No. 12-

IN THE

Supreme Court of the United States

CHUEN PIU KWONG, AKA Phillip Kwong,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an abstract of judgment, which is prepared by a court clerk for sentencing purposes after a defendant's guilty plea and without the defendant's input, qualifies as a conclusive record made or used in adjudicating guilt sufficient to determine the nature of a prior conviction under *Shepard v. United States*, 544 U.S. 13 (2005).

2. Whether a burglary conviction in a state that does not require an unlawful or unprivileged entry can be considered a crime of violence under *Leocal v. Ashcroft*, 543 U.S. 1 (2004), when it is not a violent felony under *Taylor v. United States*, 495 U.S. 575 (1990).

PARTIES TO THE PROCEEDING

Petitioner is Chuen Piu Kwong, AKA Phillip Kwong, petitioner below.

Respondent is United States Attorney General Eric H. Holder, Jr., respondent below.

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MISCELLANEOUS

PETITION FOR A WRIT OF CERTIORARI

Petitioner Phillip Kwong respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the Immigration Judge is unreported but reprinted in the Appendix ("App.") at App. 20a-24a. The decision of the Board Immigration Appeals is unreported but reprinted at App. 17a-19a. The opinion of the Ninth Circuit is reported at 671 F.3d 872 and reprinted at App. 1a-16a. The order of the Ninth Circuit denying rehearing and rehearing en banc is unreported but reprinted at App. 25a-26a.

JURISDICTION

The judgment of the Ninth Circuit was entered on December 7, 2011. App. 1a. The Ninth Circuit denied a timely petition for rehearing and rehearing en banc on April 2, 2012. App. 15a. Justice Kennedy extended the time to file a petition for a writ of certiorari to August 1, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Section 1227(a)(2)(A)(iii) of Title 8 of the United States Code provides:

> Any alien who is convicted of an aggravated felony at any time after admission is deportable.

8 U.S.C. § 1227(a)(2)(A)(iii).

Section 1101(a)(43)(F) of Title 8 of the United States Code provides:

> The term "aggravated felony" means—
>
> . . .
>
> (F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year;

8 U.S.C. § 1101(a)(43)(F).

Section 16 of Title 18 of the United States Code provides:

> The term "crime of violence" means—
>
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16.

Section 459 of the California Penal Code provides:

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.

Cal. Penal Code § 459.

Section 460 of the California Penal Code provides:

> (a) Every burglary of an inhabited dwelling house, vessel, as defined in the Harbors and Navigation Code, which is inhabited and designed for habitation, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, or trailer coach, as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree.
>
> (b) All other kinds of burglary are of the second degree.

Cal. Penal Code § 460.

INTRODUCTION

This case presents an important question on which five circuits are divided. Two of the five conflicting circuits that hear seventy-five percent of the nation's immigration cases and blanket the Mexican border—the Ninth and Fifth Circuits—have reached irreconcilable decisions on a recurring question of importance that undermines the uniform application of the nation's immigration and criminal sentencing laws: whether an abstract of judgment—a document prepared by a clerk for sentencing purposes *after* the defendant pleads guilty—is "comparable" to the documents explicitly approved by this Court in *Shepard v. United States*, 544 U.S. 13 (2005), for determining the nature of a prior conviction.

In this case, the Ninth Circuit relied on an abstract of judgment by itself to determine that Petitioner was convicted of first-degree burglary and thus removable as

an aggravated felon. The Eighth and Eleventh Circuits would agree with the Ninth Circuit's approach. Had this case been brought in Texas, however, Petitioner could not be deported under the Fifth Circuit's interpretation of *Shepard*. The result in the Third Circuit would be the same as in the Fifth. As this circuit split shows, and as the participation of six other organizations as *amicus curiae* before the Ninth Circuit underscores, this Petition presents an important question for the Court's review.

This case also presents a second important question: whether a burglary conviction in a state like California, which does not conform to the generic burglary definition and does not require an unlawful or unprivileged entry, can be considered a "crime of violence" but not a "violent felony." This Court's decision in *Taylor v. United States*, 495 U.S. 575 (1990), which held that burglary qualifies as a violent felony only if the entry is unlawful or unprivileged, compels reversal of the Ninth Circuit's decision that Petitioner's first-degree burglary conviction in California qualifies as a crime of violence. Because the definition of a crime of violence is narrower than the definition of a violent felony, *Taylor* precludes any determination that Petitioner's California burglary conviction was a crime of violence. This question is important because the Ninth Circuit's decision permits the government to deport individuals who have been convicted of nonviolent offenses—such as shoplifting—that create no risk of violent force being used. The Court should grant the Petition and reverse the Ninth Circuit.

STATEMENT OF THE CASE

1. Most states define burglary as "an unlawful or unprivileged entry into, or remaining in, a building or

other structure, with intent to commit a crime." *Taylor*, 495 U.S. at 598. This is considered the "generic, contemporary meaning" of burglary. *Id.* Some states, however, define burglary more broadly. California is one of the states that has adopted a nongeneric definition of burglary. *Id.* at 591. It does not require the entry to be unlawful or unprivileged. *See* Cal. Penal Code § 459 (punishing "[e]very person who enters [various structures] … with intent to commit grand or petit larceny or any felony").

This Court has adopted a well-established framework to determine whether a burglary conviction in a nongeneric state like California still qualifies as generic burglary. In *Taylor*, the Court held that lower courts may "look only to the fact of conviction and the statutory definition of the prior offense" to determine whether an earlier conviction after trial was for generic burglary. 495 U.S. at 602. The Court recognized an exception to this "categorical approach" only for "a narrow range of cases where a jury [in a State with a broader definition of burglary] was actually required to find all the elements of" the generic offense. *Id.*

In *Shepard*, the Court extended *Taylor*'s reasoning to "the identification of generic convictions following pleas . . . in States with nongeneric offenses." 544 U.S. at 19. The Court held that lower courts may rely upon only certain highly reliable documents to establish the nature of a prior conviction.

2. Petitioner is a Chinese national. He was admitted to the United States in 1990 as a lawful permanent resident, but has been ordered removed to China pursuant to Section 1101(a)(43)(F) of the Immigration and Nationality

Act based on a 1997 conviction for burglary under California Penal Code Section 459.

The California state court's abstract of judgment indicates that Petitioner pleaded guilty to violating Section 459 on April 1, 1997 and was sentenced to two years of imprisonment on April 29, 1997. In the space for a description of the "crime," the abstract reads: "Burglary — First Deg." A file stamp indicates the abstract was "ENDORSED FILED" on May 1, 1997. App. 27a.

3. California law requires that a certified copy of an abstract of judgment or minute order be filed in conjunction with every criminal conviction that results in a sentence of imprisonment. Specifically, "[w]hen a probationary order or a judgment, other than of death, has been pronounced," the clerk of court must provide "either a copy of the minute order or an abstract of the judgment . . . to the officer whose duty it is to execute the probationary order or judgment, and no other warrant or authority is necessary to justify or require its execution." Cal. Penal Code § 1213(a).

The abstract of judgment is designed to ensure that the Department of Corrections has sufficient information to execute the judgment. The form and contents of the abstract of judgment are "prescribed by the Judicial Council," Cal. Penal Code § 1213.5, which recognizes that abstracts function as "internal court forms used only by the court and the California Department of Corrections and Rehabilitations."[1]

1. *See* Letter from the Criminal Law Advisory Committee to the Judicial Council of California, at 3 (Aug. 31, 2006), *available at* www.courts.ca.gov/documents/102006ItemA28.pdf.

The Judicial Council has promulgated a standard form that must be used to prepare the abstract of judgment. The Council initially adopted the form in 1977 and most recently revised it in January 2012.[2] On the form, the clerk of court may record information about the sentencing hearing, such as the identities of public officials and counsel present, and about the sentence itself, such as the term and type of sentence and any enhancements, fees, fines, restitution or other financial obligations imposed by the court.

The form asks for only minimal information about the conviction. There are spaces in which the clerk may identify the count of conviction, the associated Penal Code section, a brief description of the "crime," the year of commission, and the type of conviction ("jury," "court," or "plea"). The space provided for the description of the "crime" is quite short and limited to one row. There are no instructions regarding the specific information to be included—such as the title of the statute, the particular crime charged, or the specific facts of the crime to which the defendant entered the guilty plea.

4. Based solely on the abstract of judgment, an Immigration Judge held that Petitioner's 1997 burglary conviction qualified as an aggravated felony because it was a crime of violence. App. 22a-24a. In the Immigration Judge's view, "[t]he Abstract of judgment reveals that Respondent received a two-year sentence for a first-degree burglary conviction under California Penal Code

2. Report to the Judicial Council: Criminal Procedure: Abstract of Judgment Forms, at 2 (Oct. 28, 2011), *available at* http://www.courts.ca.gov/documents/ItemA11.pdf.

§ 459" and "[t]he Ninth Circuit has found that first-degree burglary [in California] is a crime of violence under 18 U.S.C. § 16(b)." App. 22a-23a (citing *United States v. Becker*, 919 F.2d 568, 571 (9th Cir. 1990)). Accordingly, "the analysis of the relevant California statutes and Abstract of judgment . . . is sufficient to conclude that Respondent committed a crime of violence. Thus, Respondent is an aggravated felon and is removable as charged under INA § 101(a)(43)(F)." App. 23a-24a. The Board of Immigration Appeals adopted and affirmed the Immigration Judge's decision "for the reasons stated therein." App. 18a.

Petitioner timely petitioned for review to the United States Court of Appeals for the Ninth Circuit in accordance with 8 U.S.C. § 1252. The Ninth Circuit affirmed, agreeing that "first-degree burglary under California law is a 'crime of violence'" under controlling circuit precedent. App. 8a (quoting *Becker*, 919 F.2d at 573). Under that precedent, "'[a]ny time a burglar enters a dwelling with felonious or larcenous intent there is a risk that in the course of committing the crime he will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension.'" App. 8a (quoting *Becker*, 919 F.2d at 571 (footnote omitted)).

