No. 11-415

In the Supreme Court of the United States

JUAN RAMIREZ-VILLALPANDO, AKA JUAN CARLOS RAMIREZ, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals could properly consult an abstract of judgment, in conjunction with a corroborating charging document and transcript of the plea colloquy, to determine whether petitioner's prior conviction by guilty plea qualified as an aggravated felony that rendered him removable.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-11a) is reported at 645 F.3d 1035. The decisions of the Board of Immigration Appeals (Pet. App. 12a-14a) and the immigration judge (Pet. App. 15a-19a) are unreported.

JURISDICTION

The original judgment of the court of appeals was entered on April 9, 2010. An amended opinion was issued, and a petition for rehearing en banc was denied (Pet. App. 20a-21a), on July 1, 2011. A petition for a writ of certiorari was filed on September 29, 2011. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a native and citizen of Mexico, was admitted to the United States as a lawful permanent resident in 1961. Pet. App. 2a, 13a. In 2006, petitioner was arrested and charged by felony complaint with (1) grand theft of personal property, in violation of California Penal Code § 487(a) (West Supp. 1988), for unlawfully taking tires and rims; and (2) receiving stolen property, in violation of California Penal Code § 496(a) (West Supp. 1988), for obtaining tires and rims. Pet. App. 2a-3a; see Administrative Record (A.R.) 170 (felony complaint). Petitioner pleaded guilty to both counts. Pet. App. 3a; see A.R. 70 (plea transcript). The abstract of judgment—an official document in California created by the clerk of court following entry of judgment—stated that petitioner was convicted of "GRAND THEFT OF PERS PROPER" under Section 487(a) and "RECEIVING STOLEN PROPERTY" under Section 496(a), and that he was sentenced to a 16-month term of imprisonment on each count, to run concurrently. Pet. App. 3a; see A.R. 168 (abstract of judgment).

2. a. Petitioner was placed in removal proceedings under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq*. He was charged with being removable under 8 U.S.C. 1227(a)(2)(A)(iii), which renders removable an alien who is convicted of an "aggravated felony" at any time after admission. Pet. App. 3a. In proceedings before the immigration judge, the government submitted three conviction-related documents into the record: the abstract of judgment, the felony complaint, and a probation officer's report. *Ibid.* Based on that record, the immigration judge determined that petitioner had been convicted of grand theft of personal property under California Penal Code § 487(a). The judge further de-

termined that the offense of conviction was a crime of theft for which the term of imprisonment (16 months) was greater than one year and that it thus constituted an "aggravated felony," as defined in 8 U.S.C. 1101(a)(43)(G). As a result, petitioner was ordered removed to Mexico. Pet. App. 3a-4a, 18a-19a.

b. The Board of Immigration Appeals (Board) affirmed. Pet. App. 12a-14a. After noting that a conviction under California Penal Code § 487(a) was not categorically an aggravated felony because Section 487(a) encompasses theft of labor in addition to theft of tangible property and because the former does not qualify as a generic theft offense, the Board looked to the conviction record. Pet. App. 13a. The Board concluded that the record reflected that petitioner had pleaded guilty to a charge of grand theft of particular items of personal property, not labor. *Ibid.* In particular, the Board noted that the transcript of petitioner's plea colloquy, which petitioner had attached to his Notice of Appeal to the Board, "indicates that he entered a guilty plea to the exact count of the felony complaint that had originally been lodged against him, a count which plainly charges him with stealing personal property." *Id.* at 13a-14a. Accordingly, the Board concluded that petitioner's "conviction under Cal. Penal Code § 487(a) is a valid factual predicate for the aggravated felony charge." *Id.* at 14a.

3. The court of appeals denied a petition for review. Pet. App. 1a-11a. Because California Penal Code § 487(a) proscribes a broader range of conduct than the generic theft offense identified in Section 8 U.S.C. 1101(a)(43)(G), the court explained, it was not categorically an aggravated felony. Pet. App. 5a-6a. Applying the modified categorical approach set forth by this Court in the criminal context in *Taylor* v. *United States*,

495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005), the court held that the record of conviction—which included the abstract of judgment, felony complaint, probation officer's report, and transcript of the plea colloquy—was sufficient to establish that petitioner had pleaded guilty to grand theft of personal property as opposed to grand theft of labor. Pet. App. 6a-10a.

