IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Case No. 08-72102

Juan C. RAMIREZ-VILLALPANDO
Petitioner,

v.

Eric H. HOLDER, Jr.,

Respondent

On Review from the Board of Immigration Appeals

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER'S PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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I. INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29-2, *amici curiae* file this brief in support of Petitioner's Petition for Panel Rehearing and Rehearing *En Banc* of the panel's decision in *Ramirez-Villalpando v. Holder*, 601 F.3d 891 (9th Cir. 2010)("*Ramirez-Villalpando*"). As shown below and in the principal petition, this case should be reheard or reheard by an *en banc* Court to secure uniformity of the Court's decisions, and because this case raises issues of exceptional importance. *See* Fed. R. App. P. 35. *Amici*'s brief specifically provides reasons in addition to those discussed by Petitioner as to why rehearing or rehearing *en banc* is necessary to secure uniformity of the Court's decisions with respect to prior decisions of this Court and the United States Supreme Court.

As the Petitioner correctly states, *United States v. Navidad-Marcos*, 367 F.3d 903, 908 (9th Cir. 2004) established a bright-line rule that a court may not rely on an abstract of judgment to determine the nature of a prior conviction. (Petition for Rehearing and Rehearing En Banc, p. 5).

The panel attempted to distinguish *Navidad-Marcos* by explaining that in this case the abstract was more "explicit," the abstract "was corroborated" by the felony complaint, and that together with other documents in the record of conviction, there was "reliable corroboration" of the nature of the conviction. *Ramirez-Villalpando, supra*, 367 F.3d at 895-896. But the issue is not whether

Navidad-Marcos can be factually distinguished in this case. The real issue is whether an abstract of judgment is a "comparable document" under *Shepard v. United States*, 544 U.S. 13 (2005). That case held that an inquiry to determine whether a plea of guilty to a nongeneric statute necessarily admitted elements of the generic offense is "limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between 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." *Id*. at 26. The Court in *Shepard* rejected "…going beyond conclusive records *made* or *used* in adjudicating guilt…" *Id*. at 21 (emphasis added).

Amici make two arguments. First, an abstract of judgment is not a "comparable" document under *Shepard* because 1) it is not "made or used in adjudicating guilt" because it is not prepared by a court official at the time the guilty plea is taken, and 2) does not have as its purpose or function to provide for inclusion of the factual basis for the plea. Second, since the use of an abstract of judgment to determine the nature of a conviction is in conflict with the requirements of *Shepard*, an abstract cannot be used as "reliable corroboration" of the nature of a conviction in conjunction with other documents which themselves are not clear and unequivocal.

Because the panel opinion is in conflict with *United States v. Shepard* and creates an inter-circuit and intra-circuit split, rehearing or rehearing en banc is necessary to achieve uniformity. This issue is of exceptional importance in U.S. Sentencing Guideline cases and immigration court cases.

STATEMENT OF INTEREST OF *AMICI CURIAE*

As described in the accompanying motion, *amici curiae* – the Florence Immigrant and Refugee Rights Project, the Immigrant Legal Resource Center, the Immigration Law Clinic of the University of California, Davis School of Law, and the Washington Defender Association's Immigration Project – are regional and national organizations committed to fair and humane administration of United States immigration laws and respect for the civil and constitutional rights of all persons. Many of their clients and the communities they serve will be significantly affected by this case. Thus, *amici* have a direct interest in this matter.

III. ARGUMENTS

A. AN ABSTRACT OF JUDGMENT IS NOT A COMPARABLE DOCUMENT UNDER *SHEPARD v. UNITED STATES*.

1. An abstract of judgment is not a document "made or used in adjudicating guilt" under *Shepard* because it is not prepared at the time the guilty plea is taken.

Shepard v. United States, 544 U.S. 13 (2005) rejected using documents "...going beyond conclusive records *made* or *used* in adjudicating guilt..." *Id.* at 21 (emphasis added). *Shepard* limited the documents that could be used in the modified categorical analysis to "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between 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." *Id*. at 6. To be a "comparable" document, an abstract would have to record the factual basis for the plea as confirmed by the defendant, which can only take place at the time of the plea. As pointed out by Petitioner, the abstract cannot be completed until after the sentence, which may occur weeks or even months after the plea. Cal. Pen. Code §§ 1213, 1213.5. In this case, the date of the hearing on the plea and sentence was November 21, 2006. AR 65. The date of the abstract in this case is December 1, 2006—11 days later. AR 18. In many cases, where the sentencing follows the plea by several weeks or even months, the abstract will also not be prepared until then.