In reaching this conclusion, the court distinguished *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc), which held that first-degree burglary under California Penal Code § 459 does not categorically qualify as a crime of violence for purposes of U.S.S.G. § 2L1.2 because the definition of first-degree burglary in California is broader than the generic definition of burglary, *id.* at 944. In this case, the Ninth Circuit held

that "*Aguila-Montes* was based on a different definition of 'crime of violence'; *Aguila-Montes* held only that a conviction under California Penal Code § 459 did not constitute a conviction for generic burglary." App. 9a (citing *Lopez-Cardona v. Holder*, 662 F.3d 1110 (9th Cir. 2011)). The court explained that "*Aquila-Montes* accordingly did not contradict or affect *Becker*'s holding that first-degree burglary under § 459 is a crime of violence because it involves a substantial risk that physical force may be used in the course of committing the offense." App. 9a.

The Ninth Circuit then held that the abstract of judgment by itself was "sufficient[]" to establish "that Kwong was convicted of first-degree burglary" and thus "removable as an alien convicted of an aggravated felony." App. 14a, 21a. The court determined Petitioner's offense was first-degree burglary (as opposed to second-degree burglary) based "solely on the abstract of judgment." App. 3a n.1. Whether the court could rely on an abstract of judgment by itself was a question "left open" in *Ramirez-Villalpando v. Holder*, 645 F.3d 1035 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1739 (2012). App. 11a n.4.

As a threshold matter, the court recognized that existing circuit precedent "squarely held that a notation in an abstract of judgment was insufficient by itself to establish what crime a defendant was convicted of." App. 11a (citing *United States v. Navidad-Marcos*, 367 F.3d 903 (9th Cir. 2004)). In *Navidad-Marcos*, the Ninth Circuit held that a California abstract of judgment "fail[ed] to satisfy the 'rigorous standard' required by *Taylor*'s modified categorical approach." 367 F.3d at 909 (citation omitted). "The form simply calls for the identification of the statute of conviction and the crime, and provides a very

small space in which to type the description. It does not contain information as to the criminal acts to which the defendant unequivocally admitted in a plea colloquy before the court." *Id.* Given the nature of the document, the court noted that it is "equally plausible, if not more probable, that the abbreviation in the form merely summarized the title of the statute of conviction rather than—as the government would have us presume—a conscious judicial narrowing of the charging document." *Id.*

Despite this precedent, the court held that its "subsequent en banc decision in *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (en banc), undermine[d] *Navidad-Marcos*." App. 11a. In *Snellenberger*, over the dissent of four judges, the Ninth Circuit construed *Shepard* to permit consideration of a clerk's minute order. "The clerk's minute order easily falls within the category of documents described [in *Shepard*]: It's prepared by a court official at the time the guilty plea is taken (or shortly afterward), and that official is charged by law with recording the proceedings accurately." App. 12a (quoting *Snellenberger*, 548 F.3d at 702). The Ninth Circuit further explained: "[I]t's enough that the minute order was prepared by a neutral officer of the court, and that the defendant had the right to examine and challenge its content, whether or not he actually did." App. 12a.

The court thus concluded that *Snellenberger*'s "reasoning is inconsistent with" *Navidad-Marcos*. App. 13a. "Everything that the en banc court said of the minute order in *Snellenberger* applies to the abstract of judgment in Kwong's case." App. 13a. "[T]he abstract is a contemporaneous, statutorily sanctioned, officially prepared clerical *record* of the conviction and sentence.

It may serve as the order committing the defendant to prison, . . . and is the process and authority for carrying the judgment and sentence into effect." App. 13a (quoting *People v. Delgado*, 183 P.3d 1226, 1234 (Cal. 2008) (citations and alterations omitted)). As a result, the court effectively overruled *Navidad-Marcos*, holding that an abstract of judgment, "[w]hen prepared by the court clerk, at or near the time of judgment, as part of his or her official duty, . . . is cloaked with a presumption of regularity and reliability." *Id.*

5. Petitioner filed a timely petition for rehearing and rehearing en banc on February 22, 2012.[3] On April 2, 2012, the Ninth Circuit denied the petition for rehearing and rehearing en banc. App. 25a. On April 12, 2012, the Ninth Circuit stayed its mandate pending the filing and disposition of this petition for a writ of certiorari. The court extended its stay of the mandate on July 10, 2012, after Justice Kennedy extended the time to file this Petition.

3. Six organizations filed two briefs *amicus curiae* in support of granting the petition. The Florence Immigrant and Refugee Rights Project, the Immigrant Legal Resource Center, the Immigration Law Clinic of the University of California at Davis, the Washington Defender Association's Immigration Project, and the National Immigration Project of the National Lawyers Guild filed an *amicus* brief urging the Ninth Circuit to reconsider its ruling on the abstract question. The Federal Defenders of San Diego, Inc. filed an *amicus* brief urging the Ninth Circuit to reconsider its ruling on the burglary question.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Ninth Circuit "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" and "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(a), (c).

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE 3-2 CIRCUIT CONFLICT INVOLVING THE USE OF AN ABSTRACT OF JUDGMENT BY ITSELF TO DETERMINE THE NATURE OF A PRIOR CONVICTION.

A. Five Circuits Accounting For Eighty Percent Of Immigration Cases Disagree As To Whether An Abstract Of Judgment By Itself May Determine The Nature Of A Prior Conviction.

The courts of appeals are divided 3-2 as to whether an abstract of judgment by itself may determine the nature of a prior conviction. This recurring conflict is mature because these five circuits account for eighty percent of immigration cases decided in this country and two of the five circuits blanket the Mexican border. The Third and Fifth Circuits have held that abstracts of judgment may not be relied upon to prove the nature of a prior conviction; the Eighth, Ninth, and Eleventh Circuits have approved of abstracts of judgment for this purpose. The Court should grant the Petition and resolve the conflict by holding that an abstract of judgment may not be relied upon for this purpose.

1. The Fifth Circuit rejected reliance on abstracts of judgment in *United States v. Gutierrez-Ramirez*, 405 F.3d 352 (5th Cir. 2005). It held that abstracts of judgment are "not a source upon which we can rely to conclude that [the] short [description] phrase manifests a 'conscious judicial narrowing of the charging document' rather than a shorthand abbreviation of the statute of conviction." *Id.* at 358. The court rejected the government's argument that *Shepard* authorized "using the abstract of judgment in this case" by itself to determine the nature of the conviction because "the abstract of judgment is generated by the court's clerical staff" and thus "is not an 'explicit factual finding by the trial judge to which the defendant assented,' which the court may consider under *Shepard*." *Id.* at 359 (quoting *Shepard*, 544 U.S. at 16). "[C]onsidering the low level of reliability associated with abstracts of judgment in California," the Fifth Circuit concluded, "they should not be added to the list of documents *Shepard* authorizes the sentencing judge to consult." *Id.* Thus, in the Fifth Circuit, "courts cannot exclusively rely on such shorthand descriptions" under *Shepard*. *Id.* at 358.

Likewise, the Third Circuit has held that "factual assertions contained only in a judgment of sentence"—Pennsylvania's version of the abstract of judgment—"may not be considered under the modified categorical approach" to determine the nature of a prior conviction. *Evanson v. Att'y Gen. of the United States*, 550 F.3d 284. 293 (3d Cir. 2008). Like a California abstract, a Pennsylvania judgment of sentence is prepared after sentencing and contains a space to enter a description of the crime. Stating its agreement with the Fifth Circuit, the Third Circuit held that it could "not look to factual assertions in the judgment of sentence"—in that case, the amount of drugs involved—

because these facts "are not necessarily admitted by the defendant" and because the information "recited in the judgment of sentence was not itself necessarily based on clear and convincing evidence." *Id.* at 293 & n.8 (citing *Gutierrez-Ramirez*, 405 F.3d at 358).

2. Contrary to these decisions, the Eleventh Circuit has approved reliance on an abstract of judgment because it "is a comparable judicial record to those listed in *Shepard*" and "presents the oral judgment of the court and carries with it the authority to implement the judgment." *United States v. Martinez-Vasquez*, 438 F. App'x 795, 798 (11th Cir. 2011). The Eleventh Circuit rejected the claim that a lower court "improperly relied on the abstract of judgment" for a sentencing enhancement. *Id.* In its view, the abstract of judgment is akin to those records approved in *Shepard* because it "is a judicial record that summarizes the judgment of conviction, is the order sending the defendant to prison, and has the authority for carrying the judgment and sentence into effect." *Id.*

Similarly, the Eighth Circuit approved the use of an abstract of judgment because it "is the type of reliable and accurate judicial record on which a court may rely." *United States v. Benitez-de los Santos*, 650 F.3d 1157, 1160 (8th Cir. 2011). The Eighth Circuit explained that an abstract "is an official court document prepared and signed by a deputy clerk of the court" who is "required to complete the report pursuant to California law." *Id.* Because the abstract "was filed by the state court," the defendant "could have examined it and urged the state court to correct any inaccuracies." *Id.* The Eighth Circuit thus rejected the argument that an abstract of judgment is not a "comparable judicial record" under *Shepard*. *Id.*

In this case, the Ninth Circuit agreed with the Eleventh and Eighth Circuits and approved the use of an abstract of judgment by itself to establish the nature of Petitioner's prior conviction. Under *Shepard*, as construed by the Ninth Circuit, it was enough that the abstract of judgment was "prepared by a court official at the time the guilty plea is taken (or shortly afterward), and that official is charged by law with recording the proceedings accurately." App. 12a (quoting *Snellenberger*, 548 F.3d at 702). The court further explained that an "'abstract is a contemporaneous, statutorily sanctioned, officially prepared clerical *record* of the conviction and sentence. It may serve as the order committing the defendant to prison, and is the process and authority for carrying the judgment and sentence into effect.'" App. 13a (quoting *Delgado*, 183 P.3d at 1234 (citations and alterations omitted)). It held that an abstract of judgment, "[w]hen prepared by the court clerk, at or near the time of judgment, as part of his or her official duty, … is cloaked with a presumption of regularity and reliability," *id.*, and thus may be relied upon by itself under *Shepard*.