The court of appeals rejected petitioner's argument that the abstract of judgment could not be considered at all under the modified categorical approach. Pet. App. 7a-10a. The court distinguished its earlier decision in *United States* v. *Navidad-Marcos*, 367 F.3d 903 (9th Cir. 2004), which had found reliance on an abstract of judgment insufficient, on two grounds. First, the court observed, the abstract of judgment here is "more explicit" than that in *Navidad-Marcos*, in that the crime described—grand theft of personal property—is fairly read as a summary of petitioner's specific offense and not merely a recitation of the statute's title ("Grand theft defined"). Pet. App. 8a-9a. Second, the court explained, the sentencing court in *Navidad-Marcos* had relied *only* on the abstract of judgment, whereas in this case the abstract is corroborated by the felony complaint—listing count 1 as "the crime of GRAND THEFT OF PERSONAL PROPERTY"—and by the plea transcript. *Id.* at 9a-10a. The court concluded that "[t]ogether, those documents clearly and specifically demonstrated that [petitioner] pled guilty to the charge of grand theft of personal property, an aggravated felony for removal purposes, and not to a charge of theft of labor." *Id.* at 10a.

ARGUMENT

Petitioner seeks review of the question whether an immigration judge and the Board of Immigration Appeals may consider an abstract of judgment in determining whether a particular conviction by guilty plea constitutes an aggravated felony pursuant to the modified categorical approach drawn from *Shepard* v. *United States*, 544 U.S. 13 (2005). The courts below, however, relied not only on the abstract of judgment but also on the charging document and transcript of the plea colloquy—documents that *Shepard* has expressly approved—which independently confirm that petitioner was in fact convicted of an aggravated felony. The Ninth Circuit's decision is therefore correct and does not conflict with the decision of any other court of appeals or of this Court. Further review is not warranted.

1. The court of appeals' decision is correct. Under the Immigration and Nationality Act, an alien convicted of an "aggravated felony" "at any time after admission" is removable from the United States. 8 U.S.C. 1227(a)(2)(A)(iii). "Aggravated felony" includes a "theft offense * * * for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(G) (footnote omitted). The generic definition of theft, in turn, is the "taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 189 (2007) (quoting *Penuliar* v. *Gonzales*, 435 F.3d 961, 969 (9th Cir. 2006), cert. granted, judgment vacated, 549 U.S. 1178 (2007)). The generic "theft offense" thus does not include theft of labor. *United States* v. *Espinoza-Cano*, 456 F.3d 1126, 1131 (9th Cir. 2006).

Accordingly, the question here is whether petitioner's conviction under California Penal Code § 487(a), which encompasses theft of not only personal property but also labor, qualifies as a "theft offense" constituting an aggravated felony. When the particular criminal statute under which an alien was convicted proscribes a broader range of conduct than that meeting the definition of "aggravated felony," the adjudicator applies the "modified categorical approach" first announced in *Taylor* v. *United States*, 495 U.S. 575 (1990). Under the modified categorical approach as applied to convictions by guilty plea, the adjudicator conducts a limited examination of documents in the record of conviction to determine whether the alien's guilty plea necessarily encompassed all the elements of the generic crime. *Shepard*, 544 U.S. at 16. Among the conviction-record documents that the Court in *Shepard* held could be used for that purpose are the charging document, the written plea agreement, and the transcript of the plea colloquy—or "some comparable judicial record." *Id.* at 26.

The record before the Board and court of appeals in this case included at least three documents pertaining to petitioner's conviction: the abstract of judgment, transcript of the plea colloquy, and felony complaint (the charging document). An abstract of judgment is a "contemporaneous, statutorily sanctioned, officially prepared clerical *record* of the conviction and sentence." *People* v. *Delgado*, 183 P.3d 1226, 1234 (Cal. 2008). Prepared by the court clerk "at or near the time of judgment, as part of his or her official duty," the abstract "is cloaked with a presumption of regularity and reliability." *Ibid.* In those respects, the abstract of judgment is a court record comparable to the other documents specified in *Shepard*. Here, the abstract of judgment identified peti-

tioner's conviction under California Penal Code § 487(a) as "GRAND THEFT OF PERS PROPER" (Pet. App. 9a, 22a; see A.R. 168)—leaving no doubt that he was convicted of a theft of personal property, not labor.

