

No. 06-50169

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL LEE SNELLENBERGER,

Defendant-Appellant.

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GOVERNMENT'S PETITION FOR REHEARING EN BANC

APPEAL FROM

THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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GOVERNMENT'S PETITION FOR REHEARING EN BANC

I

INTRODUCTION

The panel held that district courts may not rely upon California minute orders or abstracts of judgment in applying the modified categorical approach under Taylor v. United States, 495 U.S. 575 (1990), and Shepard v. United States, 544 U.S. 13 (2005). In so holding, the panel rejected a line of this court's cases holding that a California abstract of judgment may be considered in combination with the charging document in applying the modified categorical approach. See United States v. Velasco-Medina, 305 F.3d 839, 851-52 (9th Cir. 2002). This court last so held in decisions issued just 15 and 19 days before the panel's opinion. See United States v. Madrid-Cuen, 2007 WL 1853399 at \*1 (9th Cir. June 25, 2007) (citation omitted) ("Under the modified categorical approach of Taylor v. United States, the sentencing

court is generally permitted to consider an appropriate charging document together with an abstract of judgment. . ."); Rodriguez-Uribe v. Gonzalez, 2007 WL 1814138 at \*1 & n.3 (9th Cir. June 21, 2007) (abstract of judgment and charging document sufficiently proved that offense supported alien's removability).

Contrary to the panel's conclusion, the Velasco-Medina line of cases never has been rejected in any reasoned opinion, and, indeed, a three-judge panel lacks the authority to reject it. The cases allowing courts to rely on the combination of a charging document and an abstract of judgment to prove what a defendant was convicted of, moreover, accord generally with Supreme Court and circuit precedent holding that a plea to a charging document admits the facts alleged in that document. More particularly, the Velasco-Medina cases were not, as the panel reasoned, overruled by the Court's 2005 decision in Shepard, which, like this court's post-Shepard cases, rejects reliance on only a minute order or abstract of judgment standing alone, not on a minute order or abstract of judgment coupled with a charging document. Due to this conflict between the panel opinion and Velasco-Medina, rehearing en banc is necessary to secure and maintain uniformity of this court's decisions, see Fed. R. App. P. 35(a)(1), (b)(1)(A).

Further, to achieve uniformity in analyzing convictions from the various states, federal courts should be able to rely on

California minute orders and abstracts of judgment in applying the modified categorical approach. A virtue of the categorical approach is that each state's individual convictions are treated with some level of uniformity in federal proceedings. Minute orders and abstracts of judgment are, in California, the judicial documents that provide proof of a conviction -- typically, no other written judgment is issued. Because California itself treats minute orders and abstracts of judgments as reliable, federal courts should do so as well.

California state convictions continually are analyzed by courts throughout the circuit in the various contexts in which the categorical approach applies, including criminal cases involving sentence enhancements under the Armed Career Criminal Act, the career offender provisions of the sentencing guidelines, and the illegal reentry sentencing guidelines provisions, as well as in immigration proceedings involving the removal of illegal aliens and their eligibility for naturalization. Due to the large number of state convictions emerging from California, the question at issue in this petition is one of exceptional importance, see Fed. R. App. P. 35(a)(2), (B)(1)(B).

## II

### ARGUMENT

BECAUSE THE PANEL OPINION HELD INVALID A FREQUENTLY APPLIED LINE OF THIS COURT'S PRECEDENT, REHEARING EN BANC IS NECESSARY TO SECURE THE UNIFORMITY OF THIS COURT'S OPINIONS ON A QUESTION OF EXCEPTIONAL IMPORTANCE

Defendant was convicted of unarmed bank robbery, in violation of 18 U.S.C. § 2113. At sentencing, the district court imposed a sentence enhancement pursuant to the career offender provisions of the Guidelines, see USSG §§ 4B1.1, 4B1.2, which required that defendant had sustained two qualifying prior convictions. The panel opinion upholds defendant's claim that one of the two prior convictions, a plea of nolo contendere to burglary under California Penal Code 459, did not qualify.

Because California's burglary statute is defined more broadly than the career offender requirement that defendant have committed a "burglary of a dwelling," it does not categorically qualify to enhance defendant's sentence. Applying the modified categorical approach, the panel held that the district court could not look to the minute order that memorialized defendant's conviction, in order to determine whether defendant's charge was sufficiently narrowed to qualify. In doing so, the panel rejected circuit case law holding that a court can consider the charging document in combination with an abstract of judgment under the modified categorical approach, in effect holding that this recent and often-applied law had been overruled sub silento.

Slip Op. at 8267. To maintain and secure uniformity of this court's opinions on an issue that will reverberate throughout the circuit, this court should grant rehearing en banc.

