to find the circumstances of conviction for purposes of enhancement). The First Circuit, noting that the defendant had not "seriously disputed" the prior burglary conviction, held that that police reports sufficed to meet the government's evidentiary burden at sentencing. *United States v. Shepard*, 348 F.3d 308, 311, 313 (1st Cir. 2004) *rev'd* 544 U.S. 13 (US).

The Supreme Court reversed, rejecting the government's request to permit prosecutors to rely on a "wider evidentiary cast" in sentencing than "conclusive records made or used in determining guilt" (i.e., "written plea agreement, transcript of plea colloquy, or any explicit factual finding by the trial judge to which the defendant assented"). *Shepard*, 544 U.S. at 16, 21. The purpose was to avoid "collateral trials" by confining "evidence [submitted to support sentence enhancements] . . . to records of the convicting court approaching the certainty of the record of conviction." *Id.* at 23. *Shepard* refers to this as a "demanding requirement" of a

showing that a "prior conviction 'necessarily' involved (and a prior plea necessarily admitted)" a predicate offense. *Id.* at 24.

Montez pled guilty to aggravated assault of a police officer. (PSR at 15.) But police reports are the only evidence the government presented at sentencing that his aggravated assault rested on the prong of the Illinois simple battery statute that qualifies as a crime of violence. (PSR at 15); *Stanley v. United States*, 827 F.3d 562, 566 (7th Cir. 2016) (noting that there are two prongs to the statute and one is a crime of violence, while the other is not). The panel's holding that "[t]he government's failure to rely on *Shepard* documents isn't error" because Montez "did not contest the facts contained in the presentence report," slip op. at *12, echoes the First Circuit's rationale—Shepard's failure to "seriously dispute[]" the burglary—that the Supreme Court roundly rejected in *Shepard* in holding that police reports were not acceptable under such circumstances, *Shepard*, 544 U.S. at 19.

Montez's sentence was enhanced by the very evidence *Shepard* bars in the very circumstances *Shepard* barred it. As the panel clearly articulated, the 2006 aggravated battery of a police officer conviction only qualifies "if Montez was convicted under the [Illinois simple battery] statute's first clause." Slip op. at *12. The government did not provide any "conclusive records made or used in determining guilt." *Shepard*, 544 U.S. at 21. Instead, the government sought to prove up the conviction by introducing police reports, *see* (PSR at 15–16, Sentencing Tr. at 36) (citing police report to the district court)), in direct violation of Supreme Court law, *Shepard*, 544 U.S at 16 ("limit[ing]" enhancement evidence to "examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.").

III. The panel opinion effectively eliminates plain-error review of *Shepard* violations in contrast to the approach of at least four other circuits.

The panel's unwarranted expansion of *Aviles-Solarzano* places this Court as the far outlier in both *Shepard* cases and on plain-error review generally. The panel chose to overlook Montez's challenges to the factual accuracy of the police report in the PSR and to treat the absence of a formal *Shepard*-based objection during the sentencing hearing as an admission that his 2006 conviction constituted a crime of violence under U.S.S.G. § 4B1.1. These dual holdings not only create an intra-circuit split, but also deepen a split among the circuits.

First, this Court had previously set strict boundaries on the propriety of using non-*Shepard*-approved evidence in sentencing. *See Kirkland v. United States*, 687 F.3d 878 (7th Cir. 2012) (holding that the "evidentiary restrictions set forth in *Shepard* …. do[] apply" to determining whether ACCA offenses were committed on the same occasion.); *see also United States v. Ngo*, 406 F.3d 839, 842 (7th Cir. 2005) (this Court's "recidivism exception" to judicial fact-finding in sentence enhancements "exempts only those findings traceable to a prior judicial record of 'conclusive significance.' Otherwise, Sixth Amendment concerns arise."). In *Aviles-Solarzano*, this Court carved out narrow set of facts where the Sixth Amendment concerns animating *Kirkland*, *Ngo*, and *Shepard* did not apply: when the PSR summarizes a *Shepard* document and the attorney engages in gamesmanship by failing to review the underlying, readily accessible *Shepard* document. *Aviles-Solarzano*, 623 F.3d at 475 (stating that the lawyer could have obtained the indictment—a public document—and her "failure to do so suggests fear of what she might find"). This Court deemed both facts essential to its finding that a defendant admitted to the accuracy of the crime-of-violence characterization contained in the PSR, thus excusing the absence of otherwise-required *Shepard* documents. *Aviles-Solarzano*, 623 F.3d at 475–76.