As the Petitioner notes, this Court *en banc* recently confirmed that *Shepard* only permits consideration of documents that are "prepared by a court official at the time the guilty plea is taken (or shortly afterward)." *Strickland v. United States*, 601 F.3d 963 (9th Cir. 2010 (en banc) (quoting *United States v. Snellenberger*, 548 F.3d 699, 702 (9th Cir. 2008) (en banc) (per curiam); *see also Fregozo-Pacheco v.*

Holder, 576 F.3d 1020, 1039 n. 7 (9th Cir. 2009) (allowing use of a document in the modified categorical analysis only because it "does appear similar to the minute order relied on in *Snellenberger*, as a document '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 proceedings accurately.")

2. An abstract of judgment does not have as its purpose or function to provide for inclusion of the factual basis for the plea or to designate which elements of the offense are admitted to.

In addition, an abstract is not a "comparable" document because an abstract does not contain admitted facts about the offense and accordingly an abstract cannot be used to clearly and unequivocally establish the facts underlying the prior conviction. Cal. Pen. Code § 1213.5 only requires that an abstract contain a "designation of the crime or crimes and the degree thereof, if any, of which the defendant has been convicted," and the "sections of the Penal Code or other provisions of law of which the designated crimes constitute violations" (as well as the sentence and enhancements). Importantly, the Penal Code does not require a specification of which part of a divisible statute the defendant has been convicted of (unless the divisible parts of the statute are specified in specifically numbered or

lettered subsections) and it does not require, or even provide for, inclusion of the factual basis for the plea.[1]

By contrast, the Court in *Shepard* stated that "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." *Shepard*, 544 U.S. at 25; *see also Ngaeth v. Mukasey*, 545 F.3d 796, 802 (9th Cir. 2008) ("We have the 'defendant's own admissions… [to] confirm[] the factual basis for the valid plea' to the elements of the generic offense of attempted theft.") (omissions in original) (quoting *Penuliar v. Mukasey*, 528 F.3d 603, 613 (9th Cir. 2008)).

In discussing why the digest or summary of the conviction in a California abstract of judgment is not to be used in the modified categorical analysis this Court stated in *United States v. Navidad-Marcos* the following:

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[1] As the dissent stated in *United States v. Snellenberger* in discussing the use of minute orders "[I]t [is] important to clarify that the facts one may consider reliably established by a California minute order are limited by the minute order's function, i.e., to record the statute of conviction and the count in the information or indictment to which the defendant pleaded guilty or nolo contendere. By its nature, a minute order cannot be used to establish the underlying facts of the crime committed. *Cf. United States v. Navidad-Marcos*, 367 F.3d 903, 908-09 (9th Cir. 2004)." *United States v. Snellenberger*, 548 F.3d 699, 705 (9th Cir. 2004)(Smith J., dissenting). As the majority in *Snellenberger* expressed no dissatisfaction with the dissent's interpretation, it is reasonable to assume that the majority did not intend for a minute order to be used more liberally within the modified categorical approach.

> 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 (emphasis supplied). The point made in that quotation from *Navidad-Marcos*—that the abstract does not contain information of what the defendant admitted to in the plea colloquy – was never quoted or discussed in the panel opinion in *Ramirez-Villalpando*. Yet, under *Shepard* a judicially noticeable document in the second stage analysis is "the defendant's own admissions or accepted findings of fact confirming the factual basis" for a plea. *Shepard*, 544 U.S. at 25. Instead of sticking with Shepard, the panel in this case determined that the abstract of judgment in this case was "more explicit" than that in *Navidad-Marcos*. *Ramirez-Villalpando*, 601 F.3d at 895. The panel noted, in the case of *Navidad-Marcos*, the description of the offense was quite plausibly the summary of the title of the statute, rather than a description of what the defendant admitted to in his plea. By contrast, the panel noted that the description of the crime in this case, was not the title of the statute. However, inexplicably, the panel never determined if an abstract of judgment is a "comparable document" under *Shepard*. In fact, incredibly, *Shepard* was never even cited, nor was the criteria for a "comparable document" in as set forth in *Shepard* ever discussed.

Since the function of the abstract of judgment is to designate the statute of conviction and subsection, if any, of the crime, along with the sentence, it can only be used to show these discrete facts, not the nature of a conviction. *United States v. Valle-Montalbo*, 474 F.3d 1197, 1201-02 (9th Cir. 2007) (fact of conviction); *United States v. Sandoval-Sandoval*, 487 F.3d 1278, 1280 (9th Cir. 2007)(per curiam) (comparing and contrasting the impermissible use of an abstract of judgment to determine the nature of a conviction with the permissible use to determine "a discrete fact regarding Defendant's prior conviction, namely, the length of a sentence").