A. Under This Court's Caselaw, a District Court May Rely on a Charging Document in Combination with an Abstract of Judgment in Applying the Modified Categorical Approach

Until the panel opinion, litigants in this circuit relied on a line of cases from this court holding that a charging document, combined with a California abstract of judgment, may be used to demonstrate that a defendant's prior conviction qualified under the modified categorical approach. This law frequently has been applied and never has been overruled -- indeed, this law was being applied by other panels shortly before the instant opinion found it invalid.

Velasco-Medina, 305 F.3d at 851-52, clearly established the proposition that the panel rejected. In that case, the district court relied on "the language in the charging papers (i.e., the Information) along with the abstract of judgment reflecting [defendant's] guilty plea" to determine that the defendant's burglary satisfied the uniform definition of burglary as required by Taylor. This court recognized that the Information in fact set out the generic elements of burglary. Id. at 852. The record otherwise contained "only the Abstract of Judgment, not the judgment itself or the guilty plea." Id. Thus, this court needed to determine "whether the Abstract of Judgment, when

coupled with the Information, furnishes sufficient proof that [defendant] was convicted of all the elements of generic burglary." Id. This Court determined that the abstract of judgment did so:

The Abstract of Judgment reflects that [defendant] pleaded guilty to Count One of the Information. As noted, Count One of the Information contained all of the elements for generic burglary. By pleading guilty to Count One, [defendant] admitted the facts alleged therein.

Id. (citing cases).

Velasco-Medina thus holds that the charging document, along with the abstract of judgment establishing that defendant pled guilty to that document, can support a determination that defendant was convicted of generic burglary under the modified categorical approach. See also United States v. Bonat, 106 F.3d 1472, 1477-78 (9th Cir. 1997) (even if district court erroneously relied on Information alone, this court would affirm because judgment shows that defendant pleaded guilty to burglary charged in Information, which included all elements of generic burglary). Indeed, this Court has observed en banc that "the sentencing court may consider the charging documents in conjunction with the plea agreement, the transcript of a plea proceeding, or the judgment to determine whether the defendant pled guilty to the elements of the generic crime." United States v. Corona-Sanchez, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc) (emphasis added); see also United States v. Smith, 390 F.3d 661, 664 (9th Cir.

2004) (abstract of judgment among documents "clearly appropriate for review" of whether conviction was generic burglary under modified categorical approach).

In numerous decisions since the March 7, 2005, opinion in Shepard, this court has continued to allow district courts to rely on an abstract of judgment in combination with a charging document in applying the modified categorical approach.<sup>1</sup>

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<sup>1</sup> See United States v. Madrid-Cuen, 2007 WL 1853399 at \*1 (9th Cir. June 25, 2007); Rodriguez-Uribe v. Gonzalez, 2007 WL 1814138 at \*1 & n.3 (9th Cir. June 21, 2007); United States v. Sandoval-Sandoval, 487 F.3d 1278, 1278 (9th Cir. 2007) (observing that circuit has "permitted reliance on an abstract of judgment, in combination with the charging document, for the purpose of determining whether a defendant had a qualifying conviction" under illegal reentry guideline); Aguilera-Moreno v. Gonzales, 2007 WL 1428790 at \*1 (9th Cir. May 14, 2007) (citing Velasco-Medina and holding California burglary conviction sufficiently narrowed because abstract of judgment showed petitioner pled guilty to allegations in complaint, which comport with generic burglary definition); United States v. Cates, 2007 WL 1314540 (9th Cir. May 7, 2007) (citing Velasco-Medina and holding that information coupled with abstract could be used to establish element of generic burglary); Al-Husseini v. Gonzales, 213 Fed. Appx. 568, 569-70 (9th Cir. Dec. 19, 2006) (applying modified categorical approach and analyzing charging documents in combination with abstract of judgment to determine plaintiff committed aggravated felony and ineligible for naturalization); United States v. Castrejon-Torres, 2006 WL 3698651 (9th Cir. Dec. 13, 2006) (noting that district court had charging document and abstract of judgment in imposing sentence enhancement but remanding for resentencing because record did not show content of charging document); United States v. Michel-Garcia, 201 Fed. Appx. 476, 477 (9th Cir. Sept. 14, 2006) (applying modified categorical approach and holding that charging document, abstract of judgment, and plea form narrowed otherwise-broad offense); United States v. Diego-Barrera, 180 Fed. Appx. 649, 651 (9th Cir. May 9, 2006) (considered with abstract of judgment, charging document sufficiently narrowed charge that was too broad under categorical approach); Oliva-Osuna v. Gonzales, 169 Fed. Appx. 501, 502 (9th Cir. Feb. 27, 2006) (finding that particular