The Ninth Circuit's reliance upon the California Supreme Court's decision in *Delgado* illustrates the depth of the conflict with the Fifth Circuit. The *Delgado* court recognized that an abstract "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 convictions" 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, while these same features convinced the Ninth Circuit that abstracts are sufficiently reliable.

Accordingly, the holdings of the Eighth, Ninth, and Eleventh Circuits are irreconcilable with the Fifth Circuit's determination that abstracts "should not be added to the list of documents *Shepard* authorizes," *id.*, and the Third Circuit's conclusion that a virtually identical document "may not be considered under the modified categorical approach," *Evanson*, 550 F.3d at 293.

3. This is a mature conflict involving the five circuits that hear over eighty percent of the country's immigration cases and two circuits that blanket the country's border with Mexico.[4] In particular, the Fifth and Ninth Circuits, which together account for nearly seventy-five percent of immigration cases, have reached diametrically opposed decisions in cases involving precisely the same document—a California abstract of judgment.[5] 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 Cert. at 21-22, *Holder*

4. *See* U.S. Courts of Appeals—Nature of Suit or Offense in Cases Arising From the U.S. District Courts, by Circuit, During the 12-Month Period Ending March 31, 2011, Table B-7, *available at* http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/B07Mar11.pdf (finding that 1,474 of 1,766 immigration offenses (or 83%) occurred within the Fifth, Ninth, and Eleventh Circuits).

5. *See id.* (finding that 1,300 of 1,766 immigration offenses (or 74%) occurred within the Fifth and Ninth Circuits).

v. Gutierrez, 2011 WL 2533820 (June 23, 2011) (No. 10-1542), *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"). There is no need to wait for more courts to weigh in on this question. A persistent conflict between these five circuits on an important issue of immigration and criminal sentencing law is precisely the kind of circuit conflict that this Court needs to resolve because it threatens to result in a vast number of inconsistent decisions in similar cases.

B. The Ninth Circuit's Decision Conflicts With *Shepard*.

The decision below conflicts with *Shepard* and should be reversed. An abstract of judgment is not "comparable" to the documents approved by *Shepard*. By its very nature, an abstract of judgment is not a conclusive record "made or used in adjudicating guilt." *Shepard*, 544 U.S. at 21.

1. In *Shepard*, the Court explained that the evidence proving the nature of a prior conviction must "be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State" to avoid "collateral trials" over the underlying facts of the prior offense. *Id.* at 23. The Court rejected the government's reliance on documents that are not "conclusive records made or used in adjudicating guilt," such as police reports and complaint applications. *Id.* at 21. The documents with sufficient reliability, the Court held, include "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." *Id.* at 16. The Court specifically left open the possibility of considering "some comparable judicial record" containing the defendant's confirmation of the factual basis for the guilty plea. *Id.* at 26.

2. An abstract of judgment is not a conclusive record "made or used in adjudicating guilt" because it is not prepared by a court official at the time that guilt is adjudicated. *Id.* at 21. It is thus fundamentally different from the written plea agreement or transcript of plea colloquy authorized by this Court in *Shepard*. The Court approved those judicial records prepared before or at the time of the guilty plea as a record of the facts explicitly found by the court in its determination of guilt. By contrast, an abstract of judgment is not prepared by a court official until *after* the guilty plea is entered and *after* a sentence is imposed. In some cases, where the sentencing follows long after the plea, an abstract of judgment may not be prepared until weeks or even months after the guilty plea. In this case, the abstract indicates that Petitioner pled guilty on April 1, 1997 and was sentenced on April 29, 1997. Nonetheless, the abstract of judgment was not finalized until May 1, 1997—one month *after* the guilty plea and two days *after* sentencing. App. 27a.

Nor does an abstract of judgment contain an "explicit factual finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 16. Unlike the judicial records authorized by the Court in *Shepard*, which are designed to prove the facts of the crime through admissions from the defendant, an abstract of judgment is a clerical document prepared for the purpose of establishing the mere fact of conviction and the sentence imposed. *See People v. Mitchell*, 26 P.3d 1040,

1042-43 (Cal. 2001). As a "clerical record of the conviction and sentence," the abstract "may serve as the order committing the defendant to prison, and is 'the process and authority for carrying the judgment and sentence into effect.'" *Delgado*, 183 P.3d at 1234 (citation omitted). Under California law, an abstract "is not the judgment of conviction; it does not control if it differs from the trial court's oral judgment, and may not add to or modify the judgment it purports to digest or summarize." *Mitchell*, 26 P.3d at 1042. "The form simply calls for the identification of the statute of conviction and the crime, and provides a very small space in which to type the description. It does not contain information as to the criminal acts to which the defendant unequivocally admitted in a plea colloquy before the court." *Navidad-Marcos*, 367 F.3d at 909.

An abstract of judgment is also not a "comparable judicial record" to those authorized in *Shepard* because its use will cause many proceedings to devolve into "collateral trials" to determine the reliability of the abstract in question. 544 U.S. at 23, 26. Every abstract contains an inherent ambiguity that must be litigated because there will always be a question whether the clerk "merely summarized the title of the statute of conviction," indicated the crime charged, or recorded the crime to which the defendant pled guilty. *Navidad-Marcos*, 367 F.3d at 909. In this case, the Ninth Circuit determined that the "crime" in this abstract described the crime to which Petitioner pled guilty, App. 27a, instead of the title of the statute of conviction. This fact-specific inquiry is precisely the situation that the Court warned against in *Shepard*.

3. The Ninth Circuit's justification for relying exclusively upon an abstract of judgment to prove the

nature of Petitioner's prior conviction is unpersuasive. The court attempted to justify its reliance on the abstract because the California Supreme Court has said that an "'abstract is a contemporaneous, statutorily sanctioned, officially prepared clerical *record* of the conviction and sentence.'" App. 13a (quoting *Delgado*, 183 P.3d at 1234 (citations and alterations omitted)). In *Delgado*, the California Supreme Court approved an abstract for purposes of state law without ever analyzing whether the document would be acceptable under *Shepard*. 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).

Delgado actually shows that an abstract of judgment could not possibly satisfy the stricter *Shepard* standard. As noted above, the *Delgado* court recognized that an abstract "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 convictions" and can cause "confusion" about the nature of a prior offense. *Id.* at 1233, 1235. A document with these inherent features could not pass the strict test for reliability established in *Shepard*.

The Ninth Circuit's claim that a document need only be prepared "contemporaneous[ly]" with the guilty plea flouts *Shepard*'s requirement that the document be "made or used in adjudicating guilt." *Shepard*, 544 U.S. at 21. A document is not "made or used in adjudicating guilt" under *Shepard* if it is prepared *after* the guilty plea. Yet the

Ninth Circuit's pliable interpretation of *Shepard* requires only that the document be prepared by a court official "at the time the guilty plea is taken (or shortly *afterward*)." *Snellenberger*, 548 F.3d at 702 (emphasis added); *see also* App. 13a ("When prepared by the court clerk, at or near the time of judgment, as part of his or her official duty, it is cloaked with a presumption of regularity and reliability.").

The Ninth Circuit was also wrong to assert that an abstract is always prepared "contemporaneous[ly]" with the guilty plea. App. 13a. Under its interpretation, an abstract finalized thirty days after a guilty plea is still prepared "shortly afterward." Under no sensible definition of the word "contemporaneous" does an event that takes thirty days after another event remotely qualify as having taken place "during the same period of time." Webster's II New College Dictionary 249 (3d ed. 2005). One can only speculate where the Ninth Circuit would draw the line between a document that is prepared contemporaneously and one that is prepared too late. The Ninth Circuit's reasoning in this case even suggests that an abstract "prepared days or weeks—and sometimes years—after the in-court proceedings" would still be acceptable under *Shepard*. *Snellenberger*, 548 F.3d at 702.

The only correct, or sensible, reading of *Shepard* is that a document prepared *after* a guilty plea is not made or used in adjudicating guilt. Only documents prepared by a court official before or at the time that guilt is adjudicated are comparable to the documents approved under *Shepard*. The Ninth Circuit should be reversed.

C. The Ninth Circuit's Decision Exacerbates Existing Confusion Over The Meaning Of *Shepard*.

The circuit conflict involving abstracts of judgment demonstrates and worsens the profound confusion concerning the proper use of documents prepared *after* a guilty plea. While *Shepard* provided important guidance to determine the reliability of conviction documents prepared before or at the same time that the plea of guilty is entered, the absence of any guidance from this Court with respect to documents prepared *after* the guilty plea—*i.e.*, abstracts of judgment, minute orders, docket sheets, and certificates of disposition—has produced confusion in the lower courts.