B. SINCE AN ABSTRACT OF JUDGMENT IS NOT A "COMPARABLE DOCUMENT" UNDER *SHEPARD*, IT CANNOT BE USED AS "RELIABLE CORROBORATION" OF THE NATURE OF A CONVICTION IN COMBINATION WITH OTHER DOCUMENTS.

1. The panel's new doctrine of "reliable corroboration" is not supported by citation to any case or authority and is in conflict with *Shepard*.

The panel stated that "in later decisions we have clarified that *Navidad-Marcos* held that the court 'erred in relying only on the abstract of judgment in determining that [a] prior offense [satisfies the elements of a given generic crime] under the modified categorical approach.'" *Ramirez-Villalpando*, *supra*, 601 F.3d at 895, quoting *United States v. Narvaez-Gomez*, 489 F.3d 970, 977 (brackets in original). But, *Narvaez-Gomez* did not imply that an abstract could *ever* be used in

the modified categorical approach. *Id*. Nor did the other cases cited in the panel opinion ever sanction the use of an abstract of judgment in combination with other documents to determine the elements of the offense admitted by the defendant. *Id*. at 895-96. Indeed, one case cited was not a "later case" but an earlier, pre-*Shepard* case, *United States v. Velasco-Medina*, 305 F.3d 839 (9th Cir. 2002).

Instead of tethering the panel's decision to the standard set forth in *Shepard* for a "comparable document," the panel crafted its own doctrine of "reliable corroboration" without citation to any case or authority. *Id*. at 896 n. 1. The panel stated that the abstract "was corroborated by the felony complaint" and that "[t]ogether, those documents clearly and specifically demonstrated that Ramirez-Villalpando pled guilty to the charge of grand theft of personal property…". *Id*. at 896. The problem with this formulation is that the complaint only shows what the government set out to prove, not what the defendant *actually* admitted in his plea of guilty. Additionally, this formulation ignores that in California "[a]n 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) (cited *in Navidad-Marcos*, *supra*, 367 F.3d at 908.)

This homespun doctrine of "reliable corroboration" is in tension, if not in outright conflict, with *United States v. Vidal*, 504 F.3d 1072, 1087 (9th Cir. 2007)

(en banc). That case held that "to identify a conviction as the generic offense through the modified categorical approach when the record of conviction comprises only the indictment and the judgment, the judgment must contain the critical phrase 'as charged in the Information.'" *Id*. at 1087 (quotations omitted). In *Vidal*, this Court held that unlawfully driving or taking a vehicle in violation of Cal. Veh. Code § 10851(a), was overly broad because the statute extends liability to accessories after the fact. Although the plea form referenced principal liability, as opposed to accessory after the fact liability, in that Mr. Vidal pled to 'Count 1 10851(a) VC Driving a Stolen Vehicle," the plea form did not "establish that Vidal admitted to all, or any of the factual allegations in the Complaint." *Id*. at 1087. Instead, something more was required to satisfy the modified categorical approach—a document that contains "the critical phrase 'as charged in the Information.'" *Id*.

This rule was recently applied in a post-*Snellenberger* case, *Fregozo-Pacheco v. Holder*, *supra*, 576 F.3d at 1040 quoting from *Vidal* and noting that "[t]he minute order memorializing Pacheco's plea leaves the box next to 'as charged' unchecked." *Id*. at 1040.

The abstract of judgment here is just as insufficient as the plea form in *Vidal* and the minute order in *Fregozo-Pacheco*, even in combination with other documents in the record of conviction. The plea colloquy is of little help because

the Court never recited the content of the felony complaint and no factual basis was set forth on the record. AR 70. The plea colloquy merely shows that Petitioner pleaded guilty to Count 1 and Count 2. AR 70. Because the plea colloquy does not show that Petitioner pleaded guilty to Count 1 "as charged in the information" and there is no admission as to what elements of the offense were admitted by Petitioner, it is not clear which part of the divisible statute Petitioner admitted. AR 70.