Not only is the Velasco-Medina application of the modified categorical approach well-established for abstracts of judgments, but it reflects a broader proposition of law. Under this court's case law dealing with the modified categorical approach, it appears not to matter whether the evidence of a plea to the charging document comes from an abstract of judgment, a minute order, or another source, so long as the evidence shows that defendant pled guilty to the charging document. See United States v. Rodriguez-Rodriguez, 393 F.3d 849, 857 (9th Cir. 2005) (defendant was convicted of burglary of a dwelling because "[b]y pleading guilty, [defendant] admitted the factual allegations in the indictment"); United States v. Williams, 47 F.3d 993, 995 (9th Cir. 1995) (burglary was generic under modified categorical approach because "[w]hen a defendant pleads guilty (or as here, pleaded nolo contendere) to facts stated in the conjunctive, each factual allegation is taken as true"); United States v. Dunn, 946 F.2d 615, 620 (9th Cir. 1991) (conviction fell within Taylor definition because defendant pleaded guilty to Information

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charging document and abstract of judgment were insufficient to narrow charge under modified categorical approach). Even after the panel opinion in this case, this court indicated in dicta that a California minute order could be considered in the modified categorical approach. United States v. Bolanos-Hernandez, \_\_\_ F.3d \_\_\_, 2007 WL 2230345 at \*7 n.1 (9th Cir. Aug. 6, 2007) (under Shepard, court may not rely on PSR but may derive fact of conviction and definition of offense from minute order). Unpublished dispositions issued after January 1, 2007 may be cited pursuant to Federal Rule of Appellate Procedure 32.1, and such dispositions prior to that date may be cited in a rehearing petition pursuant to Ninth Circuit Rule 36-3(c)(iii).

narrowing burglary charge); United States v. O'Neal, 937 F.2d 1369, 1373 (9th Cir. 1990) (under modified categorical approach, defendant convicted of generic burglary where offense was charged that way and defendant pled guilty to charge).<sup>2</sup> Indeed, the cases rejected by the panel are consistent with a Supreme Court case from the most recent term, in which the Court had no hesitation concluding that the fact that a defendant was charged and convicted by documents that narrowed an otherwise overly broad burglary offense was satisfactory to narrow his prior burglary conviction under Taylor. James v. United States, 127 S. Ct. 1586, 1599 n.7 (2007).

B. Neither This Court Nor Shepard Rejected the Caselaw Holding That a District Court Applying the Modified Categorical Approach May Rely on a Charging Document in Combination with an Abstract of Judgment

The Velasco-Medina line of cases directly conflicts with the panel's holding. The panel chose to distinguish these contrary cases by holding that they had been silently overruled by Shepard and three of this court's post-Shepard decisions:

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<sup>2</sup>The instant case involved a minute order rather than an abstract of judgment. As the panel implicitly recognized, there is no reason to treat California minute orders and abstracts of judgments differently in applying the modified categorical approach. See Slip Op. at 8267 & n.5 ("neither abstracts of judgments nor minute orders may be considered under the modified categorical approach defined in Shepard"). Minute orders and abstracts of judgment generally are treated interchangeably under California state law. See, e.g., Cal. Penal Code § 1213 ("either a copy of the minute order or an abstract of the judgment" sufficient to execute judgment of imprisonment).

The government relies on a line of pre-Shepard cases, such as United States v. Velasco-Medina, 305 F.3d 839, 852 (9th Cir. 2002); United States v. Corona-Sanchez, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc); and United States v. Rodriguez-Rodriguez, 393 F.3d 849, 857 (9th Cir. 2005). Our post-Shepard cases, however, have rejected the use of abstracts of judgments in conducting the modified categorical approach. See United States v. Narvaez-Gomez, \_\_\_ F.3d \_\_\_, 2007 WL 1614778, \*5 (9th Cir. 2007) (citing United States v. Navidad-Marcos, 367 F.3d 903, 908-09 (9th Cir. 2004)); see also Ruiz-Vidal v. Gonzales, 473 F.3d 1072, 1078-79 (9th Cir. 2007); Martinez-Perez v. Gonzales, 417 F.3d 1022, 1029 (9th Cir. 2005).

Slip Op. at 8267.

The panel's reasoning is incorrect, as is its characterization of the state of the law. First, as the first footnote in this petition demonstrates, even accepting the panel's interpretation of the decisions it cites, this court's post-Shepard cases have not uniformly rejected the use of abstracts of judgments in applying the modified categorical approach. Rather, this court repeatedly has approved of that use of abstracts of judgments, in combination with the charging document. Though this court has done so in unpublished opinions, the fact that the rulings continually have been unpublished likely indicates that the court simply has been applying established law in an unremarkable way. See Ninth Cir. R. 36-2 (criteria for publication). Whether these cases missed the mark and failed to recognize the proper effect of Shepard, or whether the current panel is incorrect, the end result for purposes of this petition for rehearing is the same -- the panel opinion is

squarely at odds with a number of post-Shepard decisions of this court, and en banc rehearing is necessary to secure uniformity in the circuit's law.

Second, however, the three post-Shepard cases that the panel cites lend no support to the notion that the Velasco-Medina line of cases has been overruled. The panel's first case, Narvaez-Gomez, cannot reflect any "post-Shepard" rejection of circuit law, as the relevant statement in Narvaez-Gomez relies entirely on a pre-Shepard case, Navidad-Marcos, 367 F.3d at 909, as the panel's citation indicates.