For example, the Ninth Circuit has approved the use of minute orders, *see United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (en banc), *cert. denied*, 130 S. Ct. 1048 (2010), and docket sheets, *see Strickland v. United States*, 601 F.3d 963 (9th Cir.) (en banc), *cert. denied*, 131 S. Ct. 505 (2010). The First Circuit has agreed with the Ninth Circuit and approved the use of docket sheets. *See United States v. McKenzie*, 539 F.3d 15, 19 (1st Cir. 2008) (concluding that "attested copies of electronic docket entries may be a sufficient proffer of prior conviction"). But at least three other circuits have disapproved or expressed doubt about the reliability of docket sheets. *See United States v. Price*, 409 F.3d 436, 445 (D.C. Cir. 2005) (explaining that a "docket listing . . . would lack the necessary indicia of reliability"); *United States v. Harcum*, 587 F.3d 219, 225 n.8 (4th Cir. 2009) (noting that "docket sheets and abstracts of judgments are not sufficiently reliable under *Taylor* and *Shepard*"); *United States v.*

Jimenez-Banegas, 209 F. App'x 384, 389 n.3 (5th Cir. 2006) (explaining that "district court docket sheets are not the type of judicial record that a court should consider" (citing *Gutierrez-Ramirez*, 405 F.3d at 357-59)); *United States v. Cherry*, 194 F. App'x 128, 131 (4th Cir. 2006) (per curiam) (noting that other courts "have examined the issue and found that clerical documents such as docket sheets are unreliable and cannot be used for sentence enhancement" (citing *Gutierrez-Ramirez*, 405 F.3d at 357-58)).

Moreover, the Second Circuit has approved the use of a New York certificate of disposition, which contains a clerk's summary of the conviction and sentence, because it is "the type of judicial record that the *Shepard* Court indicated a federal district court may consider in an effort to determine the nature of the New York offense to which a federal defendant has previously pleaded guilty." *United States v. Green*, 480 F.3d 627, 633 (2d Cir. 2007). Yet the Third Circuit has disapproved the use of a certificate of disposition because it is "not the judgment[] of conviction" and is merely a "handwritten document[] prepared by the . . . Clerk . . . years after the defendant's convictions." *United States v. Hernandez*, 218 F.3d 272, 278-79 (3d Cir. 2000).

These decisions illustrate that, seven years after *Shepard*, confusion abounds in the circuits regarding the types of post-conviction documents that may be consulted to prove the nature of a prior conviction. *See, e.g.*, *United States v. Foster*, 674 F.3d 391, 395 (4th Cir. 2012) (Motz, J., dissenting from the denial of rehearing en banc). The Court has not addressed this issue since *Shepard*, and the lower courts' confusion calls out for a uniform rule that applies across divided circuits. Resolving the present

conflict involving abstracts of judgment will provide necessary guidance to lower courts as they consider a variety of post-conviction documents not expressly approved by the *Shepard* Court.

D. This Recurring Question Of Importance Should Be Considered Now.

This question presented is a recurring one with widespread effect. Because an abstract of judgment or minute order is prepared after every criminal conviction in California, *see* Cal. Penal Code § 1213(a), this question will repeat itself in hundreds of cases across the country in which a California state-court conviction is alleged as the sole basis for removal or sentencing enhancement. Indeed, there have been dozens of such decisions in the courts of appeals since *Shepard*. While the Fifth Circuit has refused to rely upon abstracts in post-*Shepard* cases, the Ninth Circuit has considered abstracts of judgment in dozens of cases since *Shepard*. *Compare United States v. Castro-Guevarra*, 575 F.3d 550, 552 n.3 (5th Cir. 2009), *with United States v. Leal-Vega*, 680 F.3d 1160, 1168-69 (9th Cir. 2012).

The question presented has widespread effect on both lawful permanent residents and criminal defendants. As a result of the circuit conflict, an individual could be removed from California or Florida based exclusively on the description of a crime in an abstract of judgment, but the same individual could not be removed from Texas or Pennsylvania based on the same conviction record simply by virtue of the jurisdiction in which they are charged with removability. Likewise, as a result of this conflict, a criminal defendant in California or Florida

could have his sentence increased based solely on an abstract of judgment, but the same defendant in Texas or Pennsylvania would not. The importance of this question is heightened by simple geography. The Fifth and Ninth Circuits, which hear 75 percent of the country's immigration cases and blanket the Mexican border, have reached conflicting decisions that will result in disparate treatment of similarly situated individuals along the southern border. *But see* Immigration Reform and Control Act, Pub. L. No. 99-603, § 115, 100 Stat. 3384, 3384 (1986) (stating that "the immigration laws of the United States should be enforced vigorously and uniformly").

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 v. Holder*, 132 S. Ct. 476, 487, 490 (2011) (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 v. Kentucky*, 130 S. Ct. 1473, 1478, 1481 (2010). The Ninth Circuit's decision allows lawful residents of this country to suffer the "particularly severe 'penalty'" of deportation based solely on an unreliable and potentially erroneous clerical document prepared weeks or months after a guilty plea is entered. *Id.* at 1481 (citation omitted); *see id.* at 1478 (describing the "'drastic measure' of deportation" as causing "harsh consequences"). "The severity of deportation—'the equivalent of banishment or exile'—only underscores how critical it is for" the government to use only reliable documents establishing the nature of a prior conviction. *Id.* at 1486 (citation omitted). In this case, an unreliable abstract of judgment could result in the deportation of a lawful resident of this country. If Petitioner had had the good fortune of being removed from Texas, instead of California, he may not be facing the prospect of deportation to China.

This case is the right vehicle to consider this important question, correct the inequity that presently exists, and clarify the meaning of *Shepard*. The abstract of judgment was the sole basis for the Ninth Circuit's determination that Petitioner was convicted of first-degree burglary. Without the abstract of judgment, the Government could not have carried its burden and Petitioner would not have been ordered removed. This case therefore provides the Court with the opportunity to squarely rule on the validity of using an abstract by itself to prove the underlying facts of a prior conviction. The Court has resisted past requests to clarify this issue, but this case presents a clean, clear, and compelling opportunity to do so. Taking up this question will allow the Court to give meaning

to the otherwise ambiguous "other comparable judicial document" language in *Shepard* that has proved confusing to the lower courts.

II. THE COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER NONGENERIC BURGLARY IS A CRIME OF VIOLENCE EVEN THOUGH IT IS NOT A VIOLENT FELONY.

The Court should also review the Ninth Circuit's separate conclusion that a conviction for nongeneric burglary in California categorically qualifies as a "crime of violence" under 18 U.S.C. § 16(b) even though the offense is not a violent felony. That determination not only enables the government to deport individuals as aggravated felons for nonviolent offenses such as shoplifting, it also conflicts with *Taylor*.

A. The Ninth Circuit's Conclusion That Nongeneric Burglary In California Is A Crime Of Violence Conflicts With *Taylor*.

1. Nongeneric burglary in California is not categorically a "violent felony." A "violent felony" under the Armed Career Criminal Act ("ACCA") is any felony that "is burglary … or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). In *Taylor*, the Court held that a conviction under a state burglary statute qualifies as a "violent felony" only if the state defines burglary in the "generic sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598. "[T]he generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure,

with intent to commit a crime." *Id.*; *see also id.* at 598 n.8 (explaining that, under the Model Penal Code, a person is not guilty of burglary if "the premises are at the time open to the public or the actor is licensed or privileged to enter"). The Court noted that "[a] few States' burglary statutes … define burglary more broadly, *e.g.*, by eliminating the requirement that the entry be unlawful." *Id.* at 599.

California is one of the states that broadly defines "burglary" because the statute does not require the entry to be unlawful or unprivileged. *See* Cal. Penal Code § 459 (punishing "[e]very person who enters [various structures] … with intent to commit grand or petit larceny or any felony"). "California Penal Code § 459 is categorically broader than generic burglary because it contains no requirement of 'unlawful or unprivileged entry.'" *Aguila-Montes*, 655 F.3d at 941. Indeed, the *Taylor* Court explained that "California defines 'burglary' so broadly as to include shoplifting and theft of goods from a 'locked' but unoccupied automobile." 495 U.S. at 591. "Thus, a person imprudent enough to shoplift or steal from an automobile in California would be found … to have committed a burglary constituting a 'violent felony.'" *Id.* The statute is so broad as to permit a conviction of a "servant" entering his employer's house with permission and a "shoplifter" who enters the department store during business hours. *See Aguila-Montes*, 655 F.3d at 944.

Given the broad scope of California's definition of burglary, Petitioner's "bare conviction of first-degree burglary under § 459 does not qualify as a 'violent felony' under 18 U.S.C. § 924(e)(2)(B)." *United States v. Davis*, 468 F. App'x 803, 804 (9th Cir. 2012).

2. The terms "violent felony" and "crime of violence" share similar statutory definitions. A "violent felony" is any crime that is "burglary . . . or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B).[6] A crime of violence is a felony "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b).

While "[t]he inquiry under § 16(b) and under the ACCA are analogous," *Addo v. Attorney General of the United States*, 355 F. App'x 672, 677 (3d Cir. 2009), the definition of a "crime of violence" in § 16(b) is "narrower" than the definition of a "violent felony" under the ACCA, *United States v. Serafin*, 562 F.3d 1105, 1109 (10th Cir. 2009) (explaining that "the Supreme Court has found that the definition of a crime of violence under § 16(b) is *narrower* than that in U.S.S.G. § 4B1.2," which is "identical" to the ACCA provision); *United States v. Evans*, 478 F.3d 1332, 1343 n.12 (11th Cir. 2007) (explaining that "§ 16(b) cover[s] a narrower category of offenses than U.S.S.G. § 4B1.2(a)(2)"); *United States v. Lucio-Lucio*, 347 F.3d 1202, 1206 n.6 (10th Cir. 2003) ("[T]he definition of "violent felony" that appears in 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.2(a)(2) … is significantly more broad than the definition in § 16.").

The definition of a "crime of violence" in § 16(b) is narrower because "[t]he reckless disregard in § 16 relates not to the general conduct or to the possibility

6. The Sentencing Guidelines' "definition of a predicate 'crime of violence' closely tracks ACCA's definition of 'violent felony.'" *James v. United States*, 550 U.S. 192, 206 (2007) (citing U.S.S.G. § 4B1.2(a)).

that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime." *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004). "Thus, § 16(b) plainly does not encompass all offenses which create a 'substantial risk' that injury will result from a person's conduct. The 'substantial risk' in § 16(b) relates to the use of force, not to the possible effect of a person's conduct." *Id.* at 10 n.7 (comparing § 16(b) with U.S.S.G. § 4B1.2(a)(2)).

