No. 16-1188

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff–Appellee,

v.

DANIEL MONTEZ,
Defendant–Appellant.

On Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
The Honorable Ronald A. Guzman
Case No. 1:12-cr-00755-8

REPLY BRIEF OF DEFENDANT–APPELLANT

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

SARAH O'ROURKE SCHRUP
Attorney
EVAN BIANCHI
Senior Law Student
MATT MONAHAN
Senior Law Student
CONOR TUCKER
Senior Law Student

Counsel for Defendant–Appellant
DANIEL MONTEZ

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I. The district court abused its discretion by its blanket admission of improper hearsay as context.

From the moment that the government suggested a severance of Montez from the other defendants charged with conspiracy—nearly a month before trial—Montez diligently and repeatedly tried to obtain from the district court a ruling on his objections to the government's intended use of others' out-of-court statements as evidence to convict him at trial:

- On May 12, 2014, Montez's lawyer informed the district court that he believed the October and December 2011 calls between Helein and Montez were "classic hearsay" because they were "out-of-court statement[s] offered for the truth of the matter asserted." (A.57–58.)

- On May 13, 2014, Montez's lawyer again raised the hearsay issue. (A.60) ("[t]here was one issue, Judge, I raised the other day about a conversation between Helein Ramirez-Padilla and my client, Mr. Montez.").

- On June 5, anticipating that the court would finally address the issue as promised "on June 10," (A.60), Montez filed a motion to exclude, (R.763).[1]

- Finally, as instructed by the district court, defense counsel raised the hearsay issue with the court at the start of trial, asserting that the October and December calls were hearsay. (A.37.)

Defense counsel ably met—and even surpassed—this Court's abuse-of-discretion standard on evidentiary issues, which requires only that litigants alert the district court of the basis of their objections. *See United States v. Amaya*, 828 F.3d 518, 524 (7th Cir. 2016) (reciting abuse of discretion standard generally); *cf.*

[1] Although the government takes pains to note that Montez's lawyer did not "notice the motion for hearing by the court," (Gov't Br. 20), it hardly made sense to do so when, by virtue of the court's previous order, both the parties and the court were on notice that the court would address the issue the week of June 9, 2014. (A.60.)

also United States v. White, 639 F.3d 331, 337 (7th Cir. 2011) (litigants do not need to use a "buzz word" to preserve objection); *United States v. Spiller*, 261 F.3d 683, 690 (7th Cir. 2001) (objection to "reliability and corroboration" sufficiently preserves hearsay objection—even absent specific mention of the word—because such objection "go[es] to the heart of the hearsay objection"); *United States v. O'Neill*, 116 F.3d 245, 247 (7th Cir. 1997) ("alert[ing] the district court to potential problems" is sufficient to preserve review for abuse of discretion).

The government seemingly concedes that Montez did object to all of the out-of-court statements in the call transcripts, (Gov't Br. 29–30), while in the same breath suggests that Montez also waived his objection below, (Gov't Br. 30), and on appeal (Gov't Br. 32). This makes no sense. It also contravenes decades of this Court's precedent about issue preservation. This Court's cases, cited above, delineate the proper floor for a preserved objection at trial, which Montez indisputably met. Nonetheless, the government hints that this Court should not entertain Montez's hearsay argument, implying through its cited authority that doing so would require the Court to "search the lengthy record" or "research or construct the legal arguments open to parties." (Gov't Br. 30) (citing *United States v. Shelton*, 669 F.2d 446, 466 (7th Cir. 1982) and *United States v. William*s, 877 F.2d 516, 518–19 (7th Cir. 1989) (quoting *Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir. 1986))). But those cases apply only when a party claiming evidentiary error does so in passing or has otherwise failed to identify the evidence at issue.

This Court need not scour the record for the offending hearsay. The twenty-two pages of transcripts are collected in the district court record under one entry, and several are reprinted in the appellant's appendix. (*See* R.1343; A.69–84.) Nor does this Court need to construct legal arguments for Montez, whose position all along has been that the transcripts were filled with impermissible hearsay. *See* (Opening Br. 16–18) (arguing the statements are hearsay); (A.37–44) (in hearing on the motion to exclude, Montez arguing below the statements are hearsay); (A.57–58) (May 2014 hearing where defense counsel asked the district court "to consider that a hearsay statement and rule it inadmissible" and further offering to "file something if the Court would like to see [his] thinking on this"). Montez has properly raised the issue with ample specific instances provided in the brief. Those examples are neither exhaustive nor exclusive; rather they are representative examples of the hearsay the district court admitted without so much as a limiting instruction. (Gov't Br. 32 n.13.)