In any event, Narvaez-Gomez states that a district court may not rely "only" on an abstract of judgment in applying the modified categorical approach, 2007 WL 1614778 at \*6, and it does not address the law holding that a court may rely on an abstract of judgment in combination with a charging document. In the same vein, Navidad-Marcos, the case Narvaez-Gomez relies on, vacated a sentence where the district court relied "solely" on the abstract of judgment. 367 F.3d at 908. More importantly, Navidad-Marcos did not indicate that a court never may rely on only an abstract of judgment in applying the modified categorical approach, just that the particular abstract of judgment at issue was inadequate. 367 F.3d at 908-09 ("the abstract of judgment in this case is not sufficient"; "this abstract of judgment fails to satisfy the

'rigorous standard' required").<sup>3</sup> In fact, Navidad-Marcos specifically noted that on remand the government would have the opportunity to supplement the abstract of judgment with "additional judicially-noticeable evidence" to support the sentencing enhancement at issue. The additional evidence presumably would include the charging document, as authorized by Velasco-Medina. Thus, neither Narvaez-Gomez nor Navidad-Marcos overruled, or even contradicted, this court's law allowing district courts to rely on a charging document combined with an abstract of judgment.

The other two post-Shepard cases the panel cites simply held that particular abstracts of judgment in combination with charging documents were insufficient under the modified categorical approach. In each case, the abstract of judgment reflected a plea to a crime other than that alleged in the applicable charging document, so the charging document could not be used to limit an otherwise overly broad offense. Ruiz-Vidal, 473 F.3d at 1079; Martinez-Perez, 417 F.3d at 1029. In applying the modified categorical approach, both cases in fact considered the abstract of judgment -- in contradiction to the proposition the panel cites the cases for -- though each panel ultimately found the evidence in the record lacking because the abstract

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<sup>3</sup> See also Desire v. Gonzalez, 2007 WL 2326214 at \*1 (9th Cir. Aug. 15, 2007) (looking to abstract of judgment but finding particular abstract inadequate).

reflected a plea to a different crime. If anything, then, these cases underscore that when an abstract of judgment reflects a plea to the offense charged, the charging document may, in combination with an abstract of judgment, be sufficient to narrow a broad offense under the modified categorical approach.

Finally, not only is there no circuit caselaw overruling the Velasco-Medina line of cases, but nothing short of an en banc decision could do so. Neither the three-judge panel in this case, nor any other three-judge panel, can overrule circuit precedent unless Supreme Court authority is "clearly irreconcilable" with that precedent. Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). No panel has held that Shepard is clearly irreconcilable with Velasco-Medina, and in fact it is not.

According to Shepard, the "heart of the decision" in Taylor was that the evidence considered under the modified categorical approach must "be confined to records of the convicting court approaching the certainty of the record of conviction" in a state where the crime of conviction is categorically a qualifying burglary. Shepard, 544 U.S. at 23. That is, in a state where the burglary statute is categorically a "burglary of a dwelling," the record of conviction (i.e., the judgment) is alone sufficient to prove that the defendant was convicted of the requisite burglary. In evaluating a conviction under the modified

categorical approach, the combination of a charging document and the judgment provides a level of certainty comparable to the judgment alone. When a charging document sets forth the elements of generic burglary, a showing that a defendant was convicted on that charge supports the conclusion that his conviction rests on the elements of generic burglary.<sup>4</sup>

Indeed, the terms of Shepard itself appear to allow the charging document to be considered in combination with a judgment. Shepard stated that

without a charging document that narrows the charge to generic limits, the only certainty of a generic finding lies in jury instructions, or bench trial findings and rulings, or (in a pleaded case) in the defendant's own admissions or accepted findings of fact confirming the factual basis for a valid plea.

544 U.S. at 25 (emphasis added). In contrast, with a charging document that narrows the charge, a judicial document that shows that a defendant pled guilty to that charge is sufficient to demonstrate that the defendant pled to the narrowed charge. That is what a judgment does in a state where the burglary statute is

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<sup>4</sup> The categorical approach does not require complete certainty that the charged offense constituted a burglary of a dwelling. See James, 127 S. Ct. at 1597 (stating, in evaluating different application of categorical approach, that approach does not require "that every conceivable factual offense covered by a statute must necessarily" fall within prescribed category). Rather, the approach requires that the elements of the charged offense constituted a burglary of a dwelling "in the ordinary case." Id. The combination of a charging document that narrows a burglary offense, and a minute order showing that the defendant pled to that charging document, adequately demonstrates, in the ordinary case, that the defendant in fact committed the narrowed burglary offense.

categorically a qualifying burglary, it is what the abstract of judgment did under Velasco-Medina, and it is what the minute order did in this case. Consideration of a charging document and a judgment "avoid[s] collateral trials," Shepard, 544 U.S. at 23, because it means a consideration of only official court documents, not an evidentiary battle between the parties relying on potentially conflicting exhibits, testimony, or documents.