Accordingly, nongeneric burglary cannot be a "crime of violence" under § 16(b) because the offense does not meet the broader definition of "violent felony." "[I]f there is no serious potential risk of physical injury, there is not likely to be a serious risk that physical force will be used." *Addo*, 355 F. App'x at 677.

3. The Ninth Circuit's determination that nongeneric burglary meets the narrow definition of "crime of violence" in § 16(b) conflicts with *Taylor*'s determination that nongeneric burglary does not meet the broader definition of "violent felony." A burglary creates the possibility of a "violent confrontation" only if the entry is unlawful or unprivileged. *Taylor*, 495 U.S. at 588. A burglary in which the entry was privileged or lawful does not carry the same risk of a violent confrontation. *Taylor* thus compels the conclusion that nongeneric burglary is not a crime of violence because it is not a violent felony.

In this case, however, the Ninth Circuit held that nongeneric burglary in California is a crime of violence because the offense creates a risk of physical force even if the entry is privileged or lawful. App. 8a; *see also United States v. Park*, 649 F.3d 1175, 1178 (9th Cir. 2011) (holding

that California residential burglary is categorically a "crime of violence" under the residual clause of U.S.S.G. § 4B1.2(a)(2)). The Ninth Circuit's determination conflicts with *Taylor* because nongeneric burglary cannot be said to "involve[] a substantial risk that the burglar will use force against a victim in completing the crime," *Leocal*, 543 U.S. at 10, if the crime does not create the "possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate," *Taylor*, 495 U.S. at 588. Only generic burglary, by its nature, creates a substantial risk of force being use against another person because of the risk of a violent confrontation.

The Ninth Circuit's conclusion that nongeneric burglary in California categorically involves a risk of physical force is unsustainable under *Leocal*. App. 8a. The term "crime of violence" "suggests a category of violent, active crimes." *Leocal*, 543 U.S. at 11; *cf. Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010) ("[T]he phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person."). Generic burglary is the "classic example." *Leocal*, 543 U.S. at 10. "A burglary would be covered under § 16(b). . . because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime." *Id.*

The same risk of physical force is not inherent to nongeneric burglary in California because the entry may be privileged and lawful. "California law permits burglary convictions both where the premises are open to the public and where the person is licensed or privileged to enter." *Aguila-Montes*, 655 F.3d at 944. Unlike

generic burglary, there will not always be a "possibility of a violent confrontation" with nongeneric burglary because the burglar may lawfully enter with the victim's consent. *Taylor*, 495 U.S. at 588. "The special danger of a break-in is therefore absent" with nongeneric burglary in California. *United States v. Mayer*, 560 F.3d 948, 953 (9th Cir. 2009) (Kozinski, J., dissenting from the denial of rehearing en banc). Because the elements of California burglary apply to anyone invited into a home, California burglary will not always involve "a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b).

The Ninth Circuit's erroneous conclusion rested on the assumption that California would never prosecute nongeneric burglary. *See Becker*, 919 F.2d at 571 n.5 (stating that it was "unaware of any California case holding that a defendant may be convicted of first degree burglary where he entered the dwelling of another with the intent to commit a felony in cooperation with a lawful occupant of that dwelling"). This assumption has proven incorrect. California routinely prosecutes burglary cases in which the defendant was invited into a dwelling and the risk of the use of physical force was nonexistent. *See, e.g.*, *People v. Salemme*, 2 Cal. App. 4th 775, 778 (Cal. Ct. App. 1992) (upholding burglary conviction for entering dwelling with intent to sell fraudulent securities "even though the act may have posed no physical danger to the victim who had invited defendant in to purchase securities from him"). In the State's view, "California's burglary statutes (Pen. Code, §§ 459, 460) encompass an entry into a structure with the intent to commit *any* felony, not just 'felonies of violence or felonies which may induce a violent

response from the victim.'" *Id.* at 777.[7] The numerous California state cases that have been prosecuted, continue to be prosecuted, and result in burglary convictions demonstrate that there is a "realistic probability, not a theoretical possibly, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

B. This Recurring Question Of Importance Should Be Considered Now.

This question presented is also important and should be decided now. California prosecutes well over 200,000 cases of burglary each year.[8] Nearly 40 percent of these cases do not involve any force at all, raising the prospect

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7. *See, e.g.*, *People v. Nguyen*, 40 Cal. App. 4th 28 (Cal. Ct. App. 1995) (entering a dwelling with the intent to steal property by giving the victim a worthless check in exchange for various items); *People v. Felix*, 23 Cal. App. 4th 1385 (Cal. Ct. App. 1994) (brother had sister's implied consent to enter her home); *People v. Ortega*, 11 Cal. App. 4th 691 (Cal. Ct. App. 1992) (burglary based on extortion); *People v. Pearson*, No. B225375, 2011 WL 5429497 (Cal. Ct. App. Nov. 9, 2011) (entering a bank intending to cash bad checks); *People v. Dowlatshahi*, No. B205068, 2009 WL 2961937 (Cal. Ct. App. Sept. 17, 2009) (consensual entry into the victim's home intending to engage in a counterfeit money and theft scheme); *People v. Balestreri*, No. H030622, 2007 WL 4792846 (Cal. Ct. App. Dec. 18, 2007) (attending an open house with the intent to obtain cash from the real estate agent under false pretenses).

8. State of California Department of Justice, Office of the Attorney General, Table 2: Supplemental Detail For Selected Crimes 2001-2010, *available at* http://oag.ca.gov/sites/all/files/pdfs/cjsc/prof10/2/00.pdf?.

that California prosecutes thousands of cases of burglary in which the offender lawfully entered the structure with the victim's consent. In addition, other states besides California broadly define burglary to encompass privileged entries. *See, e.g.*, Idaho Penal Code § 18-1401; Nev. Penal Code § 205.060. Many individuals convicted under these statutes will be removed for having been convicted of aggravated felonies despite convictions for nonviolent offenses.

This important question is also a recurring one. Courts have considered whether nongeneric burglary in California qualifies as a crime of violence or violent felony multiple times in the last two years. *See, e.g.*, *United States v. Ramos-Medina*, 682 F.3d 852 (9th Cir. 2012); *Lopez-Cardona v. Holder*, 662 F.3d 1110 (9th Cir. 2011); *United States v. Aguila–Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc); *United States v. Park*, 649 F.3d 1175 (9th Cir. 2011); *United States v. Echeverria-Gomez*, 627 F.3d 971 (5th Cir. 2010). The Ninth Circuit has consistently refused to reconsider en banc whether nongeneric burglary in California categorically satisfies the particular definition of "crime of violence" in § 16(b). This Court's review is needed to resolve the conflict with *Taylor* and eliminate the tension with *Leocal*.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 7, 2011

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-72167

Agency No. A42-024-428

CHUEN PIU KWONG, aka Phillip Kwong,

Petitioner,

v.

ERIC H. HOLDER JR., Attorney General,

Respondent.

OPINION

On Petition for Review of an Order
of the Board of Immigration Appeals

Argued February 15, 2008
Submitted October 20, 2011
San Francisco, California

Filed December 7, 2011

Appendix A

Before: William C. Canby, Jr., Carlos T. Bea*
and Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge Canby

COUNSEL

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Liza S. Murcia, U.S. Department of Justice, Office of Immigration Litigation, Civil Division, Washington, DC, for the respondent.

OPINION

CANBY, Circuit Judge:

Petitioner Chen Piu Kwong, a lawful permanent resident of the United States, was ordered removed on the ground that he had been convicted of an aggravated felony. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). He contends that the evidence was insufficient to establish that the crime of which he was convicted was an aggravated felony. We conclude that Kwong's conviction of first-degree burglary was a conviction of an aggravated felony, and was sufficiently established by the state court's abstract of judgment. We also reject Kwong's claim of ineffective

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* Judge Carlos T. Bea was drawn to replace Judge Stephen G. Larson, who resigned during the pendency of this appeal.

assistance of counsel, and we accordingly deny his petition for review.

I. Background

Kwong is a native and citizen of the People's Republic of China. He entered the United States as a lawful permanent resident in 1990. In April 1997, Kwong pleaded guilty to a violation of California Penal Code § 459, the California burglary statute, and was sentenced to two years in prison. As a consequence of his conviction, removal proceedings were initiated.

The evidence of Kwong's conviction that was before the IJ was a certified copy of the abstract of the judgment of the state court.[1] That abstract noted that Kwong had pleaded guilty to a violation of § 459 of the Penal Code and described the crime as "Burglary — First Deg." Section 460 of the Code defines first-degree and second-degree burglary; first-degree burglary is "burglary of an inhabited dwelling house, vessel . . . which is inhabited

1. The abstract of judgment was the evidence that the IJ relied upon at the time of ruling that Kwong was removable. Months later, in applying for withholding of removal, Kwong introduced a transcript of his plea hearing, which the government urges us to take into account. Kwong contends that such use of the transcript is prohibited by 8 C.F.R. § 1240.11(e), which provides that an application for relief from removal "shall not be held to constitute a concession of alienage or deportability." We need not address this issue because we rely solely on the abstract of judgment, which was the only document explicitly relied upon by the IJ in finding Kwong removable. The Board of Immigration Appeals affirmed the IJ's decision "for the reasons stated therein."

and designed for habitation, floating home . . . , or trailer coach . . . , or the inhabited portion of any other building." Cal. Penal Code § 460(a). The abstract of judgment also indicated that Kwong had been sentenced to two years of imprisonment.