After Montez properly (and repeatedly) raised the hearsay issue, the ball fell on the district court's side of the net, triggering its duty to rule. *United States v. Bartlett*, 567 F.3d 901, 910 (7th Cir. 2009) (the applicable federal rules require "counsel [to] present positions, and judges [to] then decide"). Instead, the district court stalled and ordered Montez to raise the issue at the start of trial, going so far as to joke at delaying Montez's trial until "after [another defendant's] sentencing," which might incent Montez to entertain a plea. (A.60.) Montez raised the issue at the start of trial, as instructed. But the hearsay issue was much thornier than

expected: these out-of-court statements were contained within Title III wiretap transcripts, and the government sought to admit them despite the lack of a *Santiago* proffer, (A.41–42), and testimony of the declarant—Helein. Although Montez exercised diligence, the district court accused defense counsel of springing the issue on the court, (A.66–67), before admitting *every* statement in the transcripts as context, (A.14–18) (memorandum and order); (A.43–44) (oral ruling). The district court then shifted the burden to the defendant to file a motion "in writing" proving that the statements were not context, (A.43), but provided no extra time for the defendant to file any such the motion, (A.44). Specifically, the district court issued its blanket ruling in the midst of the first day of trial, handed down an order to the same effect a few hours later,[2] and the jurors received the statements just minutes after that. *Compare* (A.46) (copies of the court's order received around 3:01pm) *with* (A.48) (prosecutor seeks to publish calls at 3:03pm) *and* (A.48) (interns begin reading transcripts in to the record at 3:05pm). The government's assertion, *see* (Gov't Br. 32), that Montez could have raised his objections anew after the court's ruling is unrealistic.

The district court's blanket ruling admitting every out-of-court statement in the transcripts as context was an abuse of discretion. Its decision did not account for

[2] That the district court ruled confusingly, and perhaps twice, does not undo the preservation effect of Montez's prior four objections, as the government suggests. (Gov't Br. 28–32.) A litigant is not required to renew objections under these circumstances. *See Bartlett*, 567 F.3d at 910 ("the rules do not require a litigant to complain about a judicial choice after it has been made"); *see also* Fed. R. Crim. P. 51(a) ("Exceptions to rulings or orders of the court are unnecessary.").

the clear principle in this Court's cases that a statement's status as context does not cure its status as hearsay. *See Amaya*, 828 F.3d at 528; *United States v. Smith*, 816 F.3d 479, 481–82 (7th Cir. 2016). That is, even if the district court was correct that all the statements served a contextual purpose, it nevertheless was obligated to ascertain whether any of those statements also played an impermissible hearsay role and thus should have been excluded. *See, e.g.*, *United States v. Gajo*, 290 F.3d 922, 929–30 (7th Cir. 2002) (affirming where the district court only admitted non-hearsay context and redacted the rest of the transcripts). And here it is clear that Helein's statements played just such a role. Montez's statements only demonstrate a desire to obtain cocaine. (A.72–77.) It is Helein's statements and only his statements—taken as true—that show cocaine on hand, ready for sale on December 12, 2011, the date charged in the indictment. (A.73, 76) (Helein claiming he possesses cocaine in the present time and place: "There's some there already, dude," "It's real nice, dude," and "I can measure all the shit."). For Montez to possess that cocaine, the jury had to believe Helein—*i.e.*, take as true his assertion that he had some "real nice" cocaine that he had to "measure" out—and that cocaine changed hands when the two met on December 12, 2011.[3]

The government, for its part, tries to circumvent the hearsay problem by impermissibly expanding the notion of context, claiming now for the first time on

[3] No other evidence at trial established this fact: the government did not produce any actual cocaine, *see* (Trial Tr. 511–12) (no cocaine found on Montez's person at his arrest, during December 2011, or at his apartment), and Helein—the declarant and other participant in the call—did not testify.

appeal that statements in telephone conversations separated by days can serve as "reactions" or "context." (Gov't Br. 33–34) (claiming that Helein's statements on December 14 are context for the December 12 conversation). Its approach, however, is far broader than in any of this Court's cases. This Court has consistently viewed the context exception as reserved to assist the jury in understanding portions of conversations involving statement-and-response. *See, e.g.*, *Gajo*, 290 F.3d at 929–30 (proper to admit only those statements needed to understand conversation and redact the rest); *Smith*, 816 F.3d at 481 (inquiring into whether statements admitted provided context to other statements on the same recordings). Indeed, that is how both the government and the district court understood the purpose of Helein's statements below: to "make what the defendant said and did in reaction to the statements intelligible to the jury." (Gov't Br. 33); *see also* (Trial Tr. 192) (government argues that the statements provide context to the defendant's admissions in the transcript.). Even if telephone statements separated by days could serve as context, the government cannot explain away the necessary inference—both in the juror's minds and as a matter of its evidentiary burden—that Helein's statements indicating that he had cocaine on hand had to be true in order for Montez to even possess cocaine on the date charged in the indictment. *See supra* p. 9; *cf.* (Gov't Br. 35–36) (asserting that Helein's statements about having cocaine were not "relevant").