Abstracts of judgment and minute orders typically do not contain admitted facts about the offense, and accordingly they are not used for, as the panel supposed, "clearly and unequivocally establishing the facts underlying a prior conviction." Slip Op. at 8267. Under Shepard and Velasco-Medina, it is not the facts in the abstract of judgment (or the minute order) that a court may rely upon in applying the modified categorical approach; rather, it is the abstract of judgment in combination with the charging document. That is, an abstract or a minute order is a judicial record that can be relied on to show that a defendant pled guilty to the charge in an Information, though the minute order does not itself supply facts about the offense.

For this reason, United States v. Diaz-Argueta, 447 F.3d 1167 (9th Cir. 2006), does not undermine the Velasco-Medina line of cases. The panel recognized that this court previously had "noted" in Diaz-Argueta, 447 F.3d at 1169, that a minute order

cannot be relied upon under Shepard. Slip Op. at 8262. Diaz-Argueta, however, merely noted in dicta that a fact supplied by the minute order alone -- in that case, a fact that would indicate whether a crime was a felony or a misdemeanor -- could not be relied upon under Shepard. Diaz-Argueta did not consider whether a minute order could be used in combination with an Information to establish under the modified categorical approach that the defendant pled guilty to facts charged in an Information.

Thus, neither this court nor the Supreme Court has rejected Velasco-Medina's holding, and the panel had no authority to disregard it.

C. Minute Orders and Abstracts of Judgment Are Reliable Documents That Are California's Equivalent of a Written Judgment

In California state courts, there is no written "judgment." Rather, the state court orally announces its judgment in a criminal case, and the written memorialization of that judgment comes in an abstract of judgment or a minute order. By statute, abstracts of judgment follow a form prescribed by the Judicial Council, the policymaking body of California's courts. See Cal. Penal Code § 1213.5.

Because they are the statutorily authorized written proof of a California conviction, abstracts of judgment and minute orders generally are considered reliable by California. People v.

Duran, 97 Cal. App. 4th 1448, 1462 (Cal. App. 2002) (minute order may be used to prove prior conviction, as it "reliably reflects" judgment imposed). Accordingly, the abstract of judgment or minute order is the official document triggering the execution of a defendant's prison sentence. People v. Hong, 64 Cal. App. 4th 1071, 1076 (Cal. App. 1998); Cal. Penal Code § 1213. The state relies on the abstract in collecting restitution, Cal. Penal Code § 1202.43, as well as in determining credit for custody time served, Cal. Penal Code § 2900.5. If a court orally corrects a judgment, its clerk must promptly amend an abstract of judgment in accordance with the ruling, Cal. Rules of Court 8.340, 8.625(e)(2).

Unlike the police reports and complaint applications disallowed by Shepard, then, California abstracts of judgment and minute orders are the official judicial documents memorializing a conviction. Because the abstract of judgment (or minute order) is a conviction record that California treats as reliable, the combination of it and a charging document provides a "record[] of the convicting court approaching the certainty of the record of conviction in a generic crime state," Shepard, 544 U.S. at 23.

Finally, California abstracts of judgment and minute orders should be treated no differently than the judgments of other states. This court has approved of reliance on an Oklahoma "Judgment on Plea of Guilty" in combination with a charging

document in applying the modified categorical approach. In Bonat, 106 F.3d at 1477, this court noted that it would have been error for a district court to find that the defendant's Oklahoma burglary conviction sufficiently was narrowed based on the charging instrument alone. Because the Judgment on Plea of Guilty showed that the defendant in fact pled to that charging instrument, however, this court held that the defendant had been convicted of a narrowed burglary offense. Id. at 1478. To follow the panel and treat California's conviction records as less worthy than Oklahoma's would improperly undermine Taylor's goal of uniformity among the states.

### III

#### CONCLUSION

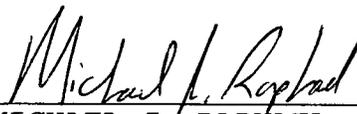
For the reasons provided, this Court should grant rehearing en banc.

Dated: August 21, 2007

Respectfully submitted,

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CA NO. 06-50169  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL LEE SNELLENBERGER,

Defendant-Appellant.

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DC No. SA CR 05-64-AHS

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**APPELLANT'S ANSWER TO PETITION FOR REHEARING EN BANC**

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ALICEMARIE H. STOTLER  
Chief United States District Judge

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**APPELLANT’S ANSWER TO PETITION FOR REHEARING EN BANC**

---

**I. Introduction.**

Rehearing en banc is not necessary in this case. Although the government is unhappy with this Court’s straightforward interpretation of the language of the Supreme Court in Shepard, there is nothing about that interpretation that is surprising or in conflict with any post-Shepard published decisions of this Court.