The doctrine of "reliable corroboration," introduced for the first time in the panel opinion, conflicts with the doctrine that inferences are not permitted in the modified categorical analysis. *Cisneros-Perez v. Gonzalez*, 465 F.3d 386, 393 (9th Cir. 2006). The permissible record of conviction must "unequivocally" establish that the alien pleaded guilty to the generic offense. *Vidal*, 504 F.3d at 1076; *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002)(en banc); *United States v. Navidad-Marcos*, 367 F.3d at 907. Under the modified categorical approach the "record" must "confirm[] that the plea 'necessarily' rested on the fact identifying the [offense] as generic." *Shepard*, 544 U.S. at 21 (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)).

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 here is no more persuasive here than it was before the Supreme Court.

The requirement that the record of conviction "unequivocally" establish that the alien pleaded guilty to the generic offense is not only required by *Taylor/Shepard*, but is also required in this case by the government's burden of proof. The government in this case must establish by "clear and convincing evidence" that an alien is removable as charged. 8 U.S.C. § 1229a(b)(5)(A). This has recently been described as a "high burden." *Al Mutarreb v. Holder*, 561 F.3d 1023, 1028 (9th Cir. 2009).

C. FAILURE TO DRAW A BRIGHT LINE IN REFUSING TO PERMIT THE USE OF ABSTRACTS OF JUDGMENT IN THE MODIFIED CATEGORICAL ANALYSIS WILL ALLOW AMBIGUOUS, UNRELIABLE, AND IRRELEVANT CLERICAL DOCUMENTS TO BE USED AGAINST THE LARGELY UNREPRESENTED CLASS OF NONCITIZENS FACING REMOVAL.

The panel concluded that abstracts of judgment may be used in conjunction with other documents to determine the nature of a conviction. Although this panel did not state it, the panel may have been influenced by the argument in *Snellenberger* that a court may correct any error in a minute order and a defendant has "the right to examine and challenge its content." *Snellenberger*, 548 F.3d at

702). But this turns the "demanding" requirements of *Taylor/Shepard* and the government's heavy burden of proof on its head. *See Ruiz-Vidal*, 473 F.3d 1072, 1079 (9th Cir. 2007). Having the right to examine and challenge an abstract of judgment may well prove practically impossible in the immigration context where many aliens speak little if any English[2] and are typically unrepresented by counsel.[3] As *amici* attest, it is very often not until aliens are in removal proceedings, and no longer represented by criminal counsel, that they learn for the first time that they are subject to removal based on their criminal conviction. To make matters worse, almost 50% of those in immigration court proceedings are detained.[4] Unlike minute orders, which are typically given to defendants at the time of the entry of plea, abstracts of judgment are prepared after sentencing, after the defendant leaves the courtroom, and are for Department of Justice records and custodial records. Most defendants and their counsel will never even see these

[2] In 2006, 88.36% of proceedings before immigration courts concerned non-English speakers. U.S. Department of Justice, Executive Office for Immigration Review, FY 2006 Statistical year Book, F1 (Feb. 2007).

[3] Of the 323,845 matters before immigration courts in 2006, 210,705 respondents (65.06%) were unrepresented by counsel. *Id*. at G1. Because a defendant's criminal representation is over by the time the clerk prepares an abstract and the defendant is placed in removal proceedings, the alien is unlikely to have the means to examine her abstract with criminal counsel and contest it if it is incorrect or ambiguous in immigration court.

[4] In 2008, 48% of those in immigration court proceedings were held in detention. U.S. Department of Justice, Executive Office for Immigration Review, FY 2008 Statistical Year Book, 01 (Feb. 2009).

records. To suggest that defendants or their attorneys must, at some undesignated time subsequent to sentencing, return to the file to make sure that the abstract of judgment conforms to what took place during the entry of plea, does not comport with reality, and unfairly shifts the burden of proof to defendants.

Amici Curiae are very concerned that unless the panel's decision in this case is reversed on the issue of the use of abstracts of judgment, that immigrants will be removed from this country based on incomplete, ambiguous, and sometimes incorrect information contained in abstracts which they and their criminal counsel have never seen. Furthermore, the government will have little incentive to provide anything more than the abstract of judgment and the complaint. The heavy burden of proof demanded in removal proceedings is based on "the drastic deprivations that may follow when a resident of this country is compelled by our government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification." *Woodby*, 385 U.S. 276, 285 (1966).

IV. CONCLUSION

For the foregoing reasons, and those in Petitioner's principal brief, the Court should grant rehearing or rehearing *en banc*.

Date: June 3, 2010

Respectfully submitted,

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Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 03-74666

I certify that:

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 3,157 words or less.

Date: June 3, 2010

/s/ Michael K. Mehr
Michael K. Mehr
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Michael K. Mehr