No. 11-415

IN THE

Supreme Court of the United States

JUAN C. RAMIREZ-VILLALPANDO,
AKA Juan Carlos Ramirez,

Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General

Respondent.

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

REPLY BRIEF

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REPLY BRIEF

This case squarely presents an important question arising under the immigration laws on which the courts of appeals are divided 3-2. The importance of the question presented is undisputed. Instead, the Government denies the existence of a circuit conflict regarding the proper use of an abstract of judgment under *Shepard v. United States*, 544 U.S. 13 (2005), based on the meaningless distinction that the abstract here was "corroborated" by other documents in the record. Opp. 8-10. This is nothing more than a distinction without a difference because the abstract was both essential to the judgment below and sufficient to support it. It is also an attempt by the Government to obscure the fact that it can provide no justification under *Shepard* whatsoever for its reliance on a document prepared by a clerk *after* a guilty plea without the defendant's input to prove the nature of a prior offense. This Court's review is urgently needed because longstanding residents of the United States like Petitioner are unjustly suffering the particularly severe penalty of deportation because of the inconsistent application of the immigration laws. *See Judulang v. Holder*, 132 S. Ct. 476, 487 (2011); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478, 1481 (2010).

I. THE NINTH CIRCUIT IS SQUARELY IN CONFLICT WITH THE FIFTH AND THIRD CIRCUITS ON THE QUESTION PRESENTED IN THIS CASE.

The Ninth Circuit's decision approving the use of an abstract of judgment squarely conflicts with decisions from two other circuits. Pet. 10-15. The Fifth Circuit unequivocally held that an abstract of judgment "should

not be added to the list of documents *Shepard* authorizes the sentencing judge to consult" because it is a "clerical" document that does not contain "an explicit factual finding by the trial judge to which the defendant assented." *United States v. Gutierrez-Ramirez*, 405 F.3d 352, 357-59 (5th Cir. 2005) (quoting *Shepard*, 544 U.S. at 16). The Third Circuit has likewise construed *Shepard* to hold that it "may not look to the factual assertions in the judgment of sentence"—Pennsylvania's version of the abstract of judgment—because the facts therein "are not necessarily admitted by the defendant." *Evanson v. Attorney Gen. of the United States*, 550 F.3d 284, 293 (3d Cir. 2008).[1] By contrast, the Ninth Circuit held in this case, consistent with the Eighth and Eleventh Circuits, that it could rely on an abstract because "[t]he crime described in the abstract of judgment . . . may fairly be read as a summary of [Petitioner's] specific offense" of theft of personal property. Pet. App. 8a-9a; *see also United States v. Martinez-Vasquez*, 438 F. App'x 795, 798 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1060 (2012); *United States v. Benitez-de los Santos*, 650 F.3d 1157, 1160 (8th Cir. 2011). The courts of appeals are thus divided 3-2 on this important question.

The Government claims there is no conflict with *Gutierrez-Ramirez* or *Evanson* because this abstract

1. The Government fails to show any material difference between a Pennsylvania judgment of sentence and a California abstract of judgment. Opp. 9-10 & n.5. The Third Circuit plainly understood the two documents to be analogous because it cited cases involving abstracts—including *Gutierrez-Ramirez*—to support its holding. *See Evanson*, 550 F.3d at 293. Indeed, both are sentencing documents that contain "factual assertions . . . not necessarily admitted by the defendant." *Id.* In *Evanson*, it was the amount of drugs, *see id.* at 293 n.8; here, it is the type property stolen.

was "corroborated" by other conviction documents. Opp. 8-10. As Petitioner previously showed, the Ninth Circuit's attempt to cure an unreliable conviction document with corroborating documents conflicts with *Shepard*. Pet. 20-21. In any event, this "corroboration" distinction is meaningless because the abstract of judgment alone could have supported the Ninth Circuit's holding. *See Kwong v. Holder*, No. 04–72167, --- F.3d ----, 2011 WL 6061513, at *1 n.1, *4-5 (9th Cir. Dec. 7, 2011), *petition for reh'g filed* (9th Cir. Feb. 22, 2012) (holding that it could "rely *solely* on the abstract of judgment" to determine that a prior conviction qualified as an aggravated felony).[2] Indeed, the Government claims the abstract alone left "no doubt" Petitioner was convicted of an aggravated felony. Opp. 7. In all three conflicting decisions, therefore, the question presented is exactly the same: whether an abstract of judgment (or its equivalent) is comparable to the documents approved in *Shepard*. It remains the case in the Ninth Circuit, but not in the Fifth or Third Circuits, that an individual could be removed based on the description of a prior offense in an abstract of judgment prepared by a court clerk for sentencing purposes after a guilty plea and without any input from the defendant. Accordingly, the Ninth Circuit's judgment in this case is squarely in conflict with the decisions of the Fifth and Third Circuits.