The IJ held that Kwong's conviction for first-degree burglary qualified as an aggravated felony because it was a crime of violence. *See* 8 U.S.C. § 1101(a)(43)(F). The IJ later denied Kwong's petition for withholding of removal. The Board of Immigration Appeals ("BIA") adopted and affirmed the IJ's rulings with regard to the order of removal and denial of withholding. The BIA also denied Kwong's motion to remand on the ground of ineffective assistance of counsel.[2]

II. Aggravated Felony

The IJ and BIA found that Kwong is subject to a removal order as an alien "convicted of an aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) stripped the federal courts of jurisdiction "to review any final order of removal against an alien who is removable by reason of having committed" an

2. We withdrew submission of Kwong's petition for review pending the outcome of *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (en banc). We subsequently further delayed decision pending the outcome of en banc proceedings in *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc). We address both *Snellenberger* and *Aguila-Montes* later in this opinion.

aggravated felony. 8 U.S.C. § 1252(a)(2)(C) (as amended). The REAL ID Act of 2005, however, restored jurisdiction over all "constitutional claims or questions of law raised upon a petition for review." 8 U.S.C. § 1252(a)(2)(D) (as amended). "Whether an offense is an aggravated felony for [removal] purposes is a question of law." *Morales-Alegria v. Gonzales*, 449 F.3d 1051, 1053 (9th Cir. 2006). Thus, we have jurisdiction to address that question.

Where, as here, the BIA adopts and affirms the IJ's order pursuant to *Matter of Burbano*, 20 I. & N. Dec. 872, 874 (BIA 1994), and expresses no disagreement with the IJ's decision, we review the IJ's order as if it were the BIA's. See *Abebe v. Gonzales*, 432 F.3d 1037, 1040-41 (9th Cir. 2005) (en banc). We review de novo the IJ's and BIA's conclusions on questions of law, including whether Kwong's offense qualifies as an "aggravated felony." See *Daas v. Holder*, 620 F.3d 1050, 1053 n.2 (9th Cir. 2010).

A. Exhaustion

As a threshold matter, the government argues that Kwong failed to exhaust his administrative remedies with respect to two issues: (1) whether he was convicted of second-degree rather than first-degree burglary, and (2) whether the IJ erred in relying only on the abstract of judgment and the length of his sentence to determine that Kwong had been convicted of first-degree burglary. We conclude that Kwong exhausted these issues before the IJ and the BIA.

"When the BIA has ignored a procedural defect and elected to consider an issue on its substantive merits, we cannot then decline to consider the issue based upon this procedural defect." *Abebe*, 432 F.3d at 1041. Thus, "[t]he BIA's express adoption of [an] IJ's decision which explicitly discussed [a] ground is 'enough to convince us that the relevant policy concerns underlying the exhaustion requirement . . . have been satisfied." *Id.* (quoting *Sagermark v. INS*, 767 F.2d 645, 648 (9th Cir. 1985)).

After initially admitting the factual allegations in the Notice to Appear and not objecting to the introduction of the abstract of judgment into evidence, Kwong filed a motion to reopen the pleadings and terminate the removal order, followed by a renewed motion to the same effect. In these motions, Kwong stated that his original concession of removability was based on the fact that, "*at that time*," his conviction was sufficient to qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43)(G). He sought to reopen because this court had subsequently decided *Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000), which held that a conviction for vehicle burglary under California Penal Code § 459 was not an "aggravated felony" under INA Section 101(a)(43)(G). The IJ evidently interpreted Kwong's motion as submitting, among other positions, that Kwong had not been convicted of first-degree burglary. The IJ addressed and decided that issue on the merits. Because the BIA adopted the IJ's reasoning and affirmed for "for the reasons stated therein," the IJ's discussion of the issue is sufficient, in and of itself, to overcome the exhaustion challenge. *See Abebe*, 432 F.3d at 1041.

We also reject the government's argument that Kwong failed to challenge the IJ's exclusive reliance on the abstract of judgment. While Kwong is required to raise every issue in the administrative proceedings, this court retains jurisdiction where "the issue in question [has] been argued in a slightly different manner [below]." *Cruz-Navarro v. INS*, 232 F.3d 1024, 1030 n.8 (9th Cir. 2000). That is the case here, for Kwong generally challenged the sufficiency of the evidence supporting the IJ's finding as to the conviction.[3]

B. First-Degree Burglary under California Penal Code § 459 as a Crime of Violence

Under 8 U.S.C. § 1101(a)(43)(F), the term "aggravated felony" includes "a crime of violence (as defined in section 16 of Title 18 . . .)." Section 16 of Title 18, in turn, provides in its residual clause that "crime of violence" means:

> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

---

3. Moreover, in his brief to the BIA, Kwong argued that the abstract of judgment (which had a notation of "Burglary — First Deg.") cited only California Penal Code § 459, and failed to show what kind of structure he was convicted of burglarizing. This contention sufficiently raised the possibility that Kwong's crime did not qualify as first-degree burglary, which is limited to burglary of specified types of structures. *See* Cal. Penal Code § 460(a).

The question for decision, then, is whether Kwong's offense "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of [its commission]." 18 U.S.C. § 16(b).

We answered that question in the affirmative some time ago in *United States v. Becker*, 919 F.2d 568, 573 (9th Cir. 1990), where we held that "first-degree burglary under California law is a 'crime of violence'" as defined by 18 U.S.C. § 16(b). *See also United States v. Park*, 649 F.3d 1175, 1178-79 (9th Cir. 2011). We pointed out in *Becker* that "[a]ny time a burglar enters a dwelling with felonious or larcenous intent there is a risk that in the course of committing the crime he will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension." 919 F.2d at 571 (footnote omitted).

In his briefing here, Kwong argues that, rather than *Becker*, our subsequent en banc decision in *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc), controls and supports his argument that first-degree burglary under California Penal Code § 459 does not qualify as a crime of violence. He contends that the definition of first-degree burglary in § 460 is broader than the generic definition of burglary, and cannot qualify as a crime of violence under either a categorical or modified categorical approach in his case.

These arguments are foreclosed, however, by our recent decision in *Lopez-Cardona v. Holder*, 2011 WL 5607634 (9th Cir. Nov. 18, 2011). *Lopez-Cardona*

flatly held that, under *Becker*, first-degree burglary in violation of California Penal Code § 459 was a crime of violence within the meaning of 18 U.S.C. § 16(b). *Id.* at *1. It also held that *Aguila-Montes* had no effect on that conclusion because *Aguila-Montes* was based on a different definition of "crime of violence"; *Aguila-Montes* held only that a conviction under California Penal Code § 459 did not constitute a conviction for generic burglary. *Lopez-Cardona*, 2011 WL 5607634 at *3. *Aquila-Montes* accordingly did not contradict or affect *Becker*'s holding that first-degree burglary under § 459 is a crime of violence because it involves a substantial risk that physical force may be used in the course of committing the offense. *Id.* at *2-3.

Kwong attempts to avoid the reach of *Becker* by contending that post-*Becker* amendments to California Penal Code § 460 had the effect of sweeping within the definition of first-degree burglary some structures that are not inhabited, so that unlawful entry into them would not involve a substantial risk of the use of force. At the relevant time in *Becker*, § 460(a) provided:

> [E]very burglary of an inhabited dwelling house or trailer coach as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree.

This definition clearly required that each prohibited entry be of an inhabited structure. At the time of Kwong's conviction, however, § 460(a) had been amended to state:

> Every burglary of an inhabited dwelling house, vessel, as defined in the Harbors and Navigation Code, which is inhabited and designated for habitation, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, or trailer coach, as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree.

Kwong contends that the intervening amendments, in adding vessels and floating homes, modified the sentence structure so that the word "inhabited" did not modify "floating home" and no longer modified "trailer coach." Although Kwong's interpretation of the amended statute is grammatically permissible, the amended statute can also be read so that the word "inhabited," as it first appears, modifies not only "dwelling house" but also "vessel," "floating home" and (as in the prior version of the statute) "trailer coach." It is true that the latter reading results in surplusage by twice describing "vessel" as inhabited, but "[r]ules such as those directing courts to avoid interpreting legislative enactments as surplusage are mere guides and will not be used to defeat legislative intent." *People v. Cruz*, 919 P.2d 731, 743 (Cal. 1996). It defies common sense to conclude that the legislature, in specifying additional inhabited structures to be included in § 460, intended to remove one or more structures from the otherwise uniform requirement of first-degree burglary that the structures must be inhabited. The California Supreme Court does not understand § 460 in its amended form to include any uninhabited structures with its definition of first-degree

burglary. *See People v. Anderson*, 211 P.3d 584, 589 (Cal. 2009) ("First degree burglary is a greater substantive offense than second degree burglary because it requires proof of all the elements of second degree burglary *and* the additional element that the area entered was used as a dwelling."); *cf. Cruz*, 919 P.2d at 743 (stating that the intent of the legislature in expressly adding vessels to § 460 was "to ensure that vessels would receive the *same* protection as other habitations."). We agree with that understanding, and construe the amended § 460(a) to require unlawful entry of an inhabited structure to meet its definition of first-degree burglary.