**II. Shepard Established a Limited Category of Records the Government can Rely Upon to Meet its Burden to Prove the Nature of a Specific Prior Conviction Under Taylor’s Modified Categorical Approach.**

**A. This Court is Bound by Shepard.**

The nature of case law from the United States Supreme Court is that the court speaks infrequently on any specific question, and speaks authoritatively when it does speak. In the area of proof of prior convictions, there are two

relevant Supreme Court decisions, issued nearly fifteen years apart, Taylor v. United States, 495 U.S. 575 (1990), and Shepard v. United States, 544 U.S. 13, 16 (2005).

In Shepard, the Supreme Court clarified Taylor and held that in determining whether the government has met its burden of proof on the nature of a prior conviction where the conviction was after a plea rather than after a jury trial, it may rely only upon the “charging document, written plea agreement, transcript of plea colloquy, and *any explicit factual finding by the trial judge to which the defendant assented.*” Shepard, 544 U.S. at 16 (emphasis added). This is a very specific limitation, and clearly requires proof of a specific factual admission by the defendant.

Following Shepard, which adhered to Taylor’s “demanding requirement” that the record of conviction consist only of documents showing that a plea “necessarily admitted” facts equating to the generic crime, and this Court’s post-Shepard decision in United States v. Diaz-Argueta, 447 F.3d 1167, 1169 (9th Cir. 2006) (“minute order of the state court, relied on by the federal district court, is not a judicial record that can be relied upon to prove the contrary”), the panel in this case held that California state court minute orders and abstracts of judgment are not Shepard-quality judicial records.

The panel decision in this case is a straightforward interpretation of Shepard in the context of California court records, because neither an abstract of judgment or minute order fit within its clear language. Both of these documents are clerical, not reviewed by the judge or the defendant, and do not come within the limitations established in the Shepard case. There is no need for rehearing en banc in this

case because the panel was correct in holding that Shepard is controlling on this question of minute orders and abstracts of judgment.

Diaz-Argueta, which was decided in reliance on Shepard, saw this as a clear-cut issue, and devoted only a paragraph to the resolution. The Diaz-Argueta court cited to the Shepard decision at pages 1259-1260, wherein the Supreme Court specifically stated:

In cases tried without a jury, the closest analogs to jury instructions would be a bench-trial judge's formal rulings of law and findings of fact, and in pleaded cases they would be the statement of factual basis for the charge, Fed. Rule Crim. Proc. 11(a)(3), shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea. With such material in a pleaded case, a later court could generally tell whether the plea had “necessarily” rested on the fact identifying the burglary as generic, Taylor . . . just as the details of instructions could support that conclusion in the jury case, or the details of a generically limited charging document would do in any sort of case. Shepard, 544 U.S. at 20-21.

United States v. Diaz-Argueta, 447 F.3d at 1169.

Although there was some tension<sup>1</sup> in this Court's case law following the issuance of the Shepard decision, that tension has been correctly and clearly resolved by the issuance of the amended panel decision in this case, and rehearing en banc is not required.

Indeed, an en banc panel of this Court recently reiterated the applicability of this Shepard-limitation on the types of documents the government can use to prove up the nature of a prior conviction under the Taylor modified categorical approach:

The government must demonstrate that Defendant pleaded guilty to three or more generic burglaries, using “the statement of factual basis for [each] charge, shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea.” Shepard, 544 U.S. at 20 (citation omitted).

United States v. Grisel, 488 F.3d 844, 851 (9th Cir. 2007) (en banc); see also United States v. Almazan-Becerra, 482 F.3d 1085 (9th Cir. 2007) (“charging document, written plea agreement, transcript of plea colloquy, and any explicit

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<sup>1</sup> That tension was created because, rather than cite to and rely upon the clear language of the Shepard decision, this Court sometimes cited to pre-Shepard decisions for the standard applicable to the determination of which documents are to be considered in determining the nature of the prior conviction at issue. For example, although United States v. Corona-Sanchez, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc), is a pre-Shepard decision, it was still cited with regularity in this Court as setting forth the correct standard for determining what documents can be relied upon when conducting the limited modified categorical inquiry under Taylor.

factual finding by trial judge to which defendant assented to determine if prior conviction qualifies for enhancement.”).

It is not whether the documents are judicially noticeable or not that is relevant, but rather whether there are findings of fact by a jury or adopted by the defendant that can be relied upon. This distinction is sometimes missed in post-Shepard decisions by this Court. For example, in a case decided by this Court on June 6, 2007, after citing Coronoa-Sanchez and the “judicially noticeable” language, the court went on to correctly cite the more limiting language of the Shepard case:

Where the prior conviction was based on a guilty plea, the sentencing court's review is limited “to those documents ‘made or used in adjudicating guilt’ such as ‘the terms of the charging document, the terms of a plea agreement or [the] transcript of [the] colloquy between the judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.’” United States v. Martinez-Martinez, 468 F.3d 604, 606-07 (9th Cir. 2006) (quoting Shepard v. United States, 544 U.S. 13, 20, 26 (2005)).