The Government also claims these cases are distinguishable because this abstract is "more explicit" in describing the nature of Petitioner's prior offense. Opp. 9. But that is beside the point. As the Government effectively concedes, every abstract contains an inherent

2. In light of *Kwong*, the Government incorrectly asserts that the Ninth Circuit has "expressly reserved the question whether" it may rely "upon an abstract of judgment without corroboration by other material in the record." Opp. 9 n.4 (quoting Pet. App. 10a).

ambiguity that must be litigated in the kind of "collateral trial" the Court warned against in *Shepard*. Pet. 19. And regardless of how explicit the description of a crime, an abstract remains flawed because it is prepared by a clerk after the guilty plea and without the defendant's input. As explained below, an abstract fails to meet the standard for reliability announced in *Shepard*.

II. THE DECISION BELOW IS WRONG.

The decision below is wrong because an abstract of judgment is not comparable to the documents approved by the Court in *Shepard*. Pet. 17-21. Unlike a charging document, written plea agreement, or a transcript of the plea colloquy—all of which are prepared before or at the same time the guilty plea is entered—an abstract of judgment is not a "conclusive record[] made or used in adjudicating guilt." *Shepard*, 544 U.S. at 16, 21. An abstract is not prepared by a court official at the time the guilty plea is taken (here it was filed ten days later), nor does it contain an "explicit factual finding by the trial judge to which the defendant assented" because it is prepared without the defendant's input for the purpose of establishing the mere fact of conviction and the sentence imposed. *Id.* at 16. The court of appeals' reliance on an abstract of judgment therefore conflicts with *Shepard* and must be reversed.

The Government makes no attempt to prove an abstract is a comparable document under *Shepard*. It bypasses any analysis of *Shepard* whatsoever by relying on a California Supreme Court decision that approved an abstract for purposes of state law without ever analyzing whether the document would be acceptable under *Shepard*. Opp. 6 (citing *People v. Delgado*, 183 P.3d 1226 (Cal. 2008)).

In fact, the California Supreme Court has expressly refused to follow the rule in *Shepard* in favor of a more lenient standard under state law. *See People v. McGee*, 133 P.3d 1054, 1071 (Cal. 2006).

As Petitioner has explained, Pet. 18-19, *Delgado* shows that an abstract of judgment could not possibly satisfy the stricter *Shepard* standard. The *Delgado* court recognized that an abstract is merely a "clerical *record* of the conviction and sentence" that "is not itself the judgment of conviction" and is used as "the process and authority for carrying the judgment and sentence into effect." 183 P.3d at 1234 (citation omitted). The court even observed that abstracts are often "too ambiguous to constitute substantial evidence of the precise nature of the prior conviction" and can cause "confusion" about the nature of a prior offense. *Id.* at 1233, 1235. These inherent features of a California abstract convinced the Fifth Circuit to conclude these clerical documents have a "low level of reliability." *Gutierrez-Ramirez*, 405 F.3d at 357, 359.

Even without the abstract, the Government claims the Ninth Circuit's decision was correct for reasons that "are outside the scope of the question presented and were not addressed by the Court of Appeals in the decision below." *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 457 (2009). In the Government's view, the transcript of the plea colloquy and felony complaint "independently confirm" Petitioner was convicted of theft of personal property. Opp. 5, 7-8. The Court need not even concern itself with this argument because the court of appeals found it necessary to rely upon the abstract "in combination" with other documents without addressing the Government's argument that the corroborating

documents provided an independent basis for decision. Pet. App. 9a. "[I]t is the wise and settled general practice of this Court not to consider an issue in the first instance." *Turner v. Rogers*, 131 S. Ct. 2507, 2524 (2011) (Thomas, J., dissenting); *see also Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005) ("Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here.").

Moreover, the Government's argument does not bear on the question presented here of the reliability of an abstract of judgment under *Shepard*. "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a); *see also Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) ("[B]y and large it is the petitioner himself who controls the scope of the question presented."); Eugene Gressman, Supreme Court Practice 463 (9th ed. 2007) ("To allow a petitioner, or a respondent, to argue other questions would subvert the theory underlying the certiorari practice[.]"). If the Court grants the petition and reverses the judgment below, "Respondent[] remain[s] free to ask the Court of Appeals to consider the claim" on remand, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 175 (2004), but there is "no reason to abandon" the Court's "usual procedures in a rush to judgment without a lower court opinion" on whether the felony complaint and plea colloquy could support the judgment without the abstract, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009).[3]

3. For these same reasons, the Government's argument that this case is a poor vehicle to resolve the question presented also lacks merit. Opp. 11-12.

In any event, the court of appeals was compelled to rely on the abstract of judgment to support its decision because the ambiguous plea colloquy transcript, considered in tandem with the felony complaint, comes nowhere close to proving Petitioner admitted to theft of personal property. The *Shepard* Court explained that "the only certainty of a generic finding lies . . . (in a pleaded case) *in the defendant's own admissions* or accepted findings of fact confirming the factual basis for a valid plea." 544 U.S. at 25 (emphasis added). To that end, the Court held that a federal court may consider a "transcript of colloquy between judge and defendant in which the factual basis for the plea was *confirmed* by the defendant." *Id.* at 26 (emphasis added). As in *Shepard*, where the petitioner "admitted sufficient facts" to support the convictions, 544 U.S. at 21 (alterations omitted), Petitioner here "stipulate[d] to a factual basis for the plea[]," A.R. 71, but never "admitted the generic fact" of theft of personal property as alleged in the felony complaint, *Shepard*, 544 U.S. at 23. Accordingly, the abstract of judgment was crucial to the judgment below because without it the court of appeals could not possibly have found Petitioner was convicted of an aggravated felony. Granting the petition will result in reversal of the judgment below.[4]

4. Contrary to the Government's claim, Opp. 7 n.1, the two references to the plea colloquy transcript in the Ninth Circuit's opinion do not show that it played any part in the Ninth Circuit's judgment, Pet. 6 n.2. The court of appeals never even bothered to explain what was said during the plea colloquy. Had it done so, the best the court could have done was conclude the plea colloquy transcript did not contradict the abstract.