The panel's extension of *Aviles-Solarzano*'s narrow exception to a *pro se defendant* whose sentence was enhanced by a *police report* when the Shepard documents were *unavailable*, is flatly contrary to *Kirkland* and *Ngo*, by eliminating the requirement that the district court's findings be traceable to a prior judicial record of "conclusive significance." It also eliminates the long-standing principle in this Court that any admission or waiver be knowing and intentional. *United States v. Jaimes-Jaimes*, 406 F.3d 845, 848–49 (7th Cir. 2005) ("[W]e do not read our cases as establishing an inflexible rule that every objection not raised at a sentencing hearing is waived" because "[w]aiver principles should be construed liberally in favor of the defendant . . . . and there is nothing in the record before us to suggest that [the defendant] had any idea that the [enhancement] might be erroneous. Forfeiture occurs because of neglect while waiver happens intentionally . . ."). [3]

The panel opinion likewise deepens a circuit split between this Court and its sister circuits. The panel's extension of *Aviles-Solarzano* into new factual territory places this Court at odds with at least four circuits on the question of what effect, if any, a defendant's silence below has on the availability of appellate review of *Shepard* errors. The panel's expansion of *Aviles-Solarzano*'s narrow holding turns *all* failures to object into judicial admissions, precluding appellate review. Other courts of appeals permit plain-error review of sentence enhancements applied via non-*Shepard* sources, even in the absence of objections below. *See, e.g.*, *United States v. Dantzler*, 711 F.3d 137, 141, 143 (2d Cir. 2014) (defendant's failure to object amounts to plain error where ACCA enhancement based on non-*Shepard*-approved documents, not treated as judicial admission); *United States v. Carthorne*, 726 F.3d 503, 508 (4th Cir. 2013)

[3] This Court's opinions somewhat conflate the terms waiver, stipulation, and judicial admission in this context. Whatever moniker is attached, however, requires intentional conduct, something that the panel opinion effectively writes out of the law.

(failure to object below to Guidelines Career Offender enhancement treated as plain error review, not judicial admission); *United States v. Castillo-Marin*, 684 F.3d 914, 920 (9th Cir. 2012) ("Our precedent is clear that a district court may not rely on a PSR's factual description of a prior offense to determine whether the defendant was convicted of a crime of violence, notwithstanding the defendant's failure to object to the PSR."); *United States v. Chavez-Hernandez*, 671 F.3d 494 (5th Cir. 2012) (holding that defect in objection below is not judicial admission, but warrants plain error review); *United States v. Boykin*, 669 F.3d 467, 470, 472 (4th Cir. 2012) (same). *But see United States v. Wilson*, 406 F.3d 1074, 1075 (8th Cir. 2005) (judicial fact finding concerning circumstances of prior conviction does not raise Sixth Amendment concerns) *abrogated United States v. Miller*, 305 F. App'x 302 (8th Cir. 2008) (unpublished) (per curiam). This Court now stands alone in prohibiting plain-error review for cases where it believes[4] the defendant did not adequately object.

CONCLUSION

For the foregoing reasons, Montez respectfully requests that this Court grant rehearing or rehearing en banc.

Respectfully submitted,

/s/ Sarah O. Schrup

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[4] It is important to recall that Montez did object to the 2006 conviction, although on a civil-rights-restored basis. (Sentencing Tr. 32.) And Montez likewise challenged the factual recitation within the PSR. The panel decided that neither affirmative act by the defendant was sufficient to permit appellate review of this clear sentencing error.

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CERTIFICATE OF COMPLIANCE WITH FED R. APP. P. 32(a) and 40 and SEVENTH CIRUCIT RULES 32 and 40

1. This petition complies with the type-volume limitations of Fed. R. App. 40(b) and Circuit Rule 40 because:

X this petition contains 3,752 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 because:

X this petition has been prepared in a proportionally-spaced typeface using Microsoft Word, in 12-point Time New Roman font with footnotes in 11-point Times New Roman Font.

/s/ Sarah O. Schrup

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CERTIFICATE OF SERVICE

I certify that I served electronically this corrected petition for rehearing through the Court's electronic filing system on July 6, 2017, which will send notice to counsel of record.

/s/ Sarah O. Schrup

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Dated: July 6, 2017