United States v. Narvaez-Gomez, 489 F.3d 970 (9th Cir. 2007) (remanding for resentencing to allow the district court to determine under the modified categorical approach---consistent with Shepard whether the defendant had the requisite intent when he committed his prior offense).

The Supreme Court itself continues to read the language in Shepard in the manner written.

In Shepard, we added that, in a nonjury case, the sentencing court might examine not only the “charging document” but also “the terms of a plea agreement,” the “transcript of colloquy between judge and defendant,” or “some comparable judicial record” of information about the “factual basis for the plea.”

544 U.S., at 26, 125 S.Ct. 1254; Gonzales v. Duenas-Alvarez, \_\_ U.S. \_\_, 127 S.Ct. 815, 819 (2007). The information needed under the modified categorical approach is the factual basis for the plea, which must be something the defendant has assented to in one form or another. Neither a minute order nor an abstract of judgment are such a document.

Under California law, as the Supreme Court of California has recently reminded us: “An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize.” People v. Mitchell, 26 Cal.4th 181, 109 Cal.Rptr.2d 303, 26 P.3d 1040, 1042 (Cal. 2001). Preparation of the abstract of criminal judgment in California is a clerical, not a judicial function. People v. Rodriguez, 152 Cal.App.3d 289, 299, 199 Cal.Rptr. 433 (Cal.Ct.App. 1984). Indeed, in California, “[a]ppellate

courts routinely grant requests on appeal of the Attorney General to correct errors in the abstract of judgment.” People v. Hong, 64 Cal.App.4th 1071, 1075, 76 Cal.Rptr.2d 23 (Cal.Ct.App. 1998). Under California law, the form of the abstract of judgment is promulgated by the Judicial Council of California. People v. Sanchez, 64 Cal.App.4th 1329, 1331, 76 Cal.Rptr.2d 34 (Cal.Ct.App. 1998); Cal.Penal Code § 1213.5. 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.

United States v. Navidad-Marcos, 367 F.3d 903, 908-09 (9th Cir. 2004).

In this case, the government did not present either a transcript of the plea colloquy nor a plea agreement signed by the defendant to prove the required narrowing of the non-categorical offense of conviction. This proof is the government’s burden. The finding of career offender status imposes severe additional penalties upon an individual defendant. The Shepard limitations are appropriate in this context.

The Shepard court discussed at length the limitations of Taylor in rejecting the government’s argument in Shepard that a broader category of documents be allowed when the government is required to prove up, under the modified categorical approach, the nature of a prior felony. In rejecting the government’s

argument, the Court observed:

Developments in the law since Taylor . . . provide a further reason to adhere to the demanding requirement that any sentence under the ACCA rest on a showing that a prior conviction “necessarily” involved (and a prior plea necessarily admitted) facts equating to generic burglary. The Taylor Court, indeed, was prescient in its discussion of problems that would follow from allowing a broader evidentiary enquiry. “If the sentencing court were to conclude, from its own review of the record, that the defendant [who was convicted under a nongeneric burglary statute] actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?” 495 U.S., at 601, 110 S.Ct. 2143. The Court thus anticipated the very rule later imposed for the sake of preserving the Sixth Amendment right, that any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant. Jones v. United States, 526 U.S. 227, 243, n. 6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999); see also Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Shepard v. United States, 544 U.S. at 24.

The Shepard decision was a careful one, and the language used was deliberately chosen. The panel decision in this case correctly held that California state court minute orders are not appropriately relied upon by the government in meeting its burden of proof on the issue of the nature of a prior conviction under the Taylor modified categorical approach. The petition for rehearing en banc should be denied.

B. The Amended Panel Decision Clarified that Velasco-Medina Can Not Stand in Light of the Supreme Court's Subsequent Decision in Shepard.

In response to the earlier petition for panel rehearing, this Court revised the panel decision to eliminate the concurrence and clarify that the statement in Diaz-Argueta, that minute orders were not the type of documents identified in the very limited listing set forth by the Supreme Court in Shepard, was the holding of that case, and the correct interpretation of the Shepard decision. The panel decision went on to clarify that to the extent Velasco-Medina, 305 F.3d 839, 852 (9th Cir. 2002), a 2002 pre-Shepard decision, was in conflict with the holding in this case, the Supreme Court's holding in Shepard controlled and this Court's contrary decision in Velasco-Medina is no longer good law. The panel decision specifically addressed the issue that now concerns the government when it stated upon denial of the petition for panel rehearing:

The government argues that our holding means this court will treat minute orders differently from abstracts of judgments, despite the documents' similarities. The government relies on a line of pre-Shepard cases, such as United States v. Velasco-Medina, 305 F.3d 839, 852 (9th

Cir. 2002); United States v. Corona-Sanchez, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc); and United States v. Rodriguez-Rodriguez, 393 F.3d 849, 857 (9th Cir. 2005). Our post-Shepard cases, however, have rejected the use of abstracts of judgments in conducting the modified categorical approach. See United States v. Narvaez-Gomez, 489 F.3d 970, 976-77 (9th Cir. 2007) (citing United States v. Navidad-Marcos, 367 F.3d 903, 908-09 (9th Cir. 2004)); see also Ruiz-Vidal v. Gonzales, 473 F.3d 1072, 1078-79 (9th Cir. 2007); Martinez-Perez v. Gonzales, 417 F.3d 1022, 1029 (9th Cir. 2005).