Finally, the erroneous admission of hearsay was not harmless. Reversal is warranted where "an average juror would have found the prosecution's case

significantly less persuasive without the improper evidence." *United States v. Cruse*, 805 F.3d 795, 810 (7th Cir. 2015). Although the government labels its evidence "overwhelming," (Gov't Br. 13), it simply is not. Recall that the government unearthed none of the actual cocaine from the alleged transaction, and in fact no cocaine at all in Montez's possession at any time. (Trial Tr. 511–12.) Against that backdrop, the government points to three pieces of evidence, which it claims are so strong that the jury would have convicted Montez of the December 12, 2011, transaction regardless of the improper hearsay: (1) a supposed "confession"; (2) the testimony of Gallo; and (3) the defendant's own words. *See* (Gov't Br. 36.) As for Montez's so-called confession, the sum-total evidence at trial about it consisted of the following exchange:

> Q: [by Mr. Kness] Did the defendant admit to you that he was buying cocaine from Gallo as of December 2011?
>
> A: [FBI Agent Steahely] Yes.

(Trial Tr. 457.) That Montez may have been buying cocaine from Gallo "as of" December 2011 does not show that Montez bought cocaine from Helein on December 12 of that month, nor does it show the requisite intent to distribute. After all, the defense case was built on the fact that Montez was a user, not distributor. *See* (Trial Tr. 496) (eliciting on cross that seven grams can be a user quantity); (Trial Tr. 564–65) (closing argument on this point). Notably, Montez also supposedly confessed to buying cocaine from Gallo "as of" October 2011 and "as of" June 2012, and the jury acquitted Montez of those charges.

For the same reasons, the government's second piece of evidence—Gallo's testimony—cannot carry the day, either on its own or in combination with the other evidence:

> Q: [by Ms. Hudson] Can you describe your relationship with the defendant in December of 2011?
>
> A: [Gallo] Well, he was just my customer.

(Trial Tr. 403.) Again, this cursory statement does not prove beyond a reasonable doubt that Montez possessed cocaine and did so with an intent to distribute on December 12, 2011. Finally, the government points to some of Montez's own statements on the recordings, claiming that Montez's reference to having "dudes" for the cocaine implies an intent to distribute, (A.73), and noting that Montez's commentary on the quality of prior cocaine on December 14 suggests prior possession, (A.83). As a threshold matter, if the government truly believed Montez's statements alone were enough to sustain a conviction, it would not have been so keen to get the entire transcripts—reenacted and recited live at trial by government interns—in front of the jury. *See, e.g.*, (Trial Tr. 348–51, 355) (recitation of transcripts in front of the jury by two government interns playing the roles of Helein and Montez). But putting that aside, the standard is not an evidence-sufficiency inquiry; the question is whether the government's case was rendered significantly weaker without the offending hearsay, and the answer in this case is yes.

Without Helein's statements on December 12—the date charged in the indictment—that he currently possessed "real nice" quality cocaine and had to "measure all of the shit," (A.73, 76), the government had no evidence that cocaine was present when Montez and Helein met on December 12. The remaining evidence was scattered and unspecific, requiring attenuated inferences to conclude that Montez purchased cocaine with an intent to distribute on that date. Thus, without Helein's hearsay, the government's case would have been significantly weaker in the eyes of an average juror.

II. The district court erred in failing to strike the government's prejudicial gang references.

Before trial, the government represented to both Montez and the court that it would not elicit gang testimony. Twice, however, in the course of the trial, the government made gang references. In light of the government's failure to follow its express pretrial representations—and given the exceptional prejudice inherent in even a passing reference to gang affiliation, *United States v. Irvin*, 87 F.3d 860, 865 (7th Cir. 1996)—the district court erred in failing to forcefully and affirmatively strike these references from the record in front of the jury, *United States v. Harris*, 325 F.3d 865, 871 n.4 (7th Cir. 2003) (noting that the trial court "would have taken appropriate disciplinary action"—including declaring sua sponte a mistrial—had there been any indication that the prosecutor's lapse was deliberate). That defense counsel declined a limiting instruction does not end the issue on appeal, as the government claims. First, limiting instructions are a separate remedy from striking

evidence from the record, although they are often employed in tandem. *United States v. Richards*, 719 F.3d 746, 763 (7th Cir. 2013) (in certain cases, "jury instructions cure the danger of unfair prejudice"); *United States v. Lee*, 558 F.3d 638, 649 n.6 (7th Cir. 2009) (striking testimony "sufficiently dealt with any problem" presented by testimony); *United States v. Rodriguez*, 239 F. App'x 294, 295 (7th Cir. 2007) (district court striking testimony and applying limiting instruction).