C. Sufficiency of Abstract of Judgment to Establish Conviction for First-Degree Burglary

In *United States v. Navidad-Marcos*, 367 F.3d 903 (9th Cir. 2004), we squarely held that a notation in an abstract of judgment was insufficient by itself to establish what crime a defendant was convicted of. *Id.* at 908-09; *see also Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1130 n.8 (9th Cir. 2007). The question arises, however, whether our subsequent en banc decision in *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (en banc), undermines *Navidad-Marcos.*[4]

In *Snellenberger,* the charging document to which the defendant pleaded guilty contained two counts of

4. This question was left open in our recent decision in *Ramirez-Villalpando v. Holder*, 645 F.3d 1035, 1041 n.1 (9th Cir. 2011).

burglary in violation of California Penal Code § 459: count 1 charged burglary of a dwelling, and count 2 charged burglary of a vehicle. The only evidence indicating which count the defendant pleaded guilty to was a minute order, which included two notations indicating that the plea was to count 1. We noted that a minute order was not among the documents, such as a plea agreement or transcript of plea hearing, listed by the Supreme Court in *Shepard v. United States*, 544 U.S. 13, 16 (2005), as being proper subjects of consideration in applying a modified categorical approach. We pointed out, however, that the *Shepard* "list was illustrative; documents of equal reliability may also be considered." 548 F.3d at 701. We then held that the minute order could be considered:

> The clerk's minute order easily falls within the category of documents described [in *Shepard*]: It's prepared by a court official at the time the guilty plea is taken (or shortly afterward), and that official is charged by law with recording the proceedings accurately.

Id. at 702. We rejected the defendant's argument that the minute order cannot be considered because there is no evidence that it was shown to the parties:

> [I]t's enough that the minute order was prepared by a neutral officer of the court, and that the defendant had the right to examine and challenge its content, whether or not he actually did. Having failed to challenge or correct the minute order in state court—perhaps

> because there wasn't a basis for doing so—Snellenberger is now bound by what it says: He pleaded nolo contendere to the burglary of a dwelling. . . .

Id.

Snellenberger did not explicitly overrule *Navidad-Marcos*, but it is clear to us that its reasoning is inconsistent with that decision. Everything that the en banc court said of the minute order in *Snellenberger* applies to the abstract of judgment in Kwong's case. As the California Supreme Court has stated:

> [T]he abstract is a contemporaneous, statutorily sanctioned, officially prepared clerical *record* of the conviction and sentence. It may serve as the order committing the defendant to prison ([California Penal Code] § 1213), and is " 'the process and authority for carrying the judgment and sentence into effect.' [Citations]." . . . When prepared by the court clerk, at or near the time of judgment, as part of his or her official duty, it is cloaked with a presumption of regularity and reliability. . . .
>
> Defendant raises no basis for a conclusion that a contemporaneous, officially prepared abstract of judgment which clearly describes the nature of the prior conviction should not, in the absence of rebuttal evidence, be presumed reliable and accurate.

People v. Delgado, 183 P.3d 1226, 1234 (Cal. 2008). We agree with, and adopt, this reasoning.

At no point in his removal hearing or appeal to the BIA did Kwong present any evidence that the abstract of judgment was incorrect in specifying a plea to first-degree burglary, and he makes no such contention here. The record therefore supports the IJ's ruling, adopted by the BIA, that Kwong was convicted of first-degree burglary.[5] Because our precedent establishes that a conviction for first-degree burglary under California Penal Code § 459 is a crime of violence, Kwong is removable as an alien convicted of an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16(b).

III. Motion to Remand—Ineffective Assistance of Counsel

Kwong argues that the BIA erred in denying his motion to remand, which was based principally on Kwong's allegation of his prior counsel's ineffective assistance. "This court reviews BIA denials of motions to reopen for

5. The IJ also stated that the two-year sentence noted in the abstract of judgment confirmed that the conviction was for first-degree burglary because the maximum for second-degree burglary was one year. This statement appears to be erroneous; if second-degree burglary results in a sentence to state prison, the sentence may exceed one year, up to a maximum of three years. *See* Cal. Penal Code § 18(a); *see also, e.g., People v. Soto*, 166 Cal. App.3d 770 (1985). The IJ also relied, however, on the notation of first-degree burglary, which we find sufficient to sustain her decision.

abuse of discretion . . . , but reviews purely legal questions, such as due process claims, de novo." *Iturribarria v. INS*, 321 F.3d 889, 894 (9th Cir. 2003). "[I]neffective assistance of counsel in a deportation hearing results in a denial of due process under the Fifth Amendment only when the proceeding is so fundamentally unfair that the alien is prevented from reasonably presenting her case." *Id.* at 899. To prevail, Kwong first "must demonstrate that counsel [failed to] perform with sufficient competence. Second, [he] must show that [he was] prejudiced by [his] counsel's performance." *Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 1994) (internal quotation marks and citation omitted).

Kwong argues that the BIA applied the wrong standard in judging prejudice from ineffective assistance of counsel, because it stated that the evidence presented by Kwong in his motion to reopen "falls far short of being sufficient to convince us that the Immigration Judge would have granted that form of relief if the evidence in question had been presented at the hearing." Kwong contends that the proper standard is whether the missing evidence "may have affected the outcome of the proceedings," *id.* at 858-59, and that the BIA accordingly erred in assessing whether that evidence "would have" changed the result.

We need not reach that question, however, because the initial inquiry in assessing a claim of ineffective assistance is whether the performance of counsel was "unconstitutionally ineffective." *Id.* at 858. The BIA made it quite clear that it did not find any such deficiency; it reviewed the actions of counsel and summarized its

holding by stating: "In short, we find, upon the facts of this case, that there was no ineffective assistance of counsel, and thus necessarily there was not a showing by the respondent that the assistance of counsel was so ineffective as to have impinged upon the fundamental fairness of the hearing."

Our review of the record convinces us that the BIA did not err in ruling that counsel's performance was not constitutionally deficient, particularly in light of the facts that counsel had to work with.[6] Counsel interrogated Kwong about Kwong's fears about being returned to China and the reasons for them. Counsel presented sufficient evidence in support of Kwong's claim for withholding of removal to permit the IJ to make a reasoned decision on the merits of that claim. We conclude that there was no violation of due process.

PETITION FOR REVIEW DENIED.

6. Kwong testified that, if he were returned to China, he would be denied admission or locked up because he had abandoned his Chinese residency. In answer to inquiries by the IJ, Kwong testified that neither he nor any member of his family had ever been arrested or detained by Chinese authorities, that he had never openly criticized the government, and that he belonged to no religious organization.

APPENDIX B — DECISION OF THE BOARD OF IMMIGRATION APPEALS, DATED JANUARY 28, 2004

DECISION OF THE BOARD OF IMMIGRATION APPEALS

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A42 024 428 - San Francisco Date: Jan 28 2004

In re: CHUEN PlU KWONG

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] Convicted of aggravated felony

APPLICATION: Termination of proceedings; asylum; withholding of removal; protection under the Convention Against Torture

ORDER:

PER CURIAM. The respondent, a native and citizen of China, has appealed from the Immigration Judge's July 31, 2002 decision in which she found the respondent removable as charged and denied his applications for relief. During the pendency of this appeal, the respondent filed a motion to remand. The appeal is dismissed and the motion is denied.

Appendix B

We agree with the factual and legal determinations set forth by the Immigration Judge in her decision. As we are unpersuaded by any arguments the respondent has made on appeal, the Immigration Judge's decision will be affirmed for the reasons stated therein. *Matter of Burbano,* 20 I&N Dec. 872 (BIA 1994). Accordingly, the appeal will be dismissed.

In a motion to remand filed during the pendency of this appeal, the respondent asserts that he suffered from ineffective assistance of counsel. The respondent has submitted evidence that he has complied with the procedural requirements of *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988).

We have reviewed the evidence presented in support of the ineffective assistance claim and do not find that the respondent's previous counsel provided ineffective assistance. No action, or failure to act, either singly or in the aggregate, on the part of the respondent's previous counsel, rendered the proceedings below fundamentally unfair. *See Magallanes-Damian v. INS,* 783 F.2d 931 (9th Cir. 1986) (alien must show not merely ineffective assistance of counsel, but assistance which is so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the due process clause of the Fifth Amendment).

First, the respondent's argument that he was not removable as charged was pursued in a professional manner, and although the Immigration Judge ruled against the respondent on the issue of removability, that

ruling was not caused by ineffective assistance of counsel. Further, the respondent's arguments regarding relief from removal were presented to the Immigration Judge with sufficient evidence to allow the Immigration Judge to reach a reasoned conclusion. While the respondent may be correct in asserting that his previous counsel could have done more to present his case for withholding of removal, a mere failure to present more evidence in support of a given position is not necessarily ineffective assistance of counsel. While the respondent asserts that he would have been eligible for withholding of removal had his previous counsel effectively represented him, the evidence he has presented in support of this proposition falls far short of being sufficient to convince us that the Immigration Judge would have granted that form of relief if the evidence in question had been presented at the hearing. In short, we find, upon the facts of this case, that there was no ineffective assistance of counsel, and thus necessarily there was not a showing by the respondent that the assistance of counsel was so ineffective as to have impinged upon the fundamental fairness of the hearing. *See Magallanes-Damian v. INS, supra.*

Accordingly, the respondent's appeal is dismissed, and his motion to remand is denied.

/s/_____

FOR THE BOARD

APPENDIX C — DECISION OF THE IMMIGRATION JUDGE, DATED OCTOBER 10, 2001

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

In re:

Chuen Piu KWONG

Respondent.

Date: October 10, 2001

File Number: A42 024 428

In Removal Proceedings

Charge: INA §237(a)(2)(A)(iii) - Aggravated felony conviction

Application: Motion to terminate

DECISION OF THE IMMIGRATION JUDGE

Appendix C

I. Procedural History

Respondent, Chuen Piu Kwong, is a native and citizen of China. Respondent was admitted to the United States on or about June 3, 1990, at San Francisco, CA, as an immigrant. On April 1, 1997 he was convicted under California Penal Code Section 459 for the offense of first-degree burglary.