III. THIS CASE IS THE BEST VEHICLE TO RESOLVE THE IMPORTANT QUESTION PRESENTED.

The Government does not dispute the importance of the question presented. Pet. 21-27. As the circuit conflict remains unresolved, more individuals, and especially those along the southern border, will be subject to disparate treatment in removal proceedings simply by virtue of the location where the proceedings take place. If the proceedings are conducted in the Ninth Circuit, an abstract of judgment could result in removal even though the same document would not result in removal in the Fifth Circuit. These two circuits together account for 75 percent of immigration cases. Pet. 14-15. The fact that the Ninth Circuit alone accounts for a significant percentage of the country's immigration docket "underscore[s] the need for this Court's review." Pet. For Writ of Certiorari 21-22, *Holder v. Gutierrez*, No. 10-1542 (U.S. June 23, 2011), *cert. granted* (Sept. 27, 2011) ("*Gutierrez* Petition") (arguing that the Court should grant certiorari because "over 40% of all cancellation-of-removal applications . . . originated within the Ninth Circuit").

This conflict on "a matter of the utmost importance—whether lawful resident aliens with longstanding ties to this country may stay here"—turns deportation into "a sport of chance." *Judulang*, 132 S. Ct. at 487, 490 (citation omitted). Whereas in *Judulang* deportation turned on an arbitrary distinction between deportation and exclusion, deportation under existing law arbitrarily turns on each circuit's approach to a specific document prepared by a clerk. As in *Judulang*, one "alien appearing before one official may suffer deportation; an identically situated alien appearing before another may gain the right to stay in

this country." *Id.* at 486. Given the Government's emphasis on "the uniform administration of the immigration laws," the Court must ensure that inconsistencies within the judicial system are addressed. *See Gutierrez* Petition at 22 (arguing that the Court should grant certiorari to ensure "'our immigration laws [are] applied in a uniform manner nationwide, particularly where the most significant aspects of the law are in issue.'" (citation omitted)).

This Court's review is imperative given that deportation is a "particularly severe 'penalty'" carrying "harsh consequences." *Padilla*, 130 S. Ct. at 1478, 1481. In this case, an unreliable abstract of judgment could cause Petitioner—a fifty-year lawful permanent resident of this country with an American wife and American children—to be removed from the only country he has ever known. The Court should grant the petition to clarify the proper use of an abstract of judgment.

This case is the best vehicle to resolve this important question presented because it offers the most common fact pattern involving an abstract of judgment. The Ninth Circuit most often considers an "abstract of judgment in combination with a charging document to establish that the defendant pled guilty to a generic crime under the modified categorical approach." Pet. App. 9a.[5] Granting certiorari in this case would allow the Court address the

5. *See*, *e.g.*, *Garcia v. Holder*, 418 F. App'x 669, 670 (9th Cir. 2011) ("an abstract of judgment can be used in conjunction with a charging document"); *Cabrera-Arucha v. Holder*, 378 F. App'x 662, 664 (9th Cir. 2010) (considering "a charging document in combination with an abstract of judgment"); *United States v. Velasco-Medina*, 305 F.3d 839, 851 (9th Cir. 2002) (approving consideration of "the charging papers (i.e., the Information) along with the abstract of judgment").

reliability of an abstract of judgment under *Shepard* as a threshold matter and provide guidance to lower courts and the BIA when an abstract is corroborated by another document in the record. This case will also allow the Court to provide broader guidance on determining the reliability of conviction documents prepared *after* a guilty plea, such as minute orders, docket sheets, and certificates of disposition. Pet. 15-17.

At a minimum, the Court should hold the petition pending the Ninth Circuit's *en banc* disposition of *Kwong*. *See* Gressman, *supra*, at 339, 483-84. The Ninth Circuit's *Kwong* decision presents a different fact pattern involving an abstract of judgment without corroboration. A petition for rehearing *en banc* currently pending in *Kwong* urges the Ninth Circuit to repudiate its practice of relying on abstracts of judgment in conflict with decisions of the Fifth and Third Circuits. Holding the petition will allow this Court to consider the question presented in conjunction with a certiorari petition in *Kwong* and ensure consistent disposition of these intimately related cases.

CONCLUSION

For the foregoing reasons, the Court should grant the petition or, in the alternative, hold the petition pending the Ninth Circuit's *en banc* disposition of *Kwong*.

Respectfully submitted,

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