Thus a lawyer's rejection of one remedy does not preclude her from raising the other on appeal. In any event, defense counsel's decision to not call additional attention to this highly prejudicial term with a limiting instruction should not be held against him under these circumstances. *See Fleming v. State*, 1 A.3d 572, 582 (Md. Ct. Spec. App. 2010) ("A defendant is not required, as a matter of law, to agree to a limiting instruction at the risk of waiving an issue for appellate review.").

Finally, this Court has recognized that sua sponte action may be appropriate in some situations, *Harris*, 325 F.3d at 871 n.4, though it has not yet defined the contours of that obligation, *see United States v. Cox*, 536 F.3d 723, 728 (7th Cir. 2008). In *Cox*, two government witnesses likened the defendant's drug-cooking method to Nazis. The defendant did not object in any way and the district court took no remedial action. Although this Court recognized the significant prejudicial impact of that word on jurors and that it had no probative value in the case, it ultimately found that the district court did not err in failing to sua sponte strike the references from the record. *Id.* It did so because the wholesale failure of the defendant to flag the issue for the court meant that the court was forced into the

role of an advocate, having to balance probative value against prejudice on its own initiative during the course of trial. *Id.* This Court found that trial courts should not bear that burden; it lies with the defendant. *Id.*

Here, however, Montez's counsel *did* do the work for the district court that this Court found lacking in *Cox*. Defense counsel requested a sidebar and then initiated a colloquy with the district court judge about the harm and relevance of the testimony. (A.51–53.) The only question was one of remedy; the one the district court offered—a limiting instruction—was one that defense counsel could rationally have concluded would do more harm than good. The district court erred in failing to recognize the seriousness of the government's lapse and resulting prejudice to Montez in the face of a relatively weak evidentiary case. The court should have sent a strong message to the jury that such tactics would not be tolerated and that the testimony would be excised from the record.

III. A remand for resentencing is warranted because Montez's 2006 conviction does not qualify as a crime of violence and the district court relied on inappropriate information in sentencing Montez as a career offender.

A. The Supreme Court's *Mathis* decision requires a finding that Illinois' 2006 aggravated battery statute does not qualify as a crime of violence under the Guidelines.

Five months after Montez's sentencing, the Supreme Court for the first time established how to analyze a state criminal statute drafted in the alternative. *Mathis v. United States*, 136 S. Ct. 2243 (2016). In so doing, the Court called into question the methodology previously employed in this Court (and presumably

applied by the district court below) in labeling Montez a career offender. In short, *Mathis* makes plain that Illinois' battery statute is indivisible, and therefore Montez's conviction under Illinois' 2006 aggravated battery of a peace officer statute cannot qualify as a crime of violence.

Turning first to the standard of review, Montez objected to using his aggravated battery of a peace officer conviction as a predicate offense for the career offender enhancement, (A.29), which is sufficient to preserve the question for this Court's review, *see United States v. Johnson*, 396 F.3d 902, 904 (7th Cir. 2005). Even if this Court were to find Montez's objection below insufficient, however, he nevertheless satisfies plain error review because *Mathis* is a binding, intervening decision that makes the enhancement plainly erroneous on appellate review. *United States v. Jumah*, 493 F.3d 868, 875 (7th Cir. 2007) (to warrant reversal it is enough that the error be "plain at the time of appellate consideration"); *United States v. Vincent*, 416 F.3d 593, 603 (7th Cir. 2005); *Johnson v. United States*, 520 U.S. 461, 468 (1997).[4]

[4] The government invokes the wrong plain-error rule—one that applies to static, extant legal rules rather than new, intervening rules. (Gov't Br. 52.) The government then attempts to show a state of confusion that defeats "plain" error. Tracing the development of Illinois courts' treatment of battery and this Court's and others' reliance on pre-*Mathis* holdings, the government argues that the error was not "of such an obvious nature that the trial judge and prosecutor were derelict in countenancing" it. (Gov't Br. 52) (quoting *United States v. Turner*, 651 F.3d 743, 748 (7th Cir. 2011)). These pre-*Mathis* decisions are no longer dispositive; what matters now is whether post-*Mathis* Illinois's battery statute lists means rather than elements.

For the first time, in *Mathis*, the Court explained the linguistic and functional distinction between a statute listing alternative means of committing an offense versus a statute containing alternative elements. *Mathis*, 136 S. Ct. at 2253. Prior to *Mathis*, the distinction was not at all clear, even as recently as 2013. *See Descamps v. United States*, 133 S. Ct. 2276, 2285 n.2 (2013). There, the majority opinion noted that if:

> the state laws at issue . . . set out 'merely alternative means, not alternative elements' of an offense . . . *that is news to us*. . . . And if the dissent's real point is that distinguishing between 'alternative elements' and 'alternative means' is difficult, we can see no real-world reason to worry.