United States v. Snellenberger, 493 F.3d 1015, 1020 (9th Cir. 2007).

The panel in this case was bound by this language in Shepard. “[W]here the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled.” Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003) (en banc); Galbraith v. County of Santa Clara, 307 F.3d 1119, 1123 (9th Cir. 2002). The panel recognized the fact that Shepard is an intervening decision by the Supreme Court when it referred to the cases relied upon by the government as “pre-Shepard” cases.

These “pre-Shepard” cases are the only published cases the government cites in support of the “rule” that California state court abstracts of judgment can be used under the modified categorical approach.

In addition to a plethora of unpublished decisions, the government cites to a

single published decision, United States v. Sandoval-Sandoval, 487 F.3d 1278 (9th Cir. 2007), which held that an abstract of judgment can be relied upon to establish the length of a prior sentence, not the nature. Thus, as recognized and discussed by the panel, Sandoval-Sandoval is entirely consistent with the rule set forth in Snellenberger. The Sandoval-Sandoval court specifically stated:

Defendant challenges this use of the abstract of judgment, asserting that our decision in United States v. Navidad-Marcos, 367 F.3d 903 (9th Cir. 2004), prohibits district courts from relying on abstracts of judgment. That broad proposition is incorrect. In Navidad-Marcos, we held that a district court may not rely on an abstract of judgment to determine the nature of a prior conviction for purposes of analysis under Taylor v. United States, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). We held that the documents contain insufficient information for that purpose. We did not hold, as Defendant contends, that abstracts of judgment are categorically unreliable.

United States v. Sandoval-Sandoval, 487 F.3d at 1280.

The panel decision similarly stated that although abstracts of judgment are not categorically unreliable, they do not fall within the limited set of records identified by the Supreme Court in Shepard. Thus, the government has failed to identify an inconsistency that requires en banc consideration.

C. Rehearing Is Not Required to Clarify the Use of California Judicial Records in Other Circuits.

The government urges rehearing in addition because courts in other circuits will need to determine whether California convictions qualify as crimes of violence and therefore they must be able to use minute orders and abstracts of judgment. Other circuit courts, however, have had no difficulty rejecting clerical documents such as abstracts of judgment, minute orders and docket sheets under the Supreme Court's delineation in Shepard. See, e.g., United States v. Gutierrez-Ramirez, 405 F.3d 352, 358 (5th Cir. 2005) (finding a sentencing court could not rely on an abstract of judgment--a clerical document containing a summary of court proceedings--to determine whether a prior conviction qualifies to enhance a sentence); United States v. Sanders, 470 F.3d 616, 620 (6th Cir. 2006); United States v. Price, 409 F.3d 436, 445 (D.C.Cir. 2005) (explaining that a docket sheet is not a reliable source of information).

In addition, to the extent any inconsistency exists from jurisdiction to jurisdiction in terms of a court relying upon a state conviction from another state but not one from California, this issue was conclusively addressed by the Shepard Court. In Shepard the government argued for a more inclusive set of records than was ultimately adopted by that Court "by invoking the virtue of a nationwide application of a federal statute unaffected by idiosyncrasies of record keeping in any particular State." Shepard, 544 U.S. at 22. The Supreme Court held that it could not have Taylor and the government's position both, and rejected the government's position. The argument is no more persuasive here than it was before the Supreme Court, and does not support the call for en banc consideration.

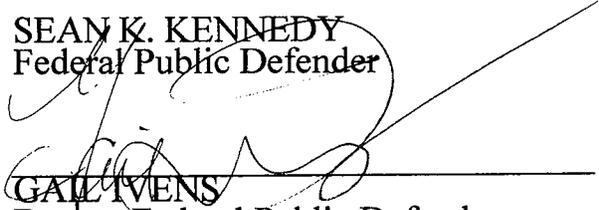
**III. Conclusion.**

The petition for rehearing en banc does not demonstrate that en banc consideration is appropriate under Fed. R. App. Proc. 35 because there is uniformity in this Court's case law and the Supreme Court's decision in Shepard. The decision does not conflict with decisions on the same point from other Circuits. For all the reasons stated herein, the petition for rehearing en banc should be denied, and the matter should be remanded to allow Mr. Snellenberger to be resentenced in accordance with the amended panel decision in this case.

Respectfully submitted,

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