Importantly, neither the Board nor the court of appeals relied solely on the abstract of judgment. Rather, they also considered the transcript of petitioner's plea colloquy and the felony complaint. Pet. App. 9a-10a, 13a-14a.[1] As noted above, the Court in *Shepard* specifically identified both of those documents as proper sources of reference under the modified categorical approach. 544 U.S. at 16, 26. The plea transcript reflects that the state court asked petitioner, "How do you plead Count 1," and petitioner responded, "Guilty." A.R. 70.[2] Count 1 of the felony complaint, in turn, charged petitioner with "the crime of GRAND THEFT OF PERSONAL PROPERTY, in violation of PENAL CODE SECTION 487(a), a Felony" for "unlawfully tak[ing] * * * personal property of a value exceeding Four Hundred Dollars ($400), to wit tires and rims." A.R. 170. Accordingly, as the court of appeals concluded,

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[1] Petitioner's contention that the plea transcript "played no part in the court of appeals' judgment" (Pet. 6 n.2) is directly contradicted by the terms of the opinion itself, which states that "the abstract of judgment listing the conviction as 'GRAND THEFT OF PERS PROPER' was corroborated by the felony complaint * * * *and the plea transcript*." Pet. App. 9a-10a (emphasis added). And the Board "note[d] in particular that the transcript of [petitioner's] plea colloquy * * * indicates that he entered a guilty plea to the exact count of the felony complaint that had originally been lodged against him, a count which plainly charges him with stealing personal property." *Id.* at 13a-14a.

[2] The court also instructed petitioner that "a plea in this case will result in deportation, denial of naturalization, denial of re-entry into this country, as well as exclusion from admission." A.R. 68.

"[t]ogether, those documents clearly and specifically demonstrated that [petitioner] pled guilty to the charge of grand theft of personal property, an aggravated felony for removal purposes, and not to a charge of theft of labor." Pet. App. 10a.

2. a. Contrary to petitioner's contention (Pet. 10-15), the decision below does not conflict with the Fifth Circuit's decision in *United States* v. *Gutierrez-Ramirez*, 405 F.3d 352, cert. denied, 546 U.S. 888 (2005), or the Third Circuit's decision in *Evanson* v. *Attorney Gen. of the United States*, 550 F.3d 284 (2008).

In *Gutierrez-Ramirez*, the Fifth Circuit held that it was insufficient to rely solely on an uncorroborated abstract of judgment in applying the modified categorical approach. 405 F.3d at 357-359. No other documents from the conviction record were available to confirm the factual basis in that case. See *id.* at 355 (noting that before the district court, "[t]he government was able to locate neither" the indictment nor judgment and produced only an abstract of judgment); *id.* at 359 ("The record contains no other evidence to narrow [defendant's] conviction to permit a determination whether it qualifies as a 'drug trafficking offense.'").[3] That fact—absent here—was critical to the Fifth Circuit's decision. *Id.* at 359 ("We conclude * * * that the district court erred in relying *exclusively* on the abstract of judgment.") (emphasis added).

Notably, the Fifth Circuit relied heavily on the Ninth Circuit's decision in *United States* v. *Navidad-Marcos*,

[3] The court of appeals allowed the government to supplement the record with the indictment, but the indictment there "merely track[ed] the language of the statute" and thus provided no additional probative value for application of the modified categorical approach. *Gutierrez-Ramirez*, 405 F.3d at 359.