Id. (emphasis added). *Mathis* clears everything up. It first directs federal courts to search for and apply any "definitive" state supreme court rulings. *Mathis*, 136 S. Ct. at 2256. Failing that, *Mathis* then directs courts to conduct a structural analysis of the statute at issue. *Id.* at 2256. Because a review of Illinois Supreme Court caselaw does not definitively answer whether the alternatives are elements or means, this Court must undertake the structural review established in *Mathis*.[5] The

[5] The Illinois Supreme Court does not settle this issue and the government agrees. *See* (Gov't Br. 54.) Though the government points to *People v. Abrams* as controlling, that case actually highlights the confusion. *See People v. Abrams*, 271 N.E.2d 37, 45 (Ill. 1971) (reasoning at one point that "[i]f there has been any touching or other form of physical contact with the victim, a battery has been committed" but then calling the prongs alternative elements). In fact, later cases (also relied on by the government) seemingly treat the prongs as alternative means to committing a battery. *See* (Gov't Br. 54) (citing *People v. Lutz*, 73 Ill.2d. 204, 212 (Ill. 1978) and *People v. McBrien*, 144 Ill. App. 3d 489, 496 (Ill. App. 4th Dist. 1986)). Illinois caselaw does not "definitively" draw the line between elements and means.

government concedes as much, itself applying *Mathis* as the governing framework for the career-offender inquiry. (Gov't Br. 54–55.)

In the absence of definitive state court rulings, *Mathis* instructs federal courts to look to the structure of the statute to differentiate a statute's factual means of commission from its elements. *Id. Mathis* says that if a statute lists multiple punishments then the alternatives are elements and the statute is divisible. *Mathis*, 136 S. Ct. at 2256. So, for example, Illinois's vehicular endangerment statute must be divisible because it provides alternative elements that can increase a sentence from a Class 2 felony to a Class 1 felony. *See* 720 ILCS 5/12-5.02 (specifying that if death results, the crime becomes a Class 1 felony). By contrast, Illinois' battery statute contains only one punishment, pointing toward indivisibility. *See* 720 ILCS 5/12-3 (all batteries are Class A misdemeanors, no matter the means used).

At the same time, *Mathis* holds that "if a statutory list is drafted to offer 'illustrative examples,' then it includes only a crime's means of commission." *Mathis*, 136 S. Ct. at 2256. As an example, *Mathis* cites to a case interpreting a Maryland criminal sexual abuse statute. *Id.* Maryland's statute set out the elements of sexual abuse—one element being abuse itself—then listed illustrative examples of abuse such as rape or incest. *See id.* at 2256. Rape and incest were examples of alternative means to proving the element of abuse. *Id.*

The Illinois battery statute resembles the Maryland statute: criminalizing a battery, and then providing illustrative examples of physical contact—*i.e.*, bodily

harm or insulting or provoking contact. 720 ILCS 5/12-3. Just as the Maryland sexual statute criminalized only one act, sexual abuse, the Illinois battery statute criminalizes only battery. Thus, applying *Mathis* to Illinois' battery statute shows that it is indivisible.

Perhaps recognizing this, the government moves on to its own proposed application of *Mathis*, but it is a strained application. The government elides the fact that the statute offers illustrative examples of a battery and includes only one punishment. *See* 720 ILCS 5/12-3. The government fixates on the use of the word "means" in the statute, reasoning that treating the prongs as means would render "by any means" superfluous.

But there is nothing superfluous about reading the alternative prongs as means. The statute criminalizes a "battery." 720 ILCS 5/12-3. And the Illinois Supreme Court and Illinois Criminal Code define battery in accordance with its common law meaning. Citing Black's Law Dictionary, the Illinois Supreme Court in *Grieco* emphasized "a willful touching" as the centerpiece of battery. *People v. Grieco*, 255 N.E.2d 897, 899–900 (Ill. 1970) (battery is a "wilful touching of the person of another"); *see also Abrams*, 271 N.E.2d at 45 (citing the commentary to the Illinois Criminal Code to hold that "[i]f there has been any touching or other form of physical contact with the victim, a battery has been committed"). Illinois state courts have thus recognized that the definitive element of battery is a mere physical contact.

And as the United States Supreme Court noted, the physical contact necessary to complete a battery is satisfied by "even the slightest offensive touching"—an incredibly low bar. *Johnson v. United States*, 559 U.S. 133, 139 (2010). That low bar, combined with the common law definition of battery ascribed to the Illinois statute by the Illinois courts, would create an unintended redundancy in the statute if the prongs were deemed elements rather than means. After all, any intentional contact that causes "bodily harm" must also be a "physical contact of an insulting or provoking nature." 720 ILCS 5/12-3(a). Because the "offensive/provoking contact" prong of the statute subsumes the "bodily harm" prong, then bodily harm can only have been included as an illustrative example of a mean that can satisfy the baseline, common law physical-contact element. Therefore, the two statutory prongs are best read as alternative means to satisfy the physical contact element. If so, then the Illinois battery statute is indivisible. And although the government did not address the Illinois aggravated battery statute, Montez demonstrated in his opening brief why that statute was divisible. (Br. 29–30.) Given this combination, and for the reasons articulated in the opening brief, Montez's conviction for aggravated battery of a peace officer cannot be a crime of violence. (Br. 32–33.)