On April 3, 1998 the Immigration and Naturalization Service ("Service") initiated removal proceedings against Respondent by filing a Notice to Appear ("NTA") with the Immigration Court. The Service alleged that Respondent was removable as an alien convicted of an aggravated felony as defined in INA § 101(a)(43)(F) & (G).[1]

At a master calendar hearing on September 16, 1999 Respondent admitted the factual allegations listed in the NTA and conceded the charge of removability. On June 25, 2001, however, Respondent amended his pleadings alleging a fundamental change in the applicable law. He claimed that his burglary conviction was no longer an aggravated felony and did not support a charge of removability. He thus requested that the Court terminate removal proceedings.

The Service opposed termination and reiterated the charge of removability. It alleged that Respondent's first

1. Although the NTA originally referred to INA § 101(a)(43), the Service later specified charges under subsections (F) & (G), *See* Service's Opposition to Motion to Terminate. Respondent's briefs addressed both charges.

degree burglary is an aggravated felony falling under the federal definitions of crime of violence and burglary. In support of its contentions, the Service provided the Court with an abstract of judgement and a description of the facts underlying the conviction by the District Attorney's office in Alameda County.

II. Analysis

In evaluating the Service's contentions, the Court needs to compare the federal definition of relevant aggravated felonies with the relevant state statute. *See Ye v. INS,* 214 F.3d 1128, 1133 (9th Cir.2000). If the conduct reached by the statute corresponds to or is narrower than the federal definition, a conviction under the statute will also constitute an aggravated felony under INA § 101(a)(43). *See Taylor v. United States,* 495 U.S. 575, 599 (1990)). If necessary, the Court may further rely on the record of conviction, but not on the specific facts underlying the conviction. *See Ye* at 1133.[2]

The Abstract of judgement reveals that Respondent received a two-year sentence for a first-degree burglary conviction under California Penal Code § 459. Section 460 of the Code defines first-degree and second degree burglaries. Under California Penal Code section 461, first-degree burglary is punishable by at least two years of imprisonment whereas second-degree burglary is punishable by a maximum one-year sentence. Thus,

2. Thus the Court will not rely on the description of the facts provided by the District Attorney.

Appendix C

California Penal Code § 460 is the relevant statute for determining whether Respondent's conviction is an aggravated felony.

California defines first-degree burglary as: "[e]very burglary of an inhabited dwelling house, [inhabited] vessel ... , floating home ... or trailer coach, as defined in the Vehicle Code, or the inhabited portion of any other buildings ...." Cal. Pen. Code § 460. A crime of violence for immigration purposes refers to offenses "involv[ing] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16 (INA section 101(a)(43)(F) referring to this definition). All of the crimes constitutive of first degree burglary in California target an habitation and present a substantial risk of violence. *See* Cal. Pen. Code § 460; *see also* Cal. Veh. Code § 635 (trailer coach "designed for human habitation or human occupancy"). The Ninth Circuit has found that first-degree burglary under CPC §§ 459 and 460 is a crime of violence under 18 U.S.C. § 16(b). See *United States v. Becker,* 919 F.2d 568, 571 (9th Cir. 1990), *cert. denied,* 499 U.S. 911 (1991).

In the instant case, the analysis of the relevant California statutes and Abstract of judgement provided by the Service is sufficient to conclude that Respondent committed a crime of violence.[3] The Court finds that Respondent was convicted for first-degree burglary under

3. The Court need not reach the Service's contention that Respondent's conviction also falls under the federal definition of burglary.

Appendix C

Cal. Pen. Code § 459. First-degree burglary as defined in § 460 is a crime of violence. Thus, Respondent is an aggravated felon and is removable as charged under INA § 101 (a)(43)(F).

ORDER

Respondent's motion to terminate removal proceedings under INA § 101(a)(43) be and is hereby **DENIED**.

/s/_____
Minn S. Yam
Immigration Judge

APPENDIX D — DENIAL OF PETITION FOR REHEARING AND REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED APRIL 2, 2012

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

No. 04-72167

Agency No. A42-024-428

CHUEN PIU KWONG, aka Phillip Kwong,

Petitioner,

v.

ERIC H. HOLDER Jr., Attorney General,

Respondent.

ORDER

Before: CANBY, BEA* and M. SMITH, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for panel rehearing. Judges Bea and Smith have voted to deny the petition for rehearing en banc, and Judge Canby has so recommended.

*Judge Carlos T. Bea was drawn to replace Judge Stephen G. Larson, who resigned during the pendency of this appeal.

Appendix D

The petition for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

ABSTRACT OF JUDGMENT – PRISON COMMITMENT
SINGLE OR CONCURRENT COUNT FORM

FORM DSL 290.1

(Not to be used for Multiple Count Convictions nor Consecutive Sentences)

☒ SUPERIOR ☐ MUNICIPAL ☐ JUSTICE } COURT OF CALIFORNIA, COUNTY OF ALAMEDA

ENDORSED
FILED
MAY 1- 1997
RONALD G. OVERHOLT, Exec. Off./Clerk
By [illegible] Deputy

COURT (I.D.) 01

BRANCH OR JUDICIAL DISTRICT:

PEOPLE OF THE STATE OF CALIFORNIA versus
DEFENDANT: PHILLIP KUANG ☒ PRESENT ☐ NOT PRESENT
AKA: AWS194 7128922

H-23744

COMMITMENT TO STATE PRISON
ABSTRACT OF JUDGMENT

AMENDED ABSTRACT ☐

DATE OF HEARING (MO) (DAY) (YR)	DEPT. NO	JUDGE	CLERK
4/29/97	7	LARRY J. GOODMAN	Phil Seoane

REPORTER	COUNSEL FOR PEOPLE	COUNSEL FOR DEFENDANT	PROBATION NO. OR PROBATION OFFICER
Linda Thissell	Jill Hiatt, DDA	Charles Jameson, Esq.	John Stone

1. DEFENDANT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONY (OR ALTERNATE FELONY/MISDEMEANOR):

COUNT	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION MO	DAY	YEAR	CONVICTED BY JURY TRIAL	COURT TRIAL	PLEA	TERM (L,M,U)	TIME IMPOSED YEARS	MONTHS
1		459*	Burglary - First Deg	97	04	01	97			X	L	2	

2. **ENHANCEMENTS** charged and found true **TIED TO SPECIFIC COUNTS** (mainly in the § 12022-series) including WEAPONS, INJURY, LARGE AMOUNTS OF CONTROLLED SUBSTANCES, BAIL STATUS, ETC.:
For each count list enhancements horizontally. Enter time imposed for each or "S" for stayed or stricken. DO NOT LIST enhancements charged but not found true or stricken under § 1385.
Add up time for enhancements on each line and enter line total in right-hand column.

Count	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total

3. **ENHANCEMENTS** charged and found true **FOR PRIOR CONVICTIONS OR PRIOR PRISON TERMS** (mainly § 667-series) and **OTHER.**
List all enhancements based on prior convictions or prior prison terms charged and found true. If 2 or more under the same section, repeat it for each enhancement (e.g., if 2 non-violent prior prison terms under § 667.5(b) list § 667.5(b) 2 times). Enter time imposed for each or "S" for stayed or stricken. DO NOT LIST enhancements charged but not found true or stricken under § 1385. Add time for these enhancements and enter total in right-hand column. Also enter here any other enhancement not provided for in space 2.

Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total

4. OTHER ORDERS:

Defendant is ordered to pay a restitution fine of $200.00.
Restitution from #128514 of $6,500.00 is transferred to this case.

Served in Ct. 7-10. Also served D. MP 4/8/99

5. TIME STAYED § 1170.1(g) (DOUBLE BASE LIMIT):

6. TOTAL TERM IMPOSED: 2

7. ☐ THIS SENTENCE IS TO RUN **CONCURRENT** WITH ANY PRIOR UNCOMPLETED SENTENCE(S):

8. EXECUTION OF SENTENCE IMPOSED:

A. ☒ AT INITIAL SENTENCING HEARING B. ☐ AT RESENTENCING PURSUANT TO DECISION ON APPEAL C. ☐ AFTER REVOCATION OF PROBATION D. ☐ AT RESENTENCING PURSUANT TO RECALL OF COMMITMENT (PC § 1170(d)) E. ☐ OTHER

9. DATE OF SENTENCE PRONOUNCED (MO) (DAY) (YR)	CREDIT FOR TIME SPENT IN CUSTODY	TOTAL DAYS	INCLUDING: ACTUAL LOCAL TIME	LOCAL CONDUCT CREDITS	STATE INSTITUTIONS
4/29/97		107	71	36	☐ DMH ☐ CDC

10. DEFENDANT IS REMANDED TO THE CUSTODY OF THE SHERIFF, TO BE DELIVERED:

☒ FORTHWITH ☐ AFTER 48 HOURS, EXCLUDING SATURDAYS, SUNDAYS AND HOLIDAYS

INTO THE CUSTODY OF THE DIRECTOR OF CORRECTIONS AT THE RECEPTION-GUIDANCE CENTER LOCATED AT:

☐ CALIF. INSTITUTION FOR WOMEN – FRONTERA ☐ CALIF. MEDICAL FACILITY – VACAVILLE ☐ CALIF. INSTITUTION FOR MEN – CHINO ☐ DEUEL VOC. INST.
☒ SAN QUENTIN
☐ OTHER (SPECIFY):

Exhibit # 2 4/29/99 (DATE) (Initials)

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

CLERK OF THE COURT

DEPUTY'S SIGNATURE [signature] DATE May 1, 1997

This form is prescribed under Penal Code § 1213.5 to satisfy the requirements of § 1213 for determinate sentences under Penal Code § 1170. Attachments may be used but must be referred to in this document.

ABSTRACT OF JUDGMENT – COMMITMENT
SINGLE OR CONCURRENT COUNT FORM
(Not to be used for Multiple Count Convictions nor Consecutive Sentences)
FORM DSL 290.1

CERTIFIED COPY
of an Original Document
As Seen By

Form Adopted by the Judicial Council of California
Effective April 1, 1992

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