367 F.3d 903 (2004), which declined to accept reliance on an uncorroborated abstract of judgment. As the Ninth Circuit explained in the decision below (Pet. App. 8a-10a), however, this case is distinguishable from *Navidad-Marcos* (and thus, similarly, from *Gutierrez-Ramirez*) in two material ways: (1) the abstract of judgment at issue here is "more explicit" in describing petitioner's specific crime rather than merely reciting the statute's title; and (2) the abstract here is corroborated by other conviction record documents, *i.e.*, the felony complaint and the plea transcript. Indeed, the Fifth Circuit itself rejected the claim of a conflict in the Ninth Circuit between *Navidad-Marcos* and *United States* v. *Velasco-Medina*, 305 F.3d 839 (9th Cir. 2002), cert. denied, 540 U.S. 1210 (2004), on the ground that the latter (like this case) permitted use of an abstract of judgment not alone but "in combination with the charging instrument." *Gutierrez-Ramirez*, 405 F.3d at 358 n.11. The decision below is thus in no way inconsistent with *Gutierrez-Ramirez*.[4]

In *Evanson*, the Third Circuit rejected under the modified categorical approach reliance on factual assertions contained solely in a "judgment of sentence" from a Pennsylvania court. 550 F.3d at 292-294. Even accepting petitioner's questionable suggestion that a Pennsylvania "judgment of sentence" is equivalent to a

[4] The Ninth Circuit below expressly reserved the question whether its own post-*Navidad-Marcos* precedent "permits reliance upon an abstract of judgment without corroboration by other material in the record in applying the modified categorical approach." Pet. App. 10a n.1. That makes the question presented by petitioner's certiorari petition particularly inapt for resolution in this case.

California "abstract of judgment" (Pet. 12),[5] *Evanson* is distinguishable on much the same grounds as *Gutierrez-Ramirez*. As the Third Circuit noted, "no transcript of the plea colloquy was presented" despite the immigration judge's suggestion to provide it. *Evanson*, 550 F.3d at 287. Although the government did produce the criminal information (a charging document), the court stated that it could "only consider the charging document to the extent that the petitioner was actually convicted of the charges," and the counts of conviction did not reflect the amount of drugs involved in the defendant's offense (a critical element of the inquiry in that case). *Id.* at 293-294. As a result, the Third Circuit held that "factual assertions contained *only* in a judgment of sentence may not be considered under the modified categorical approach." *Id.* at 293 (emphasis added). Indeed, it cited approvingly the Fifth Circuit's decision in *Gutierrez-Ramirez* as holding that the "'district court erred in relying exclusively on the abstract of judgment,'" but considering that the "abstract of judgment might be permissible in combination with charging document." *Ibid.* (quoting 405 F.3d at 358). *Evanson* therefore plainly does not foreclose reference to an abstract of judgment where, as here, it is considered in conjunction with a charging document and plea transcript.

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[5] The Third Circuit stated that a judgment of sentence includes factual assertions, used by the court for discretionary sentencing determinations, that are not necessarily admitted by the defendant and are not necessarily based on "clear and convincing" evidence—the standard of proof for removability. *Evanson*, 550 F.3d at 293 & n.8. In contrast, as explained above (p. 6, *supra*), an abstract of judgment is an official clerical record of the details of the conviction and sentence only, devoid of the type of factual assertions in a judgment of sentence that the court in *Evanson* found objectionable.

b. Contrary to petitioner's contention (Pet. 17-21), the decision below does not conflict with this Court's decision in *Shepard* either. *Shepard* nowhere addresses consideration of an abstract of judgment (or equivalent document)—let alone in conjunction with corroborating records of the type it designated as permissible under the modified categorical approach—but rather leaves the door open to consideration of "comparable judicial records." 544 U.S. at 26. Indeed, petitioner himself seems to concede as much elsewhere in his petition. See Pet. 11 ("[T]he 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. The Court's decision to reserve this question in *Shepard* has led to a division in the lower courts over whether documents prepared after a guilty plea are 'comparable' to the documents explicitly identified in *Shepard*.") (internal citation omitted). Accordingly, there is no merit to the assertion that the decision below conflicts with *Shepard* in a manner warranting this Court's review.

3. The court of appeals' and Board's reliance on petitioner's plea transcript and felony complaint make this a particularly poor vehicle to resolve the question presented for an additional reason: assuming *arguendo* that an abstract of judgment could never be consulted under the modified categorical approach—even in conjunction with other permissible sources—the result in this case would be the same. Just the plea transcript and felony complaint here are sufficient, in tandem, to support a finding that petitioner was convicted of a theft of personal property, not labor, and to support a finding that his crime of conviction thus constituted an aggravated felony. See pp. 6-8 & n.1, *supra*. Resolving the

question presented in petitioner's favor would therefore make no difference to the disposition of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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