B. At a minimum, the district court committed error under *Shepard*.

It is impossible to know if Montez was convicted of or plead guilty to a crime of violence based on his PSR. Montez, pro se at sentencing, objected both to specific

facts in the PSR as well as the use of the aggravated battery as a predicate offense. (A.29.) Though he did not object specifically to the lack of any *Shepard* document, Montez's objections nonetheless demonstrate that he did not stipulate to the factual accuracy of the PSR. (A.25, 28) (objecting to gang classification and a separate conviction); (PSR at 16); *cf. United States v. Aviles-Solarzano*, 623 F.3d 470, 475 (7th Cir. 2010) (holding that "[t]here is no reason to go digging for a state court indictment if the parties agree on what it says").

Those objections cast "real doubt on the reliability of the information in the PSR," thus triggering the government's "burden of independently demonstrating the accuracy of the information." *United States v. Heckel*, 570 F.3d 791, 795–96 (7th Cir. 2009). The government did not carry its burden, and cannot do so on appeal. Crucially, the probation officer never located any *Shepard* documents. (PSR at 10.) The PSR does not quote an indictment nor does it refer to any disposition order. (PSR at 10.) Rather, as the government concedes, the PSR infers the elements of Montez's conviction from facts in police reports, (Gov't Br. 55–56) ("That [factual] information, particularly the information in the police report, indicated that the charge was based on defendant's [*sic*] kicking a police officer in the chest several times and once in the face causing bruising and swelling."), which is wholly improper.

The Supreme Court could not have been clearer when it held that applying the modified categorical approach—which the district court here believed it was doing—prohibits making factual inferences from a police report. *Shepard v. United*

States, 544 U.S. 13 (2005); *Descamps v. United States*, 133 S. Ct. 2276 (2013). This Court, too, is adamant that district courts simply may not infer the offense of conviction from underlying facts. *United States v. Thigpen*, 456 F.3d 766, 770 (7th Cir. 2006) ("A district court cannot try to supplement its knowledge about the actual crime of conviction with facts from [non-*Shepard*] sources . . . . [A] district court may go no further than documents directly establishing what the conviction is.") (internal citations omitted); *United States v. Ramirez*, 606 F.3d 396, 398 (7th Cir. 2010) ("Perhaps the writer was taking assertions from police reports, which under *Shepard* can't be used . . . ."). Thus, the district court's rote adoption of the PSR, even in the face of Montez's objections and the PSR's plain-as-day reliance on police reports, amounted to a procedural sentencing error that this Court reviews de novo. *United States v. Scott*, 555 F.3d 605, 608 (7th Cir. 2009).

According to the government, this Court should find no error because it was Montez's fault that those documents never appeared below. (Gov't Br. 56) (claiming that because Montez "did not dispute" the police report's characterization of the incident, "neither the probation officer nor the government" obtained the requisite documents); *see Aviles-Solarzano*, 623 F.3d at 475 (finding no error where defendant did not challenge the accuracy of PSR for fear of what he might find). The government gets nowhere with its reliance on *Aviles-Solarzano*. First, Montez was not burying his head in the sand. As discussed above, Montez objected to the factual accuracy of the PSR on a number of grounds, and he also disputed the probation officer's reporting of the battery. *See* (PSR at 16) (Montez disputing the police

report's attributing violent acts to Montez by pointing out that Montez is the one who sustained injuries). Second, *Aviles-Solarzano* explicitly assumes that *Shepard* documents were readily accessible to the defense. *Aviles-Solarzano*, 623 F.3d at 475 ("[Defense counsel] could have gotten hold of a certified copy of the indictment and compared it with the summary in the presentence investigation report."). Here, the PSR itself rebuts any expectation that Montez could have obtained the relevant *Shepard* documents. Even the Probation Office admitted that it could not obtain the proper documents. (PSR at 10) ("Pursuant to cost containment measures implemented by the Clerk of the Circuit Court of Cook County, 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 clerk's offices.").

If the Probation Office itself could not obtain the *Shepard* documents, Montez—an incarcerated defendant who appeared pro se during his sentencing hearing—was surely in no position to fare any better. Though Montez challenged several aspects of the accuracy of his PSR, even if he had wanted to find these records, they would not have been available to him. His burden of proof, in other words, was insurmountable. *United States v. Serrano-Mercado*, 784 F.3d 838, 856 (1st Cir. 2015) (Lipez, J., concurring) ("The government may not have been able to produce appropriate records of the targeted conviction—the documents may be inaccessible or no longer exist, meaning that the conviction could not be used to enhance the defendant's sentence.").

Even if this Court were to review under plain error, remand is still appropriate. *United States v. Olano*, 507 U.S. 725, 732 (1993) (identifying four-prong test for plain-error review). A district court's reliance on documents proscribed by *Shepard* is plain error, satisfying the first two prongs of the test. *United States v. Hagenow*, 423 F.3d 638, 645 (7th Cir. 2005) ("Hagenow I"); *United States v. Reyes*, 691 F.3d 453, 459 (2d Cir. 2012) ("We have little trouble concluding that a sentencing court may not rely on a PSR's description of a defendant's pre-arrest conduct that resulted in a prior conviction to determine that the prior offense constitutes a 'crime of violence' under U.S.S.G. § 4B1.2(a)(1), even where the defendant does not object to the PSR's description."); *United States v. McCann*, 613 F.3d 486, 502 (5th Cir. 2010) ("a district court may not apply a particular offense level based *solely* on the PSR's conclusory characterization as having been for a crime of violence" and when it does so, "it makes an error that is clear and obvious" even where, as there, the defendant did not object) (emphasis in original).

Furthermore, because the career-offender enhancement increased Montez's Guideline range, the district court's error affected his substantial rights. *See United States v. Olano*, 507 U.S. at 734; *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016). Montez need not demonstrate any more to demonstrate prejudice. *Molina-Martinez*, 136 S. Ct. at 1346 ("[W]hen a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used."). The government argues that Montez

bears the burden of showing prejudice on appeal in order to secure a remand, citing cases from the First, Tenth, and D.C. Circuits. (Gov't Br. 56.) But this Court has never required defendants to bear this burden in order to secure a remand, and the one case that even tangentially touches upon the issue suggests that this would not be the appropriate approach. *Hagenow I*, 423 F.3d at 645 (remanding as plain error resulting from intervening *Shepard* decision without any additional showing from defendant when district court relied on affidavit in enhancing the sentence).

Moreover, there is broad disagreement among the circuits on this question. In contrast to the cases cited by the government, five other circuits have held that a failure to properly apply the modified categorical approach, including a failure to rely on appropriate *Shepard* documents, affects a defendant's substantial rights by significantly altering the defendant's sentencing range. *See Reyes*, 691 F.3d at 460 ("The district court's error in sentencing Reyes as a career offender on this record affected his substantial rights because it resulted in an elevated offense level under the Guidelines."); *United States v. Castillo-Marin*, 684 F.3d 914, 927 (9th Cir. 2012) (finding imposition of substantially greater sentence based on reliance on improper *Shepard* documents affected the defendant's substantial rights and merited reversal); *United States v. Pearson*, 553 F.3d 1183, 1186 (8th Cir. 2009) (finding plain error for failure to apply modified categorical approach when record would not allow such an inquiry and when failure would affect defendant's substantial rights) (*partially overturned on other grounds by United States v. Tucker*, 740 F.3d 1177, 1184 (8th Cir. 2014)); *United States v. Washington*, 404 F.3d 834, 843 (4th Cir.

2005) (finding *Shepard* violation affected defendant's substantial rights because "the sentence imposed by the district court as a result of the Sixth Amendment violation was longer than that to which he would otherwise be subject"); *United States v. Bonilla-Mungia*, 422 F.3d 316 (5th Cir. 2005).

The Second Circuit's *Reyes* decision makes obvious the prejudicial effect of the error. Reyes, sentenced under the career offender enhancement, plead guilty to a battery on a law enforcement officer. *Reyes*, 691 F.3d at 455. Reyes did not object to the enhancement. *Id.* at 457. Reversing for plain error, the Second Circuit identified as the central problem that it was "impossible to know whether Reyes's conviction *necessarily* rested on the 'intentionally strikes' or 'intentionally causes bodily harm' prongs—rather than the 'intentionally touches' prong—of the battery statute." *Id.* After all, even if Reyes had struck the deputy, he could have plead guilty "by simply admitting that he touched the corrections officer in an unwanted manner." *Id.* at 460. In that case, the offense would not be a crime of violence because the conviction would rest on non-physical-force facts. *Id.*

As *Reyes* shows, the approach taken by the majority of circuits is more faithful to the burden allocations that apply generally and aligns with how this Court treats other procedural errors at sentencing.[6] In this context, the government

[6] This Court has held that procedural errors in other sentencing contexts warrant a remand without requiring the defendant to first prove that his sentence would be different without the procedural error. *See United States v. Poulin*, 745 F.3d 796, 801 (7th Cir. 2014) (finding procedural error where judge failed to address mitigation and remanding for proper consideration); *United States v. Gulley*, 722 F.3d 901, 911 (7th Cir. 2013) (instructing judge on remand to rectify procedural error in failing to explain departure from Guidelines); *cf.*

must bear the burden of proving any material fact that leads to a sentencing enhancement as long as those facts may be easily ascertained by looking at the *Shepard* documents. *See Kirkland v. United States*, 687 F.3d 878, 890 (7th Cir. 2012) (requiring the government to prove that offenses occurred on separate occasions, which—like determining the elements of a particular conviction—is easily met by providing *Shepard* documents). Thus, it is the government's responsibility—not the defendant's—to provide the sentencing court with the appropriate *Shepard* documents, *id.*, and that burden applies not only at the initial sentencing but also upon remand, *United States v. Hagenow*, 487 F.3d 539, 542 (7th Cir. 2007) ("Hagenow II") (carving out exception to general rule that "the government, the party with the burden of proof on a sentencing enhancement, [is not permitted] a second opportunity to present evidence in support of that enhancement" on a sentencing remand in cases arising under plain error review); *see also Bonilla-Mungia*, 422 F.3d at 321 ("On remand, the district court should order the Government to supplement the record with documents that might establish which elements [defendant] pleaded guilty to."); *United States v. Anglin*, 601 F.3d 523, 529 (6th Cir. 2010) (holding that the government bore the burden to prove that a specific conviction was a crime of violence because mere "factual information contained in a PSR may not be considered in determining the nature of a defendant's prior conviction."). Adopting the government's proposed approach,

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United States v. Anderson, 517 F.3d 953, 965–66 (7th Cir. 2008) (finding harmless error where district court "clearly stated" it would impose the same sentence even if the Guideline range was incorrect).

which would require a defendant *during his appeal* to produce documents *to prove his ineligibility* for a sentencing enhancement would short-circuit this long-standing burden allocation. This Court should reject the government's efforts to muddy what is otherwise a straightforward case of plain procedural error requiring remand.

IV. The government failed to show that it timely disclosed to the court or to the defendant corrected transcripts of telephone conversations.

As Montez pointed out in his opening brief, the record is hopelessly obscure as to whether the government provided accurate, revised transcripts to him sufficiently in advance of trial. And the government on appeal does nothing to shed light on the question. Without any citation to the record, the government now asserts that it "represented to the court and defendant's counsel did not dispute, the government provided defense counsel with the list of calls the government intended to introduce at trial, along with final transcripts of the calls, on May 5 and 9, 2014—a month before trial." (Gov't Br. 47.) Yet there were still four defendants in the case, (05/12/2014 Hr'g Tr. 1–3), and the only reference to these revised transcripts does not reveal the actual list of calls that were going to be used, whether that list applied universally to all defendants or were tailored to each, whether the list referenced was to be used in Montez's trial or the other defendants' trial, or which of the four remaining defendants actually received revised transcripts on May 5 and 9. In fact, at the May 16, 2014, hearing, the district court took the government to task for failing to timely produce accurate transcripts. *See*

(05/16/2014 Hr'g Tr. 18–20) (noting that the court did not have a timeline detailing when the government delivered accurate transcripts, and requesting one).

If the government's disclosure of accurate evidence to Montez was tardy, it would have violated its duty to timely disclose and correct relevant evidence, *see* Fed. R. Crim. P. 16(c) (prosecutor's duty to disclose), and would have prevented Montez from mounting a "meaningful opportunity to defend against the charge," *Musacchio v. United States*, 136 S. Ct. 709, 715 (2016) (internal quotation marks omitted). Given the government's inability to confirm Montez's timely receipt of accurate transcripts, he is entitled to a new trial with adequate time to prepare.

CONCLUSION

For the foregoing reasons, Appellant Daniel Montez respectfully requests that the Court vacate his conviction and remand for a new trial or, in the alternative, remand his case to the district court for resentencing.

Respectfully submitted,

Daniel Montez
Defendant-Appellant

By: /s/ SARAH O'ROURKE SCHRUP
Attorney

EVAN BIANCHI
Senior Law Student
MATT MONAHAN
Senior Law Student
CONOR TUCKER
Senior Law Student

BLUHM LEGAL CLINIC

Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Counsel for Defendant-Appellant
DANIEL MONTEZ

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)

1. This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,880 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 12-point Century Schoolbook font with footnotes in in 11-point Century Schoolbook font.

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/s/ Sarah O'Rourke Schrup
Attorney

EVAN BIANCHI
Senior Law Student
MATT MONAHAN
Senior Law Student
CONOR TUCKER
Senior Law Student

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Counsel for Defendant-Appellant
DANIEL MONTEZ

Dated: February 6, 2017

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Daniel Montez, hereby certify that I electronically filed this brief with the clerk of the Seventh Circuit Court of Appeals on February 6, 2017, which will send notice of the filing to counsel of record in the case.

_____

/s/ Sarah O'Rourke Schrup
Attorney

EVAN BIANCHI
Senior Law Student
MATT MONAHAN
Senior Law Student
CONOR TUCKER
Senior Law Student

BLUHM LEGAL CLINIC
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Counsel for Defendant-Appellant
DANIEL MONTEZ

Dated: February 6, 2017